NO. 25624

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF A MALE MINOR, BORN ON MAY 5, 2002

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-S NO. 02-1-0081)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Acting C.J., Lim and Nakamura, JJ.)

Mother appeals the December 6, 2002 findings of fact and conclusions of law that the family court of the third circuit[1] made upon (1) its August 17, 2002 order that terminated Mother's parental rights and awarded permanent custody of her infant son Doe (date of birth: May 5, 2002) to the Director of the Department of Human Services (DHS), and (2) its October 12, 2002 order that denied Mother's August 14, 2002 motion for reconsideration of the August 17, 2002 order.[2]

Upon an assiduous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we

[1] The Honorable Ben H. Gaddis, judge presiding.

[2] Mother does not specify or argue error with particular respect to the family court of the third circuit's October 12, 2002 order that denied her August 14, 2002 motion for reconsideration. Hence, we will not review and thus affirm the family court's October 12, 2002 order. See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2002); Wright v. Chatman, 2 Haw. App. 74, 76-77, 625 P.2d 1060, 1062 (1981); HRAP Rule 28(b)(7) (2002); Weinberg v. Mauch, 78 Hawaiʻi 40, 49, 890 P.2d 277, 286 (1995); In re Waiʻola O Molokaʻi, Inc., 103 Hawaiʻi 401, 438 n.33, 83 P.3d 664, 701 n.33 (2004).

resolve Mother's points of error on appeal as follows:

1. Mother first argues that the family court violated her constitutional right to procedural due process by denying her July 24, 2002 motion for either (1) a continuance of the permanency hearing, or (2) a writ of *habeas corpus ad subjiciendum*[3] to fly her from felony incarceration at the Women's Community Correctional Center on Oahu (WCCC) to the permanency hearing. Apparently, Mother's request for a continuance of the July 30, 2002 permanency hearing was premised upon her attorney's representation that a circuit court chambers conference on a motion for her immediate release from prison was scheduled for August 15, 2002. The upshot of the family court's denial of her motion was that Mother participated in the permanency hearing via telephone. This first point of error lacks merit. At the outset of this case, on May 30, 2002, the family court found "aggravated circumstances" because of the prior termination of Mother's parental rights to her seven other children. See Hawaii Revised Statutes (HRS) §§ 587-2 (Supp. 2003)[4] & 587-71(i), -71(j) &

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[3] It appears the terminology Mother utilized was incorrect. "[T]he purpose of [a writ of *habeas corpus ad subjiciendum*] is to test the legality of the detention or imprisonment [of the detainee.]" Black's Law Dictionary 709-10 (6th ed. 1990). Ostensibly, what Mother moved for was a writ of *habeas corpus ad testificandum*. Hawaii Revised Statutes (HRS) § 660-4 (1993) ("any court of record [may] issue . . . a writ of habeas corpus ad testificandum, to bring in any prisoner to be examined as a witness in any action or proceeding, civil or criminal, pending in the court").

[4] "'Aggravated circumstances' means that: . . . . The parental rights have been judicially terminated or divested regarding a sibling[.]" HRS § 587-2 (Supp. 2003) (enumeration omitted; format modified).

-71(m) (Supp. 2003).[5] Moreover, at the combined adjudication/order to show cause (OSC) hearing held on June 14, 2002, the family court noted that, "[Mother] stipulates to court jurisdiction and foster custody on the basis of her substance abuse, exposing her baby to drugs prenatally -- ice, and being incarcerated at this time[.]" At the same hearing, the family court found that, "Regarding the [OSC] hearing, Mother did not meet her burden as to showing why this should not be set for a permanent plan hearing. The basis for the Court's finding is Mother's substance abuse history, neglect, and prenatal drug exposure to the child[.]" Furthermore, the July 30, 2002 hearing on Mother's motion for a continuance or a writ concluded as follows:

> THE COURT: [Mother] is contesting [the permanency hearing to follow]?
>
> [MOTHER'S COUNSEL]: Um, yes, Your Honor. But we are not going to be putting on any evidence. What I want the Court to do -- and I've spoken to [DHS's counsel] -- because nothing has happened between the OSC hearing and this hearing, I put on [at the OSC hearing] basically all the evidence which is the things

[5] HRS § 587-71(i) (Supp. 2003) provides in pertinent part that, at the disposition hearing, "The court need not order a service plan if the court finds that aggravated circumstances are present." HRS § 587-71(j) (Supp. 2003) provides that,

> If the court makes a determination that aggravated circumstances are present under this section, the court shall set the case for a show cause hearing as deemed appropriate by the court within thirty days. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing.

HRS § 587-71(m) (Supp. 2003) provides, in relevant part, that "the court need not order any visitation if the court finds that aggravated circumstances are present."

> she completed while at WCCC. Nothing else has happened. She has not visited the child. She has not done any other services.
>
> So basically I wanted the Court to take judicial notices of the things that is [sic] already in evidence. Because there has been nothing new other than her criminal status. That's all.
>
> And our basic position on that is there's a possibility she very well might get out in the near future.
>
> THE COURT: This is an aggravated circumstances case.
>
> [DHS'S COUNSEL]: Yes, Judge. The Court made that finding, Judge at the May 30th hearing.
>
> THE COURT: [Mother's counsel], it appears to me that your client's appearance is unlikely to meaningfully alter the outcome here.
>
> [MOTHER'S COUNSEL]: I would have to agree with that.
>
> THE COURT: I've already ruled that [DHS] does not have to make any reunification efforts with your client. Your client has had multiple drug exposed inference [sic; presumably, infants]. While I wish her every success in attempting to achieve sobriety and attempting to stop using drugs that hurt babies, I really fail to see how [Mother's] presence . . . is going to materially alter the result here.
>
> [MOTHER'S COUNSEL]: Okay.

Under the circumstances, the family court did not violate Mother's constitutional rights or abuse its discretion in denying her request for a writ. In re Doe Children, 102 Hawai‘i 335, 338-43, 76 P.3d 578, 581-86 (App. 2003). By the same token, the family court's denial of Mother's alternative request for a continuance was not an abuse of discretion. Cf. Kam Fui Trust v. Brandhorst, 77 Hawai‘i 320, 325, 884 P.2d 383, 388 (App. 1994) (trial court's denial of a continuance was not an abuse of discretion where the "reason for seeking a continuance was to assert a defense which had already been precluded by the entry of default").

2. Mother's next and last points of error may be

considered together. First, Mother contends there was not sufficient evidence to terminate her parental rights and award permanent custody of Doe to DHS because it was "premature for the Court to make this determination when the status of the Mother's criminal case was still not resolved." Opening Brief at 7 (citation to the record omitted). Second, Mother argues that it is

> fortune telling to say that the permanent plan dated May 05 [sic], 2002 filed by DHS is in the best interest of the child. There is not sufficient evidence and not enough time allowed to show that the Mother could not comply with a service plan pending the outcome of the status of her incarceration.

Opening Brief at 8. In this latter connection, Mother proposes that Doe be placed not in his current foster home but in the foster home of her seventh child, pending her imminent release from prison and completion of services: "There is no justification for the rush to judgement here." Opening Brief at 8. We disagree on both points. Over and above the family court's finding of "aggravated circumstances," HRS §§ 587-2 & 587-71(i), -71(j) & -71(m), there was substantial evidence to support the termination of Mother's parental rights, the award of permanent custody to DHS, and the establishment of the May 18, 2002 permanent plan proposing adoption of Doe by his current foster parents. In re Doe, 95 Hawai‘i 183, 190, 20 P.3d 616, 623 (2001). We also notice, In re Estate of Herbert, 90 Hawai‘i 443, 466, 979 P.2d 39, 62 (1999) (a fact is a proper subject for judicial notice "if it is common knowledge or is easily

verifiable" (citations and block quote format omitted)), that the motion for immediate release referred to by Mother's counsel was ultimately denied.

Therefore,

IT IS HEREBY ORDERED that the family court's December 6, 2002 findings of fact and conclusions of law, its August 17, 2002 order terminating Mother's parental rights and awarding permanent custody, and its October 12, 2002 order denying Mother's August 14, 2002 motion for reconsideration, are affirmed.

DATED: Honolulu, Hawai‘i, July 26, 2004.

On the briefs:

Beverly Jean Withington,
for mother-appellant.

Mary Anne Magnier and
Christobel K. Kealoha,
Deputy Attorneys General,
State of Hawai‘i, for appellee.

Acting Chief Judge

Associate Judge

Associate Judge