NOT FOR PUBLICATION

NO. 27072

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST OF W.B., A Minor

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 99-06365)

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

The father (Father) of W.B., born on September 17, 1999, appeals from the following two orders entered by the Family Court of the First Circuit[1]: (1) the November 18, 2004 Order Awarding Permanent Custody; and (2) the December 23, 2004 Orders Concerning Child Protective Act.

On July 6, 1999, the mother (Mother) of W.B. was pregnant with W.B., had not received any prenatal care, had tested positive for methamphetamines, and was a heavy user of alcoholic beverages.

W.B. was born on September 17, 1999. On November 23, 1999, Mother again tested positive for methamphetamines. On December 7, 1999, W.B. was taken into protective custody by the police and turned over to the State of Hawai'i Department of Human Services (DHS). On December 10, 1999, DHS filed a Petition for Temporary Foster Custody of W.B. The case was closed on November 15, 2001.

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[1] Judge Nancy Ryan presided.

On October 18, 2002, DHS filed a Petition for Family Supervision of W.B. On October 28, 2002, Judge Marilyn Carlsmith granted the petition and ordered compliance with the October 16, 2002 service plan.

On June 12, 2003, DHS removed W.B. from Mother's physical custody and assumed foster custody. DHS then placed W.B. in the home of Father. On July 10, 2003, due to concerns about Father's drug use, DHS placed W.B. in a DHS licensed foster home. W.B. has remained in that placement since that date.

On February 3, 2004, DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. The trial was held on October 18, 21, and November 18, 2004. On November 18, 2004, the court entered the Order Awarding Permanent Custody that terminated the parental and custodial duties and rights of Father and Mother and ordered the June 9, 2004 Permanent Plan into effect. The goal of that permanent plan is adoption.

On December 23, 2004, after a hearing, the court entered Orders Concerning Child Protective Act which, among other things, denied Father's December 3, 2004 motion for reconsideration.

On January 20, 2005, Father filed a notice of appeal. The court entered the Findings of Fact and Conclusions of Law (FsOF and CsOL) on February 28, 2005. The most relevant of those FsOF state as follows:

> 45. . . . [A] parent's drug use has a negative impact on the parent's ability to provide a safe family home for the [sic] his/her child . . . .

46. . . . Unless the substance abuse issues are successfully addressed, the parent would not be able to successfully address his/her mental health, characterological and/or emotional issues.

. . . .

49. Father has been in a relationship with Mother since November 1996. . . . Father stated that his relationship with Mother consists of drug use.

50. Father has a substance abuse problem, with an extensive history of substance abuse. Father has no insight into his substance abuse problem, and does not have the motivation to address his substance abuse problem. . . .

51. During the 1999 DHS and family court intervention, and during the present DHS and family court intervention, DHS identified [F]ather's substance abuse as a safety issue that negatively impacted his ability to provide a safe family home for the Child. Father, however, has consistently minimized and/or denied his substance abuse.

52. Father participated in a psychological evaluation with Dr. Stephanie Kong, Psy.D. on March 20, 2001. According to the Kapiolani Child Protection Center Multidisciplinary Team, during this psychological evaluation, Father was not open to discuss his substance abuse.

. . . .

54. Father has used methamphetamines in the family home and has sold drugs. . . .

55. During the present DHS and family court intervention, Father was referred to Hina Mauka for drug urinalysis testing. Father tested positive for amphetamines and methamphetamines on September 25, 2003 and October 20, 2003.

56. On October 30, 2003, Father participated in a substance abuse assessment with Hina Mauka. . . . Father was diagnosed with Amphetamine Dependence. According to this assessment, Father lacked insight into his chemical dependence. The assessment recommended that Father participate in outpatient substance abuse treatment, participate in at least three Alcoholics/Narcotics Anonymous meetings per week, and participate in random urinalysis for drugs. . . .

57. Father was removed from the Hina Mauka drug urinalysis program on November 14, 2003 due to his testing positive for drugs on October 20, 2003 and October 26, 2003, and his "no show" on November 14, 2003.

. . . .

60. On April 5, 2004, Father tested positive for amphetamines and methamphetamines. . . .

61. Father tested positive for amphetamines and methamphetamines on May 21, 2004 and May 30, 2004. After the May 30, 2004 urinalysis testing, Hina Mauka removed Father from its urinalysis testing program. . . .

. . . .

63. On October 20, 2004, Father tested positive for methamphetamines.

64. On October 20, 2004, Father participated in a substance abuse assessment with Hina Mauka. . . . Father denied that he had a drug problem and minimized his drug use despite being confronted with his previous positive drug tests, and also denied any consequences of his drug use. . . . Father was diagnosed with Polysubstance Dependence. . . .

. . . .

67. During cross-examination, Father denied that he had a substance abuse problem. . . .

68. Due to his continued denial of having a substance abuse problem and/or minimization of his drug use, Father has no insight into his substance abuse problem, and has no motivation to address his substance [abuse] problem. The prognosis for Father, in addressing his substance abuse issues, is fair to poor.

. . . .

74. The Child's GAL agreed with DHS' assessment and recommendation for permanency planning for [W.B.], with regards [sic] to Father.

This case was assigned to this court on August 26, 2005.

In accordance with Hawai‘i Rules of Appellate Procedure (HRAP) 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, we decide the issues as follows.

First, in the opening brief, counsel for Father states that

> arguments have been used in other cases that although an appellant is contesting the finding of permanent custody, that if appellant does not contest each and every one of the many finding [sic] and conclusions, that, therefore, the appellant agrees with the findings and conclusions.
>
> This is obliviously [sic] not true if a person is appealing a decision. We therefore state that appellant does not agree with the findings or the conclusions made in this case. [Father] is in disagreement with each and every finding and conclusion that even tends to say that [Father] could not and [sic] the time of the

trial or in a reasonable time thereafter provide a safe home for [W.B.].

It appears that counsel for Father is either unaware of or misunderstands the duty imposed upon him by HRAP Rule 28 (Supp. 2006)[2]. All findings of fact (not including conclusions

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[2] Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (Supp. 2006) states in relevant part:

BRIEFS.

. . . .

(b) Opening Brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

. . . .

(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. . . .

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

. . . .

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

. . . .

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. . . .

(5) A brief, separate section, entitled "Standard of Review," setting forth the standard or standards to be applied in reviewing the respective judgments, decrees, orders or decisions of the court or agency alleged to be erroneous and identifying the point of error to which it applies.

(6) [Reserved].

of law that are erroneously labeled as findings of fact) that are not challenged as required by HRAP Rule 28 or, if so challenged, that are not clearly erroneous, are facts in the case.

Second, Father contends that on November 18, 2004, when the court entered the Order Awarding Permanent Custody, it was reasonably foreseeable that, prior to July 10, 2005,[3] Father would become willing and able to provide W.B. with a safe family

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> (7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.
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> . . . .
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> (10) An appendix. Anything that is not part of the record shall not be appended to the brief, except as provided in this rule.

[3] Hawaii Revised Statutes § 587-73 (Supp. 2005) states, in relevant part, as follows:

> **Permanent plan hearing.** (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:
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> . . . .
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> (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;
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> (3) The proposed permanent plan will assist in achieving the goal which is in the best interests of the child; provided that the court shall presume that:
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> (A) It is in the best interests of a child to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes; and
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> (B) The presumption increases in importance proportionate to the youth of the child upon the date that the child was first placed under foster custody by the court[.]

home. In light of the record, this contention has no merit.

Third, Father notes that he "never committed actual harm to his child. The supposed harm was all imagined from the possibility of harm because of his drug use." He contends that he "was not given sufficient time to prepare for the care of [W.B.] and was not given the help needed to get into a substance abuse program that he needed." This contention has no merit. Father's "Polysubstance Dependence" and selling of drugs prove his inability to provide W.B. with a safe family home. Moreover, Father's admission that he used drugs and needed to get into a substance abuse program contradicts his statement quoted above that "[Father] is in disagreement with each and every finding and conclusion that even tends to say that [Father] could not and [sic] the time of the trial . . . provide a safe home for [W.B.]."

Fourth, Father asks, "[i]s eight months sufficient time from taking a child away to filing for Permanent Custody?" He fails to explain the relevance of this question. On July 10, 2003, DHS placed W.B. in a DHS licensed foster home. November 18, 2004, was the last day of the trial. The relevant period of time when deciding whether Father is "presently willing and able to provide" is from July 10, 2003 to November 18, 2004. The relevant period of time when deciding whether Father "will become willing and able to provide" is from July 10, 2003 to July 10, 2005.

Fifth, Father contends that he "did not get sufficient assistance to complete his service plan." He asks:

> Was the refusal of the social worker and therefore the State's refusal to allow [F]ather to enter a residential drug treatment because he did not have medical insurance show that the service plan was set up to be impossible for father to comply?

This question assumes a fact that is contradicted by Father's testimony. At the hearing on November 18, 2004, Father testified, in relevant part as follows:

> Q. Medical insurance, you got the medical insurance?
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> A. I got medical insurance from my own doctor because [the DHS social worker] never sent me to sign the signatures to get insurance, they never signed them for me, so I got to get my insurance doctor -- from my doctor.

Sixth, Father contends that

> [t]he social workers are put in a strange position. They cannot help a parent as much and they cannot give a parent as much money to help a child. So in the best interest of providing help for the child the social worker is allowed to give a non-parent even more assistance. Therefore the social workers are encouraged to take these children away from a parent.

Obviously, Father is blaming DHS and its social workers for facts and/or conditions that only he can change, that he was ordered to change, and that he refused and/or failed to change. These facts and/or conditions are his denial that he has a drug problem, his minimization of his drug use, his denial of any consequences of his drug selling and use, and his polysubstance dependence.

Seventh, in his opening brief, Father contends that

> [t]he act from which permanent custody is found, is unconstitutional because not one has ever been reversed on appeal in Hawaii. This means that whenever the trial court finds for permanent custody, it is infallible and no one need even question what it does. This places an unconstitutional burden on a parent who loses their child.
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> It is a violation of a parents [sic] right to Due Process of law.

This contention alleges a fact not in the record on appeal as described in HRAP Rule 10 (Supp 2006).[4] Therefore, even if it is a fact, it may not be considered in this appeal. Orso v. City & County of Honolulu, 55 Haw. 37, 38, 514 P.2d 859, 860 (1973) ("3A Barron & Holtzoff, Federal Practice & Procedure § 1590 (Rules ed. 1958), states the general rule: 'Matters not appearing in the record will not be considered by the court of appeals, unless the occurrence thereof is conceded by the parties[.]'")

Moreover, the question whether a permanent custody decision by the family court has ever been reversed on appeal is not a relevant question. The relevant question is whether the application of the following relevant standard of review has been satisfied.

> [T]he family court's determinations pursuant to HRS § 587-73(a) with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing

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[4] HRAP Rules 10 states, in relevant part:

THE RECORD ON APPEAL.

(a) Composition of the Record on Appeal. The record on appeal shall consist of the following:

(1) the original papers filed in the court or agency appealed from;

(2) written jury instructions given, or requested and refused or modified over objection;

(3) exhibits admitted into evidence or refused;

(4) the transcripts prepared for the record on appeal;

(5) in a criminal case where the sentence is being appealed, a sealed copy of the presentence investigation report; and

(6) the indexes prepared by the clerk of the court appealed from.

> and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact; thus, inasmuch as the family court's determinations in this regard are dependant upon the facts and circumstances of each case, they are reviewed on appeal under the "clearly erroneous" standard. See In re John Doe, Born on September 14, 1996, 89 Hawai'i 477, 486-87, 974 P.2d 1067, 1076-77 (App.), cert. denied, (March 17, 1999) (quoting AIG Hawai'i Ins. Co. v. Estate of Caraang, 74 Haw. 620, 629, 851 P.2d 321, 326 (1993) (internal quotation marks and citations omitted)); see also In re Jane Doe, Born on June 4, 1987, 7 Haw.App. 547, 558, 784 P.2d 873, 880 (1989). Likewise, the family court's determination of what is or is not in a child's best interests is reviewed on appeal for clear error. See id.; Doe, 89 Hawai'i at 486-87, 974 P.2d at 1076-77.
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> Moreover, the family court "is given much leeway in its examination of the reports concerning [a child's] care, custody[,] and welfare, and its conclusions [in this regard], if supported by the record and not clearly erroneous, must stand on appeal." Id. at 487, 974 P.2d at 1077 (quoting Woodruff v. Keale, 64 Haw. 85, 99, 637 P.2d 760, 769 (1981) (citing In re Mary Doe II, 52 Haw. 448, 454, 478 P.2d 844, 848 (1970), and Turoff v. Turoff, 56 Haw. 51, 55, 527 P.2d 1275, 1278 (1974))) (internal quotation marks omitted).

In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001).

Accordingly, we affirm the following two orders entered by the family court: (1) the November 18, 2004 Order Awarding Permanent Custody; and (2) the December 23, 2004 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, April 12, 2006.

On the briefs:

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