

## FC-S SDO'S & MEMO OPINIONS

### August 2011 to Present

HRAP Rule 35 (c) (2): Unpublished appellate decisions, entered after July 1, 2008, may be cited for persuasive value only. A copy of the decision (SDO/Memo Opinion) must be attached to the legal brief/memo. SDO/ Memo Opinions usually turn on the facts; important legal issues are digested only.

CASE	CITATION	DIGEST
In re A.S.	No. 30649, SDO (App. Aug. 31, 2011)	Father appealed the Family Court's decision to terminate his parental rights. ICA affirmed: 1. Child in foster custody for 2 years. 2. After 2 years of participating in services, Father unable to demonstrate ability to appropriately care for the child by making positive behavioral changes. Refused to participate in some services because believed he did not need them. 3. Rejected Father's argument that he did not understand the court-ordered service plan requirements because he contacted the service providers listed in the service plan. 3. Record showed that the Family Court issued its HRS § 587-73 (a) (1) and (2) [HRS § 587A-33 (a) (1) and (2)] parental unfitness determination before issuing the permanent plan determination.
In re S.F. and K.F.	No. 30729, SDO (App. Aug. 31, 2011)	Mother appealed the Family Court's decision to terminate her parental rights. ICA affirmed: 1. Mother was not prejudiced by not being provided a new court-ordered service plan. Per DHS (in its reports and the DHS SW's expert testimony), Mother's problems, and service plan requirements did not change, the requirements were the same as the conditions of her Federal probation, and Mother was not in compliance with both. 2. Mother did not properly preserve the service plan issue for appeal by making timely and specific requests for additional or different services. Merely arguing that Mother was not provided a service plan in pre-TPR (review) hearings or pleadings is not sufficient. 3. Rejected Mother's reasonable efforts argument that DHS failed to provide supervised [in person] visits while Mother was in Oklahoma serving Federal probation. DHS started telephone contacts. Family Court did not abuse its discretion in denying supervised visits due to Mother's non-compliance with services in the CPA case, and her Federal probation that resulted in the delay in transferring her Federal probation to Hawaii. 4. Child's best interest is paramount in determining visitation. <u>citing Doe</u> 109 Haw. 399, 411 (2006).
In re L.T.	No. CAAP-11-0000010, SDO (App.	Mother appealed the Family Court's decision to terminate her parental rights. ICA affirmed: 1. Child in foster custody for 3 years.

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	Aug. 31, 2011)	2. Mother could not demonstrate behavioral changes and integration of services, such as naming the AA/NA 12 Steps, to address her drug addiction. Her therapist testified that Mother's anticipated date of discharge was unknown.
In re Adoption of a Male Child	No. CAAP-11-000069, SDO (App. Sep. 30, 2011)	<p>DHS, as the child's permanent custodian, removed the child from the placement with paternal grandparents due to their medical problems and drug abuse problems. DHS placed the child in a non-relative resource home. Paternal grandparents' appealed the family court's denial of their adoption petition. ICA affirmed:</p> <ol style="list-style-type: none"> <li>1. Unchallenged findings of fact showed that it was not in the child's best interests to be adopted by paternal grandparents. <u>Citing</u> HRS § 578-8 (a) (4).</li> <li>2. Although the Family Court's Findings of Fact and Conclusions of Law were not timely filed, there was no prejudice to the paternal grandparents because they were filed before the opening brief was due and had the opportunity to challenge them on appeal.</li> </ol>
In re I.O.	No. 30526, SDO (App. Oct. 14, 2011)	<p>Mother and Father appealed the Family Court's decision to terminate their parental rights. ICA affirmed:</p> <ol style="list-style-type: none"> <li>1. Both Parents failed to present any discernible argument on the findings of fact they each alleged to be in error in their "Points of Error." Therefore, the challenge to those findings of fact is waived. HRAP Rule 28 (b) (7).</li> <li>2. Parents failed to make timely demands (i.e., service plan and/or review hearings) for services and/or accommodations for services, and to claim that DHS failed to make "reasonable efforts." Failure to timely raise these issues is a waiver of the issues at trial and appeal, i.e., these issues cannot be raised for the first time at trial and on appeal.</li> <li>3. The appellate courts will decline to review issues of the credibility of witnesses.</li> <li>4. DHS gave Father a reasonable time to reunify <u>citing</u> <u>In re Doe</u>, 89 Haw. 477, 492, 974 P.2d 1067, 1082 (App. 1999).</li> <li>5. Although Mother completed services, her co-dependency (of Father) problems continued to exist and compromised her ability to provide a safe family home, <u>citing</u> <u>In re Doe</u>, 95 Haw. 183, 193-194, 20 P.3d 616, 626-27 (2001).</li> <li>6. Rejected Mother's argument that DHS was prohibited from filing its Motion for Permanent Custody (Motion to Terminate Parental Rights) on the grounds that DHS did not remove the child's newborn sibling from Mother. There is no law supporting this argument.</li> </ol>
In re A Children	No. CAAP-11-0000310, SDO (App. Oct. 21, 2011)	<p>Mother appealed the Family Court's decision to terminate her parental rights. ICA affirmed:</p> <ol style="list-style-type: none"> <li>1. No error with the permanent plan goal of adoption instead guardianship, as requested by Mother. DHS presented compelling reason why guardianship is not in the child's best interests.</li> </ol>

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		<p>2. Sufficient for DHS to only prove that Mother was “not able” to provide a safe family home in the reasonable future; don't have to prove “not willing” (and vice versa) because parent must be both willing and able for the child to be reunified with parents.</p> <p>3. Service plan compliance is not the dispositive issue at the TPR/MPC. Waived reasonable efforts argument when Mother did not challenge service plans and request accommodations at hearings subsequent to the hearing where she contested the service plan.</p>
In re K.D.-V. and In re K.D.-K.	No. CAAP-11-0000075, SDO (App. Nov. 23, 2011)	<p>Mother appealed the Family Court’s decision to terminate her parental rights. ICA affirmed:</p> <p>1. Mother waived the argument that the Family Court’s numerous findings of fact were clearly erroneous because the DHS social worker who prepared an earlier DHS report was not available for cross-examination. Mother failed to show where in the Record she objected to the Family Court’s consideration of the report, and where she made the demand to cross-examine the report writer.</p> <p>2. Even if the above argument was not waived, there was sufficient evidence in the Record in other DHS reports where the DHS social worker who prepared those reports testified at trial and the show cause hearing.</p> <p>3. Despite Mother’s compliance with the service plan, she was not able to reunify with the children in a reasonable period of time (2 years); Mothers was given more than 2 years to attempt to reunify with the children.</p>
In re NY	No. CAAP-11-0000039, SDO (App. Jan. 13, 2012)	<p>(Incarcerated) Mother appealed the Family Court’s decision to terminate her parental rights. ICA affirmed:</p> <p>1. No error when the first service plan did not have requirements for Mother, who was serving an indeterminate 10-year sentence for felony drug offenses).</p> <ul style="list-style-type: none"> <li>- Mother did not object to the service plan, and thereby failed to preserve this issue on appeal.</li> <li>- Even if issue were preserved, DHS is not obligated to provide services that are not available in the prison system, and participation in services is an empty pursuit until the parent is released from incarceration.</li> </ul> <p>2. Termination of parental rights not solely based on Mo's incarceration because of:</p> <ul style="list-style-type: none"> <li>- The length of Mother’s incarceration,</li> <li>- Mother’s history x of drug use and failed drug treatment,</li> <li>- Mother only visited C once before arrest and incarceration;</li> <li>- Mother’s mental health problems;</li> <li>- Mother’s inability to reunify even if she were to complete drug treatment in a timely manner.</li> </ul> <p>3. Mother did not provide any legal argument on DHS' obligation to provide visits when the child</p>

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		<p>resided on a different island from Mother.</p> <p>4. No error when DHS did not provide an 'Ohana Conference. Statute requires DHS to consider using 'Ohana Conferences, but is not required to convene them.</p>
In re M Children: BM	No. CAAP-11-0000153, SDO (App. Jan. 20, 2012); <u>cert. dismissed</u> , No. SCWC-11-00153, (Jun. 21, 2012).	<p>Mother appealed the Family Court's decision to terminate her parental rights. ICA affirmed:</p> <p>Facts: DHS removed the child and the younger sibling due to unexplained fractures to the sibling. 16 months later, DHS returned both children to Father's care, on the condition Mother would not be left alone with the children. 7 months later, the younger sibling died of injuries consistent with being shaken, and DHS assumed foster custody.</p> <p>1. Rejected Mother's argument that she was denied Due Process on the grounds that she was "misled" by DHS pretrial statement that stated that the MPC/MTPR trial would not address the cause of the younger sibling's death (Mother and/or Father being the perpetrator), and that the Family Court erred by considering the Naval Criminal Investigative Services (NCIS) reports for the truth of the matter.</p> <ul style="list-style-type: none"> <li>- DHS' pretrial statement, as supplemented, clearly stated that the cause the sibling's death would be addressed at trial.</li> <li>- Mother denied the family court's offer to continue the trial to allow her to review the NCIS reports.</li> <li>- Mother stipulated to the admission of the NCIS reports into evidence, without qualification.</li> </ul> <p>2. Rejected Mother's argument that DHS did not make reasonable efforts (reasonable opportunity) on the grounds that DHS did not provide services when she moved to Texas. DHS provided numerous services while she was in Hawaii and she moved to Texas in contravention of a court order, failed to maintain contact with DHS, and did not attempt to participate in services in Texas.</p> <p>3. Findings of fact stating that Mother abused Methadone while pregnant with sibling was not clearly erroneous because Mother stipulated to the report supporting the finding of fact into evidence without reservation.</p>
In re N Children: XN, SN1, EN, SN2	No. CAAP-11-000523, SDO (App. Feb. 24, 2012); <u>cert. rejected</u> , No. SCWC-11-00523 (Jun. 27, 2012)	<p>Mother and Father appealed the Family Court's decision to terminate their parental rights. ICA affirmed:</p> <p>1. Both parents alleged numerous findings of fact to be clearly erroneous, but failed to make specific arguments. Therefore, the points of error were waived. .</p> <p>2. Rejected Father's arguments:</p> <ul style="list-style-type: none"> <li>- Agreed that Father did not actually harm/abuse the Children's, but Father did subject the Children's to threatened harm due to his failure to protect. ICA noted that Father denied that Mother's conduct was abusive.</li> </ul>

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		<ul style="list-style-type: none"> <li>- The lack of an identified permanent placement is irrelevant</li> <li>- The Family Court did not err in denying motion for immediate review that asked the Family Court to consider report of SN1's therapist. Counsel did not submit (proffer the report into evidence) report because s/he wanted the Family Court to rule on motion without reviewing the motion. The report was not part of the Record, and the appellate court had no basis to consider the merits of this argument.</li> <li>- Rejected the reasonable efforts argument, re; services, because the issue was not properly preserved.</li> </ul> <p>3. Rejected Mother's arguments:</p> <ul style="list-style-type: none"> <li>- Mother completed services, but failed to acknowledge harm and accept responsibility. Appellate courts will not "re-weigh" the evidence.</li> <li>- DHS made reasonable efforts even though conjunct therapy for Mother and the Children was not provided because the Children's therapists did not recommend conjunct therapy and/or the Children were ambivalent about participating in conjunct therapy.</li> </ul>
In re M Children: BM	No. SCWC-11-00153, (Jun. 21, 2012).	<p>ICA affirmed the Family Court's decision to terminate Mother's parental rights. Mother filed application for writ of certiorari. Hawaii Supreme Court dismissed for lack of appellate jurisdiction.</p> <ol style="list-style-type: none"> <li>1. HRS § 602-59 (c) amended the time to an application for writ of certiorari from 90 days to 30 days (with a 30-day extension) from the entry of the ICA's judgment on appeal, effective January 1, 2012 (all judgments on appeal filed on or after January 1, 2012. HRAP Rule 40.1 amended to conform with HRS § 602-59 (c).</li> <li>2. ICA entered judgment on appeal on February 9, 2012, and Mother filed her application for writ of certiorari filed May 8, 2012.</li> </ol> <p>Dissent (Acoba) would have granted the petition for writ of certiorari:</p> <ol style="list-style-type: none"> <li>1. In criminal cases, the Hawaii Supreme Court has permitted untimely appeals when defense counsel inexcusably or ineffectively failed to pursue the defendant's appeal, and justice so warrants and the untimely appeal was not due to the defendant's error or willful inadvertence.</li> <li>2. Due to parents' (parental rights) protected liberty interest, the same exceptions should be applied in termination of parental rights cases.</li> </ol>
In re B Children	No. CAAP-11-00890, SDO (App. Jun. 27, 2012)	<p>Family Court granted MTPR for 1 child and MEPP for 2 children. Mother appealed. ICA affirmed:</p> <ol style="list-style-type: none"> <li>1. Based on the ICA's review of the record, the disputed findings of fact and conclusions of law are not clearly erroneous.</li> <li>2. The appellate courts will not address issues regarding credibility and the weight of the evidence, re: the disputed finding of fact regarding the credibility of one of the witnesses.</li> </ol>

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