

NOS. 23313 AND 23318

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

IN THE INTEREST OF
JOHN DOE BORN ON NOVEMBER 23, 1997

(FC-S NO. 98-05574)

AND

IN THE INTEREST OF
JOHN DOE BORN ON SEPTEMBER 21, 1994

(FC-S NO. 98-05573)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Foley, JJ.)

Male Doe child, born on September 21, 1994, will be referred to as "Child 1." Male Doe child, born on November 23, 1997, will be referred to as "Child 2." Appellant is the natural and legal mother (Mother) of Child 1 and Child 2. The stepfather of Child 1 and legal father of Child 2 will be referred to as "Father 2."

Mother appeals the following two orders entered by District Family Court Judge Karen Radius:

1. The February 15, 2000 Order Awarding Permanent Custody divesting Mother of her parental rights to Child 1 and Child 2 and awarding permanent custody of them to the State of Hawai'i Director of Human Services (DHS).

2. The February 25, 2000 Orders Concerning Child Protective Act that responded to Mother's February 15, 2000 Motion for Reconsideration of Permanent Custody Orders and Withdrawal of Counsel by denying the motion for reconsideration and granting the motion for withdrawal of counsel.

On May 23, 2000, the family court entered Findings of Fact and Conclusions of Law, in relevant part, as follows:

FINDINGS OF FACT

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1. On September 2, 1998 protective custody of the children was assumed by the Honolulu Police Department

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3. At a hearing on September 10, 1998, the parties stipulated that . . . there was an adequate basis to sustain the petition in that the children were children whose physical or psychological health or welfare had been harmed or were subject to threatened harm by the acts or omissions of the children's family.

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18. The children have been in foster care from September 2, 1998 to the present. On February 12, 1999, the children were placed in the foster care of [Maternal Great-Grandparents] in Texas to be closer to [Mother] who had relocated to Texas.

19. On August 9, 1999, the children were returned to Hawaii because [Maternal Great-Grandparents] were unable to care for them and had placed them with Mother and [Maternal Grandmother] without the approval of DHS or the Court.

20. Mother was unable to provide a safe home in Texas.

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26. [Child 1] is aggressive and was diagnosed on August 5, 1998 with Attention Deficit Hyperactivity Disorder, combined type, ("ADHD"), Oppositional Defiant Disorder, and Physical Abuse of Child. . . .

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29. [Child 1] needs ongoing psychiatric and medical intervention. [Child 1] has impaired vision and speech difficulties.

. . . .

32. [Child 2] suffers from significant delays in his communication and adaptive skills and mild delays in his social and fine motor skills.

33. [Child 2] needs long-term occupational and physical therapy.

34. Both children are highly special needs children. The children provide a challenge to any care giver. The children's delays and behaviors are overwhelming to the point of being at risk of harm if the caretaker cannot deal with the problems.

. . . .

57. Mother is considered to be within the extremely low range of intellectual functioning. Mother's overall intellectual functioning is at the first percentile with a cognitive age equivalent of ten years and four months. She is illiterate.

58. Mother has neither the ability to verbally reason nor non-verbal cognitive skills to function well.

59. She is even more impaired in her ability to hold and process information in short term memory. In psychological evaluations given by Scot Liepack, Ph.D., and Patti Shirakawa, Ph.D., on November 26, 1998 and December 4, 1998, Mother was diagnosed as suffering from Adjustment Disorder with Mixed Anxiety and Depressed Mood, Major Depressive Disorder, Single Episode, Rule Out Dysthymic Disorder, Rule Out Generalized Anxiety Disorder, Mild Mental Retardation.

60. This diagnosis negatively impacts Mother's ability to provide a safe family home for the children because her deficits in emotional functioning place her at substantial risk for abusive treatment and/or possible neglect of her children.

61. Mother's deficits in parenting skills and knowledge also places her at substantial risk for abusive treatment and/or possible neglect of her children. Mother cannot adequately manage the tasks required as the primary care provider for her special needs children.

62. Drs. Liepack and Shirakawa recommend that in order to reunify with her children[,] Mother would need a substantial level of help to successfully care for her children.

. . . .

70. Mother left Hawaii on December 20, 1998 because [Father 2] had been court-martialed and jailed for abuse. Mother was also in the midst of a pregnancy with medical complications. Mother had no support system in Hawaii. Mother gave birth to [Daughter] on January 26, 1999 in Texas.

. . . .

104. [Father 2] was tried and convicted of allegations of abuse to [Child 1]. He was incarcerated in December 1998 and released on or about March 1999.

In this appeal, Mother contends that she was in the following "Catch-22" situation:

In order to take advantage of DHS assistance and recommended programs and therapy, Mother would be alone in Hawaii, without any family support. However, in Texas, Mother, who is severely indigent, must herself pay for services for which neither Texas nor Hawaii [Child Protective Services] agencies would pay. Mother needed substantial assistance in order to regain custody of [Child 1] and [Child 2] but was left to fend for herself.

The record does not support Mother's allegation that "in Texas, Mother, who is severely indigent, must herself pay for services for which neither Texas nor Hawaii [Child Protective Services] agencies would pay." The September 2, 1999 Family Service Plan ordered Mother to cooperate with the DHS and inform the DHS within two days of her current living situation, attend services recommended, inform the DHS of any changes in the home within 48 hours, and inform the DHS worker of any problems in complying with the service plan. Mother failed to comply. The Safe Family Home Report dated September 2, 1999, states, in relevant part, that "[t]he DHS had left several verbal messages with [Maternal Great-Grandmother] to tell [Mother] that she needed to contact the DHS regarding her address/telephone numbers so that the services could be initiated in the proper County [in Texas]." From March 15, 1999, to August 24, 1999, Mother did not contact DHS.

The record shows that Mother had the opportunity to comply with the orders contained in the various Family Service Plans (September 8, 1998, December 21, 1998, March 23, 1999, and September 2, 1999) so that she could be reunited with her children. When she failed to follow these orders, she demonstrated that she could not provide a safe family home for Child 1 and Child 2.

Child 1 and Child 2 had been in the custody of the DHS since September 2, 1998. Mother states, "[Hawaii Revised Statutes (HRS)] sec. 587-73(e) sets an outside limit of three years for permanency planning. In this case that point had not been approached at the time of trial." The more relevant statute is HRS § 587-73(a)(2). Prior to July 1, 1999, it stated as follows:

Permanent plan hearing. (a) At the permanent plan hearing, the court shall . . . determine whether there exists clear and convincing evidence that:

. . . .

(2) It is not reasonably foreseeable that the child's legal mother . . . 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 three years from the date upon which the child was first placed under foster custody by the court[.]

As Mother notes, the "three years" period was the absolute outside limit. It did not bar action prior to the end of that period. Moreover, effective July 1, 1999, the "three" was changed to "two." Thus, in this case, the absolute outside limit is "two years," the period began on September 2, 1998, and the

trial occurred in February 2000. During the one year and five months period of time allowed to Mother, she clearly demonstrated that it was not reasonably foreseeable that she would become willing and able to provide the children with a safe family home, even with the assistance of a service plan, prior to September 2, 2000.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the family court's February 15, 2000 Order Awarding Permanent Custody and the February 25, 2000 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, September 17, 2001.

On the briefs:

Arthur E. Ross
for Appellant.

Chief Judge

David R. McCormick and
Mary Anne Magnier,
Deputy Attorneys General,
for Appellee.

Associate Judge

Associate Judge