NO. 27361

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

IN THE INTEREST OF N. M-O
(NO. 27361; FC-S NO. 03-09097)

IN THE INTEREST OF A-C. M-O
(NO. 27362; FC-S NO. 02-08022)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NOS. 03-09097 and 02-08022)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ. and Acoba, J., concurring and dissenting)

The present matter concerns the decision of the Department of Human Services ("DHS") to place Daughter and Son with non-relative Foster Parents following termination of Mother's and Father's parental rights. Appellants, the maternal grandparents of the children, were deemed an unsuitable placement by DHS because of their difficulty parenting three children from Mother's earlier marriage. Foster Parents have since relocated to Florida with Daughter and Son. Appellants were granted leave to intervene, and the first circuit family court[1] considered their request to bring the children back to Hawai'i. The family court ultimately affirmed DHS' placement decision based upon a preponderance of the evidence standard of proof.

On appeal, Appellants assert that the children have a constitutional right to be placed with family members after termination of their natural parents' parental rights and that interference with that right (i.e., placement with non-relative

[1] The Honorable Paul T. Murakami presided.

Foster Parents) is justified only if DHS can establish, by clear and convincing evidence, that available relative placements were unsuitable. Accordingly, Appellants urge this court to hold that the family court affirmed DHS' placement decisions based upon an insufficient standard of proof.[2]

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments and the issues raised, we hold that Appellants, grandparents who are not the legal custodians or guardians of the children, lack standing to assert the children's constitutional rights as a basis for arguing that a clear and convincing evidence standard of proof was required.

It is well-established that, ordinarily, "'[c]onstitutional rights may not be vicariously asserted.'" Freitas v. Admin. Dir. of the Courts, 104 Hawai'i 483, 486, 92 P.3d 993, 996 (2004) (citing Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 256, 861 P.2d 1, 9 (1993) (quoting State v. Marley, 54 Haw. 450, 457, 509 P.2d 1095, 1101 (1973))); see also Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests,

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[2] In their opening brief, Appellants assert the following five points of error: (1) the family court erred by failing to recognize a child's constitutionally protected due process interest in being placed with extended relatives if a qualified placement is available; (2) the family court erred by failing to require proof by clear and convincing evidence that the non-relative placement was in the best interest of each child; (3) the family court erred by finding that the DHS was authorized to determine the appropriate placement for the children; (4) the family court erred by concluding that Appellants, grandparents who were not the legal guardians of the children, did not have standing to assert the constitutional right to placement with family members; (5) the family court erred by concluding that no appropriate placement with extended relatives was available as of the conclusion of trial. However, the arguments asserted do not align with the foregoing points of error. Hence, we address only those points actually argued. See Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2005) ("Points not argued may be deemed waived.").

and cannot rest a claim to relief on the legal rights or interests of third parties."). However, the United States Supreme Court has recognized certain exceptions to the foregoing limitation. In particular, the Court has approved

> the rights of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute . . . ; the litigant must have a close relation to the third party . . . ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id. at 410-11 (internal citations omitted). The Court has also, in the past, considered "the impact of the litigation on third-party interests." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 n.3 (1989).

In the case at bar, standing must be rejected inasmuch as Appellants have failed to demonstrate a sufficient injury in fact. In order to secure standing, Appellants were required to demonstrate an injury in fact to a legally cognizable interest -- i.e., a recognized legal right. See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 227 (2003) (unanimously concluding that the failure to show injury to a recognized "legal right" precluded satisfaction of the injury in fact component of the standing doctrine); Smith v. Frye, 488 F.3d 263, 272 (4th Cir. 2007); Salt Institute v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006); Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1339 (11th Cir. 2000); Curry v. Regents of Univ. of Minnesota, 167 F.3d 420, 422 (8th Cir. 1999); Langdon v. Google, Inc., 474 F.Supp.2d 622, 629 (D. Del. 2007); People v. Clark, 869 N.E.2d 1019, 1034 (Ill. Ct. App. 2007); In re Petition for Decertification, 730 N.W.2d 300, 304 (Minn. Ct. App. 2007); Indiana Democratic Party v. Rokita, 458 F.Supp.2d 775, 813 n.57 (S.D. Ind. 2006); Wimberly v.

Ettenberg, 570 P.2d 535, 539 (Colo. 1977).

Here, Appellants assert the following harm: (1) "the Court determined that the children would remain with their (non-related) foster parents and thus effectively terminated the possibility of any future contact between the children and the members of their biological family (including Appellants)" (emphasis added); and (2) "applying an incorrect standard of proof caused them an injury-in-fact in that the relationship between them and their grandchildren was terminated based only upon a preponderance of the evidence and not by clear and convincing evidence." First, Appellants have no common law or constitutional right to "the possibility of future contact" with their grandchildren. See Mullins v. State of Oregon, 57 F.3d 789, 794 (9th Cir. 1995) ("[W]e are certain that [a grandparent's interest in a potential, undeveloped relationship with his or her grandchild] does not rise to the level of a fundamental liberty interest."); Graham v. Children's Servs. Dir., Dep't of Human Res., 591 P.2d 375, 379 (Or. Ct. App. 1979) ("In summary, we conclude that grandparents have no liberty interest herein and no rights superior to a nonrelative applying for permission to adopt."); Robichaud v. Pariseau, 820 A.2d 1212, 1216 (Me. 2003) ("Grandparents do not have a common law or constitutional right of access to their grandchildren."); In re Schmidt, 496 N.E.2d 952, 958 (Ohio 1986) (concluding that grandparents "had no legal right to custody or visitation with their grandson, and they held no legally protectable interest that was related to [their grandson's] care and custody").[3] Appellants also do not assert

[3] Other jurisdictions have held that extended relatives may have an interest in preserving an existing family relationship. See Moore v. City of (continued...)

any statutory basis for recognition of such a right.[4] Second, although Appellants appear to claim a deprivation of a preexisting "relationship" with the children based upon an insufficient standard of proof, they do not elaborate upon, and the record lacks evidence of, the extent of that "relationship." See discussion supra at n.3. Given the lack of evidence, we may presume that the "relationship" referred to is either (1) the fact of consanguinity, and/or (2) another reference to the future relationship Appellants wish to have with the children. As mentioned, neither produces a legally cognizable interest.

To the extent that Appellants have failed to

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[3](...continued)
East Cleveland, 431 U.S. 494, 504 (1977) (plurality opinion) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); Mullins, 57 F.3d at 794 ("A negative right to be free of governmental interference in an already existing familial relationship does not translate into an affirmative right to create an entirely new family unit out of whole cloth."); Osborne v. City of Riverside, 385 F.Supp.2d 1048, 1054 (C.D. Cal. 2005) ("The court concludes that . . . grandparents have no liberty interest in familial integrity or association with their grandchildren by virtue of genetic link alone, but grandparents who have a long-standing custodial relationship with their grandchildren such that together they constitute an existing family unit do possess a liberty interest in familial integrity and association.") (Quotation marks omitted.); Rivera v. Marcus, 696 F.2d 1016, 1024-25 (2d Cir. 1982) ("We believe that custodial relatives like Mrs. Rivera are entitled to due process protection when the state decides to remove a dependent relative from the family environment."). Relatedly, the Supreme Court has explained that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, . . . as well as from the fact of blood relationship." Smith v. Org. of Foster Families For Equal. & Reform, 431 U.S. 816, 844 (1977) (citation omitted) (alteration in original). Although Appellants share a blood relationship with children, a fundamental inadequacy exists inasmuch as Appellants do not assert, and the record is devoid of, any evidence of the emotional attachments that serve as the cornerstone of the family relationship (i.e., daily association, attributes of custody or guardianship, or a shared household). Under these circumstances, we do not perceive a family unit the integrity of which Appellants may have had a liberty interest in.

[4] For example, Appellants do not assert this jurisdiction's grandparent visitation statute, codified as Hawai'i Revised Statutes § 571-46.3, as a statutory basis for determining that Appellants have a legally cognizable interest in future visitation.

demonstrate an injury in fact to a legally cognizable interest, they lack standing to assert a jus tertii claim on behalf of Daughter and Son. A fortiori, they also lack standing to assert the children's constitutional rights as a basis for requiring an elevated standard of proof. Therefore,

IT IS HEREBY ORDERED that the family court's May 6, 2005 Decision and Order and May 31, 2005 Order denying Appellants' motion for reconsideration are affirmed.

DATED: Honolulu, Hawai'i, October 5, 2007.

On the briefs:

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