IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KP,
Petitioner/Petitioner-Appellant,

vs.

EM,
Respondent/Respondent-Appellee.

SCWC-22-0000357

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-22-0000357; CASE NO. 2PA211000062)

SEPTEMBER 15, 2025

CONCURRING AND DISSENTING OPINION BY GINOZA, J.,
IN WHICH McKENNA, J., JOINS

This appeal arises out of a custody dispute between Petitioner-Appellant KP (**Mother**) and Respondent-Appellee EM (**Father**) over their Minor Son and Minor Daughter (collectively, **the children**)[1] (**Custody Case**) in the Family Court of the Second Circuit (**Family Court**). Also relevant to this appeal are

[1] Minor Son was born in 2016 and Minor Daughter was born in 2018.

matters in separately docketed domestic abuse cases filed by Mother against Father (**Domestic Abuse Cases**).[2]

I concur with the majority's holdings that the Family Court did not err in (1) precluding witness testimony regarding the credibility of the children's disclosures pursuant to State v. Batangan, 71 Haw. 552, 799 P.2d 48 (1990); and (2) excluding Dr. Margaret Goldberg's (**Dr. Goldberg**) testimony regarding the children's disclosures during play therapy.[3]

However, I write separately to respectfully dissent from the majority rulings that the Family Court (1) did not abuse its discretion in granting Father sole legal and physical custody, and allowing Father to relocate to Utah with the children; and (2) did not err in finding clear and convincing evidence that Mother abused the Hawai'i Revised Statutes (**HRS**) chapter 586 protection from abuse process.

[2] This Custody Case was docketed under 2PA211000062 and the Domestic Abuse Cases were docketed under 2DA211000295, 2DA211000296, 2DA211000313, 2DA211000314, 2DA211000411, 2DA211000412, 2DA211000510, and 2DA211000511. A total of three different Family Court judges presided over this case at different points in time: the Honorable Keith E. Tanaka presided from May 6, 2021 to on or shortly after June 15, 2021; the Honorable Adrianne N. Heely presided from June 16, 2021 to on or before January 13, 2022; and the Honorable Lance D. Collins presided from on or before January 13, 2022 to April 25, 2022. When each of the Family Court judges presided over this matter, it appears that they also presided over any pending Domestic Abuse Case at the same time.

[3] Although Dr. Goldberg's testimony was excluded, her report was admitted into evidence.

I. Discussion

A. The Family Court abused its discretion in granting sole legal and physical custody to Father and allowing Father's relocation to Utah with the children.

In custody cases, "Hawai'i courts have consistently adhered to the best interests of the child standard as paramount[.] In so doing, the family court is granted broad discretion to weigh the various factors involved, with no single factor being given presumptive paramount weight, in determining whether the standard has been met." Fisher v. Fisher, 111 Hawai'i 41, 50, 137 P.3d 355, 364 (2006); HRS § 571-46(a)(1) (2018) ("Custody should be awarded to either parent or to both parents according to the best interests of the child[.]"). The majority concludes that the Family Court properly ruled based on its findings which support its conclusion that Father's sole custody and relocation to Utah serves the best interest of the children.

I respectfully disagree that the relevant statutory factors were properly assessed. HRS § 571-46 states in relevant part:

> (a) In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

> (1) Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court also may consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child;
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> . . . .
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> (7) Reasonable visitation rights shall be awarded to parents, grandparents, siblings, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child;
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> . . . .
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> (b) In determining what constitutes the best interest of the child under this section, the court shall consider, but not be limited to, the following:
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> . . . .
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> (7) The emotional needs of the child[.]

(Emphases added.) Additionally, in DJ v. CJ, this court recognized that determining a child's best interest also implicates a child's right to parental contact. 147 Hawaiʻi 2, 24, 464 P.3d 790, 812 (2020).

Here, the Family Court did not consider how the out-of-state relocation would affect the children's emotional needs, or the children's ability to maintain meaningful contact with Mother, who has been the primary caretaker for the children throughout their lives. See id. (citing Sweet v. Passno, 206 A.D.2d 639, 640, 614 N.Y.S.2d 611, 611-12 (1994)). Minor Son was born in 2016 and Minor Daughter was born in 2018. After Minor Son's birth, Mother and Father were living together in

Utah at Mother's family home with Mother's parents. In 2019, Mother and Father both entered separate in-patient drug rehabilitation facilities; Mother went to Colorado in March 2019 to enter a long-term rehabilitation facility where she could continue caring for the children, while Father remined in Utah. Subsequently, in December 2019, Mother moved to Pāʻia, Maui with the children to live with her parents. In March 2020, Father also moved to Maui. The children continued to live with Mother at her parents' house, with Father visiting the children frequently at Pāʻia which included spending nights and weekends with the children.

Throughout their lives, the children had lived with Mother. Given these circumstances, there clearly would be impacts on these young children's emotional needs that should have been considered by the Family Court. See HRS § 571-46(b)(7). There was no such discussion in this case. See DJ, 147 Hawaiʻi at 24, 464 P.3d at 812 ("[A]n out-of-state relocation affects a parent's substantive liberty interest in the care, custody, and control of a child, but is governed by a child's best interests, which includes a child's right to parental contact.").

The determination regarding the emotional needs of a child is not solely about who is "better equipped" at meeting the children's needs. The Family Court must also consider the

children's right to meaningful parental contact. See HRS § 571-46(a)(1); HRS § 571-46(a)(7) ("Reasonable visitation rights shall be awarded to parents[.]"); DJ, 147 Hawai'i at 24, 464 P.3d at 812 (recognizing that determining a child's best interest also implicates the child's right to parental contact).

Here, there was no consideration of the children's ability to maintain a meaningful relationship with Mother due to Father relocating to Utah. As noted in DJ, "[w]hen a child relocates out-of-state with the other parent, . . . travel expenses make regular continued contact with the child quite difficult, if not impossible, for the great majority of Hawai'i parents." 147 Hawai'i at 23, 464 P.3d at 811. In this case, Mother is only entitled to "reasonable supervised visitation with the children – in person or through telephone, computer videotelephony or other reasonable means – as agreed upon by the parties, or as further ordered by the Court." For any in-person visit, she would have to travel to Utah. Moreover, for any type of visit, Father would have to agree to the visit or Mother would need an order from the Family Court allowing the visit. In my view, considering the record in this case, such limited visitation at the discretion of Father or requiring Mother to return to court is not in the best interest of the children.

Accordingly, I respectfully dissent and conclude that the Family Court abused its discretion in granting sole legal

and physical custody to Father and allowing relocation to Utah without first considering how the relocation would affect the child's emotional needs and their ability to have meaningful contact with Mother.

B. The Family Court erred in finding clear and convincing evidence that Mother wilfully misused the protection from abuse process under HRS chapter 586.

HRS § 571-46(b)(16) states:

> (b) In determining what constitutes the best interest of the child under this section, the court shall consider, but not be limited to, the following:
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> . . . .
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> (16) A parent's prior wilful misuse of the protection from abuse process under chapter 586 to gain a tactical advantage in any proceeding involving the custody determination of a minor. Such wilful misuse may be considered only if it is established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular family circumstance the wilful misuse tends to show that, in the future, the parent who engaged in the wilful misuse will not be able to cooperate successfully with the other parent in their shared responsibilities for the child. The court shall articulate findings of fact whenever relying upon this factor as part of its determination of the best interests of the child. For the purposes of this section, when taken alone, the voluntary dismissal of a petition for protection from abuse shall not be treated as prima facie evidence that a wilful misuse of the protection from abuse process has occurred.

Before a family court can consider a parent's prior wilful misuse of the protection from abuse process to gain a tactical advantage in its "best interest of the child" determination, the family court must first find such wilful misuse by clear and convincing evidence. HRS § 571-46(b)(16).

Clear and convincing evidence "is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable." Masaki v. Gen. Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 574 (1989), abrogated on other grounds by Guieb v. Guieb, 156 Hawaiʻi 162, 571 P.3d 382 (2025).

Here, based on my review of the record, I conclude the Family Court erred in finding clear and convincing evidence that Mother misused the protection from abuse process under HRS chapter 586 to gain a tactical advantage in this proceeding.

The issue of whether Father had sexually abused the children was a key question in this case. The Family Court found that Mother filed eight ex parte petitions for an HRS chapter 586 temporary restraining order (**TRO**) while the custody case was pending. Although the Family Court states that seven of the ex parte petitions were "denied", that is clearly erroneous because the Family Court's own findings state that two were dismissed by stipulation. More important, however, is that the Family Court appears to have completely discounted another judge's findings that there was probable cause to believe Father had committed past act(s) of abuse or that acts of abuse by Father were imminent.

On October 20, 2021, Mother filed a petition for TRO on behalf of Minor Son against Father (**October 20, 2021 TRO Petition**). Mother's TRO petition was based, *inter alia*, on recent disclosures made by Minor Son during a therapy session with licensed clinical social worker, Dr. Goldberg, the children's therapist. Mother alleged that on October 16, 2021, following an unsupervised visit with Father, Minor Son disclosed to Dr. Goldberg that Father touched Minor Son's "peepee" earlier that day. Mother also alleged that Minor Son previously disclosed sex abuse to Dr. Goldberg, that Dr. Goldberg reported Minor Son's disclosure to the police, and that Dr. Goldberg's reporting ultimately resulted in Social Worker Leslie Armstrong (**SW Armstrong**) and Dr. Goldberg being interviewed by Maui Police Department (**MPD**) Detective Oran Satterfield on September 10, 2021. Mother asserted that SW Armstrong "is asking that [Father] not have visitation at this time" and that Dr. Goldberg does not "want any unsupervised visits at this time."

Judge Adrianne N. Heely issued a TRO (**October 20, 2021 TRO**) for Minor Son and against Father, to expire on April 18, 2022. The October 20, 2021 TRO provided that "the Court finds there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse by [Father] may be imminent."

Thereafter, at a November 8, 2021 hearing, after testimony from Mother and Father, and after reviewing evidence including an interview with Minor Son, Judge Heely found that there was "sufficient evidence by a preponderance at least to have a protective order in place." Judge Heely stated that "[Minor Son] described the specifics at the Dragon Fruit Farm in the RV with clothes being pulled down and underwear being pulled down, and the touching and how it felt[.] I will find that there is sufficient evidence by a preponderance at least to have a protective order in place."

In this Custody Case, the Family Court later dissolved Judge Heely's protective order. However, even if the Family Court came to a different conclusion from Judge Heely on the ultimate question of whether a protective order was required against Father, the record does not support a finding by clear and convincing evidence that Mother wilfully misused the HRS chapter 586 protection from abuse process. As Judge Heely found, there was evidence in the Domestic Abuse Case to warrant a TRO and protective order.

I further note that Judge Heely determined that the evidence against Father warranted a psychosexual evaluation of him. As the Family Court found, an October 29, 2021 report by the Child Welfare Service confirmed a threat of sexual abuse of the children by Father and recommended, among other things, a

psychosexual evaluation. The Family Court found that Father obtained a psychosexual assessment. However, there is no finding by the Family Court in the Custody Case as to the results of that assessment.

Based on the record, I respectfully dissent from the majority's holding that the Family Court did not err in finding that Mother wilfully misused the HRS chapter 586 process to gain a tactical advantage in this case. Rather, there was no such clear and convincing evidence in this case, and in fact there is substantial evidence to the contrary.

II. Conclusion

Based on the above, I would vacate the Judgment on Appeal entered by the Intermediate Court of Appeals on May 6, 2024, and the Family Court's March 28, 2022 Findings of Fact, Conclusions of Law, Decision and Order, and remand to the Family Court for further proceedings.

/s/ Sabrina S. McKenna

/s/ Lisa M. Ginoza