DISSENTING OPINION BY REIFURTH, J.

This case considers whether and when the family court may award foster custody of a parent's injured child to the Department when the parent has "not been ruled out" as the perpetrator of the child's injury, but where the strongest evidence against the parent is that she was in the vicinity of the child at the time of the incident and that she has provided no explanation for the child's injury. As such, the question implicates the relationship between the State's obligation to protect the health, safety, and welfare of the child; the Department's obligation to prove by a preponderance of the evidence that the child was harmed or is subject to threatened harm by the acts or omissions of his family before foster custody may be taken; and a parent's fundamental right to control the upbringing of her child.

The majority concludes that the Family Court did not clearly err in its FOFs and did not abuse its discretion in granting the Department's petition for foster custody. To the contrary, I conclude that the State fails to prove its case by a preponderance of the evidence when no reasonable inferences arise and the State relies in whole on the parent's inability to explain her ambulatory child's injury. Therefore, I respectfully dissent.

I. Background

On January 9, 2014, the Department received a report alleging that RK had been physically abused. Boyfriend had purportedly found RK unconscious in the upstairs bedroom of their home in Honolulu, Hawai'i. Mother and Boyfriend called emergency medical services and an unresponsive RK was transported by ambulance to the Queen's Medical Center. In order to relieve some of the pressure from a swelling brain, RK underwent surgery to remove part of his skull. Medical professionals found that although "[t]here were no physical signs of an injury/trauma," RK had suffered a subdural hemorrhage (also referred to as a subdural hematoma) on the right side of his brain. Still unconscious following the surgery, RK was transferred to Kapiolani Medical Center for Women and Children. Due to his

severe residual brain injury, RK is unlikely to ever regain consciousness, and doctors expect that RK will require life-long, full-time care. After about a month at Kapiolani, RK was released to the care of his maternal grandfather.

When RK was injured, he was living in the home of Boyfriend's parents with Mother; Boyfriend; RK's sibling, KK; Boyfriend's parents and Boyfriend's three siblings. Mother and the Children's natural father shared legal custody of the Children. At the time of the injury, Mother was the Children's primary care-giver and Boyfriend was a secondary care-giver. And although RK's medical history included at least two prior bone fractures and a bump on the head, each of those injuries had occurred in public places when RK was in the care of people other than Mother and/or Boyfriend.[1/]

On January 13, 2014, Dr. French prepared a Child Protection Pediatrics Report for RK's case based on her interviews with Mother and Boyfriend, consultations with RK's treating physicians, a review of RK's medical records, and a search of medical literature on subdural hematomas. Mother and Boyfriend related to Dr. French the following events surrounding the injury:

> History for [M]other: [RK] . . . was in good health except for a cough and runny nose until 1/8. Mother came home from picking up food at Zippy's at about 8 PM. She was coming up the stairs calling [Boyfriend] and [the Children] to come down for dinner. [RK] stumbled a bit on the way down the stairs and hit the left side of his head on the wooden stair rail. Mother fed him. He ate ok and then vomited. They thought it was part of his illness from earlier in the week. He vomited 4 more times and then went to sleep at about 10:30 on a sleeping bag on the floor in the room [Mother] slept in. He had no further vomiting and woke up the next day at 8:30 or so back to himself. He was playing with his

---

[1/] Various physicians noted RK's prior bone fractures in the Queen's "MD and Allied Health Consult Notes" ("Consult Notes"). One physician noted that RK broke his left leg two months ago when he slipped at a swimming pool while being supervised by his maternal great aunt, and broke his right leg in January 2013 when he ran down a hill and slipped on wet grass; while another physician noted that RK fractured his left leg about two months ago, and his right arm a year ago. *Cf.* Child Protection Pediatrics Report by Dr. Gina M. French (stating that in January 2013, RK broke his right leg when he slipped at a pool while with his Aunt Pam, and broke his left leg when he ran down a hill and slipped on wet grass while at a soccer game that RK attended with Boyfriend and Boyfriend's aunty.) The discrepancies between the three reports do not appear to be material. Dr. French further testified at trial that there had been no suspicion about a head injury RK suffered when he walked into a corner on May 28, 2013 because it was a common childhood occurrence and there seemed to be no damage to his brain.

> brother with their Christmas toys. At about 9:30 Mother took the two boys to the store to get food. He ate oranges and mac and cheese and then vomited about ten minutes later. He went to watch TV, took his usual 11 AM nap and then got up seeming like himself. Mother went out to hang the laundry. About 5 minutes later [Boyfriend] came running downstairs. [Boyfriend] had to slap [RK] because [RK] was unresponsive. [Mother and Boyfriend] called 911 and [RK] was taken to Queen's[.]
>
> [Boyfriend]: describes it with the following additions. When [M]other came back from Zippy's he was upstairs with the boys. When she called them to come down he was helping [KK] down the stairs with [RK] behind them when [RK] walked into the wooden railing. He was a bit dazed. [Boyfriend] picked him up to make sure he was ok. He put him back down and [RK] wobbled into the bathroom to the right. [Boyfriend] grabbed him before he fell. He walked him to the dinner table and sat down to feed him some saimin. He gave [RK] two bites when [RK] vomited at the table. He was taken upstairs by his mother for a shower. He vomited about 5 more times and then went to sleep. [Boyfriend] left the house early the next morning after kissing the [C]hildren goodbye. He went to his boss's house and returned at about noon. Upon arriving he heard [RK] screaming in the house. He went in to see what was happening. ([Mother] was outside hanging the clothes.) He asked [RK] "boy you ok"? [RK] didn't look right, his eyes rolled back and he got tense. [Boyfriend] grabbed him and slapped his leg to try and get his attention. It didn't work, [Boyfriend] thought he might need fresh air, put him by the window on the bed. [RK's] eyes were half closed and he was limp. He let him go and turned to turn on the fan. [RK's] arms flexed and his eyes were rolling. He was making no sounds. [Boyfriend] slapped him on the left side of his face, trying to revive him. [RK] looked at him for a moment and [Boyfriend] called for [Mother]. They ultimately called 911 and the ambulance [came] quickly.

Although Dr. French's report did not address the possible causes of RK's injury, her overall impression was that the injury was "most consistent" with some unexplained "blunt trauma." Consequently, as stated in the Consult Notes, there was "enough suspicion for nonaccidental trauma," so an evaluation by Child Protective Services ("CPS") was recommended.

A February 26, 2014 Safe Family Home Report (the "SFH Report") prepared and submitted by the Department lists as the "Family's Strengths" strong family support, that Mother was employed, and that the family was willing to assist in caring for the Children. It further indicates that the "[f]amily appears to be totally competent and appropriate with the exception of the abuse or neglect and the lack of explanation or an explanation that makes no sense"; and that Mother, Boyfriend, and Boyfriend's family were cooperative from the onset of the case. A February 26, 2014 Family Service Plan states that the

Department's "Final goal" was to maintain the Children in the family home without Department intervention. After receiving the Children from police protective custody on or around February 26, 2014, the Department nonetheless determined that the Children were subject to imminent harm while in their family's custody and assumed temporary foster custody of them.[2/] *See* Haw. Rev. Stat. §§ 587A-9(a)(1) and -4 (Supp. 2013).

A two-day Multidisciplinary Team ("MDT") Conference was held to help determine the possible cause of RK's injury and to assess the safety of the family home. Although the February 21, 2014 MDT Conference Report (the "MDT Report") noted that KK was in good health with apparently normal development, and that Mother and Boyfriend were cooperative during the Child Welfare Services investigation and "have documented history of providing good routine medical care of [RK] and [KK]," the MDT Report ultimately assessed Mother and Boyfriend to be "inadequate" caregivers because they could not explain how RK was injured:

> The account of what happened does not fit the injury and therefore is more consistent with non-accidental trauma. If he survives this severe brain injury, [RK] will need life long full time care from adults around him. Therefore, [RK] is assessed as a special needs child from his injuries. [KK] is currently assessed as an average needs child who is up to date with his immunizations and routine well baby check ups.
>
> [Mother] and [Boyfriend], are assessed as inadequate caregivers as they have not provided a plausible explanation for [RK's] injuries. There are several psychosocial risk factors, such as [Boyfriend's] marijuana use[3/] and possible domestic violence in his past relationship,[4/] and

---

2/ As stated in the SFH Report:

> Due to not knowing how [RK] got hurt and who may have caused the injury, [KK] is at risk of harm. This case is being considered as an unidentified perpetrator of harm regarding the injury [RK] sustained, as no one in the family is able to explain how [RK] sustained the injury and the explanation given does not match the injury.

3/ According to the MDT and SFH Reports, Boyfriend reported using marijuana two-to-three times each week. The MDT Report also explains that Boyfriend was in the process of obtaining a medical marijuana license during the relevant time period.

4/ The MDT Report also indicates that Boyfriend's former girlfriend had obtained a temporary restraining order against him, which expired October, 2012. The SFH Report indicates, however, that Mother stated that Boyfriend would walk away when they argued about something, and Boyfriend's former

(continued...)

> [Mother's] use of physical discipline.[5/] Although it appears that they have a strong family support system, it is unknown whether any of these supports can be protective of the children. Therefore, [Mother] and [Boyfriend's] social system is assessed as inadequate and their home is unsafe at this time.[6/]

In accordance with the MDT Report's conclusions, the Department filed its Petition for Temporary Foster Custody ("Petition") on March 3, 2014. *See* Haw. Rev. Stat. §§ 587A-9(a)(5), and -11 (Supp. 2013). The Petition provides that "[t]he explanation provided does not match the injury and it is unknown how [RK] was injured" and "[the Department] has been unable to determine the perpetrator of harm to [RK] and there are no identified protective non-perpetrators at this time." Mother and Boyfriend contested the Petition at the two-day trial on August 6 and 7, 2014.[7/] *See* Haw. Rev. Stat. § 587A-28(a)(1) (Supp. 2013).

At trial, Dr. French elaborated on her written report and testified that RK's injury was probably caused by a hard blow to the head; it was possible for no sign of blunt-force head trauma to appear on the outside of the skull, but have tremendous damage on the inside because the brain is soft; and that although serious impact to the left side of RK's head could have easily explained the trauma to the right side of his brain, his impact with a wooden railing the evening before he was found unconscious was minor. Dr. French further testified that even if RK's impact with the railing had been hard enough to cause the injury, it was

---

[4/](...continued)
girlfriend does not appear to have given a statement in this case.

[5/] As stated elsewhere in the MDT Report, Mother "acknowledged having used physical punishment in the past with her children where she slaps their hands."

[6/] Despite the MDT's characterization of Mother and Boyfriend's psychosocial risk factors as "minimal," the MDT also concluded that Mother and Boyfriend's failure to provide any plausible explanation for the subject injury supported its conclusion that the two were "inadequate caretakers at this time."

[7/] Following trial, the Department prepared another Safe Family Home Report, dated July 22, 2014, which made recommendations similar to what the Petition prayed for, and ultimately recommended that the Children "remain in foster care, as the perpetrator of harm has not been identified." This report explains that, "[a]t this time, it is difficult to determine whether the family will resolve the safety issues in the home, due to the perpetrator not being identified and [Mother's]/[Boyfriend's] unwillingness to participate in services."

highly unlikely it did so because RK acted normally until the following afternoon.[8/] Rather, Dr. French opined, the event causing the injury likely occurred within a few hours before RK's collapse, and further, she found no evidence of a medical condition that would explain RK's injury.

Of critical importance to the case, however, Dr. French also agreed that it was possible that the subdural hematoma had resulted from some "non-intentional trauma" that no one knew about. Consistent with this statement, both Mother and Boyfriend testified that they had no idea how RK was hurt.

That critical uncertainty notwithstanding, in the Order After Trial, the Family Court found that the Children were subject to harm or threatened harm by Mother or Boyfriend and awarded foster custody to the Department. In the Orders Concerning CPA, the Family Court found that continuation in the family home would be contrary to the Children's immediate welfare; there was reasonable cause to believe that continued placement in emergency foster care was necessary to protect them from imminent harm; the Children had been harmed or were subject to threatened harm by the acts or omissions of Mother and Boyfriend; and Mother and Boyfriend were identified as perpetrators of harm to RK and, therefore, KK was also at risk. *See* Haw. Rev. Stat. § 587A-28(e)(7).

II. Discussion

Mother contests the following COLs in the Order After Trial:

> 1. The children have been harmed due to the acts and/or omissions of their family[.]
>
> . . . .
>
> 10. . . . [G]iven the evidence adduced at Trial and the

[8/] In her report, Dr. French nonetheless acknowledged that children with head injuries do, under certain circumstances, exhibit normal behavior between the injury event itself and the onset of the injury's most serious symptoms:

> [Although t]here are . . . reports of "lucid" periods in children with blunt head trauma resulting in su[b]dural hematomata, . . these usually involve descriptions of a crying but awake child not of a child who was playing and eating as described in this case.

> proximity of [Mother and Boyfriend] to the child when his severe brain injury occurred, the Court identifies both of them as perpetrators of harm to [RK.]

Mother contests the following FOFs, which I would deem to be COLs, in the FOF/COL:

> 86. Mother subjected [RK] to harm and both of the Children to threatened harm due to her failure to adequately protect [RK] and/or provide an explanation as to how [RK's] brain injury occurred.
>
> . . . .
>
> 117. [RK's] physical or psychological health or welfare has been harmed and is subject to threatened harm by the acts or omissions of his family.
>
> 118. [KK's] physical or psychological health or welfare is subject to threatened harm by the acts or omissions of his family.
>
> . . . .
>
> 120. It is contrary to the immediate welfare of the Children to remain in the family home.
>
> 121. Mother is not willing and able to provide the Children with a safe family home, even with the assistance of a service plan.

Finally, while Mother does not explicitly challenge any COLs in the FOF/COL, her arguments on appeal clearly demonstrate challenges to the following COLs:

> 8. The Children's physical or psychological health or welfare have been harmed or are subject to threatened harm by the acts or omissions of the Children's family.
>
> . . . .
>
> 10. It is contrary to the immediate welfare of the Children to remain in the family home.
>
> 11. Mother is not willing and able to provide the Children with a safe family home, even with the assistance of a service plan.

In this case, the Department had the burden of proving by a preponderance of the evidence that the Children were harmed or were subject to threatened harm by the acts or omissions of their family. *See* Haw. Rev. Stat. §§ 587A-4, -28(e). Accordingly, the State "need only offer evidence sufficient to tip the scale slightly in [its] favor," while Mother "can succeed by merely keeping the scale evenly balanced." *State v. Romano*, 114 Hawai'i 1, 8, 155 P.3d 1102, 1109 (2007) (quoting *Kekona v. Abastillas*, 113 Hawai'i 174, 180, 150 P.3d 823, 829 (2006)). In order to prevail then, the State must offer something more than that Mother cannot prove that it was somebody else.

There is no dispute that RK was injured. Instead, Mother argues that the Family Court clearly erred in naming Mother and Boyfriend as perpetrators of the harm while paradoxically also finding that no perpetrator was identified. I would agree.

In its FOF/COL, the Family Court found that neither Mother nor Boyfriend had *been ruled out* as a perpetrator of RK's brain injury. Despite these findings, in COL 10 in the Order After Trial and paragraph "O"[9/] in the Orders Concerning CPA, the court found that Mother and Boyfriend *were* perpetrators of harm to RK based on the evidence adduced and their proximity to RK when his injury occurred. COL 10 in the Order After Trial and paragraph "O" in the Orders Concerning CPA are wrong because, as the court correctly found in FOF 77 of the FOF/COL, no perpetrator was identified.

Additionally, Mother contends that:

> The argument of the Department is that a primary caretaker is always the perpetrator of harm to her child if that child is physically injured and the caretaker is unable to explain the cause of that injury. This is contrary to the statutory requirement that the harm is caused by an act or omission by the child's family. Section 587A-28, [HRS]. It is the burden of the Department to prove that there was an act or omission by the family.

To the extent that Mother argues that the Department failed to show by a preponderance of the evidence that the acts or omissions of Mother or Boyfriend caused RK's injury, as HRS § 587A-28 requires, I agree.

In *In re ZM*, No. 29299, 2009 WL 1144907, *2 (Hawai'i App. Apr. 29, 2009) this court found that the failure to identify a perpetrator of harm does not necessarily preclude the family court from granting foster custody to the Department. There, the mother and father were the child's primary caretakers. *Id.* at *1. The father brought the child to the emergency room, and the child was transferred by ambulance to Kapiolani, where tests indicated brain damage, five fractured ribs, and a fractured clavicle. *Id.* One of the rib injuries appeared to have occurred

[9/] Paragraph "O" provides, "Based on the evidence adduced and [sic] trial and the proximity of [Mother and Boyfriend] to [RK] when his severe brain injury occurred, both of them are identified as perpetrators of harm to [RK.]"

at a different time than the other fractures, and the majority of the rib fractures occurred ten to fourteen days before the skeletal survey. *Id.* The family court found that the fractures and brain damage were non-accidental, having required "a forceful event to have occurred"; there was no identified perpetrator for the child's injuries; neither the mother nor the father had been ruled out as perpetrators; and neither the mother nor the father had adequately explained how the child was injured or provided credible testimony. *Id.* at *1-2.

In *ZM*, we explained that father had a history of assaultive behavior while mother had a history of mental health problems:

> [The father] had a history of assaultive behavior, including convictions for Abuse of a Family Member and Assault. . . . [The mother] had a history of mental health problems including Intermittent Explosive Disorder, a Probable Bipolar II Disorder, and a Personality Disorder Not Otherwise Specified with antisocial features. . . . [The mother] had come to the attention of CPS in March, 2004, when [the child's] half-sibling was threatened by [the mother] and half-sibling's father. Custody of half-sibling was subsequently awarded to the half-sibling's father in 2007 after [the mother] hit a maternal uncle with a metal battalion and kicked and punched maternal grandfather, and then failed to continue with parenting classes and was not compliant with recommendations for a psychological evaluation.

Id. at *2. The family court noted the context in coming to its conclusion that mother was unable to adequately care for the child:

> [G]iven [the mother's] mental heath condition and lack of psychological and psychiatric intervention, history of poor parenting skills, history of confirmed child maltreatment with the half-sibling without following through with services, and not having been ruled out as the perpetrator of [the child's] harm, she is unable to adequately care for the [c]hild.

Id. (internal quotation marks omitted). Thus, the court awarded the Department foster custody of the child. *Id.* at *1.

On appeal in *ZM*, the mother argued that the lack of an identified perpetrator of harm to the child precluded the family court from granting foster custody to the Department. *Id.* Specifically, she argued that because the family court found no identified perpetrator of harm, the court could not find that she or the father harmed or threatened to harm the child. *Id.*

This court held that "[d]epending on the circumstances of the alleged abuse, the family court can take action to protect a child even if the identity of the perpetrator has not been determined." *Id.* at *2. We explained that:

> The circumstances of [the child's] injuries and the implausibility of [the mother and father's] explanation for them, together with [the mother's] mental health issues, prior threatening conduct toward [the child's] half-sibling and lack of compliance with services in that prior case, and [the father's] history of assaultive behavior, all support the inference that [the child's] physical and psychological welfare had been harmed or was subjected to threatened harm by the acts or omissions of [the child's] family. HRS § 587-63(b)(1)[(repealed Sept. 1, 2010)]. The identity of the perpetrator is one of a number of factors which the family court must consider under the safe family home guidelines, *id.*; HRS § 587-25[(repealed Sept. 1, 2010)], and we cannot say that the family court clearly erred in its consideration of those factors at this stage of the proceeding.

Id.

ZM is distinguishable from the instant case. Here, the evidence does not create an inference that the acts or omissions of Mother or Boyfriend harmed RK. The record does not show that they had any prior Department involvement. Mother's psychological evaluation revealed that she lacked "any significant impairment that would interfere with [her] general functioning"; appeared "to have sufficient cognitive abilities to comprehend the needs of her children"; did not "present with any major issues of concern" with regard to her emotional status and personality; had a "minimal indication of risk factors associated with substance use or abuse"; and had notable parenting strengths. In its FOF/COL, the Family Court noted Mother's tendency to slap the Children on the hands or buttocks to discipline them and her failure to engage in services recommended by the Department,[10/] but the MDT considered this physical discipline to be of "minimal" concern.

In its FOF/COL, the Family Court noted Boyfriend's daily use of marijuana, diagnosis of cannabis and alcohol abuse (self-report history), and failure to engage in services

---

[10/] Mother's "failure to engage in services" was addressed in the testimony. Conceding that she had only participated in the recommended psychological evaluation to date, Mother agreed to participate in each of the other recommended services about which she was questioned.

recommended by the Department.[11/] Additionally, although Boyfriend's psychological evaluation states that he should improve his parenting attitude and knowledge and address his substance abuse history, current marijuana use, and emotional and personality weaknesses, it also states that he appeared "to have sufficient cognitive functioning abilities to comprehend the needs of his children," did "not present with any major areas of concern," and "had some parenting strengths."

Further, Mother and Boyfriend did not provide an implausible explanation for RK's injury but only mentioned RK running into the railing on his way to dinner the prior evening as part of the string of events leading up to their 911 call. At trial, they testified that they had no idea how RK was hurt.

Although doctors recommended CPS involvement because non-accidental trauma was suspected, they provided no basis for or otherwise elaborated on their suspicion. The suspicion may have been based in part on RK's earlier bone fractures and head injury, but Dr. French testified that those injuries occurred while RK was in public and with people other than Mother and Boyfriend. The fact that the earlier injuries are not mentioned in the Petition, however, strongly suggests that the Department's decision to seek temporary foster custody was unrelated to the earlier injuries.

As the Family Court stated at the close of the two-day trial, this is "not an easy case." Indeed, RK's injury was severe; the Children are young; doctors suspected that RK's trauma was non-accidental, though the basis for that suspicion was unstated; Dr. French testified that the injury was caused by unexplained blunt force trauma; and no perpetrator of harm was

---

[11/] Boyfriend's "failure to engage in services" was also addressed in testimony. Explaining that he had participated in the psychological evaluation and that he was willing to participate in individual and couples therapy/counseling and parenting education, Boyfriend continued to object to participating in what he understood the Department meant by "substance abuse assessment." Although the questioning was not precise and, in part, because Boyfriend represented himself at the hearing, it appears that Boyfriend believed that the Department was unaware that he had obtained a medical marijuana license from the State, and that any substance abuse assessment should exclude marijuana usage permitted by the license. The MDT considered Boyfriend's marijuana use to be of "minimal" concern, and the FOF/COL noted that Boyfriend had obtained a medical marijuana license shortly before the hearing.

identified. RK, however, was an active ambulatory child who, only the day before, reportedly stumbled on his way down the stairs on his way to dinner and hit the side of his head on the stair rail. Moreover, RK had previously fractured bones and injured his head in several public incidents for which neither Mother nor Boyfriend were responsible. In sum, the circumstances do not support an inference that Mother or Boyfriend perpetrated the harm to RK. *Contra ZM*, 2009 WL 1144907; *In re T.A., K.A., A.S.*, No. CAAP-16-0000016, 2016 WL 4491823, at *1 (Haw. App. Aug. 26, 2016) (holding that mother could not be ruled out as the perpetrator of harm where the child was eighteen-weeks old, non-verbal, and non-ambulatory).

The safety and health of a child is paramount. *See* Haw. Rev. Stat. § 587A-2 (Supp. 2013). However, and particularly when the parent cannot be fairly characterized as the perpetrator of any harm upon the child, these considerations must be balanced against a parent's rights with regard to her child. As this court noted in *In re Doe*:

> The United States Supreme Court has characterized the "rights to conceive and to raise one's children" as "essential, . . . basic civil rights of man, . . . and rights far more precious than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 . . . (1972) (brackets, citations, ellipsis, and quotation marks omitted). According to the Court, a natural "parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference, and absent a powerful countervailing interest, protection.'" *Lassiter v. [Dep't] of Social Servs. of Durham [Cty.], N.C.*, 452 U.S. 18, 27 . . . (1981) (quoting *Stanley*, 405 U.S. at 651 . . .).

95 Hawai'i 201, 227, 20 P.3d 634, 660 (2000), *reversed on other grounds*, 95 Hawai'i 183, 20 P.3d 616 (2001).

Because foster custody was awarded in this case solely on the basis that Mother and Boyfriend cannot explain how RK was injured, and in light of there being no evidence except the injury itself creating an inference that they had anything to do with the injury or could not provide a safe family home for the Children, I would hold that the State failed to meet its burden to prove by a preponderance of the evidence that the Children's health or welfare was harmed or subject to threatened harm by the acts or omissions of Mother or Boyfriend, as required by HRS

§ 587A-28(e). *See Romano*, 114 Hawai'i at 8, 155 P.3d at 1109. Thus, I would hold that the Family Court reversibly erred in awarding foster custody of the Children to the Department, and COLs 1 and 10 in the Order After Trial; paragraphs "A," "D," "F," "O," and "P" in the Orders Concerning CPA;[12] and mislabeled FOFs 86 and 106[13] and COLs 8, 10, 11, and 13[14] in the FOF/COL are wrong.

III. Conclusion

The temporary nature of foster custody notwithstanding, it is clear that neither the court nor the Department will allow reunification in the absence of a confirmable explanation by Mother and/or Boyfriend of RK's injury. *See* Haw. Rev. Stat. § 587A-30. In light of the aforementioned erroneous conclusions, I would reverse the award of foster custody in the August 14, 2014 Order After Trial and August 22, 2014 Orders Concerning

---

[12] Paragraphs "A," "D," "F," and "P" provide:

> A Continuation in the family home would be contrary to the immediate welfare of the child(ren);
>
> . . . .
>
> D There is reasonable cause to believe that continued placement in emergency foster care is necessary to protect the child(ren) from imminent harm;
>
> . . . .
>
> F Based on the report(s) submitted pursuant to HRS § 587A-7 and 587A-18 and the record herein, there is an adequate basis to sustain the petition in that the child(ren) is/are a child(ren) whose physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child(ren)'s family who are [Mother] and [Boyfriend];
>
> . . . .
>
> P Based on finding "O" above, [KK] is also at risk of harm[.]

[13] Mislabeled FOF 106 provides, "[Boyfriend] subjected [RK] to harm and both of the Children to threatened harm due to his failure to adequately protect [RK] and/or provide an explanation as to how [RK's] brain injury occurred."

[14] COL 13 provides, "[Boyfriend] is not willing and able to provide the Children with a safe family home, even with the assistance of a service plan."

Child Protective Act, entered in the Family Court of the First Circuit.

Lawrence M Reifurth