

NO. 23923

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

In the Interest of JANE DOE, born August 9, 1995  
(FC-S NO. 99-06123)

and

In the Interest of JOHN DOE, born July 8, 1998  
(FC-S NO. 99-06124)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT COURT

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Mother-Appellant (Mother) appeals from (1) the October 24, 2000 Order Awarding Permanent Custody and (2) the November 21, 2000 Orders Concerning Child Protective Act entered by District Family Judge Linda K. C. Luke. We affirm.

We agree with Mother and conclude that the family court was wrong when it decided that her motion for reconsideration was untimely but conclude that the error was harmless.

We disagree with Mother and conclude that the two orders at issue are based on findings of fact that are clearly erroneous and on conclusions of law that are wrong.

BACKGROUND

Mother is the biological mother of both Jane Doe and John Doe. Jane Doe (Jane) was born on August 9, 1995. John Doe (John) was born on July 8, 1998.

On August 12, 1999, Mother was incarcerated for the vehicular assault of her boyfriend (John's Alleged Father 2), who is one of two alleged natural fathers of John. Also on this date, the Honolulu Police Department assumed protective custody of Jane and John pursuant to Hawaii Revised Statutes (HRS) § 587-22(c) (1999) and, immediately thereafter, the State of Hawai'i Department of Human Services (DHS) assumed temporary foster custody.

On August 17, 1999, DHS filed Petitions for Temporary Foster Custody in the Family Court of the First Circuit, in FC-S No. 99-06123 and FC-S No. 99-06124, seeking custody of Jane and John, respectively.<sup>1</sup> The petitions were based on Mother's imprisonment and specified additional threats of harm to the children stemming from domestic violence issues between Mother and John's Alleged Father 2, Mother's alleged substance abuse and her childhood sexual abuse, as well as an unsanitary home environment. The family court entered orders on August 19, 1999, continuing temporary foster custody and implementing an interim service plan dated August 17, 1999.

Following a September 3, 1999 hearing, the family court entered orders asserting jurisdiction pursuant to HRS §§ 571-11(9) and 587-11 (1993), continuing the August 17, 1999 service plan, awarding foster custody to DHS, and permitting

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<sup>1</sup> The two cases have been consolidated in this appeal.

Mother "reasonable supervised or unsupervised visitation with [Jane and John] at the discretion of the DHS and the guardian ad litem." While Jane and John were under the foster care of their maternal grandmother from September 16, 1999, to February 4, 2000, Mother had "sporadic visits" with Jane and John. Due to the grandmother's health, foster custody of Jane and John was conveyed, on February 4, 2000, to Mother's aunt and uncle, who requested that Mother's visitation not occur in their home. DHS then scheduled one-hour-per-week visits at the DHS office. Mother failed to comply with this visitation schedule.

The family court conducted a service plan hearing on October 26, 1999, wherein it ordered the service plan dated October 11, 1999. Mother failed to appear at the hearing and was defaulted.<sup>2</sup>

The October 11, 1999 service plan required Mother to participate in the following services: substance abuse treatment, random drug screening, psychological evaluation, outreach services (to increase parenting skills), domestic violence group. The plan also required Mother, *inter alia*, to

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<sup>2</sup> At this hearing, the family court also authorized the State of Hawai'i Department of Human Services to serve Jane Doe's (Jane) alleged natural father (Jane's Father) and the first of John Doe's (John) two alleged natural fathers (John's Alleged Father 1) by publication. Jane's Father and John's Alleged Father 1 failed to appear at a review hearing held February 24, 2000, and were defaulted. Neither Jane's Father nor John's Alleged Father 1 are parties to this appeal.

Cooperate with the DHS Social Worker by:

- a. Keeping appointments with worker and providers
- b. Attending other services as recommended
- c. Informing of any changes in the home
- d. Informing of any problems in following the service plan[.]

With the exception of a drug assessment, Mother did not participate in any of the services outlined in the service plan.

Following a hearing on March 14, 2000, the family court ordered into effect the service plan dated March 1, 2000, and ordered, at Mother's request, that DHS increase the length of Mother's visits with Jane and John from one hour to two hours and provide Mother with a bus pass to facilitate her visitations.<sup>3</sup> Despite these accommodations, Mother thereafter visited with Jane and John only once and failed to contact DHS to confirm further visits.

DHS filed Motion[s] for Order Awarding Permanent Custody and Establishing a Permanent Plan on May 31, 2000. In an accompanying Safe Family Home Report dated May 16, 2000, which alleged that Jane and John were subject to the "threat of neglect," DHS cited as safety issues the facts that Mother was arrested on August 12, 1999, released on bail and was awaiting trial, the unsanitary conditions of Mother's home at the time of

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<sup>3</sup> Also at the March 14, 2000 hearing, the second of John's two alleged natural fathers (John's Alleged Father 2) informed the family court of his possible paternity of John. The family court ordered John's Alleged Father 2 to contact the Child Support Enforcement Agency within seven days to establish paternity. John's Alleged Father 2 failed to comply with this order, and did not establish good cause for his failure to comply. John's Alleged Father 2 is not a party to this appeal.

the children's removal, and Mother's "lack of appropriate parenting skills, domestic violence issues, and a reported history of drug usage."

At the ensuing Permanent Plan Hearing held on October 10, 2000, at 9:00 a.m., Mother was represented by counsel, but failed to personally appear. At the opening of the proceedings, the position of both the guardian ad litem and DHS was that Mother be defaulted. During closing arguments, the family court engaged in the following colloquy with Mother's attorney, Joseph Dubiel:

THE COURT: Does [M]other rest?

MR. DUBIEL: Well, we'd like to continue, of course, because she's supposedly on her way. So I would like -- I would like not to rest and --

THE COURT: I'll allow you to put in a written statement by -- from her, but I need it by the end of today. And I'll issue my decision tomorrow.

MR. DUBIEL: Okay.

On October 24, 2000, the family court entered its Order Awarding Permanent Custody. Although the family court received Mother's Motion for Reconsideration of Permanent Custody Orders (Motion for Reconsideration) on November 8, 2000, it did not file this motion until November 14, 2000. On November 21, 2000, the family court entered Orders Concerning Child Protective Act (November 21, 2000 Order), stating:

Based upon the record and/or the evidence presented, the Court finds that:

A. The motion for reconsideration was not timely filed;

- B. The court has no jurisdiction as the appeal period has passed;
- C. Mother has not established good cause to overturn any prior order of this court.

THEREFORE, IT IS HEREBY ORDERED THAT:

- 1. Mother's Motion for Reconsideration of Permanent Custody Orders filed on November 14, 2000 is denied.

On November 28, 2000, Mother filed a notice of appeal of the family court's November 21, 2000 Order. On December 15, 2000, the family court entered Findings of Fact (FsOF) and Conclusions of Law (CsOL), in relevant part, as follows:

The court makes the following findings of fact and conclusions of law based on the requisite standard of proof as required by Chapter 587, Hawaii Revised Statutes ("HRS"), i.e., clear and convincing evidence.

**FINDINGS OF FACT**

. . . . .

The Children

. . . . .

13. [Jane and John] (collectively, the "Children") were first placed in foster care on August 12, 1999 after they were taken into police protective custody due to their Mother's incarceration for assaulting her boyfriend with a vehicle.

14. The Children have been residing in the current foster home since February 4, 2000.

15. [Jane] has observed Mother and [John's Alleged Father 2] fighting and yelling at each other.

16. The Children have not visited with Mother since April 2000 due to Mother's failure to follow through with contacting the DHS to confirm her visits.

Mother

17. Mother was served by personal service with a copy of the summons and certified copy of the petition on August 18, 1999.

18. Mother first came to the attention of the DHS in April 1999 when the DHS received a report of medical neglect of [John] by Mother who brought [John] to the Wahiawa Hospital emergency room with a fever of 104.5 degrees but failed to bring [John] to

follow-up appointments. Mother was referred to Child and Family Service Child Abuse and Neglect Diversion program and the safety issues were resolved therefore, court involvement did not become necessary at that time.

19. Mother needs to address her issues of substance abuse. Mother has openly admitted to the DHS social worker that she used marijuana "recreationally".

20. Mother has been in an abusive relationship with [John's Alleged Father 2] since their involvement about three years ago. Mother still does not understand how the abusive relationship between herself and [John's Alleged Father 2] has a detrimental effect on the Children's physical and psychological well-being.

21. As a condition of her bail release, Mother was prohibited from contacting [John's Alleged Father 2], however, during a home visit, the DHS discovered that [John's Alleged Father 2] was in the home with Mother and was hiding from the DHS because of the contact restriction with Mother.

22. Throughout this case, Mother has exhibited a pattern of alternating between insight and denial, compliance and non-compliance, participation and non-participation, improvement and regression, and insight and lack of insight into her Children's needs.

23. Mother has failed to complete most of the services in which she was ordered to participate. The only service Mother completed was a substance abuse assessment.

24. Mother initially received supervised visits with the Children at maternal grandmother's home where the Children had been placed, then after maternal grandmother had surgery, the Children were placed with maternal aunt and uncle who preferred that Mother not visit at their home.

25. Mother was offered one-hour visits with the Children at the DHS offices but Mother did not keep her first scheduled visit because she believed one hour was too short.

26. Visits for Mother were increased to two hours, however, after the first two-hour visit, Mother failed to keep her scheduled visits with her Children.

27. Mother has not visited with the Children nor has she requested visits with the Children since April 2000.

28. Mother was referred by the DHS for a psychological evaluation but failed to follow-up on the referral and did not complete the psychological evaluation.

29. Mother has frustrated DHS's attempts to remain in contact with her in that she has not kept in contact with the DHS, calling in on a regular basis to determine if she should submit to a random urinalysis ("UA"), and to provide them with information regarding her current whereabouts or a current method of contact.

30. Mother was given every reasonable opportunity to effect positive changes to provide a safe family home and to reunify with the Children.

31. Mother had notice of the trial scheduled for October 10, 2000 at 9:00 a.m. as Mother was present at the hearings on July 6, 2000 and the pre-trial conference on September 29, 2000 at which hearings Mother was ordered to appear for trial. Additionally, Mother contacted the bailiff's desk on October 10, 2000 at 8:35 a.m. to inform the Court that she was going to be late because she was waiting for her ride, however, Mother did not appear until 3:05 p.m. that afternoon and when Mother requested to speak with the judge, Mother was informed that she should contact her attorney.

32. Mother was given a reasonable opportunity to provide the Court with an explanation of her absence from the hearing on October 10, 2000, but failed to do so.

33. Mother was afforded the opportunity to submit a written position statement to the Court for consideration in this matter and the written statement, although submitted late, was considered by this Court before rendering its decision.

34. The parties stipulated that Mother's current boyfriend . . . , (who[m] she has been seeing for the past two months) would testify that Mother is a good mother and can provide a safe home but apparently was not able to observe Mother in visits with the Children as Mother's last visit occurred prior to her involvement with [her current boyfriend].

35. Mother is not presently willing and able to provide the Children with a safe family home, even with the assistance of a service plan because her foregoing problems continue to exist and she has refused, and failed to benefit from the services which have been provided to her over the last thirteen to fourteen months.

36. It is not reasonably foreseeable that Mother will become willing and able to provide the Children with a safe family home, even with the assistance of a service plan because even if Mother were to suddenly change her long standing pattern of behavior, there is no likelihood that she would sufficiently resolve her problems at any identifiable point in the future.

. . . .

DHS

. . . .

64. Mother's Motion for Reconsideration of the Permanent Custody Orders filed on November 14, 2000, was filed more than twenty days after the entry of the order being reconsidered, which is untimely pursuant to Hawaii Revised Statutes § 571-54.



65. Mother's Motion for Reconsideration of Permanent Custody Orders filed on November 14, 2000, was filed more than ten days after entry of the order being reconsidered, which is untimely pursuant to Rule 59(e), Hawaii Family Court Rules.

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**CONCLUSIONS OF LAW**

. . . .

3. The legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the Children with a safe family home, even with the assistance of a service plan.

4. It is not reasonably foreseeable that the legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the Children with a safe family home, even with the assistance of a service plan, within a reasonable period of time[.]

5. That the permanent plan dated May 17, 2000 is in the best interests of the Children.

Mother asserts the following as errors committed by the family court:

1. That FsOF nos. 64 and 65 and the orders cited above in the November 21, 2000 Order, which found Mother's Motion for Reconsideration to be untimely, are clearly erroneous.

2. That FsOF nos. 35 and 36 and CsOL nos. 3 and 4, finding and concluding that Mother is not willing and able to provide Jane and John with a safe family home, even with the assistance of a service plan, now or within a reasonable period of time, are clearly erroneous.

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 conviction that a mistake has been made." State v. Balberdi, 90 Hawai'i 16, 20, 21 975 P.2d 773, 777-778 (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 Hawai'i 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 Hawai'i 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

### A.

#### Motion for Reconsideration

DHS concedes that the family court's finding of untimeliness as to Mother's Motion for Reconsideration was in error, but asserts that the error was harmless. We agree.

Although Mother cites Hawai'i Family Court Rules (HFCR) Rule 7b as the basis for her Motion for Reconsideration, it is more properly characterized as a motion brought under HRS § 571-54 (1993). HFCR Rule 59(e) (2000) states, in relevant part, as follows: "Motion to Reconsider, Alter or amend a Judgment or Order. Except as otherwise provided by HRS section 571-54, a motion to reconsider, alter or amend the judgment or order shall be filed not later than 10 days after entry of the judgment or order[.]"

HRS § 571-54 (1993) states, in relevant part:

An order or decree entered in a proceeding based upon section 571-11(1), (2), (6), or (9) shall be subject to appeal to the supreme court only as follows:

Within twenty days from the date of the entry of any such order or decree, any party directly affected thereby may file a motion for a reconsideration of the facts involved. . . . The findings of the judge upon the hearing of the motion and the judge's determination and disposition of the case thereafter, and any decision, judgment, order, or decree affecting the child and entered as a result of the hearing on the motion shall be set forth in writing and signed by the judge. Any party deeming oneself aggrieved by any such findings, judgment, order, or decree shall have the right to appeal therefrom to the supreme court upon the same terms and conditions as in other cases in the circuit court and review shall be governed by chapter 602[.]

Although the Motion for Reconsideration was not filed until after the twenty-day period for filing had expired, it was timely because the family court received it on November 8, 2000, within the twenty-day period for filing. Price v. Obayashi, 81 Hawai'i 171, 179, 914 P.2d 1364, 1372 (1996) (holding "as long as documents in question are tendered within the time period prescribed by our rules, the clerks of the courts *must* file them"). The family court's conclusion to the contrary is wrong.

Motions for reconsideration under HFCR Rule 59(b) "require good cause and . . . involve the exercise of wide discretion which will not be reversed on appeal absent abuse thereof." Lusch v. Foster, 3 Haw. App. 175, 184, 646 P.2d 969, 975 (1982) (internal quotations omitted) (citing Lee v. Kimura, 2 Haw. App. 538, 634 P.2d 1043 (1981)). Although the family court's conclusions that "[t]he motion for reconsideration was not timely filed" and "[t]he family court has no jurisdiction as the appeal period has passed" are wrong, the family court also decided that "Mother has not established good cause to overturn any prior order of this court." Mother's failure to satisfy the good cause requirement was necessarily fatal to her Motion for Reconsideration. The family court's specific decision that Mother failed to "establish . . . good cause to overturn any prior order of this Court" was a decision sufficient in and of

itself to deny the Motion for Reconsideration and was not an abuse of discretion.

B.

#### Safe Family Home Findings

HRS § 587-73 (Supp. 1999) provides:

**Permanent plan hearing.** (a) 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[.]

Evidence presented to the family court indicated that Jane and John had been in foster care for more than one year; Mother had not demonstrated a desire to participate in services to show that she could provide a safe family home and reunify with her children; Mother's parenting skills, anger management problems, domestic violence issues, and a possible substance abuse problem still presented risks to Jane and John; and Mother had not kept in contact with DHS on a regular basis and the last visit with her children was in April 2000.

Based upon the evidence in the record, we determine that the family court's FsOF are supported by substantial evidence and that its CsOL are right. Mother's only contentions to the contrary are that the family court's FsOF nos. 35 and 36 and CsOL nos. 3 and 4 were erroneous because an insufficient period of time had elapsed between Jane and John's placement into foster care on August 12, 1999, and the permanent plan hearing on October 10, 2000. Mother argues, "This is simply not enough time for a mother to show that she can provide a safe home. This is only 14 months. There are cases stating that three years [should] be the limit as well as cases considering two years. In re Doe, 89 Hawai'i 477, 489, 974 [P.2d] 1067, 1079 (1999)."

The Doe case upon which Mother relies, however, interpreted HRS § 587-73(a)(2) (1993), which has twice been amended since the case was decided. Although the case to which Mother refers to considered HRS § 587-73(a)(2), the statute then designated a three-year maximum time period, whereas the statute currently effective allows for a "reasonable period of time which shall not exceed two years." This period is a maximum, not a minimum.

Interpreting the "reasonable period of time" provision when the period was "not to exceed three years," the Hawai'i Supreme Court 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 family court was not required to wait two years before granting the motion.

CONCLUSION

Accordingly, we affirm the family court's

- (1) October 24, 2000 Order Awarding Permanent Custody and
- (2) November 21, 2000 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, March 8, 2002.

On the briefs:

Joseph Dubiel  
for Mother-Appellant.

Chief Judge

Jay K. Goss and  
Mary Anne Magnier,  
Deputy Attorneys General,  
for Department of Human  
Services-Appellee.

Associate Judge

Associate Judge