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NOS. CAAP-22-0000582 AND CAAP-22-0000583

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

CAAP-22-0000582

IN THE INTEREST OF AJ
(FC-S NO. 20-00112)

and

CAAP-22-0000583

IN THE INTEREST OF AS
(FC-S NO. 21-00223)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

(By: Hiraoka, Presiding Judge, Wadsworth and McCullen, JJ.)

In these consolidated appeals, **Mother** and **Father** (together, **Parents**) appeal from the orders terminating their parental rights in siblings **AJ** and **AS** (together, **Children**), entered by the Family Court of the First Circuit on September 21, 2022.¹ For the reasons explained below, we affirm in both cases.

AJ was born in 2020 and tested positive for methamphetamine at birth. The Hawai'i Department of Human Services (**DHS**) petitioned for temporary foster custody one week

¹ The Honorable Jessi L.K. Hall presided over the trial for both cases.

after AJ was born. The petition was granted. A guardian ad litem for AJ was also appointed.

AS had been born in 2015. DHS petitioned for temporary foster custody over AS on December 7, 2021. The petition was granted. A guardian ad litem for AS was also appointed.

DHS filed separate motions to terminate Parents' parental rights in AJ and AS. A consolidated trial (**TPR Trial**) was held on September 20, 2022. Parents attended with their respective counsel. Children's guardian ad litem (**GAL**) also attended. Parents each moved to continue the trial. DHS and the GAL opposed a continuance. The family court denied a continuance.

All parties then stipulated to a "hybrid stipulated facts contested hearing." DHS's safe family home reports were accepted as the testimony of DHS. The family court heard testimony from DHS social worker Puafisi **Tupola**, whom the parties stipulated was an expert on child protective and child welfare services. See Hawaii Revised Statutes (**HRS**) § 587A-19 (2018). Father and Mother also testified. Orders terminating Parents' parental rights in AJ and AS were entered on September 21, 2022. These appeals followed. The family court entered findings of fact and conclusions of law in both cases on November 10, 2022. We consolidated the appeals on December 22, 2022.

Parents argue that the family court erred by terminating their parental rights, and challenge a number of the family court's findings of fact (**FOF**)² and conclusions of law (**COL**).³ Mother argues that DHS failed to make reasonable efforts to reunify her with Children. Father argues that the family court erred by denying his motion to continue the TPR Trial.⁴

² Parents challenge FOF nos. 27, 38, 43-46, 52-54, 57, 61-63, 69, 71-80, 82, and 83 for AJ; and FOF nos. 17, 28, 33-36, 42-44, 47, 50-52, 58, 60-69, 71, and 72 for AS.

³ Parents challenge COL nos. 10-13 for AJ; and COL nos. 11-14 for AS.

⁴ Mother also requested a continuance, but her opening brief states no point of error and presents no argument challenging the denial of her
(continued...)

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 Doe, 95 Hawai'i 183, 189, 20 P.3d 616, 622 (2001) (cleaned up).

The challenged findings of fact pertain to: (a) DHS's efforts to engage with Parents; (b) Parents' failure to participate in services; (c) Parents' inability to provide Children with a safe family home; and (d) a permanent plan with a goal of adoption being in Children's best interests. We review findings of fact under the clearly erroneous standard. Id. at 190, 20 P.3d at 623. But we "will not pass upon issues dependent upon the credibility of witnesses and the weight of evidence; this is the province of the trier of fact." Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (citation omitted).

Mother. The DHS safe family home reports stated that Mother used amphetamines and methamphetamine at least twice a day while she was pregnant with AJ. She and AJ tested positive for methamphetamine shortly after AJ was born in 2020. In 2020, her parental rights in three of Children's older siblings had been terminated because of her failure to comply with services meant to address her substance abuse, highly transient lifestyle, and unavailability.

On November 24, 2021, DHS found AS residing with an aunt, with no legal caretaker; AS had been residing there for over four years.

Mother failed to keep in contact with DHS and didn't participate in any of the services required in the service plan. She failed to: participate in substance abuse assessments and random urinalyses; demonstrate consistent and prolonged sobriety; participate in a psychological evaluation; participate in a

⁴(...continued)
request.

parenting education program; participate in a domestic violence assessment; and participate in counseling. DHS was unwilling to return Children to Mother. Children's current foster caregivers were willing to become a permanent out-of-home placement with a goal of adoption.

At trial, Tupola opined that Mother wouldn't be able to provide a safe home for Children because of her long history of trauma and substance use. Tupola testified that her telephone contact with Mother was inconsistent because Mother had different phones due to lost or broken cell phones. She or a DHS aide went to the area of the Waimānalo Gym, where Mother lived, to look for her. It was the only place Tupola had known Mother to live. Tupola opined that Children's current foster caregivers were able to meet Children's needs, and continued placement there would be in Children's best interests.

At trial, Mother admitted: she had a problem abusing methamphetamine, and that she was asked to get, but never got, a substance abuse assessment; her drug use got worse after Children's older sibling disappeared from her adoptive parents' house, and was presumed dead;⁵ she was living at Sherwood's Beach in Waimānalo; and she knew how to get in touch with Tupola.

Father. According to the DHS safe family home reports, Father was incarcerated when AJ was born. He had recently been released from the O'ahu Community Correctional Center and his location was unknown. In 2020, his parental rights in three of Children's older siblings had been terminated because of his failure to comply with services to address his substance abuse, highly transient lifestyle, and unavailability. He was incarcerated five to six times since 2020, with the longest term of incarceration being four months. When he wasn't incarcerated, he failed to consistently keep in contact with DHS. He participated in a parenting education program while incarcerated, didn't complete the program because he was released, and didn't thereafter attempt to enter a parenting education program. He

⁵ Mother's parental rights in the child had been terminated in 2020.

initially participated in substance abuse monitoring through his H.O.P.E. probation, but didn't demonstrate consistent and prolonged sobriety. He also failed to participate in a psychological evaluation, a domestic violence assessment, and counseling. DHS was unwilling to return Children to Father because of safety concerns about failure to demonstrate sobriety and frequent incarceration.

At trial, Tupola opined that Father wouldn't be able to provide a safe home for Children because of his long history of trauma and substance use. She testified that telephone contact with Father was inconsistent because he had different phones due to lost or broken cell phones. She testified that she or a DHS aide went to the area of the Waimanalo Gym, where Father lived, to look for him. This was the only place that she had known Father to live when he was not incarcerated.

Father testified that he had been incarcerated five or six times since 2020, most recently for four months. He was incarcerated after being convicted of promoting crystal methamphetamine and violating his probation. He said he is addicted to methamphetamine. He last tested positive in 2021. His drug use got worse after Children's older sibling disappeared from her adoptive parents' house, and was presumed dead.⁶ He knew how to reach Tupola, but had not contacted her in the month before trial.

Substantial evidence supported the challenged findings of fact. They are not clearly erroneous.

We review the family court's conclusions of law de novo, under the right/wrong standard. Est. of Klink ex rel. Klink v. State, 113 Hawai'i 332, 351, 152 P.3d 504, 523 (2007). Mixed questions of fact and law are reviewed under the clearly erroneous standard because the determination is dependent on the facts and circumstances of each individual case. Id. A conclusion of law that is supported by the trial court's findings

⁶ Father's parental rights in the child had been terminated in 2020.

of fact and reflects an application of the correct rule of law will not be overturned. Id.

The family court is authorized to terminate parental rights if DHS proves, by clear and convincing evidence,⁷ 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;
- (3) The proposed permanent plan is in the best interests of the child. In reaching this determination, the court shall:
 - (A) Presume that it is in the best interests of the child to be promptly and permanently placed with responsible and competent substitute parents and family in a safe and secure home; and
 - (B) Give greater weight to the presumption that the permanent plan is in the child's best interest, the younger the child is upon the child's date of entry into foster care; and
- (4) The child consents to the permanent plan if the child is at least fourteen years old, unless the court consults with the child in camera and finds that it is in the best interest of the child to proceed without the child's consent.

HRS § 587A-33(a) (2018).

The family court entered substantially identical conclusions of law in each case. The challenged conclusions are:

⁷ "Clear and convincing evidence" is

an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.

Masaki v. Gen. Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 574 (1989) (citations omitted). The family court applied the appropriate standard in both cases.

10/11. The legal mother, legal father, as defined under HRS Chapter 578A, are not presently willing and able to provide the Child with a safe family home, even with the assistance of a service plan.

11/12. It is not reasonably foreseeable that the legal mother, legal father, as defined under HRS Chapter 578A, 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.

12/13. Having made Conclusions of Law pertaining to "parental unfitness" pursuant to HRS § 587A-33(a) (1) and (2), the Court makes the following Conclusion of Law regarding the proposed Permanent Plan pursuant to HRS §§ [sic] 587A-33(a) (3).

13/14. The Permanent Plan dated May 2, 2022, with the goal of adoption, is in the Child's best interests.

COL nos. 10/11, 11/12, 12/13, and 13/14 are actually mixed findings of fact and conclusions of law.⁸ As discussed above, they are not clearly erroneous. They are also supported by the family court's findings that are not challenged by Parents, and therefore binding. Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997) ("If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid."). The family court found, and Parents do not dispute, that: AJ's and AS's resource family homes are safe and appropriate; AJ and AS are doing well in their current placements, which are able to meet their physical, medical, emotional, and psychological needs; AJ and AS are very bonded with their current caregivers and the placements are in their best interests; and visitation between Children and Parents has been sporadic. They also reflect an application of the correct rules of law. See HRS § 587A-7 (2018) (Safe family home factors); HRS § 587A-32 (2018) (Permanent plan); HRS § 587A-33 (Termination of parental rights hearing).

⁸ The family court's label of a finding of fact or a conclusion of law does not determine the standard of review. Crosby v. State Dep't of Budget & Fin., 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994). Whether a determination is a finding of fact or a conclusion of law is a question of law. Thus, the accuracy of the label by the family court is freely reviewable by an appellate court. See Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 229, 751 P.2d 1031, 1034 (1988).

Mother argues that "DHS failed to make reasonable efforts to reunify Mother with her children because DHS failed to adequately assist Mother to provide her with the necessary services to overcome the issues she faced in order to reunify her with her children." The family court's findings to the contrary – FOF nos. 27/17 and 73/62, and COL nos. 11/12 – are not clearly erroneous. In addition, AJ's date of entry into foster care was October 5, 2020. HRS § 587A-33(a)(2) gives a parent a maximum of two years to become willing and able to provide a child with a safe family home. When the family court entered its order terminating Parents' parental rights, AJ had been in foster custody for 23 months. The multiple DHS safe home reports in the record show that DHS made reasonable efforts during that time to reunify Mother with AJ.

As to AS, the family court found under HRS § 587A-28(e)(4) that aggravated circumstances⁹ were present because of termination of Parents' parental rights in AS's three older siblings. Mother doesn't challenge this finding. When aggravated circumstances are present, DHS "shall not be required to provide the child's parents with an interim service plan[.]" HRS § 587A-28(e)(4)(A)(i) (2018). Mother's argument that DHS failed to make reasonable efforts to reunify her with AS lacks merit.

Father argues that the family court erred by denying his motion to continue the TPR Trial. We review for abuse of discretion. Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006). Father's request was based on: (1) his not being able to contact his attorney between the August 23, 2022 pretrial conference and the September 20, 2022 trial date, because he had lost his cell phone or his cell service; and it being the first anniversary of the unsolved disappearance of AJ and AS's older sibling from her adoptive parents' house. The GAL opposed a continuance because AJ's case had been pending for over two

⁹ "'Aggravated circumstances' means that . . . [t]he parent's rights regarding a sibling of the child have been judicially terminated or divested[.]" HRS § 587A-4 (2018).

years. See HRS § 587A-33(a)(2) (giving a parent maximum of two years to become willing and able to provide a child with a safe family home). Father's trial counsel had been appointed on August 14, 2020, more than two years before the TPR Trial; counsel should have been familiar with the material facts of the cases, including the numerous DHS safe family home reports and the GAL's five reports in the record. The family court also found in AS's case that "aggravated circumstance were present . . . due to the termination of [Parents'] parental rights in 2020 of the Child's three older siblings[.]" See HRS § 587A-28(e)(4)(A)(i) and (ii) (requiring that family court, if aggravated circumstances are present, conduct permanency hearing within thirty days and order DHS to file motion to terminate parental rights within sixty days). On this record, we cannot conclude that the family court abused its discretion by denying Father's motion to continue the TPR Trial.

For the reasons explained above, we affirm the "Order Terminating Parental Rights" in FC-S No. 20-00112 and the "Order Terminating Parental Rights" in FC-S No. 21-00223, each entered by the family court on September 21, 2022.

DATED: Honolulu, Hawai'i, September 6, 2023.

On the briefs:

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/s/ Keith K. Hiraoka
Presiding Judge

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/s/ Sonja M.P. McCullen
Associate Judge