

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28405

IN THE INTERMEDIATE COURT OF APPEALS  
 OF THE STATE OF HAWAI'I  
 IN THE INTEREST OF K.W.

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

2008 APR 24 PM 1:47

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
 (FC-S No. 02-08663)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Nakamura, and Fujise, JJ.)

Mother-Appellant (Mother) appeals from the Order Awarding Permanent Custody and the Letters of Permanent Custody, both entered by the Family Court of the First Circuit (the family court)<sup>1</sup> on January 11, 2007, which awarded permanent custody of Mother's natural daughter, K.W. (Child), to the Director of the Department of Human Services of the State of Hawai'i (DHS).

On appeal, Mother asserts four points of error:

(1) the family court erred in concluding that "it is not reasonably foreseeable that [Mother] will not be able to provide [Child] with a safe family home in face of the fact that [M]other had been actively engaged in therapy[;]" (2) the family court "should have given [M]other additional time to fulfill the service plan because [M]other has demonstrated all the various ways that she cares for [Child;]" (3) the family court should not have permitted Mother's "waiver of cross examination and the submission of the case on the record as it deprives a person of their right to due process[;]" and (4) the family court "should have proceeded with a full blown trial as this is the only method wherein Appellant's rights as a mother are protected."

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<sup>1</sup> The Honorable Paul T. Murakami presided.

As to her first two points on appeal, Mother has not challenged any of the facts found by the family court in its Findings of Fact and Conclusions of Law filed on March 27, 2007. "If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997) (internal quotation marks omitted). Mother has also not presented any argument in her opening brief as to the first two points on appeal. Accordingly, we deem these points waived and abandoned. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7); Berkness v. Hawaiian Elec. Co., 51 Haw. 437, 438, 462 P.2d 196, 197 (1969).

As to Mother's third and fourth points on appeal, we note initially that the following discussion occurred at the outset of the January 11, 2007 permanent-custody trial:

[DEPUTY ATTORNEY GENERAL]: Your Honor, I think there's a proposal to modify the trial procedure today which I'll yield -- defer to [Mother's counsel].

THE COURT: [Mother's counsel].

[MOTHER'S COUNSEL]: Yes, Your Honor. In discussions with both the guardian ad litem and my client, what we intend to do today is waive cross in terms of the report writers for [DHS] and we'd be asking the judge to render a decision based upon the exhibits submitted.

THE COURT: Very well. Correct, [Mother's Guardian Ad Litem (GAL)]?

[MOTHER'S GAL]: That's correct, Your Honor.

THE COURT: [Mother], correct?

[MOTHER]: I haven't really submitted everything.

THE COURT: Do you have some things to submit as well?

[MOTHER]: Yes, this is the family service plan.

THE COURT: Wait. [Mother's Counsel], do you have an exhibit list?

[MOTHER'S COUNSEL]: Actually this is what I've submitted already. All of those things that . . .

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I am submitting just M through O on behalf of [M]other to --- and copies have been provided to all the parties.

THE COURT: Anything further?

[MOTHER'S COUNSEL]: I think [M]other just wanted to state for the record that she was in compliance with the --

[MOTHER]: That I've completed the family service plan  
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[MOTHER'S COUNSEL]: -- completed the service plan.

MOTHER: -- and I've handed in towards the safe family home report eliminations on the names and persons who are not the family of my daughter and they have been placed in the family of my daughter and reported to be the threatening harm and assault to my daughter. And yeah --

THE COURT: Understood. [Child's GAL].

[CHILD'S GAL]: Judge, I'm okay with the modification of the trial agreement.

THE COURT: Thank you. Any objections to [M]other's exhibits?

[DEPUTY ATTORNEY GENERAL]: No, Your Honor.

THE COURT: All in evidence subject to cross. You may proceed.

(Emphasis added.) No cross-examination occurred, and the parties thereafter made their closing arguments.

The record thus indicates that Mother was present at trial, was represented by counsel, conferred with her counsel regarding her waiver of cross-examination, had a GAL protecting her interests, and was provided an opportunity to present evidence and exhibits as well as cross-examine the witnesses who had been summoned to appear at trial. Mother was agreeable to submitting the case to the court based on the exhibits submitted, and she personally addressed the court and informed the court that she had completed the family service plan. Therefore, Mother waived her right of cross-examination. See In re Doe, 77 Hawai'i 109, 116, 883 P.2d 30, 37 (1994). "The basic elements of procedural due process of law require notice and an opportunity

to be heard at a meaningful time and in a meaningful manner[.]"  
Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw.  
361, 378, 773 P.2d 250, 261 (1989). Mother was certainly  
afforded such an opportunity.

Moreover, the record reveals that the family court bent  
over backwards to protect Mother's parental rights in Child. Not  
only did the family court set aside several defaults by Mother  
for failing to attend court hearings, but contrary to Hawaii  
Revised Statutes (HRS) § 587-73(a)(2) (2006),<sup>2</sup> the family court  
gave Mother approximately four years, instead of two years, to  
provide Child a safe home with the assistance of a service plan.  
Mother failed to complete the service plan after four years due  
to her inability to pass required drug tests and find safe and  
stable housing for herself or Child.

In light of the history of this case, we cannot  
conclude that Mother was denied due process at trial or that the  
family court erred in allowing her to submit the case based on  
the exhibits and evidence submitted at trial. Additionally, the

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<sup>2</sup> HRS § 587-73(a)(2) provides now, as it did at the time of trial, 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:

. . . .

- (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[.]

family court did not err or abuse its discretion when it terminated Mother's parental rights for Mother's failure to provide a safe home within a reasonable period of time. Id. Therefore,

IT IS HEREBY ORDERED that the family court's Order Awarding Permanent Custody and the Letters of Permanent Custody, both filed on January 11, 2007, are hereby affirmed.

DATED: Honolulu, Hawai'i, April 24, 2008.

On the briefs:

Edward J.S.F. Smith  
for mother-appellant.

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Mary Anne Magnier,  
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