

NO. 22777

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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IN THE INTEREST OF DOE CHILDREN:

JANE DOE,  
Born on June 27, 1991

JOHN DOE,  
Born on August 18, 1992

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-S NO. 97-04937)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,  
Ramil, and Acoba, JJ.)

Father-Appellant (Father)<sup>1</sup> appeals from a June 30, 1999 order of the Family Court of the First Circuit (the court), awarding custody of Jane (Jane) and John (John) Doe (collectively "Children") to Appellee Department of Human Services of the State of Hawai'i (DHS), concluding that Father could not provide a safe family home for Children, even with the assistance of a service plan, and establishing a permanent plan of foster care leading to

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<sup>1</sup> For purposes of preserving confidentiality, Father-Appellant is referred to as "Father," the subject children are referred to as "Children" and "Jane Doe" and "John Doe," and Children's mother is referred to as "Mother."

Children's potential adoption by third parties. In addition, Father appeals from the court's June 18, 1999 and August 9, 1999 orders denying his motions for reconsideration.

First, we discern no violation of "due process" rights as argued by Father. Limits on the time allotted for trial which, in this case, covered a period of two days, was a matter vested in the court's authority to control the mode and order of trial.<sup>2</sup> Hawai'i Rules of Evidence Rule 611 (1993). As to Father's claim that he lacked time to testify in his own case, (1) Father did not initially object to the time limitations imposed for trial, (2) Father testified when called as an adverse witness by DHS, (3) counsel for the guardian ad litem gave Father the guardian's "extra" accumulated time to use at trial, (4) the court reminded counsel of time constraints, (5) Father's counsel indicated Father was not going to be called as part of Father's direct case, (6) Father never indicated what he would additionally testify to in his own case, and (7) Father was allowed to submit a seven-page written argument to the court on testimony adduced at trial.

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<sup>2</sup> We caution trial courts that a rigid adherence to a time schedule must be tempered by the circumstances of the trial as it unfolds, since such circumstances cannot always be accurately predicted ahead of time.

As to Father's claim that he was denied full cross-examination of expert witnesses Brenda Wong, Anthony Troche, and Beverly Nakamoto, we observe that (1) Father did cross-examine each witness, (2) Father waived any objection to the witnesses referring to reports prepared by other persons by not objecting at trial, State v. Vliet, 91 Hawai'i 288, 298-99, 983 P.2d 189, 199-200 (1999) (stating that "HRE Rule 103(a)(1) . . . requires a specific objection . . . if the ground is not apparent from the context" and that "a complete failure to object will waive the point") (internal quotation marks, citations, brackets, and footnote omitted)), and (3) we may "rely on the trial [court's] ability to make [its] decision on the consideration of only the competent evidence applicable to the issue [it] is deciding." Sabol v. Sabol, 2 Haw. App. 24, 30, 624 P.2d 1378, 1383 (1981).

\_\_\_\_\_ As to Father's claim that he was denied effective assistance of counsel, because his counsel did not call Father or Father's companion, Elise Kapio (Kapio), to testify as part of Father's case, assuming, without deciding, that an ineffective assistance of counsel standard applies, Father has failed to show he was denied effective assistance of counsel because (1) in the absence of Kapio's sworn statement, what she would testify to is speculation, State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218,

1230 (1994) ("In the absence of sworn statements from potential witnesses, defendant's characterization of their potential testimony amounts to nothing more than speculation."), and (2) as to Father and Kapio, the decision to call or not call particular witnesses is a strategic decision left to counsel and will not be second guessed on appeal. See State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (stating that decision of trial counsel not to call witnesses was a strategic decision not to be second-guessed on appeal).

For the foregoing reasons, we discern no abuse of discretion by the court or any purported "due process" violations.

Second, we conclude the court did not err in finding there was clear and convincing evidence that Father could not provide a safe family home in the reasonably foreseeable future. Sexual abuse allegations aside, the record contains substantial evidence detailing Father's substance abuse history, diagnosed mental disorders, physically abusive relationship with Mother, failure to satisfactorily complete reunification service plans, and inability to fully appreciate Children's special needs. In light of this evidence, the court did not abuse its discretion. The family court's decisions will not be disturbed unless "[it] disregarded rules or principles of law or practice to the

substantial detriment of a party litigant . . . [and its] decision clearly exceed[ed] the bounds of reason.” In re Jane Doe, 84 Hawai’i 41, 46, 928 P.2d 883, 888 (1996) (internal quotation marks and citation omitted).

Third, we conclude that the court properly determined that DHS used reasonable efforts to reunify Children with Father. DHS provided Father with services, the court expressed willingness to provide Father with services even when Father was not willing to comply, and Father acknowledged his understanding of what the plans required and agreed to each service plan. Hence, reasonable opportunities for reunification were provided.

Finally, we do not agree, as Father asserts, that the court’s findings of fact were unsupported by the evidence or were clearly erroneous. Father challenges findings of fact regarding the neglect of Children, the contentious nature of his relationship with Mother, Children’s feelings of fear and anxiety toward him, and his inability to provide a suitable home in the reasonably foreseeable future. Such findings were not clearly erroneous because they were supported by substantial evidence. In re Jane Doe, 76 Hawai’i 85, 92-93, 869 P.2d 1304, 1311-12 (Sup. 1994) (stating that substantial evidence is “credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to reach a conclusion”). Therefore,

IT IS HEREBY ORDERED that the court's June 30, 1999 order awarding custody of Children to DHS and its June 18, 1999 and August 9, 1999 orders denying Father's motions for reconsideration are affirmed.

DATED: Honolulu, Hawai'i, October 23, 2000.

On the briefs:

T. Stephen Leong, for  
Father-Appellant.

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Mary Anne Magnier, Deputy  
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Services-Appellee.