

NO. CAAP-16-0000512

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

IN THE INTEREST OF LR

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-S NO. 15-1-0111)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, and Leonard and Reifurth, JJ.)

This appeal arises out of the decision by the Family Court of the Second Circuit ("Family Court")¹ to deny the Department of Human Services - Child Welfare Services' ("DHS") Petition for Temporary Foster Custody ("Petition") of LR, a minor child. Appellees Father and Mother are the natural parents of LR. The Petition alleged, among other things, that LR was at risk of harm or the threat of harm by both parents because of domestic abuse.

Guardian Ad Litem-Appellant Renata Foster-Au appeals from an Order Following Evidentiary Hearing on Jurisdiction issued on June 27, 2016. Foster-Au argues that the Family Court reversibly erred when it denied her Motion to Change Status from Temporary Family Supervision to Temporary Foster Custody ("Motion to Change Status") after wrongly concluding that Father did not subject LR and/or her half-sister (collectively, "the Children") to any sexual risk, and did not subject LR to harm or a threat of harm where the court apparently failed to consider Father's

^{1/} The Honorable Keith E. Tanaka presided.

alleged drug use, domestic violence, and exposure of the Children to sadomasochism ("S&M"), or bondage, discipline, and sadomasochism ("BDSM").² Related to this argument is Foster-Au's contention that in the November 15, 2016 Findings of Fact, Conclusions of Law, and Order Denying Jurisdiction of the Minor Child to the Department of Human Services, Findings of Fact ("FOFs") 6-8, 10-15, and 18 are clearly erroneous, and Conclusions of Law ("COLs") 1 and 2 are wrong.

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 Foster-Au's point of error as follows.

The Family Court did not err in denying Foster-Au's Motion to Change Status because FOFs 6-8, 10-15, and 18 were not clearly erroneous and did not concern matters within the province of the Family Court. Accordingly, COLs 1 and 2 are not wrong because they are based on FOFs that are supported by substantial evidence in the record.

COLs 1³ and 2⁴ are based on FOFs 8⁵, 10⁶, 14⁷, and 15⁸,

^{2/} S&M was described as a form of sex in which people enjoy inflicting or receiving pain. BDSM was described as a form of sex with a focus on controlling or dominating another person for pleasure and involved dressing up and using various sources of restraint, or bondage. These sexual practices were alternatively referred to throughout the proceedings. For the sake of simplicity, we refer to the two together, as S&M/BDSM.

^{3/} COL 1 provides:

Based upon a preponderance of the evidence standard, and upon the credible evidence and totality of the circumstances, the court concludes that DHS has failed to prove, pursuant to Hawai'i's Child Protective Act, [HRS] § 587A-5, that Father has harmed L.R.'s and/or [half-sister]'s physical or psychological health or welfare, or subjected them to threatened harm by any acts or omissions.

^{4/} COL 2 provides: "Based upon a preponderance of the evidence standard, and upon the credible evidence and totality of the circumstances, the court concludes that Father poses no sexual risk to [the Children]."

^{5/} FOF 8 provides:

The court has viewed the videos of [half-sister]'s purported disclosures created by [Grandmother] and considered all of [half-sister]'s subsequent disclosures and finds that all of [half-sister]'s disclosures of Father's alleged sexual abuse, which began on or about July 13, 2014, are not reliable. The manner in which [Grandmother] created these

(continued...)

which we decline to review because they consist of credibility-of-the-witness and weight-of-the-evidence determinations, and the Family Court's prerogative to draw reasonable inferences from the evidence presented to it. See *In re Doe*, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." (quoting *State v. Jenkins*, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000))); *In re Doe*, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005) (explaining that the appellate courts "give due deference to the right of the trier of fact 'to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced.'" (quoting *State v. Lubong*, 77 Hawai'i 429, 432, 886 P.2d 766, 769 (App. 1994))). Thus, we conclude that FOFs 8, 10, 14, and 15 are not clearly erroneous.

Additionally FOFs 10-13⁹, are not clearly erroneous

^{5/}(...continued)

videos and other writings and/or statements of [half-sister]'s purported disclosures is highly problematic and suggests that [half-sister] had been coached by [Grandmother]. Moreover, the unreliability of [half-sister]'s disclosures is corroborated by her recantation to her therapist, Una Starbuck, on October 15, 2014.

^{6/} FOF 10 provides, in part, "The court has weighed the testimony of Dr. Marvn [sic] Acklin, qualified as an expert in the field of clinical and forensic psychology, observed his demeanor while testifying, and finds that he is a credible expert witness."

^{7/} FOF 14 provides:

The unreliability of [half-sister]'s purported disclosures of Father's alleged sexual abuse has tainted all of the opinions of witnesses [Grandmother]; Earan Larry-Fiakpuyi; Leslie Armstrong; Jocelyn Chang; Santo Triolo, Ph.D; Beverly Lundquist; Robin Winters; Chelsea Hill; [Foster-Au]; Mother; and Det. Anthony Krau. Based upon [half-sister]'s contaminated disclosures that were disseminated to these witnesses, the court finds that the testimony of all of these witnesses are similarly unreliable.

^{8/} FOF 15 provides, "The court has weighed the testimony of Father, observed his demeanor while testifying, and finds that he is a credible witness."

^{9/} FOFs 10-13 provide, in relevant part:

10. . . . Dr. Acklin reviewed the evidence of [half-sister]'s purported disclosures for forensic reliability and conducted a psychosexual examination of Father.

(continued...)

based on the Family Court's finding that Dr. Marvin Acklin was credible and its adoption of parts of Dr. Acklin's Report of Psychosexual Evaluation. As stated above, we decline to review the credibility-of-the-witness and weight-of-the-evidence determinations and, therefore, do not disturb the Family Court's characterization of Dr. Acklin's opinions. See *Doe*, 95 Hawai'i at 190, 20 P.3d at 623. Furthermore, while FOFs 6¹⁰, 7¹¹, and 18¹² are mixed FOFs and COLs, they are not clearly erroneous. FOFs 6, 7, and 18 are either supported by substantial evidence in the record, or are based on Dr. Acklin's testimony, which the Family Court found to be credible, and the Report of Psychosexual

^{2/}(...continued)

11. The court adopts Dr. Acklin's opinion and finds that all of [half-sister]'s purported disclosures that he reviewed appeared to be of "no forensic reliability whatsoever" and the product of a "terribly flawed evidentiary process" that contaminated all of [half-sister]'s subsequent disclosures during the Children [sic] Justice Center's [{"CJC's"}] interviews and to other professionals and/or witnesses.

12. The court adopts Dr. Acklin's opinion and finds that the "CJC interviews are fatally flawed by interviewer incompetence and the presence of fantastical information which appears to be the product of coaching of the child and encouragement to fabricate movie-influenced fantasy fabrication which impugn the reputation and conduct of [Father]."

13. The court adopts Dr. Acklin's opinion and finds that Father poses no sexual risk to [the Children]."

^{10/} FOF 6 provides:

Based upon a preponderance of the evidence standard, and upon the credible evidence and totality of the circumstances, the court finds that Father has not harmed L.R.'s and/or [half-sister]'s physical or psychological health or welfare, or subjected them to threatened harm by any acts or omissions.

^{11/} FOF 7 provides:

Based upon a preponderance of the evidence standard, and upon the credible evidence and totality of the circumstances, the court finds that [Grandmother] has harmed L.R.'s and/or [half-sister]'s physical or psychological health or welfare, or subjected them to threatened harm, by creating and disseminating 35 different videos and other numerous statements of [half-sister]'s purported disclosures of Father's alleged sexual abuse to others, including potential witnesses.

^{12/} FOF 18 provides, "Based upon a preponderance of the evidence standard, and upon the credible evidence and totality of the circumstances, the court finds that Father poses no sexual risk to [the Children]."

Evaluation, parts of which the Family Court adopted. Accordingly, we conclude that there is substantial evidence to support the Family Court's FOFs. *See id.*

The Family Court was not wrong to conclude in COL 1 and 2 that based on the preponderance of evidence, DHS failed to prove that Father's alleged domestic violence, drug use in the home, or exposure of the Children to S&M/BDSM subjected LR and/or half-sister to harm, threatened harm, or sexual risk. *See* Haw. Rev. Stat. § 587A-5 (Supp. 2015) (requiring the family court to base its finding that a child is subject to imminent harm on the facts and circumstances reported to DHS); Haw. Rev. Stat. § 587A-28(f) (Supp. 2015) (requiring the court to dismiss a petition if it finds that a child has not been subjected to threatened harm by the child's family); Haw. Rev. Stat. § 587A-4 (Supp. 2015) (defining "harm").

Accordingly, the Order Following Evidentiary Hearing on Jurisdiction, issued on June 27, 2016, by the Family Court of the Second Circuit, is affirmed.

DATED: Honolulu, Hawai'i, June 29, 2017.

On the briefs:

Elizabeth C. Melehan
for Guardian Ad Litem-
Appellant.

Presiding Judge

Erin Lowenthal,
Deputy Attorney General,
for Petitioner-Appellee.

Associate Judge

Nicole Forelli
for Mother-Appellee.

Associate Judge

Hayden Aluli
for Father-Appellee.