IN THE SUPREME COURT OF GUAM

JOANNE DOWNEY COFFEY,
Respondent-Appellant,
vs.
THE GOVERNMENT OF GUAM,
Petitioner-Appellee.

IN THE INTEREST OF M.D.,
MINOR AS THE REAL PARTY.

Supreme Court Case No.: CVA97-016
Superior Court Case No.: JP0724-95
Filed: October 28, 1997
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Appeal from the Superior Court of Guam
Argued and Submitted October 20, 1997
Agana, Guam

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OPINION

BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J.:

[1] Respondent-Appellant Joanne Downey Coffey appeals from an Order of the Superior Court, Family Division, Honorable Katherine A. Maraman, presiding, which terminated her parental rights. Based upon the record and the applicable law, we affirm the order of the Superior Court terminating parental rights.

BACKGROUND

[2] Respondent-Appellant Joanne Downey Coffey and Kenneth Powell, Jr. are the natural parents of MD. On September 14, 1995 an ex parte order was issued which placed MD in the temporary legal custody of Child Protective Services (CPS). The following day it was ordered that MD remain in foster care with visitation with the Respondent-Appellant and that a Person in Need of Services (PINS) petition be filed. Such petition was filed and a lengthy fact-finding hearing was held with the court below issuing a written Decision And Order That The Child Is In Need Of Services sustaining the petition filed on May 1, 1996.

[3] The court made the following findings by a preponderance of the evidence. MD, who was born on March 19, 1995 to Respondent-Appellant and Kenneth Powell, Jr. has resided in Guam since her birth. The birth father's location is unknown and, thus, he was not served with the PINS petition, although Respondent-Appellant was served and present at the hearings with counsel. Throughout the summer of 1995, Respondent-Appellant and the babysitter, Vicki Gingrich, primarily cared for MD. Respondent-Appellant's then boyfriend, WS, occasionally cared for the infant. Bruises and other marks on MD's body were indicative of injuries sustained by MD during the months of June, August and September of 1995. It was established that MD suffered multiple fractures in her ribs and to her right scapula, occurring at different times, respectively. Further-

more, it was also established that MD suffered from a fractured left tibia which was the result of a non-accidental trauma. WS was not able to properly care for MD and Respondent-Appellant knew of his inexperience and inability which resulted in injuries to MD. On August 18, 1995 Respondent-Appellant was inebriated and unable to care for MD at which time WS battered MD, which resulted in a black eye and a hemorrhage in her eye as well as sustained injuries to MD's torso and perineum leaving bruises. Respondent-Appellant also caused injuries to her daughter, including injury to MD's eye on September 8, 1995. Respondent-Appellant was unable to provide a sanitary home environment for MD nor did she provide MD with proper hygiene. Furthermore, Respondent-Appellant lacks parenting skills evidenced by her failure to provide supplies for MD while at day care, to provide the child with medical care when injured or ill, to make sure the child receives timely immunizations and child well care appointments, and to provide age appropriate toys for the baby. Subsequently, sometime during the summer of 1996, Respondent-Appellant married Leland Christopher Coffey. The findings of the fact finding are not in dispute in this matter, only those findings presented at the disposition hearing are on appeal here as they go to the support for the termination.

[4] As a result of the court's sustaining the petition, a disposition hearing was ordered and held on September 11 and 17, 1996. Factual support for the termination was provided through the court's factual findings in its Decision and Order dated May 1, 1996 and testimony given at the disposition hearing. The court received testimony from several witnesses including Dr. Jonathan Richardson, M.D.; Dr. James Kiffer, a licensed clinical psychologist; Jocelyn Cruz, Child Protective Services (CPS) caseworker; Respondent-Appellant herself and her husband, Mr. Coffey. The court issued a written decision and order on April 10, 1997 which terminated parental rights of the Respondent-Appellant over MD without having created a service plan or holding a permanent plan hearing. Subsequently, a Judgment of Termination of Parental Rights was signed. Respondent-Appellant filed a timely notice of appeal on May 1, 1997.

DISCUSSION

[5] Respondent-Appellant raises three issues on appeal: (1) the trial court deprived the Respondent-Appellant of Due Process of law under the Fourteenth Amendment of the U.S. Constitution; (2) the trial court decision to terminate parental rights was not supported by clear and convincing evidence; and (3) the trial court did not adequately comply with the requirements of the Child Protective Act (CPA).

I.

[6] The standard of review in examining findings of fact is whether or not the findings were clearly erroneous with due regard to be given to the opportunity of the trial court to judge the witnesses' credibility. Guam R. Civ. P. 52(a); *Service Employees Int'l Union, AFL-CIO, CLC v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1317 (9th Cir. 1992). The question as to whether a constitutional right has been violated is reviewed *de novo*. *United States v. Michael R.*, 90 F.3d 340, 343 (9th Cir. 1996),

[7] It has been established through case law that the right to parent is a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753-4 (1982). As a fundamental right it is afforded great protections from state interference. *Id.* However, the state's interest may prevail under certain circumstances. The CPA governs areas of abuse or neglect of children and, although reunification is a goal of the CPA, ultimately what is sought to be effectuated is the best interest of the child. Procedural safeguards are necessary in order to maintain a balance between a parent's rights and the state's interest in protecting children including the requirement that it be established by clear and convincing evidence that a home is unsafe and it is not reasonably foreseeable it will become safe before terminating parental rights. 19 GCA § 13324 (1994); *Santosky*, 455 U.S. at 769; *In the Interest of Lonnie Arceo Quichocho*, Civ. No. 86-0002A, 1986 WL 68915 (D. Guam App. Div. November 21, 1986).

[8] Respondent-Appellant argues

that her due process rights were violated and equally that the government failed to prove by clear and convincing evidence that she could not provide a safe home for MD. Essentially these two arguments merge. There is a fundamental right to parent which may only be divested by a showing of clear and convincing evidence. *Santosky*, 455 U.S. at 769. Respondent-Appellant also argues that this standard was not met and therefore her due process rights were violated.

[9] The government bears the burden of proving by clear and convincing evidence that the Respondent-Appellant is not able to provide a safe home for MD. *Id.* at 745. Respondent-Appellant believes that the testimony given by Drs. Richardson and Kiffer, and Jocelyn Cruz, was not adequate to rise to the level of establishing that the Respondent-Appellant could not provide a safe home. The Respondent-Appellant focuses on the fact that all three witnesses did not possess all relevant information to make proper evaluations. The doctors never directly came out and supported a finding for termination and Dr. Kiffer and Ms. Cruz indicated that given certain circumstances occurring it was possible that reunification could become feasible.

[10] Furthermore, the Respondent-Appellant alleges that the court did not adequately consider the testimony of her and her husband which demonstrated a willingness and a capability on their parts to provide a safe home for MD. Specifically, information as to a changed economic status which results in the Respondent-Appellant's being able to be at home and care for the child, and Mr. Coffey's willingness to care for MD and take responsibility should any further signs of abuse arise.

[11] There has been no evidentiary support for the contention that at any step in the dependency process the Respondent-Appellant's due process rights were violated. Moreover, the Respondent-Appellant was timely served and given notice and was present with counsel at all hearings. Testimony was presented by several witnesses at the disposition hearing. The Respondent-Appellant argues that the evidence presented was not enough for the government to meet its burden of proof by

clear and convincing evidence. Clear and convincing evidence is defined in the CPA as " that measure of degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." 19 GCA § 13101(h) (1994).

[12] Dr. Richardson conducted testing on the Respondent-Appellant for the purpose of determining whether she suffered from any major psychiatric conditions and to ascertain signs of personality issues or substance abuse. At the disposition hearing, it was Dr. Richardson's testimony that the Respondent-Appellant suffered from borderline personality structure and probable disorder. Through his testing he found that there were parent-child problems and a possibility of substance abuse. His diagnosis indicated that there was only a limited possibility that the Respondent-Appellant would reach a point at which she could be motivated to benefit from insight therapy and take responsibility for her role in MD's abuse and realize herself as a source of the problem. He did indicate that there was a possibility that in several years the Respondent-Appellant may possibly become a good candidate for insight therapy.

[13] Dr. Kiffer, a licensed clinical psychologist with Client Services and Family Counseling Division of the Superior Court, also conducted a psychological evaluation of the Respondent-Appellant and presented testimony at the disposition hearing. His testimony was in concert with that of Dr. Richardson although his was more extensive as to the present inability of the Respondent-Appellant to adequately care for MD as evidenced by her lack of emotional bonding with the child and lack of protective instinct. Dr. Kiffer diagnosed the Respondent-Appellant with Immature Personality Disorder, which exhibits itself in poor judgment for her age. He made no recommendation to specifically terminate or go forward with a service plan.

[14] Dr. Kiffer indicated that the feasibility of reunification could become possible, but it would be dependent on several future occurrences. Although this was stated, it is still possible for a trier of fact to decide that such a prospect is too remote a possibility to

warrant continued efforts for reunification. Moreover, Dr. Kiffer also felt that the Respondent-Appellant possessed an unwillingness to participate in therapy, although she would attend if ordered to do so by the court. Dr. Kiffer indicated that a real improvement would not result because she would not engage in meaningful counseling.

[15] He further outlined two critical stages in a child's life at which adoption is feasible. He determined that at six (6) months of age is a milestone for adoption because a child's development is stabilizing and the child is facing issues of trust, safety and love. He also stated that two (2) years old is a good age for adoption because family begins to become important to and for the child and it is a critical stage for neurological and developmental factors. He did, however, also indicate that there are some negative ramifications of adoption as well.

[16] Jocelyn Cruz, the CPS caseworker assigned to this case, was responsible to see that MD received proper care while in foster care. Ms. Cruz monitored the services being provided to the Respondent-Appellant of which she availed herself. Ms. Cruz indicated that the supervised visits between the Respondent-Appellant and MD went well. Additionally, Ms. Cruz indicated that the Respondent-Appellant's denial of responsibility in MD's injuries made reunification impossible because this denial could result in further abuse if the child were returned to her. Ms. Cruz recommended that the Respondent-Appellant's parental rights be terminated. As was the case with Dr. Kiffer's evaluation, Ms. Cruz also agreed that if the Respondent-Appellant whole heartedly engaged in therapy and was provided and participated in services which would develop parenting skills, she would re-evaluate and reconsider her recommendation for termination. However, the fact that she might reconsider under certain circumstances is not enough to show that the circumstances had adequately changed nor that her reconsideration would yield a different result.

[17] The testimony of the Respondent-Appellant and her husband did indicate some willingness to provide a safe home. The Respondent-Appellant attested that she was now a

housewife and that she had enough financial support to allow her to stay home and take care of her home and her child, and thus the child would not be placed in day care. She indicated that she would participate in counseling or therapy if recommended by the court. She testified that she feels she has bonded with MD and that the child runs to her and hugs and kisses her at visits. Mr. Coffey, a Data Processor and Technician Second Class for the Navy Department, testified that he would seek to adopt MD if reunification occurs. He stated that he would provide for MD as if she were his own. He would be responsible for reporting any signs of abuse or neglect. He has attempted to bond with MD and he is willing to remain in Guam for as long as monitoring is necessary. He is the guardian at litem to a child of one of his previous supervisors in Hawaii and he has cared for his three nieces.

[18] The court had before it evidence that the home was not safe for MD, that it was not reasonably foreseeable that the Respondent-Appellant would be able to provide a safe home and that termination was in the child's best interest. First, there was evidence that MD was beaten and battered and that her resulting injuries were neglected by the Respondent-Appellant. Secondly, there were advance psychiatric and psychological evaluations regarding the Respondent-Appellant's mental capacity and parenting abilities. Third, there was the Respondent-Appellant's inability to accept responsibility for the injuries which were sustained by MD and the ramifications of this denial on the possibility of future abuse; and on the prospect of meaningful reunification there was evidence of the child's adoptability. Although the Respondent-Appellant has cited cases from other jurisdictions which do indicate that termination may not occur based solely on the best interest of the child, because someone else could better care for the child or because there is no bond between the parent and child, considering all of the circumstances, there was a culmination of several factors and evidence presented which caused the court to terminate her rights.

[19] In light of the overwhelming evidence presented in favor of termination, it was reasonable

for Judge Maraman, after considering its totality, to have found that Drs. Richardson and Kiffer, and Ms. Cruz, were more convincing and more credible witnesses than the Respondent-Appellant and Mr. Coffey. That, in turn, supported a finding, by clear and convincing evidence, that the Respondent-Appellant could not provide a safe home for MD. We see no reason to disrupt Judge Maraman's factual findings; rather, we give deference to the fact that she had the opportunity to properly judge the credibility of the witnesses. Guam R. Civ. P. 52(a); See also *Quichocho*, Civ. No. 86-0002A, 1986 WL 68915 (D. Guam App. November 21, 1986) (holding that in light of overwhelming evidence to support termination, the fact that one finding was erroneous was harmless).

II.

[20] We review the Superior Court's application of the law *de novo. Camacho v. Camacho,* 1997 Guam 5, ¶ 24.

[21] Reunification of the family is a policy goal of the CPA as is providing rehabilitative services where possible to effectuate that goal. 19 GCA § 13100 (1994). The Respondent-Appellant argues that strict compliance with the CPA was not followed in that the CPA mandates that a service plan be created and implemented and that failure to do so is in direct contravention to the CPA. 19 GCA § 13301(c) (1994). Furthermore, CPS has a duty to submit written reports and evaluate relevant information in determining the feasibility of reunification. 19 GCA § 13309(a) (1994). Additionally, the Respondent-Appellant asserts that proper notice was not given under 19 GCA § 13314(a) in that MD's father was never served and notified pursuant to 19 GCA § 13306.

[22] The CPA provides the framework for the jurisdiction. The process includes the filing of a PINS petition, a trial or fact-finding hearing, a disposition hearing, then a service plan and finally a permanent plan hearing. 19 GCA § 13300 et. seq. (1994). A PINS petition was filed pursuant to section 13305, the court conducted a fact-finding hearing

pursuant to section 13318[1] which was sustained and a disposition hearing was then held pursuant to section 13319(c)(1)[2].

Although the Respondent-Appellant contends that a service plan should have been implemented at this stage in the proceeding, there is no requirement that the court do so. The court then made a determination that even with supervision, the family home was not safe and decided to terminate parental rights in the best interests of the child. 19 GCA § 13320(d) (1994).

[23] The Respondent-Appellant makes the argument that the CPA was not complied with, in that the father was not served and given notice of the petition as required by 19 GCA § 13306(a).[3] However, it is clear

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[1](c) If the parties do not admit the allegations in the petition, the case shall be set for a fact-finding hearing within 30 working days of the answering date.

(d) The court shall hear child protective proceedings under this chapter without a jury. The hearing shall be conducted in an informal manner and may be adjourned from time to time. The general public shall be excluded and only such persons shall be admitted as are found by the court to have a direct interest in the case. The child may be excluded from the hearing at any time at the discretion of the court. If a party is without counsel or a guardian ad litem, the court shall inform the party of the right to be represented by counsel and to appeal.

[2](c) If the court sustains the petition and does not immediately enter an order regarding the disposition of the child, it shall:

(1) Determine, based upon the facts adduced during the fact-finding hearing and any other additional facts presented to it, whether temporary foster custody should be continued or should be entered pending an order of disposition. The court shall consider all relevant prior and current information for determining whether the child's family is willing and able to provide the child with a safe family home, and the report or reports submitted pursuant to §13309, and proceed pursuant to subsection (c) of §13316 prior to rendering a determination.

[3](a) After a petition has been filed, the court shall issue a summons requiring a child's family member or members who have legal or physical custody of the child at the time of the filing of the petition to bring the child before the court at the preliminary hearing as set forth in the summons. In addition, any legal parent, the natural parents (unless parental rights have been terminated) and other persons who are to be parties to the child protective proceeding at the time of the filing of the petition also shall be summoned, in the manner provided in this section.

from the record that summons was issued for Kenneth Powell, Jr. on September 19, 1995 in compliance with section 13306; however, his location was determined to be unknown. Pursuant to 19 GCA § 13307(a) service shall be made personally; however, if the court finds that such personal service is impractical, the court may order service by other means including by registered or certified mail to the last known address or by publication. The alternative to personal service is discretionary by the court below. In subsection (b) of that same section, the court may proceed in the absence of such a person who has been summoned pursuant to subsection (a). 19 GCA § 13307(b) (1994). Irrespective of this analysis, the summoning of the natural birth father has no bearing on the termination of the Respondent-Appellant's rights. Moreover, on July 30, 1997, Kenneth Powell, Jr. , subsequent to the proceedings in the Superior Court, executed and filed a document renouncing his parental rights over MD. Furthermore, there is no dispute as to the fact that the Respondent-Appellant was properly summoned and served with notice of the proceedings and that she was subsequently present with counsel at the hearings.

[24] The absence of services being provided by CPS and of a service plan are the main arguments of the Respondent-Appellant as to any procedural defects. However, there is no mandatory language in the CPA requiring that a service plan be implemented. The statute instead simply defines what a service plan is and its requirements. 19 GCA § 13304 (1994). The Respondent-Appellant argues that 19 GCA § 13301(d) is where the mandate exists.

> Child Protective Services shall make available among its services for the prevention and treatment of child abuse or neglect multidisciplinary teams, instruction in education for parenthood, protective and preventive social counseling, emergency caretaker services and emergency shelter care, emergency medical services and the establishment of group organized by former

> abusing or neglecting persons and encourage self-reporting and self-treatment of present abusers.

19 GCA § 13301(d) (1994). However, section 13301(d) merely states that services be made available for the prevention and treatment of child abuse or neglect and does not make specific mention of a service plan per se. The evidence presented indicated that CPS provided monitored visitation with MD. The Navy Case Review Screening Committee made an evaluation of the Respondent-Appellant and recommended a myriad of programs in which she should participate. She attended Effective Parenting Classes conducted through the Navy Family Services Center and received individual counseling with two different therapists, including fifteen (15) sessions with Cathy Illarmo, a licensed counselor.

[25] Although the foregoing were not CPS programs, this is not of great import. In oral arguments it was conceded by the Petitioner-Appellee that CPS often utilizes the services of other agencies to effectuate its goal of providing services to families in need. The fact that the Respondent-Appellant sought out those programs through the Navy does not mean that CPS did not make services available to her. CPS carefully monitored those programs in which she was involved. We realize that CPS's resources are limited and do not expect, nor believe the statute requires, that only CPS-provided services satisfy the statute, especially in circumstances where outside programs and services are either superior to those CPS offers and/or more readily available to persons in need of them. Therefore, it is clear that services were made available to her.

[26] Furthermore, the statute governing disposition hearings provides as follows:

> (d) If the court determined that the child's family home is not a safe family home, even with the supervision of Child Protective Services the court shall vest foster custody of the child in an authorized agency and enter such further orders as the court deems to be in the best interest of the child.

19 GCA § 13320(d) (1994).

[27] The evidence supports a finding that the home could not become safe within a reasonable amount of time; thus, based on this provision it would be possible for the court to terminate in the child's best interest. Additional support for the termination is found in section 13320(f):

> At the disposition hearing the court may order such terms, conditions and consequences as the court deems to be in the best interest of the child.

Clearly if the court found termination to be in the child's best interest, nothing in this section precludes termination at the disposition stage.

[28] What the Petitioner-Appellee alluded to was that in effect what Judge Maraman did was establish a permanent plan at the disposition hearing and ordered termination. At a permanent plan hearing under 19 GCA § 13324(a), the court may make a finding that by clear and convincing evidence the family was unwilling and unable to provide a safe home and that under §13324(b)(3)(A) a permanent plan which frees the child up for adoption may be established.

> The court shall consider information and determine by clear and convincing evidence that:
>
> > It is not reasonably foreseeable that the child's family will become willing and able to provide the child with a safe family home, even with supervision of Child Protective Services, within a reasonable period of time, which shall not exceed two years from the date upon which the court was first placed under foster custody by the court.

19 GCA § 13324(a)(2) (1994). Foster custody ensued on September 15, 1995 and the court terminated parental rights on April 10, 1997, a year and a half later. Permanent plans must be made within two years from the time the child was first placed under foster custody by the court if the family is unwilling and unable to provide a safe home, even with help from CPS. 19 GCA § 13324(e) (1994). In the permanent planning stage the court must

consider whether the proposed permanent plan is in the child's best interest. The proposed permanent plan is in the child's best interest based on the presumption that it is in the child's best interest "to be promptly and permanently placed with responsible and competent substitute caretakers and family in a safe and secure home." 19 GCA § 13324(a)(3)(A) (1994). Also to be considered is the fact that this presumption increases in proportion to the child's age upon foster custody. 19 GCA §13324(a)(3)(B) (1994). Although the nomenclature may not have been present, Judge Maraman has adequately complied with both the letter and the spirit of the CPA before terminating the Respondent-Appellant's parental rights.

CONCLUSION

[29] Based on the foregoing, the Judgment of Termination of Parental Rights of the Superior Court is hereby AFFIRMED.

BENJAMIN J. C. CRUZ,
Associate Justice

JANET HEALY WEEKS,
Associate Justice

PETER C. SIGUENZA,
Chief Justice