

NO. CAAP-15-0000675

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

IN THE INTEREST OF JM

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 13-00164)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding J., Leonard and Ginoza, JJ.)

Father-Appellant/Cross-Appellee CM and Mother-Appellee/Cross-Appellant TB appeal separately from the "Order Terminating Parental Rights" entered on September 11, 2015 in the Family Court of the First Circuit¹ (**family court**). CM also appeals from the "Letters of Permanent Custody" entered on September 11, 2015 in the family court.

On appeal, CM contends² the family court "clearly erred

¹ The Honorable Frances Q.F. Wong presided.

² CM's opening brief fails to comply with Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4), which provides, in pertinent part:

Rule 28. 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:

. . . .

(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

(continued...)

in finding clear and convincing evidence that [CM] was not willing and able to provide the Child with a safe family home and that it was not reasonably foreseeable that [CM] will become willing and able to provide the Child with a safe family home."

TB argues³ on appeal that the family court erred in failing to provide TB with an appointed guardian ad litem pursuant to Hawaii Revised Statutes (**HRS**) § 587A-16 (Supp. 2015).⁴

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve CM and TB's points raised on appeal as follows and affirm.

I. Termination of CM's Parental Rights

On appeal, CM argues, "The evidence shows that [CM] was willing and making an effort to provide a safe family home for

²(...continued)

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.

CM's counsel is warned that future violations of HRAP Rule 28 may result in sanctions. Because of the nature of this case, we address all of the arguments presented in CM's opening brief.

³ TB's opening brief fails to comply with HRAP Rule 28(b)(4). TB's counsel is warned that future violations of HRAP Rule 28 may result in sanctions. Because of the nature of this case, we address all of the arguments presented in TB's opening brief.

⁴ HRS § 587A-16(b)(1) provides:

§587A-16 Guardian ad litem.

. . . .

(b) The court may appoint a guardian ad litem for an incapacitated adult party, as set forth below:

- (1) Upon the request of any party or sua sponte, the court may order a professional evaluation of an adult party to determine the party's capacity to substantially:
 - (A) Comprehend the legal significance of the issues and nature of the proceedings under this chapter;
 - (B) Consult with counsel; and
 - (C) Assist in preparing the party's case or strategy[.]

the Child. Had [CM] been able to contact [the Department of Human Services (**DHS**)] and if DHS had provided additional support to [CM], it is reasonably foreseeable that [CM] may have become willing and able to provide the Child with a safe family home."

CM cites to instances in which he "made efforts to satisfy the service plan" and his medical issues in an attempt to counterbalance the family court's findings of "several instances where [CM] failed to comply with the recommended services." Specifically, CM cites to evidence showing that he tried to contact his social worker in attempts to find programs in Arizona to satisfy the requirements of the service plan, but was unsuccessful.⁵

CM's argument is insufficient to overcome the overwhelming evidence in the record, and the numerous unchallenged findings of fact, supporting the family court's determination that CM was not presently willing and able to provide the child with a safe family home and that it was not reasonably foreseeable that CM would become willing and able to do so in the future. Therefore, the family court's findings and conclusions are not clearly erroneous. See In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) ("The family court's [findings of fact] are reviewed on appeal under the 'clearly erroneous' standard." (citing In Interest of Doe, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996))).

II. Appointment of Guardian ad Litem for TB

TB's sole argument on appeal is that the family court erred by failing to appoint a guardian ad litem under HRS § 587A-16 because TB was an "incapacitated adult party."⁶

[T]he purpose of appointing a guardian ad litem is to protect the person under disability. Indeed, courts should appoint guardians ad litem for parties litigant when

⁵ In a Family Service Plan dated July 31, 2014, the DHS recommended random drug monitoring/screening, sex abuse assessment and counseling, parenting education, cooperation with the DHS social worker, and work in partnership with the DHS social worker.

⁶ An "incapacitated person" under HRS § 587A-4 (Supp. 2015) is defined as "a person who, even with appropriate and reasonably available assistance, is unable to substantially: (1) Comprehend the legal significance of the issues or nature of the proceedings under this chapter; (2) Consult with counsel; and (3) Assist in preparing the person's case or strategy." (Format altered.)

reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant.

In re Doe, 108 Hawai'i 144, 154, 118 P.3d 54, 64 (2005) (emphases and internal quotation marks omitted) (quoting Leslie v. Estate of Tavares, 91 Hawai'i 394, 400, 984 P.2d 1220, 1226 (1999)).

A psychological evaluation of TB dated January 13, 2014 explained and summarized TB's presenting problems, stating:

[TB] presents with clear mental health concerns that are pertinent to an assessment of her day-to-day functioning as a parent. Her general presentation and the findings on the personality aspects of the testing are reflective of an individual with a mood disorder with marked hypomanic features evident today. She was hyper-verbal, spoke in a fast manner, was impulsive in her responding and evidenced no insight into how her mental condition impacts on her functioning much less her ability to parent. There are indications of [TB] having difficulties viewing her own limitations and she appears to overuse denial to avoid self-examination. She might not utilize energy very wisely and might not see projects or responsibilities through to completion. She may become bored and restless easily and have little interest in details or routines. She might tend to have a low tolerance for frustration. While she has an adequate knowledge and understanding about basic parenting skills and information, it is questionable as to the degree to which she would be capable of applying these in an orderly and systematic manner. Accordingly, she is regarded as at increased risk for physical and psychological neglect. Prognostically, taking into consideration her long-standing history of mental disorder, past failures in treatment services, current denial of a mental disorder and lack of understanding or appreciation as to how her behavior [sic] on her ability to parent, [TB] would be expected to evidence little or no significant positive change.

The evaluation also stated, "The mental status examination and findings from the personality measures did not reveal indications of impairment of reality contact or psychotic related symptomatology. There were no indications of hallucinations, delusions, paranoia or other marked disturbances in [TB's] basic thinking or perceptual processes." The assessment did not indicate that TB would have difficulty understanding or participating in the proceedings involving the termination of her parental rights.

A behavioral health initial evaluation dated August 21, 2013 assessed TB's functioning, stating:

[TB] is currently experiencing symptoms of Mania associated with her diagnosis of Bipolar disorder, and is facing [Child Protective Services] involvement with her newborn given poor follow through with her psychiatric

concerns. [TB] demonstrates limited insight and motivation into addressing the issues associated with her mood disorder, and minimizes the appropriateness of on-going psychiatric treatment. In addition, [TB] has significant psychosocial stressors that are contributory to her current symptoms and which need to be addressed in anticipation of her continued parenting role.

The need for both behavioral and medical interventions for addressing her depression, mania, and anxiety were discussed with [TB], particularly in light of CPS involvement with her family. It was strongly recommended to [TB] and her boyfriend that they initiate Behavioral Health services at the earliest opportunity as part of her postpartum management.

The evaluation did not indicate that TB would have difficulty understanding or participating in a termination of parental rights hearing.

A substance abuse assessment dated September 26, 2014 stated:

This client reported no suicidal/homicidal ideations. There was no evidence of delusions, obsessions, compulsions, or a bizarre belief system. The client's intelligence appeared to be average. She seemed focused and was able to concentrate throughout the entire interview. Her immediate memory was intact and her remote memory appeared to be fair. Her impulse control was good. She has good judgment and insight. She appears to be motivated to comply with her service plan.

The assessment did not indicate that TB would have difficulty understanding or participating in a termination of parental rights hearing.

TB's manic presentation at trial and the psychological evaluations evidencing TB's struggle with symptoms related to her diagnosis of Bipolar disorder do not conclusively demonstrate that TB was unable to comprehend the legal significance of the termination of parental rights hearing, to consult with counsel, or to assist in the preparation of her case or strategy. See HRS § 587A-16. Additionally, there is no indication in the record that any party requested an evaluation of TB related to appointing a guardian ad litem for her or that the court considered appointing a guardian ad litem for TB. In sum, the family court's failure to appoint a guardian ad litem for TB was not an abuse of discretion. See Doe, 108 Hawai'i at 153, 118 P.3d at 63 (noting that a family court's decision to appoint a guardian ad litem is reviewed for abuse of discretion).

Therefore,

IT IS HEREBY ORDERED that the September 11, 2015 "Order Terminating Parental Rights" and September 11, 2015 "Letters of Permanent Custody" both entered in the Family Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, May 20, 2016.

On the briefs:

Jason Z. Say
for Father-Appellant/Cross-
Appellee.

Presiding Judge

Herbert Y. Hamada
for Mother-Appellee/Cross-
Appellant.

Associate Judge

Mary Anne Magnier
Kurt Jamie Shimamoto
Deputy Attorneys General
for Appellee/Cross-Appellee
Department of Human Services.

Associate Judge