

NO. 27936

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

IN THE INTEREST OF B CHILDREN:
C.A-A.B., C.L.B., E.B., G.A-L.B., F.B., AND G.B.

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 05-10592)

MEMORANDUM OPINION

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

The family in this case includes six children (the Six Children), their father (Father), and their mother (Mother). Father appeals from the March 16, 2006 Orders Concerning Child Protective Act and the May 1, 2006 Orders Concerning Child Protective Act entered in the Family Court of the First Circuit. We vacate the Findings of Fact and Conclusions of Law entered on June 21, 2006 and dismiss this appeal brought by Father because it is moot.

BACKGROUND

Father's opening brief states that "[t]he family is originally from the Washington, D.C. area. The family has also lived in two cities in the State of Virginia, two cities in the State of California and the State of Nevada." The family came to Hawai'i from Las Vegas on June 5, 2005.

On October 5, 2005, after the police assumed protective custody of the Six Children, Mother and Father signed an agreement voluntarily placing the Six Children in the foster

care¹ of the State of Hawai'i Department of Human Services (DHS).

¹ Hawaii Revised Statutes § 587-2 (Supp. 2006) states in part:

Definitions. When used in this chapter, unless the context otherwise requires:

"Family supervision" means the legal status created pursuant to this section, section 587-21(b)(2), or by an order of court after the court has determined that the child is presently in the legal or permanent custody of a family which is willing and able, with the assistance of a service plan, to provide the child with a safe family home. Family supervision vests in an authorized agency the following duties and rights, subject to such restriction as the court deems to be in the best interests of the child:

- (1) To monitor and supervise the child and the child's family members who are parties, including, but not limited to, reasonable access to each of the family members who are parties, and into the child's family home; and
- (2) To have authority to place the child in foster care and thereby automatically assume temporary foster custody or foster custody of the child. Upon placement, the authorized agency shall immediately notify the court. Upon notification, the court shall set the case for a temporary foster custody hearing within three working days or, if jurisdiction has been established, a disposition or a review hearing within ten working days of the child's placement, unless the court deems a later date to be in the best interests of the child.

An authorized agency shall not be liable to third persons for acts of the child solely by reason of its possessing the status of temporary family supervision or family supervision in relation to the child.

"Foster care" means a residence designated as suitable by an authorized agency or the court to provide twenty-four hour out of family home, substitute care for the child.

"Foster custody" means the legal status created pursuant to this section, section 587-21(b)(2), or by an order of court after the court has determined that the child's family is not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan.

- (1) Foster custody vests in a foster custodian the following duties and rights:
 - (A) To determine where and with whom the child shall be placed in foster care; provided that the child shall not be placed in foster care outside the State without prior order of the court; provided further that, subsequent to the temporary foster custody hearing, unless otherwise ordered by the court, the temporary foster custodian or the foster custodian may permit the child to resume residence with the family from which the child was removed after providing prior written notice to the court and to all parties, which notice shall state that there is no objection of any party to the return; and upon the return of the child to the family, temporary foster custody, or foster custody automatically shall be revoked and the child and the child's family members who are parties shall be under the temporary family supervision or the family supervision of the former temporary foster custodian or foster custodian;
 - (B) To assure that the child is provided in a timely manner with adequate food, clothing, shelter, psychological care, physical care, medical care, supervision, and other necessities;
 - (C) To monitor the provision to the child of appropriate education;
 - (D) To provide all consents which are required for the child's physical or psychological health or welfare, including, but not limited to, ordinary medical, dental, psychiatric,

The next day, when Mother and Father revoked their consent, the DHS, through the police, assumed temporary foster custody of the Six Children.

On October 11, 2005, the DHS commenced this case by filing a Petition for Temporary Foster Custody of the Six Children. On October 18, 2005, Judge Marilyn Carlsmith appointed Michael A. Tongg as the Guardian Ad Litem (GAL Tongg) for the Six Children.

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- psychological, educational, employment, recreational, or social needs; and to provide all consents for any other medical or psychological care or treatment, including, but not limited to, surgery, if the care or treatment is deemed by two physicians or two psychologists, whomever is appropriate, licensed or authorized to practice in this State to be necessary for the child's physical or psychological health or welfare, and the persons who are otherwise authorized to provide the consent are unable or have refused to consent to the care or treatment;
- (E) To provide consent to the recording of a statement pursuant to section 587-43; and
 - (F) To provide the court with information concerning the child that the court may require at any time.
 - (2) The court, in its discretion, may vest foster custody of a child in any authorized agency or subsequent authorized agencies, in the child's best interests; provided that the rights and duties which are so assumed by an authorized agency shall supersede the rights and duties of any legal or permanent custodian of the child, other than as is provided in paragraph (4).
 - (3) An authorized agency shall not be liable to third persons for the acts of the child solely by reason of the agency's status as temporary foster custodian or foster custodian of the child.
 - (4) Unless otherwise ordered by the court, a child's family member shall retain the following rights and responsibilities after a transfer of temporary foster custody or foster custody, to the extent that the family member possessed the rights and responsibilities prior to the transfer of temporary foster custody or foster custody, to wit: the right of reasonable supervised or unsupervised visitation at the discretion of the authorized agency; the right to consent to adoption, to marriage, or to major medical or psychological care or treatment, except as provided in paragraph (1)(D); and the continuing responsibility for support of the child, including, but not limited to, repayment for the cost of any and all care, treatment, or any other service supplied or provided by the temporary foster custodian, the foster custodian, or the court for the child's benefit.

The October 26, 2005 Orders Concerning Child Protective Act entered by Judge Carlsmith ordered that C.A-A.B. shall be returned to Mother and Father "today".

The November 29, 2005 Orders Concerning Child Protective Act entered by Judge Carlsmith pertains to the five children other than C.A-A.B. (the Five Children) and states that "[a]ll parties are ordered to appear for a pretrial hearing on 2/7/06 at 8:30 a.m. and a one-day Adjudication trial on 2/22/06 at 8:30 a.m."

The December 19, 2005 Orders Concerning Child Protective Act entered by Judge Carlsmith state that "[Father and Mother] are prohibited from having any contact with the [Five Children], their respective foster parents, or their respective schools[,] and that "[a]ll parties are ordered to a second day of trial on 5/1/06 at 8:30 a.m."

On February 8, 2006, GAL Tongg filed a motion to reschedule the February 22, 2006 trial as he planned to be out of the country from February 18, 2006 through March 1, 2006, and from March 17, 2006 through April 3, 2006. On February 10, 2006, Judge William J. Nagle III denied GAL Tongg's motion and "excused" GAL Tongg "from attending the hearing on 2/22/06."

Judge Nagle presided over the February 22, 2006 trial. The February 22, 2006 Orders Concerning Child Protective Act entered by Judge Nagle states that "[a]ll parties shall appear at

a further half-day trial on March 3, 2006 at 9:00 a.m."

As a result of the trial, Judge Nagle's March 16, 2006 Orders Concerning Child Protective Act did various things including the following: (1) ordered that the family court had exclusive jurisdiction pursuant to Hawaii Revised Statutes (HRS) §§ 571-11(9) and 587-11 (1993); (2) awarded the DHS family supervision over C.A-A.B.; (3) found that Father and Mother "are not presently willing and able to provide [the Five Children] with a safe family home, even with the assistance of a service plan"; (4) awarded the DHS foster custody over the Five Children; (5) suspended Father's and Mother's visits with G.A-L.B. and F.B., and (6) ordered that Mother and Father shall have no contact with G.A-L.B., F.B., and their foster parents.

On April 5, 2006, Father filed a Motion for Reconsideration. In the May 1, 2006 Orders Concerning Child Protective Act, Judge Nagle denied this motion.

On May 16, 2006, Mother filed a Notice of Appeal. On May 30, 2006, Father filed a Notice of Appeal. On June 21, 2006, Judge Nagle entered Findings of Fact and Conclusions of Law.

On August 8, 2006, this court entered an order dismissing Mother's appeal for her failure to file a motion for reconsideration required by HRS § 571-54 prior to its amendment effective July 1, 2006.

DISCUSSION

I.

Based on the following precedent, the DHS contends and we conclude that we have appellate jurisdiction over that part of the March 16, 2006 Orders Concerning Child Protective Act that awarded the DHS foster custody over the Five Children.

We therefore conclude that, under the circumstances, the family court's determination of jurisdiction, followed by the award of foster custody, met the requisite degree of finality of an appealable order; accordingly, this court is vested with appellate jurisdiction.

In re Doe, 77 Haw. 109 at 115, 883 P.2d 30 at 36 (1994).

The DHS contends that we do not have appellate jurisdiction over that part of the March 16, 2006 Orders Concerning Child Protective Act that awarded the DHS family supervision over C.A-A.B. In the answering brief, the DHS asserts that

the award of foster custody of the concerned children is a jurisdictional pre-requisite for a parent's appeal of the family court's findings and orders adjudicating the case, but the appellate courts do not have appellate jurisdiction over appeals adjudicating the case followed by an award of family supervision of the concerned children to DHS.

We agree with the DHS.

II.

The October 6, 2006 Amended Orders Concerning Child Protective Act entered by Judge Matthew Viola, which amended the August 1, 2006 Orders Concerning Child Protective Act entered by Judge Viola, states that on May 8, 2006, G.P.B.; on June 5, 2006, E.B. and C.L.B.; and on July 19, 2006, G.A-L.B. and F.B. were

returned to Father and Mother at which times the DHS assumed family supervision of them.

The DHS contends that

Father's appeal became moot, and the appellate court lost the underlying requisite basis (the award of foster custody of [the Five Children] to DHS) for appellate jurisdiction when these children were returned to [Father's and Mother's] care on June 5, 2006, as confirmed by the family court on August 1, 2006.

It is established in Hawai'i that

[a] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal--adverse interest and effective remedy--have been compromised."

CARL Corp. v. State, Dept. of Educ., 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000) [hereinafter, "CARL II "] (quoting *In re Application of Thomas*, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992) (quoting *Wong v. Board of Regents, University of Hawai'i*, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980))).

In re Doe, 105 Haw. 38, 56, 93 P.3d 1145, 1163 (2004) (brackets in original).

However, an appeal is not moot if the case appealed has substantial continuing collateral consequences on the appellant. *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). The June 24, 1994 Amended Order in FC-D No. 88-2056 states in relevant part that "[v]isitation shall only be allowed by express order of [the] Family Court. The Family Court judge reviewing this matter should review FC-S No. 89-01365 and FC-S No. 92-02414 prior to ordering visitation." In other words, in addition to any other impact it may have on his life, the result of Father's appeal will have a direct impact on his rights to visit his children. Therefore, Father's appeal is not moot.

In re Doe, 81 Haw. 91, 99, 912 P.2d 588, 596 (App. 1994) (brackets in original).

In light of this precedent, we conclude that this appeal by Father is moot if the case does not have substantial continuing collateral consequences on Father. For that to be

true, we conclude that the June 21, 2006 Findings of Fact and Conclusions of Law must be vacated.

CONCLUSION

Accordingly, we vacate the Findings of Fact and Conclusions of Law entered on June 21, 2006 and dismiss this appeal brought by Father because it is moot.

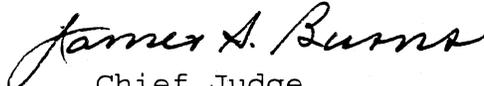
DATED: Honolulu, Hawai'i, April 13, 2007.

On the briefs:

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Michael A. Tongg,
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Chief Judge


Associate Judge


Associate Judge