NO. 24053

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LAWRENCE A. TYLER, Plaintiff-Appellant,

vs.

ELIZABETH A. LINSER, Defendant-Appellee.

APPEAL FROM THE FAMILY COURT OF THE FIFTH CIRCUIT
(UCCJ NO. 96-0005)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
Acoba, J., concurring and dissenting separately)

Plaintiff-appellant Lawrence A. Tyler (Father), pro se, appeals from the December 28, 2000 order of the Family Court of the Fifth Circuit, the Honorable Calvin K. Murashige presiding, denying his motion and affidavit for relief after order or decree. Father essentially contends that the family court erred by: (1) refusing to change primary physical custody of his minor daughter (Child) from defendant-appellee Elizabeth A. Linser (Mother), pro se, to him; (2) modifying his visitation rights and phone contact time with Child; (3) modifying the financial liability for Child's travel costs; (4) failing to find that Mother "has been uncooperative in a manner and to a degree that is contrary to the best interests of [Child,]"; and (5) failing to find that Mother's false accusations of inappropriate sexual contact with Child were contrary to Child's best interests.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Father's contentions as follows. Each of the family court's determinations being challenged on appeal is based on the best interests of the child standard. See Hawai'i Revised Statutes (HRS) § 571-46(6) (Supp. 1999). Consequently, we review them for clear error. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001); see also In re Jane Doe, 7 Haw. App. 547, 558, 784 P.2d 873, 880 (1989) ("[T]he decision as to what custodial arrangements are in the best interests of a child is a matter or question of ultimate fact reviewable under the clearly erroneous standard of review.").

However, because Father has failed to include transcripts from the trial proceedings in the record on appeal,[1] "[t]he state of the appellate record is such that all of the evidence presented to the [family] court is not presented here[,] and we have no way of knowing if the evidence is relevant." Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 153, 682 P.2d 82, 88 (1984) (emphasis added). Father has, therefore, failed to meet his burden of furnishing this court

[1] On May 29, 2001, Father moved this court to "instruct the lower court to supplement the record on appeal with copies of the video tapes of the hearings of June 9, 2000, August 25, 2000 and November 3, 2000." In an order dated May 31, 2001, we denied Father's motion "without prejudice to a subsequent motion filed in the circuit court in accordance with Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(e)(2)(B)." Father did not subsequently move the family court to supplement the record on appeal with copies of the videotapes from trial. The record does not, therefore, contain copies of the trial videotapes much less trial transcripts.

with a sufficient record to positively show alleged error. Bettencourt v. Bettencourt, 80 Hawai‘i 225, 230, 909 P.2d 553, 558 (1995) (citing Union Bldg. Materials Corp., 5 Haw. App. at 151, 682 P.2d at 87); see also Lepere v. United Public Workers 646, 77 Hawai‘i 471, 887 P.2d 1029 (1995) (appellant has duty to include relevant transcripts of proceedings as part of record on appeal); Loui v. Board of Medical Examiners, 78 Hawai‘i 21, 29 n.17, 889 P.2d 705, 713 n.17 (1995) (party has duty to provide appellate court with transcripts); HRAP Rule 10(a)(4) (2001) ("[t]he record on appeal shall consist of . . . the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b)[.]"); HRAP Rule 10(b)(1)(A) (2001) ("When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, 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."). Consequently, this court lacks the means to assess the merits of Father's contentions, as well as the relevant findings of the family court in the absence of the trial transcripts. Therefore,

IT IS HEREBY ORDERED that the family court's December 28, 2000 order denying Father's motion and affidavit for relief after order or decree is affirmed. See Bettencourt, 80 Hawai‘i

at 231, 909 P.2d at 559; Union Bldg. Materials Corp., 5 Haw. App. at 151, 682 P.2d at 87 ("An appellant must include in the record all of the evidence on which the lower court might have based its findings and if this is not done, the lower court must be affirmed.").

DATED: Honolulu, Hawai'i, March 15, 2004.

On the briefs:

Lawrence A. Tyler,
plaintiff-appellant,
appearing pro se

Elizabeth A. Linser,
defendant-appellee,
appearing pro se

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would vacate and remand as to the family court's limitation of Christmas and Spring visits between Child and Father to only odd numbered years. There appears to be no rational basis in the record for this qualification of Father's visitation rights. Otherwise, I concur in the result.