

DISSENTING OPINION BY RECKTENWALD, J.  
IN WHICH NAKAYAMA, J., JOINS

I respectfully dissent. I share the majority's concerns with the deficiencies of the amended petition, but believe that the effect of those deficiencies was to deprive the family court of jurisdiction to adjudicate NC as a person in need of supervision (PINS) under HRS § 571-11(2)(B). See Kapuwai v. City & County of Honolulu, Dep't of Parks and Rec., 121 Hawai'i 33, 40, 211 P.3d 750, 757 (2009) ("it is well-settled in this jurisdiction that, '[i]f the parties do not raise the issue [of a lack of subject matter jurisdiction], a court sua sponte will'") (citation omitted; brackets in the original).

As an initial matter, I note that the majority opinion does not suggest that a child cannot, as a matter of law, be adjudicated as a PINS under HRS § 571-11(2)(B) (providing that the family court has jurisdiction over a child "[w]ho is beyond the control of the child's parent or other custodian or whose behavior is injurious to the child's own or others' welfare") based on conduct that also constitutes a law violation under HRS § 571-11(1) (providing that the family court has jurisdiction over "any person who is alleged to have committed an act prior to achieving the age of eighteen years of age which would constitute a violation or attempted violation of any federal, state, or local law or municipal ordinance"). See Majority opinion at 30-31. I agree with that reading of chapter 571. In other words, there are categories of conduct that can both constitute a

violation of the law and fall within the scope of HRS § 571-11(2) (B), and in such cases the petitioning party may proceed under either 571-11(1) or (2) (B), provided the petition contains the necessary allegations and those allegations are then established in the adjudication hearing.

The question in this case is whether the amended petition contained the necessary allegations. To answer that question, I begin by examining the statutes that confer jurisdiction on the family court, as well as the related rules. HRS § 571-11, concerning family court jurisdiction over children, provides in pertinent part as follows:

**Jurisdiction; children.** Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

- (1) Concerning any person who is alleged to have committed an act prior to achieving eighteen years of age which would constitute a violation or attempted violation of any federal, state, or local law or municipal ordinance. Regardless of where the violation occurred, jurisdiction may be taken by the court of the circuit where the person resides, is living, or is found, or in which the offense is alleged to have occurred.
- (2) Concerning any child living or found within the circuit:
  - (A) Who is neglected as to or deprived of educational services because of the failure of any person or agency to exercise that degree of care for which it is legally responsible;
  - (B) Who is beyond the control of the child's parent or other custodian or whose behavior is injurious to the child's own or others' welfare;
  - (C) Who is neither attending school nor receiving educational services required by law whether through the child's own misbehavior or nonattendance or otherwise; or
  - (D) Who is in violation of curfew.

(Emphasis added).

HRS § 571-21(d) governs the content of the petition, and provides in pertinent part as follows:

In children's cases, under section 571-11(1) and (2), the petition . . . shall set forth plainly: (1) the facts which bring the child within the purview of this chapter; (2) the name, age, and residence of the child; (3) the names and residences of the child's parents; and (4) the name and residence of the child's legal guardian if there be one, of the person or persons having custody or control of the child, or of the nearest known relative if no parent or guardian can be found. If any of the facts required are not known by the petitioner the petition shall so state. . . .

(Emphasis added).

HRS § 571-41 discusses the procedure to be followed by the family court in adjudicating petitions brought under HRS § 571-11(1) and (2), and provides in relevant part, in subsection (c), as follows:

Findings of fact by the judge or district family judge of the validity of the allegations in the petition shall be based upon a preponderance of evidence admissible in the trial of civil cases except for petitions alleging the court's jurisdiction under section 571-11(1) which shall require proof beyond a reasonable doubt in accordance with rules of evidence applicable to criminal cases; provided that no child who is before the court under section 571-11(1) shall have admitted against the child any evidence in violation of the child's rights secured under the constitution of the United States or the State of Hawaii.

(Emphasis added).

It is apparent from these provisions that (1) the family court has jurisdiction in certain limited circumstances, which are specifically set forth in HRS §§ 571-11; (2) the petition must plainly set forth the facts that "bring the child within the purview of this chapter[;]" and (3) the court must

determine the "validity of the allegations in the petition" by a preponderance of evidence in 571-11(2) cases, and beyond a reasonable doubt in 571-11(1) cases. Reading these provisions together, I conclude that the petition must, in order to establish the jurisdiction of the court, identify the specific provision(s) of 571-11 that are relied upon and the facts that bring the child within the scope of that provision(s).

This interpretation is consistent with Rules 121 to 158 of the Hawai'i Family Court Rules (HFCR), which govern "[j]uvenile [c]ases" in the family court "under HRS sections 571-11(1) and 571-11(2) [.]". HFCR Rule 81(b). Rule 121 sets forth definitions, and provides that "[p]etition" means the legal document containing the allegations upon which the court's jurisdiction is based."

Rule 125 governs the "Contents of Petition," and provides that "[t]he petition shall set forth, in plain language and with reasonable particularity, the date, place, and manner of the acts alleged and the law or standard of conduct allegedly violated." (Emphasis added). Thus, the rule recognizes that the petition must allege both the applicable "law or standard of conduct" and the acts that allegedly violated it.

Finally, Rule 140 recognizes that the allegations of the petition must be "sufficient" to establish jurisdiction:

ORDER OF PROCEEDINGS.

The court may . . . inquire of the child in a case brought under HRS section 571-11(1) or (2) whether the child admits or denies all or some of the allegations in the petition. Failure or refusal of the child to admit the allegations shall be deemed a denial of them.

If any or all of the allegations of the petition admitted by the child are sufficient to give the court jurisdiction, the court may take testimony to corroborate the admission or otherwise to establish the allegations of the petition. If any of the allegations of the petition required to be established to give the court jurisdiction are denied by the child, the court may proceed to hear such evidence as is presented in support of such allegations and of the prayer of the petition. The court may order that any allegations denied by the child and which are not supported by adequate proof or not required to be heard be stricken from the petition. If the court is satisfied after consideration of all of the facts and circumstances presented that the prayer of the petition should be granted, it may then proceed with adjudication.

(Emphasis added).

The amended petition in this case is a two page document. The first page provides a pre-printed area at the top for the petitioner to check a box indicating whether the child "comes within the purview" of HRS §§ 571-11(1), 571-11(2), 571-44 and/or 571-48. In the instant case, none of those pre-printed boxes was checked. The first page further asserts that "[NC] appears to come within the purview of the HRS Section indicated above, in that the child allegedly violated or attempted to violate the law in the following manner[.]"

The second page of the Amended Complaint states that "[NC] appears to come within the purview of the HRS Section indicated above, by reason of the following facts[,]" then goes on to list the four counts against NC. Count I reads as follows:

Sometime between June 1, 2003, and October 23, 2003, the exact date being unknown, in Kona, County and the State of Hawaii, [NC] knowingly subjected to sexual contact [CW], a person who was less than fourteen years old, or caused [CW] to have sexual contact with him, thereby committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-7332(1)(b) [sic], Hawaii Revised Statutes, as amended, brining [sic] him before this [c]ourt as a Person in Need of Supervision under Sections 571-11(2) and 571-44, Hawai'i Revised Statutes, as amended.<sup>[1]</sup>

(Emphasis added).

Thus, it appears that the amended petition attempts to allege that NC was a PINS "under Sections 571-11(2) and 571-44,"<sup>2</sup> based upon NC "committing the offense of Sexual Assault in the Third Degree, in violation of Section 707-7332(1)(b) [sic.]" As I noted above, chapter 571 does not preclude the filing of a petition invoking the jurisdiction of the family court under 571-11(2) based on conduct that would constitute a law violation under 571-11(1). However, the amended petition here was not sufficient to invoke the jurisdiction of the family court under 571-11(2), because it does not identify which aspect of the court's jurisdiction under 571-11(2) is applicable. While it

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<sup>1</sup> The other three counts, which apparently pertained to different acts of sexual contact with CW, reiterated the text of Count I. However, whereas Counts I and II included a range of dates from June 1, 2003 to October 23, 2003, Counts III and IV included a more limited range of dates, from August 2003 to September 2003.

<sup>2</sup> HRS § 571-44 provides in relevant part as follows:

No child under the age of twelve shall be adjudged to come within section 571-11(1) without the written recommendation of a licensed psychologist or of a psychiatrist or other physician duly qualified by special training and experience in the practice of child psychiatry.

could be argued that several of the possible grounds (truancy, violation of curfew, educational neglect) are obviously inapplicable, there are two distinct grounds under 571-11(2)(B) that could provide a basis for adjudicating NC a PINS under the circumstances of this case ("beyond the control of the child's parent or other custodian" or "behavior [that] is injurious to the child's own or others' welfare"). However, the amended petition neither alleges that NC's conduct demonstrated that he is "beyond the control of [his] parent or other custodian" nor that his behavior is "injurious to [his] or others' welfare."

The failure to include that allegation is a jurisdictional defect that requires that the amended petition be dismissed. HRS § 571-21(d) requires that the petition plainly set forth the facts that "bring the child within the purview of this chapter[,]" but the amended petition does not do so. Similarly, HRS § 571-41(c)'s requirement that the family court enter findings regarding "the validity of the allegations in the petition[,]" implicitly recognizes that those allegations must be sufficient as a matter of law to establish the court's jurisdiction, but the allegations in the amended petition do not suffice. Also, HFCR Rule 125 requires the petition to set forth "with reasonable particularity, the date, place, and manner of the acts alleged and the law or standard of conduct allegedly violated." HRS § 571-11(2) incorporates or reflects many

different standards of conduct, but the amended petition does not specify which one is alleged to apply. Although the amended petition does indicate what sections of the penal code NC's underlying conduct would violate, that allegation, without more, is insufficient to establish the family court's jurisdiction under HRS § 571-11(2).

This analysis is consistent with decisions from other jurisdictions that have considered the adequacy of petitions filed in similar proceedings. In A Minor v. Juvenile Division of the Seventh Judicial District Court of the State of Nevada, 630 P.2d 245 (Nev. 1981); the Nevada Supreme Court considered the validity of an adjudication of a juvenile as a Child in Need of Supervision (CHINS), based on the allegation that the juvenile had "disregarded proper instructions from his parent . . . by becoming intoxicated and [was] beyond [the parent's] control, and [was] consequently (sic) a child in need of supervision[.]" Id. at 247 (ellipses in original). The juvenile had been placed on probation as a result of that adjudication, and had later been sentenced to confinement based on violations of the terms of probation. Id. at 247-48. The court held that:

CHINS jurisdiction is dependent upon a showing, not of the violation of the criminal law, but rather upon a showing of a status or condition of the subject minor.

[I]t should have been charged and found that [the juvenile]:

1. "Habitually disobeys the reasonable and lawful demands of his parents . . ."
2. "and is unmanageable; . . ."
3. "and is in need of care or rehabilitation."



The petition refers not to [the juvenile's] habitual disobedience but rather to an isolated act of disobedience ("becoming intoxicated" on November 6, 1979). There is no allegation or mention of any "need of care or rehabilitation." With good reason the legislature does not permit the juvenile court to take jurisdiction over children in cases of single or isolated instances of disobedience; otherwise there would not be a child in the state immune from juvenile court intervention.

For these reasons, [the juvenile] has not been properly adjudicated a child in need of supervision[.] . . .

Id. at 251-52 (some ellipses in original).

Accordingly, the Nevada Supreme Court directed that the case be dismissed. Id. at 253. While this case is factually distinguishable in some ways from the instant case, nevertheless, the court's holding makes clear that the State's failure to adequately plead the allegations in a petition creates a jurisdictional defect that deprives the court of the ability to properly adjudicate the child a PINS.

Requiring specificity of pleading in petitions seeking to invoke the family court's jurisdiction under HRS § 571-11(2) ensures that the relevant issues in such proceedings are fully and fairly adjudicated. In the instant case, based on the record before us, it appears that it was not until very late in the proceedings--on a motion for reconsideration brought almost a year after the court had adjudicated the amended petition and determined that it had jurisdiction under HRS § 571-11(2)--that the family court or the parties gave serious consideration to exactly how NC's alleged conduct fit within the scope of that

section. Up until that time, the parties appeared to assume that if NC's conduct constituted a violation of law if committed by an adult, he would then necessarily be a PINS under HRS § 571-11(2). Conversely, they seemed to assume that if his conduct did not constitute a violation of the law because both he and CW were under age 14, then the case would be at an end. No one appeared to recognize that the relevant issue was whether the alleged conduct, whether or not it would violate the law if committed by an adult, indicated that NC's behavior was injurious to his own welfare or that of others, or that he was beyond the control of his parents.

It was not until the court entered its December 19, 2006 Findings of Fact, Conclusions of Law and Order Denying Motion for Reconsideration that consideration appears to have been given to exactly how NC's conduct fit within HRS § 571-11(2), and even then, the court seemed to suggest that the question of whether that conducted violated the law could be dispositive:

FINDINGS OF FACT

5. [NC] was found to be a person in need of supervision, not a law violator, based on his age.

CONCLUSIONS OF LAW

3. There is nothing in the plain language of the statute under which the minor was adjudicated which specifies that the perpetrator of the crime must be an adult, or that he must be older than the alleged victim.
4. HRS 571-11(2) specifies that a minor may be

adjudicated under that section for any behavior committed prior to the age of 18, which is injurious to the welfare of the charged minor or to the welfare of others. Given the fact that the statutes pertaining to sexual assault, which this minor is alleged to have violated do not specify any minimum age for the perpetrator, nor any age difference between the complainant and perpetrator, the minor was properly adjudicated under that section for behavior committed prior to the age of 18 that would constitute a violation of state law. The court also finds that [NC's] behavior was injurious both to his own welfare and to that of [CW].

5. The Hawaii statutes pertaining to sexual assault are not so vague as to fail to give notice as to what is prohibited. Both sexual penetration and sexual contact with a person under the age of 14 are absolutely prohibited.
6. The court will not read in the statutes governing sexual assault, a requirement not put in those statutes by the legislature, i.e. that the person accused must be and [sic] adult. The legislature has shown itself quite capable of inserting minimum age differences by enacting subsection (c) of 707-730 and 707-732 pertaining to alleged victims between the ages of 14 and 16.
7. The fact that the legislature recognized that there might be sexual experimentation by minors between the ages of 14 and 16, which should not be punished criminally absent a 5 year age difference between the parties, does not mean that the legislature deemed it appropriate to allow sexual experimentation between minors younger than age 14. In this case there was an age difference of approximately two years between [NC] and [CW], [CW] being approximately 7 years old at the time, the significantly older [NC] engaged in sexual contact with [CW] and subjected him to sexual penetration. Sexual experimentation of the type alleged and proven is not appropriate for 7 year olds or 9 year olds.
8. Supervision by the court is appropriate in this case. Dr. In recommended short term therapy for [NC]. Dennis Gershick, Barbara Mullen and Claude McDowell all recommended treatment for [NC], consisting primarily of education about healthy sexual relationships and boundaries. According to their evaluation treatment readiness for change was rated at moderate risk because [NC] does not acknowledge that he did anything wrong, and does not perceive a problem or need to change. According to the letter from the father of [CW] he is very concerned about what he perceives as [NC's] family's pervasive denial about what occurred between the boys and unwillingness to get help. Accordingly,

supervision of the minor is warranted.

(Emphasis added).

Thus, the record shows confusion throughout the proceeding about the issues relevant to determining whether NC was a PINS under HRS § 571-11(2). That confusion could have been avoided or at least reduced had the amended petition been correctly pleaded in the first instance to allege how NC's conduct fit within the scope of HRS § 571-11(2). Since the State's failure to plead that allegation in the amended petition deprived the family court of jurisdiction, I conclude that the amended petition should have been dismissed.

My reasoning differs from the majority in that, while I interpret the amended petition as seeking (but failing) to invoke the family court's jurisdiction under HRS § 571-11(2), the majority interprets it as having the effect of invoking the court's jurisdiction under HRS § 571-11(1). Majority opinion at 31. Thus, because the family court proceedings failed to comport with various requirements for adjudications under that provision, the majority concludes that the judgment cannot stand. Majority opinion at 33-34. I respectfully disagree with the majority's reasoning for three reasons. First, the amended petition plainly states that its objective is to have NC adjudicated as a "Person in Need of Supervision under Sections 571-11(2) and 571-44[.]"

Second, from the time of the filing of the amended petition,<sup>3</sup> there is no indication in the record that NC was misled that the ultimate purpose of the proceeding was anything other than to determine whether he should be adjudicated as a PINS. Finally, although NC and the other participants may have been confused about the relevance of NC's alleged law violations to the determination of whether he was a PINS, NC was not in fact adjudicated as a law violator under HRS § 571-11(1); rather, the family court adjudicated him as a PINS under HRS § 571-11(2), and the family court's disposition was consistent with that adjudication and did not contain any provisions that could only be imposed on a law violator. See HRS § 571-48.

For the foregoing reasons, I would conclude that the family court lacked jurisdiction to adjudicate NC a PINS.

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*Mon E. Ackerman*

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<sup>3</sup> I note, however, that the original petition did not allege that NC was "a Person in Need of Supervision under Sections 571-11(2) and 571-44," and thus appeared on its face to allege that NC was a law violator under HRS § 571-11(1).