NO. CAAP-14-0000871

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LE, Petitioner-Appellant, v.
VM, Respondent-Appellee

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-P NO. 08-1-0012)

SUMMARY DISPOSITION ORDER
(By: Nakamura, C.J., and Leonard and Reifurth, JJ.)

This appeal arises out of a paternity case focusing primarily on issues of child custody and child support. Petitioner-Appellant LE ("Father") appeals from the "Findings of Fact, Conclusions of Law and Order Denying Petitioner's Second Motion for Reconsideration from Decision and Order of the Court, Filed Herein on March 28, 2014" ("FOF/COL"), which was entered by the Family Court of the Third Circuit ("Family Court")[1/] on May 29, 2014. The March 28, 2014, "Decision and Order of the Court" ("Decision and Order") awarded Father and Respondent-Appellee VM ("Mother") with joint legal and physical custody of their two biological children.[2/]

[1/] The Honorable Anthony K. Bartholomew presided.

[2/] In his Notice of Appeal, Father purported to appeal from the FOF/COL. Father failed to designate the Decision and Order or the May 7, 2014 "Order Denying Plaintiff's Motion for Reconsideration from Decision and Order of the Court, Filed Herein on March 28, 2014" ("Order Denying First Motion for Reconsideration") in his Notice of Appeal. However, "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Haw. R. App. P. 3(c)(2). Father's appeal was timely as to all three decisions. Because it can be fairly inferred that Father intended to appeal from the Decision and Order and Order Denying First Motion for Reconsideration in addition to the FOF/COL, and because there is no evidence that Mother was misled by Father's mistake, we may review Father's arguments as they apply to all three decisions. *See Tamman v. Tamman*, No. SCWC-10-0000032, 2012 WL 1035720, *2 (Hawaiʻi March 28, 2012).

On appeal, Father alleges that the Family Court erred when it: (1) applied the doctrine of laches to this case; (2) denied his request for retroactive child support; and (3) did not award retroactive child support to him from the date when he first requested it.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments they advance and the issues they raise, we resolve Father's points of error as follows, and affirm.

This case is resolved largely on the basis that Father neither ordered nor presented this court with transcripts from the December 15, 2008 hearing during which the Family Court, prior to its final determination of custody, addressed temporary visitation, modified an existing restraining order to allow face-to-face contact between the parties to permit mediation and ordered the parties to mediate, and ordered the appointment of a guardian ad litem to perform a custody evaluation. Under Hawai‘i Rules of Appellate Procedure Rule 10(b),[3/] "[t]he burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript." *Bettencourt v. Bettencourt*, 80 Hawai‘i 225, 230, 909 P.2d 553, 558 (1995) (original brackets omitted) (quoting *Union Bldg. Materials Corp. v. The Kakaako Corp.*, 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)) (internal quotation marks omitted). "The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error." *Id.* Although transcripts are not always necessary for appellate review if "it is possible to determine that the court erred without recourse to the transcript," *Thomas-Yukimura v.*

[3/] The rule states in relevant part:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court appealed from, the appellant shall file with the appellate clerk, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

Haw. R. App. P. 10(b)(1)(A).

Yukimura, 130 Hawai‘i 1, 10 n.19, 304 P.3d 1182, 1191 n.19 (2013), such a determination is impossible here.

Father did not meet his burden to provide this court with an adequate record to show error. The Family Court's minutes from the December 15, 2008, hearing before Judge Lloyd Van De Car state that the "[m]otion for child support, custody etc. is continued until moved on." The minutes reflect that the onus was placed on Father to renew his motion if he still wished to receive child support, presumably upon completion of the ordered mediation.

Father does not contest that the Family Court continued his child-support motion "until moved on," and does not argue that he ever renewed his motion. If the minutes are correct and the Family Court informed Father that he must file a renewed motion for child support, then the Family Court did not err in concluding in the FOF/COL that Father's request was barred by the doctrine of laches. *See Vitali v. Hauen-Limkilde*, No. 30405, 2012 WL 5288815, *1 (Hawai‘i App. Oct. 25, 2012) (noting that generally, the family court may only order support payments prospectively); *Hayashi v. Hayashi*, 4 Haw. App. 286, 292–93, 666 P.2d 171, 176 (1983) (holding claim for retroactive award of support was barred by the doctrine of laches). In other words, Father's claim of error depended on his demonstrating that the minutes were not accurate and that he had not been informed that he had to file a renewed motion for child support. However, Father failed to provide us with a transcript of the December 15, 2008 hearing, which would be necessary to demonstrate that the minutes were inaccurate. Therefore, Father has not established that the Family Court erred in concluding that his claim for retroactive child support was barred by latches.

Furthermore, even if we were to overlook Father's failure to provide the transcript, Father has not overcome the Family Court's findings of fact and conclusions of law which support its decision to deny his request for retroactive child support. The Family Court made the following pertinent findings of fact:

> 23. During the evidentiary hearing, the parties submitted between them in excess of fifty exhibits, none of

> which had to do with the financial circumstances of the parties or other issues relevant to a calculation of the relative child support obligations of the parties. Nor did the parties submit updated financial disclosure forms.
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> . . . .
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> 24. During the evidentiary hearing, neither party offered any testimony relevant to the issue of child support, except for a single question to [Father], in which he was asked if he had received child support during the pendency of the litigation and he replied that he had not.
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> 25. In his written argument to the court after the hearing, [Father] urged that he should be awarded retroactive child support; however, [Father] did not submit for the court's consideration any specific amount claimed, any assertions regarding the parties' relative income during the litigation, or any proposed child support guidelines worksheet.

Appellate courts review family court findings under the "clearly erroneous" standard, which means that we will not disturb such a finding unless "(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." *In re Doe*, 95 Hawai‘i 183, 190, 20 P.3d 616, 623 (2001) (quoting *State v. Okumura*, 78 Hawai‘i 383, 392, 894 P.2d 80, 89 (1995)) (internal quotation marks omitted). Applying this standard, we conclude that these findings were not clearly erroneous.

Moreover, Father has not demonstrated that the Family Court was wrong in reaching the following conclusions:

> B. . . . [A]ssuming *arguendo* that [Father] was entitled to receive child support from the time Judge Nakamura ordered the 60/40 custody arrangement which continued through this court's decision and order in March, 2014, [Father] was entitled to receive a payment *monthly* for approximately five and a half years, and during that time did not once act upon the court's instruction that he could move the matter on when it became of concern to him. If that was not sleeping on his rights, this court cannot imagine what would be.
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> C. [Father] further argues that it would have been "premature and impossible" to address the issue of child support during the evidentiary hearing "given that neither party knew who would prevail at trial." While that may have been so regarding the issue [of] current child support based upon the court's trial decision, [it] was completely irrelevant regarding the matter of retroactive child support, which, if it was due, would be based entirely upon the parties' past history and entirely unaffected by the court's trial decision regarding custody going forward, whatever it may have been.

> . . . .
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> E. Finally, [Father] asserts that an award to him of retroactive child support would not be prejudicial to [Mother] because he does not seek a lump sum payment, which would certainly be many thousands of dollars, but rather a monthly discount of the amount he now owes [Mother] pursuant to the court's trial order. In the court's view, a monthly discount from the amount she is owed, while certainly less onerous than a lump sum obligation, is nonetheless clearly prejudicial to [Mother]. Compromising [Mother's] present ability to care for the children while they are in her care because [Father] chose to sleep on his rights for five and a half years would certainly be prejudicial to her.

Unlike family court findings, a family court's conclusions of law "are reviewed on appeal de novo, under the right/wrong standard." *Id*. (citing *In re Doe*, 84 Hawai‘i 41, 46, 928 P.2d 883, 888 (1996)). "[C]onsequently, [those conclusions] are 'not binding upon an appellate court and are freely reviewable for their correctness.'" *Id.* (original brackets omitted) (quoting *Doe*, 84 Hawai‘i at 46, 928 P.2d at 888). Here, as previously stated, Father has not demonstrated that the above conclusions are wrong. The foregoing findings and conclusions support and validate the Family Court's decision, and, thus, the Family Court did not err in denying on the basis of latches Father's claim for a retroactive award of child support.

Therefore, (1) the March 28, 2014 Decision and Order of the Court, (2) the May 7, 2014 Order Denying Plaintiff's Motion for Reconsideration from Decision and Order of the Court, Filed Herein on March 28, 2014, and (3) the May 29, 2014 Findings of Fact, Conclusions of Law and Order Denying Petitioner's Second Motion for Reconsideration from Decision and Order of the Court, Filed Herein on March 28, 2014, which were entered in the Family Court of the Third Circuit, are affirmed.

DATED: Honolulu, Hawai‘i, June 20, 2016.

On the briefs:

Brian J. De Lima and
William B. Heflin
(Crudele & De Lima)
for Petitioner-Appellant.

Douglas L. Halsted
for Respondent-Appellee.

Chief Judge

Associate Judge

Associate Judge