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NOS. 27110 and 27111

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST R.R.

(FC-S NO. 02-08286)

and

IN THE INTEREST OF L.B.

(FC-S NO. 02-08287)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Nakamura, JJ.)

This case involves two female children, R.R., born on April 22, 1994 (No. 27110), and L.B.,^{1/} born on December 20, 2001 (No. 27111) (collectively, "Children"). Respondent-Appellant Mother (Mother) appeals from the November 19, 2004 Order Awarding Permanent Custody and the January 11, 2005 Orders Concerning Child Protective Act entered in each case in the Family Court of the First Circuit.^{2/3/}

On December 15, 2004, the Findings of Fact and Conclusions of Law (December 15, 2004 Fsof and CsOL) referred to

^{1/} The female child L.B. carried another surname when the Petition for Foster Custody was filed. The surname was changed when her father established his paternity of her.

^{2/} Judge Linda K.C. Luke presided.

^{3/} Although each of the two female children involved in this appeal have separate family court case numbers, the trials were consolidated and there is no relevant difference in the facts, proceedings, court orders, and findings and conclusions entered in each case. Appeals Nos. 27110 and 27111 were consolidated on June 23, 2005.

K. HAMAKAHO
 CLERK OF THE DISTRICT COURTS
 STATE OF HAWAII

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herein were entered by the court in each case.

On April 14, 2002, the Children were taken into protective custody by the Honolulu Police Department and placed into the foster custody of Petitioner-Appellee State of Hawai'i Department of Human Services (DHS). On April 16, 2002, the DHS obtained foster custody of the Children pursuant to a voluntary foster agreement between Mother and the DHS. On April 24, 2002, the DHS placed the Children with their paternal grandmother. On May 22, 2002, the DHS removed the Children from their paternal grandmother. On May 29, 2002, the DHS filed a Petition for Foster Custody. On June 3, 2002, pursuant to Mother's stipulation, the DHS awarded foster custody of the Children to the DHS and ordered the May 28, 2002 service plan. The following was one of the actions it required Mother to take:

1. Substance Abuse Assessment and Treatment
 - a. Focus of task: Participate in an assessment and any recommended treatment.
 - b. Name and address of providers [sic]:

Hina Mauka
Lee Town Center
94-216 Farrington Hwy., Suite B2-306
Waipahu, HI 96797
Ph 671-6900

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

On June 5, 2002, the court appointed a Guardian Ad Litem (GAL) for the Children.

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On October 22, 2002, Mother completed Outpatient Substance Abuse Treatment with Hina Mauka. On February 14, 2003, Mother tested positive for amphetamines and methamphetamines. On March 14, 2003, the Children were returned to Mother, and the DHS retained family supervision authority. On March 22, 2003, Mother tested positive for amphetamines and methamphetamines. On July 26 and 27, 2003, Mother tested positive for cocaine. On July 31, 2003, the DHS took foster custody of the Children by removing them from Mother. On August 5, 2003, Hina Mauka removed Mother "from the UA Monitoring Program because [she has] tested positive two or more times for controlled substances in a three-month period." It "suggested" that Mother "be referred to a substance abuse treatment program or referred for assessment at Hina Mauka."

On August 11, 2003, the DHS moved for an immediate review. On August 13, 2003, Judge Gale L. F. Ching approved this request.

In a report dated October 14, 2003, and filed on October 15, 2003 (GAL's Exhibit 3), the GAL recommended that the court "[c]ontinue foster custody and start permanency planning. The [C]hildren deserve a permanent home and should not be forced to wait until mother is ready to be a safe parent."

On January 28, 2004, the DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. The recommended permanent plan was to award the DHS permanent

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custody of the Children with adoption as the goal.

FOF No. 131 reports that

Mother participated in a substance abuse assessment on March 17, 2004 with Hina Mauka that recommended that Mother participate in Outpatient Substance Abuse Treatment and individual therapy, continue to participate in random urinalysis monitoring, explore at least three support groups such as Alcoholics Anonymous and/or Narcotics Anonymous, undergo services for her domestic violence, feelings of depression, and thoughts of suicide, and continue her services for her anorexia disorder. Based on the credible evidence, Mother did not follow through with the above recommendations, although Mother did participate in individual therapy.

FOF No. 131 further reports that "[s]ince [R.R. and L.B.'s] second removal from Mother's care on July 31, 2003, Mother has not participated in substance abuse treatment."

On April 2, 2004, a social worker for ABC Center of Hawaii reported:

I met with [Mother] on two occasions (2/5/05 [sic] and 3/10/04) and determined that she is suffering from anorexia nervosa. She was willing to talk about this problem but demonstrated little willingness to follow through to work on her issues. This lack of commitment was also evident by her attendance. She did not show for appointments on 2/13/04 and 2/18/04 and did not bother to call to cancel the appointments.

On May 10, 2004, in a preliminary report, a Multidisciplinary Team Conference convened by the Kapiolani Child Protection Center recommended that Mother become a participant in a residential substance abuse treatment program. The Multidisciplinary Team Conference Report dated May 27, 2004 (State's Exhibit 57) states, in relevant part:

Caretaker's Status, Functioning, Needs

Physical and Psychosocial Status

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[Mother] has had a history of prostitution to support her drug usage, having tested positive at different times in 2002 and 2003. She reportedly had completed Intensive Outpatient Drug Treatment

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but failed to maintain sobriety, resulting in the second removal of her children. . . .

. . . .

Social Environment and Social Support System

. . . .

Risk Factors: Mother has had drug relapse even after completion of services and has not resumed services after a significant period of time has passed. . . .

. . . .

TEAM RECOMMENDATIONS

1. Placement Recommendations: Continued placement out of parents' care was recommended for both children, with support of a case direction of permanency planning given the length of time that has lapsed since initial involvement and parents' lack of demonstrated progress.

. . . .

Caretaker(s) and Social System Recommendations

. . . .

2. Drug treatment for mother should be of a residential type. Desired Outcome: Provide a more intensive treatment context since outpatient method was not successful; sustain a drugfree lifestyle.

The July 12, 2004 Safe Family Home Report (State's Exhibit 64) recommended adoption as a permanent plan and reported that Mother "has failed to follow through on her Hina Mauka recommendations contained in her substance abuse assessment dated 3/17/04." The July 12, 2004 Family Service Plan (State's Exhibit 65) stated, in relevant part:

1. Substance abuse treatment recommendation: Outpatient Substance Abuse Treatment. [Mother] should consider residential drug treatment for her illicit drug dependency, as recommended by the Multidisciplinary Team on 05/10/04.

The July 12, 2004 Permanent Plan (State's Exhibit 66) states, in relevant part:

- I GOAL: Permanent Custody of [R.R. and L.B.] be awarded to the DHS, with the subsequent goal of Adoption within one

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year of the award of Permanent Custody.

In a document filed on July 27, 2004, the Volunteer Guardian Ad Litem (VGAL) stated that the:

VGAL Program social worker is in agreement with the former guardian ad litem . . . that it is in the best interests of each child that the [DHS's] Motion for Order Awarding Permanent Custody and Establishing A Permanent Plan, filed January 28, 2004 should be granted.

On November 10, 2004, after a trial on September 16, 17, and 23, 2004, the court entered its Order Granting Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan Filed January 28, 2004. The Order Awarding Permanent Custody was filed on November 19, 2004. In the December 15, 2004 FsOF and COL entered in R.R.'s case, the court found, in relevant part:

39. [R.R.] is a special needs child based on her mental health issues.

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41. . . . [R.R.] suffers from Post Traumatic Stress Disorder secondary to trauma of being neglected by her family for a long period of time and from having had so many unstable living situations.

In the December 15, 2004 FsOF and COL entered in L.B.'s case, the court found, in relevant part:

59. [L.B.] is a special needs child due to her developmental delays and her mental health issues.

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66. . . . [L.B.] suffers from Reactive Attachment Disorder ("RAD")-disinhibited type beginning to be in remission; Effects of Fetal Alcohol Syndrome ("FAS") . . .; and Neglect of Child.

On January 11, 2005, the court entered its Orders Concerning Child Protective Act which, among other actions, denied Mother's November 24, 2004 Motion for Reconsideration.

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Mother filed a notice of appeal in each of the cases on February 8, 2005. This consolidated appeal was assigned to this court on September 15, 2005.

In her appeal, Mother challenges FsOF Nos. 122, 127, 131, 132, 133, 135, 136, 137, 141, 147, 148, 149, 150, 152 and CsOL Nos. 10, 11, 13. She contends, in her opening brief, that the challenged FsOF

are not supported by the evidence, given that the services recommended by the DHS, and ordered by the court below, did not properly address mother's substance abuse problem, which mother sought to cure. These findings are based on the belief that it was mother who did not have enough motivation to overcome her substance abuse problem, as opposed to mother being provided with an ineffective treatment method:

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Throughout the life of this case, mother has put her faith in trying to follow the Service Plans recommended by the DHS as a means of improving herself, and putting herself in a position where she could provide a safe home for her children. . . .

What the record reveals is that first and foremost the plans called for mother to enter into substance abuse treatment. Specifically, the service plans recommended that mother enter into outpatient substance abuse treatment. What the record further reveals is that mother did in fact complete Intensive Outpatient Treatment, receiving her clinical discharge from the program that the DHS had asked her to participate in.

What is undisputed is that from May of 2002, until July 12, 2004, slightly more than two months before the permanent custody trial in this case, the DHS maintained that outpatient substance abuse treatment was the correct instrument to deal with mother's substance abuse problem. What happened on July 12, 2004, is that for the first time, the DHS stated that mother should be involved in a residential treatment program, something very different from the outpatient program that she had been recommended for, and which she had finished with a clinical discharge.

In short, the DHS, for well over two years, had been incorrect in the treatment modality which it required mother to participate in in order to cure her addiction, and her addictive behaviors. This was not realized until the Multidisciplinary Team in May of 2004, and was not put into a court order until July 12, 2004. As was noted above, the tragedy of this discovery was that the trial to terminate parental rights was already on calendar by this late date, only two months away.

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The central role of the substance abuse problem is underscored by the facts surrounding the return of the children in

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2003. This was accomplished because mother had finished the Intensive Outpatient Treatment Program, and received her clinical discharge. The DHS recognized that completing treatment was important. The problem of course is that in hindsight it was the wrong kind of treatment and would not effectively handle the addiction which plagued mother.

The key role of the substance abuse problem is further buttressed by the eventual removal of the children in July of 2003. We need to keep in mind that this took place not because mother had not finished her parenting classes or was lagging in her individual therapy. The children were removed because mother had a relapse and used illegal drugs once again. . . .

It also should not be forgotten that mother's performance of services such as the parenting classes and individual therapy would have been enhanced had mother received a proper course of substance abuse treatment first. It follows logically that mother would not have been able to complete these other services until she had been able to properly treat her addiction issues.

. . . Mother completed the Intensive Outpatient Treatment Program. That the program was not successful is no surprise, the DHS later acknowledged that mother would be better served by a residential treatment program.

The question now is, whether it would be equitable to terminate mother's parental rights because she followed a court ordered treatment program that did not adequately address her level of addiction. Mother contends that it would not. Clearly, the proper course of action on the part of the DHS, when it realized its mistake, was to have mother enter into residential treatment rather than to proceed to the permanent custody trial. It was error for the court to terminate mother's parental rights under this set of facts because it can not be established by clear and convincing evidence that she would not have been able to provide a safe home for her children with the assistance of . . . an **appropriate** service plan.

(Emphasis in original.)

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, duly considering and analyzing the law relevant to the arguments and issues raised by the parties, and applying the standard of review stated in In re Jane Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (Haw. 2001), we decide the issues as follows:

The facts relevant to Mother's argument occurred in the following sequence: (1) in 2002, to treat her drug addiction,

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Mother was referred to and completed the Intensive Outpatient Treatment Program; (2) in 2003, Mother had a relapse and used illegal drugs once again; (3) in March of 2004, it was recommended that Mother again participate in Outpatient Substance Abuse Treatment; and (4) in May of 2004, it was recommended that Mother enter a residential treatment program. In essence, Mother contends that fact (2) proves that the programs described in facts (1) and (3) were the wrong programs and that the program described in fact (4) was the right program. For the following reasons, we conclude that this argument has no merit.

First, Mother's participation in the 2002 Intensive Outpatient Treatment Program was a decision made by Hina Mauka after its assessment of Mother. On June 3, 2002, pursuant to Mother's stipulation, the DHS ordered the May 28, 2002 service plan. One of the actions that service plan required Mother to take was to go to Hina Mauka and "[p]articipate in an assessment and any recommended treatment."

Second, there is no evidence that the 2002 Intensive Outpatient Treatment Program did not properly address Mother's substance abuse problem, was an ineffective treatment method, was not the correct instrument to deal with Mother's substance abuse problem, was an incorrect treatment modality, and did not adequately address Mother's level of addiction. Even in hindsight, the record does not establish that the 2002 Intensive Outpatient Treatment Program was the wrong kind of treatment such that it would not effectively handle the addiction which plagued

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Mother. The May 2004 recommendation that Mother participate in a residential treatment program is a consequence of Mother's 2003 relapse and subsequent failure to return to Hina Mauka for further participation in the Intensive Outpatient Treatment Program, not an admission that the 2002 Outpatient Substance Abuse Treatment did not properly address Mother's substance abuse problem.

Third, there is no evidence that Mother's relapses were a consequence of the inadequacy of the 2002 Intensive Outpatient Treatment Program. FOF No. 122 reports that "Mother did not present with any cognitive deficiencies that would interfere with her ability to participate in services and with her ability to understand the ramifications of her actions." Thus, it is more likely that Mother's relapses were the consequences of Mother's voluntary choices. This is especially so because of Mother's knowledge that her relapses would seriously jeopardize her stated desire to resume custody of the Children.

Fourth, there is no evidence of any curative action taken by Mother after her relapses, after Hina Mauka's August 5, 2003, suggestion that Mother "be referred to a substance abuse treatment program or referred for assessment at Hina Mauka[,]" or after the May 27, 2004 Multidisciplinary Team Conference Report. Similarly, there is no evidence that the DHS caused Mother's failure to enter a recommended residential treatment program.

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Fifth, at the trial, Mother supported the Children's placement with their father or, failing that, with their paternal grandmother.

THEREFORE, IT IS HEREBY ORDERED that the November 19, 2004 Order Awarding Permanent Custody and the January 11, 2005 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, April 28, 2006.

On the briefs:

Dean T. Nagamine
for Respondent-Appellant
Mother.

Dierdre Marie-Iha and
Dorothy D. Sellers,
Deputy Attorneys General,
for Petitioner-Appellee
Department of Human Services.


Chief Judge


Associate Judge


Associate Judge