

NO. 29096

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST OF D.H.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 05-10194)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting Chief Judge, Nakamura, and Fujise, JJ.)

The Department of Human Services (DHS) appeals from orders, findings of fact, and conclusions of law entered by the Family Court of the First Circuit (family court)¹ that denied the DHS's "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan" (Motion for Permanent Custody). The DHS appeals from the family court's: 1) February 1, 2008, "Orders Concerning Child Protective Act" (February 2008 Order), which denied the DHS's Motion for Permanent Custody; 2) March 10, 2008, "Orders Concerning Child Protective Act" (March 2008 Order), which denied, in part, the DHS's Motion for reconsideration of the February 2008 Order; and 3) May 30, 2008, "Findings of Fact and Conclusion of Law" that were entered in support of the February 2008 Order and the March 2008 Order.

Father-Appellee (Father) is the father of D.H., who was born in 1994. Mother is the natural mother of D.H. Stepmother was the wife of Father and cared for D.H. for a period of time. Father and Stepmother were divorced in November 2007. Through its Motion for Permanent Custody, the DHS sought to terminate the parental rights of Father and Mother.

On appeal, DHS argues that the family court: 1) applied the wrong legal test for determining whether the DHS had satisfied its burden of proving that Father was an unfit parent

^{1/} Honorable Paul T. Murakami presided.

in ruling on the DHS's Motion for Permanent Custody; 2) erred in ruling that the proposed permanent plan was defective; and 3) abused its discretion in denying the DHS's motion for reconsideration. The DHS requests that we not only vacate the challenged family court orders, but direct the family court to grant the DHS's Motion for Permanent Custody.

For the reasons set forth below, we conclude that the family court applied the wrong legal test in ruling on the DHS's Motion for Permanent Custody, and we therefore vacate the family court's decision to deny that motion. It is not clear from the record how the family court should rule under the appropriate legal standard. Thus, we remand the case for further proceedings to permit the family court to decide the DHS's Motion for Permanent Custody under the appropriate legal standard.^{2/}

I.

When D.H. was born in 1994, Father and Mother were married. Father and Mother were divorced in 2001, and Father was awarded custody of D.H. and D.H.'s two siblings. Later in 2001, Father married Stepmother, who had three children of her own. Father was in the Navy and subject to frequent deployments. As a result, Father depended on Stepmother to run the household when he was gone.

On February 15, 2005, the DHS filed a petition for temporary custody of D.H. (Temporary Custody Petition). The Temporary Custody Petition alleged that while D.H. was in the care of Stepmother, D.H. was subjected to inappropriate punishment. It further alleged that Father had been deployed for military duty, but was aware of Stepmother's treatment of D.H. The family court granted the Temporary Custody Petition.

^{2/} Mother was excused from the trial on the DHS's Motion for Permanent Custody because of a medical condition, but through her counsel opposed termination of her parental rights and requested maintaining the status quo with long-term foster custody. The family court did not specifically rule on Mother's parental fitness. On remand, the family court is directed to enter specific findings and conclusions regarding Mother's parental fitness.

D.H. has been diagnosed as having chronic PTSD (Post Traumatic Stress Disorder) and behavioral problems which apparently make it difficult to care for D.H. Behaviors and characteristics attributed to D.H. include being psychologically self-destructive, destructive of property belonging to others, and consistently irresponsible; stealing; suffering from sleep disturbance; hyperactivity; lack of cause-and-effect thinking; and learning disorders. After the DHS became involved, efforts were made to reunite D.H. with his Mother, but those attempts failed. Father participated in therapy and services proposed by the DHS and successfully completed those activities. He has actively and consistently sought reunification with D.H. In November 2007, he divorced Stepmother.

Foster Mother has cared for D.H. since December of 2005. D.H. indicated that he wanted to live permanently with Foster Mother. D.H. also expressed fear of Father and indicated that he did not want to be returned to Father's care.

The DHS filed its Motion for Permanent Custody on November 9, 2005. Trial on this motion was held on December 28, 2007.

II.

The interpretation of a statute is a question of law subject to de novo review. In re Doe, 109 Hawai'i 399, 407, 126 P.3d 1086, 1094 (2006). The determinations of the family court relating to whether a child's parent is, or will become in the foreseeable future, willing and able to provide a safe family home for the child are reviewed under the clearly erroneous standard. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (hereinafter, "2001 Doe").

III.

A.

The DHS argues that the family court misconstrued Hawaii Revised Statutes (HRS) § 587-73(a) (2006) and applied the wrong legal test in ruling that the DHS had failed to satisfy its burden of proving Father's parental unfitness. We agree.

HRS § 587-73(a) provides in relevant part:

(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; [and]
- (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[.]

(Emphasis added.)

The Hawai'i Supreme Court has interpreted HRS § 587-73(a) (1) and (2) to mean that the DHS can meet its burden of establishing parental unfitness by proving that a parent is unwilling or is unable to provide the child with a safe family home and that the parent will not become willing or able to provide a safe family home within a reasonable period of time. Id. at 192, 20 P.3d at 625. In other words, under the statute, a parent must be both willing and able to provide the child with a safe family home. Thus, proof that a parent is either unwilling or unable to provide the child with a safe family home (now or in the foreseeable future) is sufficient to demonstrate that the parent is unfit.

In 2001 Doe, the Hawai'i Supreme Court stated:

[T]he CPA [(Child Protective Act)] does not allow for the divestiture of parental rights absent clear and convincing evidence, adduced by the state, that the parent is "unfit," or, in other words, both that the parent is unwilling or unable to provide his or her child with a safe family home at the time a permanent plan hearing is conducted and that the parent will not become willing or able to do so within a reasonable period of time.

Id. (emphases added).

The family court, however, interpreted HRS § 587-73(a)(1) and (2) as requiring the DHS to prove by clear and convincing evidence that Father was both unwilling and unable to provide D.H. with a safe family home. In its conclusions of law, the family court stated:

8. The plain meaning of HRS Sec. 587-73(a)(1) and (2), by the use of the conjunction "and", shows the legislative intent that the proponent of a motion for permanent custody (DHS) must establish, by clear and convincing evidence, that the child's legal mother [and] legal father . . . are not willing to provide the child with a safe family home and are not able to provide the child with a safe family home[.]

The family court's interpretation was wrong. It is contrary to the Hawai'i Supreme Court's interpretation of the statute in 2001 Doe and is inconsistent with the purpose of the CPA "to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm." HRS § 587-1 (Supp. 2008). A parent who is willing but is not able to provide the child with a safe family home cannot assure the safety and health of the child. The same is true of a parent who is able but is not willing to provide the child with a safe family home. Accordingly, the DHS satisfies its burden of proving that a parent is unfit by demonstrating, by clear and convincing evidence, either that a parent is not willing or is not able to provide the child with a safe family home.

B.

The family court's erroneous interpretation of HRS § 587-73(a)(1) and (2) would be harmless error if the family court determined that the DHS had failed to prove by clear and convincing evidence that Father was not willing and also that Father was not able to provide a safe family home. With respect to the "willingness" prong, the family court concluded that the "DHS failed to establish, by clear and convincing evidence, that Father is not willing to provide [D.H.] with a safe family

home[.]"^{2/} However, the family court's determination regarding the "ability" prong was ambiguous. On this issue, the family court concluded:

9. The credible evidence in the Record shows by clear and convincing evidence, that due to [D.H.'s] extensive emotional and mental health needs and [D.H.'s] present desire not to have contact wit [sic] Father (due to [D.H.'s] perceived fear of Father) and his desire to remain in his present DHS placement with [Foster Mother], Father although willing and able cannot provide [D.H.] with a safe family home[.]

The family court's conclusion that Father "although . . . able cannot provide [D.H.] with a safe family home" is inherently contradictory. It appears that the family court was torn between a) Father's positive efforts to reunite with D.H. and create a safe family home and b) D.H.'s perceived fear of Father and D.H.'s personal needs. HRS § 587-73(a), however, requires the family court, after considering the factors set forth in the safe family home guidelines under HRS § 587-25 (2006 & Supp. 2008), to determine whether there is clear and convincing evidence that the child's parent is not able to provide a safe family home. The family court failed to make a discernable decision on this issue as required by statute.

The safe family home guidelines require the court to consider factors that include the child's "[f]ear of being in the family home" and a parent's demonstration of his or her understanding and use of "recommended/court ordered services designed to effectuate a safe family home for the child." HRS § 587-25(a). The family court can consider Father's efforts to reunite with D.H. and create a safe family home as well as D.H.'s perceived fear of Father and D.H.'s personal needs in determining whether there is clear and convincing evidence that Father is not able to provide D.H. with a safe family home. We conclude, however, that the statute requires the family court to render a decision on this issue. In other words, the family court must

^{2/} We rule that this conclusion was supported by credible evidence in the record and was not clearly erroneous.

determine, considering all the relevant factors, whether there is clear and convincing evidence that Father is not able to provide D.H. with a safe family home. Given the contradictory language used by the family court, we conclude that the family court did not render a discernable decision on this issue, and we direct the family court on remand to render a definitive decision.^{4/}

C.

The family court's determination on remand regarding whether the DHS has proven by clear and convincing evidence that Father is not able to provide a safe family home for D.H. may affect its decision on the adequacy of the proposed permanent plan. Thus, we decline to address the DHS's claim that the family court erred in ruling that the proposed permanent plan was defective.

IV.

For the foregoing reasons, we vacate the family court's February 2008 Order and its March 2008 Order to the extent that they reflect the family court's decision to deny the DHS's Motion

^{4/} We note that the Child Protective Act (CPA), HRS Chapter 587 (1993 & Supp. 2008), does not "permit the divestiture of parental rights based solely upon a determination that it is in the child's best interests to do so." 2001 Doe, 95 Hawai'i at 194, 20 P.3d at 627.

[T]he criteria set forth in HRS §§ 587-73(a)(1) and (2), if established, constitute a finding that the parents are, in essence, "unfit." Unless there is clear and convincing evidence that the parents are "unfit," on the bases that they are unwilling or unable to provide a safe family home and there is no reasonable foreseeability that they will become willing and able to do so within a reasonable period of time, the family court, pursuant to the CPA, may neither award the DHS permanent custody of a child nor terminate the parental rights and duties of the child's parents.

Id. at 194-95, 20 P.3d at 627-28 (citations omitted).

for Permanent Custody, and we remand the case for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, August 31, 2009.

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