

NO. CAAP-16-0000408

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

K.G., Petitioner-Appellant, v.
D.D. and CHILD SUPPORT ENFORCEMENT AGENCY,
STATE OF HAWAII, Respondents-Appellees

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-P NO. 15-1-0168)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Petitioner-Appellant K.G. (**Mother**) appeals from the Order After Trial on Child Custody, Visitation and Parenting filed on April 29, 2016 (**Order After Trial**), filed in the Family Court of the Second Circuit (**Family Court**).¹ The Order After Trial awarded Mother and Respondent-Appellee D.D. (**Father**) joint legal custody of their son, I.D. The Order After Trial awarded Mother primary physical custody, and Father was awarded significant parenting time.

On appeal, Mother argues that the Family Court abused its discretion when it (1) granted joint legal custody and

¹ The Honorable Lloyd A. Poelman presided.

significant parenting time to Father without rebutting the presumption created by an act of family violence under Hawaii Revised Statutes (**HRS**) § 571-46(a)(9) (Supp. 2016), and (2) showed bias for Father and Father's counsel.

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, we resolve Mother's points of error as follows:

(1) Mother argues that the Family Court abused its discretion when it granted Father joint legal custody and significant parenting time without rebutting the presumption created by an act of family violence under HRS § 571-46. In particular, Mother asserts that the Family Court "failed to grasp the underlying facts which would make it impossible for [Father] to overcome the rebuttable presumption."

HRS § 571-46 states in relevant part:

Criteria and procedure in awarding custody and visitation; best interest of child. (a) In actions for divorce, separation, annulment, separate maintenance, or 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 shall 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; and
 - (C) If a parent is absent or relocates because of an act of family violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation;
- (10) A court may award visitation to a parent who has committed family violence only if the court finds that adequate provision can be made for the physical safety and psychological well-being of the child and for the safety of the parent who is a victim of family violence[.]

In Rezentes, this court recognized that the presumption created under HRS § 571-46(a) (9)² is a presumption "imposing the burden of producing evidence under [Hawaii Rules of Evidence (HRE)] Rule 303." Rezentes v. Rezentes, 88 Hawai'i 200, 208, 965 P.2d 133, 141 (App. 1998) (quoting H. Stand. Comm. Rep. No. 1511-96, in 1996 House Journal, at 1625). HRE Rule 303 (2016) provides in relevant part:

(a) General rule. A presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of producing evidence.

(b) Effect. The effect of a presumption imposing the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction on presumption shall be given and the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

² HRS § 571-46(a) (9) has not substantially changed since this court's Rezentes decision. Compare HRS § 571-46(a) (9) (Supp. 1997) with HRS § 571-46(a) (9) (Supp. 2016).

Nothing in this rule shall be construed to prevent the drawing of any inferences.

Here, the Family Court found that Father's conviction for Abuse of Family or Household Member constitutes an act of family violence under HRS § 571-46(a)(9). Based on the Family Court's determination of family violence, a rebuttable presumption was raised "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." HRS § 571-46(a)(9). To rebut the presumption, Father had to demonstrate that he posed no threat to I.D., and that placing I.D. in his care and custody would not be detrimental to I.D.'s best interests. See AC v. AC, 134 Hawai'i 221, 232, 339 P.3d 719, 730 (2014).

The Family Court found that Father presented evidence at trial that rebutted the presumption created by HRS § 571-46(a)(9). In reaching its finding, the Family Court clearly considered I.D.'s safety and well-being. The Family Court found that the "overwhelming evidence is that the child's safety needs are met when he is with [Father.]" The Family Court also found that Father and I.D. shared a close and loving relationship with Father's girlfriend A.A. and her children. Additionally, the Family Court found that Father is a loving and capable father who is able to separate his own needs from those of I.D. and who encourages I.D. to have a good relationship with Mother and I.D.'s extended family. Moreover, the Family Court considered Father's "history of causing physical harm, bodily injury, or assault or causing reasonable fear of physical harm, bodily

injury, or assault to another person[.]" HRS § 571-46(a)(9)(B). The Family Court found that the incident underlying the Abuse of Family or Household Member conviction was an isolated incident, that I.D. was not present during the incident, and that the incident did not involve Mother. The Family Court also determined that there was no credible evidence that Father behaved inappropriately to I.D. or in I.D.'s presence, or that Father was verbally or physically abusive to Mother.

The Family Court has wide discretion in making its decisions and "those decisions will not be set aside unless there is a manifest abuse of discretion." In re Doe, 95 Hawai'i 183, 189, 20 P.3d 616, 622 (2001). "An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Rezentes, 88 Hawai'i at 208, 965 P.2d at 141 (citation omitted). Furthermore, it is "well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence; this is the province of the trier of fact." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (quoting Doe, 95 Hawai'i at 190, 20 P.3d at 623).

Based on the foregoing, we cannot conclude that the Family Court abused its discretion when it determined that the presumption created by HRS § 571-46(a)(9) was rebutted.

(2) Mother contends that the Family Court showed bias towards Father and Father's counsel, citing Findings of Fact (**FOFs**) 6 and 11 in the Family Court's July 13, 2016 Findings of

Fact; Conclusions of Law. In FOF 6, the Family Court found that the "testimony of both [A.A.] and [Father] was credible. [A.A.'s] testimony was especially credible. She was both open and candid in her testimony." In FOF 11, the Family Court found that:

There was no credible evidence presented at trial of [Father] abusing drugs or alcohol. The credible evidence was that, during the months preceding the filing of the instant petition, [Father] rarely drank and did not use any illegal drugs. There was no evidence presented at trial that [Father] was verbally or physically abusive to [Mother.] The credible evidence showed that the child is well fed when with [Father].

Mother and Father presented conflicting evidence related to Father's alcohol consumption, alleged abuse, and I.D.'s eating habits. Mother testified that Father was verbally abusive during the course of their relationship. Mother also testified that when Father "drinks or when he's on steroids his anger comes out a lot more. And he would call [her] a bitch, a cunt, on a daily basis." When asked if she stood by her statement in her affidavit that I.D. was not eating at Father's house, Mother responded affirmatively. A.A. testified that Father is a good parent to I.D., and he "makes sure [I.D.] gets his needs, his dinners, takes a bath, like any basic parent needs to do." A.A. also testified that she was aware that Father was not allowed to drink alcohol while on probation. A.A. related that Father drank alcohol "occasionally a couple times[,]" while on probation, but had not had a drink in months. Father testified that he never used drugs and that he has never physically abused I.D. or Mother. Upon review of the record, FOF 11 reflects the Family Court's determination that A.A. and Father's testimony were credible.

Mother cites no authority to support her assertion that a court's credibility determinations constitute evidence of bias or prejudice. Mother provides no further argument or evidence to support her contention that the Family Court was biased towards Father. Thus, we reject Mother's assertion that the Family Court's credibility determinations constitute evidence of bias or prejudice.

Mother also argues that the Family Court showed bias in favor of Father's counsel. In support of her argument, Mother asserts that the Family Court

provided leading recitation of [Father's counsel's] questions to witnesses, allowed [Father's counsel] to make jumps from direct to cross-examination with a witness which blurred the lines between direct and leading questions, allowed [Father's counsel] to testify without sustaining objections, and provided false and misleading facts in the Findings of Fact and Conclusions of Law.

Upon a review of the entire record, we conclude that there is no support in the record to suggest that the Family Court disregarded its duty to "maintain the attitude and appearance of impartiality." State v. Pokini, 55 Haw. 640, 645, 526 P.2d 94, 101 (1974). It appears that the Family Court assisted both parties' counsel throughout the custody trial. As such, the Family Court's actions "appear[ed] to be motivated by a desire to maintain order and decorum during the proceedings rather than by any improper biases." State v. Fukusaku, 85 Hawai'i 462, 483, 946 P.2d 32, 53 (1997) (footnote omitted). Based on the foregoing, we reject Mother's contention that the Family Court showed a bias towards Father's counsel.

For these reasons, the Family Court's April 29, 2016
Order After Trial is affirmed.

DATED: Honolulu, Hawai‘, June 29, 2017.

On the briefs:

Stuart E. Ragan,
for Petitioner-Appellant.

Presiding Judge

Kyle B. Coffman,
for Respondent-Appellee D.D.

Associate Judge

Associate Judge