NOT FOR PUBLICATION

NO. 24426

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF JOHN DOE, Born on August 22, 1998

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S No. 98-066K)

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

Father and Mother appeal (1) the February 12, 2001 order of the family court of the third circuit[1] that awarded permanent custody of John Doe (John) to the Department of Human Services (DHS) and established a permanent plan, and (2) the court's June 19, 2001 order denying each parent's motion for reconsideration of the February 12, 2001 order.

After a painstaking review of the record and the briefs submitted by the parties, and giving due consideration to the arguments advanced and the issues raised by the parties, we resolve the points of error raised by the parents on appeal as follows:

1. Mother's Appeal

(a) Mother first argues that the court erred in granting temporary foster custody (TFC) to DHS because the court

[1] The Honorable Victor M. Cox and Colin L. Love, judges presiding.

denied her appointed counsel[2] between September 4, 1998 and November 17, 1998. However, any issues regarding the court's TFC order are moot at this juncture, see, e.g., In re Nice, 751 N.E.2d 552, 558-59 (Ohio Ct. App. 2001) ("any issues concerning an extension of temporary custody essentially become moot after a court grants an agency's motion for permanent or legal custody"), and "this court may not decide moot questions or abstract propositions of law." Life of the Land v. Burns, 59 Haw. 244, 250, 580 P.2d 405, 409 (1978) (brackets, citation and internal quotation marks omitted). Alternatively, because an award of TFC to DHS is a final, appealable order, In re Jane Doe, Born February 22, 1987, 77 Hawai'i 109, 115, 883 P.2d 30, 36 (1994), Mother "waived her arguments concerning the propriety of the court's extension of temporary custody by failing to appeal after the extension was ordered." Nice, 751 N.E.2d at 558. At any rate, Mother retained custody of John and was represented by a guardian ad litem, who is an attorney,[3] for much of the time she

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[2] Hawaii Revised Statutes (HRS) § 587-34(a)(1993) provides, in pertinent part:

> The court may appoint . . . independent counsel for any other party if the party is an indigent, counsel is necessary to protect the party's interests adequately, and the interests are not represented adequately by another party who is represented by counsel.

[3] HRS § 587-34(d)(1993) provides:

> When the court determines, after such hearing as the court deems to be appropriate, that a party is incapable of comprehending the legal significance of the issues or the nature of the child protective proceedings, the court may appoint a guardian ad litem to represent the interests of the party; provided that a guardian ad litem appointed

lacked appointed counsel and thus, we cannot say the court abused its discretion in not appointing counsel for Mother at the outset. See Hawaii Revised Statutes (HRS) § 587-34(a) (1993). Moreover, our independent review of the record reveals no indication of prejudice to Mother's substantial rights as a result of the interim lack of counsel. In re Jane Doe, Born on December 15, 1982, 99 Hawai'i 522, 534 n.18, 57 P.3d 447, 459 n.18 (2002) ("The appellate courts of this jurisdiction have . . . applied procedural due process protection only where an individual's rights are substantially affected." (Citations omitted; emphasis in the original.)). Cf. Lassiter v. Dep't of Social Services, 452 U.S. 18, 32-33 (1981). Accordingly, any error in this regard was harmless. Hawai'i Rules of Civil Procedure (HRCP) Rule 61 (West 2002).[4] Indeed, the following is the only argument Mother can muster on appeal in this respect:

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pursuant to this section shall investigate and report to the court in writing at six month intervals, or as is otherwise ordered by the court, regarding the current status of the party's disability, including, but not limited to, a recommendation as to available treatment, if any, for the disability and a recommendation concerning the manner in which the court should proceed in order to best protect the interests of the party in conjunction with the court's determination as to the best interests of the child.

[4] Hawai'i Rules of Civil Procedure Rule 61 (West 2002) provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

"Mother was not given ample advice in entering into the agreement upon which the failure to comply was the stem of the placement of the child on November 5, 1998." Mother's Opening Brief at 7. This argument is wholly conclusory and hence, insufficient on appeal. Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967) (the court rule then governing opening briefs "requires specific arguments which demonstrate to this court, why a particular viewpoint should be adopted"; "generalities and assertions amounting to mere conclusions of law" cannot suffice).

(b) Mother's other point of error is that, "The court erred in finding that Mother could not provide a safe family home even with the assistance of a service plan and will not be able to provide for the child within a reasonable time in its decision filed on February 12, 2001." Mother's Opening Brief at 7. Specifically in this regard, Mother argues that the court did not give her adequate time to comply with the service plan when it set the order to show cause (OSC) hearing two months after the service plan was issued, and held the permanent plan hearing eight months after the OSC hearing. We disagree. The court did not abuse its discretion in setting the OSC hearing as it did. See HRS §§ 587-71(e) & 587-71(o) (Supp. 1999).[5] And the court

[5] HRS § 587-71(e) (Supp. 1999) provided, in relevant part, that "[i]f the child's family home is determined not to be safe, even with the assistance of a service plan pursuant to subsection (d), the court may, and if the child has been residing without the family home for a period of twelve

afforded both parents ten months, from the issuance of the service plan to the permanent plan hearing, to demonstrate that they were capable, with the assistance of the service plan, of providing a safe family home for John, their failure to take full advantage of the opportunity notwithstanding. This amount of time was eminently reasonable, *a fortiori* because the court had monitored the progress of both parents since the inception of the proceedings more than two years before, and was thereby thoroughly familiar with each parent's situation vis `a vis John. Therefore, the court's decision to set the permanent plan hearing when it did was not a "manifest abuse of discretion." In re Jane Doe, Born on June 20, 1995, 95 Hawai'i 183, 189, 20 P.3d 616, 622 (2001) (citation and internal quotation marks omitted).

(c) The underlying issue intimated in Mother's two points of error on appeal, supra, is whether substantial evidence existed to support the court's ultimate determination. Jane Doe, Born on June 20, 1995, 95 Hawai'i at 196, 20 P.3d at 629. We conclude -- in light of Mother's chronic and serious psychological problems (including floridly psychotic episodes); her inability to understand proper child care despite services; and the expert opinions adduced that Mother can never provide a

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consecutive months shall, set the case for a show cause hearing as deemed appropriate by the court[.]" At the time of the setting of the show cause hearing, John Doe (John) had been residing without the family home for a period of twelve consecutive months. HRS § 587-71(o) (Supp. 1999) provided that "[n]othing in this section shall prevent the court from setting a show cause hearing or a permanent plan hearing at any time the court determines such a hearing to be appropriate."

safe family home for John, even with the assistance of a service plan -- that substantial evidence did indeed support the court's February 12, 2001 decision. Cf. id. at 197-98, 20 P.3d at 630-31.

2. Father's Appeal

(a) Father argues that it was error for the court and DHS to proceed without an interpreter for Father at critical junctures of the case. This argument clearly lacks merit, for it is obvious from the whole record that Father had an adequate command of the English language, with or without an interpreter, and regardless of whether technical or legal subjects were at hand. Cf. Jane Doe, Born on December 15, 1982, 99 Hawai‘i at 535, 57 P.3d at 460.

(b) Father also avers that the court's initial refusal to appoint him counsel denied him due process. We disagree. For much of the interim in which he lacked counsel, Father had custody of John. As for the roughly two weeks and the one hearing during which Father was both without counsel and without custody of John, nothing in the record suggests that the proceedings were at the point that appointment of counsel for Father was necessary to adequately protect his interests. See HRS § 587-34(a); Jane Doe, Born on December 15, 1982, 99 Hawai‘i at 535, 57 P.3d at 460 ("An example of a family court proceedings [(sic)] where a person's parental rights are substantially

affected would be the combined adjudication/disposition hearings in this case, where one purpose of the hearings was to determine whether or not parental rights should eventually be terminated."). Given the circumstances, we conclude the court did not abuse its discretion in refusing to appoint counsel for Father at the outset. See HRS § 587-34(a). In any event, the record reveals no prejudice to Father's substantial rights as a result of the interim lack of counsel. Jane Doe, Born on December 15, 1982, 99 Hawai'i at 534 n.18, 57 P.3d at 459 n.18. Cf. Lassiter, 452 U.S. at 32-33. Accordingly, any error in this regard was harmless. HRCP Rule 61. Moreover, Father's entire argument on this point of error on appeal is as follows: "The court's tardy appointment of counsel below compounded the lack of an interpreter in Father's case. Not only was Father placed in the position of making critical choices and decisions, he had to do so without counsel and through the opacity of limited language ability." Father's Opening Brief at 19. As previously noted, this kind of argument is wholly conclusory and hence, insufficient on appeal. Ala Moana Boat Owners' Ass'n, 50 Haw. at 158, 434 P.2d at 518.

(c) Father next asserts that the court erred in setting the adjudication hearing date some six-and-a-half months after the return date. Father asserts that under HRS § 587-

62(b)(4) (1993),[6] the court should have set the adjudication hearing no later than ten working days after the return date. Father fails to recognize that the HRS § 587-62(b)(4) provision he relies on only applies "if the child is to remain in foster care subsequent to the return date[.]" Father had custody of John before and after the return date and thus, the provision was inapplicable. Thereafter, and even after DHS had again assumed TFC of John, Father failed to object to the adjudication hearing date, even though he was represented by counsel for most of that interim. At any rate, Father fails to advance any argument of prejudice as a result of the alleged statutory violation. HRCP Rule 61.

(d) Father also argues that the court failed to provide him services and visitation pending the adjudication hearing. This argument lacks merit. The court provided for visitation, and the record shows that Father participated in numerous visitation sessions with John. Moreover, throughout the period of time in question, DHS made numerous efforts to engage both parents in services, their spotty record of utilization notwithstanding.

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[6] HRS § 587-62(b)(4) (1993) provides, in relevant part, that, "if the child is to remain in foster care subsequent to the return date, the court shall set the case for an adjudication hearing or a disposition hearing within ten working days of the return date, unless the court deems a later date for the hearing to be in the best interests of the child or the later date is agreed to by all parties and is approved by the court."

(e) Father laments that the court erred in setting the OSC hearing too soon after the issuance of a service plan. We disposed of an identical argument in Mother's appeal, supra. Based upon the same reasoning, we conclude it is similarly defective here. See HRS §§ 587-71(e) & 587-71(o).

(f) Citing testimony he gave during the hearing on the motions for reconsideration, Father asserts that the court erred in not finding that he had informed DHS about Rosita Sarmiendo's (Sarmiendo)[7] imminent move to Honolulu, which purportedly would have established that he was willing and able to comply with the safety plan. This point of error is without merit. The court simply did not believe his testimony. From the court's decision on the motions for reconsideration:

> Father's multiple versions of the events surrounding the incident of 10/15/98 combined with his consistent position that mother posed no threat to the child lead the Court to a conclusion that his credibility is greatly suspect and that he did in fact, consciously ignore the court ordered safety plan.

We do not presume to review the court's determinations, such as this one, on the credibility of witnesses and the weight of the evidence. Jane Doe, Born on June 20, 1995, 95 Hawai'i at 190, 20 P.3d at 623 ("It 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

[7] Rosita Sarmiendo is John's paternal aunt, one of several alternate supervisors of Mother's contacts with John in Father's home.

fact." (Brackets, ellipsis, citations and internal quotation marks omitted.)).

(g) Father also argues that the outcome of his case would have been different had certain questions been asked of him, or asked in a different way. For example, Father testified that he would leave John in Mother's unsupervised care, which given Mother's condition was an obviously perilous choice; Father complains on appeal that he was never asked what he would do under DHS requirements. This point of error is purely speculative and we decline to review it.

(h) Father complains that the service plan provision requiring that he establish his paternity of John was superfluous in light of his status as the presumed natural father; therefore, the court's finding that the service plan was appropriate was clearly erroneous in this regard. How this alleged error prejudiced Father eludes us, and Father does not deign to enlighten us in this respect. This point of error must therefore fail. HRCP Rule 61.

(i) Father next asserts that he received ineffective assistance of counsel during the proceedings below. Assuming, *arguendo*, that once counsel is appointed in a termination of parental rights case, due process requires that counsel's assistance be effective, see, e.g., In re D.D.F. and S.D.F., 801 P.2d 703, 707 (Okla. 1990) ("The right to counsel would be of no

consequence if such counsel were not required to represent the parent in a manner consistent with an objective standard of reasonableness." (Citation omitted.)), and assuming, further *arguendo*, that the standard of review for effectiveness of counsel in criminal cases would apply, we conclude that Father's counsel did not commit "specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence . . . that . . . resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Domingo v. State, 76 Hawai'i 237, 241, 873 P.2d 775, 779 (1994) (citation and internal quotation marks omitted). In this respect, Father complains that his counsel failed to adequately communicate with him about his case and that, as a result, counsel failed to bring forth the Sarmiendo information and failed to pursue the possibility of a prophylactic restraining order against Mother. However, there was no prejudice in the former result, because substitute counsel did elicit testimony from Father that he had informed DHS about Sarmiendo's imminent move to Honolulu, but the court simply did not believe him. And there was no error or omission in the latter, for by Father's own admission, counsel recommended that Father obtain a restraining order against Mother, but Father rejected counsel's advice because he did not want to break up the family.

(j) For his final contention on appeal, Father urges us to stiffen the standard of proof for terminating parental rights, from "clear and convincing" to "beyond a reasonable doubt." We cannot. HRS §§ 587-41 (1993) & 587-73 (Supp. 2002); Woodruff v. Keale, 64 Haw. 85, 100-101, 637 P.2d 760, 770 (1981).

Therefore,

IT IS HEREBY ORDERED that the court's February 12, 2001 and June 19, 2001 orders are affirmed.

DATED: Honolulu, Hawai'i, June 20, 2003.

On the briefs:

Stephanie St. John,
for mother-appellant.

Chief Judge

Julie Kai Barretto,
for father-appellant.

Associate Judge

Nolan Chock,
Mary Anne Magnier,
Jay K. Goss,
Deputy Attorneys General,
State of Hawai'i,
for appellee.

Associate Judge