
NOT FOR PUBLICATION

NO. 27017

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

IN THE INTEREST OF K-F CHILDREN:
M.K-F, AND S.K-F, Minors

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 APR 13 AM 9:37

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 03-09323)

SUMMARY DISPOSITION ORDER

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

The mother (Mother) of the K-F Children, M.K-F, born on May 9, 1994, and S.K-F, born on September 21, 1998 (hereinafter the Children), appeals from the October 19, 2004 Order Awarding Permanent Custody, and November 23, 2004 Orders Concerning Child Protective Act entered in the Family Court of the First Circuit.¹

The State of Hawai'i Department of Human Services (the DHS) commenced its involvement with this family on June 14, 2003 when Mother tested positive for amphetamines and admitted to hospital staff that she went on a three day alcohol and crystal methamphetamine binge prior to the hospital admission on June 12, 2003.

On October 17, 2003, the Children were taken into police protective custody, turned over to the DHS, and then placed in a licensed foster home. On October 22, 2003, the DHS commenced this case by filing a Petition for Temporary Foster Custody. On November 21, 2003, Judge Bode A. Uale granted the

¹ Judge Linda K.C. Luke presided.

NOT FOR PUBLICATION

petition and ordered the October 20, 2003 Family Service Plan into effect.

The January 9, 2004 report of the court-appointed Guardian Ad Litem (GAL) for the Children stated, in relevant part, as follows:

Service Plan: DHS may need to do some early concurrent planning regarding the children's future in the event parents do not make the necessary commitment and progress in this case, given that there are no relatives who have been identified as appropriate enough to even have current placement of the children, and the fact that the children are so difficult to deal with (making permanent non-relative placement a real challenge).

The January 10, 2004 Safe Family Home Report reported that Mother had completed residential treatment at Hina Mauka² and would be transferred to the Intensive Outpatient Treatment phase of her program on January 18, 2004.

On January 26, 2004, Hina Mauka reported that Mother "entered Intensive Outpatient treatment at the Hina Mauka Substance Abuse Treatment Program on 01-20-04 and was discharged on 01-24-04 due to incomplete noncompliance with attendance."

At the continued review hearing on February 19, 2004, the court was informed that Mother had opted out of drug court. The GAL stated that he was "urging the [DHS] to move toward permanent custody." In the presence of all parties, the court advised the alleged father of the Children that "right now, DHS is planning to file a motion to terminate your rights." At the conclusion of the hearing, the court entered its Orders Concerning Child Protective Act which ordered the February 5,

² Hina Mauka is a nonprofit corporation dedicated to the sensitive treatment of alcoholism and other forms of substance abuse.

NOT FOR PUBLICATION

2004 Family Service Plan into effect, scheduled the next hearing to occur on April 27, 2004, and ordered that "DHS shall file a motion for permanent custody for the next hearing." No one objected to this order.

On February 27, 2004, counsel was appointed for Mother by Judge Michael F. Broderick.

In a Safe Family Home Report dated April 6, 2004, the DHS stated, in relevant part:

At this time the DHS believes that [Mother] and [Father] cannot now or in the reasonable foreseeable future provide for [the Children's] needs, even with the assistance of a service plan.

The DHS recommends that the children remain in foster custody until a decision can be made concerning permanent custody.

For the above reason, the DHS is convinced that even with the assistance of a service plan, [Mother] and [Father] are unable to provide a safe, stable and nurturing home environment for [the Children] within a reasonable period of time. The DHS is convinced that permanent custody of the [C]hildren to the DHS is in their best interest. At their ages, they need the benefit of a nurturing permanent home to enhance their development and sense of security. [The Children] cannot wait any longer for their parents, especially [M]other, to commit to services and make progress in their services, understand their needs and be able to provide a safe family home.

In its Permanent Plan dated April 6, 2004, the DHS stated, in relevant part:

I. **GOAL:**
Permanent Custody of [the Children] be awarded to the [DHS], with the subsequent goal of adoption by October 2003 or within six months of the award of permanent custody or whichever date is greater.

II. **REASON FOR STATED GOAL:**

The DHS is recommending that Permanent Custody of [the Children] be awarded to the DHS as the children's mother and father have not been able to demonstrate progress toward establishing safe home within a timely period. The DHS believes that [the Children] must be stabilized now in a permanent home where all of their needs are met on a timely basis.

NOT FOR PUBLICATION

On April 15, 2004, the DHS filed its Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. On April 27, 2004, after a hearing, the court entered an order continuing the February 5, 2004 Family Service Plan in effect and scheduling a trial on September 7, 2004.

On September 29, 2004, after a trial on September 7, 2004, the court entered the Order Granting Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan filed April 15, 2004. The goal of the permanent plan is adoption. On October 19, 2004, Mother filed a motion for reconsideration. This motion was denied on November 23, 2004. On November 9, 2004, the court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL).

On December 22, 2004, Mother filed a notice of appeal. This case was assigned to this court on August 26, 2005.

Mother challenges FsOF nos. 2, 3, 7, 27, 38, 48, 49, 50, 51, 52, 54, 55, 82, 84, 98, 99, 100, 101, 106, 107, 108, 109, 110, 127, 128, 129, and 133, and CsOL nos. 3, 4, 5, and 6. In essence, Mother contends that the court erred when it ordered the DHS to file a motion for permanent custody and when it granted the motion.

In the opening brief, Mother argues that

The termination of parental rights and granting of permanent custody to the DHS was premature. The children have been in court ordered foster custody for less than ten months when the court held the trial granting the Motion for Permanent Custody. A Permanent Plan hearing is not required until children have been residing out of the home for fifteen of the last twenty-two months.

NOT FOR PUBLICATION

The service plans offered by the DHS and ordered by the court was [sic] not timely and comprehensive. Mother was not afforded enough time to complete her service plan. Also, psychological evaluation was never a part of the service plan and not considered by the court, therefore, there was not an opportunity to assess Mother's needs for possible mental health assistance.

The evidence was not clear and convincing that Mother was unwilling and unable to provide a safe home for the children with the assistance of the services. Notwithstanding her own medical needs, Mother has completed the residential treatment program

.

The DHS has not exerted reasonable and active efforts to reunify Mother with the children. The DHS' efforts to provide Mother with services were limited due to premature filing of the Motion for Award of Permanent Custody. Soon after Mother elected to discontinue with the FDC [Family Drug Court], the service referrals discontinued as well. The children have been in court ordered foster custody for just two months when Mother was discharged from the FDC.

Mother completed her residential treatment program and she was doing well in the program. Relapse is a part of rehabilitation process and can not be deemed unexpected or viewed as the end to Mother's ability to successfully complete the services or to provide a safe family home for the children.

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 and issues raised by the parties, we decide the issues as follows.

First, absent compliance with pertinent provisions in Hawaii Revised Statutes (HRS) § 587-72(c) (Supp. 2005)³, it may

³ Hawaii Revised Statutes § 587-72(c) (Supp. 2005) states, in relevant part:

Upon each review 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 submitted pursuant to section 587-40, and:

.

- (5) Order revisions to the existing service plan, after satisfying section 587-71(h), as the court, upon a hearing that the court deems to be appropriate, determines to be in the best interests of the child; provided that a copy of the revised service plan shall be incorporated as part of the order;

NOT FOR PUBLICATION

be that the family court was not authorized to order the DHS to file a motion for permanent custody. Assuming the court erred, however, the error was harmless. This is because the record is clear that (1) when the court, on February 19, 2004, ordered that "DHS shall file a motion for permanent custody for the next hearing[,]" it did so with the consent of the DHS, and (2) when, on April 15, 2004, the DHS filed the Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan, the DHS did so pursuant to its decision and not pursuant to the compulsion of the court's order.

Second, the relevant question is not when is a Permanent Plan hearing required. The relevant question is when is it permitted. HRS § 587-72(e) (Supp. 2005) states:

If the child has been residing outside of the family home for an aggregate of fifteen out of the most recent twenty-two months from the initial date of entry into out-of-home care, the [DHS] shall file a motion to set the matter for a permanent plan hearing unless:

- (1) The [DHS] has documented in the safe family home guidelines prepared pursuant to section 587-25(a), a compelling reason why it would not be in the best interests of the child to file a motion; or
-
- (6) Enter further orders as the court deems to be in the best interests of the child;
 - (7) Determine whether aggravated circumstances are present and, if so, the court shall set the case for a show cause hearing as the court deems appropriate within thirty days. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing; and
 - (8) If the child has been residing outside the family home for twelve consecutive months from the initial date of entry into out-of-home care, set the case for a show cause hearing as deemed appropriate by the court. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing.

NOT FOR PUBLICATION

- (2) The State has not provided to the family of the child, consistent with the time period in the service plan, such services as the [DHS] deems necessary for the safe return of the child to the family home;

provided that nothing in this section shall prevent the [DHS] from filing such a motion to set a permanent plan hearing if the [DHS] has determined that the criteria in section 587-73(a) are present.

Clearly, both the September 7, 2004 trial and the September 29, 2004 Order Granting Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan filed April 15, 2004 were permitted. The relevant period of time when deciding whether Mother was "presently willing and able to provide" is from November 21, 2003 to September 7, 2004. The relevant period of time when deciding whether Mother "will become willing and able to provide" was from November 21, 2003 to November 21, 2005.

Third, not only was there no indication of a need for a psychological evaluation of Mother, there was no request for one. Mother had all the time between April 27, 2004, when the court entered an order continuing the February 5, 2004 Family Service Plan in effect, and the September 7, 2004 trial to comply with the service plan and to request services. HRS § 587-73(a)(1) and (2) require "the assistance of a service plan[.]" This requires the DHS to help. It assumes that the recipient will take the action necessary for that help to be beneficial. In this case, Mother refused and/or failed to take such action. Unchallenged FsOF nos. 62, 88, 92, 93, 94, and 95 state as follows:

62. [M.K-F] and [S.K-F] are both special needs children with special medical conditions.

. . . .

88. Mother . . . suffers from polysubstance dependency and has admitted to a history of drug use dating back to marijuana use since 1980 and crystal methamphetamines use since 1992.

NOT FOR PUBLICATION

92. Mother completed the residential phase of her treatment program at Hina Mauka on January 17, 2004 however failed to complete the outpatient phase of the program and was discharged due to non compliance with attendance on January 24, 2004.

93. Mother then requested to discontinue with the Family Drug Court Program and was subsequently discharged from FDC on January 23, 2004.

94. Mother relapsed on drugs after leaving drug court and regret[t]ed leaving the FDC program.

95. Mother further admitted at trial to being a drug addict and last used drugs five days before trial.

Clearly, Mother is blaming the DHS for facts and/or conditions that only she could change, that she was ordered to change, and that she refused and/or failed to change.

THEREFORE, IT IS HEREBY ORDERED that the family court's October 19, 2004 Order Awarding Permanent Custody, and November 23, 2004 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, April 13, 2006.

On the briefs:

Tae Won Kim
for Mother-Appellant.

Jay K. Goss and
Mary Anne Magnier
Deputy Attorneys General
for the Department of Human
Services-Appellee.


Chief Judge


Associate Judge


Associate Judge