NO. 23918

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF JANE DOE,
born on February 8, 2000, Minor

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 00-06547)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Mother-Appellant (Mother) appeals from the Order Awarding Permanent Custody entered on October 24, 2000, by District Family Judge Diana L. Warrington. This Order, *inter alia*, awarded permanent custody of Mother's daughter, Jane Doe, to Appellee State of Hawaiʻi Department of Human Services (DHS), divested Mother of her parental and custodial duties and rights to Jane Doe, and ordered implementation of the Permanent Plan dated September 30, 2000.

Mother contends that the record lacks clear and convincing evidence to support the family court's findings that (1) Mother was not willing and able to provide a safe family home for Jane Doe, even with the assistance of a service plan; (2) Mother would not become so within a reasonable period of time not exceeding two years from February 8, 2000; and (3) the

permanent plan recommending adoption is in Jane Doe's best interest.

We affirm.

BACKGROUND

Mother is an admitted heroin addict with a dual diagnosis of a mental impairment. Mother used cocaine throughout her pregnancy with Jane Doe, including on February 8, 2000, when Mother gave birth to Jane Doe. After testing positive for cocaine at the time of birth, Mother voluntarily signed a foster custody agreement, and DHS placed Jane Doe in the foster home where she has remained.[1]

Mother admits that she has "a major drug problem." Specifically, Mother admits to using cocaine and heroin and supporting her drug habit by prostitution. She seeks medical treatment for "many different medical problems," including mental illness.

Jane Doe is Mother's fourth child. Mother's parental rights to her first child were terminated because of Mother's inability to provide a safe home, domestic violence, and Mother's use of drugs. Mother's first child was placed under the legal guardianship of the child's paternal grandmother. Mother's

[1] The foster family expresses a desire to adopt Jane Doe in the event that reunification with Mother-Appellant (Mother) is not possible. According to the family court's Finding of Fact (FOF) no. 14, unchallenged by Mother, Jane Doe has "bonded to her foster family," and "[d]ue to Mother's lack of contact with [Jane Doe], [Jane Doe] is not bonded to Mother."

parental rights to her second child were terminated, and the second child was adopted. Although DHS has had no involvement with Mother's third child, Mother's drug use led to placement of Mother's third child in the custody of the child's maternal grandmother (Maternal Grandmother).[2]

On March 15, 2000, DHS filed a petition for foster custody of Jane Doe. During the period of March and April, 2000, Mother told a DHS social worker that she "wasn't ready to get sober" and that she would contact DHS within six months. At a hearing on March 28, 2000, the court ordered the service plan dated March 5, 2000 into effect. After this hearing, Mother made no attempts to contact DHS. Mother did not respond to DHS' efforts to contact her to arrange visits with Jane Doe or to participate in the court-ordered services.

On April 3, 2000, the family court appointed a Guardian Ad Litem (GAL) to protect Jane Doe's interests.

In its April 13, 2000 Orders Concerning Child Protective Act (April 13, 2000 Orders), the court assumed jurisdiction pursuant to Hawaii Revised Statutes (HRS) §§ 571-11(9) and 587-11 (1993), ordered Mother's continued compliance with the March 5, 2000 service plan, and awarded

[2] The third child of Mother is a boy. Mother testified, "I have physical custody of my son. My mother has power of attorney, okay?"

foster custody of Jane Doe to DHS. Although she was represented by counsel at the April 13, 2000 hearing, Mother failed to personally appear and was defaulted. Also in the April 13, 2000 Orders, pursuant to the father's agreement and HRS § 587-73 (2000), the court ordered termination of the parental and custodial duties and rights of Jane Doe's father (Father).

In a Safe Family Home Report dated September 29, 2000 (9-29-00SFHR), DHS reported that Mother presented the following types of harm to Jane Doe: physical neglect/threat of physical neglect. The report noted that "[t]hreatened harm to [Jane Doe] was confirmed" and that Mother "had not acknowledged the harm she caused [Jane Doe]" by using cocaine throughout her pregnancy. The report observed that Mother presented safety issues relating to substance abuse and mental health. The report stated, in relevant part, as follows:

> Over several years, [Mother] has been offered parenting programs to help her learn how to parent her children. She has never participated. She has not been able to demonstrate the ability to meet basic physical needs, such as housing and food, for any child. As for emotional needs, she has never acknowledged how her behavior affects her children. She did not maintain visits with her oldest child, she basically has abandoned her other three children, including [Jane Doe].
>
> . . . .
>
> [Mother] has an extensive history of substance abuse. She has used heroin and cocaine. She has not been able to benefit from any treatment programs. She reportedly continues to use illegal substances.
>
> . . . .
>
> Efforts to locate and engage [Mother] have been frustrating as she uses her mother's address as her own, but she does not live there. DHS social worker has made home visits to the mother's home on 6/15/00 and 9/26/00. A registered letter was sent on 7/7/00.

> There has been no response. [Maternal Grandmother] stated on 9/26/00 that they, the family, do not know where [Mother] actually lives and that they see her on occasion. They have always been willing to inform her of her need to contact DHS, but [Mother] does not respond.
>
> . . . .
>
> [Mother] has not demonstrated a willingness or an ability to resolve the safety issues that would allow her to parent her child. There is no indication that she wants to resume custody of [Jane Doe].

Based upon recommendations stated in the 9-29-00SFHR, DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan on October 5, 2000 (Motion for Permanent Custody).

Although incarcerated for a felony drug charge, Mother was able to appear at the hearing on October 11, 2000, when the court scheduled trial on the Motion for Permanent Custody, and at the trial on October 24, 2000.

At the trial, the family court took judicial notice of the records and files of the case, and DHS Social Worker Supervisor, Kathleen Reiber (Ms. Reiber), testified, in relevant part, as follows:

> [Deputy Attorney General]: Okay.
>
> And how was mother's history used in making DHS's assessments in this case?
>
> [Ms. Reiber]: It was used in two different ways. Initially when the case came in this time [regarding Jane Doe,] there had been a gap of several years that there had been no contact [between Mother and] the Department.
>
> And during that period of time although her -- her other children had gone on to other permanent situations the information we've had is [Mother] was doing much better.
>
> She was getting her life together and she was handling herself in a very different situation.

So, when we got [Jane Doe's] case in February of this year with the presenting problems of drug addiction then the indictors [sic] were that unfortunately the ability to maintain or the ability to sustain any kind of reported sobriety was not there.

And we had to take a look at what the factors were so initially when [Jane Doe's] case came in the worker was willing to work with [Mother] on a more of a voluntary basis just to assess until she got the [prior] records.

You see, initially we didn't have all the records. When the full records came in it was apparent that we needed to have court jurisdiction to insure that the services were to be followed.

And unfortunately what's happened is that during . . . the subsequent months [to DHS assuming supervision over Jane Doe] the pattern of [Mother's] non-compliance, the pattern of non-contact, the pattern of putting the child second which was relevant before [as to Mother's older children] continues to be relevant again.

And therefore, the pattern has re-emerged as it was before.

So, any success or sobriety or maintaining of semblance of a normal life does not seem to be relevant.

. . . .

Q. And in [your] affidavit on behalf of DHS [that] stated that it is DHS's position that [Mother] is not presently and willing or able to provide [Jane Doe] with a safe family home even with the assistance of a service plan.

Is that still DHS's assessment?

A. Yes.

Q. And is it still DHS's assessment that she -- it is not reasonably foreseeable that she will be able to provide [Jane Doe] with a safe family home in a reasonably foreseeable future even with the assistance of a service plan?

A. Yes.

Q. Okay.

And, Mrs. Reiber, would six months make a difference -- giving her six months to get into a drug treatment program to do services and monitor, would that make a difference in the DHS's assessment?

A. No.

Q. And why is that?

A. Unfortunately this child now is eight months old.

This child's bond has already been established.

> To allow this child to continue to wait for another six months with no guarantee of success or completion would not be in the child's best interest.
>
> Plus the fact six months would not be what we would call a reasonable time frame in this case. It is -- if [Mother] had been serious about wanting [Jane Doe] back then the day that we entered into this situation in February is the day she should have gotten herself under treatment.
>
> We would be looking at eight months of a track record at this point in time with a much better possibility of reunification.
>
> But at this point to start that track record eight months down the line is not in the child's best interest.
>
> And I think a six month time period is very unrealistic given the history.
>
> So, therefore, I don't think six months would make a difference.
>
> And when you take a look at six months maybe in our lives six months is not that big of a time frame. And for us sometimes it isn't.
>
> But for six months in the life of [Jane Doe] is another almost fifty percent of her life. And I don't think that that's what we should be doing for the child.

The GAL reported that "[a]lthough [Jane Doe] faces an uncertain health and developmental future because of her prenatal drug exposure and [Mother's] ill health, she has as stable, warm and loving environment [with her foster family] as this GAL could wish." The GAL's recommendations to the court included the following:

> VIII. Recommendation/Objection Statement:
>
> The Guardian Ad Litem makes the following recommendations:
>
> 1. that DHS explain why it is not ready to proceed to permanent custody on October 11, 2000, as previously ordered by the Court;
>
> 2. that the Court consider appropriate sanctions against DHS for the needless delay in moving toward permanent custody;
>
> . . . .

5. that this case proceed to permanent custody without further delay.

In relevant part, the court entered the following Findings of Fact and Conclusions of Law, and those challenged by Mother are set out in bold print:

> The Court makes the following findings of fact and conclusions of law based on the requisite standard of proof as required by the Child Protective Act, HRS Chapter 587, as set forth in HRS § 587-73, i.e., clear and convincing evidence.
>
> **FINDINGS OF FACT**
>
> . . . .
>
> 15. [Jane Doe] was exposed *in utero* to cocaine by Mother's illegal use of cocaine throughout Mother's pregnancy with [Jane Doe]. Tests administered to [Jane Doe] after her birth confirmed that child's *in utero* exposure to drugs.
>
> 16. [Jane Doe] displayed stiffness, tremors, sensitivity to light and feeding difficulties during her first weeks of life, but has overcome these difficulties. She is developing appropriately but is petite in stature. She has no health concerns except for some bouts of asthma.
>
> . . . .
>
> 20. Mother has a history of substance abuse and mental health problems. Mother's substance abuse and mental health issues are the primary safety issues that prevent her from providing a safe home for [Jane Doe]. Although Mother had participated in substance abuse treatment and mental health treatment programs, from as early as 1987, she has never successfully addressed her substance abuse and mental health issues.
>
> 21. Mother used cocaine throughout her pregnancy with [Jane Doe], including the day she gave birth to [Jane Doe].
>
> 22. Mother admitted to having a $100.00 per day heroin habit.
>
> 23. At the beginning of the case, Mother told DHS social worker Elin Amano-Tabuyo that she was willing to do anything it takes to reunify with [Jane Doe].
>
> 24. During the period of March to April 2000, Mother met with DHS social worker Elin Amano-Tabuyo, and told her she was not ready to participate in substance (drug) abuse treatment and would inform Ms. Amano-Tabuyo when she was ready.

25. At the time of the October 24, 2000 trial, Mother was in pretrial incarceration for felony drug charges. Mother testified that she was seeking admission into the Circuit Court Drug Court Program, and was ready to participate in a drug abuse treatment program.

26. Based on Mother's long history of serious drug/substance abuse, failure to address her drug/substance abuse through appropriate treatment, and relapses, Mother would not be able to successfully address her drug/substance abuse problem in a reasonable period of time.

27. During her pregnancy with [Jane Doe], Mother had minimal prenatal care.

28. Although Mother expressed a willingness to visit with [Jane Doe] in February 2000, she failed to contact DHS to arrange for visits with [Jane Doe]. Mother has not had any visits with [Jane Doe].

29. Mother did not respond to DHS's efforts to contact her, and did not initiate contact with DHS after the March 28, 2000 hearing to participate in service and to arrange for visits.

30. Due to Mother's non-participation in services and failure to visit with [Jane Doe], she has no insight into [Jane Doe's] ordinary needs.

31. Mother was personally served with the service plan prior to the March 28, 2000 hearing, and was again provided with a copy of the service plan at the March 28, 2000 hearing.

32. In the two previous cases regarding Mother's two oldest children, Mother was offered services and participated in services to effectuate reunification. Mother failed to successfully complete services and failed to benefit from these services.

33. Mother did not participate in any services in this case, and under the circumstances presented by this case, Mother was given every reasonable opportunity to effect positive changes to provide a safe family home and to reunify with [Jane Doe].

34. Mother has, by act or omission subjected [Jane Doe's] physical or psychological heath or welfare to harm pursuant to HRS §587-2(4).[3]

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[3] In her opening brief in her point on appeal no. 2, Mother erroneously quotes the trial court's FOF no. 34 as follows: "From a therapeutic point of view, it would be psychologically detrimental to the children to have further visits with Mother and Father, as such interaction re-stimulates terrifying memories. [RA: Appendix C attached]" We note that this alleged finding is not a part of Appendix C attached to Mother's opening brief and is not the family court's FOF no. 34. Moreover, we have not located this language anywhere in the record on appeal.

35. Mother is not presently willing and able to provide [Jane Doe] with a safe family home, even with the assistance of a service plan, because her foregoing problems continue to exist and there continues to be a reasonable foreseeable substantial risk of harm to [Jane Doe] after due consideration of the safe family home guidelines as set forth in Section 587-25.

36. It is not reasonably foreseeable that Mother will become willing and able to provide [Jane Doe] with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed 2 years from the date of first placement under foster care by the Court.

. . . .

47. The permanent plan proposed by the DHS which recommends adoption is in the best interests of [Jane Doe] because it provides [Jane Doe] with legal, psychological and emotional permanency.

. . . .[4]

CONCLUSIONS OF LAW

. . . .

3. The Court may look to the past and present conditions of the home and the natural parents so as to gain insights into the quality of care the child may reasonably be expected to receive in the future. Woodruff v. Keale, 64 Haw. 85, 99, 637 P.2d 760, 769 (1981). See In re Mary Doe II, 52 Haw. 448, 453, 478 P.2d 844, 847 (1974).[5]

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[4] Although the family court's FsOF number only to 51, Mother quotes a FOF no. 65 as follows:

> It is not reasonably foreseeable that Father will become willing and able to provide [Jane Doe] with a safe family home, even with the assistance of a service plan. Even if Father were suddenly to change his long-standing pattern of behavior and wholeheartedly engage in all of the services offered, he could not sufficiently resolve his problems or lack of insight in the reasonably foreseeable future. [RA: Appendix C attached]

There is language similar to the first sentence of Mother's alleged FOF no. 65 in the family court's FOF no. 40 and Conclusion of Law (COL) no. 6. With respect to the second sentence, we note that Father is not a party to this appeal and that his parental rights to Jane Doe were voluntarily terminated.

[5] Mother's point on appeal no. 1, erroneously quotes the family court's COL no. 3 as follows:

> The legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 [sic], HRS, are not

(continued...)

4. DHS has the authority to file a motion to set the case for a permanent plan hearing, and did not have to wait until [Jane Doe] had resided out of the family home for the aggregate of fifteen out of the last twenty-two months. HRS § 587-72 (e).[6]

. . . .

7. [Jane Doe's] legal mother, [Mother], as defined under chapter 578 is not presently willing and able to provide [Jane Doe] with a safe family home, even with the assistance of a service plan, HRS §587-73(a)(1) as there continues to be a reasonably forseeable [sic] substantial risk of harm to [Jane Doe] as defined in HRS §587-2(4), and after due consideration given to the information pertaining to the safe family home guidelines as set forth in Section 587-25.

8. It is not reasonably foreseeable that [Jane Doe's] legal mother, as defined under chapter 578 will become willing and able to provide [Jane Doe] with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed 2 years from the date of first placement under foster care by the Court. HRS 587-73(a)(2)

9. That the proposed Permanent Plan dated September 30, 2000 is in the best interests of [Jane Doe]. HRS § 587-73(a)(3).

10. In arriving at its decision, the Court first made a determination pursuant to HRS §587-73(a)(1) and (2) prior to its determination pursuant to HRS §587-73(a)(3).

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[5](...continued)

presently willing and able to provide the child with a safe family home, even with the assistance of a service plan. [RA: Appendix C attached]

(Bracketed portions in original.)

[6] Mother's point on appeal no. 2 erroneously quotes the family court's COL no. 4 as follows:

It is not reasonably foreseeable that the legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 [sic], HRS, 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. [RA: Appendix C attached]

(Bracketed portions in the original.)

> 11. In arriving at its decision, the Court did not use the presumptions set forth in HRS §587-73(a)(3)(A) and (B) as a basis for reaching its decision. In re Jane Doe (born June 20, 1995) ___ Hawaii___, P.3d___(App.December 22,2000) [sic].[7]

(Footnotes added.)

Following the trial, the court entered its Order Awarding Permanent Custody divesting Mother of her parental and custodial duties and rights pursuant to HRS §§ 587-2 (1999) and 587-73 (2000), awarding permanent custody to DHS, and ordering the implementation of a permanent plan with the goal of adoption.

Mother's Motion for Reconsideration of Order Awarding Permanent Custody was filed on November 9, 2000, and denied on November 21, 2000.

RELEVANT STANDARDS OF REVIEW

Findings of fact are reviewed under the "clearly erroneous" test. Doe VI v. Roe VI, 6 Haw. App. 629, 640, 736 P.2d 448, 456 (1987)(citing Doe III v. Roe III, 3 Haw. App. 241, 648 P.2d 199 (1982)). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm

[7] The case referred to is In Re Doe, 95 Hawai‘i 201, 20 P.3d 634 (App. 2000). This court's opinion in that case was reversed by the Hawai‘i Supreme Court on certiorari in In Re Doe, 95 Hawai‘i 183, 20 P.3d 616 (March 30, 2001). The latter opinion is precedent that the family court could not consider the Hawaii Revised Statutes (HRS) § 587-73(a)(3) presumption when it decided FsOF nos. 35 and 36 but could consider the HRS § 587-73(a)(3) presumption when it decided FOF no. 37.

conviction that a mistake has been made." State v. Balberdi, 90 Hawai'i 16, 20-21, 975 P.2d 773, 777-78 (1999).

Conclusions of law are reviewed *de novo* under the right/wrong standard. Doe VI v. Roe VI, 6 Haw. App. 629, 640, 736 P.2d 448, 456 (1987) (citing Friedrich v. Dept. of Transportation, 60 Haw. 32, 586 P.2d 1037 (1978); Nani Koolau Co. v. K & M Construction, Inc., 5 Haw. App. 137, 681 P.2d 580 (1984)).

> [T]he family court's determinations pursuant to HRS § 587-73(a) with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact; thus, inasmuch as the family court's determinations in this regard are dependant upon the facts and circumstances of each case, they are reviewed on appeal under the "clearly erroneous" standard. *See In re John Doe, Born on September 14, 1996,* 89 Hawaii 477, 486-87, 974 P.2d 1067, 1076-77 (App.), *cert. denied*, (March 17, 1999) (quoting *AIG Hawaii Ins. Co. v. Estate of Caraang*, 74 Haw. 620, 629, 851 P.2d 321, 326 (1993) (internal quotation marks and citations omitted)); *see also In re Jane Doe, Born on June 4, 1987*, 7 Haw. App. 547, 558, 784 P.2d 873, 880 (1989). Likewise, the family court's determination of what is or is not in a child's best interests is reviewed on appeal for clear error. *See id.; Doe*, 89 Hawaii at 486-87, 974 P.2d at 1076-77.

In re Jane Doe, Born on June 20, 1995, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001).

DISCUSSION

HRS Chapter 587, the Child Protective Act, establishes criteria for the termination of parental rights. An order divesting Mother of her parental rights to Jane Doe is not authorized absent a valid finding, by clear and convincing

evidence, that (1) Mother is not presently willing and able to provide Jane Doe with a safe family home and (2) even with the assistance of a service plan, it is not reasonably foreseeable that Mother would become so within a reasonable period of time "not to exceed two years from the date upon which the child was first placed under foster custody by the court[.]" HRS § 587-73(a)(2).[8] While HRS § 587-73(a)(2) sets a maximum "reasonable period of time," it does not set a minimum.

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[8] HRS § 587-73(a) (Supp. 2000) provides, in relevant part, as follows:

> At the permanent plan hearing, the court shall consider fully all relevant prior and current information pertaining to the safe family home guidelines, as set forth in section 587-25, including but not limited to the report or reports submitted pursuant to section 587-40, and determine whether there exists clear and convincing evidence that:
>
> (1) The child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan;
>
> (2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 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 date upon which the child was first placed under foster custody by the court;
>
> (3) The proposed permanent plan will assist in achieving the goal which is in the best interests of the child; provided that the court shall presume that:
>
> (A) It is in the best interests of a child to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes; and
>
> (B) The presumption increases in importance proportionate to the youth of the child upon the date that the child was first placed under foster custody by the court[.]

HRS § 587-73(a)(3) mandates a presumption that it is in the best interests of the child to be promptly and permanently placed with substitute parents and families, with this presumption "increas[ing] in importance proportionate to the youth of the child[.]"

Interpreting the "reasonable period of time" provision when the period was "not to exceed three years," the Hawai‘i Supreme Court has held that "nothing in HRS § 587-73(a)(2) or its legislative history indicates that DHS must expend three years in attempting to achieve reunification." In Re Doe, Born on September 14, 1996, 89 Hawai‘i 477, 492, 974 P.2d 1067, 1087 (App. 1999). The maximum period is now two years and the same rule applies. DHS was not required to wait two years before filing a motion for the termination of parental rights and the award of permanent custody and the court was not required to wait two years before granting the motion.

Although Jane Doe was only eight months old when the family court entered its order, we conclude that the record supports the family court's ultimate finding that

> [t]his case is appropriately before the Court and it may seem premature but taking all of the past history and the current history and reports into consideration on a case by case basis the Court will find that [DHS] has met its burden of proving all the material elements under Chapter 587 by clear and convincing evidence.

1.

Proof that Mother is not presently willing and able to provide Jane Doe with a safe family home, even with the assistance of a service plan.

The determination of whether a child's family is willing and able to provide a safe family home is guided by the "Safe family home guidelines" of HRS § 587-25 (1993).[9]

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[9] HRS § 587-25 (1993) provides, in relevant part:

(a) The following guidelines shall be fully considered when determining whether the child's family is willing and able to provide the child with a safe family home:

(1) The current facts relating to the child which include:

(A) Age and vulnerability;

. . . .

(C) Peer and family relationships and bonding abilities;

. . . .

(2) The initial and any subsequent reports of harm and/or threatened harm suffered by the child;

(3) Date(s) and reason for child's placement out of the home, ...

(4) Historical facts relating to the alleged perpetrator . . . which include:

. . . .

(D) Prior involvement in services;

(5) The results of psychiatric/psychological/developmental evaluations of the child [and] the alleged perpetrator . . . ;

(6) Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the family home;

(7) Whether there is a history of substance abuse by the child's family or others who have access to the family home;

(continued...)

Mother argues that the "trial court was clearly erroneous in finding that the record contained clear and convincing evidence that [Mother] was not willing and able to provide her child with a safe family home, even with the assistance of a service plan." Mother asserts that "[t]his case was started essentially because [Mother] had a history of drug use and prior involvement with the DHS regarding her first two children." Based upon the evidence in the record, we disagree. This case began with Mother's voluntary placement of Jane Doe

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[9](...continued)

> (8) Whether the alleged perpetrator(s) has acknowledged and apologized for the harm;
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> . . . .
>
> (10) Whether there is a support system of extended family and/or friends available to the child's family;
>
> (11) Whether the child's family has demonstrated an understanding and utilization of the recommended/court ordered services designated to effectuate a safe home for the child;
>
> (12) Whether the child's family has resolved or can resolve the identified safety issues in the family home within a reasonable period of time;
>
> (13) Whether the child's family has demonstrated the ability to understand and adequately parent the child especially in the areas of communication, nurturing, child development, perception of the child and meeting the child's physical and emotional needs; and
>
> (14) Assessment (to include the demonstrated ability of the child's family to provide a safe family home for the child) and recommendation.
>
> (b) The court shall consider the likelihood that the current situation presented by the guidelines set forth in subsection (a) will continue in the reasonably foreseeable future and the likelihood that the court will receive timely notice of any change or changes in the family's willingness and ability to provide the child with a safe family home.

into DHS foster care and arose not from Mother's prior history, but from the harm caused to Jane Doe by Mother's drug use throughout her pregnancy with Jane Doe, including Mother's use of cocaine on the date of Jane Doe's birth.

Mother asserts that "DHS concluded that [Mother's] failure to contact the social worker [from March 28, 2000, to September 29, 2000] was the equivalent to [Mother's] being unwilling to care for her child. [Mother] testified she was willing to enter into the Sand Island drug treatment program provided she was granted an early release from incarceration."[10] The trial court, however, found Mother "not to have been a credible witness." "[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the [trier of fact]." State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) (citation omitted).

There is substantial evidence on the record that Mother was both unwilling and unable to provide a safe family home for

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[10] Appellee State of Hawai'i Department of Human Services (DHS) stated in its answering brief that "Mother testified that she was now ready to participate in substance abuse treatment, and was seeking release from incarceration to participate in residential substance abuse treatment. One questions whether Mother's primary motivation was to avoid further incarceration." (Record citations omitted.) In her reply brief, Mother contends that the second sentence is highly prejudicial to Mother because "[t]he record is void of any such finding that [Mother] sought substance abuse treatment with the intention of seeking release from incarceration." She argues she should be given the opportunity to offer contrary evidence, and that the case should be remanded to the lower court for a new trial or for additional evidence. We disagree. The second sentence is a valid argument based on the evidence in the record and the trial court's finding that Mother was not a credible witness.

Jane Doe. The family court's FOF no. 35 is not clearly erroneous. Mother failed to contact DHS or to respond to DHS' efforts to contact her, she did not participate in services, she did not visit Jane Doe, and she continued to abuse drugs.

Mother contends that because "[t]he DHS social worker stated that [Mother] improved herself between child protective cases[,] . . . [Mother's] prior history of drug abuse and failure in treatment should not be conclusive evidence of her present ability to provide a safe home for her child." Mother is correct that her prior history alone should not be conclusive as to this issue. See HRS § 587-25 (mandating numerous factors the family court must consider in determining whether a family is willing and able to provide a safe family home). This evidence, however, is accompanied by evidence of Mother's continuing psychological problems and substance abuse.

2.

> Proof that it was not reasonably foreseeable that Mother would become willing and able to provide a safe family home, even with the assistance of a service plan, within a reasonable period of time.

Mother asserts that "a short period of less than eight months was given to [Mother] to prove that she would be able to provide a safe home for her child, [and] the only other evidence used against [Mother] was her history regarding her first two children." First, as discussed, HRS § 587-73 establishes no

minimum time that DHS is required to wait before moving for permanent custody. Second, we disagree with Mother's assessment of the evidence used.

The family court relied not only on Mother's history with her older children, but also on the history that Mother had established throughout her pregnancy with Jane Doe and during the first eight months of Jane Doe's life. This evidence included the *in utero* harm Mother caused Jane Doe, and Mother's continuing patterns of drug abuse, non-participation in services, failure to contact DHS, and failure to visit or bond with Jane Doe.

Although Ms. Reiber was the only witness to testify for DHS, "the testimony of a single witness, if found by the trier of fact to have been credible, will suffice" as substantial evidence to support the family court's determination. In Re Jane Doe, Born on June 20, 1995, 95 Hawai‘i 183, 197, 20 P.3d 616, 629 (2001) (citations omitted). Moreover, the testimony of Ms. Reiber is supported by other evidence in the record.

Substantial evidence supports the family court's finding that even with the assistance of a service plan, Mother will not become willing and able to provide Jane Doe with a safe family home within a reasonable period of time not to exceed two years from February 8, 2000. FOF no. 36 is not clearly erroneous.

3.

Termination of Mother's parental rights was in Jane Doe's best interest.

Mother asserts that

> DHS considered the best interest of [Jane Doe] only from the standpoint of whether [Jane Doe] could be raised by [Mother]. No consideration was given as to whether permanent custody could preclude [Jane Doe] from being united with her sibling living with [Jane Doe's] maternal grandmother.

HRS § 587-73 (Supp. 2000) provides, in relevant part:

> (b) If the court determines that the criteria set forth in subsection (a) are established by clear and convincing evidence, the court shall order:
>
> . . . .
>
> (3) That an appropriate permanent plan be implemented concerning the child whereby the child will:
>
> (A) Be adopted pursuant to chapter 578; provided that the court shall presume that it is in the best interests of the child to be adopted, unless the child is or will be in the home of family or a person who has become as family and who for good cause is unwilling or unable to adopt the child but is committed to and is capable of being the child's guardian or permanent custodian[.]

Jane Doe was not in the home of Maternal Grandmother, and there is no evidence that Jane Doe would be in the home of Maternal Grandmother. At the initial permanent plan hearing, DHS is not required to prove the non-willingness or non-ability of other members of the child's family to provide the child with a safe family home.[11] Therefore, the presumption applies.

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[11] HRS § 587-73(a) (Supp. 2000) specifies that the initial determination of willingness and ability to provide the child with a safe family home pertains only to "[t]he child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578[.]" The willingness and ability of the child's "family" as defined in HRS

(continued...)

Furthermore, even if the presumption did not apply, there is substantial evidence that Jane Doe was thriving in the environment of her foster family, had bonded with her foster family and that the family wished to permanently adopt Jane Doe. Mother's claim of error as to this point is, therefore, without merit. FOF no. 47 is not clearly erroneous.

CONCLUSION

Accordingly, we affirm the family court's October 24, 2000 Order Awarding Permanent Custody to DHS, divesting Mother of her parental and custodial duties and rights to Jane Doe, and ordering the implementation of the Permanent Plan dated Setember 30, 2000.

DATED: Honolulu, Hawai‘i, March 1, 2002.

On the briefs:

Herbert Y. Hamada
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Chief Judge

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Mary Anne Magnier,
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Services-Appellee.

Associate Judge

Kimberly S.Towler,
Guardian Ad Litem-Appellee.

Associate Judge

[11](...continued)

§ 587-2 (1993) is not relevant unless and until there is a "continued permanent plan hearing." HRS § 587-73(d)(2) (Supp. 2000).