

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NOS. 29397, 29398, 29399, AND 29400

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NO. 29397

IN THE INTEREST OF J.K.
(FC-S No. 04-09517)

and

NO. 29398

IN THE INTEREST OF L.K-K.
(FC-S No. 04-09573)

and

NO. 29399

IN THE INTEREST OF R.K-K.
(FC-S No. 05-10561)

and

NO. 29400

IN THE INTEREST OF S.K-K.
(FC-S No. 07-11271)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

Mother and Father appeal from orders awarding permanent custody filed on September 29, 2008 concerning children J.K., L.K-K., R.K-K., and S.K-K. by the Family Court of the First Circuit (family court), the Honorable Jennifer Ching presiding.

Department of Human Services (DHS) first became involved with Mother and Father in 1997 based on a report of sexual harm to another child, C.K., by Father. Father initially denied sexually harming C.K. There were subsequent reports of harm to one or more of Mother's children in 1998, 2000, 2001, 2002, 2003, and 2004. Not all of the reports of harm were confirmed.

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C.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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On February 10, 2004, DHS filed a Petition for Foster Custody of J.K. and L.K-K. Mother and Father stipulated to jurisdiction and foster custody.

DHS confirmed sexual harm to C.K. and J.M. by Father in 2005. Father denied sexually abusing either C.K. or J.M. In the January 19, 2006 Multidisciplinary Team Conference Report, the report stated that Father denied harming C.K. and that Mother took the side of Father in his refusal to participate in sex abuse treatment services. Mother's support of Father raised concerns about Mother's ability to be protective of the children.

On September 20, 2005, DHS filed a Petition for Family Supervision of R.K-K. DHS recommended that R.K-K. stay with Mother as long as Father left the family home and Mother agreed not to allow Father contact with R.K-K. until he engaged in services. Mother and Father violated the agreement that Father would have no contact with R.K-K.

On January 20, 2007, Mother gave birth to S.K-K. S.K-K. tested positive for amphetamines and methamphetamines. Mother and Father denied using illegal drugs and could not explain how S.K-K. could have been exposed to illegal drugs. DHS assumed placement responsibility for S.K-K. based on the voluntary consent of the parents, the positive test for amphetamines, and the fact that Father, the perpetrator of harm to C.K., lived with Mother. A petition for foster custody of S.K-K. was filed on March 2, 2007.

The Multidisciplinary Team Conference Report dated May 18, 2007 noted that J.K. had made an unconfirmed allegation of sexual touching by Father and that Father recently admitted to sexual abuse of C.K. The report stated that "[d]espite his improved attendance in therapy, this is a fairly recent occurrence and is just the very beginning of an anticipated long process necessary to reduce the level of risk of re-offense." With respect to Mother, the report stated that "she has remained aligned with whatever position taken by [Father] even if it compromised the children's safety and this has been consistently

so since [DHS] became involved with them as a couple in 2000." The report also noted that Mother was in individual therapy "yet has not demonstrated any changes in her level of empathy towards her children."

On November 13, 2007, DHS filed a Motion for Order Awarding Permanent Custody for J.K. and L.K-K. On April 28, 2008, DHS filed a Motion for Order Awarding Permanent Custody for R.K-K. and S.K-K. The four cases were set for consolidated trial for May 27, 2008, May 28, 2008, and May 29, 2008.

The family court issued its orders awarding permanent custody on September 29, 2008.

Mother makes the following arguments on appeal:

1. Mother was not provided reasonable services in a timely manner based on the delay in referring Mother to individual therapy and Adults Molested as Children's Group (AMAC).

2. Mother's right to due process was violated by the failure of DHS to provide her with certain visitation logs as part of discovery.

3. There was no clear and convincing evidence that Mother was not willing and able to provide a safe home for the children.

4. The permanent plan was not in the best interest of the children because there was no adequate showing that Mother was not a fit parent.

Father makes the following arguments on appeal:

1. The evidence was insufficient to establish that Father would not be able to provide a safe family home within a reasonable period of time.

2. The social worker incorrectly considered the best interests of the children before determining whether Father could be a fit parent.

3. Father was denied a fair trial because DHS failed to provide the parties with copies of an e-mail regarding a polygraph examination taken by Father.

4. Neither S.K-K. nor R.K-K. had been in foster custody for two years by the time of trial in May 2008.

A decision on the scope of discovery (State v. Fukusaku, 85 Hawai'i 462, 477-78, 946 P.2d 32, 47-48 (1997)) and the sanctions imposed for a discovery violation (Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 251, 948 P.2d 1055, 1092 (1997)) are reviewed for an abuse of discretion. See also Doe v. Doe, 120 Hawai'i 149, 173, 202 P.3d 610, 634 (App. 2009). The criteria applied in the review of a sanction are as follows:

We have utilized the following three factors in determining whether a discovery sanction was appropriate: (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that an opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

Kawamata Farms, Inc., 86 Hawai'i at 249, 948 P.2d at 1090.

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 for clear error. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001); see In re Doe, 103 Hawai'i 130, 135, 80 P.3d 20, 25 (App. 2003).

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." State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995).

In re Doe, 95 Hawai'i at 190, 20 P.3d at 623.

Issues of constitutional law are reviewed under the right/wrong standard of review. Doe v. Doe, 120 Hawai'i 149, 202 P.3d 610 (App. 2009).

There appears to have been some delay in referring Mother to individual therapy. Mother's need for individual therapy was identified as early as October 15, 2004. Individual therapy was not part of the service plan until the September 19, 2005 Family Service Plan. However, Mother does not state how she

was prejudiced by the delay in individual therapy. Even after approximately one-and-a-half years of therapy, the Multidisciplinary Team Conference Report dated May 18, 2007 noted that Mother "has not demonstrated any changes in her level of empathy towards her children." In the absence of prejudice to Mother, the determination of the family court cannot be vacated. Hawai'i Family Court Rules (HFCR) Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."); see also In re Doe, 100 Hawai'i 335, 343, 60 P.3d 285, 293 (2002).

Unlike the delay in referral to individual therapy, Mother was referred to AMAC group therapy once it became appropriate. Chiyo Churchill (Churchill), a therapist at Catholic Charities Hawaii Child Sex Abuse Treatment Program, testified that she did not believe that Mother would have benefitted from earlier referral to AMAC because Mother was not open to going into a group and her presence could have been damaging to the group. "[T]he testimony of [a] single witness, if found by the trier of fact to have been credible, will suffice." In re Doe, 95 Hawai'i at 196, 20 P.3d at 629.

Mother does not point to any instance in which she requested either individual therapy or AMAC group therapy. If Mother did not feel that DHS was fulfilling its obligation to provide necessary services, Mother is required to request additional services. See In re Doe, 100 Hawai'i at 344, 60 P.3d at 294 ("Manifestly, a claim for additional services and accommodations must be timely made.").

Mother claims that she was denied due process as a result of DHS's failure to disclose visitation logs prior to trial, but fails to demonstrate an abuse of discretion by the family court in the remedy afforded Mother or that Mother's substantial rights were prejudiced. At a May 16, 2008 hearing, Mother, joined by Father, renewed a request for DHS to disclose visitation reports from PACT or DHS and for a continuance of

trial. DHS stated that it did not have any written logs other than what was already produced and opposed any delay of trial. The GAL opposed the request for a continuance. The family court ordered DHS to ask for any information regarding visitation and to turn it over to Mother and Father as soon as possible. Marian Abang-Maytorena (Abang-Maytorena), a social services aide with Child Welfare Services, testified that her log of contacts and her notes on visitations were not part of DHS records. She testified that she gave a DHS social worker her copy of the log on May 21, 2008. DHS instructed Abang-Maytorena to redact her calendar. DHS received the diary entries on May 22, 2008. Copies were made on May 23, 2008 and subsequently provided to Mother and Father.

Mother argued that her ability to present her case was impaired because the late disclosure of the visitation logs prevented her from impeaching testimony of DHS witnesses regarding the visits. The family court took a half-hour break to allow counsel to review the logs, but denied the motion to continue. After the review, Mother requested a continuance to the next day and that DHS make Abang-Maytorena available the next day to testify. The family court granted the request to continue to the next day and ordered DHS to make Abang-Maytorena available to testify.

On May 29, 2008, Mother renewed her request for a mistrial or in the alternative for a continuance. Mother stated that had she received the logs prior to trial, she would have questioned the social worker or "other witnesses" on the impact of the use of a sippy cup rather than a bottle and Mother's ability to meet the needs of C.K. The family court denied the motion for mistrial, but allowed Mother to recall any witness. The family court allowed the State to reopen its case to have Abang-Maytorena testify and to introduce the logs and day planner. Abang-Maytorena testified regarding the logs, how the logs were maintained, and the circumstances of their disclosure to DHS. The family court also allowed Mother to recall any

witness relating to the new evidence and would consider an offer of proof as to whether or not the testimony of the witness should be limited to the new evidence. Mother only elected to recall Churchill. Mother rested her case after Mother testified.

Three factors are relevant in evaluating the family court's response to a discovery violation:

- (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that an opposing party had formally requested through discovery;
- (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and
- (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

Kawamata Farms, Inc., 86 Hawai'i at 249, 948 P.2d at 1090 (1997). There may have been some culpability on the part of DHS since the materials were in the possession of an employee of Child Welfare Services. However, the materials were not purposely withheld. The prejudice resulting from the late disclosure appears to be speculative at best. Mother was allowed to recall any witness she wanted. Mother only recalled Abang-Maytorena and Churchill. There is no indication that any prejudice that may have existed prior to Mother's decision to recall Abang-Maytorena and Churchill continued to exist after Mother rested her case. No argument was made that DHS obtained a benefit from the late disclosure. Based on these circumstances, the family court did not abuse its discretion in denying the continuance and mistrial and Mother was not denied due process.

The family court did not clearly err in concluding that Mother was not willing and able to provide a safe home for the children within a reasonable time. From the initial involvement of DHS with the family in 1997 to the time of trial in 2008, Mother was unable to demonstrate an ability and willingness to protect the children from harm. The Multidisciplinary Team Conference Report dated May 18, 2007 stated that "[Mother] has remained aligned with whatever position taken by [Father] even if it compromised the children's safety and this has been consistently so since CPS became involved with them as a couple

in 2000." The report also noted that Mother was in individual therapy "yet has not demonstrated any changes in her level of empathy towards her children." At birth, in January of 2007, S.K-K. tested positive for amphetamines and methamphetamines. Mother and Father could not explain how S.K-K. could have been exposed to illegal drugs. Based on the foregoing evidence, the family court did not clearly err in concluding that Mother was not willing and able to provide a safe home for the children within a reasonable time even with the assistance of services.

Nor was the family court clearly erroneous in concluding that Father, the perpetrator of harm, was not willing and not able to provide a safe home for the children within a reasonable time. Father initially denied the allegations of sex abuse. The Multidisciplinary Team Conference Report dated May 18, 2007 stated that "[d]espite [Father's] improved attendance in therapy, this is a fairly recent occurrence and is just the very beginning of an anticipated long process necessary to reduce the level of risk of re-offense." Based on the continued risk of re-offense by Father, the family court was not clearly erroneous in concluding that Father was not willing and able to provide a safe home for the children within a reasonable time.

Even if the social worker considered the best interests of the child before the fitness of Father as a parent, there is no indication that such consideration affected the substantial rights of Father, especially in light of the evidence of Father's unfitness as a parent. See HFCR Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties."); see also In re Doe, 100 Hawai'i at 343, 60 P.3d at 293.

Father's substantial rights were not affected by the failure of the social worker to disclose an e-mail regarding a lie detector test taken by Father. We note preliminarily the general rule that evidence of polygraph examinations are

inadmissible. Doe, 120 Hawai'i at 176, 202 P.3d at 637. In this case, the Findings of Fact and Conclusions of Law only refer to the polygraph examination as a requirement of Father in connection with the psychosexual evaluation and it does not appear that the family court relied on the evidence of the polygraph examinations. In light of the fact that polygraph examinations are inadmissible, Father introduced the evidence of the polygraph examinations, and the polygraph examinations did not affect the Findings of Fact and Conclusions of Law, we conclude that the failure of the social worker to notify Father of an e-mail related to a polygraph examination did not affect a substantial right of Father.

The fact that neither S.K-K. nor R.K-K. had been in foster custody for two years by the time of trial in May 2008 did not make the family court's conclusion that Father was not willing and not able to provide a safe home for the children within a reasonable time clearly erroneous. S.K-K. had been placed in foster custody within days of being born in January of 2007. By the time trial commenced in May of 2008, S.K-K. had been in foster custody for a nearly a year-and-a-half and most of S.K-K.'s life. At that point, even Father's interpretation of Mr. Carron's testimony would require another six months just for Father to be clinically discharged from sex offender treatment. Mr. Carron was clear that even after clinical discharge, Father would still not necessarily be ready to resume contact with, much less assume custody of, the children. This would exceed the two-year period allowed by Hawaii Revised Statutes § 587-73(a)(2) (2006 & Supp. 2008).

R.K-K. was taken into foster custody in November of 2006 and therefore had exceeded the two-year period by the time of trial. Based on our careful review of the record on appeal, in light of the applicable standards of review, and having duly considered the issues and arguments raised by Mother and Father, we conclude that there is substantial evidence in the record to support the family court's orders awarding permanent custody of

the children.

Accordingly, it is hereby ordered that the Family Court of the First Circuit's September 29, 2008 orders awarding permanent custody are affirmed.

DATED: Honolulu, Hawai'i, May 28, 2009.

On the briefs:

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for Father-Appellant.

Corinne K. A. Watanabe

Acting Chief Judge

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