

NOS. 28933 and 28932

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

No. 28933  
IN THE INTEREST OF "R" CHILDREN:  
J.S.R., J.A.R.1, and J.A.R.2  
(FC-S No. 04-068K)

and

No. 28932  
IN THE INTEREST OF J.B.  
(FC-S No. 04-067K)

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APPEALS FROM THE FAMILY COURT OF THE THIRD CIRCUIT

SUMMARY DISPOSITION ORDER

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

In this consolidated appeal, Mother-Appellant (Mother) appeals from the order entered by the Family Court of the Third Circuit<sup>1</sup> (family court) on December 13, 2007 (December 13, 2007 order) that: (1) terminated her parental and custodial rights over J.A.R.1 and J.A.R.2; (2) awarded permanent custody of J.A.R.1 and J.A.R.2 to State of Hawai'i Department of Human Services-Appellee (DHS); and (3) reserved decision as to Mother's remaining children, J.B. and J.S.R.

On appeal, Mother advances the following points of error:

(1) The December 13, 2007 order is defective because it: (a) does not state "that the [DHS] social worker is qualified as an expert in the area of social work and child protective or child welfare services[,]" (b) "does not reflect the court's [oral ruling] to include a finding that parents' ability to provide the children with a safe family home constitutes an 'extraordinary circumstance' such that the [December 13, 2007 order] may be revoked[,]" (c) does not state that DHS has established each statutory requirement for an award

<sup>1</sup> The Honorable Aley K. Auna, Jr. presided.

of permanent custody by clear and convincing evidence, and (d) was "not signed by the presiding judge";

(2) Hawaii Revised Statutes (HRS) § 587-40(e) (2006), which provides that a social worker employed by DHS in the areas of child-protective or child-welfare services is qualified to testify as an expert in those areas, violates her right to due process because the family court "must be given the discretion to determine whether a witness is an expert";

(3) The family court's findings of fact (Finding) B, C, D, and F were not supported by substantial evidence inasmuch as: (a) Findings C and D were solely substantiated by the DHS social worker's testimony, and (b) Finding F was erroneous because the family court may not "treat 'permanent custody' and 'placement' as separate and distinct issues";

(4) The family court's conclusions of law: (a) were not supported by substantial evidence because they are in turn based on Findings that are not supported by substantial evidence, and (b) revoked custody as to J.B. and J.S.R., who must, accordingly, be returned to Mother's custody; and

(5) Mother: (a) was denied the opportunity to cross-examine individuals who prepared reports that DHS relied on, in violation of HRS § 587-40(d) (2006), because "DHS did not call any of its witnesses, except [Mother] and the [DHS] social worker"; and (b) received ineffective assistance of counsel because Mother's counsel did not request to cross-examine the authors of the reports.

After a careful review of the record on appeal and the briefs submitted by the parties, and having duly considered the issues and arguments raised on appeal, as well as the statutory and case law relevant to the issues raised on appeal, we disagree with Mother and resolve her points of error as follows.

A.

As to the first point of error, we conclude that the December 13, 2007 order is not defective because:

(a) The transcript of proceedings establishes that the family court: (i) qualified the DHS case manager as an expert under HRS § 587-40(e), and (ii) found that DHS established the

statutory requirements for permanent custody by clear and convincing evidence;

(b) Where a trial court fails to expressly indicate the burden of proof it applied to the evidence adduced, it is presumed that the court applied the correct burden (see State v. Kotis, 91 Hawai'i 319, 340, 984 P.2d 78, 99 (1999));

(c) The family court may, under HRS § 587-73(b)(1)(C)(ii) (2006 & Supp. 2007), modify or revoke its permanent custody order based on "extraordinary circumstances," and therefore the December 13, 2007 order need not memorialize the family court's willingness to revisit its prior ruling; and

(d) The presiding judge has indeed signed the December 13, 2007 order.

B.

As to the second point of error, the family court retains discretion to exclude testimony, notwithstanding a witness's HRS § 587-40(e) expert qualification, "if it concludes that the proffer of specialized knowledge is based on a mode of analysis that lacks trustworthiness." In re Doe, 91 Hawai'i 166, 177, 981 P.2d 723, 734 (App. 1999) (internal quotation marks omitted).

Here, the family court did not abuse its discretion in qualifying the DHS case manager as an expert and receiving his testimony. The DHS case manager testified that: (1) he has been employed by DHS for over eighteen years; (2) he was actively involved for the last three years as the case manager in this proceeding; and (3) he prepared the permanent plan that the family court subsequently adopted. On these facts, there was "a reasonable basis to infer that [the DHS case manager's] opinions were based upon an explicable and reliable system of analysis." Id. at 178, 981 P.2d at 735 (internal quotation marks omitted).

C.

As to Mother's third point of error, we conclude that Findings C and D are supported by substantial evidence<sup>2</sup> and

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<sup>2</sup> Because Mother's opening brief does not submit an argument as to Finding B, we decline to address this point. See Hawai'i Rules of Appellate Procedure Rule 28(b)(4).

Finding F is not erroneous because the family court may separately decide the issues of permanent custody and placement.

1.

"[T]he 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." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (internal quotation marks and brackets omitted).

Moreover, in appeals concerning family court decisions to terminate parental rights,

the question on appeal is whether the record contains substantial evidence supporting the family court's determinations, and appellate review is thereby limited to assessing whether those determinations are supported by credible evidence of sufficient quality and probative value. In this regard, the testimony of a single witness, if found by the trier of fact to have been credible, will suffice.

Id. at 196, 20 P.3d at 629 (internal quotation marks and citations omitted).

Applying this standard, we conclude that there is substantial evidence to support Findings C and D, which relate to Mother's current and prospective ability to provide a safe-family home. Contrary to Mother's assertion on appeal, Mother testified at the November 30, 2007 hearing that she was presently homeless and unemployed, did not complete a court-ordered residential substance abuse treatment program, and had relapsed several times since 2004.

2.

Finding F, relating to permanent placement, is not erroneous because the family court may separately decide the issues of permanent custody and placement. Notably, a child's permanent placement is decided after the family court awards DHS with permanent custody. See HRS § 587-73(b)(1); In re Doe, 100 Hawai'i 335, 346 n.19, 60 P.3d 285, 296 n.19 (2002) ("After termination of rights, custody is given to DHS which is charged with finding a suitable home for the child.").

D.

As to the fourth point of error, we conclude that the family court's conclusions of law are not erroneous. A complete reading of the December 13, 2007 order confirms that the family court: (1) awarded DHS with permanent custody of only J.A.R.1 and J.A.R.2; (2) expressly reserved decision regarding permanent custody of J.B. and J.S.R.; and (3) did not alter the family court's prior ruling awarding DHS foster custody of J.B. and J.S.R.

E.

As to Mother's last point of error, we conclude that: (1) Mother waived her right to cross-examine the authors of the reports, and (2) her claim of ineffective assistance of counsel lacks merit.

In this case, DHS's exhibits were admitted eleven days before the November 30, 2007 permanent-plan hearing, subject to cross-examination, and Mother failed to subpoena the authors of the reports to compel their testimony. Under these circumstances, Mother waived her right to cross-examination. See HRS § 587-40(d) ("A written report submitted under this section shall be admissible . . . ; provided that the person or persons who prepared the report may be subject to direct and cross-examination as to any matter in the report[.]"); In re Doe, 77 Hawai'i 109, 116, 883 P.2d 30, 37 (1994) ("[H]aving stipulated to jurisdiction and having failed to file a motion to compel . . . testimony [of the authors of the reports] at trial, despite prior notice to Mother by DHS that [the authors] would not be called as witnesses, Mother effectively waived her right to cross examine[.]"); State v. Brooks, 44 Haw. 82, 89, 352 P.2d 611, 616 (1960) ("The right to cross-examine a witness is fundamental and accepted as a right basic to our judicial system. When, however, a party fails to avail himself [or herself] of the opportunity to cross-examine, he [or she] thereby forfeits such right.").

In addition, Mother has not substantiated a claim of ineffective assistance of counsel. See State v. Wakisaka, 102 Hawai'i 504, 514, 78 P.3d 317, 327 (2003) (stating that the defendant must establish: "1) that there were specific errors or

omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense"); and State v. Gomes, 93 Hawai'i 13, 20 n.5, 995 P.2d 314, 321 n.5 (2000) (stating that "in the context of an ineffective assistance of counsel claim, . . . matters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight.") (emphasis in original) (internal quotation marks omitted).

For these reasons, the "Order Divesting Parental Rights and Ordering Permanent Plan for [J.A.R.1 and J.A.R.2], and Reserving Decision for [J.B. and J.S.R.]" filed on December 13, 2007 is hereby affirmed.

DATED: Honolulu, Hawai'i, January 20, 2009.

On the briefs:

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