NOT FOR PUBLICATION

NO. 26441

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MITCHELL D. WAITE, Petitioner-Appellant, v.
DIANE BUTTON, Respondent-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-UCCJ NO. 02-1-0026)

MEMORANDUM OPINION
(By: Burns, C.J., Foley and Nakamura, JJ.)

In a post-judgment proceeding between the biological parents of a minor child regarding the custody of the child, Petitioner-Appellant Mitchell D. Waite (Father) appeals from the Family Court of the First Circuit's (1) Order Re Custody on Petitioner's Motion for Custody Pursuant to the UCCJA Filed on June 6, 2002,[1/] filed on February 9, 2004; and (2) Order re: Respondent's Motion for Order Awarding Her Sole Legal and Sole Physical Custody of the Minor Child, filed on March 2, 2004.[2/] We affirm.

1/ Effective January 1, 2003, Act 124, Session Laws of Hawaii 2002, repeals the Uniform Child Custody Jurisdiction Act (UCCJA), Hawaii Revised Statutes (HRS) Chapter 583, and replaces it with the Uniform Child-Custody Jurisdiction and Enforcement Act, HRS Chapter 583A. Act 124, however, states in relevant part as follows:

> SECTION 5. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before the effective date of this Act. A motion or other request for relief made in a child-custody determination which was commenced before the effective date of this chapter shall be governed by the law in effect at the time the motion or other request was made.

2/ Except where otherwise expressly noted, Judge Karen M. Radius presided.

BACKGROUND

Father and Respondent-Appellee Diane Button (Mother) are the biological parents of a daughter (Child), born on October 18, 1996. Prior to Child's birth, Mother met and began dating her current husband, Mark Button (Stepfather). Mother and Stepfather were married on March 1, 1997. On December 22, 1997, a Stipulation for Judgment and Judgment was filed in California at the Marin County Superior Court. The Judgment stated, in relevant part, as follows:

> 1. The parties acknowledge that [Father] is an important figure in [Child's] life. They have agreed that [Child's] residence will be moved to Hawaii and that regardless of the location of her primary residence they agree that all parties will cooperate to insure that [Child] has a meaningful relationship with her father . . . .
>
> 2. The parties shall share joint legal custody of their minor child . . . .
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> 3. [Mother] shall have primary physical custody of [Child] and [Child's] primary residence shall be with [Mother]. [Child] shall be with [Father] as provided for in this agreement, and in subsequent Special Master and/or court orders. At all other times [Child] shall be with [Mother].
>
> 4. [Mother] may move with [Child] to Hawaii on October 1, 1997 and may establish [Child's] residence in Hawaii. The "home state" of [Child] for purposes of the UCCJA [Uniform Child Custody Jurisdiction Act] and PKPA [Parental Kidnapping Prevention Act] is and shall remain California unless neither party continues to reside in California.
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> . . . .
>
> 8. Prior to [Child's] move to Hawaii the parties shall consult with each other and with Dr. Oklan to develop a schedule for [Child's] time with [Father] after her move to Hawaii.
>
> 9. During the first year subsequent to [Child's] move to Hawaii [Child] will return to California to be with [Father] eight times and [Father] will be with [Child] four times in Hawaii. During the second year after her move [Child] will return to California six times to be with [Father] and [Father] will be with [Child] six times in Hawaii. During the third year after her move [Child] will return to California four times to be with [Father] and [Father] will be with [Child] eight times in Hawaii.

> [Child's] time with [Father] in California shall include five consecutive non-traveling days including a weekend. The exact dates and hours of [Child's] time with [Father] shall be decided by mutual agreement or by the Special Master.

In October 2001, Hawai'i's Child Protective Services (CPS) initiated an investigation of allegations of Father's sexual abuse of Child. Michelle Shaner, an investigative social worker for CPS, conducted the investigation. As part of her investigation, Ms. Shaner arranged for a forensic interview of Child at the Children's Justice Center. This interview was conducted by Dr. Victoria Cynn, Ph.D., on October 25, 2001. Ms. Shaner also arranged for a medical examination of Child, which was conducted on November 5, 2001 by Dr. Victoria Schneider, M.D., at Kapiolani Medical Center's Sex Abuse Treatment Center. Upon completion of the investigation, CPS instructed Mother to seek a temporary restraining order (TRO) on behalf of Child against Father. The family court subsequently granted a TRO, barring Father from having contact with Child.

On March 5, 2002, while denying the allegations of sexual abuse, Father stipulated to the entry of an Order for Protection, pursuant to Hawaii Revised Statutes (HRS) Chapter 586.[3/]

On June 6, 2002, Father commenced this proceeding under UCCJ No. 02-1-0026 by filing a Motion for Custody Pursuant to the

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[3/] Judge R. Mark Browning presided.

Uniform Child Custody Jurisdiction Act. In his motion, Father sought the following:

> a. Sole legal and physical custody of [Child] to be awarded to [Father] herein[;]
>
> b. a full custody evaluation be conducted according to the standards of the American Psychological Association and Hawaii law[; and]
>
> c. the custody evaluation address allegations of sex abuse, making, encouraging or supporting knowingly false allegations of sex abuse, as well as allegations of the alienation by [Mother] of [Child] from [Father].

Trial was held on November 18 and 19, 2002, and written closing arguments were filed on December 3, 2002. On July 7, 2003, after entering the April 7, 2003 Decision and Order, the family court entered Findings of Fact and Conclusions of Law (FsOF and CsOL). These FsOF and CsOL state, in relevant part, as follows:

> II. FINDINGS OF FACT
>
> 1. The child [Child] was born on October 18, 1996 in San Francisco, California.
>
> 2. [Mother], (hereinafter Mother) and [Father] (hereinafter Father) were never married. They did live together in California prior to [Child's] birth.
>
> 3. Mother and Father ceased their intimate relationship in the spring of 1996 and no longer lived together by the time of [Child's] birth.
>
> 4. Father entered into a child support agreement with Mother just prior to [Child's] birth. Said agreement also provided that Father would have continuing contact with [Child] and share in joint legal custody and have custodial time with [Child]. The agreement stated that if the parties disagreed as to custodial time, they would mediate prior to litigating the matter.
>
> 5. Father voluntarily signed [Child's] birth certificate.
>
> 6. Mother had met and began dating her current husband Mark Button (hereinafter [Stepfather]) prior to [Child's] birth. She married [Stepfather] on March 1, 1997.

7. Mother and Father have been engaged in protracted litigation in California to set custody and visitation schedules. The litigation commenced as early as February 1997, when [Child] was only 4 months old.

8. Despite ongoing litigation, Mother and Father have been able to reach agreements on many occasions regarding custody and visitation with the assistance of child psychologists and family law professionals.

9. The parties had agreed for Mother to move to Hawaii and Father to have contact in Hawaii with [Child] several times a year.

10. [Child] attended . . . Preschool in Haleiwa.

11. [Child] started Kindergarten . . . on July 26, 2001. Mother informed the school on the registration form that [Father] is the child's biological father and [Stepfather] is the stepfather.

12. [Child] is a bright child, scoring high on standardized tests and receiving an excellent report card with superior marks. Mother and Father and the teachers agree that [Child] is bright.

13. Father was to come to Hawaii and have several visits over a 7 -8 [sic] day period in August, 2001 and next in October, 2001. The schedule included some day visits, an overnight and eventually a day from 10 a.m. until 7 p.m. on the next day.

14. In August, 2001 Father visited. He had rented a two bedroom home in Hawaii and [Child] and Father visited as scheduled.

15. While [Child] was not upset on the first day Father picked her up from school on the August, 2001 visit, she reacted emotionally to Father's visit and had a difficult time in school as well as wet the bed at Mother's home.

16. Mrs. Jennifer Brough, the kindergarten teacher, reported difficulties with [Child's] behavior while she was in school in August during Father's visit and that [Child] had expressed a desire several times not to go to the visits. [Child] told Mrs. Brough that she would get candy or ice cream if she sleeps with [Father].

17. [Father] visited the school in August 2001 and videotaped the class. [Child] did not seem her normal bubbly self.

18. Mrs. Brough talked to the school principal and also told Mother in August that something was different about [Child]. She did not suggest to Mother that [Child] was sexually abused.

19. Mrs. Brough also found [Child] anxious and not wanting to go [to] the upcoming October visits prior to those visits occurring.

20. Father's next scheduled visit was for September 30 to

October 7, 2001. During this time [Child] was on a school break. [Child] again had difficulty while at home and with friends during the days when Father was in Hawaii.

21. After the last Saturday morning to Sunday evening visit October 6 - 7, 2001, [Child] came home tired and went to bed at 7:30 pm.

22. [Child] woke after 9:00 p.m. crying that her bottom hurt and asking for warm water or medicine. She wet the bed that night. She told [Stepfather] that [Father] had touched her and it hurt.

23. On October 12, 2001 [Child] went for her regular check up. When her pediatrician Dr. Fujimoto was doing the check up and telling her not to let anyone touch her private area, [Child] told her pediatrician that "[Father] touches me and it hurts." "[Father] touched me in the private area." "He touched me pretty hard. When I go to the bathroom he touches there kind of hard." She repeated this several times. [Child's] physical examination was normal.

24. Dr. Fujimoto reported these statements to Child Protective Services (CPS). Dr. Fujimoto made no physical findings of abuse and did not confirm or unconfirm abuse.

25. When Dr. Fujimoto spoke with Father about the statement he did not deny touching [Child], but stated "we are going to get this guy."

26. CPS investigated the allegations by interviewing Mother and [Stepfather], Father, the child's pediatrician and school teachers, arranging for a taped interview of [Child] at the Children's Justice Center and arranging for a visit to Dr. Victoria Schneider at Kapiolani Medical Center.

27. At the appointment with Dr. Schneider, the child repeated the statement to the effect that [Father] touches her down there and it hurts. Dr. Schneider did not ask further questions. She did not find any physical evidence of sex abuse.

28. Failure to find physical evidence of sex abuse is not uncommon even where there is proven or admitted sexual abuse.

29. [Child] was interviewed at the Children's Justice Center (formerly Children's Advocacy Center) by Dr. Virginia Cynn, a psychologist.

30. [Child] disclosed that "[Father] touched me there (pointing to her vaginal area) and it hurt."

31. The interviewer, Dr. Cynn, never obtained a clear statement as to vaginal penetration or touching or penetration of the anus. Dr. Cynn failed to obtain details as to time, place and other matters.

32. Ms. Shaner, the CPS investigative worker confirmed sexual abuse including touching and vaginal and anal penetration based upon the Children's Justice Center interview and her investigation.

33. CPS instructed Mother to obtain a restraining order and obtain counseling for the child. CPS recommended Dr. Dan Kehoe, a psychologist who practices in the area where Mother lives. CPS did not petition the court under the Child Protective Act, HRS Chapter 587 because CPS found Mother to be protective.

34. Mother obtained a restraining order in Hawaii. Father agreed to the restraining order pending a hearing which he hoped would be in California where previous litigation had occurred.

35. The California court declined to exercise its continuing jurisdiction believing that the Hawaii court had access to the CPS personnel, school and professionals who [Child] had seen.

36. Trial was set to make a finding of whether or not Father had sexually abused the child.

37. Father has consistently denied abuse of the child, believing that her disclosures are at best a product of a faulty CPS system or at worst a plan by Mother and stepfather to deny him access to the child.

38. Father has obtained a psychosexual examination by Dr. Jack Annon who found that Father was not likely to be a danger to [Child].

39. Dr. Thomas Merrill opined as to the weaknesses in the CPS and Children's Justice Center investigation and the need to review the dynamics of this family structure as well as the he [sic] child's current status.

40. Based upon the evidence presented, the Court finds based upon a preponderance of the evidence that Father inappropriately touched [Child]. This court does not find sufficient evidence of vaginal or anal penetration of [Child].

41. Father had a relationship with [Child] prior to October, 2001. He had visited with her and sought continued visitation and communication. He had continued to support [Child] and to actively pursue visitation rights in every way possible. He has not violated the Restraining Order prohibiting contact.

42. The Court appointed Dr. Craig Robinson, PhD. [sic] to serve as [Child's] Guardian [A]d Litem.

43. Dr. Robinson shall have full access to the transcripts and all evidence presented in this trial and shall have the opportunity to speak to the parties and such others as he believes necessary. Dr. Robinson shall prepare a written report to the court within 90 days of this order recommending a plan for appropriate treatment for [Child] and for Father as well as to suggest appropriate treatment resources. Dr. Robinson shall further propose a plan to determine whether reunification with Father is appropriate and how that shall occur.

44. Pending Dr. Robinson's report and further order of the Court, the Restraining Order shall remain in full force and effect.

III. CONCLUSIONS OF LAW

1. The burden of proof in this case is preponderance of the evidence.

2. Respondent Mother has met the burden of proof by preponderance of the evidence that Father has sexually abused [Child] by inappropriate touching.

3. It is in the child's best interest that Craig H. Robinson, PhD. [sic] be appointed to serve as [Child's] Guardian Ad Litem to protect and promote the needs and interest of [Child].

4. It is in the child's best interest that Dr. Robinson as Guardian ad [sic] Litem prepare a written report for the Court within 90 days of the filing of the April 7, 2003 Order recommending an appropriate treatment plan for [Child] and for Father as well as suggest appropriate treatment resources.

5. It is in the child's best interest that Dr. Robinson, as Guardian Ad Litem report to the Court on whether reunification between Father and [Child] is appropriate and how that shall occur.

6. It is in the child's best interest that pending the submission of Dr. Robinson's report and further Order of the Court, the March 5, 2002 Order for Protection issued by Judge Browning shall remain in full force and effect.

7. To the extent that any of the Findings of Fact are Conclusions of Law, they shall be so considered. To the extent that any of the Conclusions of Law are Findings of Fact, they shall be so considered.

On July 11, 2003, Dr. Robinson submitted his Report of the Custody Guardian Ad Litem. In his report, Dr. Robinson recommended that Father enter a sex offender treatment program. While still denying the allegations of sexual abuse, Father sought permission to commence treatment by filing his Motion for Authorization to Commence Treatment as Recommended by the Custody Guardian Ad Litem on July 29, 2003. On September 3, 2003, following a hearing on August 5, 2003, the family court entered an order granting Father's motion for authorization to commence

treatment.[4/] Father successfully completed the treatment program in February 2004.[5/]

On December 19, 2003, Mother filed a motion for an order awarding her sole legal and physical custody of Child. On

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[4/] In the Report of the Custody Guardian Ad Litem, Dr. Craig H. Robinson, Ph.D., recommended that Petitioner-Appellant Mitchell D. Waite (Father) participate in the Sharper Future sex offender treatment program located in San Francisco, California. Respondent-Appellee Diane Button (Mother) opposed the granting of an order authorizing Father to commence treatment. In her response to Father's motion, Mother insisted that Father "be required to participate in a sex offender treatment program where he is required to admit and acknowledge that he sexually harmed [Child]." Dr. Robinson disagreed. In his second report as Custody Guardian Ad Litem, Dr. Robinson states,

> [T]here is no reason to believe that [Father] is going to ever acknowledge wrong doing for something he asserts never happened. From my perspective, research suggests denial of wrongdoing has virtually no predictability regarding successful treatment outcome. Therefore, as long as [Father] participated in the program and did what he was required to do, I am satisfied.

Alternatively, Mother argued that Father's treatment should be subject to the following conditions: (1) Dr. Charles Flinton, Ph.D., the program director of the Sharper Future program, be provided with a written copy of Mother's concerns; (2) Dr. Flinton be required to conduct a completely new psychosexual assessment of Father, and not be allowed to rely on the previous assessment conducted by Dr. Jack S. Annon, Ph.D.; (3) Dr. Annon and Dr. Thomas S. Merrill, Ph.D., be prohibited from contacting Dr. Flinton or the Sharper Future program; and (4) the confidentiality of Father's records at the Sharper Future program be waived. Ultimately, the family court granted Father's motion for authorization to commence treatment without imposing the conditions suggested by Mother.

[5/] A letter written by Dr. Flinton, regarding Father's participation in the Sharper Future program, states, in relevant part, as follows:

> [Father] does not exhibit a sexual interest in children, nor is there any evidence to suggest that he holds beliefs or exhibits thinking patterns supportive of child molestation. [Father] denied any sexual molestation on a polygraph exploring the sexual molestation of his daughter. This denial was supported by an indication of "no deception" on the polygraph. He also scored in the low risk range for reoffense on measures comparing him to other people who have been accused of sex offenses . . . .
>
> . . . .
>
> At the present time, [Father] appears to be at low risk of sexually offending against children. He has met the requirements of this program and we currently do not see a need for sex offender treatment.

February 9, 2004, the family court entered an order denying Father's June 6, 2002 motion for sole legal and physical custody of Child. On March 2, 2004, the family court entered an order regarding Mother's motion for sole legal and physical custody of Child stating, in relevant part, as follows:

> 1. As to the request for physical custody of [Child], an order has already been entered denying [Father's] prior request for physical custody and granting physical custody to [Mother].
>
> 2. As to [Mother's] request for an order of sole legal custody, nunc pro tunc to April 8, 2003 the court denies this request.

Father filed a notice of appeal on March 9, 2004.[6/] The appeal was assigned to this court on November 17, 2004.

POINTS ON APPEAL

In the amended opening brief, Father contends that FsOF nos. 23, 32, and 40 are clearly erroneous, CsOL nos. 2 and 6 are wrong, and the family court reversibly erred when it precluded

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[6/] On March 12, 2004, upon learning that Mother and her husband, Mark Button (Stepfather), had "closed" on a house in Tennessee and planned to relocate there with Child on March 16, 2004, Father filed a Motion for Order Prohibiting Removal of Minor Child from the City and County of Honolulu. On April 7, 2004, following a hearing on March 15, 2004, the family court entered an order denying Father's motion, stating, in relevant part, as follows:

> 1. [Father's] Motion. [Father's] March 12, 2004 Motion is hereby denied. The parties' minor child, [Child], born on October 18, 1996, shall be allowed to move from the City and County of Honolulu, State of Hawai'i, with [Mother] as currently scheduled.
>
> . . . .
>
> 3. Jurisdiction. Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, this Court shall retain jurisdiction over this matter until further order of the Court.
>
> 4. Prior Orders. All prior orders not inconsistent with this Order shall remain in full force and effect.

counsel for Father from questioning Dr. Jack S. Annon, Ph.D., regarding the reasons for his opinion that the videotape of the October 25, 2001, forensic interview by Dr. Cynn was "inconclusive".

STANDARDS OF REVIEW

A. Findings of Fact and Conclusions of Law

> The family court's [findings of fact] are reviewed on appeal under 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 nonetheless left with a definite and firm conviction that a mistake has been made. "Substantial evidence" is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In re Doe, 101 Hawai'i 220, 227, 65 P.3d 167, 174 (2003) (internal quotation marks, citations, and ellipsis omitted).

"If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983).

The family court's conclusions of law are reviewed *de novo* under the right/wrong standard. Doe, 101 Hawai'i at 227, 65 P.3d at 174. Conclusions of law, "consequently, are not binding upon an appellate court and are freely reviewable for their correctness." Id. (internal quotation marks, citation, and brackets omitted).

B. Admission of Opinion Evidence (Expert Testimony)

"Generally, the decision whether to admit expert testimony rests in the discretion of the trial court. To the extent that the trial court's decision is dependant upon interpretation of court rules, such interpretation is a question of law, which this court reviews de novo." Barcai v. Betwee, 98 Hawai'i 470, 479, 50 P.3d 946, 955 (2002) (citations omitted).

DISCUSSION

A. Findings of Fact and Conclusions of Law

In the amended opening brief, Father challenges FsOF nos. 23, 32, and 40, and CsOL 2 and 6. Father argues that (1) the October 25, 2001 forensic interview did not establish that Child had been sexually abused by Father, and the evidence adduced at trial also did not support such a finding; and (2) the collateral contacts made by Ms. Shaner during the CPS investigation did not establish that Child had been sexually abused by Father.

FOF no. 23 states:

> On October 12, 2001 [Child] went for her regular check up. When her pediatrician Dr. Fujimoto was doing the check up and telling her not to let anyone touch her private area, [Child] told her pediatrician that "[Father] touches me and it hurts." "[Father] touched me in the private area." "He touched me pretty hard. When I go to the bathroom he touches there kind of hard." She repeated this several times. [Child's] physical examination was normal.

Father contends that FOF no. 23 is clearly erroneous because it misstates and misquotes Dr. Fujimoto's testimony at trial.

Father correctly states that, at trial, Dr. Fujimoto only testified that Child said "[Father] touched me there and it hurt." Dr. Fujimoto did not testify as to the other statements mentioned in FOF no. 23. However, Dr. Fujimoto's handwritten notes and typed addendum of the physical examination were entered into evidence at trial. In the addendum, Dr. Fujimoto noted, in relevant part, as follows:

> As I was examining the genitalia area, I typically tell all of my young patients that no one is supposed to look or touch their private area and that they are also not supposed to look or touch anyone else's private area. While I was telling [Child] this, she told me, "[Father] touched me in the private area". "He touched me pretty hard. When I go to the bathroom he touches there kind of hard".

As there is substantial evidence in the record to support FOF no. 23, we conclude that it is not clearly erroneous.

FOF no. 32 states, "Ms. Shaner, the CPS investigative worker confirmed sexual abuse including touching and vaginal and anal penetration based upon the Children's Justice Center interview and her investigation." Father contends that this finding is clearly erroneous considering that (1) Ms. Shaner testified otherwise at trial, and (2) the family court also found that "[t]his court does not find sufficient evidence of vaginal or anal penetration of [Child]."

It appears that FOF no. 32 is based on the following evidence: (A) an Investigation Summary written by Ms. Shaner which states, in relevant part, "Allegations of sexual abuse/threat of abuse of [Child] by her biological father

[Father] are confirmed"; (B) Ms. Shaner's letter, dated November 30, 2001, to Father's attorney wherein she states, "Due to the information obtained during this investigation, the sexual harm of [Child] by her biological father [Father] has been confirmed[,]" and summarizes the reasons for her conclusion:

> [Child] has been consistent in stating to three professionals that [Father] sexually touched her. In the [Child Justice Center] videotape interview, [Child] used anatomical drawings to show that [Father] touched her vaginal area with his penis and touched her buttocks with his hand. She said "it hurts" when [Father's] penis touched her anus and her vagina. [Child] said "my family doesn't touch my bottom, just [Father]." She has acting out behaviors at home and in the school setting when [Father] visits.

At trial, Ms. Shaner testified as follows regarding the letter:

> [Counsel for Mother] And does this letter contain your conclusions and your recommendations?
>
> [Ms. Shaner] Yes.
>
> . . . .
>
> [Counsel for Mother] In the paragraph that starts on the bottom of the page and continues on to the top of the next page, you use the word "touched" as your conclusion. Did you conclude that [Father] had penetrated [Child] in any way?
>
> [Ms. Shaner] I had concern that he penetrated her because she -- in the videotape she says "in," and then [Dr. Cynn] went through, you know, "do you understand what 'in' is?" Um, I believe I had concerns that there may have been partial, which -- how much I don't know.
>
> [Counsel for Mother] But you didn't use the word "penetration," you used the word "touching."
>
> [Ms. Shaner] Yes. That's, I guess, a safer word. There was some contact.
>
> [Counsel for Mother] My question is did you conclude that there was penetration, or just touching?
>
> [Ms. Shaner] I'm -- I believe I concluded penetration.
>
> [Counsel for Mother] Even though it says "touching" in your report?
>
> [Ms. Shaner] Yes, yes.

Thus, FOF no. 32 accurately states Ms. Shaner's conclusion. FOF no. 31, however, notes that "[t]he interviewer, Dr. Cynn, never obtained a clear statement as to vaginal penetration or touching or penetration of the anus. Dr. Cynn failed to obtain details as to time, place and other matters." Moreover, in FOF no. 40, the court did "not find sufficient evidence of vaginal or anal penetration of [Child]." Therefore, FOF no. 32 is not a finding of fact. It is a statement of evidence presented, part of which the court found to be a fact and part of which the court did not find to be a fact.[7/]

Father contends that FOF no. 40 is clearly erroneous. "It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (internal quotation marks, citations, brackets, and ellipsis omitted). The question is whether the record contains "substantial evidence" in support of the family court's finding of fact.

At trial, the evidence presented in support of the allegations against Father consisted largely of (1) testimony that Child had told her pediatrician Dr. Fujimoto that Father had touched her in her "private area" and "it hurt[,]" and that she

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[7/] We do not understand the concern whether or not "penetration" occurred. We also do not understand why Finding of Fact (FOF) no. 40 finds "that Father inappropriately touched [Child]" without finding exactly how Father did so.

later made similar statements to Dr. Schneider during a medical examination, and to Dr. Cynn during a forensic interview; and (2) testimony regarding behavioral problems Child exhibited at school and at home, during times when Father was visiting from the mainland. In response to the allegations against him, Father presented evidence that consisted largely of (1) the testimony of Dr. Jack S. Annon, who testified regarding a psychosexual assessment that he had conducted of Father, and his conclusion that Father did not pose a foreseeable risk of sexual harm to Child;[8/] (2) the testimony of Dr. Thomas S. Merrill, Ph.D., who testified as to his opinion that the CPS investigation was incomplete and biased, and the reasons upon which he based that opinion;[9/] and (3) Father's own testimony regarding his attempts

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8/ Dr. Annon's psychosexual assessment of Father included a polygraph examination conducted by Ed Clarke, a forensic psychophysiologist.

9/ In his pre-trial report, Dr. Merrill states his opinion regarding the investigation conducted by Child Protective Services (CPS):

> Clearly the investigation is incomplete. To find a parent guilty of sexually abusing a child and subsequently terminate the relationship between that parent and child is most serious and should occur only after an exhaustive investigation/evaluation of all data and historical issues, including all antecedents to the behaviors in question. To not do so clearly demonstrates a confirmatory bias, with the outcome predictable.
>
> . . . .
>
> My opinion after reviewing the data is as follows:
>
> 1. The finding of harm by CPS is based on a faulty interview and incomplete data.
>
> 2. A thorough review of the data available does not support the charge of sex abuse or the finding of threat of harm.

At trial, upon examination by Father's counsel, Dr. Merrill provided the following testimony:

to maintain a relationship with Child.

As stated earlier, one of the major components of the evidence presented by Mother was the statements made by Child to Dr. Fujimoto, Dr. Schneider, and Dr. Cynn.[10/]

The other major component of the evidence presented in

> [Counsel for Father]: You said in your report that it is you opinion that the [CPS] investigation was inadequate, what is that opinion based upon?
>
> [Dr. Merrill]: It's based on the review of the videotaped interview and it's based on the totality of the evaluation that they did. It's based on their acknowledge [sic] not having enough time to complete it. That if they had time they would certainly like to get to it so they can get to the truth, if they just could.
>
> It's based on absolute determination that once a decision is made, there is no room for alternative hypotheses, which Ms. Shaner stated. And that one of the things that the manual says you're to do is to consider all alternative hypotheses. Uh, that you're to determine the "where," "when," "how," of the issues and of those, the only thing that was determined was that [Child] stated that she had been abused. So that's the "what." The other three indices have not been determined.
>
> There's no -- no complete evaluation -- that's systemic evaluation, which in the case of contested and ongoing difficulties between parents and visitation is required. It's the standard of care. You cannot make the determination of the harm without that.
>
> [Counsel for Father]: And you refer to "alternative hypotheses." For example, would you want to examine alternative hypotheses for [Child] having behavioral difficulties [during] the visitation times with [Father]?
>
> [Dr. Merrill]: Yes. The protocol is to rule in and/or rule out, and you have to establish the possible hypotheses and then take -- they only had one hypothesis, and that was that [Child] . . . had been abused by [Father] and then it looked like the attempts were to rule in.

[10/] Mother also notes that Child made a similar statement to Dr. Dan Kehoe, Ph.D., a psychologist to whom Child had been referred by CPS. However, Dr. Kehoe did not begin treating Child until after the CPS investigation had concluded that the allegations of sexual harm had been "confirmed". Thus, Dr. Kehoe was not one of the collateral contacts made by Michelle Shaner, an investigative social worker for CPS, during her investigation. Further, Dr. Kehoe testified that he did not treat Child for sexual abuse, but instead treated her for a sleeping disorder. He also testified that he relied upon the comments and recommendations made by CPS in forming his opinion of whether the allegations of sexual abuse were true.

support of the allegations against Father was the testimony adduced at trial regarding behavioral problems exhibited by Child during times when Father was visiting from the continental United States. At trial, Jennifer Brough, Child's kindergarten teacher, testified that she observed that, during the times of Father's visits, Child's demeanor changed from "her normal bubbly self" to "obstinate" and "withdrawn." Ms. Brough also testified that Child expressed reluctance to going home with Father. Ms. Brough testified that there were several instances when Child became aggressive toward other children and that she later expressed "no remorse" for her behavior. According to Ms. Brough, Child would typically return to "her normal bubbly self" "about a week to a week and a half" after Father returned to the mainland. Mother and Stepfather also testified regarding Child's behavioral problems. Mother and Stepfather testified regarding a bed-wetting incident that occurred during a period when Father was visiting from the mainland. Mother also testified that Child displayed aggressive behavior toward her siblings and other children. When questioned about Child's behavior, Ms. Shaner testified that while "acting-out behaviors" may be corroborative of allegations of sexual harm, they may also have other causes. Ms. Shaner also testified that while Child's reluctance to go home with Father might indicate sexual harm, it could also represent "normal behavior".

Essentially, the evidence in support of the allegations against Father is largely comprised of Child's statements, as related to the three doctors, supported by testimony regarding the behavioral problems exhibited by Child during times when Father was visiting. While such evidence is not as "overwhelming" as Mother contends, it is substantial evidence supporting FOF no. 40. Therefore, FOF no. 40 is not clearly erroneous.

COL no. 2 states, "Respondent Mother has met the burden of proof by preponderance of the evidence that Father has sexually abused [Child] by inappropriate touching." FOF no. 40 not being clearly erroneous, COL no. 2 is not wrong. See Maria v. Freitas, 73 Haw. 266, 271, 832 P.2d 259,262-63 (1992) (conclusion of law supported by the trial court's findings of fact and reflects an application of the correct rule of law will not be overturned).

COL no. 6 states, "It is in the child's best interest that pending the submission of Dr. Robinson's report and further Order of the Court, the March 5, 2002 Order for Protection issued by Judge Browning shall remain in full force and effect." In light of FOF no. 40, as well as unchallenged FsOF nos. 42-44, COL 6 is right.

B. Admission of Expert Testimony

At trial, Dr. Jack S. Annon testified on behalf of Father. Dr. Annon testified with regard to a psychosexual assessment that he had conducted of Father and his conclusion that Father did not pose a foreseeable risk of sexual harm to Child. Counsel for Father also inquired as to Dr. Annon's opinion regarding the validity of the October 25, 2001 forensic interview. Upon objection by counsel for Mother, the family court prohibited Dr. Annon from testifying on this issue, on the grounds that the reasons supporting his conclusion regarding the forensic interview were not contained in the pre-trial report he submitted to the court.[11/] On appeal, Father contends that the family court erred by refusing to admit Dr. Annon's testimony regarding the reasons for his conclusion that the October 25, 2001 forensic interview was inconclusive. Father argues that, under Rule 702, Hawaii Rules of Evidence (HRE), Chapter 626, HRS, Dr. Annon's testimony was admissible.[12/]

[11/] Dr. Annon's pre-trial report was admitted into evidence. Although, it does not reveal the reasoning behind his opinion, it does state his ultimate conclusion that the October 25, 2001 forensic interview was "inconclusive."

[12/] Rule 702, Hawaii Rules of Evidence (HRE), Chapter 626, HRS (2004) states, in relevant part, as follows:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

The Hawai'i Supreme Court has held that, in determining the admissibility of expert testimony, "the trial court must determine whether the expert's testimony is (1) relevant, and (2) reliable." Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co. Ltd., 100 Hawai'i 97, 117, 58 P.3d 608, 628 (2002); see also State v. Vliet, 95 Hawai'i 94, 106, 19 P.3d 42, 54 (2001).

At trial, after Dr. Annon's curriculum vitae was entered into evidence, the following colloquy occurred regarding Dr. Annon's qualifications to testify:

> [Counsel for Father]: . . . I'd like to have [Dr. Annon] qualified . . . as an expert in forensic psychology, clinical psychology, the assessment and treatment of sex offenders and victims.
>
> . . . .
>
> THE COURT: . . . .
>
> It's my understanding, Dr. Annon, you've been certified as an expert on [sic] a number of times in both Circuit Court and Family Court; is that right?
>
> [Dr. Annon]: That's correct, Your Honor.
>
> THE COURT: And what fields have you been certified in?
>
> . . . .
>
> [Dr. Annon]: Forensic psychology, clinical psychology, assessment and treatment of sexual offenders and their victims, eyewitness testimony, sanity evaluations, and some others.
>
> THE COURT: . . . .
>
> Okay. [Counsel for Mother], given the resume, unless you've got some specific voir dire or objection, the Court's gonna certify him in all three of those areas.
>
> [Counsel for Mother]: That's fine, Your Honor.
>
> THE COURT: Okay. Thank you. You're so certified, Doctor.

Counsel for Father also gave the following offer of proof regarding Dr. Annon's proposed testimony:

> [Counsel for Father]: [Dr. Annon] would testify that based upon the quality of the interview itself that it was . . . impossible to draw a conclusion based upon the child's statements that [Father] . . . sexually harmed [Child], and he would testify that . . . the detail is very much an important part of an interview.
>
> That he would testify that [Dr. Cynn] doesn't follow protocol and that she sets the tone that it's a play area. That . . . she didn't establish truth-lie.
>
> That she didn't practice in understanding that she said to the child, "if you don't get it," -- "if you don't understand, correct me," but it's important to practice with a five-year old to know that they know how to correct an adult.
>
> That he would testify that the interview is inconclusive because [Child] took over that interview, meaning she had control of the interview. That . . . she was slipping quite easily between reality and fantasy and that it was very important to keep her in reality and that [Dr. Cynn] let her go back and forth . . . between the two.
>
> He would testify that in this interview that it is important to let the child lead but that in this interview the child was not just leading, she was taking over and not paying attention to the interview.
>
> That he would testify that follow-up questions were long and that it was clear that [Child] was not concentrating very well on the follow-up questions.
>
> And . . . he would testify that there was a very noticeable lack of follow-up questions in regard to touching the penis of . . . [Stepfather] -- that . . . she didn't come back to that until much later.
>
> And he would testify that the demeanor of [Dr. Cynn] was such that she was shaking her head and nodding yes and no, when that -- oftentimes that kind of demeanor and expression causes a child to want to say the answer that the interviewer is leading them to.

Based on the foregoing, it seems clear that Dr. Annon's testimony would have been relevant and reliable with regard to the validity of the forensic interview. Therefore, in accordance with HRE Rule 702, his testimony would have been admissible. However, in accordance with HRE Rules 611 and 403, it is within

the family court's discretion to control the presentation of testimony and evidence at trial.[13/] In a memorandum entitled "First Circuit Domestic Division Procedures and Policies (Effective 1/1/98)", dated November 12, 1997 (Policy Memorandum), the family court states its policy requiring the content of an expert witness' testimony to be presented to the court in a written pre-trial report:

> 4. Pursuant to Rules 611 and 403 of the Hawai'i Rules of Evidence, the Court exercises discretion to control the mode and order of witnesses and presentation of evidence to ascertain the truth and move the trial in an expeditious fashion. Therefore, the following procedures are usually followed:
>
> . . . .
>
> c. Direct examination of expert witnesses must be contained in the written report submitted in accordance with the Pretrial Order. The report and curriculum vitae will be received in evidence provided the expert is present in Court for cross-examination or cross-examination is waived. Limited questions on direct may be permitted to clarify the report, but not to add significant content not contained in the written report.

See 2000 Hawai'i Divorce Manual, volume 2, section 19 at 179.

[13/] HRE Rule 611 (2004) states, in relevant part, as follows:

> **Mode and order of interrogation and presentation.** (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

HRE Rule 403 (2004) states, in relevant part, as follows:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This Policy Memorandum is not a part of the relevant Hawai'i Family Court Rules (HFCR). It is a family court policy and procedure. We note, however, that HFCR Rule 83 (2004) states, in relevant part, as follows:

> The board of family court judges may recommend, for adoption by the supreme court, from time to time, rules of court governing practices and procedure in the family courts and amendments of rules. . . . In all cases not provided for by rule, the family courts may regulate their practice in any manner not inconsistent with these rules.

As the family court's policy and procedure requiring the content of an expert witness' testimony to be contained in a written pre-trial report does not conflict with the existing rules of either the HFCR or the HRE, we conclude that it is within the family court's discretion to impose such a requirement. If the opposing party questions the qualifications, knowledge and/or credibility of the expert witness, the opposing party may press those questions during cross-examination of the expert witness at the trial and, under this procedure, will have pre-trial time to prepare for such cross-examination.

At trial, the family court sustained counsel for Mother's objection that the reasoning for Dr. Annon's conclusion regarding the validity of the forensic interview was not contained in his pre-trial report. Our review of the record confirms that, while Dr. Annon's pre-trial report clearly states his conclusion that the forensic interview was inconclusive, the reasons upon which he based that conclusion are absent. We

therefore hold that the family court properly excluded that portion of his proffered testimony.

CONCLUSION

Accordingly, we affirm the Family Court of the First Circuit's (1) Decision and Order, filed on April 7, 2003; (2) Findings of Fact and Conclusions of Law, filed on July 7, 2003; (3) Order Re Custody on Petitioner's Motion for Custody Pursuant to the UCCJA filed on June 6, 2002, filed on February 9, 2004; and (4) Order re: Respondent's Motion for Order Awarding Her Sole Legal and Sole Physical Custody of the Minor Child, filed on March 2, 2004.

DATED: Honolulu, Hawai'i, October 25, 2005.

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