NO. CAAP-18-0000672

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

AKM on behalf of AM, A Minor, Petitioner-Appellant, v.
RA, Respondent-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-DA NO. 18-1-0563)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, Hiraoka and Nakasone, JJ.)

Petitioner-Appellant AKM (**AKM**) appeals from the Family Court of the First Circuit's (**Family Court**) July 25, 2018 Order Dissolving Temporary Restraining Order [(**TRO**)], filed on March 13, 2018 (**Order Dissolving TRO**).[1] AKM filed a Petition for an Order for Protection on Behalf of Family or Household Member(s) (**Petition**) on March 13, 2018 on behalf of AM, AKM and Respondent-Appellee RA's (**RA's**) minor child, which was initially granted, but later dissolved after an evidentiary hearing.

[1] The Honorable Steven M. Nakashima presided.

AKM raises a single point of error on appeal, contending that the Family Court abused its discretion in denying his petition for a TRO on behalf of AM. Within that point of error, AKM also challenges Findings of Fact (**FOFs**) 4, 14, 15, 16, 21, 22, 26, 27, and 28, and Conclusions of Law (**COLs**) 4 and 5, which are set forth in the Family Court's February 13, 2019 FOFs and COLs.

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 AKM's point of error as follows:

Hawaii Revised Statutes (**HRS**) § 586-3(b) (2018) permits a family member to petition for relief on behalf of a minor. If, however, the petitioner does not prove, by a preponderance of the evidence, that "domestic abuse" occurred and that a protective order is necessary to prevent further abuse, a court can dissolve the TRO pursuant to HRS § 586-5 (2018).[2] HRS § 586-1 (2018) defines "Domestic abuse" as:

> (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members; or
>
> (2) Any act which would constitute an offense under section 709-906, or under part V or VI of chapter 707

[2] HRS § 586-5 states, in pertinent part:

> **§ 586-5. Period of order; hearing.** (a) A temporary restraining order granted pursuant to this chapter shall remain in effect at the discretion of the court, for a period not to exceed one hundred eighty days from the date the order is granted or until the effective date, as defined in section 586-5.6, of a protective order issued by the court. . . .

(Emphasis added.)

> committed against a minor family or household member by an adult family or household member. [3]

On appeal, AKM argues that the Family Court improperly focused only on AM's vaginal laceration and that the court abused its discretion in determining there was insufficient evidence to establish that domestic abuse occurred. AKM challenges the following FOFs and COLs:

> [FOF] 4. There was never any question in this case that [AM] had suffered a tear to her vaginal area. In fact, there was no dispute that [RA] was the first parent to have reported the vaginal tear and the report was made to [AM's] pediatrician, Dr. Nadine Salle, on March 10, 2018. On March 12, 2018, [AM] was seen by Dr. Salle who made a mandated reporter's report of the injury.
>
> . . . .
>
> [FOF] 14. Nevertheless, it was [AKM's] belief that [RA] had been the perpetrator of the tear to [AM's] vaginal area.
>
> a. [AKM's] belief was based on his theory that [RA] had deliberately injured their daughter to retaliate against [AKM] and/or to have [AKM] blamed for the injuries to [AM] to create a scenario of domestic violence by [AKM] so that [RA] could get her green card as a victim of domestic violence[.]
>
> b. [AKM's] theories were based on alleged circumstantial evidence which [AKM] believed proved his allegations that [RA] had caused the injury to [AM]:
>
> i. The rocky relationship between [AKM] and [RA] seemingly from the start of their relationship.
>
> ii. [AKM's] belief that [RA] made numerous false statements, among other things,

[3] HRS § 709-906 (2014) prohibits physically abusing a family or household member or refusing to comply with the lawful order of a police officer, as defined by the statute. Part V of Chapter 707 relates to sexual assault in the first, second, third, and fourth degree, continuous sexual assault of a minor under the age of fourteen years, indecent exposure, and incest. Part VI of Chapter 707 relates to promoting child abuse in the first, second, and third degree, electronic enticement of a child in the first and second degree, and indecent electronic display to a child.

regarding an alleged non-existent miscarriage, regarding [RA's] prior relationships/marriage with other men, and other alleged false statements.

iii. [AKM's] belief that [RA] had caused other injuries to [AM] before the vaginal injury (see, allegations 5B, 5C. and 5D. of the present Petition).

iv. [AKM's] belief that [AM] stopped having injuries from [RA] once he put up video cameras in their home.

[FOF] 15. While [AKM's] theories were set forth with fervor by both [AKM] and his counsel, the Court finds that the circumstantial "evidence" presented did not prove [AKM's] theories by a preponderance of the evidence.

[FOF] 16. What was clear to this Court was that both Parties dislike each other intensely and are willing to make accusations against each other that may be difficult to prove or disprove. Quite frankly, without corroboration from neutral third parties, the Court was not willing to give either side the benefit of the doubt.

. . . .

[FOF] 21. Moreover, the Court finds that none of the medical witnesses presented any evidence that pointed to [RA] causing the vaginal injury, let alone, proving by a preponderance of the evidence that [RA] caused the vaginal injury to [AM].

[FOF] 22. The evidence from Dr. Salle was that she confirmed being informed by [RA] on March 10, 2018 that [AM] had an injury to her vaginal area. Dr. Salle confirmed that she told [RA] that if [RA] believed it was [AKM] who had caused the injury to [AM] that [RA] should take [AM] to the emergency room that very evening of March 10, 2018. If [AKM's] theory was correct that [RA] was trying to blame [AKM] for the injury, [RA] would have had a perfect opportunity to raise the issue based on the pediatrician's instructions. But [RA] did not take [AM] to the emergency room, instead [RA] treated the wound and took [AM] to see Dr. Salle on Monday, March 12, 2018.

. . . .

[FOF] 26. It was therefore, not surprising that DHS concluded

> "After assessing all of the information gathered, the DHS does not find any safety issues with either parent. The Department believes both [RA] and [AKM] would benefit from having individual therapy. [AM] would benefit from participating in play therapy. The DHS believes Foster Care is contrary to [AM's] best interest. The department has completed its assessment, will not be confirming sex abuse and will be closing the case." *April 17, 2018 DHS Report Letter*.
>
> [FOF] 27. As set forth above, the Court was concerned about the safety of [AM] when [AKM] filed his Petition and obtained the TRO against [RA]. The Parties had already appeared before this Court in their Paternity case and the Parties had made similar allegations in the Paternity case regarding false miscarriages, alleged lies about each other's relationships with people in Nepal and India, and suspicious injuries to [AM]. However, the vaginal injury was a brand new issue that had now occurred in the middle of the Paternity case. Thus, while the Court considered the other issues that were raised in the TRO Petition, the primary issue that the Parties and the Court focused upon was the vaginal injury.
>
> [FOF] 28. Based on all the evidence presented and the Court's weighing of the credibility of the evidence presented, the Court finds that [AKM] failed to prove by a preponderance of the evidence that [RA] was the perpetrator of any of the injuries to [AM] that [AKM] alleged in his Petition. In particular, so that there is no ambiguity regarding the vaginal injury, the Court finds that there was no medical evidence presented that the vaginal injury was caused by [RA]. . . .
>
> . . . .
>
> [COL] 4. Based on the findings, [AKM] has failed to prove by a preponderance of the evidence that [RA] engaged in any conduct that would amount to domestic abuse or that a restraining order is necessary to prevent the recurrence of abuse.
>
> [COL] 5. Accordingly, the Temporary Restraining Order that was issued on March 13, 2018 is dissolved effective July 25, 2018 and the Petition in FC-DA 18-1-0563 is dismissed with prejudice.

AKM argues that counsel for RA "beguiled" the Family Court into believing that the sole issue before the court was AM's vaginal laceration. However, the Family Court was

consistent throughout the litigation in its position that all evidence relevant to the allegations contained in the Petition would be considered. In addition, the record demonstrates that the evidence related to, *inter alia*, AM's head injury in 2017, and AM being upset in January 2018, during custody exchanges, was presented, considered, and addressed in the Family Court's decision to dissolve the TRO. In addition to the specific allegations set forth in the Petition, the Family Court permitted AKM leeway to testify about RA's alleged lack of credibility, motive to harm AM, and desire to "set him up." Thus, we reject AKM's argument that the Family Court was beguiled by RA and/or that it limited its inquiry to the events of March 10, 2018.

AKM further argues that the Family Court's FOFs were clearly erroneous because they "omit the majority of the relevant and credible testimony that was presented which established that RA had committed 'domestic abuse.'"

It is axiomatic 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." LC v. MG, 143 Hawaiʻi 302, 310-11, 430 P.3d 400, 408-09 (2018) (quoting In re Doe, 95 Hawaiʻi 183, 190, 20 P.3d 616, 623 (2001)). When a party challenges the sufficiency of the evidence to support a family court's decision,

> [t]he question on appeal is whether the record contains "substantial evidence" supporting the family court's determinations, and appellate review is thereby limited to assessing whether those determinations are supported by "credible evidence of sufficient quality and probative

> value." In this regard, the testimony of a single witness, if found by the trier of fact to have been credible, will suffice.

SG v. BA, CAAP-18-0000051, 2021 WL 164836, *4-5 (Haw. App. Jan. 19, 2021) (SDO) (quoting In re Doe, 95 Hawaiʻi at 196, 20 P.3d at 629).

Here, the challenged FOFs were not clearly erroneous because they were supported by substantial evidence. Regarding AM's vaginal laceration, as AKM admitted, there was "no smoking gun" and there was no evidence linking RA to the laceration "other than motivation." During cross-examination, AKM acknowledged that he had no personal knowledge as to how AM's vaginal laceration occurred and that he could not provide any testimony as to how he believed the laceration occurred. The third party witnesses in this case - from the Department of Human Services, Forensic Medical Examiner Dr. Bob Bidwell, AM's pediatrician Dr. Nadine Salle, and Dr. June Ching, who conducted a forensic interview with AM at the Children's Justice Center - were unable to conclude that either parent was the source of AM's laceration.

The Family Court's FOFs regarding the January 2018 videos of AM being upset during custody exchanges were also supported by substantial evidence. The Petition alleged that AM not wanting to return to RA on January 21 and 25, 2018 "indicate[d] possible abuse by [RA]." The videos show that AM was upset during those two specific custody exchanges, but do not

indicate why she was upset. Further, AKM testified that AM was happy during other custody exchanges.

The allegation related to AM's 2017 head injury was heavily reliant on AKM's speculation and conjecture as to how the injury occurred. AKM was asleep when AM was injured and testified that he believed RA deliberately injured AM because there was "no bump", that it looked like a "clean cut." AKM's argument relied on his testimony as to his belief about RA's "motive and opportunity" to harm AM. The Family Court, after evaluating each witness's credibility and weighing the evidence, declined to adopt AKM's interpretation of the evidence. We conclude that the Family Court did not abuse its discretion in determining that there was insufficient evidence to establish that RA had injured AM. The Family Court did not err in concluding that AKM failed to establish that RA engaged in conduct amounting to domestic abuse, and accordingly, did not err in dissolving the TRO.

For these reasons, the Family Court's July 25, 2018 Order Dissolving TRO is affirmed.

DATED: Honolulu, Hawaiʻi, April 5, 2022.

On the briefs:

Alen M. Kaneshiro,
for Petitioner-Appellant.

Michael A. Glenn,
for Respondent-Appellee.

/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Karen T. Nakasone
Associate Judge