NO. SCWC-12-0000521

IN THE SUPREME COURT OF THE STATE OF HAWAII

HRS CHAPTER 587A (CHILD PROTECTIVE ACT) APPEAL

In the Interest of T.M.	FC-S No. 10-002K APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER TERMINATING PARENTAL RIGHTS ISSUED ON MAY 3, 2012 Family Court of the Third Circuit Honorable Aley K. Auna, Jr.

PETITIONER/RESPONDENT-APPELLEE DEPARTMENT OF HUMAN SERVICES' RESPONSE TO RESPONDENT/PETITIONER-APPELLANT PARENT'S APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF CONVENTIONAL SERVICE

DAVID M. LOUIE 2162
Attorney General, State of Hawaii

MARY ANNE MAGNIER 3451
NOLAN CHOCK 2212
Deputy Attorneys General
Department of the Attorney General
Family Law Division
Kapolei Building
1001 Kamokila Blvd. #211

Kapolei, HI 96707
Telephone: (808) 693-7081
Email: MaryAnne.Magnier@hawaii.gov

77-6399 Nalani Street, Suite 101
Kailua-Kona, Hawaii 96740
Telephone: 808-327-6263
Email: nolan.k.chock@hawaii.gov

Attorneys for Petitioner/Respondent-Appellee
Department of Human Services

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PETITIONER/RESPONDENT-APPELLEE DEPARTMENT OF HUMAN SERVICES' RESPONSE TO RESPONDENT/PETITIONER-APPELLANT PARENT'S APPLICATION FOR WRIT OF CERTIORARI

In this case under the Child Protective Act, HRS Chapter 587A, Petitioner/Respondent-Appellee Department of Human Services ("DHS"), the permanent custodian of T.M, submits the following response to the Application for Writ of Certiorari submitted by the child's parent ("Mother") who is the Respondent/Petitioner-Appellant. This Response is made pursuant to HRAP Rule 40.1(e).

I. CASE SUMMARY

The subject child, TM, was born on June 8, 2009. TM was placed in police protective custody and transferred to the temporary foster custody of the Department of Human Services ("DHS") on December 31, 2009. [R. 23] The family court took exclusive original jurisdiction over TM and awarded foster custody to DHS at a hearing on February 10, 2010. [R. 181 – 185] After 26 months of court intervention and services,[2] the family court determined that the child's parents could not provide TM with a safe family home both presently and within a reasonable period of time in the future, and parental rights were terminated at a hearing on March 16, 2012.[3] DHS was awarded permanent custody of the child at the same hearing. [Tr. (3/16/12) 7] Except for the first six months of his life, TM has spent his entire his life in DHS foster custody or permanent custody. The child's mother ("Mother") filed her Notice of Appeal in Family Court on May 25, 2013. [R. 932] and [JEFS Docket No. 1 in the ICA case] The Intermediate Court of Appeals issued an opinion on June 28, 2013 affirming the Family Court ruling (herein referred to as "ICA Opinion").[4] Mother filed an Application for Writ of Certiorari ("Application") with the Hawaii Supreme Court on September 12, 2013.

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[2] The Petition for Temporary Foster Custody was filed six days after TM was placed in police protective custody – January 6, 2010 [R.11]

[3] The court's decision was announced at a hearing on March 16, 2012 [Tr (3/16/12): 1-9] and the Order Terminating Parental Rights and Awarding Permanent Custody to DHS was filed on April 17, 2012 [R. 904-907]

[4] In the Interest of TM, No. CAAP-12-000521, Summary Disposition Order, filed on June 28, 2013.

II. ARGUMENT

A. The portion of Mother's "Statement of the Case" relating to the court's failure to appoint an attorney for Mother contains numerous mis-characterizations of the evidence

The family court appointed an attorney for TM's mother ("Mother") over five months prior to the termination of parental rights hearing. [R. 694] So the issue is not the appointment of legal counsel for an indigent parent *per se*, but rather when should the attorney have been appointed. The ICA Opinion is in agreement with Mother and DHS with respect to the need for an attorney during a termination of parental rights proceeding.

In her Application, Mother creates a narrative that the family court repeatedly rebuffed her attempts to obtain legal counsel at earlier points during the case, thus creating a nineteen month delay. This serves as the basis for Mother's argument that her due process rights were violated and that the ICA committed a grave error by failing to recognize that. However, a closer examination of the facts of the reveals that Mother mis-characterizes the events and statements made during the hearings prior to appointment of counsel.

Mother states that at the first court hearing, the family court "inexplicably excluded" her. [Application at 3] However, Mother was present and included during the entire hearing. [Tr (1/7/10) 3-20] Due to the fact that there were two sets of parents at the hearing (plus other family members), the court was not able to focus exclusively on Mother. But the court did speak to her as a parent and there was some direct interactions with Mother. [Tr (1/7/10):8, 19] The court's statement quoted in Mother's Application [Application at 3] wherein the court was speaking about Mother in the third person occurred after an exchange between the court and Mother's mother (child's maternal grandmother). The fact that some of the court's comments were "about" Mother" rather than directly "to" Mother should not be interpreted to mean that the court was excluding her from the hearing.

At the second court hearing, Mother states that her guardian ad litem ("GAL") "objected" to the dual role of serving as both Mother's guardian ad litem as her attorney. [Application at 3] The GAL's statement to the court (in its entirely) is as follows:

> Well, that's my first thing, your Honor, is that at this point understanding that I haven't spoken with [Mother] yet, and I need to speak with her about this stuff because if there's going to be a difference of opinion in working as her guardian ad litem than

> working as her attorney, then I would be suggesting that she have a separate attorney to deal with her as a minor over [TM]. But at this point I haven't spoken with her to find out whether or not there is any conflict between those two positions.

[Tr (1/14/10): 8-9] It is clear that the guardian ad litem was speaking of a contingency that *might* happen in the future (after she talked to Mother). To say that the GAL interposed an objection at that time and was asking the court to appoint an attorney is not accurate.

Mother follows up her statement about Mother's objection with another inaccurate statement, "The family court still refused to appoint a lawyer. [*Id.* at 8]" Page 8 of the transcript from that hearing does not contain any evidence that the family court was refusing (or was going to refuse) to appoint an attorney for Mother.

Mother follows those mis-characterizations with the statement: "No lawyer was appointed for [Mother] after the Department drafted and the family court ordered a family service plan." [Application at 3] While on its face that statement is true, it seems to imply that the court should have appointed an attorney before the family service plan was ordered based on Mother's prior request for an attorney. But as mentioned above, there were no prior requests for an attorney.

Then with respect to the periodic review hearing on May 24, 2011, Mother states in her Application that her GAL "reminded the family court that it had neglected to appoint a lawyer."[Application at 3] Mother is referring to the following the following statement by her GAL (a portion of which was left out in Mother's Application):

> And then also with regards to this, because I am only [Mother's] GAL – and I've mentioned this several times in this case. She has never been assigned anybody as her attorney in her case involving her child, [TM]. If we are going to permanency at this point and Alexandra is going to be turning 18, the suggestion is that she apply for and look at getting her own attorney for that case.

[Tr. (5/24/11): 11] The phrase stating that the GAL "mentioned this several times in this case" is linked to the first part of the sentence (that she is "only [Mother's] GAL") and it is related to the second sentence stating that Mother does not have an attorney. It does not refer to the failure of the court, on prior occasions, to appoint an attorney for Mother. Because there were no prior requests for an attorney, it is inaccurate to describe the family court as neglectful.

Mother's statement that the GAL "reminded the family court that it had neglected to appoint a lawyer" is followed by her statement that, "The family court still took no action."

[Application at 4] That statement is also inaccurate. The court did take action as indicated by its response, "Okay. Well, maybe perhaps you can assist her with that, I mean filling out the application. Okay?" And Mother's GAL replied, "Sure." [Tr (5/24/11): 11] The court was trying to facilitate the appointment of an attorney for Mother by asking her GAL to help her fill out an application.[5] It was a positive step in the direction of getting an attorney appointed. So to say that the "court still took no action" misconstrues the court's efforts in procuring an attorney for Mother.

Regarding the subsequent hearing on September 13, 2011, Mother states, "The family court was still reluctant to appoint someone and asked Ms. Rigaud's guardian ad litem to stay on the case. She refused:" [Application at 4] Mother's statement gives the impression that the court did not want to appoint an attorney for Mother. That impression is not correct. The court's hesitation related to **who** would be the attorney. Due to the fact that Mother's GAL was being discharged (because Mother had reached age of majority), the court was interested in having Mother's GAL serve as her attorney.[6] [Tr. (9/13/11): 8) The family court was not asking Mother's GAL to stay on as her GAL in lieu of appointing an attorney for Mother.

After Mother's GAL explained why she felt she should not be appointed as Mother's attorney, the court replied, "Okay. Thank you." [Tr. (9/13/11): 9] A few minutes later, the court approved Mother's application for an attorney, [Tr. (9/13/11): 11] and asked the bailiff to find an attorney for Mother. [Tr. (9/13/11): 12]

Thus, the delay in the appointment of an attorney for Mother cannot be attributed to the Family Court's "dogged refusal"[7] to appoint an attorney for Mother. Rather it was the result of Mother's failure to request an attorney and her failure to submit an application on a timely basis. Due to the fact that no earlier request was made, it is unknown whether Mother even wanted an attorney earlier in the case. Mother's after-the-fact complaint about the lack of an attorney goes contrary to what appears to be Mother's choice to proceed without an attorney

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[5] The Child Protection Act states: "The court may appoint an attorney to represent a legal parent who is indigent based on court-established guidelines." HRS section 597A-17(a) The application is the court's method of documenting that the parent is indigent based on court-established guidelines.

[6] The fact that Mother's GAL was an attorney and she had a lengthy relationship with Mother made her the natural choice for appointment as Mother's attorney.

[7] "Dogged refusal" is the term used by Mother in her Application. [Application at 11]

during the earlier stage of the case that was focused on reunification with her son.[8] The court could not assume that Mother's failure to make a request was due to the fact that she was too young to understand that she had the right to an attorney, especially in light of the fact that she was explicitly informed of her right to any attorney at the very first court hearing [Tr (1/7/10): 8-9]

B. The ICA did not commit grave errors when it held that the family court did not abuse its discretion by failing to appoint counsel to represent Mother prior to September 13, 2011.

Although the appointment of an attorney is discretionary under Hawaii law,[9] the ICA recognized that the indigent parent in this case (Mother) was entitled to a court-appointed attorney.[10] This is consistent with federal decisions which emphasis the importance of court-appointed counsel (even when the parent is not in danger of incarceration) (see e.g. Lassiter v. Dept. of Social Services of Durham county, N.C., 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)) and with the ICA's own decisions (see, e.g. In re "A" Children, 119 Hawaii 28, 193 P.3d 1228 (Haw. Ct. App. 2006)).

The ICA also recognized in In re "A" Children, 119 Haw at 58, 193 P.3rd at 1258 that the failure to appoint an attorney sufficiently in advance of a contested TPR hearing could result in a due process violation.[11] Although the ICA reached a different result in this case with respect to the violation of due process, it used the same three part balancing used by the U.S. Supreme Court in Lassiter, 452 U.S. at 31, 101 S.Ct. 2153.[12] The different result was the product of the many factual differences between the parent in this case compared to the parent in the In re "A" Children case,[13] and the fact that the court appointed an attorney to represent

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[8] The earlier stage of the case even included a seven month period where Mother actually lived with TM in the foster home. [TR (3-2-12): 6]

[9] HRS section 587A-17(a)

[10] Likewise, the ICA pointed out that "The Family Court was well aware that Mother was entitled to a GAL and her won attorney." [ICA Opinion at 2)

[11] The ICA wrote, "Based on our review of the record, it is apparent to us that the belated appointment of an attorney for Father created an appreciable risk that Father would be erroneously deprived of his parental rights in Sons." In re "A" Children, 119 Haw at 58, 193 P.3rd at 1258

[12] This three part test had been articulated five years earlier by the U.S. Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976). It was a case involving social security disability benefits.

[13] The ICA articulated the differences in the instant case: "Mother does not argue that she failed to understand or would have benefitted form earlier guidance regarding the relationship between her

the parent in In re "A" Children case was only appointed 16 days before the hearing (with a different attorney showing up on the trial date)[14] as opposed to the over five month lead time in the instant case.

In her Application, Mother does not point to any specific grave errors of law by the ICA. Instead, she speculates that Mother would not have lost her parental rights if an attorney appointed earlier had: 1) explained the deadlines the of Child Protective Act to Mother (including when DHS is required to move to terminate parental rights), 2) developed a strategy to comply with the service plan, and/or 3) sought out relatives to take custody of T.M. instead of the child remaining in DHS foster custody. Upon the appointment of an attorney on September 13, 2011, her attorney could have (and may have) addressed all three matters. She had ample time to do so. And if they were not addressed outside the courtroom, they could have been raised at any of the four hearings prior to the TPR hearing.[15] And if those issues were not adequately addressed during those hearings, her attorney could have raised them during the TPR hearing. By not raising those issues, the court can only assume that Mother and her attorney determined that they were satisfactorily addressed or that they were not significant enough to raise (thus waiving any objections).

C. The ICA did not commit grave error when it found that the family court did not abuse its discretion by denying Mother's motions to continue the TPR hearing.

The ICA Opinion states that "Mother was given a reasonable amount of time, more than two years, after TM was placed in foster custody, to demonstrate that she was willing and able to provide TM with a safe family home." [ICA Opinion at 5]

January 21, 2011 DHS Family-Service-Plan (Service-Plan) requirements and probation conditions. Further, she has not demonstrated and the evidence in the record on appeal does not reveal that she lacked the education or intelligence to understand the proceedings; misunderstood any part of the proceedings; failed to comprehend the meaning or significance of any Service-Plan requirement; was marginalized during the proceedings; or missed any hearings." [ICA Opinion at 5]

[14] In re "A" Children, 119 Haw 58, 193 P.3rd at 1258

[15] The court announced that it would appoint an attorney for Mother at a hearing on September 13, 2011. After that hearing, and before the start of the TPR hearing, there were hearings on: September 20, 2011, December 13, 2011, February 7, 2012, March 2, 2012,

Under the Child Protective Act, the court has the discretion to set a TPR hearing at any time.[16] Rather than scheduling the TPR hearing earlier in the case, the family court gave Mother the full amount of time, and then some, to show that she could rehabilitate herself and provide TM with a safe family home. This is despite the fact that time is of the essence for cases under the Hawaii Child Protective.[17] The family court is required to balance a parent's right to participate in reunification services against the right of the child to be placed in a permanent home in an expeditious manner.

Mother asserts that "The family court, however, did not consider the late appointment of counsel for Ms. Rigaud, and Ms. Riguad's circumstances." [Application at 12] To the contrary, it appears that the late appointment of counsel and Mother's circumstances explain why the court gave Mother extra time to rehabilitate herself and create a safe home for her child.

The finding that the family court did not abuse its discretion by denying Mother's motions to continue the TPR hearing was not a grave error by the ICA.

III. CONCLUSION

The ICA Opinion does not contain any grave errors of law or fact and there are no obvious inconsistencies in the IAC decision with that of the supreme court, federal decisions, or its own decisions.

Although Mother was not represented by legal counsel during a major portion of this case, she did have an attorney when it mattered most, the five-and-a-half months prior to the TPR hearing. The court did nothing to impede Mother from requesting an attorney earlier in

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[16] The Child Protective Act states, "Nothing in this section shall prevent the court from setting a termination of parental rights hearing at any time the court deems appropriate." HRS section 587A-28(g)

[17] The Purpose section of the Child Protective Act states, in pertinent part, as follows: "The policy and purpose of this chapter is to provide children with **prompt** and ample protection from the harms detailed herein, with an opportunity for **timely** reconciliation with their families if the families can provide safe family homes, and with **timely** and appropriate service or permanent plans to ensure the safety of the child so they may develop and mature into responsible, self-sufficient, law-abiding citizens. . . . The service plan shall be carefully formulated with the family in a **timely** manner. Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems that put the child at substantial risk of being harmed in the family home. . . . Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child shall be permanently placed in a **timely** manner." HRS section 587A-2

the case. While it is true that Mother was not provided with a court appointed attorney until after she because an adult, it is also true that Mother did not submit her application for a court-appointed attorney until a week before her 18th birthday.[18]

Petitioner/Respondent-Appellee respectfully urges the Court the deny Mother's Application for a Writ of Certiorari.

DATED: Kailua-Kona, Hawaii. 9/27/13

Respectfully Submitted,

DAVID M. LOUIE
Attorney General
State of Hawaii

Nolan Chock
NOLAN CHOCK
Deputy Attorney General

Attorneys for Petitioner/Respondent-Appellee, Dept. of Human Services

[18] Mother's application was submitted on or about August 31, 2011 [R. 704] and she reached the age of majority on September 8, 2011.

CERTIFICATE OF SERVICE

The undersigned certifies that the parties to this case were duly notified of the filing of this document by notice of electronic filing at the electronic address provided in the court record, or at their last known address by U. S. Mail, postage prepaid.

Benjamin E. Lowenthal
Law Offices of Philip H. Lowenthal
33 North Market Street
Suite 101
Wailuku, Hawaii 96793
Attorney for Mother/Appellant

Susan M. Kim
Attorney at Law
P. O. Box 1853
Kealakekua, Hawaii 96750
Guardian Ad Litem for Child

Gary Hagerman
Attorney at Law
65-1308 Pomaikai Place
Kamuela, HI 96743
Attorney for Father

DATED: Kailua-Kona, Hawaii. 9/27/13

Nolan Chock

NOLAN CHOCK
Deputy Attorney General

Attorney for Petitioner/Respondent-Appellee
Department of Human Services