

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 27763

IN THE INTERMEDIATE COURT OF APPEALS
 OF THE STATE OF HAWAII
 IN THE INTEREST OF J.M-J.

NORMA T. YARA
 CLERK, APPELLATE COURTS
 STATE OF HAWAII

2006 DEC 22 PM 12: 26

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
 (FC-S NO. 04-09955)

SUMMARY DISPOSITION ORDER

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

The mother (Mother) of J.M-J. appeals from the December 23, 2005 Order Awarding Permanent Custody and the January 17, 2006 order denying Mother's motion for reconsideration entered in the Family Court of the First Circuit.¹

J.M-J. was born on April 28, 1992, and resided with Mother. J.M-J. is a "special needs" child requiring special education services. He is mildly autistic and suffers an attention deficit hyperactivity disorder. In 1995, at Mother's request, the father (Father) of J.M-J. assumed responsibility for the care of J.M-J. Although Mother and Father were married in Hawaii in 1996, Mother returned to Los Angeles within weeks of the wedding and J.M-J. remained with Father.

¹ Judge William J. Nagle, III, presided.

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On September 15, 2004, Father appeared mentally ill and was transported to Queen's Medical Center. J.M-J. was taken into police protective custody and placed in the temporary foster custody of the State of Hawai'i Department of Human Services (DHS). On September 21, 2004, DHS petitioned for the award of temporary foster custody of J.M-J. On September 23, 2004, after a hearing, Judge Marilyn Carlsmith granted the petition.

On October 7, 2004, Angela-Jo Correa-Pei, Esq., was appointed as Guardian Ad Litem (GAL) for J.M-J.

On October 25, 2004, Father failed to appear and was defaulted. Mother's location was then unknown.

In a handwritten letter dated December 13, 2004, Mother asked the court to postpone the December 17, 2004 hearing until some time in January or February. On December 17, 2004, the court denied Mother's request and awarded foster custody of J.M-J. to DHS.

At a hearing on March 16, 2005, Mother was present with her "consulting counsel" Tom Haia. The Court continued foster custody of J.M-J., permitted Mother to appear by telephone for the next review hearing on September 8, 2005, and ordered a psychiatric evaluation of Mother.

On August 16, 2005, DHS filed a motion for permanent custody. At a hearing on September 8, 2005, Mother appeared by telephone. Her "consulting counsel" Herbert Hamada was present in person. Trial was set to occur on December 23, 2005.

In a December 2, 2005 report, GAL opined that "[i]t is in the best interests of [J.M-J.] that the Motion for Permanent Custody be granted and that the Permanent Plan dated August 11, 2005 be ordered."

On December 23, 2005, after a trial with Mother and her trial counsel, Herbert Hamada, present, the court entered the Order Awarding Permanent Custody that (1) terminated Mother's and Father's parental and custodial rights and duties, (2) appointed the State of Hawai'i Director of Human Services as permanent custodian of J.M-J., and (3) ordered the August 11, 2005 Permanent Plan into effect. The August 11, 2005 Permanent Plan states in part:

The present foster parent is anxiously waiting to adopt [J.M-J.] [J.M-J.] has known his foster father since he was approximately four years. The DHS Permanency Unit will assess the suitability of this family and any other family members who may come forward that are interested in adopting [J.M-J.] Final decisions regarding [J.M-J.'s] adoptive parents will be done by the DHS Permanency Unit.

On January 12, 2006, Mother filed a motion for reconsideration of the December 23, 2005 order. On January 17, 2006, after a hearing, the court entered an order denying this motion.

On February 15, 2006, Mother filed a notice of appeal. On March 10, 2006, the court entered the "Findings of Fact, Conclusions of Law and Order Granting Department of Human Services' Motion for Order Awarding Permanent Custody and

Establishing a Permanent Plan Filed August 16, 2005."² The findings of fact state in part:

4. . . . [Mother] was unable to deal with [J.M-J.'s] hyperactive tendencies, and had no understanding of his autism. In 1995, [Mother] requested that [Father] assume responsibility for the care of [J.M-J.], and voluntarily relinquished custody of him. Although [Mother] and [Father] married in Hawaii in 1996, [Mother] returned to Los Angeles within weeks of the "wedding", leaving [J.M-J.] with [Father]. Apart from a few telephone calls, cards and letters over the ensuing nine years, [Mother] had no contact with [J.M-J.]. In fact, the DHS-supervised visit between [Mother] and [J.M-J.] was the first time [Mother] had seen [J.M-J.] since 1996. At that visit, [Mother] had very little interaction with [J.M-J.], and spent most of her time talking with DHS staff employees.

5. [Mother] has failed to perform the Court-ordered services. She has failed to take or complete a parenting class and has failed to undergo a psychological examination, despite DHS' arrangements for such examination in September, 2005. [Mother] testified at trial that she would not be able to provide a home for [J.M-J.] for at least six months; she had no child care plan and proposed that [J.M-J.] be placed in a group home in California until [Mother] was ready for him. . . .

6. Most importantly, [Mother] has little or no insight into [J.M-J.'s] special needs, perhaps because of the lapse of time and lack of contact with him, as well as her failure or refusal to perform court-ordered services. [Mother] also testified at the trial that she had received mental health services over an extended period of time, including psychiatric medication and counseling. . . .

7. [Father] has been diagnosed with paranoid schizophrenia; he has been hospitalized in 1997 and 2004 for this condition, and his last known address is the Institute Of Human Services. . . . [Father's] former domestic partner terminated his relationship with [Father] in order to care for [J.M-J.]. The Foster Father has performed the Court-ordered services, and has demonstrated an admirable ability to care for the ordinary and special needs of [J.M-J.]. The Court finds that it is in [J.M-J.'s] best interest that [J.M-J.] remain with the Foster Father. . . .

[9.] The permanent plan proposed by DHS envisions continuing custody of [J.M-J.] with the Foster Father, pending adoption or guardianship by the Foster Father.

² The December 23, 2005 final order became appealable when the January 17, 2006 order was filed. After the notice of appeal was filed on February 15, 2006, the family court lacked jurisdiction to enter the orders contained in the March 10, 2006 document.

In this appeal, Mother contends that (1) the court abused its discretion at the December 17, 2004 hearing when it did not provide her with the assistance of counsel, (2) there was insufficient evidence to support the court's finding that DHS had proved, by clear and convincing evidence, that it is not reasonably foreseeable that Mother will become willing and able to provide J.M-J. with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed two years from September 23, 2004, and (3) the permanent plan is not in best interests of J.M-J. because (a) Father and Foster Father had been in a homosexual relationship, and (b) other than Foster Father's statements, "no other evidence was presented corroborating that substance abuse of crystal methamphetamine and domestic violence were no longer problems that [F]oster [F]ather had to address."

In the answering brief, DHS responds to (3), above, as follows:

As set forth in the August 11, 2005 DHS safe family home report, and the social worker's testimony at trial, Foster Father successfully completed rehabilitative services under a former DHS intervention in 1997-1998, including earning a certificate from the PACT-Family Peace Center dated September 16, 1998, and a clinical discharge from the Salvation Army for substance abuse treatment. He had originally [been] made a party to the case as a household member of Father, but ceased that relationship in order to become [a] foster parent for [J.M-J.] He was licensed as a child-specific foster parent and the child was placed with him on November 8, 2004.

(Record citations omitted).

Mother did not file a reply brief.

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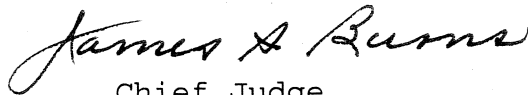
Upon a review of the record and the briefs and having given due consideration to the issues and arguments, we affirm the family court's December 23, 2005 Order Awarding Permanent Custody and January 17, 2006 order denying Mother's motion for reconsideration.

DATED: Honolulu, Hawai'i, December 22, 2006.

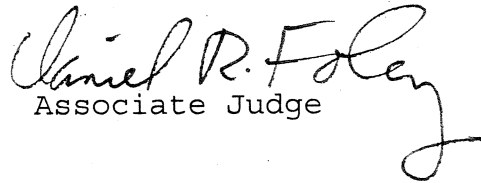
On the briefs:

Herbert Y. Hamada
for Mother-Appellant.

Susan B. Brandon and
Mary Anne Magnier,
Deputy Attorneys General
for Petitioner-Appellee.


Chief Judge


Associate Judge


Associate Judge