NO. CAAP-15-0000436

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF ES

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 13-00005)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, and Reifurth and Ginoza, JJ.)

Father-Appellant appeals from the Family Court of the First Circuit's ("Family Court's") June 3, 2015 Order Terminating Parental Rights; May 22, 2015 Decision and Order Regarding Father's Motion for Relief from Orders Filed February 4, 2014 and to Dismiss the Petition Filed July 16, 2014 ("Order Denying Relief/Dismissal"); and its May 22, 2015 Decision and Order Regarding Father's Motion for Immediate Review Filed April 6, 2015.[1/] These dispositions essentially terminated Father's parental rights to his child, ES, and awarded permanent custody of ES to the Department of Human Services ("DHS").

On appeal, Father argues that the Family Court clearly erred and violated his constitutional rights when it denied his July 16, 2014 motion for relief from the February 4, 2014 Orders Concerning Child Protective Act ("February 4, 2014 Orders"), and to dismiss the January 9, 2013 Petition for Temporary Foster

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[1/] The Honorable Bode A. Uale issued the orders.

Custody ("July 16, 2014 Motions") on the ground that the court's February 22, 2013 Orders Concerning Child Protective Act ("February 22, 2013 Orders") awarding foster custody of ES to the DHS, were the "law of the case." Specifically, Father contends that: (1) DHS did not have probable cause to place ES in protective custody in January 2013; (2) the prior judge's ruling on the matter was not controlling as the "law of the case"; (3) the court should have granted Father's motion to compel testimony by hospital nurse Kathryn Martin, formerly known as Kathryn Menor, and (4) the Family Court's June 16, 2015 Findings of Fact and Conclusions of Law are clearly erroneous and moot."[2/]

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

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[2/] Father filed an opening brief and an amended opening brief in this case. In the opening brief, Father "specifically points error in" five findings of fact ("FOFs"): 18, 93, 115, 116, and 123, and in four conclusions of law ("COLs"): 9, 10, 11, and 12. In contrast, Father does not raise any of the FOFs or COLs in his subsequently filed amended opening brief. Nonetheless, the central issue in this case involves terminating one of Father's fundamental constitutional rights. *See generally, Doe v. Doe*, 116 Hawai'i 323, 333-35, 172 P.3d 1067, 1077-79 (2007). Taking into account, then, the fact that Father raised the FOFs/COLs issue in his first opening brief, and because of the nature of the fundamental right involved, we proceed to address Father's assertions in the first opening brief although they are not properly preserved.

Because Father's blanket assertion that the FOFs and COLs are erroneous "as [a] whole" does not comport with the requirements set forth in the Hawai'i Rules of Appellate Procedure ("HRAP"), however, we address only those findings and conclusions specifically identified for the court. *See* Haw. R. App. P. Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."). Additionally, the opening brief merely states that the FOFs and COLs that Father does specify are "not supported for the reasons listed above," yet it fails to expand on this contention. In fact, Father's argument on the first three points of error also violates the HRAP because it contains no citations to, or discussions of, any specific FOFs or COLs alongside their purportedly supporting arguments. Haw. R. App. P. Rule 28(b)(7) (requiring opening briefs to include "[t]he argument, containing the contentions of the appellant on the points presented *and the reasons therefor, with citations to the . . . parts of the record relied on*" (emphasis added)). Moreover, the "reasons listed above" to which Father refers in his "argument" on the fourth point of error are, for the most part, not apparent. *See id.* Accordingly, as discussed below, we deem all undecipherable arguments with respect to the listed FOFs and COLs to be waived. *See Kakinami v. Kakinami*, 127 Hawai'i 126, 144 n.16, 276 P.3d 695, 713 n.16 (2012) (citing *In re Guardianship of Carlsmith*, 113 Hawai'i 236, 246, 151 P.3d 717, 727 (2007) explaining that "this court may 'disregard a particular contention if the appellant makes no discernible argument in support of that position'").

Father's points of error as follows, and affirm:

(1) On appeal, rather than argue that the Family Court was wrong on the merits of his Hawai'i Family Court Rules ("HFCR") Rule 60(b) motion for relief from the February 4, 2014 Orders,[3/] Father contends that the Family Court erred by premising its decision to deny that motion on the conclusion that the February 22, 2013 Orders constituted the law of the case rather than the testimony and evidence adduced at five days of trial. We disagree and instead conclude that the Family Court did not abuse its discretion for at least three reasons.

First, it is unclear from the record whether and to what degree the Family Court failed to consider the evidence adduced at trial prior to denying Father's HFCR Rule 60(b) motion. Father points to the court's May 22, 2015 Order Denying Relief/Dismissal which includes: four paragraphs about the February 22, 2013 Orders; a fifth paragraph noting that "[n]either father or mother motioned the Court for reconsideration and neither took an appeal of the Court's ruling"; a sixth paragraph concluding that "the Court herein finds that Judge Christine Kuriyama's ruling after trial on the merits is law of the case"; and a seventh paragraph denying the motion.

That order, however, arose in the context of a five-day trial, during which Father presented witnesses and submitted documentary evidence to the Family Court, which Father claimed entitled him to reversal of the February 4, 2014 Orders. That the Family Court considered the witness testimonies and the other evidence appears evident from the many findings and conclusions that the court included in its June 16, 2015 Findings of Fact and Conclusions of Law. Thus, although FOF 18 states, "Neither Mother nor Father filed for reconsideration of the Court's orders on February 22, 2013, adjudicating the petition and assuming jurisdiction over Mother and Father nor did Mother or Father file

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[3/] "A motion to set aside a judgment pursuant to HFCR Rule 60(b) is reviewed for abuse of discretion." *Child Support Enf't Agency v. Doe*, 98 Hawai'i 499, 503, 51 P.3d 366, 370 (2002) (citing *Hayashi v. Hayashi*, 4 Haw. App. 286, 290, 666 P.2d 171, 174 (1983)).

an appeal[, so] Judge Kuriyama's findings and orders is the law of the case[,]" that finding is but one of 131 findings of fact and twelve conclusions of law that address the issues common to both Father's motion for relief and DHS's motion for termination of parental rights.[4/] Therefore, Father has failed to establish that the Family Court failed to consider the testimony and other evidence at trial.

Second, Father fails to establish why the February 22, 2013 Orders should not be considered as law of the case. Father's motion, although directed against the February 4, 2014 Orders, was in fact a belated challenge to the February 22, 2013 Orders. Since Father argued that the court was wrong in coming to its conclusions in the February 22, 2013 Orders, it was his burden to establish error. *In re RGB*, 123 Hawai'i 1, 17, 229 P.3d 1066, 1082 (2010) (quoting State v. Hinton, 120 Hawai'i 265, 273, 204 P.3d 484, 492 (2009)). And because Father's July 16, 2014 Motions presented no cogent reasons or exceptional circumstances to support amending the February 22, 2013 Orders or the February 4, 2014 Orders, the Family Court did not err in holding that the February 22, 2013 Orders controlled. *See Aoki v. Aoki*, 105 Hawai'i 403, 411, 98 P.3d 274, 282 (App. 2004) ("[The law-of-the-case doctrine] is not completely inflexible, . . . since a judge is allowed to modify a prior decision of another judge if either cogent reasons support such a modification, or [if] exceptional circumstances are present." (citing *Tradewinds Hotel, Inc. v. Cochran*, 8 Haw. App. 256, 264, 799 P.2d 60, 66 (1990))).

And, finally, even if we were to overlook Father's failure to raise the Rule 60(b) issue on appeal and proceed on our own to address the merits of the Family Court's ruling on the Rule 60(b) motion,[5/] our conclusion remains the same. That is,

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[4/] Indeed, as the Family Court noted when it agreed to hear both matters during the same trial, "it's kinda like two different sides of the same issue."

[5/] Father specifically contended that his motion would fall under HFCR Rule 60(b)(3) or (b)(6). Since Father appears to specifically allege (continued...)

regardless of how the argument is framed, Father's HFCR Rule 60(b) motion was untimely because, as a de facto attack on the February 22, 2013 Orders, it was not filed "not more than one year after the judgment, order, or proceedings was entered or taken."[6/] Haw. F. Ct. R. 60. Thus, FOF 18 is not erroneous, the Family Court did not abuse its discretion, and Father's first point of error fails. *See generally In re Doe*, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) ("[T]he 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.'" (brackets omitted) (quoting *In re Doe*, 89 Hawai'i 447, 487, 974 P.2d 1067, 1077 (App. 1999))).

(2) There is also no merit to Father's claim that the DHS violated his constitutional rights under the Fourteenth Amendment to the United States Constitution by removing ES without probable cause. In fact, Father cites to no authority that supports his assertion that DHS was required to show that it had probable cause to place ES in protective custody before doing so, and we find none. *See Kakinami*, 127 Hawai'i at 144 n.16, 276 P.3d at 713 n.16. Rather, Hawaii Revised Statutes ("HRS") § 587A-8 (Supp. 2012) sets out the legal standard for protective custody by a police officer without a court order.[7/]

[5/](...continued)
fraud, the claim falls under HFCR Rule 60(b)(3). And, as such, it fails.

[6/] The effects of the delay in bringing the HFCR Rule 60(b) motion are evident here where the court was simultaneously considering DHS's motion for termination of parental rights. Upon the court's granting of DHS's motion, Father's motion effectively became moot and any error that might have occurred in the underlying award of foster custody was thereby made harmless.

[7/] Section 587A-8 of the HRS states, in relevant part:

> (a) A police officer shall assume protective custody of a child without a court order and without the consent of the child's family if, in the discretion of the police officer, the officer determines that:
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> (1) The child is subject to imminent harm while in the custody of the child's family;
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> (2) The child has no parent, as defined in this chapter, who is willing and able to provide a
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> (continued...)

Moreover, Honolulu Police Department ("HPD") Officer Gabriel Kira had adequate reasons to assume protective custody under HRS § 587A-8 when he did so shortly after ES's birth. Indeed, testimony by Officer Kira established that the officer decided to assume protective custody of ES only after consulting with Ermalinda Pascua, a DHS Social Worker assigned to ES's case.[8/] In one of its unchallenged findings, the Family Court stated that both Pascua and Officer Kira "are found by the Court to be credible witnesses," and, in contrast, Father's testimony was "not credible". *See generally In re Doe*, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005) (explaining that appellate courts give "deference to the right of the trier of fact 'to determine credibility, weigh evidence, and draw reasonable inferences . . . .'" (quoting *State v. Lubong*, 77 Hawai'i 429, 432, 886 P.2d 766, 769 (App. 1994))). Pascua had informed Officer Kira that: Mother had "recently" tested positive for methamphetamine and amphetamine;[9/] Mother had suffered previous, documented incidents

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[7/](...continued)

safe family home for the child;

(3) The child has no caregiver, as defined in this chapter, who is willing and able to provide a safe and appropriate placement for the child; or

(4) The child's parent has subjected the child to harm or threatened harm and the parent is likely to flee with the child.

Haw. Rev. Stat. § 587A-8(a).

[8/] Father's contention that it was *Pascua*, rather than Officer Kira, who took ES into protective custody, when Pascua instructed hospital staff to keep ES in the nursery until Pascua and the HPD arrived, is incorrect. Pascua's instructions to hospital staff did not amount to a transfer of custody. Officer Kira testified that he assumed protective custody of ES only after arriving at the hospital, at which time he conferred with Pascua and witnessed first-hand Father's violent and threatening behavior. Therefore, the Family Court issued a finding, which Father does not explicitly challenge on appeal, stating that: the *HPD* "assumed police protective custody of [ES,] and therefore transferred custody to DHS in accordance with HRS § 587A-8." Because this finding is unchallenged, and because Father has presented no compelling reason to disturb it, we will not do so on appeal. *See State v. Kiese*, 126 Hawai'i 494, 502, 273 P.3d 1180, 1188 (2012) (explaining that FOFs not challenged on appeal are binding (citing *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 227, 140 P.3d 985, 1007 (2006))).

[9/] In two of its FOFs, the Family Court found that Mother tested positive for amphetamines during two hospital visits that occurred in the (continued...)

of relationship violence at Father's hands;[10] and Pascua had observed "Father's [threatening] behavior during the initial removal of [ES]" from the hospital.[11] It is clear from the officer's testimony that he believed that ES was "subject to imminent harm" while in Father's custody and/or that ES had "no parent . . . who is willing and able to provide a safe family home for [ES]."[12] Haw. Rev. Stat. § 587A-8(a)(1) and (2). Therefore, Officer Kira satisfied all applicable standards for

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[9](...continued)
first half of her pregnancy with ES. However, as noted in FOF 31, "Mother did not test positive for drugs upon admission to the hospital or at delivery of [ES]." Thus, even though Officer Kira apparently misconstrued Pascua's statement to mean that Mother tested positive within a month of delivering ES, rather than testing positive more than three months prior to delivery, the error was harmless. That is, even if Officer Kira had correctly understood Pascua, Mother's two positive results on her prenatal drug tests, which the Family Court explained in two of its unchallenged FOFs, still would have provided adequate support for the officer's decision to assume protective custody of ES shortly after the child was born. *See* Haw. Rev. Stat. § 587A-8(a)(1) and (2); *see also Kiese*, 126 Hawai'i at 502, 273 P.3d at 1188.

[10] For example, FOFs 7 and 71 establish that during a hospital visit occurring early on in her pregnancy with ES, Mother presented with injuries "such as a depressed fracture and swelling under her chin area," and she "reported to hospital staff that Father [had] assaulted her." In FOF 86, the court also found that Mother has filed at least one Temporary Restraining Order against Father, which remains in effect as of the date of this disposition. Based on evidence such as this, the Family Court stated in FOF 96 that "[s]ince the inception of this case in January 2013, there have been at least four different incidents of domestic violence between Mother and Father that have either resulted in injuries to Mother or the arrest of Father or both." Father fails to challenge any of these findings on appeal. *See Kiese*, 126 Hawai'i at 502, 273 P.3d at 1188. Furthermore, Father has cited to no authority to support the notion that allegations against a parent must be adjudicated before a police officer may take the parent's child into protective custody under HRS § 587A-8, and we find none. *See Kakinami*, 127 Hawai'i at 144 n.16, 276 P.3d at 713 n.16.

[11] Father does explicitly challenge FOF 93, in which the Family Court found that "Father exhibited violent and threatening behavior that necessitated the assistance of additional HPD officers" during the "initial removal of [ES]." Nonetheless, there is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support" the court's statement in FOF 93, particularly in light of its unchallenged credibility determinations in FOFs 127 and 129. *2001 Doe*, 95 Hawai'i at 190, 20 P.3d at 623 (defining the "clearly erroneous" standard of review that applies to a family court's FOFs on appeal). Thus, Father's challenge to FOF 93 fails.

[12] According to another one of the Family Court's unchallenged findings, "[ES] has significant medical needs and is diagnosed with clef[t] palate, asthma, and cerebral palsy." Further, the record indicates that DHS initially attempted to place the newborn ES in foster custody of a "relative resource caregiver," but DHS subsequently removed ES from that placement "because Father was threatening the resource caregiver . . . ." *See* Haw. Rev. Stat. § 587A-8(a)(3).

"assum[ing] protective custody of [ES] without a court order and without the consent of [ES]'s family" under HRS § 587A-8(a), and as noted above, Father's arguments to the contrary are unpersuasive. Accordingly, the second point of error fails.

(3) The Family Court did not prevent Father from compelling the testimony of Nurse Kathryn Martin. In light of the temporary restraining order that Nurse Martin had obtained against Father due to concerns for her own safety, however, the court allowed Father to secure the evidence by deposing Nurse Martin. Father, however, failed to depose Nurse Martin. Furthermore, as discussed above, Officer Kira's decision to assume protective custody of ES was not based on an allegation that *ES* tested positive for drugs, as Father contends, so any error on the part of the Family Court in excusing Nurse Martin from testifying regarding her statement that ES tested positive for drugs, was harmless.

(4) Finally, Father advances no discernible argument for why this court should depart from any of the remaining FOFs or COLs he challenges on appeal, so we deem those arguments to be waived. *Kakinami*, 127 Hawai'i at 144 n.16, 276 P.3d at 713 n.16. Moreover, our own review of the record reveals no grounds for concluding that the Family Court's findings in FOFs 115, 116, and 123, which form the basis for COLs 9, 10, and 11, or its conclusion in COL 12 that "[t]he Permanent Plan dated July 10, 2014, is in the best interests of [ES]," were erroneous. *See 2001 Doe*, 95 Hawai'i at 190, 20 P.3d at 623. Thus, Father's challenge to the Findings of Fact and Conclusions of Law is, like his first three alleged points of error, meritless. *See Stanford Carr Dev. Corp. v. Unity House, Inc.*, 111 Hawai'i 286, 303 n.10, 141 P.3d 459, 476 n.10 (2006) ("It is axiomatic that '[i]f a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid.'" (quoting *Kawamata Farms, Inc. v. United Agric. Prods.*, 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997))).

Therefore, IT IS HEREBY ORDERED that the Family Court of the First Circuit's June 3, 2015 Order Terminating Parental

Rights, May 22, 2015 Decision and Order Regarding Father's Motion for Relief from Orders Filed February 4, 2014 and to Dismiss the Petition Filed July 16, 2014, and the May 22, 2015 Decision and Order Regarding Father's Motion for Immediate Review Filed April 6, 2015 are affirmed.

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

On the briefs:

Tae Chin Kim
(opening and reply brief)
and Jason Z. Say
(amended opening brief)
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Presiding Judge

Associate Judge

Associate Judge