

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29541

IN THE INTERMEDIATE COURT OF APPEALS  
 OF THE STATE OF Hawai'i 29541

IN THE INTEREST OF "R" CHILDREN: R.R. and K.R.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
 (FC-S NO. 08-11914)

K. HANAKAHO  
 CLERK, APPELLATE COURTS  
 STATE OF HAWAII

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FILED

MEMORANDUM OPINION

(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Father-Appellant (Father) and Mother-Appellant (Mother) (collectively Parents) appeal from the December 22, 2008 Order issued by the Family Court of the First Circuit (family court),<sup>1</sup> which granted Petitioner-Appellee State of Hawai'i, Department of Human Services (DHS) family supervision over the Parents' children, R.R. and K.R. (collectively Children).

On appeal, Mother argues that the family court erred by (1) admitting testimony describing images of alleged child pornography because it violated Hawaii Rules of Evidence (HRE) Rule 1002 (best evidence rule) and (2) relying upon hearsay evidence for the truth of the matter asserted.

On appeal, Father contends (1) the family court erred by finding that Father was involved with child pornography because no images were produced, in violation of the best evidence rule and (2) that DHS failed to demonstrate threatened harm.

We agree that the family court erred by admitting and relying upon testimony that described the alleged images of child pornography rather than the originals themselves and without that testimony, the evidence was insufficient to demonstrate

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<sup>1</sup> The Honorable Linda S. Martell presided.

threatened harm. Hawaii Revised Statutes (HRS) §§ 587-11;<sup>2</sup> 587-41(b) (2006). Therefore, we vacate the order awarding family supervision to DHS and remand the case for an entry of an order dismissing the Petition without prejudice.

I.

On July 28, 2008, DHS filed a Petition for Family Supervision (Petition) initiating this case.<sup>3</sup> In this Petition,

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<sup>2</sup> Exclusive jurisdiction is vested in the family court under HRS § 587-11,

in a child protective proceeding concerning any child who was or is found within the State at the time the facts and circumstances occurred, are discovered, or are reported to the department, which facts and circumstances constitute the basis for the finding that the child is a child 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 the child's family.

<sup>3</sup>

Upon satisfying itself as to the course of action that should be pursued to best accord with the purpose of this chapter, the department shall:

. . . .

- (2) Seek to enter into a service plan, without filing a petition in court, with members of the child's family and other authorized agency as the department deems necessary to the success of the service plan, including but not limited to, the member or members of the child's family who have legal custody of the child. The service plan may include an agreement with the child's family to voluntarily place the child in the foster custody of the department or other authorized agency, or to place the child and the necessary members of the child's family under the family supervision of the department or other authorized agency; provided that if a service plan is not successfully completed within six months, the department shall file a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter and the case shall be reviewed as is required by federal law; [or]

(continued...)

DHS stated that (1) on July 1, 2008, it received a report alleging threat of sexual harm to the Children by Father, (2) the Naval Criminal Investigative Service (NCIS) seized three computers from the family home, (3) an investigation by NCIS revealed that 580 images and videos of child pornography were found on the three computers, (4) the Children were interviewed and "[n]either disclosed any harm or neglect by their parents," (5) on July 18, 2008, Father was ordered to move out of the family home; and (6) Mother disclosed that "three to four years ago she noticed that Father was 'wasting our money' by purchasing and downloading child pornography on her credit cards" and that Father admitted he had an "addiction" to child pornography and participated in counseling with a United States Navy chaplain.

DHS requested family supervision over the Children due to Father's addiction to child pornography, Father's "failure to participate in appropriate therapeutic services," Mother's failure to be more proactive in monitoring Father's involvement with child pornography, and Mother's failure to recognize the safety issues which led to Mother's inability to adequately and appropriately parent, which resulted in threatened sexual harm to the Children.

On August 4, 2008, the family court issued an Order stating that Mother and Father contested the Petition and set trial on the matter for October 13, 2008. The family court denied DHS's requests to order the family to participate in a psychological evaluation pending trial and to have Father participate in a psychosexual evaluation/assessment pending trial. Father was allowed supervised visitation with Children daily until 7:00 p.m.

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<sup>3</sup>(...continued)

(4) File a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter.

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On September 18, 2008, DHS submitted its Pretrial Statement which listed, *inter alia*, eight exhibits. On September 24, 2008, over Parents' objection, the family court issued an Order admitting DHS's Exhibits 3 through 16 into evidence, subject to cross examination, although only eight exhibits were previously listed in DHS's Pretrial Statement.

On October 6, 2008, Father filed a Motion to Strike/Motion in Limine to exclude DHS's exhibits that were previously admitted into evidence by the family court. Father also sought to preclude DHS's social worker, Emery Henderson (Henderson), and NCIS agents from testifying because images of the alleged child pornography were requested in discovery but not produced. Father also sought to preclude testimony by experts without knowledge of the case.

On October 7, 2008, Mother filed a Motion in Limine to exclude DHS's Exhibits 9 through 16 because they were not listed in DHS's Pretrial Statement. On that same day, Mother also filed a Motion In Limine to exclude introduction of images from computers seized by NCIS because such images were not listed in DHS's Pretrial Statement and to exclude testimony about the images because it violated Hawaii Rules of Evidence (HRE) Rule 1002 and the best evidence rule.

On October 13, 2008, trial commenced. NCIS Special Agent, Paul Lerza (Lerza) testified that NCIS was notified when Father's name came up during an investigation of child pornography purchased over the internet conducted by Immigration and Customs Enforcement (ICE). ICE reported that they had discovered Father had purchased access to child pornography web sites. NCIS interviewed Father, obtained authorization to conduct a search and seizure resulting in three computers being taken from Father's home and sent to the Defense Cyber Forensics Laboratory (DCFL) which makes a copy of all the files on the computer and sends the computers and copy back to the agents. The computers taken from Father and Mother's home were at Lerza's Hawaii office.

Lerza stated that he had training in performing child pornography investigations when he was at ICE and also when he moved to NCIS. DCFL runs an algorithm to determine whether picture files being investigated are contained in known child pornography databases. Over the objection of Father's and Mother's counsel based on the best evidence rule, Lerza testified that he saw pictures which he described as depicting "prepubescent, preteen, and teenage girls with lascivious display of genitalia, which is a criteria under federal law of what child pornography is." Lerza stated that he also saw pictures and videos of oral and vaginal penetration of prepubescent, preteen, and teen girls. Lerza testified that he personally viewed between six and twelve pictures showing lascivious display of genitalia, twenty-two pictures were confirmed as child pornography by DCFL, and these images and videos were found on the computers. All three computers had suspected pornography pictures on them, but the bulk of the suspected pornography pictures were found on the computer in the bedroom next to the master bedroom.

However, Lerza also admitted that he did not conduct the search of Father's residence or appear in the chain of custody for the images. Lerza further admitted that he did not view the actual images on the computers, compare his working copy of the images to the images on the computers, or make the working copy of the images, although the computers were back in Hawai'i. Lerza stated that he did not have any expertise in child pornography, talk to the Children, have any training to interview children, or have expertise in identifying child pornography. Lerza did not suspect child abuse was going on.

DHS then called clinical psychologist Dr. Steven Choy (Dr. Choy), clinical director of the Kapiolani Child Protection Center as an expert witness. Dr. Choy consulted with DHS on over 8,000 child maltreatment cases, including sexual abuse cases, over the past thirty years. DHS stated that Dr. Choy would not testify about a Multidisciplinary Team Report as it indicated in

its Pretrial Statement, but only as an expert in child psychology, child abuse and neglect, specializing in sex abuse and threat of sex abuse.

Dr. Choy testified that it was his job to determine the risk of sexual abuse reoccurring. Father's counsel again objected to Dr. Choy as an expert witness because he did not demonstrate any particular basis for making predictions of sexual abuse.

Upon further voir dire, Dr. Choy stated that when making predictions, he relies upon certain characteristics such as "people who observe pornography, people who observe or (indiscernible), thing like that -- have shown to have a direct link to people who offend sexually, either at that period of time or in the future." Dr. Choy admitted that in all the cases where he performed evaluations, about ten of them involved child pornography from the internet and he found all presented a threat of harm. In response to the question "So your position is that either viewing or possessing child pornography is absolutely diagnostic of threat of harm?" Dr. Choy stated:

I didn't -- I didn't say that. I didn't say it was absolutely, because nothing is absolute. There are some intervening factors that we see; in other words, whether that person is married, where there's some intervening factors in terms of external control, whether there's issues of impulse control, good impulse control, of not good impulse control. So there are other factors besides just viewing child pornography. However, based upon the research, that does have a strong bearing and correlation to someone sexually offending children.

Dr. Choy then stated that, while one looks at other factors, possessing child pornography is a very big factor and "[y]ou cannot deny the well [sic] of research in this particular area . . . that shows an extremely high correlation between viewing and sexually offending." Over an objection based on the small number of cases in this category evaluated by Dr. Choy, the family court stated that it would allow Dr. Choy to testify as an expert. However, before Dr. Choy provided any further testimony, the trial day ended and trial was eventually continued to December 2, 2008.

On November 25, 2008, Mother filed a Motion to Compel Discovery or in the Alternative to Strike Steven Choy, Ph.D., as a witness. Mother's counsel stated that (1) on October 23, 2008, interrogatories were served upon DHS for Dr. Choy, (2) DHS responded that the discovery deadline had passed and would not respond to the interrogatories, (3) answers to interrogatories were necessary because the court had excluded the Multidisciplinary Team Report and, as a result, DHS changed the scope of Dr. Choy's testimony to answering hypotheticals, and (4) Mother had a right to know what Dr. Choy would testify about in order to prepare for trial. Mother's counsel also stated that he was not aware of any discovery cut-off in the case.

On December 2, 2008, the trial resumed. The family court heard Mother's motion to compel, in which Father joined. After further discussion, the family court granted the motion to strike Dr. Choy's testimony and denied the request to compel answers to interrogatories.

DHS then called Henderson, who testified that he specialized in investigating reports of child sexual abuse and institutional abuse such as abuse in a child care facility, foster home, day care center, or by a licensed babysitter. He was also previously qualified as an expert in sex abuse assessment. Henderson admitted that he does not have expertise in psychology, pedophilia, causation of sexual abuse, or in prediction of sexual abuse.

Henderson explained that, subsequent to the preparation of his Curriculum Vitae,<sup>4</sup> he attended a training session in September 2008 in which a Dr. Bivens discussed diagnostic aspects of child pornography and provided some literature, consulted with

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<sup>4</sup> Henderson's Curriculum Vitae documents, *inter alia*, receiving a masters degree in social work, membership in the National Association of Social Workers, Hawai'i State licensure as a social worker, and experience and training in the field of child abuse generally and intra-familial sexual abuse specifically, dating back to 1985. HRS § 587-40(e) (2006) provides that "[a] person employed by the department as a social worker in the area of child protective or child welfare services is qualified to testify as an expert in the area of social work and child protective or child welfare services."

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Dr. Choy, and reviewed the literature provided by Dr. Bivens on September 5th. Henderson obtained a copy of the literature cited by Dr. Bivens called "Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia." A copy of this article was admitted into evidence by the family court.

Henderson also stated that he confirmed a threat of sexual harm from information provided to him by NCIS that Father admitted purchasing pornography and had child pornography on computers seized from his home, that Mother told Henderson this was the second time Father had acknowledged purchasing child pornography, the threat of harm is Father's involvement with child pornography, the Children are at risk for threat of harm by Father because DHS does not have a lot of information in terms of what precipitated Father's involvement with child pornography, DHS filed the Petition because it could not meet with Father and had unanswered questions, and the basis that Father posed a risk was that DHS had no information about Father's involvement with child pornography or "whether or not he could possibly act upon some inappropriate interaction with the children based on his involvement with child pornography."

Henderson testified that in an interview he conducted with NCIS Agent Laukley of Mother, she stated that her understanding was that the interview concerned an investigation of Father's co-worker's involvement with child pornography. Agent Laukey then informed Mother that Father was the only focus of the investigation. Henderson testified that Mother was upset that there was another occurrence; Mother reported Father was wasting money downloading child pornography three or four years ago. Based on Mother's statements, Henderson believed that Father had a recent involvement with child pornography because Mother told him that Father had told her that Father had deleted the pictures during the first incident of downloading pornography. Henderson admitted Mother stated that Father downloaded "pornography," but that at the time they were only discussing child pornography.

Henderson iterated that the Multidisciplinary Team concluded that without appropriate services, the Children were at risk of harm by Father, and the opinion in the Multidisciplinary Team Report is based on the information that he provided to the team.

Over the objection of Parents, Henderson testified that he spoke to Dr. Choy on August 28, 2008 and discussed the case including his concern about the lack of information regarding Father. Dr. Choy told him that lack of information was a concern. Dr. Choy also told Henderson that child pornography is one of the best indicators of pedophilia. Dr. Choy's opinion was based on his "review of both the literature as well as [Dr. Choy's] wealth of knowledge in the area of child sexual abuse," and that it was Dr. Choy's opinion that "with the extent of child pornography both nationally and to some extent locally, people involved in child pornography present a greater risk to offend, specifically to abuse children, than people who have actually been convicted of child abuse -- child sexual abuse offenses."

Henderson testified that Dr. Choy's position is consistent with DHS's position. In Henderson's opinion, the Children continue to be at risk for the threat of harm by Father, based on the Multidisciplinary Team Report, consultation with Dr. Choy, and the training by Dr. Bivens consisting of literature about pedophilia.

On cross-examination, Henderson testified that it is his position that those who view child pornography are at greater risk to offend than those who have been convicted of sex offenses against their children and based on his professional opinion and Father's involvement with child pornography, Father has the potential to sexually offend against Children by engaging in an overt sexual act or in the production of pornography.

However, Henderson went on to state that, (1) many people view child pornography, (2) there are many more people who have viewed child pornography than have been convicted of sexual offenses against children, (3) he does not know how many persons

view child pornography in the United States, nor does he have a basis for comparing the number of those who view child pornography with the number of those who sexually offend against children, and (4) it is possible that the vast majority of those who view child pornography commit no sexual offense. Henderson also stated that people who view adult sexually explicit materials are not likely to commit sexual crimes against other adults and the possibility exists that anyone could harm the Children.

Henderson reiterated that he has no expertise on the prediction of sexual abuse, but that he has the statutory responsibility to predict the possibility that something could happen without Father's participation in necessary services. Henderson testified that "I think I've clearly indicated in my testimony in the past and I've answered that I cannot predict the future. However, we do have concerns in the absence of information as to whether or not [Father] presents a danger or threat of harm to [Children]."

Henderson stated DHS does not have any information other than Father had access to and possession of child pornography, there is insufficient information to determine whether Father is a pedophile, and DHS does not assume that Father is a pedophile because it does not have enough information.

Mother testified that Father told her he purchased adult pornography three or four years ago and he never stated that the images involved children. Mother assumed Father stopped purchasing adult pornography. Father told Mother that NCIS needed to take the computers because of possible child pornography pictures on them. She stated that she has never seen any pictures of alleged child pornography on their computers. When she told Henderson that Father was downloading pornography, she only knew that Father had admitted to previously downloading adult pornography. Mother estimated Father downloaded "a few

hundred dollars" worth of pornography on her credit card in the first incident.

On December 10, 2008, the family court issued its Decision and Order continuing family supervision and ordering the August 4, 2008 Service Plan. Father and Mother timely filed this appeal. On January 30, 2009, the family court issued its Findings of Fact and Conclusions of Law.

II.

Father and Mother both challenge the competency of the evidence presented by DHS to prove that Father was involved in child pornography. Neither Parents' computers themselves nor copies, electronic or printed, of the photographs in issue were introduced as evidence at the hearing before the family court. Counsel for both Parents vigorously objected to the admission of the testimony of Lerza describing the contents of photographic images he had seen based on, *inter alia*, the "best evidence rule" codified in HRE Rule 1002. Whether evidence should have been admitted or excluded under the best evidence rule is a question of law that we review *de novo*. See, State v. Kealoha, 74 Haw. 308, 319, 844 P.2d 670, 676 (1993) (observing analysis of the admissibility of documents under the best evidence rule involves a determination of whether the evidence fulfills the requirements of the evidence rules and is therefore a right/wrong standard of review).

HRE Rule 1002 provides, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." An "'original' "of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original'." HRE Rule 1001(3). DHS argued at the hearing,

and on appeal, that the best evidence rule did not apply. DHS relies on HRE Rule 1004 (2) and (4).<sup>5</sup>

HRE Rule 1004(4) excuses the production of the original where the document is not "closely related to a controlling issue." However, the sole basis of DHS's Petition was that Father presented a threat of sexual harm to the children because he possessed child pornography in the household and that Mother failed to recognize the safety issues presented by Father's possession of child pornography. Thus, the nature of the photographs found on the Parents' computers was central to assessing the presence of a threat of harm to Children.

DHS also argues that, because NCIS had "denied access" to the images and videos, HRE Rule 1004(2) applied. Lerza was present to testify regarding the NCIS investigation. Lerza's testimony made it clear that Parents' computers were, at the time of the hearing, in the possession of the Hawai'i NCIS office. Lerza asserted no privilege or nor did he present any explanation for the failure of NCIS to either produce Parents' computers or printouts of the images in question. Thus, the record does not support the position that the originals of the images were "not

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<sup>5</sup> HRE Rule 1004 provides:

**Rule 1004 Admissibility of other evidence of contents.**

The original or a duplicate is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the content would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

obtainable."<sup>6</sup> In light of the plain language of HRE Rule 1004(2) which specifies that "not obtainable" means "no original can be obtained by available court process or procedure," DHS's argument that this exception applies is not supported by the record.

Finally, Lerza was the only witness that purported to have seen the images on Parents' computers. As the testimony of DHS's witnesses made clear, the allegations in the Petition stemmed solely from DHS's belief that Father was in the possession of child pornography. As we have ruled Lerza's testimony was improperly admitted, there was no evidence of this essential allegation.

Given our disposition of this point of error, it is unnecessary to reach the other points raised on appeal.

III.

Therefore, the December 22, 2008 Order of the Family Court of the First Circuit is vacated and the case is remanded for the entry of an order dismissing the Petition without prejudice.

DATED: Honolulu, Hawai'i, August 26, 2009.

On the briefs:

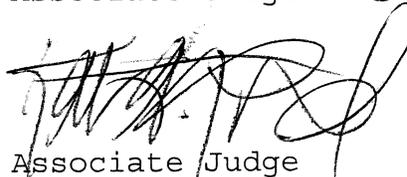
Francis T. O'Brien,  
for Mother-Appellant.

  
Presiding Judge

Thomas D. Farrell,  
for Father-Appellant.

Eric J. Alabanza and  
Mary Anne Magnier,  
Deputy Attorneys General  
for Petitioner-Appellee.

  
Associate Judge

  
Associate Judge

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<sup>6</sup> It is true that Father's counsel represented to the family court that his subpoena server attempted to serve a subpoena on NCIS but the server was threatened with arrest. However, there is nothing in the record that indicates any party sought to invoke the assistance of the court in their efforts to obtain these photographs.