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Intermediate Court of Appeals
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NO. CAAP-15-0000562

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

FC-S NO. 14-00245
In the Interest of KB

AND

FC-S NO. 15-00004
In the Interest of SY

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 14-00245 & FC-S NO. 15-00004)

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Reifurth and Ginoza, JJ.)

Appellant Mother (Mother) appeals from the Orders Concerning Child Protective Act, filed on July 22, 2015 in the Family Court of the First Circuit (Family Court),¹ which awarded foster custody of her children, K.B. and S.Y. (collectively the children), to Appellee State of Hawaii'i, Department of Human Services (DHS).

On appeal, Mother contends the Family Court erred by finding that (1) her children's physical or psychological health or welfare was harmed or subject to threatened harm by her acts or omissions and (2) foster custody was necessary because she was not willing and able to provide a safe family home for the children, even with the assistance of a service plan. Mother argues that there was no clear and convincing evidence that she caused injury to her step-child, K.D., and also that a videotaped

¹ The Honorable Catherine H. Remigio presided.

interview of K.B. and J.D. (K.D.'s full sister) should have been submitted as the best evidence of what they said about the incident.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Mother's points of error as follows and affirm.

DHS petitioned the Family Court to invoke the court's jurisdiction and to award foster custody of K.B. and S.Y. to DHS based on an incident on December 13, 2014, in which their sibling K.D.,² then three and a half years old, suffered life-threatening head injuries. Mother contends that the injuries to K.D. were the result of K.D. falling from a couch. DHS contends that K.D.'s injuries were caused by Mother. At the time of the incident, Mother was at home with K.D., K.B. and J.D. Mother was pregnant with S.Y. at the time.

The Family Court found, *inter alia*, that there was clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, that the continued custody of K.B. and S.Y. by the parent or Indian custodian is likely to result in serious emotional or physical damage to K.B. and S.Y.,³

² At the time of the December 13, 2014 incident, Mother was married to P.D. K.B. is Mother's child from a previous relationship. J.D. and K.D. are P.D.'s children from a previous relationship. S.Y. is the son of Mother and P.D. Thus, K.D. is a step-sibling to K.B. and half-sibling to S.Y.

³ The Family Court applied, and no party contests the applicability of, the standard under 25 U.S.C. § 1912(e) for foster custody placement because K.B. and S.Y. are each an Indian Child as defined in 25 U.S.C. § 1903(4)(a). 25 U.S.C. § 1912(e) states:

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Further, 25 U.S.C. § 1912(d) states:

a finding which is supported by the testimony of qualified expert witnesses, that having K.B. and S.Y. continue in the family home would be contrary to the immediate welfare of the children, that K.B. and S.Y. "are children whose physical or psychological health or welfare is subject to imminent harm, has been harmed, or is subject to threatened harm by the acts or omissions" of Mother, that Mother was not presently willing and able to provide a safe family home, even with the assistance of a service plan, and that continued custody by Mother was likely to result in serious emotional or physical damage to the children.

In addressing a petition for foster custody, HRS § 587A-28(e) (Supp. 2015) provides in pertinent part:

§587A-28 Return hearing

. . . .

(e) If the court finds that the child's physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child's family, the court:

- (1) Shall enter a finding that the court has jurisdiction pursuant to section 587A-5;
- (2) Shall enter a finding regarding whether, before the child was placed in foster care, the department made reasonable efforts to prevent or eliminate the need to remove the child from the child's family home;
- (3) Shall enter orders:
 - (A) That the child be placed in foster custody if the court finds that the child's remaining in the family home is contrary to the welfare of the child and the child's parents are not willing and able to provide a safe family home for the child, even with the assistance of a service plan; or
 - (B) That the child be placed in family supervision if the court finds that the child's parents are willing and able to provide the child with a safe family home with the assistance of a service plan[.]

Drs. Sarah Rogers and Catherine Heinzen Jim both testified that a CT scan of K.D.'s brain showed a subdural

(d) Remedial services and rehabilitative programs;
preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

hematoma which they characterized as critical or life threatening. Dr. Jim stated that Mother told her that K.D. was injured from falling from a couch. Although Dr. Jim did not offer an opinion about how the injury occurred, she testified that she often sees children about the same age as K.D. with complaints of falling from a couch but none of them had injuries similar to K.D. and that the injuries were not consistent with similar falls in her experience.

Dr. Kayal Natarajan testified that K.D.'s fractured skull with bleeding on the brain was not consistent with a small child falling off a couch because only 1 in 2 million falls would result in such injury to a child like K.D. Dr. Natarajan stated that K.D.'s injury requires force such as being involved in a motor vehicle crash or riding a skateboard downhill without a helmet. In her opinion, K.D.'s injuries were inflicted and nonaccidental due to child abuse.

Dr. Brenda Wong, a clinical psychologist, testified that there is no protective person in the family home because there was no one identified as the perpetrator of harm to K.D. Dr. Wong also stated that there is also a suspicion that one of the parents could have injured K.D., therefore, the other children were at risk of harm. Mother was the only adult present at the time of the incident and K.D.'s Father (P.D.) was ruled out as the perpetrator of harm because he was not present when K.D. was injured. Dr. Wong concluded that it was not safe to return the children to the family home until the risk factors in the home are identified.

David Hoke (Hoke), a DHS social worker, testified that the children are subject to threatened harm because Mother's explanation of K.D.'s injuries are not accurate. Hoke further testified regarding his observation of the separate interviews of K.B. (seven years old at the time) and J.D. (six years old at the time) at the Children's Justice Center. Hoke testified that K.B. and J.D. stated that they heard K.D. cry briefly but they stayed in the room where they were, and then after that they saw Mother take K.D. into the bathroom and close the door. According to Hoke, K.B. and J.D. reported they heard the shower being turned

on, that when K.D. entered the bathroom she was wearing Hello Kitty pajamas but that before going to the hospital K.D. was changed into a white shirt and pink pants, and that they saw the wet Hello Kitty pajamas in the house. Hoke further testified that Mother did not participate in all services recommended under a service plan, and based on all of the information provided to DHS, DHS's assessment is that Mother and P.D. are not willing and able to provide a safe family home, even with the assistance of a service plan.

The Family Court found all of the testimony by DHS's expert witnesses to be credible. "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." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (citation omitted).

There was substantial evidence to support the Family Court's finding that Mother was the perpetrator of the injuries suffered by K.D. on December 13, 2014. Mother was the only adult present at the time K.D. sustained the injuries. K.D.'s injuries were consistent with intentional, nonaccidental infliction, and Mother's explanations were not consistent with the injuries sustained.

The evidence that Mother was the perpetrator of the injuries suffered by K.D. also shows that the Family Court did not err in determining by clear and convincing evidence that the continued custody of K.B. and S.Y. by Mother was likely to result in serious emotional or physical damage to K.B. and S.Y. and that K.B. and S.Y. were subject to threatened harm by the acts or omissions of Mother. Mother was offered remedial services and rehabilitative programs to address the family home safety concerns but failed to complete the offered services and programs. Thus, DHS made active and reasonable efforts to prevent the breakup of the Indian family and prevent or eliminate the need to remove the children from the family home. Based on the evidence in this case, the Family Court did not err in determining that the requirements for foster care placement pursuant to 25 U.S.C. § 1912(d) and (e) and HRS § 587A-28(e) had

been satisfied.

With regard to Mother's contention that the Family Court should have required DHS to produce a videotaped recording of K.B.'s and J.D.'s interviews at the Children's Justice Center as the best evidence of their statements, Mother did not object to the introduction of Hoke's testimony regarding what the children stated. At the conclusion of Hoke's testimony on June 18, 2015, Mother's counsel inquired whether the Family Court wanted to see a recorded interview of the children, because it was the best evidence of the children's statements, instead of relying upon witness testimony about what the children said. The Family Court responded that it was counsel's decision whether to offer such evidence for the court's consideration. The recorded interview was not submitted into evidence and there was no objection. Therefore, the point of error is without merit.

Therefore,

IT IS HEREBY ORDERED that the Orders Concerning Child Protective Act, filed on July 22, 2015 in the Family Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, April 22, 2016.

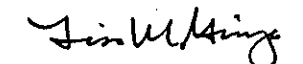
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Chief Judge


Associate Judge


Associate Judge