

NO. 29222

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII  
IN THE INTEREST OF M.B.

EMIL RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-S NO. 05-10597)

SUMMARY DISPOSITION ORDER

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

Appellant Father and Cross-Appellant Mother, appeal the Order Awarding Permanent Custody, filed on June 27, 2008 in the Family Court of the First Circuit (**Family Court**),<sup>1/</sup> which awarded permanent custody of their minor child, M.B., to Petitioner-Appellee, the State of Hawaii'i, Department of Human Services (**DHS**).

On appeal, Father contends that the Family Court erred by: (1) awarding permanent custody of M.B. to DHS because Mother and Father were not provided an interpreter during court proceedings and court-ordered services; (2) finding that there was clear and convincing evidence that Father could not provide a safe family home, even with the assistance of a service plan because he was not provided an interpreter during court-ordered services; (3) taking judicial notice of FC-S No. 05-10179 which involved Mother's other children; and (4) adopting the permanent plan, which failed to comply with Hawaii Revised Statutes (**HRS**) § 587-27(1)(A) because it did not identify the proposed adoptive parents in a separate report.

On appeal, Mother contends that the service plan was inadequate because it failed to follow psychological evaluation recommendations which stated that Mother should receive interpreter translation assistance during court-ordered services

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<sup>1/</sup> The Honorable Linda K.C. Luke presided.

due to her limited ability to understand English and individual psychotherapy. Mother argues that a failure to provide such services demonstrates that DHS did not exert reasonable efforts to provide adequate services in order for Mother to reunify with M.B. Thus, Mother claims that the Family Court erred by finding that she could not presently provide a safe family home or provide a safe family home in the foreseeable future, even with the assistance of a service plan.

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

Father

(1) & (2) The Hawaii Supreme Court has held that "parents who are in need of an interpreter because of their inability to understand English are entitled to the assistance of one at any family court hearing in which their parental rights are substantially affected." See In re Jane Doe, 99 Hawai'i 522, 526, 57 P.3d 447, 451 (2002). However, the right to an interpreter is not limitless. While, as a matter of procedural due process, some individuals must be provided an interpreter at family court proceedings where their parental rights are substantially affected, interpretive services are not mandated for all court proceedings. Id. at 534-35, 57 P.3d at 459-60. Father has cited no legislative or judicial authority mandating interpretative services for all aspects of a service plan.

Father has failed to demonstrate his need for an interpreter or any prejudice resulting from the lack of an interpreter at the early hearings in this case. Indeed, it appears that those hearings were continued so that a Marshallese language interpreter could be provided. Moreover, it does not appear from the record that Father required an interpreter in order to complete court-ordered services or understand the court proceedings. Father obtained a job in which he spoke English to

his co-workers. He also spoke to a DHS social worker in English. He attended and completed a parenting class that was conducted entirely in English. He acted as an interpreter for Mother during her parenting class. Far from being unable to understand English, Father appeared capable of understanding English sufficiently to participate in all aspects of the court proceedings and services.

(3) "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Hawai'i Rules of Evidence (**HRE**) Rule 201(e). Father fails to cite where in the record he objected to the Family Court taking judicial notice of FC-S No. 05-10179 and has failed to show how the Family Court's decision to take judicial notice of those proceedings substantially affected Father's substantial rights in the permanent custody proceedings. Taking judicial notice of records and files of a case may or may not be proper. Inasmuch as this court resorts to plain error analysis cautiously, and none has been shown, we conclude that the point of error is waived. See HRE 103(a)(1); Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4).

(4) DHS's Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan requested that DHS be awarded permanent custody and did not propose adoption of M.B. Therefore, DHS was not required to file the names of proposed adoptive parents under seal. Even if DHS were required to file prospective adoptive parents' names under seal, such an error would be harmless as it does not affect the determination of whether Father can provide a safe family home.

Finally, substantial credible evidence in the record shows that Father could not provide a safe home for M.B., with his special needs, by making changes to compensate for Mother's parenting deficiencies caused by Mother's cognitive deficits and other factors. Father has no insight into M.B.'s special needs

because he does not believe the child has special needs and Father believes that the child would be "normal" if returned to Father. Although Father completed a parenting education program, Father's attendance at supervised visits was inconsistent, his ability to participate in services was impacted in part by his work schedule, and Father appeared to defer primary childcare responsibilities to Mother, who could not safely care for M.B., as well as the other child who remains in the home and who does not have special needs. The record contains clear and convincing evidence supporting the Family Court's determination that it was not reasonably foreseeable that Father could provide a safe family home within a reasonable period of time even with the assistance of a service plan. In re Doe, 89 Hawai'i 477, 492, 974 P.2d 1067, 1082 (App. 1999); In re Doe, 100 Hawai'i 335, 344 n.15, 60 P.3d 285, 294 n.15 (2002).

Mother

The gravamen of Mother's argument is that she was not able to comprehend, communicate, and participate with service providers and benefit from services provided without the benefit of a Marshallese interpreter in conjunction with all services. Mother relies on HRS §§ 371-31 and 371-33 (Supp. 2008), which require state agencies to take reasonable steps to ensure meaningful access to services by limited English proficient persons. However, the reasonableness of an agency's steps is determined by a totality of circumstances, including the resources available to the State or covered entity and the costs. See HRS § 371-33(a)(4). It appears from the record that the DHS social worker, DHS, and other service providers attempted to find Marshallese language interpreters, through various sources, to assist Mother and Father. In some instances, interpreters were not available or did not show up for the services. In other instances, interpreters did not accurately translate or interjected personal comments. The Family Court's uncontested findings include that DHS's ability to consistently obtain

Marshallese language interpreters was severely impacted by factors beyond DHS's control, especially the availability and reliability of interpreters. We conclude that the Family Court did not err in finding that DHS made reasonable efforts to provide appropriate services and interpreter services to Mother.

In addition, the record supports the Family Court's conclusion that the State proved by clear and convincing evidence that Mother cannot provide M.B. with a safe family home. Notably, Mother was provided an interpreter throughout the permanent custody hearing. Even after having heard multiple witnesses describe M.B.'s multiple developmental, behavioral, cognitive, sensory, social-emotional, speech-language, and medical issues in depth during the hearing, Mother stated that she did not know what M.B.'s special needs were. It is clear that, even with language interpretation, Mother is unable to understand M.B.'s special needs or how to address them. The record contains clear and convincing evidence supporting the Family Court's determination that it was not reasonably foreseeable that Mother could provide a safe family home within a reasonable period of time even with the assistance of a service plan.

For these reasons, the Family Court's June 27, 2008 Order Awarding Permanent Custody of M.B. to DHS is affirmed.

DATED: Honolulu, Hawai'i, September 30, 2009.

On the briefs:

Tae Won Kim  
for Father-Appellant

Randal Isamu Shintani  
for Mother-Appellee/  
Cross-Appellant

Patrick A. Pascual  
Mary Anne Magnier  
for Petitioner-Appellee  
Department of Human Services

  
Chief Judge

  
Associate Judge

  
Associate Judge