NOT FOR PUBLICATION

NO. 27092

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HEATHER O. KURPIS, Plaintiff-Appellee, v.
PETER A. KURPIS, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-D NO. 98-150K)

MEMORANDUM OPINION
(By: Burns, C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Peter A. Kurpis (Father) appeals from the family court's[1/] (1) December 1, 2003 "Order on Plaintiff's Motion and Affidavit for Order to Show Cause and Relief After Order or Decree, Filed March 18, 2003, and Defendant's Motion and Affidavit for Post-Decree Relief, Filed March 25, 2003" (December 1, 2003 Order), (2) February 20, 2004 "Order Denying Defendant's Motion for Reconsideration of Decision Announced at Hearing on October 31, 2003, or in the Alternative, Motion for New Trial, and Order Re: Payment of Educational Expenses and Dr. Acklin's Fees and Costs" (February 20, 2004 Order), and (3) January 6, 2005 "Order on Defendant's Motion for Post-Decree Relief, Dated September 10, 2004" (January 6, 2005 Order). After vacating part of one finding of fact stated in the December 1, 2003 Order, we affirm in all other respects.

1/ Except as otherwise indicated, Judge Aley K. Auna, Jr. presided.

BACKGROUND

Father and Plaintiff-Appellee Heather Kurpis, nka Heather Whitfield Outlaw (Mother), were married on May 9, 1992. They have two children (the Children). Their daughter was born on February 22, 1993, and their son was born on October 26, 1994. On June 4, 1998, Mother filed a complaint for divorce. The divorce decree entered on August 20, 1998, by Judge Colin L. Love states, in relevant part, as follows:

> 2. Child Custody.
>
> . . . .
>
> b. Award of Custody. The parties are awarded joint legal and physical custody of the minor [C]hildren of the parties. The parties shall have physical custody of the [C]hildren for equal periods of time on a monthly basis as arranged by agreement between the parties, and as established in practice.
>
> . . . .
>
> c. Residence Information. . . . .
>
> The parties agree that should either of them move away from West Hawaii, the best interest of the [C]hildren will be served by the other party also moving to the same location. The parties shall cooperate with each other in the process of deciding whether, when and where to move the area of residence of the [C]hildren, ...
>
> . . . .
>
> 3. Child Support.
>
> a. There shall be no award of child support to either party because the income of the parties is the same and the [C]hildren will be spending an equal amount of time with both parties. . . .
>
> . . . .
>
> d. Education Expenses. The educational expenses of the [C]hildren shall be paid 50% by [Father] and 50% by [Mother].

Mother and Richard Schulze married in November 2000 and divorced in 2003. In January 2002, Father informed Mother of his desire and intent to move to the continental United States for

economic reasons. Mother testified that, in June of 2002, she informed Father of her financial inability to make any payments for the Children's educational expenses. Father thereafter moved the Children from school at the Hawaii Preparatory Academy (HPA) to the Kohala Elementary School. On February 26, 2003, Microsoft Corporation in Seattle, Washington, hired Father as a software engineer commencing March 24, 2003.

The proceedings leading to this appeal commenced on March 18, 2003, when Mother filed a post-divorce motion seeking an order (1) awarding her physical custody of the Children, (2) requiring Father to pay temporary child support to her, (3) requiring Father to provide medical and dental insurance for the Children and to pay for any uncovered expenses, and (4) requiring Father to pay the higher educational expenses of the Children. On March 25, 2003, Father filed a motion seeking an order (1) awarding him sole legal and physical custody of the Children, and (2) requiring Mother to reimburse Father her 50% share of the previously incurred educational expenses of the Children in the approximate amount of $20,000.

On June 20, 2003, at Father's request, the court appointed Marvin Acklin, Ph.D., (Dr. Acklin) as Custody Evaluator.

On July 2, 2003, the court entered an order stating, in relevant part:

> 8. Plaintiff Mother shall have summer visitation with the [C]hildren during which she may take them to visit with their family on the mainland; she will bring the [C]hildren

> at her expense to Seattle, Washington on July 8, 2003. There Mother shall transfer the minor [C]hildren according to a mutually agreeable plan to Defendant Father for his summer visitation; Father shall send the [C]hildren back to Mother on the Big Island at his expense by no later than Friday, August 22, 2003, so that they can return to school in North Kohala by August 25, 2003.

The trial was held on September 25 and 26, 2003. During the trial, Dr. Acklin recommended the appointment of Father as the primary custodial parent of the Children.

The court's December 1, 2003 Order, which decided some of the requests of the prior motions, states, in relevant part:

> I. FINDING (sic) OF FACT AND CONCLUSIONS OF LAW:
>
> . . . .
>
> F. Both Mother and Father love their children.
>
> G. Both Mother and Father have treated their children well.
>
> . . . .
>
> Q. The [C]hildren can receive a good education no matter where they live. What is important is what influence the custodial parent will have upon the [C]hildren educationally, emotionally, and socially.
>
> R. Both parents will be excellent influences upon the [C]hildren and can provide the stability necessary for the [C]hildren to mature into productive citizens of society.
>
> S. Both the Seattle and Kohala areas are appropriate environments for educational and extracurricular activities for the [C]hildren.
>
> . . . .
>
> U. Mother's choice to remove the [C]hildren from her crisis in July 2002 was a good choice. However, the [C]hildren were frightened by Mother's experience at that time. Father's care of the [C]hildren during Mother's crisis was good for the [C]hildren.
>
> V. Mother has recovered from her crisis and she appears to have a good handle on her life.
>
> W. Mother's schedule is flexible enough to care for the [C]hildren when they are out of school. She provides numerous wholesome activities and opportunities for the children to excel educationally, physically, and socially.
>
> X. Father's schedule is dictated by his employment, which sometimes takes him away from caring for the [C]hildren.

Even though his fiancé may provide excellent substitute care, this situation could not replace a mother's influence.

. . . .

AA. Father has not provided financial support for the [C]hildren since departing Hawaii in March 2003. Although he was not ordered to, he should have at least voluntarily assisted his children financially.[2/]

BB. Father and Mother's communication skills with each other are poor. Both need to get beyond their personal animosities and look at what would be best for the children. . . . For example: the Court was concerned about E-mailing, which Father insisted upon and although convenient, should not be the exclusive mode of communication.[3/] Another example: When the [C]hildren returned to Hawaii, Father should not have simply walked passed [sic] Mother at the airport without at least acknowledging and greeting her in front of the [C]hildren.

CC. Father has sometimes been rigid in his care of the [C]hildren and his relationship with Mother.

. . . .

EE. The Court seriously and thoroughly considered Dr. Marvin Acklin's investigation and recommendations and does recognize him as an authority on relocation cases. However, the Court has seriously considered the ages of the [C]hildren, their years of residency and the quality of life in the Waimea and Kohala areas, and the totality of the circumstances as critical for this Court's decision amongst other things. We must remember that it was Father who moved the [C]hildren to the Kohala area.

FF. Relocation to Washington will not significantly improve the [C]hildren's quality of life.

GG. It would be in the best interests of the [C]hildren that sole legal and physical custody of the [C]hildren be awarded to Mother, with reasonable visitation to Father.

HH. Mother offered to change sole legal and physical custody from her to Father commencing August 1st of the year that each child finishes the 8th grade. Circumstances do change

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[2/] The finding in part AA that "Father has not provided financial support for the [C]hildren since departing Hawaii in March 2003. Although he was not ordered to, he should have at least voluntarily assisted his children financially," is contradicted by (1) the subsequent finding in part MM.c and (2) the court's February 20, 2004 Order which establishes that Mother owed Father $10,229.02 for the educational expenses of the Children for the school years from 1999 through 2002.

[3/] Part BB should be worded as a finding and an order rather than as a lecture. Moreover, there is no explanation why, in light of the fact that "Father and Mother's communication skills with each other are poor," E-mailing should not be the exclusive mode of communication.

over the years and the Court cannot foretell what the circumstances will be at that time. The parties may decide to change custody sooner. The [C]hildren will finish the 8th grade during different years. It would not be in the [C]hildren's best interests to separate them at that time either. However, Mother has put on record her intentions and the Court hopes[4/] that she will follow through with her promise. But no orders shall be issued at this time regarding this change.

II. VISITATION: The Court finds that it would be in the best interests of the [C]hildren that Father has every Christmas vacation and summer vacation with the [C]hildren subject to the following provisions:

. . . .

b. Father shall be responsible for transportation costs of visitation.

c. Mother has taken annual summer trips with the [C]hildren to visit her parents. If she elects to take such a trip in the future, it would be in the best interest of the [C]hildren that she be allowed no more than 10 days with the [C]hildren during that summer. She shall be responsible for the [C]hildren's transportation costs for the trip with her.

d. The parties may agree to other physical visitations and it is the Court's hope that Mother be extremely flexible, especially if Father is in Hawaii.

e. Father shall have unlimited telephone and written contact with the [C]hildren during reasonable hours.

. . . .

MM. . . . .

. . . .

b. Under the circumstances of this case, it would be appropriate to issue an order that Mother not drink alcohol and both parties not use illicit drugs or abuse prescription drugs during physical custody or visitation.

c. It would be just and equitable that Father's child support obligation and/or arrearages be offset by any amount Mother owes Father regarding . . . reimbursement of HPA costs advanced by Father.

Accordingly, IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

. . . .

11. Mother is ordered not to drink alcohol and both parties are ordered not to use illicit drugs or abuse

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[4/] "[T]he Court hopes" is not a statement that belongs in the court's findings or order.

> prescription drugs during physical custody or visitation.[5/]

Footnotes added.

The December 1, 2003 Order also ordered Father to pay $1,640 child support per month commencing April 1, 2003. However,

> Because Father is responsible for the transportation costs if the [C]hildren visit him in Washington, the Court finds [sic] that it would be just and equitable that child support be temporarily suspended for the months of July and August each year that the [C]hildren visit him in Washington during the summer.[6/]

Footnote added.

On December 3, 2003, Father filed a motion for reconsideration or a new trial (December 3, 2003 Motion). In support thereof, he filed a twenty-six page statement in which he stated, in relevant part, as follows:

> Because Mother's counsel took up more than his share of time by a significant margin, my testimony was short and rushed, barely a half hour. Not only was it difficult to refute the many lies that had accumulated, it was difficult to even touch on important points of my own testimony. I also had to cancel the appearance of witnesses (. . .) due to our shortage of time. In that lost time, essential testimony affecting the outcome of this trial was lost.

The court's February 20, 2004 Order (1) denied Father's December 3, 2003 Motion, (2) required Mother to reimburse Father $10,229.02 for educational expenses, (3) required Father to pay Mother $14,760.00 past due child support at the rate of $1,640 per month from April 1, 2003 through December 31, 2003, and (4) ordered Mother to reimburse Father $2,100 for her share of Dr.

5/ For obvious reasons, it would be more appropriate for the order to state that "both parties are ordered never to use illicit drugs or abuse prescription drugs."

6/ This is not a finding. It is a decision that is reviewed under the abuse of discretion standard.

Acklin's fees and costs.

On February 27, 2004, the court entered an order amending its prior orders to state that child support was $1,367 ($1,640 X 10 ÷ 12) per month. On March 16, 2004, the court entered an order stating that the February 27, 2004 order reducing Father's child support obligation to $1,367 per month was not in effect prior to December 1, 2003.

On March 19, 2004, Father filed a notice of appeal and thereby commenced appeal no. 26461.

On March 22, 2004, Father moved for a reduction of his child support obligation and to cancel his $2,430.98 debt to Mother. On May 12, 2004, the court entered an order denying Father's March 22, 2004 motion because (1) "[t]he Court is concerned and believes that it does not have jurisdiction to consider the issues raised in [Father's] motion for post-decree relief due to the fact that [Father] has filed a Notice of Appeal . . . ." and "[e]ven if the Court had jurisdiction to enter orders modifying the amount of child support to be paid by [Father] and cancelling the award of back child support in spite of the filing of a Notice of Appeal by [Father], it would deny [Father's] present Motion[.]"

On July 7, 2004, the Hawai‘i Supreme Court entered an order dismissing Father's appeal no. 26461 because the family court had not decided all of the requests made in the March 18,

2003 and March 25, 2003 motions.[7]

On September 10, 2004, Father filed a motion for "an order determining the issues of payment of uninsured health expenses and payment of higher educational expenses raised in Plaintiff Mother's March 18, 2003 motion[.]" In its January 6, 2005 Order, the family court (1) required Father to maintain the Children "on a medical/dental insurance policy"[8] and for Father to pay 72% and Mother to pay 28% of all uncovered expenses, and (2) required Father to pay 72% and Mother to pay 28% of the children's "private and higher educational expenses[.]" This January 6, 2005 Order is the final and appealable order.

Father's notice of appeal, filed on February 1, 2005, commenced this appeal. This case was assigned to this court on September 26, 2005.

DISCUSSION

In the opening brief, in support of his complaint that "Mother's counsel took up more than his share of time by a significant margin[,]" Father contends that "[Mother] had about 5 hours (5:02) and [Father] only had about 4 hours (4:05). Thus, [Mother] had an extra hour of time. This was unfair, and objected to in the Motion for Reconsideration." We assume that Father's calculations are correct. However, Father did not at

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[7] The record does not contain an officially filed copy of the Hawai'i Supreme Court's July 7, 2004 Order Dismissing Appeal. Father attached a copy of this order to his September 10, 2004 motion.

[8] The court did not state any minimum coverage requirements for the "medical/dental insurance policy[.]"

the trial (1) object or (2) request additional time to present evidence. We conclude that he thereby waived his right to assert this challenge in this appeal.

Father contends that the court abused its discretion when it awarded custody to Mother. He challenges parts F, G, Q, R, W, X, AA, BB, CC, EE, FF, GG, and MM.b of the December 1, 2003 Order. In the opening brief, he summarizes his argument as follows:

> Because [Father] is clearly and convincingly a better parent and role model, because Seattle is a better place for the [C]hildren socio-culturally and educationally, because the best interests of the [C]hildren are served having them in the custody of [Father] in Seattle, and because the Family Court abused its discretion in deciding otherwise, [Father] respectfully requests this Court to reverse the decision of the lower court regarding custody, and to vacate and remand the ancillary decisions regarding child support.

Hawaii Revised Statutes (HRS) § 571-46 (Supp. 2006) specifies, in relevant part:

> In awarding the custody, 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;
>
> . . . .
>
> (3) 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;
>
> . . . .
>
> (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change and, wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award;
>
> (7) Reasonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child[.]

When the parties cannot agree on the child(ren) custody issue in a divorce case and there is a trial, the family court must (1) find the relevant facts, and (2) decide what custody arrangements are in the best interests of the child(ren).

> The family court's [Findings of Fact] are reviewed on appeal under the "clearly erroneous" standard. A [Finding of Fact] is clearly erroneous when (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. "Substantial evidence" is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In re Doe, 101 Hawai'i 220, 227, 65 P.3d 167, 174 (2003) (internal quotation marks, citations, and ellipsis omitted).

> The decision of a family court judge in a domestic relations case will be set aside only where there has been a manifest abuse of the judge's wide discretion in such matters. Ahlo v. Ahlo, 1 Haw.App. 324, 619 P.2d 112 (1980). This standard of review applies to all issues in domestic relations matters, including custody issues.

Sabol v. Sabol, 2 Haw. App. 24, 31, 624 P.2d 1378, 1383 (1981).

When reviewing family court decisions for an abuse of discretion, it is well established that

> [t]he family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion. Under the abuse of discretion standard of review, the family court's decision will not be disturbed unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason.

In re Doe, 77 Hawai'i 109, 115, 883 P.2d 30, 36 (1994) (internal quotation marks, citations, brackets, and ellipsis omitted).

In the opening brief, Father states that "[i]n its Findings of Fact, the Court seems to equalize the two parents and locations, then preserve its perception of the status quo." Upon

a review of the record, we agree. Father contends that this equalization is an abuse of discretion. Upon a review of the record, we disagree.

In the reply brief, Father contends that "if [Mother's] specious argument that this is a matter of 'credibility of witnesses' and 'weigh[t] of evidence' were allowed to prevail, no custody decision could be reviewed on appeal." We agree that the standards of review present the appellant with a difficult burden to satisfy. We disagree that they preclude appellate review.

In light of the second sentence of part HH stating the undeniable fact that "[c]ircumstances do change over the years and the Court cannot foretell what the circumstances will be at that time[,]" the five sentences that follow that second sentence do not belong in the court's findings and would only serve to confuse the situation because, when that time comes, it may not be in the best interests of the Children for Mother to "follow through with her promise[.]"

CONCLUSION

Accordingly, we vacate the following sentences in part HH of the family court's December 1, 2003 "Order on Plaintiff's Motion and Affidavit for Order to Show Cause and Relief After Order or Decree, Filed March 18, 2003, and Defendant's Motion and Affidavit for Post-Decree Relief, Filed March 25, 2003":

> Circumstances do change over the years and the Court cannot foretell what the circumstances will be at that time. The parties may decide to change custody sooner. The [C]hildren will finish the 8th grade during different years. It would not be in the [C]hildren's best interests to separate them at that time either. However, Mother has put on record her intentions and the Court

> hopes that she will follow through with her promise. But no orders shall be issued at this time regarding this change.

In all other respects, we affirm. In addition, we affirm the family court's February 20, 2004 "Order Denying Defendant's Motion for Reconsideration of Decision Announced at Hearing on October 31, 2003, or in the Alternative, Motion for New Trial, and Order Re: Payment of Educational Expenses and Dr. Acklin's Fees and Costs," and January 6, 2005 "Order on Defendant's Motion for Post-Decree Relief, Dated September 10, 2004."

DATED: Honolulu, Hawai'i, May 17, 2006.

On the briefs:

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James S. Burns
Chief Judge

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