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NO. 26656

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

IN THE INTEREST OF JOHN DOE,
Born on May 31, 2002, a Minor

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 02-08308)

SUMMARY DISPOSITION ORDER

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

The mother (Mother) of a male child (Son), born prematurely on May 31, 2002, appeals from the April 28, 2004 (1) Order Awarding Permanent Custody and (2) Letters of Permanent Custody that were entered in the Family Court of the First Circuit.^{1/}

When Son was born, Mother tested positive for amphetamines and admitted that she and Son's father (Father) used "ice", marijuana, and alcohol throughout her pregnancy. Mother left the hospital, but Son stayed. On June 5, 2002, Son was discharged from the hospital and placed in a foster home by the State of Hawai'i Department of Human Services (DHS). On June 7, 2002, DHS filed a petition for temporary foster custody. On June 12, 2002, Mother stipulated to foster custody and the June 7, 2002 service plan. At a June 21, 2002 drug court hearing, Mother was ordered to attend treatment and services. At

^{1/} The Honorable Marilyn Carlsmith presided.

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a drug court hearing on July 12, 2002, the court ordered Mother not to have any contact with her boyfriend (Boyfriend No. 1) and to comply with the June 29, 2002 service plan which required her to participate in the Family Drug Court Program. On September 27, 2002, the court ordered Mother to comply with the September 21, 2002 service plan. On March 21, 2003, the court ordered Mother to comply with the March 20, 2003 service plan. On March 28, 2003, the court ordered Mother not to have any contact with Father. On May 2, 2003, Mother was discharged from the family drug court program. Mother failed to appear at the May 13, 2003 court review hearing. On June 28, 2002, Son was placed with his paternal grandparents who are interested in adopting him.

On August 28, 2003, the DHS filed its Motion for Permanent Custody. At the September 2, 2003 review hearing, the court set a pretrial on January 2, 2004 and a trial on January 15, 2004. At the January 2, 2004 pretrial, Father stipulated to the Motion for Permanent Custody. On January 15, 2004, Mother felt ill and the court granted her request for a continuance of the trial to January 23, 2004. On January 23, 2004, after a trial, the court denied the Motion for Permanent Custody and made Mother's new boyfriend (Boyfriend No. 2) a party to the case. On January 29, 2004, the DHS filed a motion for reconsideration. On February 3, 2004, Father filed a Motion to Reinstate Father's Parental Rights. On February 25, 2004, the

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court granted the motion for reconsideration filed by the DHS and scheduled a July 6, 2004 trial.

On April 14, 2004, the court ordered Mother and Father to comply with the February 9, 2004 service plan. The following are some of its requirements: (1) Mother shall participate in outpatient substance abuse treatment until clinically discharged, random drug screenings, parent education, AA/NA meetings, and individual therapy sessions; (2) Father, upon release from incarceration, shall participate in substance abuse treatment until clinically discharged, random drug screenings, parent education, individual therapy, AA/NA meetings, and anger management sessions; and (3) Boyfriend No. 2 shall participate in a substance abuse assessment and recommended treatment, random drug screenings, parent education, and a psychological evaluation. The court continued Father's motion, granted the State's request to advance the trial, set aside the July 6, 2004 trial date, set the trial for April 28, 2004, and continued all prior consistent orders.

On April 28, 2004, after a trial, the court (1) denied Father's motion, and (2) entered its Order Awarding Permanent Custody, and ordered the August 7, 2003 Permanent Plan into effect. The long term goal of the August 7, 2003 Permanent Plan is adoption. Letters of Permanent Custody, entered on April 28, 2004, appointed the Director of Human Services, State of Hawai'i, as Son's permanent custodian.

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On May 13, 2004, Mother filed a motion for reconsideration. On June 8, 2004, the court denied Mother's motion. Mother filed a notice of appeal on June 24, 2004. The Court entered its Findings of Fact (FsOF) and Conclusions of Law on August 17, 2004. This appeal was assigned to this court on March 11, 2005.

The FsOF state, in relevant part:

11) The return hearing was held on June 12, 2002. Present were Mother, Mother's [Boyfriend No. 1], . . . , and

. . . .

82) Mother was scheduled to enter the Women's Way Program with [Son], but she missed her appointment on June 24, 2002 and lost her slot.

83) Mother tested positive for marijuana and methamphetamines on June 25, 2002.

84) Mother entered the Sand Island Residential Treatment Center on July 1, 2002.

85) Mother was terminated from the Sand Island Treatment Center on October 18, 2002 for refusing to take responsibility for manipulative and dishonest behavior.

86) Mother entered the Oxford clean and sober home on October 29, 2002.

87) By February 2003, [Son] was living with Mother from Monday through Saturday. Mother was making good progress in her reunification efforts and full reunification was to be completed on March 15, 2003. However, when Father was released from prison around February 14, 2003[,] Mother began to get distracted. Reunification was postponed due to Mother missing a parenting education class and due to Mother and Father testing positive for opiates on February 26, 2003.

88) During the month of March 2003, Mother and Father were in regular contact with one another, despite (1) Father not participating in a drug treatment program. [and] (2) testing positive and admitting to relapsing on methamphetamine and cocaine.

89) Mother's consecutive five days of unsupervised visits were immediately suspended as she was in regular contact with Father, thereby placing herself and [Son] at risk for harm. Mother's co-dependency issues with Father arose and distracted her from focusing on her own recovery and services. Further, although

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Mother denied that she had relapsed since Father was released from prison, the drug court case manager had concerns that Mother had tampered with her drug tests.

90) Mother confessed to the drug court case manager on March 31, 2003 that she was selling drugs because she needed money. During the time that Mother was selling drugs, [Son] was in Mother's home for five days of the week. Mother's actions, behaviors, and confession showed that she was exercising unhealthy lifestyle decisions that jeopardized [Son's] safety and jeopardized reunification with [Son]. Mother was also discharged from parenting classes due to missing three classes.

91) On April 30, 2003, it was recommended, and granted by the court, that Mother be discharged from the Family Drug Court Program due to her pervasive pattern of dishonesty and manipulation with the drug court staff and others for a couple of months prior. Mother was unable and unwilling to stop her addictive behaviors of lying, dealing drugs, dishonesty with the court, hanging out with using friends, had an unhealthy focus on Father, and was not motivated to change. . . .

92) Mother was referred to the Hina Mauka Urinalysis Monitoring Program ("U/A Monitoring Program") on July 15, 2003. Mother did not appear for her urinalysis testing on August 15, 2003 and on August 21, 2003. Mother was removed from the U/A Monitoring Program on August 21, 2003 for two "no-shows."

93) Mother was re-referred to the U/A Monitoring Program on September 2, 2003. DHS started to look into arranging visits for Mother, due to her testing negative for three consecutive tests, however, on October 9, 2003, she tested positive for methamphetamines. Mother's urine sample was sent to a laboratory which confirmed methamphetamine use. Thereafter, Mother was a "no-show" for testing on October 20, 2003 and October 26, 2003.

94) Mother claimed that the reason she tested positive on October 9, 2003 was due to her taking Sudafed and some dietary supplements. Methamphetamine is an illegal drug and is not found in medication or dietary supplements which are bought over-the-counter.

95) Mother was a "no-show" for her drug screen on December 18, 2003 and December 30, 2003.

96) Mother completed a substance abuse assessment at Hina Mauka on January 30, 2004. The assessment noted that Mother:

- a) Appeared to lack insight into her drug problems. . . .
- b) Had inappropriate social contacts that jeopardized her recovery and had few friends or peers who did not use alcohol/other drugs.
- c) Had insufficient resources and skills to maintain an adequate level of function.
- D) Reported few sources of support and was involved

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with a man who was actively using drugs. (. . .)

97) The assessment recommended that Mother participate in an Outpatient Substance Abuse Treatment Program, a minimum of three AA/NA meetings a week, and random urinalysis monitoring.

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100) At the trial on April 28, 2004, Father testified to the following:

a) While he and Mother were in the Family Drug Court Program, both he and Mother tampered with their urine samples by using another person's urine. The procedure was to put another person's urine into a vial, cover the vial and keep the vial warm. For Father, this meant placing the vial under his scrotum. At the time of providing the urine sample, the vial cover was removed and the urine was poured into the cup.

b) Father admitted that he was caught once because the temperature of the urine was suspicious.

c) Father and Mother used drugs after his release from prison in February, 2003.

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109) After the January 23, 2004 trial, a visit was arranged for Mother and [Son] for February 2, 2004. DHS confirmed the visit with Mother on January 30, 2004. Mother did not appear for the visit, nor did she call the social worker to discuss the reason she was not present. The DHS social worker's attempt to contact Mother on February 3, 2004 was unsuccessful. Mother did not request any further visits until April, 2004.

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118) After the trial on January 23, 2004, Mother was given more time to engage in services in order to provide a safe family home. As of the continued trial on April 28, 2004, Mother had completed the substance abuse assessment on January 30, 2004, but did not follow through with the recommendations of participating in an out-patient substance abuse treatment program and attending AA/NA meetings. Further, Mother did obtain medical insurance and had not engaged in individual therapy.

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122) Father is incarcerated, reported that he was re-booked on three outstanding charges and at [sic] testified at trial that he was not sure of his release date.

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140) [Mother's Boyfriend no. 2] was a no-show for his drug screen and orientation for random urinalysis monitoring on January 30, 2004.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments advanced and the issues raised, we resolve Mother's points of error as follows:

1. Mother's argument that two weeks was insufficient time for her to prepare for a continued permanent custody trial has no merit. She was as prepared for a reconsideration trial on April 28, 2004 as she was for the trial on January 23, 2004.

2. Mother's argument that "[Mother's] attorney was . . . surprised with a ruling that allowed testimony which amounted to a reconsideration of the lower court's decision denying the motion for permanent custody on January 23, 2004" lacks merit because the April 28, 2004 trial was the result of the court's February 25, 2004 order granting the motion for reconsideration of its January 23, 2004 denial of the Motion for Permanent Custody.

3. Mother contends that the family court reversibly erred when it terminated Mother's parental rights due to Mother's unresolved substance abuse problem when appropriate substance abuse treatment was not available to Mother because of her sobriety. Notwithstanding all the services previously provided or offered to her, she does not assert that she does not need

substance abuse treatment. On the contrary, she states, in relevant part:

With the exception of a positive drug screen in October 2003, [M]other has tested negative on her random urinalyses. Because of her sobriety [Mother] was unable to enter into a drug treatment program between January 2004 and April 2004. [DHS's] social worker confirmed that drug treatment programs do not accept clients who have been sober for one month. [Mother] should not be penalized when her continued sobriety prevented her from completing drug treatment."

The DHS responds:

Mother had not obtained the necessary substance abuse treatment she needed. Mother's argument that she should not be penalized for not being able to get into a program due to her sobriety is without merit. Mother testified that she delayed nearly three months until March 2004 to make treatment inquires [sic], despite participating in her substance abuse assessment on January 30, 2004 which recommended out-patient substance abuse treatment. Mother also lied to the various treatment programs when she stated that she had been clean for a year and nine months, as she tested positive on October 9, 2003 and did not appear for urinalysis testing on December 18 and 30, 2003. A no-show is considered a presumptive positive. Mother's failure to get into an outpatient treatment program was due to her knowledge that a treatment program would not accept an individual who had been clean and sober for three months. Although Mother had been testing negative for drugs on her urinalysis testing, there was evidence that she had been tampering with her urine samples.

(Record references omitted.) The family court's implicit agreement with the DHS is supported by the record.

4. Mother's argument that the DHS did not prove what Hawaii Revised Statutes § 587-73 (Supp. 2004)^{2/} required it to

^{2/} Hawaii Revised Statutes § 587-73 (Supp. 2004) states, in relevant part, as follows:

Permanent plan hearing. (a) At the permanent plan hearing, the court shall consider fully all relevant prior and current information pertaining to the safe family home guidelines, as set forth in section 587-25, including but not limited to the report or reports submitted pursuant to section 587-40, and determine whether there exists clear and convincing evidence that:

- (1) The child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with

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prove is without merit.

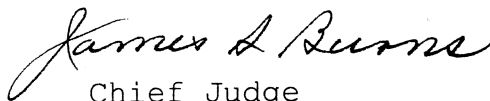
Therefore, IT IS HEREBY ORDERED that the April 28, 2004 (1) Order Awarding Permanent Custody and (2) Letters of Permanent Custody are affirmed.

DATED: Honolulu, Hawai'i, October 28, 2005.

On the briefs:

Herbert Y. Hamada
for Mother-Appellant.

Arlene A. Harada-Brown and
Mary Anne Magnier,
Deputy Attorneys General,
for Petitioner-Appellee.


Chief Judge


Associate Judge


Associate Judge

the assistance of a service plan;

- (2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court;
- (3) The proposed permanent plan will assist in achieving the goal which is in the best interests of the child; provided that the court shall presume that:
- (A) It is in the best interests of a child to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes[.]