

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28524

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

IN THE INTEREST OF A-M.M.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-S NO. 05-10433)NORMA T. YARAE  
CLERK, APPELLATE COURT  
STATE OF HAWAII

2008 APR 22 AM 7:51

FILED

SUMMARY DISPOSITION ORDER

(By: Nakamura, Presiding Judge, Fujise and Leonard, JJ.)

Appellant Father (**Father**), natural father of A-M.M., who was born on June 19, 2005 (**Child**), and Appellant Mother (**Mother**), natural mother of Child, appeal the Order Regarding Motion for Order Awarding Permanent Custody and Establishing A Permanent Plan, Filed July 5, 2006, filed on April 12, 2007, and Order Awarding Permanent Custody, filed on April 27, 2007, in the Family Court of the First Circuit (**Family Court**)<sup>1</sup>.

Points of Error

On appeal, Father challenges Findings of Fact (**FOF**) Nos. 95, 106, 112, 113, 114, 116, 117, 118, 124, and 130. Father's underlying claims are that, although he was incarcerated during the proceedings, he would have been eligible for parole before the end of the statutorily reasonable two-year period of time, he expected to complete the KASHBOX treatment program within that time (and had started parenting classes and was working on his GED) and, he should have been allowed the full two years as his reasonable opportunity to comply with a service plan. Father contends that he was denied a reasonable period of time to complete a service plan to be able to provide a safe home for Child.

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<sup>1</sup> The Honorable Gale L.F. Ching presided.

On appeal, Mother challenges FOF Nos. 31, 32, 33, 37, 38, 41, 66, 72, 78, 82, 83, 85, 87, 88, 89, 90, 120, 123, 124, 125, 126, 127, 128, 129, and 131 and Conclusions of Law (COL) Nos. 12, 13, 14, and 15. Mother's underlying claims include that she is currently caring for Child's sibling, that DHS does not find she is an unfit parent for the sibling and, therefore, it is inconsistent to find that Mother is an unfit parent for Child. Mother also argues that it could not be in Child's best interest to implement a service plan that precludes contact with a sibling. Mother contends the family court abused its discretion by awarding permanent custody of Child to Appellee State of Hawai'i, Department of Human Services (DHS) because DHS failed to prove by clear and convincing evidence that Mother could not reunify with Child. Mother also claims the Permanent Plan is not in the best interest of Child because it does not provide for contact with a sibling.

APPLICABLE STANDARDS OF REVIEW

The Family Court possesses wide discretion in making its decisions. The Family Court's decisions will not be set aside unless there is a manifest abuse of discretion. Therefore, "we will not disturb the family court's decisions on appeal unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (citation omitted).

The family court's FOFs are reviewed on appeal under the clearly erroneous standard. A FOF is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

On the other hand, the family court's COLs are reviewed on appeal *de novo*, under the right/wrong standard. COLs, consequently, are not binding upon an appellate court and are freely reviewable for their correctness.

....

Moreover, the family court is given much leeway in its examination of the reports concerning a child's care, custody, and welfare, and its conclusions in this regard, if supported by the record and not clearly erroneous, must stand on appeal.

Id. (citations, internal quotation marks, brackets, and some ellipses omitted).

#### DISCUSSION

Upon careful review of the record and the briefs submitted by the parties and having given careful consideration to the arguments advanced and the issues raised by the parties, we resolve Father and Mother's points of error as follows:

Even assuming that the Family Court erred finding that Father would not be eligible for parole until March 2008, the Family Court did not err in finding that Father would not be able to provide a safe home within a reasonable period of time pursuant to Hawaii Revised Statutes (HRS) § 587-73. HRS § 587-73 provides, in relevant part (emphasis added):

§587-73 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:

- (1) The child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan;
- (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;

We have stated that: "A criminal charge, conviction, or incarceration does not per se result in the forfeiture of parental rights, but confinement can be considered a factor in deciding whether a parent may provide a safe family home." In the Interest of T.H. and K.H., 112 Hawai'i 331, 336, 145 P.3d 874, 879 (App. 2006). However, that "general statement is not true where the parent's mandatory minimum incarceration exceeds two years from the date upon which the child was first placed under foster custody by the court." Id. Father's interpretation of HRS § 587-73(a)(2) is erroneous. HRS § 587-73(a)(2) states that two years is the maximum reasonable time allowed for completion of a service plan, not the minimum.

Child was first placed under foster custody on or about June 21, 2005. Although father anticipated completing the KASHBOX program on or about June 19, 2007, at the permanent custody hearing, Father stated that the parole board would not set a hearing until about one month after he completed the program. Under the best of circumstances, Father would not have been released until after Child had been in foster custody for over two years. Therefore, and in light of the Family Court's other findings which are not clearly erroneous, the Family Court did not err in finding that it was not reasonably foreseeable that Father would be able to provide Child with a safe family home, even with the assistance of a service plan, within a reasonable period of time pursuant to HRS § 587-73.

Mother argues that, in order to prevail at trial, DHS needed to provide by clear and convincing evidence that Mother could not provide a safe home for Child, even with the assistance of a service plan. Mother objects to numerous of the Family Court's FOFs, in many instances asking us to pass upon issues

dependent upon the credibility of witness and the weight of evidence, which is the province of the trier of fact. For example, some of Mother's principle arguments urge us to consider her apparent fitness as a parent to Child's infant sibling, her explanations for her lack of visitation with Child, and her disagreement with the Family Court's assessment of her and the DHS case worker's relative credibility.

In addition, Mother was dropped from the Hina Mauka random urinalysis program because she did not show up two times (no show was presumptively a positive test result). Although she attended AA meetings two or three days a week, she did not know what the first step of the program was called, and Mother otherwise failed to comply with the service plan. She urges us to consider her young age and her progress as she has matured. It appears, however, that the Family Court considered and weighed the positive steps taken by Mother, as well as the negative factors that were present. There is substantial evidence to support the Family Court's finding that it was not reasonably foreseeable that Mother could provide a safe home, even with the assistance of a service plan, within a reasonable period of time. Based on our careful review of the record, we do not find that the Family Court's FOFs are clearly erroneous.

Mother's claim that the Permanent Plan is not in the best interest of Child because it precluded contact between Child and Child's infant sibling is raised for the first time on appeal. Mother fails to point to where in the record she objected to the Permanent Plan on that basis and how she brought the alleged error to the attention of the Family Court. The written record on appeal and Mother's testimony at trial does not mention the issue of visitation with Child's sibling. In addition, contrary to Mother's argument, the Permanent Plan states "After [Child] is adopted, decisions about [Child's] placement, health,

education, therapy, cultural awareness and contact with birth family will be at the sole discretion of their adoptive parents." The Permanent Plan provides that the adoptive parents will determine contact with the birth family, therefore a reasonable consideration of contact with a sibling is provided for in the Permanent Plan. We do not find that this aspect of the Permanent Plan exceeds the bounds of reason and, therefore, we will not disturb the Family Court's decision on this basis.

CONCLUSION

For the foregoing reasons, the Order Regarding Motion for Order Awarding Permanent Custody and Establishing A Permanent Plan, Filed July 5, 2006, filed on April 12, 2007 and Order Awarding Permanent Custody, filed on April 27, 2007, in the Family Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, April 22, 2008.

On the briefs:

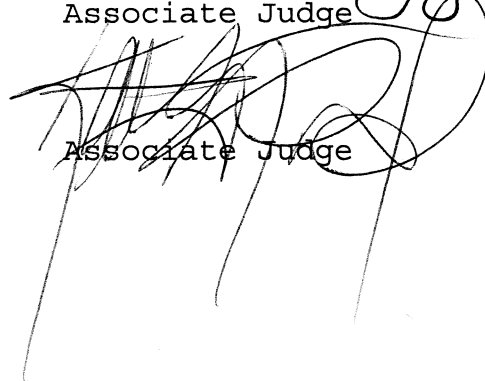
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