

CONCURRING OPINION BY LEONARD, J.

I concur in the majority's opinion. I write separately to clarify the basis for my agreement to affirm the Family Court's exercise of jurisdiction over K.P. pursuant to Hawaii Revised Statutes chapter 587A. The Family Court stated its decision as follows:

After reviewing the -- my notes, recalling the evidence in this case, the testimony that was presented, arguments made by counsel, by the Deputy Attorney General, here's my findings.

I find there is an adequate basis to involve family -- to invoke Family Court jurisdiction over the child and her parents in this case. Jurisdiction in this case is based on threatened harm to the child, and it's based on the following.

One, there's -- I agree with the guardian ad litem, there is unresolved substance abuse issue that needs to be addressed.

Also, the child witnessing physical altercation between [Mother's boyfriend] and [Father]. So the child has experienced or has witnessed violent behavior that's has gone on in the home and also between [Mother's boyfriend] and [Father].

What was obvious during this whole hearing, and I could feel it through [Mother] and her testimony, is the amount of stress that all of this is causing [K.P.]. As [Mother's] testimony was one that for a long time it's been [K.P.] and you. And [Mother's boyfriend] came into the picture and [K.P.] wanted more time with you. That, to me, this Court, seems to have caused some stress on her.

Then the altercation between [Mother's boyfriend] and [Father], that seems to have caused some stress on [K.P.].

So when we talk about harm, as [Mother's attorney] argued, this Court, in looking at you, [Mother], and the stress you're going through because of all of this, it seems as though that stress is now being transferred to [K.P.], and that's why I feel the threatened harm in this case is the threat of extreme mental distress on her because of the situation.

And based on that, that's why this Court feels that jurisdiction -- this Court needs to take jurisdiction over this case.

The Family Court's reference to an unresolved substance abuse issue appears to include: (1) Mother's admitted use of marijuana; (2) Mother's live-in boyfriend's admitted use of

marijuana and denied but presumptive use of methamphetamine, which was based on a drug screening test that was not subjected to laboratory confirmation; and (3) it appears, Father's history of methamphetamine use.

Mother testified that, in the past, she had a medical marijuana certificate related to her ovarian cancer, she did not currently hold a medical marijuana certificate, but that she had self-medicated for migraines, outside of the home, and outside of K.P.'s presence, after K.P. went to bed. There is no testimony or other evidence that Mother ever used marijuana in K.P.'s presence, was impaired by marijuana when transporting or caring for K.P., or that K.P. was at all aware of Mother's use of marijuana. The evidence in the record concerning Mother's marijuana use does not, by itself, constitute a threat of harm to K.P. sufficient to support the imposition of family supervision. Although Mother's boyfriend's positive test for methamphetamine appears to have been a screening test of limited reliability, the boyfriend's explanation, that it was secondhand smoke from his contact with other methamphetamine users, is not entirely reassuring. Although K.P. was not currently living with Father, regular visitation with Father was anticipated, and his history of methamphetamine use was relevant to the Family Court's determination.

As the majority states, and the Family Court found, K.P.'s family had a history of altercation and domestic violence issues. Prior to Mother and Father's divorce, in 2010, Father had been arrested for Family Abuse of K.P. There were also unconfirmed reports of abuse directed at Mother and K.P.'s brother. It appears, however, that subsequent to that time, Father had engaged in services and DHS had assessed Father to be an adequate caretaker for K.P. Nevertheless, there was a high level of unresolved conflict between Father and Mother's boyfriend, which had manifested itself in both verbal and physical altercations, including at least one physical altercation that K.P. witnessed. The record reflects that Father

had been incarcerated as a result of a violent episode involving Mother's boyfriend. The Family Court properly found that the altercations between Father and Mother's boyfriend seemed to cause stress to K.P. and contributed to a threat of harm of extreme mental distress.

Some of the Family Court's other observations would not support the State's exercise of jurisdiction over this family, absent the aforementioned factors. For example, the court's observation concerning Mother's boyfriend coming into the picture and K.P. wanting more time with Mother is not tantamount to neglect or threat of neglect warranting family supervision. For better or worse, this is a common phenomenon in many family situations and is not grounds for State intervention. Likewise, Mother's experience of stress related to DHS's involvement and the court proceedings, and K.P.'s resulting experience of stress that was perceived by the court, is likely to exist to some degree or another in nearly every case and, absent extraordinary circumstances, does not itself constitute a basis for the exercise of jurisdiction over a family.<sup>1</sup>

Nevertheless, as has been often stated by the appellate courts in this jurisdiction, the Family Court possesses wide discretion and "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." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (citations omitted).

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<sup>1</sup> As the majority states, this court will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence. Thus, I will merely note, for example, the apparent contradiction of DHS's assessment of Father as an adequate caretaker and criticism of Mother for allowing K.P. to live with Father at times, which appears also to be consistent with the terms of their divorce. The social worker's rationale was that, because Mother had previously asserted that Father was a "horrible" parent, Mother's allowing K.P. to live with him unsupervised for a period of time demonstrated bad parenting on her part. Thus, it seems that the social worker expected Mother, *inter alia*, to apply a higher standard of protectiveness than DHS. It is, however, the province of the Family Court to evaluate the witnesses and evidence presented, including the reasonableness of the State's concerns and expectations.

For these reasons, I agree with the majority's determination that the Family Court's January 12, 2015 Order Affirming Jurisdiction should be affirmed.