NO. 27589

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

BRIAN JOHN ELLIS, JR., Plaintiff-Appellee, v.
ELIZABETH B. ELLIS, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-DIVORCE NO. 03-1-0912)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Elizabeth B. Ellis (Elizabeth) appeals from the "Order Denying Motion and Affidavit for Post Decree Relief Filed Aug. 12, 2005" entered on October 27, 2005 by the Family Court of the First Circuit[1/] (family court). The order granted in part and denied in part Elizabeth's motion for post-decree relief against Plaintiff-Appellee Brian John Ellis, Jr. (Brian).

On appeal, Elizabeth argues that the family court "erred in refusing to enforce [Elizabeth's] decision as the sole legal custodian to have the subject minor child [Child] attend pre-school during [Brian's] visitation where [Elizabeth] articulated a valid reason for the child to attend preschool." Specifically, Elizabeth contends the family court erred by denying her request to reduce Brian's number of custody days by having the Child attend preschool on Thursdays and Fridays.

[1/] The Honorable Karen M. Radius presided.

Elizabeth also contends that the following Findings of Fact (FOFs) contained in the family court's January 4, 2006 Findings of Fact and Conclusions of Law are clearly erroneous:

> 22. [Brian] and [Elizabeth] have brought the parties' child to preschool on a regular and consistent basis.
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> . . . .
>
> 25. When [Brian] has allowed child to remain out of preschool, the child has been engaged in positive, enriching, developmentally appropriate, and fun activities.
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> . . . .
>
> 27. There is no evidence that the child's current preschool, Kamaaina Kids in Aikahi Park, provides an atmosphere that is any more supportive of the child's needs than [Brian's] care.
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> 28. [Elizabeth] has previously acknowledged that [Brian's] residual rights allow him to determine whether the parties' child attends preschool during the visitation period.
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> 29. [Elizabeth's] claim that [Brian's] failure to bring their child to preschool will set back his speech and therefore visitation should be changed has no merit. [Brian] is bringing the parties' child to preschool. Further, the parties' child has no speech problem or similar educational delays. Continuing, if the child was missing school and he had a speech delay, there is no evidence that the preschool provides services during [Brian's] visitation time that would remedy the child's delay.

Elizabeth further contends that the following Conclusions of Law (COLs) set forth in the January 4, 2006 Findings of Fact and Conclusions of Law are wrong:

> 4. [Brian's] residual rights necessarily extend to encompass allowing [Brian] to keep the parties' child out of preschool on selected dates and thereby preserving his visitation time.
>
> 5. When the rights of the parties are in conflict, the welfare of the child must prevail.
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> 6. [Elizabeth] has failed to show a significant change in circumstances requiring a review of custody/ visitation issues.
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> 7. Even if [Elizabeth's] claims were to be considered a significant change in circumstances, changing

> [Brian's] visitation rights in this case is not in the best interest of the child.
>
> . . . .
>
> 9. [Elizabeth's] request for an Order requiring [Brian] to bring the child to preschool is denied.

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 Elizabeth's points of error as follows:

(1) The family court's FOFs were not clearly erroneous.

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

(a) The family court did not clearly err in FOF 22. Brian produced letters to the family court from two educators at the Child's preschool indicating the Child's attendance was consistent and regular.

(b) The family court did not clearly err in FOF 25. Brian explained to the family court what he did with the Child on days when the Child did not attend preschool, including taking the Child on trips to the zoo and having the Child spend time with the Child's grandparents.

(c) The family court did not clearly err in FOF 27. Elizabeth directs us only to her own testimony as to the alleged superiority of the preschool environment over that provided by Brian. This is counterbalanced by Elizabeth's testimony in which she admitted that the State of Hawai'i had determined the Child did not require special education for his speech problems. In light of Elizabeth's contradictory testimony, we cannot conclude the family court committed clear error; nor are we left with any definite and firm conviction that any error was made.

(d) The family court did not clearly err in FOF 28. Although the record on appeal reveals only the scantiest support for this FOF -- a note from Elizabeth in which she solicits Brian's thoughts on whether the Child should attend preschool on Thursday and Friday mornings -- we cannot say the family court clearly erred in inferring from this note any acknowledgment by Elizabeth that Brian's rights included the right to keep the Child out of preschool on those days. In any event, this FOF is superfluous, as such a previous acknowledgment of Brian's purported residual rights would not foreclose her from taking a contrary position before the family court at a subsequent date.

(e) The family court did not clearly err in FOF 29. This FOF is essentially an amalgamation of several distinct findings, none of which is clearly erroneous. First, we have already noted the family court did not err in finding that

preschool was not critical to the Child's speech progression and the Child did not require any special education that could be provided by the preschool he was attending. Second, we have already concluded the family court did not err in finding that Brian was bringing the Child to preschool on a regular basis. FOF 29 was not clearly erroneous.

(2) The family court's COLs were not wrong. The family court's COLs, on appeal, are reviewed *de novo* under the right/wrong standard. In re Jane Doe, 101 Hawai'i at 227, 65 P.3d at 174. Conclusions of Law, "consequently, are not binding upon an appellate court and are freely reviewable for their correctness." Id. (internal quotation marks, citation, and brackets omitted).

(a) The family court was not wrong in its COL 4, in which it concluded that Brian's residual rights included the right to keep the Child "out of preschool on selected dates and thereby preserving [sic] his visitation time." Hawaii Revised Statutes (HRS) § 571-46 (2006 Repl.) (Criteria and procedure in awarding custody and visitation) and the definitions in HRS § 571-2 (2006 Repl.) of the terms "legal custody" and "residual parental rights and responsibilities" do not give a custodial

parent the unfettered right to unilaterally interfere with a non-custodial parent's rights to reasonable visitation.[2/]

We note the following relevant language set forth in HRS § 571-46:

> **§571-46 Criteria and procedure in awarding custody and visitation.** In the actions for divorce . . . where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action . . . or at 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 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, and the court may also 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[.]

This language clearly indicates that the family court had the authority to make factual inquiry into the nature of the

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[2/] Hawaii Revised Statutes (HRS) § 571-2 (2006 Repl.) defines "legal custody" thusly:

> "Legal custody" means the relationship created by the court's decree which imposes on the custodian the responsibility of physical possession of the minor and the duty to protect, train, and discipline the minor and to provide the minor with food, shelter, education, and ordinary medical care, all subject to residual parental rights and responsibilities and the rights and responsibilities of any legally appointed guardian of the person.

The same statute defines the term "residual parental rights and responsibilities" as follows:

> "Residual parental rights and responsibilities" means those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not necessarily limited to, the right to reasonable visitation, consent to adoption or marriage, and the responsibility for support.

parental relationship and exercise discretion in determining the best interest of the Child.

(b) Elizabeth argues that the family court was wrong as to its COLs 5, 6, 7 and 9. She advances no legal argument whatsoever in support of this argument nor does she cite any statutory authority or precedent.[3/] She cites no case law contradicting the principle stated in COL 5 that the welfare of the child is of primary concern in custody disputes. Moreover, Elizabeth directs this court to no part of the Record on Appeal evincing that the family court committed reversible error when it determined that no significant change of circumstances occurred. COL 7 is irrelevant to the outcome of the case because it is phrased as a hypothetical. Finally, COL 9 is not a COL; rather, it is a statement of the procedural action taken by the family court in response to Elizabeth's motion. Elizabeth's points of error as to the remaining COLs are therefore deemed waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).

Therefore,

[3/] Elizabeth cites to a Montana case, Fitzhugh v. Fitzhugh, 248 Mont. 306, 811 P.2d 1273, 1274 (1991), in support of her proposition that "[i]t is reasonable to alter visitation to accommodate a child's attendance at pre-school." Fitzhugh supports that proposition, but states no rule of any kind that a non-custodial parent should be compelled to modify visitation to accommodate a custodial parent's preschool wishes. Fitzhugh concludes only that the lower court's custody rulings were reasonable. 248 Mont. at 309, 811 P.2d at 1275. That case, simply, is entirely irrelevant to this one.

The "Order Denying Motion and Affidavit for Post Decree Relief Filed Aug. 12, 2005" entered on October 27, 2005 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 21, 2007.

On the briefs:

Stephen T. Hioki
for Defendant-Appellant.

Brian John Ellis, Jr.,
Plaintiff-Appellee pro se.

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Associate Judge