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NO. CAAP 15-0000400

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DARREN TODD SCHMIDT, Petitioner-Appellant, v.
COURTNEY MARIE CARROLL, Respondent-Appellee

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-M NO. 12-1-0003)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, Fujise and Leonard, JJ.)

Petitioner-Appellant Darren Todd Schmidt (**Father**)

appeals from the Findings of Fact, Conclusions of Law, Decision and Order filed on April 15, 2015 (**Custody Order**), in the Family Court of the Third Circuit (**Family Court**).¹ The Custody Order awarded Respondent-Appellee Courtney Marie Carroll (**Mother**) sole legal and physical custody of their child (**Child**) with limited visitation to Father.

On appeal, Father raises three points of error, contending that the Family Court erred when it: (1) disregarded Mother's alleged violation of Hawaii's custodial interference statute, Hawaii Revised Statutes (**HRS**) § 707-726 (2014), and

¹ The Honorable Henry T. Nakamoto presided, except as otherwise noted.

thereby rewarded unlawful behavior intended to be prevented by the law, violated due process, and wrongly shifted the burden onto Father, who is a fit parent; (2) made "clearly erroneous findings of fact in support of its applying an incorrect legal standard pursuant to HRS § 571-46 [(Supp. 2015)], in awarding sole legal and physical custody to Mother, to the detriment of Father's substantive rights and child's best interest;" and (3) cited clearly erroneous procedural background to obscure judicial delay to the detriment of Father's substantial rights. Father asks the court to reverse the Order.

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 Father's points of error as follows:

(1) HRS § 707-726, which is part of Hawai'i's Penal Code, provides in relevant part:

§ 707-726 Custodial interference in the first degree.
(1) A person commits the offense of custodial interference in the first degree if:

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(c) The person, in the absence of a court order determining custody or visitation rights, intentionally or knowingly takes, detains, conceals, or entices away a minor with the intent to deprive another person or a public agency of their right to custody, and removes the minor from the State.

This is not an appeal of a criminal proceeding. In his January 24, 2012 Petition for Custody, Father requested that Mother be compelled to appear before a Hawai'i court, Father be adjudged to be the legal and natural father of child, legal and physical custody be awarded to Father subject to Mother's rights

of reasonable visitation, and Mother should be ordered to pay for the support, maintenance and education of the child. A criminal prosecution of Mother was not before the Family Court. In addition, the record indicates that Father contacted the police and the Office of the Prosecuting Attorney, which responded in pertinent part:

After a careful consideration of the facts and the law as it may pertain to this case, and in using my prosecutorial discretion to charge a crime or not, I have come to the conclusion that it is not in the best interests of your child for the State of Hawaii to interfere with the pending Family Court proceeding. Indeed, it is common knowledge that that forum is the most convenient and appropriate to decide child custody matters, especially where allegations and counter-allegations against both parents are being made. That forum was specifically designed and intended to handle such matters, and has the resources at hand to more readily decide what the best interests of your child call for.

Father fails to provide any Hawai'i precedent or other persuasive authority supporting his contention that the Family Court had an obligation to treat Mother's relocation to Indiana as a violation of HRS § 707-726 in these Family Court custody proceedings.

It is clear from the record that Father raised this allegation in the Family Court proceedings, in his Motion to Return Minor Child to Hawaii and for Temporary Legal and Physical Custody and Child Support (Motion to Return). Mother responded to this motion, as well as to Father's Petition for Custody. After a June 4, 2012 hearing, the Family Court denied, without prejudice, Father's Motion to Return, instead ordering that the

parties agree on a custody evaluator, who was to visit with Child at each parent's home.²

Despite Father's arguments to the contrary, we cannot conclude that Findings of Fact (FOFs) 14, 15, 19, 20, 23, 30, and 33 "provide erroneous support to Mother's custodial interference offense." Rather, FOFs 14, 15, 19, 20, 23, 30, and 33 are supported by the record in this case - including the report of the custody evaluator (which was admitted into evidence by stipulation), and the trial testimony of Father, Mother, and maternal grandfather - and thus are not "clearly erroneous." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001). We decline to disturb the Family Court's evaluation of credibility and weighing of the evidence. Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) (citing State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000)). Accordingly, we conclude that this point of error is without merit.

(2) In the second point of error, Father principally challenges the Family Court's determination that pursuant to HRS § 571-46, it is in the best interest of Child that Mother be awarded sole legal and physical custody of the minor child. Father argues that the Family Court erred in "making clearly erroneous [FOFs] in support of its applying an incorrect legal standard pursuant to HRS § 571-46[.]" Father contends that the Family Court made erroneous FOFs, which falsely support Mother's

² The Honorable Anthony K. Bartholomew presided over the Motion to Return.

false allegations that poor conditions existed in Child's Hawai'i home before Mother relocated Child to live in Indiana. Father contends that the Family Court did this in order to support its incorrect Conclusions of Law (COLs) B, C, D. Father also argues that the Family Court made erroneous FOFs to "obfuscate [his] caregiving." In particular, Father challenges FOFs 8, 10, 12, 13, 15, 25, and 28-30.

HRS § 571-46 sets forth the criteria for awarding child custody. HRS § 571-46(a) states in relevant part:

(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 shall be guided by the following standards, considerations, and procedures:

(1) Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court also may consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child;

.

(4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare, and custody of any minor child of the parties.

HRS § 571-46(b) provides a list of factors for the Family Court to examine when determining the best interest of the child. The Hawai'i Supreme Court has recognized that the Family Court is "granted broad discretion to weigh the various factors involved, with no single factor being given presumptive paramount weight, in determining whether the standard has been met."

Fisher v. Fisher, 111 Hawai'i 41, 50, 137 P.3d 355, 364 (2006).

HRS § 571-46(b) states in relevant part:

(b) In determining what constitutes the best interest of the child under this section, the court shall consider, but not be limited to, the following:

.

- (3) The overall quality of the parent-child relationship;
 - (4) The history of caregiving or parenting by each parent prior and subsequent to a marital or other type of separation;
 - (5) Each parent's cooperation in developing and implementing a plan to meet the child's ongoing needs, interests, and schedule; provided that this factor shall not be considered in any case where the court has determined that family violence has been committed by a parent;
 - (6) The physical health needs of the child;
 - (7) The emotional needs of the child;
 - (8) The safety needs of the child;
 - (9) The educational needs of the child;
-
- (11) Each parent's actions demonstrating that they allow the child to maintain family connections through family events and activities; provided that this factor shall not be considered in any case where the court has determined that family violence has been committed by a parent;
 - (12) Each parent's actions demonstrating that they separate the child's needs from the parent's needs;
 - (13) Any evidence of past or current drug or alcohol abuse by a parent;
 - (14) The mental health of each parent;
 - (15) The areas and levels of conflict present within the family[.]

Here, the Family Court concluded that it was in the best interest of the Child to award sole legal and physical custody to Mother, subject to Father's visitation.

Upon review of the record, it appears that FOFs 8, 10, and 12 are not based on evidence presented at trial.³ Rather,

³ The Family Court's FOFs include:

[FOF 8]: Father and Mother met in February of 2007. In January 2009, Mother became pregnant. [Child] was born on October 17, 2009, in Hawaii. After [Child] was born, Mother received approximately \$570 a month in food stamps for she
(continued...)

FOFs 8, 10, and 12 appear to be based on Mother's Memorandum in Opposition to Motion to Return Child,⁴ and Mother's Proposed Findings of Fact and Conclusions of Law. Thus, as they are not supported by substantial evidence, we conclude FOFs 8, 10, and 12 are clearly erroneous, although it is unclear to what extent the facts stated therein are in dispute. In any case, pursuant to Rule 61 of the Hawai'i Family Court Rules, the "court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties." Father has not explained how FOFs 8, 10, and 12 affected his substantial rights. Furthermore, even "[e]rroneous findings of fact that are unnecessary to support the decision and judgment of the trial court are not grounds for reversal."

Wright v. Wright, 1 Haw. App. 581, 585, 623 P.2d 97, 100 (1981).

³(...continued)

and [Child]. Mother began to work part time at a local farmer's market on weekends in the morning, earning approximately \$70, per week to help make ends meet. While she was working, Father was able to take care of [Child], but only up to about 5 hours at a time.

[FOF 10]: The front cabin on the property is approximately 20 ft. x 20 ft. in dimensions with single wall plywood and a corrugated aluminum roof. It has one bedroom and one bathroom. Electricity is off-grid, and limited to two (2) solar panels and a generator. The back cabin is smaller with just one room.

[FOF 12]: On August 27, 2011, Mother and [Child] returned to South Bend. She was due to return to Hawaii in mid-September, but the trip was eventually extended until approximately October 11, 2011. Mother's parents paid her transportation costs. Mother left on the 11th for Hawaii, stopping for two days in California to visit Paternal Grandmother. She returned with [Child] to Hawaii on October 15, 2011[.]

⁴ Mother's Memorandum in Opposition to Motion to Return Child was supported only by a declaration of counsel, which included statements Mother reportedly made to her attorney. Counsel represented that he did not have sufficient time to receive a signed declaration from Mother, but would submit one thereafter. Upon review of Mother's Answering Brief and the record on appeal, we are unable to confirm that such declaration was ever filed.

As in Wright, FOFs 8, 10, and 12 are of "marginal relevance only and [are] clearly not necessary to support the family court's decision." Id. Accordingly, we decline to reverse the Family Court's Custody Order on the grounds that these FOFs are clearly erroneous.

However, FOFs 13, 15, 25, and 28-30 are supported by substantial evidence in the record, and are not clearly erroneous. FOFs 13, 15, and 30 are based on Mother's testimony. With regard to FOF 13, Mother testified that she discussed leaving Hawai'i with Father. Mother stated "[w]e were having problems in the home, we were arguing a lot. So got a ticket and [Child] and I left." With regard to FOF 15, Mother testified that she relocated to Indiana because she "thought there would be more opportunities for [Child] and I there. Things weren't going very well with [Father] in Hawaii, we were living in poverty. He was pretty controlling as well." Mother related that she felt psychologically abused by Father. With regard to FOF 30, Mother related that she has "always been [Child's] primary caretaker."

FOF 25 is the Family Court's assessment of Dr. Carol Luzzi's (Dr. Luzzi) testimony. Dr. Luzzi testified that Mother provided superior care in treating Child's medical condition. Dr. Luzzi stated that if Child's stable environment is disrupted, it could cause "serious backsliding." Dr. Luzzi opined that Child should not have "long term visitation away from her current living situation over the next calendar year[.]" In FOF 27, the "court [found] Dr. Luzzi to be a credible witness." We decline to disturb the Family Court's evaluation of credibility and

weighing of this evidence. Tamashiro, 97 Hawai'i at 92, 34 P.3d at 22 (citation omitted).

FOF 28 is the Family Court's assessment of the custody evaluator's report. In her report, the custody evaluator noted that Father "believes that [Child's] emotional injury is not due to ADHD but caused by being separated from him." The custody evaluator believed that Father would not accept Child's diagnosis, follow the recommendations of Drs. Andrea Karweck (Dr. Karweck) and Luzzi, or administer Stratera or other ADHD medication.

FOF 29 is based on Father's testimony. Father testified that he does not "discount potential ADHD things and the need to bring in medication if necessary." However, Father believes that "recognizing the developmental implications of not having attachment -- healthy secure attachment to both parents, that's primary to a child's best interest[.]" FOF 30 accurately depicts Mother's relationship with Child, based on the evidence presented.

Thus, the Family Court did not clearly err in considering FOFs 13, 15, 25, and 28-30, as part of the substantial evidence in the record to support the Family Court's conclusion that "it is in the best interest of the minor child that [Mother] be awarded sole legal and physical custody of the minor child[.]" The Family Court's FOFs and COLs reflect its consideration of the factors outlined in HRS § 571-46(b), including the "overall quality of the parent-child relationship," the "history of caregiving or parenting by each parent prior and

subsequent to a marital or other type of separation," "[e]ach parent's cooperation in developing and implementing a plan to meet the child's ongoing needs, interests, and schedule," the "physical health needs of the child," the "emotional needs of the child," the "educational needs of the child," "[e]ach parent's actions demonstrating that they allow the child to maintain family connections through family events and activities," "[e]ach parent's actions demonstrating that they separate the child's needs from the parent's needs," and the "areas and levels of conflict present within the family." See HRS § 571-46(b). We conclude that the Family Court did not abuse its discretion when it determined that Mother should be awarded sole legal and physical custody of the minor child, with limited visitation available to Father.

(3) Father contends that the Family Court erroneously concluded: "The Custody Evaluator filed a Motion for Instructions on December 31, 2012, which was heard on January 11, 2013. *At the hearing the Custody Evaluator advised the Court that [Father] failed to provide the necessary deposit to begin the evaluation.*" Father avers that there was no January 11, 2013 hearing, and that the custody evaluator received full payment. We are unable to find any record of such a hearing, but the custody evaluator's December 31, 2012 Motion and Declaration do report and request action from the court due to Father's delays in payment, which the custody evaluator reported was delaying the completion of her evaluations. Although Father provides no particular record citation to aid us, from our review of the

record as a whole, it does appear that Father made the payment(s) at some point, perhaps even shortly after the custody evaluator's motion, as Father suggests.

The substance of Father's complaint, however, is that the evaluation process took too long and that the delays worked in Mother's favor, as the longer Child lived more-or-less exclusively with Mother, the more it worked to Father's detriment. Father's complaint is not completely without merit and the lengthy period of time that it took to complete the evaluation process in this case is of concern to this court. In addition, there is no evidence that Father is an unfit parent and, absent a decision to relocate to Indiana, it appears that Father will have a limited role in Child's life. However, there were many factors, based on substantial evidence in the record, supporting the Family Court's decision, and there is no evidence that a speedier process would have led to a different result. Therefore, we cannot conclude that the Family Court abused its discretion in awarding custody of Child to Mother.

For these reasons, the Family Court's April 15, 2015 Custody Order is affirmed.

DATED: Honolulu, Hawai'i, April 29, 2016.

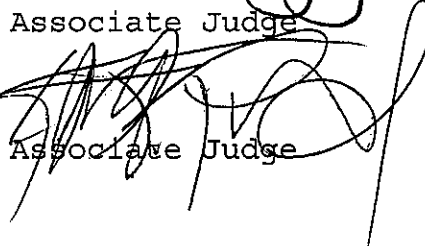
On the briefs:

Harry Eliason,
for Petitioner-Appellant.

Brian J. De Lima,
Francis R. Alcain,
Justin P. Haspe,
(Crudele & De Lima)
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge