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NO. CAAP-16-0000696

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

IN THE INTEREST OF P CHILDREN

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 14-00112)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, and Ginoza and Chan, JJ.)

Mother-Appellant (Mother) appeals from the "Order Terminating Parental Rights" entered on November 14, 2016, in the Family Court of the First Circuit (Family Court).^{1/} The Family Court terminated Mother's parental rights to her three children, FP, JP1, and JP2 (collectively, the Children), and appointed the Director of the Department of Human Services as the permanent custodian of the Children.

On appeal, Mother contends that: (1) the Family Court clearly erred in finding by clear and convincing evidence that it was not reasonably foreseeable that Mother would become willing and able to provide the Children with a safe family home within a reasonable period of time; and (2) she was not given a reasonable opportunity to reunite with the Children before her parental rights were terminated. The principal basis for the Family Court's termination of Mother's parental rights was her inability to overcome her substance abuse problems and demonstrate consistent sobriety. As explained below, we affirm the Family Court.

^{1/} The Honorable Steven M. Nakashima presided.

I.

While pregnant with JP2, Mother tested positive for methamphetamine on January 24, 2014, January 31, 2014, and February 6, 2014. At that time, she was participating in the Salvation Army's outpatient drug treatment program. Although Mother and JP2 both tested negative for illicit drugs at JP2's birth, Mother admitted that she used crystal methamphetamine shortly after JP2's birth. JP2 was removed from Mother's care, and on June 12, 2014, the Department of Human Services (Department) filed a petition for temporary foster custody of JP2 and for family supervision of FP and JP1. Mother stipulated to the relief sought in the petition, and the Family Court ordered temporary foster custody for JP2 and family supervision for FP and JP1.

On November 17, 2014, Mother had a positive drug test and admitted that she had used drugs. The Department assumed foster custody of FP and JP1 on November 18, 2014. In response to the Department's motion for immediate review, Mother stipulated to foster custody for FP and JP1, and the Family Court ordered foster custody for these children.

On June 3, 2015, Mother tested positive for methamphetamine, and she later admitted that she had used drugs. On October 26, 2015, the Department filed a motion to terminate Mother's parental rights to the Children. The Family Court set the motion for a trial on June 29, 2016, and on April 21, 2016, it set July 27, 2016, as an additional trial day to hear witnesses.

On June 28, 2016, the Department filed a motion to continue the trial. The Family Court held a hearing on the Department's continuance motion on June 29, 2016. At the hearing, the Department stated that while it was not changing its position that Mother's parental rights should be terminated, it was willing to give Mother a chance to show that she should be given more time to demonstrate she can provide a safe family home for the Children. In particular, the Department was willing to give Mother the opportunity to show how she interacted with FP,

since JP1 and JP2 were temporarily away from Hawai'i with their foster caregivers. The Family Court granted the Department's motion for continuance, ordered a June 28, 2016, service plan, and also ordered Mother, who was present at the hearing, to submit to a drug test that day -- June 29, 2016.

Mother failed to appear at the testing facility on June 29, 2016. Mother did not appear for testing even though the Department called Mother four times that day and left messages reminding her that a no-show was presumed to be a positive/dirty drug test. On July 5, 2016, the Department asked Mother to submit to a hair follicle test, which would show whether Mother had used illicit substances in the last 90 days. Mother failed to appear for a hair follicle test, even though the Family Court, on July 14, 2016, granted the Department's motion to compel Mother to submit to a hair follicle test, and Department social workers went to Mother's residence on two occasions to provide assistance in transporting Mother to the testing facility.

The Family Court held a trial on the Department's motion to terminate parental rights on July 27, 2016, September 23, 2016, and October 5, 2016. At the conclusion of the trial, the Family Court granted the motion and terminated Mother's parental rights to the Children.

II.

In order to terminate a parent's parental rights, the family court must, among other thing, determine by clear and convincing evidence that:

- (1) A child's parent whose rights are subject to termination is not presently willing and able to provide the parent's child with a safe family home, even with the assistance of a service plan;
- (2) It is not reasonably foreseeable that the child's parent whose rights are subject to termination 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 child's date of entry into foster care[.]

Hawaii Revised Statutes (HRS) § 587A-33(a)(1), (a)(2) (Supp. 2016). The Family Court made both these determinations by clear and convincing evidence in terminating Mother's parental rights.

We apply the following standards in reviewing the Family Court's decision to terminate parental rights:

Generally, the "family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion." Thus, we will not disturb the family court's decisions on appeal "unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant . . . and its decision clearly exceeded the bounds of reason."

In re Jane Doe, 95 Hawai'i 183, 189-90, 20 P.3d 616, 622-23 (2001) (citations and brackets omitted; ellipsis points in original). The family court's findings of fact are reviewed under the "clearly erroneous" standard and its conclusions of law are reviewed *de novo*. Id. at 190, 20 P.3d at 623. The family court's determinations "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 and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact" which are reviewed under the "clearly erroneous" standard. Id.

"[T]he family court's determination of what is or is not in a child's best interests is reviewed on appeal for clear error." Id. "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. (citation and brackets omitted).

III.

We resolve the arguments presented by Mother on appeal as follows:

A.

Mother contends that the Family Court clearly erred in finding by clear and convincing evidence that it was not reasonably foreseeable that Mother would become willing and able

to provide the Children with a safe family home, within a reasonable period of time.^{2/} We disagree.

The Family Court relied on Mother's inability to overcome her substance abuse problems and demonstrate consistent sobriety in finding that it was not reasonably foreseeable that Mother would become willing and able to provide the Children with a safe family home within a reasonable period of time. Mother cites periods of time during which she tested clean for drugs, and she disputes that her substance abuse problems were sufficient to show that she would not be able to provide a safe family home within a reasonable period of time.

However, the record indicates that after testing positive while pregnant with JP2 and undergoing drug treatment, Mother relapsed several times, including during a critical period immediately before the scheduled June 29, 2016, trial on the Department's motion to terminate her parental rights. Mother's last positive drug test before her scheduled trial was in June 2015. However, she failed to appear for testing as ordered by the Family Court on June 29, 2016, and she refused to submit to a hair follicle test ordered by the Family Court on July 14, 2016, even though she was aware that the failure to submit to testing would be viewed as a positive test for drugs. Mother's actions indicate that she had not maintained her sobriety and had been using drugs during the period immediately preceding her scheduled June 29, 2016, trial. We conclude that there was substantial evidence to support the Family Court's finding that "[d]uring the course of this case, Mother was never able to demonstrate that she had the ability to maintain long term sobriety such that she had the ability to provide a safe family home for her children."^{3/}

^{2/} Mother does not contest the Family Court's finding that she was not presently willing and able to provide a safe family home for the Children. See HRS § 587A-33(a)(1).

^{3/} Although Mother challenges the Family Court's finding that "despite engaging in a range of parenting services, Mother was never able to demonstrate that she could adequately care for and parent her children," she does not present any argument to support this challenge. We conclude that there was substantial evidence to support this finding.

Mother contends that it was improper for the Family Court to use her refusal to submit to testing in June and July of 2016 against her because a positive drug test could have exposed her to possible criminal charges. However, as the Department notes, Mother did not raise this argument before the Family Court, and thus it is waived. In addition, if possible exposure to criminal prosecution was the reason for Mother's refusal to submit to testing, she could have sought the protection provided by HRS § 587A-20 (Supp. 2016).^{4/} Mother did not seek the protection provided by HRS § 587A-20. Mother's contention that it was improper for the Family Court to consider her refusal to submit to testing is without merit.

Contrary to Mother's claim, we conclude that the Family Court did not err in determining that it was not reasonably foreseeable that Mother would become willing and able to provide the Children with a safe family home within a reasonable period of time.

B.

Mother argues that she was not given a reasonable opportunity to reunite with the Children before her parental rights were terminated. In support of her argument, she cites the fact that although the Department moved to continue the trial and issued a new service plan on June 28, 2016, to give Mother more time to demonstrate her ability to provide a safe family home, the trial began only 28 days after the new service plan.

We reject Mother's argument that she was not given a reasonable opportunity to reunite with the Children. JP2 had been in foster custody for two years and FP and JP1 had been in foster custody for 20 months when the trial began. The record indicates that the Department had moved to continue the trial

^{4/} HRS § 587A-20 provides:

The court may order that testimony or other evidence produced by a party in a proceeding under this chapter shall be inadmissible as evidence in any other state civil or criminal action or proceeding if the court deems such an order to be in the best interests of the child.

from June 29, 2016, until July 27, 2016, to give Mother a last chance to demonstrate that she could provide a safe family home, particularly with respect to FP, the eldest child. The Department stated that if Mother showed progress in her interactions with FP, it would consider a further continuance of the trial to give Mother more time to show that she could provide a safe family home. The Department, however, asked that Mother submit to a drug test on June 29, 2016, because she had a history of relapsing and the Department wanted to ensure that she remained clean.

Mother's repeated refusal to submit to testing raised concerns with the Department about her sobriety and expanding her visits with FP. The Department did not know that Mother would refuse to submit to testing when it moved for a continuance of the trial and sought a new service plan. The Family Court also did not know that Mother would refuse to submit to testing when it continued the trial and ordered the new service plan. In response to Mother's refusal to submit to testing, the Department decided to proceed with the trial on July 27, 2016. Given the circumstances, we conclude that Mother was given a reasonable opportunity to reunite with the Children before termination of her parental rights.

IV.

Based on the foregoing, we affirm the Family Court's "Order Terminating Parental Rights."

DATED: Honolulu, Hawai'i, June 29, 2017.

On the briefs:

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Craig H. Nakamura
Chief Judge

Lisa M. King
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