

NO. 23947

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

In the Interest of JOHN DOE,
Born on November 17, 1994, Minor

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 95-03704)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant (Mother) appeals from the following orders entered by District Family Judge Karen M. Radius: (1) "Order Awarding Permanent Custody" entered on October 4, 2000, and (2) "Amended Order Denying (Father's) Motion for Reconsideration of Order Awarding Permanent Custody, Filed 10/24/00 and Granting in Part and Denying in Part Mother's Motion for Reconsideration and to Stay Decision, Filed 10/24/00" entered on December 5, 2000.

John Doe was born on November 17, 1994, at which time Mother tested positive for drugs, leading to intervention by the State of Hawaii Department of Human Services (DHS, or the department). The case was closed on December 4, 1996, after Mother completed recommended services.

At the commencement of the instant case, John Doe shared a family home with (a) Mother, (b) a half-sibling (Jane Doe), (c) Jane Doe's father who was also Mother's boyfriend

(Boyfriend), and (4) a maternal uncle, who had recently been released from prison and had a history of molesting children. Due to Mother's drug abuse and mental instability, Mother signed a Voluntary Foster Custody Agreement (the agreement) on September 24, 1998, in which she agreed to DHS' foster care of John Doe. John Doe was accordingly placed into a DHS emergency shelter home. Mother's revocation of the agreement on November 18, 1998, necessitated police protective custody of John Doe and led to his placement into a provisionally licensed foster home.

DHS filed a Petition for Temporary Foster Custody on November 23, 1998, stating the following:

a. THREATENED HARM

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PARENTAL PROBLEMS

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8. Mother has a history of domestic violence with Father and Boyfriend.

9. On September 17, 1998, a Public Health Nurse ("PHN") went to the family home to pick up Mother. When the PHN arrived at the family home, Mother and Boyfriend were arguing. When Mother tried to leave with the PHN, Boyfriend threatened both the PHN and Mother. The next morning, Boyfriend went to the PHN's office and again threatened her.

10. Mother has a chronic crystal methamphetamine abuse problem. Mother admitted that she has a substance abuse problem and is seeking treatment.

11. Boyfriend admitted that he has used drugs in the past.

12. Mother also has a history of mental illness and suicide attempts.

13. Mother's drug abuse, history of mental illness, and domestic violence with Boyfriend constitute threatened harm to the child.

. . . .

b. IMMINENT HARM

The child was placed in Temporary Foster Custody on November 18, 1998, because there is reasonable cause to believe that the harm, as set forth in paragraph (a) above, will occur within the next ninety days. The child was taken into police protective custody and placed in a DHS provisionally licensed foster home where he remains.

On July 11, 2000, the court held a hearing at which Mother's counsel informed the court that Mother was "inclined to go along with" the Motion for Permanent Custody with the hope that John Doe be adopted by Maternal Grandmother. Father agreed to the same.

Trial was held on September 19, 2000. Father and Mother both testified to their willingness to give permanent custody to Maternal Grandmother. Mother, testifying in her own behalf, admitted that she could not care for John Doe at the time of trial. She stated that she wanted "somebody in [her] family to have 'em or some -- somebody that . . . will do a good job." She believed Maternal Grandmother could "do a good job."

The court announced its decision on October 3, 2000, and stated, in relevant part, as follows:

I'm going to find that neither parent can provide a safe home even with the assistance of a service plan now or in the reasonably foreseeable future.

The Court is going to order as far as -- permanent custody to the Department of Human Services. Find it's in the children's [sic] best interest.

And also order that DHS do a home study of grandmother's home, including a visit to her house, that grandma be considered as well as any other unrelated parties.

. . . .

I'm going to set a hearing in six months, but I want the social study done before then. And if DHS isn't recommending grandma, then I want a copy of the home study of anybody that DHS may be recommending in addition.

. . . .

The reason making my order is, I want DHS to take a fresh look with grandma. I want a clear and thorough look at what's in these kids [sic] best interest for long term.

. . . .

Well, all the permanent plan says right now is adoption. And we all agree -- I don't know if you agree -- but we -- I find that adoption is in the child's best interest. But I haven't yet found adoption by whom.

Mother asserts the following points of error by the family court: (1) the court failed to enter Findings of Fact (FsOF) and Conclusions of Law (CsOL) relating to Mother's fitness as a parent; (2) the court's reliance on Mother's noncompliance with court-ordered service plans was an improper basis to terminate her parental rights; (3) District Family Judge Bode Uale's conflict of interest violated Mother's right to a fair trial; (4) the court erroneously found that DHS exerted reasonable efforts to reunite John Doe with his family; and (5) the court erred in finding, by clear and convincing evidence, that Mother was unable to provide a safe family home, presently or prospectively.

With respect to point (4), we note that commencing no later than June 24, 1998, Hawaii Revised Statutes (HRS) § 587-1 (Supp. 2001) states, in relevant part, as follows:

The service plan shall effectuate the child's remaining in the family home, when the family home can be immediately made safe with services, or the child's returning to a safe family home. The service plan should be carefully formulated with the family in a timely manner. Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems which put the child at substantial risk of being harmed in the family home. Each appropriate resource, public and private, family and friend, should be considered and used to maximize the legal custodian's potential for providing a safe family home for the child. Full and careful consideration should be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated. Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child will be permanently placed in a timely manner.

The department's child protective services provided under this chapter shall make every reasonable effort to be open, accessible, and communicative to the persons affected in any manner by a child protective proceeding; provided that the safety and best interests of the child under this chapter shall not be endangered in the process.

"Family home" is a statutory term, defined under HRS § 587-2 as "the home of the child's legal custodian where there is the provision of care for the child's physical and psychological health and welfare."

Maternal Grandmother, while indeed John Doe's family,¹

¹ Hawaii Revised Statutes (HRS) § 587-2 (1993) states, in relevant part, as follows:

"Family" means each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under section 578-2, each parent's spouse, or former spouses, each sibling or person related by consanguinity or marriage, each person residing in the same dwelling unit, and any other person who or legal entity which is a child's legal or physical custodian or guardian, or who is otherwise responsible for the child's care, other than an authorized agency which assumes such a legal status or relationship with the child under this chapter.

is not his legal custodian, and her home is not John Doe's family home. Therefore, whereas Maternal Grandmother was among those to "be considered and used to maximize the legal custodian's potential for providing a safe family home" for John Doe, she was not among those whom DHS was required to exert reasonable efforts to reunify with John Doe.

In her reply brief, Mother alleges that "DHS failed to fulfill its duty to place [John Doe] with *Maternal Grandmother* as required by sections 587-2 and 571-46, HRS." (Emphases in original.) However, neither of these statutory sections places such a duty on DHS. HRS § 587-2 is merely a list of defined terms under the Child Protective Act, and although HRS § 571-46 prescribes "[c]riteria and procedure in awarding custody and visitation," Mother specifically cites to § 571-46(7),² which discusses visitation rights, not the award of custody.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

² HRS § 571-46(7) (Supp. 2001) states as follows: "Reasonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child[.]"

IT IS HEREBY ORDERED that the orders from which the appeal is taken are affirmed.

DATED: Honolulu, Hawai'i, May 16, 2002.

On the briefs:

Chris C. China
for Petitioner-Appellant.

Chief Judge

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

Associate Judge

Associate Judge