

NOT FOR PUBLICATION

NO. 25252

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

IN THE INTEREST OF DOE CHILDREN:
JANE DOE, Born on January 3, 1987,
JOHN DOE, Born on November 17, 1988, and
JANE DOE, Born on December 20, 1996

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 02-08101)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

This Child Protective Act case involves a family with the following members: the paternal grandfather (Grandfather); the paternal grandmother (Grandmother); the father (Father); the mother (Mother); the following children of Father's deceased brother and Mother: Half-Brother; Half-Sister 1; and Half-Sister 2; and the following children of Father and Mother:¹ Adult Sister; Jane Doe I, born on January 3, 1987; John Doe, born on November 17, 1988; and Jane Doe II, born on December 20, 1996.

In this opinion, we will refer to Jane Doe I, John Doe, and Jane Doe II as the "three minor children". Grandfather, Grandmother, Father, Mother, Adult Sister and the three minor children all live in one home (Home).

¹ The Petition for Temporary Foster Custody filed by the State of Hawai'i, Department of Human Services (DHS), on March 6, 2002, alleges, in relevant part, as follows:

10. Mother was married at a young age to Father's brother, producing three children: [Half-Brother, Half-Sister 1, and Half-Sister 2]. After the father of those children was murdered, Mother married Father soon thereafter and gave birth to [Adult Sister, Jane Doe I, John Doe, and Jane Doe II]. As an adult, Mother has always lived with Grandfather and Grandmother.

Father appeals from the following orders entered in the Family Court of the First Circuit, Judge Kenneth E. Enright, presiding:

1. The May 22, 2002 Orders Concerning Child Protective Act awarding to the State of Hawai'i, Department of Human Services (DHS) foster custody of the three minor children and ordering the March 6, 2002 Family Service Plan (March 6, 2002 FSP) into effect.

2. The July 10, 2002 Orders Concerning Child Protective Act denying Father's motion for reconsideration and entering further orders.

We affirm.

In his opening brief, Father presents the following points on appeal:

1. The trial court erred when it denied [F]ather's motion for advanced costs to depose [Half-Sister 1] in Oregon.

2. The trial court erred when it allowed Ms. Diamond [Hinda L. Diamond, MSW, DHS Social Worker] to rely upon statements made to her by [Half-Sister 1].

3. The evidence is insufficient to prove by a preponderance of the evidence that [F]ather or [M]other harmed or threatened to harm their three [minor] children.

4. The weight of the evidence is against any physical harm to [Jane Doe I] by [M]other or [F]ather.

5. The weight of the evidence is against any physical harm to [John Doe] or [Jane Doe II] by [M]other or [F]ather.

6. The lower court could have preserved the family home for the children by ordering the removal of [Grandfather].

In his opening brief, however, Father presents only the following arguments:

A. FATHER-APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE LOWER COURT DENIED HIS REQUEST FOR ADVANCED COSTS TO DEPOSE [HALF-SISTER 1] IN OREGON.

B. THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT THE RECORD CONTAINED A PREPONDERANCE OF THE EVIDENCE THAT THE THREE [MINOR] CHILDREN WERE HARMED OR THREATENED WITH HARM BY FATHER, MOTHER, OR GRANDFATHER.

C. THE TRIAL COURT CLEARLY ERRED BY FINDING PSYCHOLOGICAL HARM TO [JANE DOE I] BY FATHER, MOTHER, OR GRANDFATHER BY THE MASSAGING OF GRANDFATHER'S BUTTOCKS BY [JANE DOE I] BECAUSE NO EXPERT OPINION EVIDENCE WAS PRESENTED.

The Hawai'i Rules of Appellate Procedure (HRAP), Rule 28(b) (2004) requires all opening briefs to contain various items, including the following:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

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(C) [W]hen the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

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Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

(5) A brief, separate section, entitled "Standard of Review," setting forth the standard or standards to be applied in reviewing the respective judgments, decrees, orders or decisions of the court or agency alleged to be erroneous and identifying the point of error to which it applies.

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(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

Father's opening brief did not comply with the requirements of HRAP Rule 28(b) quoted above. For example, the only finding of fact explicitly challenged by Father in his opening brief in the manner required by HRAP Rule 28(b) is finding of fact no. 45.

BACKGROUND

Prior to March 1, 2002, DHS social worker Hinda Diamond (Diamond) received a call from Half-Sister 1, who is married and lives on the mainland. Half-Sister 1 expressed concerns for the safety of the three minor children based on her own experience when living in the Home with Grandfather, Father, and Mother. On March 1, 2001, after Diamond interviewed each of them, the three minor children were taken into police protective custody and released to DHS.

In the Petition for Temporary Foster Custody filed by DHS on March 6, 2002, Half-Sister 1's description of her childhood experience was quoted in part as follows:

[A]s minors, [Half-Sister 1] and [Half-Sister 2] were regularly beaten and kicked by Grandfather which would leave bruises on their buttocks, bloody noses, and lumps on their head. [Half-Sister 1] reported being made to hide the bruises from authorities and recalls seeing Grandfather spit on Mother's face. [Half-Sister 1] also reported that she and [Half-Sister 2] were made to massage Grandfather when he was naked and that she never felt comfortable massaging him. She stated that Grandfather would perform breast exams on [Half-Sister 2] and physically check to see if she was a virgin. [Half-Sister 1] recalled that Grandfather would also enter their room at night and open their buttocks checking for "worms." [Half-Sister 1] and [Half-Sister 2] were molested a number of times by an uncle who lived next door and that, while they informed Mother about the harm, she was unable to protect them from further harm. Her immediate family refuses to allow her to speak with her siblings, blames her for "breaking up" their family, and she is concerned they are "brainwashing" the children against her. According to [Half-Sister 1], Grandfather rules the home and everyone is afraid of him.

After Diamond's conversation with Half-Sister 1, Diamond introduced herself to Jane Doe I, told her she was a CPS social worker, and explained that she "had come to talk to her, to see how she was doing, see if there were any problems at home or at school." According to Diamond,

Basically [Jane Doe I] kind of took the ball from there. She very, very quickly started crying and started talking about what was going on at home, how it was very concerning for her to talk to me because she had a lot of fear about describing what was happening at home. She was describing that she was hit quite often at home by . . . her grandfather. She showed me on her -- it would be her left jaw area where she had been bruised by her grandfather and she had covered it up with make up approximately a week prior.

She was very fearful because she said that these were family secrets and she wasn't supposed to talk about family secrets. And at that point, within a matter of minutes, she was crying very, very almost hysterically crying and she was very concerned about her safety once these secrets were told and her ability to return home as well as return to the school. She felt that she couldn't even return back to Waianae because the family, she described, was so powerful and everybody knew the family.

And she even requested that we hurry up with the interview because she was fearful for my safety as well as her own safety because the school day was coming to a close and the adults would be wondering where she was and coming to look for her . . . she did not feel that her parents, [Mother] and [Father], could protect her because they also either disciplined her in a physical way or because they themselves are fearful of [Grandfather].

Diamond then talked to John Doe. John Doe told Diamond that "Grandfather had two days prior bloodied his nose and described being hit at home." John Doe also mentioned that Grandfather hits Jane Doe II.

Diamond then talked to Jane Doe II. Jane Doe II told Diamond that "she had been hit by Grandfather on every part of her body except her face and that she is hit with a big stick and her buttocks being red [sic]." Jane Doe II also reported that

she witnessed John Doe's nose bleeding and Jane Doe I "getting 'whacked'" on her face and eyeglasses.

On March 8, 2002, after a hearing on the March 6, 2002 Petition for Temporary Foster Custody, the court entered an order continuing the DHS' temporary foster custody and scheduled a March 21, 2002 trial.

In her March 6, 2002 Safe Family Home Report, Diamond reported, in relevant part, that the three minor

children were interviewed on March 1, 2002. They all, independent of each other, reported repeated physical abuse by [Grandfather]

[Jane Doe I] reported being hit by [Grandfather] almost daily for various minor infractions. She said she is bruised approximately twice a month on her buttocks, back or face by [Grandfather]. [Jane Doe I] reported that when she was in seventh grade, two years ago, she was bruised so hard by being hit with a bamboo stick on her buttocks that she could barely sit down. She recalled screaming for help. The most recent incident of bruising occurred on February 25, 2002, when [Grandfather] was mad at her for arguing with her sister. [Jane Doe I] reported being hit approximately forty times about her neck and face and having her lower right jaw bruised. She covered the bruise with make up and did not inform any authorities about the abuse. [Jane Doe II] witnessed the hitting. [Jane Doe I] reports witnessing her siblings being hit on a regular basis. [Jane Doe I] states that when she is hit [Mother] sprays Pam cooking oil on the skin to fade the red marks. [Jane Doe I] reports that [Mother] is unable to protect the children because she herself is afraid of [Grandfather].

[Jane Doe I] states that she is made to massage [Grandfather's] whole body while he wears only his underwear. She feels uncomfortable with this; but when she refuses, she gets hit by [Grandfather].

[John Doe] reports being hit by [Grandfather] on a regular basis. He states this is the normal form of discipline when the children do not listen. Though John Doe does not like being hit, he accepts that it is the way of his household. [Grandfather] last hurt [John Doe] on February 27, 2002. Grandfather was upset with the dog spilling over the food that [John Doe] had given him. [John Doe] stated he got yelled at. When he did not look [Grandfather] in the eyes, he got hit in the face causing his nose to bleed. [Jane Doe I] reports she has heard [John Doe] yelling in pain as he gets hit by [Grandfather].

[Jane Doe II] stated that she has been hit by [Grandfather] on every part of her body except her face. She reports being hit with a "big stick" and her buttocks being red. [Jane Doe II] said the last time she was hit was approximately during the third week of February. [Jane Doe II] stated that on the night of February 22, 2002, she was informed by [Grandfather] that she would be hit for an infraction. She expressed relief that she would not be at home for the discipline. [Jane Doe II] stated that [Adult Sister] is the "luckiest one" because she does not get hit. [Jane Doe I] reported seeing [Jane Doe II's] buttocks bruised. [Jane Doe II] stated that she witnesses her brother and sister getting hit on a regular basis. She witnessed [John Doe's] nose bleeding and [Jane Doe I] getting "whacked" on her face and her eyeglasses being hit. [Jane Doe II] reported crying out of fear when she saw her sister being struck.

All three children expressed concern about speaking of the abuse. They have been cautioned by the adults in the home not to talk about the family "secrets." [Jane Doe I] sobbed in fear of [Grandfather] and parents' retaliation if they had access to her after knowing she spoke about the abuse. [Jane Doe I] stated that she knew she could not return home or to school as she would not be safe. The children report being hit by [Mother] and [Father] but usually not bruised. They report that because [Grandfather] rules the home their parents are ineffective protectors. [Jane Doe I] said [Mother] tells her that she would like to leave the home. According to the children, [Mother] tries to hide the redness from being hit by spraying Pam on them. The children report being hit by [Father] but usually not to the extent that they are bruised. . . [Jane Doe I] said she cannot concentrate at school as she is always worried about her home life. She has felt like running away many times but is worried her family will not love her anymore as they have disowned her older sister, [Half-Sister 1], for leaving the home.

. . . .

[Mother] is the perpetrator of neglect of her children by knowingly allowing them to be beaten, threatened, demeaned and psychologically abused by [Grandfather]. [Mother] has helped to hide the red marks and bruises by using her own home remedies, such as Pam oil spray or telling the children not to talk about what happens in the home. As she may be a victim of abuse herself, it is unknown how much control she has of her home situation.

. . . .

[Father] has denied knowing anything about his [three minor] children being abused. He has stated that he would know if they were being hurt. [Father] has stated that he has never seen [Grandfather] harm the [three minor] children or else he would have stopped it. [Father] acknowledges hitting the [three minor] children for punishment but never bruising them.

Father understands the [three minor] children are reporting abuse but states he thinks they were afraid to tell the truth to [Diamond]. There has been no reason or motivation given for the

[three minor] children to lie.

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. . . According to the [three minor] children, their father knows about [Grandfather's] actions but has not stopped [Grandfather] from disciplining the [three minor] children.

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According to all people spoken to, [Grandfather] is a firm disciplinarian who is the patriarch of the family. He runs the home strictly, and there is fear in many people who deal with him.

(Testimony typed as in original.)

On March 12, 2002, the court appointed Sheri Ritter as the Guardian Ad Litem (GAL) of the three minor children.

In her March 18, 2002 Safe Family Home Report, Diamond reported, in relevant part, that

[t]he [three minor] children were spoken to in person or by phone almost daily since being removed from their home on March 1, 2002. A videotaped interview was conducted with the children at the Children's Justice Center on March 14, 2002. [The three minor children] have all been consistent in their reports of abuse by [Grandfather], and neglect by [Father and Mother] in the home.

[Jane Doe I] has remained adamant in her statements that the . . . home is not a safe place for children. [Jane Doe I] said that hitting is [Grandfather's] "tradition"; the children are "always getting lickings" and he will never stop. . . .

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[Jane Doe I] stated [Grandfather] calls people names and swears at them. She said he uses words such as "f-k head," "a-hole" or "c-k sucker." [Jane Doe I] reported [Grandfather] and parents tell her not to talk about what happens in the house or else she will get hit more. [Jane Doe I] said [Grandfather] is lying about not abusing the [three minor] children and her parents are "lying for [Grandfather]". She said she is now able to speak out about the abuse because she feels "safe" in foster custody. [Jane Doe I] denied that [Half-Sister 1] had anything to do with her allegations of abuse. [Jane Doe I] stated it had been approximately a year since she had spoken to [Half-Sister I] prior to being met by [Diamond].

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Family members have been suggested as possible placements for [the three minor children]. . . . The family members have regrettably

declined to shelter the [three minor] children as they have said they cannot assure their safety. They are afraid either [Father] or [Grandfather] will come to their home and insist on seeing or taking the [three minor] children. Family members say they will be unable to stop them. Family members have said it is "miserable to have them on your back" if you go against [Grandfather's] family. Many people who have been spoken to about taking the children have expressed fear of speaking out against [Grandfather's family].

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. . . According to Allison Wasson, DHS Adult Services social worker, [Grandfather] does not need to have his whole body massaged as [Jane Doe I] is made to do. She acknowledged his legs need to be massaged but it can be done by an adult. . . .

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[GAL] went to the family home on March 13, 2002. She reported [Grandfather] stated he would have beaten [GAL] and [Diamond] if [GAL] had brought [Diamond] with her to the home.

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Hawaii Behavioral Health [HBH] and Department of Health staff all reported concerns about [Grandfather]. They stated that [Grandfather] is the "problem" in the home and he controls everyone in the house. [Grandfather] is seen as the "dictator" in the home whom no one dares to go against. He was observed by the professionals to scream and yell at everyone. [Grandfather] was observed being verbally abusive to [Mother] and telling her to shut up. [Mother] was noted to do all the work in the house and take orders from [Grandfather]. [Grandfather] was heard by the professionals to use derogatory and demeaning language to the children. He did not approve of the foster care rules not to hit the children. He said that since the child was a foster child he would refrain from hitting her but if she was his child he would slap her. [Grandfather] said he would do whatever he wanted for discipline with the other children in the home since they were family. [Grandfather] reported to HBH staff that he did not want a foster child in the home; and if she were not gone, then he would hit [Mother] for taking the child in. He reported that he was not consulted about becoming a foster home. . . . [Staff] removed the child as soon as they knew the extent of the problems in the . . . home. The . . . foster home license was revoked on February 25, 2002

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Guns in the home are used to kill animals and to fire randomly on holidays. Threats of violence have been made against the petitioner coming to the home and if the children are not returned to the family home. [Grandfather] seems to have no regard for the law and authority. He disregards advice from his doctors about his health, from professionals about the use of corporal punishment, brags about having illegal animals on his property and laughingly makes threats against people. He, along with his wife,

son, daughter-in-law and other family members, has already snuck one letter to the [three minor] children against DHS's specifications. The letter clearly instructed the [three minor] children to destroy it after reading and to not listen to the DHS and to make it seem as if the family was really missed so the DHS would return the [three minor] children. Secrets are very important to this family and [Grandfather] has instilled much fear in the [three minor] children.

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. . . There is concern that even if [Father and Mother] move out of the home [Grandfather] will still have an emotional and psychological hold on them. As is evident by speaking to many other people who know this family, there is much fear and intimidation placed on people who do not even live near the [family] much less have any daily contact with them. [Grandfather] has many connections on the island and he has not hesitated to use them in an attempt to clear his name and get the [three minor] children returned home.

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[Jane Doe I] is very clear that she does not want to return home. She has threatened to kill herself if returned to her . . . home. She does not feel anywhere [in that area] is safe for her now that she has revealed the family secrets. [John Doe] and [Jane Doe II] have said they would like to return home but only to their parents, not to [Grandfather].

At this time parents are not able to be protective and meet the needs of their [three minor] children.

In a March 20, 2002 order, the court continued temporary foster custody and ordered Father and Mother not to have any contact with the three minor children unless approved by the DHS and the GAL.

On April 26, 2002, Mother filed a "Motion for Order Allowing the Advancement and Payment of Costs Necessary For Deposing [Half-Sister 1] on the Mainland." Mother's attorney argued, in relevant part, as follows:

2. In reviewing the documents filed with the court and those provided by the DHS through discovery and in talking with the social workers involved in this matter it is very apparent that [Half-Sister 1] provided substantial information to the DHS upon which the Department used to initiate its investigation and to base its opinions.

3. In discussing this matter with my client it is just as obvious that [Half-Sister 1] has a long history of animosity against the extended family and that she has made threats to "get even" with the family.

4. The extent of [Half-Sister 1's] involvement with the DHS was made evident when within moments of the children being taken into custody the social worker allowed [Jane Doe I] to talk to [Half-Sister 1] on the cell phone.

5. As a reporter [Half-Sister 1] is a possible witness for the State. I have been informed that the State "may not be calling [Half-Sister 1]". This does not change her importance in the State's case.

6. The deposition of [Half-Sister 1] is vital to my client receiving a fair trial of this matter.

7. It is believed that the personal animosity [Half-Sister 1] holds for the . . . family has motivated her to provide the DHS with false and exaggerated information about the family and the treatment of the three [minor] children who are the subjects of this matter.

8. Even if the DHS does not call [Half-Sister 1] as a witness the information that she provided has so tainted the entire investigation and DHS process that it is impossible to separate her claims from the information that the DHS did obtain from other sources.

9. It is therefore, necessary to have [Half-Sister 1] placed under oath and deposed over a wide range of topics in order to determine the extent of false and unsupported information that she provided the DHS.

Judge Lillian Ramirez-Uy heard Mother's motion on May 3, 2002. DHS argued that Half-Sister 1's relationship with the three minor children "is of no relevancy whatsoever as to the harm of the [three minor] children because the [three minor] children, after being interviewed by Miss Diamond, assessed by DHS, we found threatened harm." DHS noted further that Half-Sister 1 was unwilling to testify because a death threat from the family had been communicated to her via another family member. Judge Ramirez-Uy denied Mother's motion. The court also received

into evidence the Guardian Ad Litem's First Report to the Court wherein the GAL expressed her agreement with the March 6, 2002 FSP. The initial goal of the March 6, 2002 FSP was "[t]o maintain [the three minor children] in a safe and nurturing foster home." The final goal of this plan was "[t]o reunite [the three minor children] with their parents when all safety issues have been addressed."

On May 13, 2002, Mother filed a "Motion for Order Suppressing Any and All Information Provided by [Half-Sister 1] to the [DHS]." Mother argued that the "actions of the DHS to block and the Court's refusal to grant Mother's request for costs to depose [Half-Sister 1]" essentially denies her a right to reasonable discovery. She indicated the presence of "[e]vidence which would have demonstrated [Half-Sister 1's] lack of current knowledge of the family home, possible drug use that would impair her ability to think rationally and place the voracity [sic] of her statements into question and seek out the source of her animosity toward the . . . family."

On May 15, 2002, Judge Enright denied Mother's motion, stating that

[Half-Sister 1's] statements may be used pursuant to . . . [Hawai'i Rules of Evidence] Rule 703. If there is some other basis upon allowing the statements to come into evidence, that foundation would have to be established. However, the Court will be quite sensitive to the fact that there has been no opportunity to depose this witness and will . . . hear argument on that point

if it becomes relevant in the future in this proceeding.²

On the first day of the May 15, 2002 trial, clinical psychologist Tom Loomis, Ph.D (Dr. Loomis) testified that Jane Doe I suffers from post-traumatic stress disorder (PTSD) and had

² HRS § 587-25 (1993) states as follows:

Safe family home guidelines. (a) The following guidelines shall be fully considered when determining whether the child's family is willing and able to provide the child with a safe family home:

- (1) The current facts relating to the child which include:
 - (A) Age and vulnerability;
 - (B) Psychological, medical and dental needs;
 - (C) Peer and family relationships and bonding abilities;
 - (D) Developmental growth and schooling;
 - (E) Current living situation;
 - (F) Fear of being in the family home; and
 - (G) Services provided the child;
 - (2) The initial and any subsequent reports of harm and/or threatened harm suffered by the child;
 - (3) Date(s) and reason for child's placement out of the home, description, appropriateness, and location of the placement and who has placement responsibility;
 - (4) Historical facts relating to the alleged perpetrator and other appropriate family members who are parties which include:
 - (A) Birthplace and family of origin;
 - (B) How they were parented;
 - (C) Marital/relationship history; and
 - (D) Prior involvement in services;
 - (5) The results of psychiatric/psychological/developmental evaluations of the child, the alleged perpetrator and other appropriate family members who are parties;
 - (6) Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the family home;
 - (7) Whether there is a history of substance abuse by the child's family or others who have access to the family home;
 - (8) Whether the alleged perpetrator(s) has acknowledged and apologized for the harm;
 - (9) Whether the non-perpetrator(s) who resides in the family home has demonstrated the ability to protect the child from further harm and to insure that any current protective orders are enforced;
 - (10) Whether there is a support system of extended family and/or friends available to the child's family;
 - (11) Whether the child's family has demonstrated an understanding and utilization of the recommended/court ordered services designated to effectuate a safe home for the child;
 - (12) Whether the child's family has resolved or can resolve the identified safety issues in the family home within a reasonable period of time;
 - (13) Whether the child's family has demonstrated the ability to understand and adequately parent the child especially in the areas of communication, nurturing, child development, perception of the child and meeting the child's physical and emotional needs; and
 - (14) Assessment (to include the demonstrated ability of the child's family to provide a safe family home for the child) and recommendation.
- (b) The court shall consider the likelihood that the current situation presented by the guidelines set forth in subsection (a) will continue in the reasonably foreseeable future and the likelihood that the court will receive timely notice of any change or changes in the family's willingness and ability to provide the child with a safe family home.

"identified physical abuse from [Grandfather] as being a traumatic event for her." Jane Doe I expressed "discomfort" when asked how she felt about the massages. Dr. Loomis stated that John Doe appeared to be "significantly depressed [although] he doesn't see himself as being depressed." John Doe had told Dr. Loomis that he gets hit with objects. Jane Doe II also spoke often of getting "lickings."

Diamond testified that on March 1, 2002, she talked to Jane Doe I at her school, to John Doe at his school, to Jane Doe II at her school and then took the three minor children on a forty-five minute drive to her office. During the drive and at the office, for about an hour or so, she talked to the three minor children. Because Jane Doe I was "very distraught, very upset" and "very alone", Diamond allowed Jane Doe I to have a phone call with Half-Sister 1. The call was "on the speakerphone so [Diamond] could listen to what was being said."

During a March 14, 2002 videotaped interview of the three minor children at the Children's Justice Center, Diamond observed that "there's three children independent of each other all reporting the same sorts of abuse and the same sorts of dynamics, from a fifteen-year-old to a thirteen-year-old to a five-year-old, in their own age ability all report abuse and fear and intimidation in the house, [which] struck [her] as each one corroborating what the other one was saying in their own manner."

In addition to the accounts of physical abuse, Jane Doe I related to Diamond the discomfort she felt in massaging Grandfather who was unclothed except for his underwear.

Dr. Loomis and Diamond were the only two witnesses called by the State.

Glenn Kila (Kila), a principal at Kamaile Elementary School, testified that he knew Grandfather's family since 1976 because he was a teacher for several of their children. Kila's perception of the relationship between Jane Doe II's parents and Jane Doe II was "very, very positive." According to Kila, Jane Doe II's parents are involved in school activities such as "SID, School Implementation Design" and "SCBM, school community based management." He also stated that based on his "professional experience", he never suspected that "the child was -- was in danger." Under cross-examination by the State, he conceded that if Jane Doe II or other professionals had told him that she was being beaten at home, he "would not doubt her."

Isaac Joshua testified that Jane Doe I was his student for about a semester until Jane Doe I left school. He stated that Jane Doe I was "doing good" academically and seemed to be "always happy, always talking, hi Mr., how you doing, talking." Jane Doe I talked to him often but never mentioned physical abuse at home. Under cross-examination by the State, he agreed that he had Jane Doe I in his class for just two months.

Marvin Yonamine was the student activities coordinator at Kapolei Middle School. He explained that he knew Father and Mother, when their older son (not the subject of the foster custody dispute) was in his class. He stated that his observed interactions with their children showed the parents to be "loving and caring parents with their kids . . . they've always come out to open houses, they're always smiling with their kids, always friendly."

Clete Ikeda (Ikeda) was a teacher at the intermediate school and had previously spoken to Jane Doe I and John Doe "just in passing." He was also the teacher of Adult Sister. Ikeda stated that he had been to the Home for Adult Sister's sixteenth birthday and graduation. He testified that he had never seen any of the family members behaving in a hostile manner or the children acting in a fearful manner. Under cross-examination, Ikeda admitted that he did not know Jane Doe I well enough to know whether her family might have treated her differently from Adult Sister.

Karen Arincorayan (Arincorayan) was a seventh-grade math teacher at an intermediate school. Arincorayan testified that Jane Doe I was a good student, and that she would often come in for extra help when she needed it. She stated that Jane Doe I's parents, were "very supportive of . . . our school programs. . . . I could always, you know, depend on them to . . . help her

or . . . ask -- ask them to give me some time to work with her --" Arincorayan stated that Jane Doe I had a pleasant demeanor and was also very nice and attentive. She also knew Jane Doe I from Bible Study. Under cross-examination from the State, Arincorayan stated that Jane Doe I never mentioned to her that "other members of the family who were religious were made fun of" Arincorayan stated that she found Jane Doe I to be a very honest person and that if Jane Doe I had told her she was being physically abused at home, she would not doubt her.

At the continuation of the trial on May 22, 2002, Grandfather testified that he would usually discipline the three minor children by "slapping 'em once and I look at their face if they're listening." If they were not listening to him, he would punish them by "tak[ing] away privileges from them or [he would] put them to bed early." Grandfather testified that he asks for massages because he has "poor circulation in [his] right leg." He stated that "it's only when I cannot stand the pain that I ask them to do that. It's not a -- it's not a force of habit." Grandfather denied ever being massaged while being naked and asserted that his wife was always in the room with him whenever he gets massages. Grandfather also denied kicking Half-Sister 1 and Half-Sister 2 in their faces, or giving them bloody noses, giving them lumps on their heads, or performing breast exams on them, or examining Half-Sister 2 to see if she was a virgin.

When asked whether he checked Half-Sister 2 "for worms by spreading her butt[,] " he responded that when "they . . . was about five or six years old, maybe younger[,] " "we helped the mom and my wife do it[.]"

Grandfather testified, in relevant part as follows:

Q. Okay. Did -- do you remember an incident with [Jane Doe I] just before [the three minor children] were taken out of the house?

. . . .

A. Well, on the 25th of February, what you call, [Jane Doe I] was picking on -- on [Adult Sister] like she always do, constant picking, bickering, and, you know, her jealous towards her older sister was just I don't know. I can't believe how that girl got so uptight about jealousy, you know, she always picking on [Adult Sister].

So they came in the house from outside by the washroom and they were screaming at each other. So I asked [Jane Doe I] to shut up because [Adult Sister] wasn't screaming, it was [Jane Doe I] that was screaming. And I always tell them to respect their elders, don't . . . don't hit one another or, you know, or what do you call, disrespect one another. You know what I mean? And she wouldn't stop, she just had one egg one that she was going keep on.

Q. This is [Jane Doe I]?

A. Yeah. And that's -- that's how she did it. When I stood up, I took her glasses off of her face, I put the thing on the counter and I gave her a slap in the mouth, you know, because she wouldn't shut up, she kept screaming at me, you know.

Q. Did that shut her up?

A. That didn't shut her up but I wasn't going to stand there and beat her to death, you know. I just -- I just slapped her in the mouth and then, you know, I started telling her what I was going do, you know and -- because she constantly using the words I -- I want to go with my older sister in Oregon. She don't even know the girl, she don't even know her sister.

Q. That's [Half-Sister 1]?

A. Yeah, [Half-Sister 1]. And I told her you always saying that, I'll send you there. Just say the word, I'll send you to [Half-Sister 1].

Q. So how many times did you slap her?

A. Once, just once in the mouth. She still was screaming that I busted her -- her mouth open before I turned away to sit down back on my chair. I told her, [Jane Doe I], you busted your mouth on the -- with the toothbrush, don't tell me I busted your mouth, I did not.

Q. Did she have a response?

A. No, she just stood there and, you know, pouting, she -- you know, she didn't say anything more after that.

Q. There's some mention about [John Doe] having a bloody nose?

A. Yeah.

Q. This happened also just before the kids were taken out of your house?

A. Right.

Q. Do you remember what the circumstance was behind that?

A. Well, for -- coon's ages, yeah, my [John Doe] would be learn -- trying to learn him to be responsible. And with the prices of dogfood today it's outrageous to splurge the food all over the ground, okay. So I ask him -- I show him how to move the dogfood bucket away from the dog's chain because common sense tell you that if the dog can tangle the bucket, the food is going to end up on the ground, okay.

So he puts the dogfood in the middle of the chain, you know what I mean? And then when I go over there, the -- the dogfood bucket, her food -- feed pan is full to the top with food and the whole way where the dog stands is nothing but dogfood, you know. And I just so happen walk over there and I said my God, [John Doe], Papa told you 101 times if I told you once, do not feed the neighborhood cats, rats and, you know, other animals. You know what I mean?

And he neva say he was sorry or anything. All he did was put down his head and started picking up the food and I was still talking to him you know

Q. Okay. So --

A. So then I walked to him because he had his head down to the ground and he was on one knee and I picked his face up, you know. And when I picked his face up I touched his nose and the thing started trickling with blood. He never screamed or yelled or made one hullabaloo over there. He just walked up to the pipe and wiped his nose up and that was the end of it.

. . . .

Q. Would you ever do anything to intentionally hurt [the three minor children]?

A. No, never. I raised all my own children, they all live with me, they all by me. They, you know, if anything, they wouldn't be with me, you know what I mean? Nobody stays with an abusive parent, I don't care what anybody tell me, you know.

. . . .

Q. That yardstick?

A. Yeah.

Q. How does it scare [Jane Doe II]?

A. Well, it doesn't scare her because she doesn't really care if I, you know, I got the stick in the hand or not, she still do what she want to do anyway. But I take the yardstick and I slam it against the table and I -- I tell her Papa is going to give it to you and she, what you call, she listens and she eat.

. . . .

Q. This year, within the last six months, let's say, who in the household has given you a massage?

A. [Adult Sister] and [Jane Doe I] and [John Doe]. This is not every day thing, though, [Deputy Attorney General].

. . . .

Q. How often do you get massages?

A. Sometimes once a week, sometimes two times a week. That's -- that's on the weekends because the children go -- go to school and majority of the schooldays they come home and they spend most of the day doing homework.

(Testimony typed as in original.)

In describing the incident which led to Jane Doe I being slapped on the face by Grandfather, Adult Sister explained that Grandfather first gave Jane Doe I two warnings. She stated that when Jane Doe I did not stop arguing with Adult Sister, she was slapped. Adult Sister denied that Jane Doe I was ever hit 41 times in the neck and the face. Adult Sister testified that whenever Grandfather disciplined her and the other grandchildren, they would get spanked, but they have never had bruises on their

bodies. Adult Sister denied ever being afraid of Grandfather or seeing him abuse a child in the household.

At the time of trial, Half-Sister 2 was living on her own but in the same neighborhood as Grandfather. Half-Sister 2 denied ever seeing any evidence of abuse on the three minor children. She stated that she had a close relationship with the three minor children, and that if they had a problem with Grandfather, they would have gone to her. Half-Sister 2 testified that Half-Sister 1 called her in February and told her that a "lady from CPS" would be calling and that she "needed to lie and make up these false accusations against Grandfather and Mother and Father[.]" Half-Sister 2 stated that Half Sister 1 also called Half-Brother and told him to lie to CPS. Half-Sister 2 stated that Half-Sister 1 told her "to lie and make up these false accusations against Grandfather and Mother and Father" or else Half-Sister 1 would have Half-Sister 2's "daughter taken away and she would make [Half-Sister 2's] life a living hell." With regard to Grandfather's massages, Half-Sister 2 denied having to massage her Grandfather; being given a breast exam by Grandfather, having her hair cut off as a form of discipline or being forced to stay away from school so as to not show bruises. Half-Sister 2 stated that CPS is currently investigating her and her daughter's father for alleged drug abuse and believes that Half-Sister 1 conspired to have this happen to her. When asked

what motive Half-Sister 1 could have for creating all these problems, Half-Sister 2 responded:

A. My sister's unhappy with her own life, she hates my mother, she hates my grandfather and my stepdad. Because of the fact that my mom married my dad's brother, she was always shameful of that when we were growing up in high school because people thought that was a disgrace. And she let it get to her. She hates them. And that was the only way she could get back at them.

.

She would send [Father, Mother, Grandfather] mean letters. She would call my Grandpa and tell him she hope he die. She would say mean things to my dad and [tell Adult Sister] that she was not my dad's. And she just keeping calling my mom a slut and that she hates my mom.

The parties stipulated to an offer of proof in lieu of live testimony that Jane Doe I had falsely accused a male classmate of sexual harassment. Her classmate had been put in jail but was later released when Jane Doe I admitted the falsity of the charge.

Father began his testimony by describing Half-Sister 1's relationship with her family. He stated that Half-Sister 1 had an "attitude change" when she started hanging out with her coach from the track team. According to Father, Half-Sister 1 moved into the coach's house where there was "pakalolo"³. Father stated that when Half-Sister 1 moved out, she was "calling the house and telling [Grandfather] to drop dead, [Grandmother] to drop dead."

Father also testified that he disciplines the three

³ "Pakalōlō" is the Hawaiian word for marijuana. Mary Kawena Pukui and Samuel H. Ebert, Hawaiian Dictionary 304 (rev. ed. 1986).

minor children with only a spank on the butt or by taking away their privileges. Father stated that he became concerned when he found out that "[Jane Doe I] had been talking to [Half-Sister 1]." He stated that Half-Sister 1

thinks partying is her number one thing. The drugs, I don't like my kids getting involved with drugs, she thinks there's nothing wrong with it, you know. And I watch my friends . . . just go down the tubes because of that stuff so I don't want it even near my property. And she doesn't have nothing [sic] nice to say about us.

Father also testified that, in light of the fact that he and Mother qualified for "foster parenting with CPS license to be foster parents[,]""⁴

why should we have to go through parenting classes? I already went through anger management with my schooling when I was in college. There was a class that I went through already. And we went through the classes to be foster parents and they went through all this stuff, you know, how to care for kids and stuff that we already knew by taking care of our own kids, you know. And we just had to get it clarified and updated, you know.

Mother testified that Half-Sister 1 left the house because she was tired of "being poor" and "being one of so many". She stated that Half-Sister 1 yelled at Mother while Mother was working as a custodian at school. Mother stated that the family does not use corporal punishment and explained that spanking would be used if "by telling them to lower it down, they don't lower it down, then we have to tell them or give them some kind of physical punishment." She stated that she has never seen any bruises on the children's faces or buttocks. Mother stated that

⁴ According to the March 18, 2002 Safe Family Home Report, the relevant foster home license was revoked on February 25, 2002.

she only uses Pam "when they fell off of their chairs or if they fell down from playing." When asked whether a child would ever be hit by a stick, she stated that the stick was "mostly for an intimidator" and that, as an example, if Jane Doe II doesn't eat, Mother would hit the table with the stick, and Jane Doe II would sometimes get a "slight tap" with it.

In relevant part, the following was stated during closing argument:

[COUNSEL FOR GRANDFATHER]: Your Honor, before we go further -- and I apologize - one thing I didn't introduce, . . . , it was the diary of [Jane Doe I]. . . . And what I've got is typed up excerpts from it. It's short but it does speak to a very important point.

. . . .

[COUNSEL FOR GRANDFATHER]: . . . There is not a word of any punishment in any of the pages of this diary starting from December 24th and running through February 2002.

. . . .

THE COURT: To the offer of proof that someone has reviewed this diary and, from their perspective, there's not a word in it that has to do with having been disciplined.

[DEPUTY ATTORNEY GENERAL]: We don't object to that, Your Honor.

THE COURT: So I'll take that at this point in time to be a stipulation. . . .

In her closing argument, the GAL stated, in relevant part, as follows:

The problem is that the three [minor] children have been consistent talking about things that are -- about the licking that in their mind has been abuse, they have been hurt. They talk about being afraid, about being belittled in the home, about witnessing abuse of animals. All of this has created an atmosphere of abuse for the kids.

They've also grown up in an atmosphere that they're not supposed to talk about these things. That's now when they're beginning to feel a little safe, they're beginning -- these things are coming out. But that may account for why none of this has ever come out before. They've been afraid to tell anyone.

After the trial ended, the court entered its May 22, 2002 Order in favor of DHS.

On June 4, 2002, counsel for Grandfather filed a Motion for Immediate Review of Family Service Plan, arguing that "discontinuing all visitation with [Grandfather, Mother, or Father] is [not] in the best interest of the [three minor] children" and stating that "[John Doe] told me he wants to be home with his family."⁵ On June 4, 2002, Father filed a Motion for Reconsideration⁶ and, in support thereof, counsel for Father argued the following grounds:

4. There was no reasonable cause to believe the [three minor] children were in need of temporary foster custody.
5. That reasonable efforts were not provided to prevent out-of-home placement and/or to prevent the need for the Petition to be filed.
6. That the State of Hawaii failed to show by a preponderance of the evidence that jurisdiction, foster custody and/or the Service Plan were necessary.
7. That Father believes [Byron Hu] provided ineffective assistance of counsel.
-
9. That Father believes the Service Plan(s) are inappropriate.
10. That Father believes the visitation schedule is inappropriate.
11. That Father believes this Honorable Court was biased against the parents.

⁵ The State submitted a letter to counsel for Grandfather, explaining that DHS has discontinued visitation due to Father's and Mother's non-compliance with the structure and rules set up to assure that no further harm of the three minor children will take place as a result of the visits. Specifically, "[Father and Mother] have a history of making manipulative statements during visitation that leads the [three minor] children to feeling guilty for disclosing the abuse at home."

⁶ On May 29, 2002, Father's counsel, Byron Hu, filed a Motion to Withdraw as Counsel. This motion was granted at the July 10, 2002 hearing.

12. That Father believes this Honorable Court was biased in favor of [DHS].

Also on June 4, 2002, Mother filed a Motion for Reconsideration and, in support thereof, counsel for Mother argued the following:

3. [Counsel for Mother] respectfully believes⁷ that the testimony presented at trial demonstrated that while the family used corporal punishment, at no time did the family go over the limit and the punishment turn to abuse.

4. There is no evidence of any injury having been suffered by the [three minor] children.

5. The testimony that was presented at trial clearly demonstrated that despite having a diagnosable psychological condition, it did not impair [Jane Doe I's] ability to function.

6. The evidence presented by the [DHS] did not rise to the level of proof necessary to successfully prove the case.

(Footnote added.)

On June 10, 2002, Grandfather filed (1) a Joinder in Father's Motion for Reconsideration, and (2) a Motion for Reconsideration of Order Granting the Department of Human Services' Motion for Jurisdiction Announced on May 22, 2002. Counsel for Grandfather declared the following in support of this motion:

3. [T]here is insufficient evidence to support any finding of injury to any child or any inability of the children to function

⁷ The Hawai'i Rules of Professional Conduct (2004) (HRPC) Rule 8 states, in its "TERMINOLOGY" section, that "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." HRPC Rule 3.4 states, in relevant part, that

A lawyer shall not

. . . .:

(g) in trial, . . . , assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

so that there are far less severe alternatives to keeping the children away from grandfather.

4. Further, any reliance on [Jane Doe I] as to injury or cause of injury is unfounded in view of her proclivity to lie under oath in other incidents, one of which is set forth in the offer of proof attached hereto as . . . Exhibit 1.⁸

(Footnote added.)

Judge Enright heard these motions and joinders on July 10, 2002.⁹ At that hearing, Mother's Motion for Reconsideration was withdrawn. Father's Motion was denied. Grandfather's joinder in Father's motion was withdrawn. Grandfather's Motion for Reconsideration was denied. Mother, Father, and Grandfather agreed not to have any contact with the three minor children "except as approved by the GAL as guided by the therapists." A review hearing was scheduled for October 16, 2002.

On August 8, 2002, Father filed this appeal.

On September 5, 2002, the court filed its Findings of Fact and Conclusions of Law (FsOF and CsOL), in relevant part, as follows:

FINDINGS OF FACT

THE PARTIES

. . . .

⁸ Exhibit 1 is an offer of proof by Grandfather as to the testimony that would have been provided by the foster father of the male classmate of Jane Doe I that Jane Doe I had falsely accused of sexual harassment. The testimony was not provided because the parties stipulated to an offer of proof in lieu of live testimony that Jane Doe I had falsely accused the classmate of sexual harassment. Her classmate had been put in jail but was later released when Jane Doe I admitted the falsity of the charge.

⁹ The July 10, 2002 Orders Concerning Child Protective Act notes, in relevant part that, at the hearing, the court "disclosed a telephone message was left at his home while he was on vacation. Father admitted calling. The court advised him this is not allowed. The court did not hear the entire message."

10. The family home and property are owned by [Grandfather and Grandmother] with financial investment in the home by Mother and Father.

. . . .

THE PROCEEDINGS

17. On the afternoon of March 1, 2002, DHS Social Worker Hinda Diamond interviewed [Jane Doe I] and [John Doe] and [Jane Doe II] at their respective schools as part of the DHS investigation of alleged harm or threatened harm to the children.
 18. During the March 1, 2002 interview with DHS, [Jane Doe I] disclosed repeated instances of physical and emotional abuse of herself and her siblings by Grandfather, including two incidents within the past week, as well as other harm by Grandfather and ineffective protection by Mother and Father.
 19. At the March 1, 2002 interviews, [Jane Doe I] wished to be taken into custody because she could not return home or to her school for fear of retaliation and [John Doe] was also concerned about revealing what was occurring in the family home.
 20. [Jane Doe I] was very concerned for the safety of her younger siblings and on March 1, 2002 urged DHS to take swift action for fear of immediate physical violence should her parents arrive at school to pick up the [three minor] children before all of the [three minor] children were in a safe place.
 21. Based on [Jane Doe I] and [John Doe's] statements, including physical abuse within the past week, and the threat to the immediate safety of the children, the [three minor] children were taken into police protective custody and DHS assumed temporary foster custody of the [three minor] children on March 1, 2002.
 22. During its investigation, DHS interviewed numerous family members, school officials, other government officials and service providers to the family.
 23. On March 6, 2002, DHS filed a petition for temporary foster custody of the [three minor] children, alleging imminent harm, harm and threatened harm to the [three minor] children.
-
25. At the initial return hearing on March 8, 2002, Mother and Father appeared with counsel and a contested temporary foster custody/adjudication/disposition hearing was scheduled for March 21, 2002
 26. On March 14, 2002, DHS conducted a videotaped interviews [sic] of each of the three [minor] children at the Children's Justice Center. The [three minor] children's

statements were consistent with their March 1, 2002 statements and are credible.

27. On March 19, 2002, Mother and Father appeared with their court-appointed counsel, Grandfather was excused and the court granted Mother's motion to continue the trial . . . [and] the trial was continued to May 15, 2002.
28. On April 9, 2002, the DHS motion for immediate review to advance the trial, the parents' pro se motions to disqualify the court, and Mother's counsel's oral motion to withdraw as counsel were heard and denied.
29. On May 3, 2002, a pretrial conference was held and Mother's motion for funds to conduct a deposition of [Half-Sister 1] . . . [was] heard and denied.
30. Before the commencement of trial on May 15, 2002, Mother's motion to suppress evidence and Father's motion in limine was denied.

HARM AND THREATENED HARM

31. Grandfather, while having some health problems, presents as an individual who is capable of inflicting a strong blow.
32. Being struck with Grandfather's hand hurt the [three minor] children more than being hit with a stick.
33. The [three minor] children perceive Grandfather as being very powerful both within the family and in the community.
34. Each of the [three minor] children saw their siblings being hit, observed bruises and red marks on their siblings, and heard their siblings screaming and crying out in pain on numerous occasions.
35. Each of the [three minor] children heard themselves, their mother and other family members being yelled at and called demeaning names by [G]randfather on numerous occasions.
36. Mother and Father did not hit the [three minor] children as hard as Grandfather did, they usually did not cause bruises, and sometimes they hit the [three minor] children to prevent Grandfather from hitting the [three minor] children.
37. Mother put cooking spray on the [three minor] children to help take away the red marks and bruises.
38. With respect to the February 25, 2002 incident, Grandfather admitted taking off [Jane Doe I's] glasses and giving her a slap on the mouth for bickering with her eighteen-year old sister.
39. On February 25, 2002, Grandfather intentionally hit [Jane Doe I] in her head causing a bruise to her jaw.

40. With respect to the February 27, 2002 incident, Grandfather admitted admonishing [John Doe] for putting out too much dog food, and because [John Doe] was not looking at him, he picked [John Doe's] face up and touched his nose, which started bleeding.
41. On February 27, 2002, Grandfather intentionally hit [John Doe] in his face causing a bloody nose.
42. Grandfather admitted slamming a yardstick against the table to frighten five-year-old [Jane Doe II] into obedience.
43. [Jane Doe I] was made to massage Grandfather over much of his body including on at least one occasion the buttocks over his underwear.
44. Mother, [F]ather and [G]randfather lack any appreciation of the serious risk of physical or psychological injury to the children inherent in the physical and verbal violence which exists in the family home.
45. Mother, [F]ather and [G]randfather lack any appreciation of the serious risk of physical or psychological injury to [Jane Doe I] inherent in making her massage her [G]randfather's buttocks.
46. [John Doe] displays symptoms of depressive disorder.
47. [Jane Doe II] displays symptoms of exposure to violence in the family home, including nightmares and acting-out behavior.
48. [Jane Doe I] does not wish to return to the family home.
49. [Jane Doe I] displays symptoms of post traumatic stress disorder, including highly frightening memories, nightmares, flashbacks, memory triggers, larger startle response, hyper vigilance and difficulty concentrating in school.
50. Mother is not presently willing and able to provide a safe family home for the [three minor] children, even with the assistance of a service plan.
51. Father is not presently willing and able to provide a safe family home for the [three minor] children, even with the assistance of a service plan.
52. Continuation in the family home is contrary to the immediate welfare of the [three minor] children.
53. No reasonable efforts by DHS could have prevented the removal of the [three minor] children from the family home.
54. DHS has made reasonable efforts toward the permanency plan of reunification.

OTHER

55. Tom Loomis, Ph.D. is a qualified expert in the field of psychology.
56. The expert opinions of the Dr. Loomis expressed in his reports and testimony were made to a reasonable psychological certainty and were based upon the kind of information reasonably relied upon by psychologists in forming opinions.
57. In order to form his expert opinions, Dr. Loomis properly applied his education, training, knowledge, experience and professional judgement to the information at hand.
58. DHS Social Workers Hinda Diamond, MSW and Kori Kiesel, MSW are qualified experts in the field of social work and child protective/child welfare services, by statute and by their education, training, experience, skill and knowledge.
59. The expert opinions of the DHS social workers expressed in the safe family home reports and testimony were made to a reasonable professional certainty and based upon the joint expertise of the social workers who testified and their respective supervisors.
60. The expert opinions of the DHS social workers expressed in the safe family home reports and testimony were based on the kind of information reasonably relied upon by experts in their field in forming opinions.
61. The expert opinions and testimony of DHS social workers Diamond and Kiesel¹⁰ were credible.
62. The [three minor] children's statements to Ms. Diamond, Ms. Kiesel, Ms. Ritter and Dr. Loomis were credible.
63. The portions of the testimony of [M]other, [F]ather and [G]randfather which were inconsistent with the testimony of the subject [three minor] children were not credible.
64. These findings of fact are based on the court's evaluation of the credibility and weight of the evidence and reasonable inferences drawn there from by the court.

CONCLUSIONS OF LAW

1. There is an adequate basis to sustain the petition in that the [three minor] children are children whose physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the [three minor] children's family.
2. The petition is sustained.

¹⁰ The case had been transferred from Diamond to Kori Keisel, who is the current social worker managing the three minor children's case.

3. The [three minor] children's family home is not a safe family home.
4. As of the date of trial, neither Mother nor Father are presently willing and able to provide the [three minor] children with a safe family home, even with the assistance of a service plan.
6. [sic] Foster custody is awarded to DHS.
7. [sic] All findings of fact and conclusions of law set forth in the court's order filed May 22, 2002 are incorporated herein by reference.

(Footnote added.)

This appeal case was assigned to this court on April 23, 2003.

STANDARDS OF REVIEW

Denial of Motion to Suppress Evidence

Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard. Furthermore . . . the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his own Fourth Amendment rights were violated by the search and seizure sought to be challenged. The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence.

State v. Balberdi, 90 Hawai'i 16, 20-21, 975 P.2d 773, 777-78 (App. 1999) (quoting State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997)).

Consequently, "[w]e review the circuit court's ruling on a motion to suppress *de novo* to determine whether the ruling was 'right' or 'wrong'" as a matter of law. State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997).

[W]hen a defendant's motion to suppress evidence is denied prior to trial, the defendant need not object at trial to the introduction of the evidence to preserve his or her right to appeal the pretrial denial of his or her motion to suppress and the introduction of the evidence at trial.

State v. Kong, 77 Hawai'i 264, 266, 883 P.2d 686, 688 (App. 1994)

(citation omitted).

[W]hen the defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial.

Id. at 266, 883 P.2d at 688 (citation omitted).

Termination of Parental Rights

[T]he family court's determinations pursuant to [Hawaii Revised Statutes (HRS)] § 587-73(a) [(1993 & Supp. 2003)] with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact; thus, inasmuch as the family court's determinations in this regard are dependant upon the facts and circumstances of each case, they are reviewed on appeal under the 'clearly erroneous' standard."

In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001)

(citations omitted).

Findings of Fact/Conclusions of Law

Findings of fact are reviewed under the "clearly erroneous" standard. In re Jane Doe, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996) (citations omitted). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made."

State v. Balberdi, 90 Hawai'i 16, 20-21, 975 P.2d 773, 777-778 (1999). Substantial evidence is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (quoting Kawamata Farms v. United Agri Prods., 86 Hawai'i 214, 253, 948 P.2d 1055, 1094 (1997) (citations, internal quotation marks, and original brackets omitted)).

Conclusions of law are reviewed *de novo* under the right/wrong standard. In re Jane Doe, 84 Hawai'i at 46, 928 P.2d at 888 (citations omitted).

Harmless Error

Hawai'i Family Court Rules (HFCR) Rule 61 (2004)

states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

In the case of In Re Doe, 102 Hawai'i 75, 79, 73 P.3d 29, 33 (2003), the Hawai'i Supreme Court stated, in relevant part, that

constitutional error[s may be] harmless so long as "the court . . . [is] able to declare a belief that it was harmless beyond a reasonable doubt." Recognizing as much, this court applies the harmless error doctrine to errors that occur in the trial process, including those that implicate an accused's constitutional rights.

Id. (internal citations omitted; brackets in original).

DISCUSSION

1.

Denial of Funds Necessary to Defend Against Petition

This point relates to FOF no. 29. Father contends that because this case started when Half-Sister 1 telephoned Diamond,

Father's counsel could not effectively rebut the statements of [Half-Sister 1] without taking her deposition prior to trial. Of particular concern was how [Half-Sister 1] could know the current situation in the . . . home of the three minors when she is living in Oregon. Father's counsel could not even confirm that [Half-Sister 1] made any statements to Ms. Diamond without talking to [Half-Sister 1] in a deposition where she is under oath and subject to perjury.

. . . [W]hen the lower court denied [F]ather advanced costs the lower court adversely affected the ability of his counsel and may be the equivalent to no counsel at all.

We disagree. HRS § 802-7 (1993) states that the court may "upon a satisfactory showing that a . . . defendant is unable to pay for transcripts or witness fees and transportation, or . . . other services, and upon a finding that the same are necessary for an adequate defense, direct that such expenses be paid from available court funds or waived. . . ." The defendant has the burden of presenting "sufficient evidence to form a proper basis upon which [those costs are] necessary for an adequate defense." State v. Hoopii, 68 Haw. 246, 248-249, 710 P.2d 1193, 1195 (1985). The judge's decision cannot be overturned absent an abuse of discretion. Id. Furthermore, such an abuse occurs only where the court "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id.

We conclude that no such abuse of discretion occurred here.

First, Half-Sister 1 was never called as a witness. Although her statements to Diamond triggered an investigation, Diamond ultimately removed the "three minor children" based on their own statements. Second, in the following trial testimony, Diamond testified that while Half-Sister 1's comments triggered her investigation, Half-Sister 1's statements were not the basis for determining the harm to the three minor children and the lack of a safe family home. Diamond testified, in relevant part, as follows:

Q. [D]id you attempt to corroborate any of those statements before making the decision to take her into custody?

A. That information of [Half-Sister 1] was taken into account not as the only information but the [three minor] children, without me (sic) even knowing that I spoke to [Half-Sister 1], on their own, all three, corroborated with each other.

. . . .

Q. When was the last time that [Half-Sister 1] actually stepped in the family home, as far as you know?

A. Approximately six years ago.

Q. Wouldn't that be significant in your analysis into finding corroborative evidence?

A. Exactly. Exactly why I had to look at currently what the [three minor] children are saying. When I get a report, it could be erroneous, it could be totally false. I take the report but I have to go and see what's currently happening. So that's why I say it did not make or break my interview with the [three minor] children. The [three minor] children were the ones that were telling me what was happening at home currently and the [three minor] children had just been in that home that day

Third, the family court's denial of this motion does not reflect counsel's lack of competence as an attorney. Therefore, this challenge is without merit.

2.

Sufficiency of the Evidence

Father argues that the evidence is insufficient to satisfy the "preponderance of evidence" standard specified in HRS § 587-41(b).¹¹ Father states that

[i]f the above allegations of the [three minor children] are true these bruises should have been observed by the [three minor] children's public educators. Ten public school administrators and teachers testified on behalf of [F]ather that during all of the time that they knew the [three minor] children, they knew of no physical abuse and saw no physical abuse. Principal Glenn Kila knew the . . . family for 30 years and had not seen any abuse of the [three minor] children.

Did the children lie or exaggerate their "lickens"? [Jane Doe I] had lied about being sexually harassed by an Eric Okuda. [Jane Doe I's] diary contained no incident of being physically abused.

In other words, Father does not contend that the State's evidence is insufficient. He contends that the evidence he presented was sufficient to disprove the State's evidence. He argues that "[i]f the above allegations of the [three minor children] are true these bruises should have been observed by the [three minor] children's public educators." The trial court, in weighing the evidence, decided that, notwithstanding Father's evidence, the State satisfied its burden of proof. The record is sufficient to support that decision.

3.

FOF no. 45

Father challenges FOF no. 45 that "Mother, [F]ather and [G]randfather lack any appreciation of the serious risk of

¹¹ HRS § 587-41(b)(1993) states that "[i]n an adjudication hearing, a determination that the child has been harmed or is subject to threatened harm shall be based on a preponderance of the evidence."

physical or psychological injury to [Jane Doe I] inherent in making her massage her [G]randfather's buttocks." Father argues that "there is no evidence in the record by any expert in psychology or psychiatry that [Jane Doe I's] massaging of [Grandfather's] buttocks would or could cause psychological harm to [Jane Doe I]." We agree. At trial, when Dr. Loomis was asked what incidents could have caused post-traumatic stress disorder in Jane Doe I, he responded that he was "not positive what caused it in [Jane Doe I] but I believe it was probably connected to the physical abuse and the emotional abuse." Dr. Loomis testified that when Jane Doe I was asked about the "massaging", she stated that "she felt uncomfortable but she nonetheless was expected to do it." Dr. Loomis stated that given Jane Doe I's discomfort with the massages, "she shouldn't be doing [the massaging]." In light of HFCR Rule 61 quoted above, the question is whether this error affected Father's substantial rights. The answer is no. The other FsOF and the evidence that Jane Doe I "shouldn't be doing [the massaging]" cause us to conclude that clearly erroneous FOF no. 45 "does not affect the substantial rights" of Father.

4.

Removal of Grandfather

Father contends that "[t]he lower court could have preserved the family home for the children by ordering the

removal of [Grandfather]." We note the following relevant considerations: (1) Father neither suggested this option in the family court nor argued it in his opening or reply briefs. (2) Diamond's March 6, 2002 Safe Family Home Report states, in relevant part, that "[Grandfather] and [Grandmother] own the home, and the family has lived with them for many years. [Father] and [Mother] have put money into the home and are invested in remaining." (3) In her March 18, 2002 Safe Family Home Report, Diamond reported, in relevant part, that "[t]here is concern that even if [Father and Mother] move out of the home [Grandfather] will still have an emotional and psychological hold on them. As is evident by speaking to many other people who know this family, there is much fear and intimidation placed on people who do not even live near the [family] much less have any daily contact with them."

It is the general rule that an appellate court should only reverse a judgment of a trial court on the legal theory presented by the appellant in the trial court. However, we have also said that the rule is not inflexible and that an appellate court may deviate and hear new legal arguments when justice requires . . . in the exercise of this discretion an appellate court should determine whether the consideration of the issue requires additional facts, whether the resolution of the question will affect the integrity of the findings of fact of the trial court; and whether the question is of great public import.

Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973). In light of the record, we decline to consider this point because "the consideration of the issue requires additional facts[.]" On this point, we decline to rely on FsOF 50, 51, 52, 53, and COL 4.

CONCLUSION

Accordingly, we affirm (1) the May 22, 2002 Orders Concerning Child Protective Act and (2) the July 10, 2002 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, June 14, 2004.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge