NO. 24712

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

In the Interest of DOE CHILDREN:
JOHN DOE, Born on November 4, 1992,
JANE DOE, Born on March 10, 1994, and
JANE DOE, Born on January 5, 1998, Minors

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 00-06719)

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

The mother (Mother) of John Doe, born November 4, 1992, Jane Doe 1, born March 10, 1994, and Jane Doe 2, born January 5, 1998 (collectively "the Doe Children"), appeals from Judge Lillian Ramirez-Uy's January 4, 2002 "Order Awarding Permanent Custody as to [John Doe and Jane Doe 1]."

Specifically, Mother challenges Judge Ramirez-Uy's November 13, 2001 "Orders Concerning Child Protective Act" (November 13, 2001 Order), which denied Mother's "Motion for Reconsideration and Further Hearing or, in the Alternative, for an Order to Set Aside Mother's Agreement to Permanent Custody" filed on October 25, 2001. Mother argues as follows:

> A. On October 5, 2001 and November 13, 2001, the court below erred by failing to hold a confirmation hearing in order to assess whether the terms of the agreement were appropriate and enforceable.

> B. On October 5, 2001 and November 13, 2001, the court below erred by failing to inquire whether [Mother] voluntarily, knowingly and intelligently entered into the October 5, 2001 agreement.
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> C. On November 13, 2001 the court below erred in finding that there was no basis to repudiate the October 5, 2001 agreement when, in fact, there was no meeting of the minds of the parties because [Mother] failed to understand the terms of the agreement.
>
> D. The family court's findings of facts entered on January 4, 2002 are not supported by substantial evidence in the record justifying their entry.
>
> E. The family court's conclusions of law entered on January 4, 2002 are erroneous because said conclusions were based on findings of facts which are not supported by substantial evidence.

We affirm.

BACKGROUND

On May 26, 2000, the Doe Children were placed in protective police custody because of alleged physical abuse, neglect, and the threat of domestic violence. On June 1, 2000, the Department of Human Services of the State of Hawai‘i (the DHS or the State) filed a petition, pursuant to Hawaii Revised Statutes (HRS) Chapter 587 (Child Protective Act), seeking temporary custody of the Doe Children because of the alleged threat of imminent harm from their parents.

Effective June 5, 2000, Judge R. Mark Browning appointed Byron K. H. Hu as Guardian Ad Litem (GAL) of the Doe Children and Thomas A. K. Haia as counsel for Mother (MC).

At a hearing held by Judge Bode A. Uale on June 5, 2000, Mother was served copies of the summons, petition, and June 1, 2000 Safe Family Home Report. Mother agreed to the jurisdiction of the family court and stipulated to temporary foster custody by the DHS.

The court accepted jurisdiction, awarded temporary foster custody to the DHS, and ordered the implementation of Service Plan #1, dated June 1, 2000. It noted that the "Parents' domestic violence, inappropriate parenting skills, and high risk concerns for abuse and neglect of their children with severe special needs, have led to their inability to provide a safe and clean home for the children." It listed sundry objectives and, with respect to Father, sundry things to be done.

Effective September 28, 2000, Judge Karen M. Radius appointed Kevin Adaniya as counsel (FC) for the father of the Doe Children (Father).

A review hearing was held on November 20, 2000, and Judge Linda K. C. Luke presided. Father was served copies of the summons, petition, the June 1, 2000 Safe Family Home Report, and Service Plan #1. Father agreed to the family court's jurisdiction and foster custody and the court ordered implementation of Service Plan #2, dated October 25, 2000.[1] Regarding Father, it was essentially the same as Service Plan #1.

At a review hearing on February 12, 2001, Judge Luke included Mother's boyfriend/fiancé (Boyfriend) as a party in the case. At the conclusion of the hearing, the court ordered

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[1/] We note that after the title page, the pages of Service Plan #2 have the date, "June 1, 2000[,]" typed in the upper left-hand corner. We also note the court stated that the Safe Family Home Report furnished Father was dated June 1, 2000, while the Safe Family Home Report received in evidence was dated October 25, 2000.

continued foster custody, the implementation of Service Plan #3, dated January 26, 2001, and the initiation of concurrent planning for the possible award of permanent custody to the DHS. Regarding Father, Service Plan #3 was essentially the same as Service Plan #2.

On July 10, 2001, the DHS filed a "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan" (July 10, 2001 Motion). Attached was the affidavit of Adele Tomoyasu (Tomoyasu), the DHS social worker assigned to the case. Tomoyasu stated that clear and convincing evidence supported her conclusions as follows:

> a. That [Mother and Father] are not presently willing and able to provide the children with a safe family home, even with the assistance of a service plan;
>
> b. That it is not reasonably foreseeable that [Mother and Father] 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; and
>
> c. The proposed permanent plan [(permanent plan or June 23, 2001 permanent plan)] . . . which nominates the DHS as the proposed permanent custodian, is in the best interests of the children[.]

On July 27, 2001, Mother filed a "Memorandum in Opposition to Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan Filed Herein on July 10, 2001" (Memorandum in Opposition). Mother argued that she was "in compliance with court-ordered and DHS-recommended services[,]" consequently, the July 10, 2001 Motion was premature. Attached to the Memorandum in Opposition was the affidavit of Carla A.

Stephany, a specialist employed by the Child and Family Services (C&FS), and Ruth Pinder, a case manager employed by the C&FS. Both stated that during visits with the Doe Children, Mother's actions were appropriate.

At a review hearing on July 30, 2001, Judge Luke ordered continued foster custody, the continued implementation of Service Plan #3, and the default of Father and Boyfriend for failure to appear. The court also ordered the DHS to provide updates from service providers specifically addressing John Doe's behavior after Mother's visits. The court continued the DHS' July 10, 2001 Motion.

Father appeared at the next review hearing held August 29, 2001, and the default entered against him was set aside. Judge Luke ordered continued foster custody, the continued implementation of Service Plan #3, an August 31, 2001 hearing for Mother only to determine the parameters for Mother's visits with the Doe Children, and an October 26, 2001 pretrial conference for all parties.

At the August 31, 2001 hearing, Judge Ramirez-Uy ordered all of the parties to appear at a Judicial Pretrial Assistant Mediation (JPAM) on October 5, 2001.

At the October 5, 2001 hearing, post-JPAM, Father was defaulted for failure to appear and Boyfriend was dismissed as a

party. The remaining parties informed the court of an agreement, and stated, in relevant part, the following:

> [Deputy Attorney General (DAG)]: So based on . . . the meetings of the parties and the representatives this morning it's my understanding that there is an agreement to -- first of all in [Jane Doe 2's] case there will be a withdrawal by the [DHS] as to the Motion For Permanency.
>
> We're going to ask that the Court continue foster custody as to that child and set it for a six month review date and also continue the service plan in effect.
>
> THE COURT: Okay.
>
> [DAG]: As to [Jane Doe 1 and John Doe], your Honor. There is pending an -- as you know, with the trial a Motion For Permanent Custody. We are asking that the Motion be granted and that it's agreed to at least by [Mother] at this point and to set aside both pre-trial and the trial.
>
> It's my understanding that the permanent plan is to be amended such that legal guardianship is now the goal of the permanent plan for the two children. . . .
>
> . . . .
>
> [MC]: Your Honor, understood -- [Mother] represented to me that the [DHS] was willing to permit the children to have contact with [Mother] after the guardianship and so I would like that the permanent plan include an amendment or modification to permit a contact between the children and [Mother].
>
> . . . .
>
> [DAG]: It's my understanding that DHS did agree that they are going to meet with the proposed prospective guardians to facilitate that.
>
> That DHS does not have any objections to that and will help in facilitating those meetings. Of course, we cannot -- once the guardianship is granted that would be within the full discretion of the guardian and I want to make sure that that's clear. . . .
>
> ([MC] and [Mother] conferring.)
>
> . . . .
>
> [MC]: You understand that?
>
> [Mother]: (No audible response.)
>
> [MC]: Your have to say out loud.
>
> [Mother]: I do.

[MC]: You do understand and you still are in agreement?

[GAL]: She's nodding her head. It's a non-verbal.

THE COURT: Okay.

[MC]: She's nodding yes or no, [GAL]?

[GAL]: She's nodding yes.

[MC]: Okay.

THE COURT: Yes.

. . . .

[MC]: Is it okay for them to dismiss [Boyfriend]?

[Mother]: Yeah.

. . . .

[DAG]: . . . .

We're asking that the findings would include based on the record of evidence presented the Court finds by clear and convincing evidence that pursuant to HRS [§] 587-73 that [Mother] and [Father] are not -- presently not willing and able to provide the children with a safe home even with the assistance of a service plan.

And it is not reasonably foreseeable that the children's [Mother and Father] will become willing and able to provide the children with a safe family home even with the assistance of a service plan with [sic] a reasonable time.

And that the proposed permanent plan is in the best interest of the children . . . .

. . . .

These terms set forth in the permanent plan as modified by the new goal of legal guardianship dated January 23rd, 2001 is ordered by the Court and a copy of the plan is attached to the order of [sic] Exhibit A incorporated therein and made a part of the order.

. . . .

THE COURT: Okay.

Thank you.

[FC], no position?

[FC]: Given the Court's prior finding of the default of my client, your Honor, no position.

THE COURT: Thank you.

> [MC]?
>
> [MC]: Just that the permanent plan be . . . amended as per agreement.
>
> THE COURT: All right.
>
> [MC]: And the record should reflect that [Mother] stipulated to the permanent custody of the two children.
>
> THE COURT: All right.
>
> . . . .
>
> [GAL]: Agree, your Honor.
>
> [THE COURT]: Okay.

On October 25, 2001, Mother filed a "Motion for Reconsideration and Further Hearing or, in the Alternative, for an Order to Set Aside Mother's Agreement to Permanent Custody" (Motion for Reconsideration). In her attached Declaration, Mother stated, in relevant part, the following:

> 7. After meeting with the social worker, I decided to agree to terminate my parental rights to the two older children - [John Doe and Jane Doe 1];
>
> 8. I have since met with my children and they told me they want to come home;
>
> 9. I made a mistake and believe that I can provide the children with a safe home;
>
> 10. I would like to have a chance to prove that I can have my children with me;
>
> 11. Therefore, I want to withdraw my agreement to terminate my parental rights to the two children and want a trial on the department's motion[.]

A hearing on Mother's Motion for Reconsideration was scheduled for November 7, 2001, but Mother failed to appear and the hearing was continued until November 13, 2001. At the November 13, 2001 hearing, Mother testified, in relevant part, as follows:

Q. . . . .

[What] was going through your mind when you decided to voluntarily terminate your rights to [John Doe and Jane Doe 1] . . . ?

A. I was exhausted that day. I had got through working thirteen hour shift at work and I was tired.

. . . .

Q. . . . .

And had you earlier thought about terminating -- voluntarily terminating your parental rights to [Jane Doe 1 and John Doe]?

A. Only with the assumption that the kids would be with my parents.

. . . .

Q. So, you had thought about terminating your parental rights?

A. Yeah, and give 'em to my parents until I can get my life straightened out.

Q. Do you feel that your life isn't straightened out right now?

A. It could be better than it is now, but yes, it is.

. . . .

Q. . . . [What] do you mean by "you got cornered"? What -- explain that to me.

A. Placed in a situation where everybody was asking me all their different questions all at one time and telling each other that there's no way you're going to get your kids back and -- hearing all negative things all in that one room, all at once, saying you're not going to get your kids back, you're not going to be able to do this, you're not going to be able to do that.

. . . .

Q. Do you believe you made an informed decision when you decided to agree to terminate your parental rights to [Jane Doe 1 and John Doe]?

A. No.

Q. Why don't you feel it was an informed decision?

A. Because I shouldn't have been placed in that position where I'm tired, exhausted and stressed out and asked to make a decision for the rest of my life all at once.

. . . .

Q. Did you voluntarily make [the] decision?

A. No. I felt pressured into the decision.

On cross-examination by the DAG, Mother testified, in relevant part, as follows:

> Q. Isn't it true that on October 5th when you made [the] agreement, the court asked you -- the judge asked you is there anything that is forcing you to make this agreement, and you said no? Isn't that true?
>
> A. Yes.
>
> . . . .
>
> Q. But on October 5th you willingly made this decision because you believed it was in their best interest to be able to go into a guardianship, correct?
>
> A. With the assumption that they'd be able to keep in contact with me.
>
> Q. You testified that you wanted the two to keep in touch with you, but you also testified that you understood that [Tomoyasu] was going to place the children wherever she felt it was best, whether that would be with relatives or not. Did I hear you correct -- you did testify you understood that [Tomoyasu] was going to place the kids wherever she felt it was best?
>
> A. Yes.
>
> . . . .
>
> Q. [Mother], when you agreed to have your parental rights terminated on October 5th, you understood that you were giving up a right to have a trial, correct?
>
> A. No. I thought I was agreeing to the kids being placed in guardianship. I didn't know that that meant no trial or any other court dates thereafter.
>
> Q. Did you think you were still going to have a trial?
>
> A. Yes.
>
> Q. What did you think the issue at the trial was going to be?
>
> A. Who the kids would be placed with.
>
> . . . .

Q. Did the court tell you that?

A. No. I assumed it.

Q. Well, isn't it true that the court told you on October 5th that your agreement would take the trial off the calendar?

A. Yes.

Q. And so after the court told you that, you stopped assuming it, correct?

A. Yes.

After Mother finished testifying, Tomoyasu and the GAL both testified for the State that Mother was not pressured into making her decision. Tomoyasu testified that she asked Mother "if she understood that . . . if she did give legal guardianship, it would mean a termination of her parental rights. And [Mother] said yes, she understood." The GAL testified that he and Mother did not discuss "any agreement or guarantees regarding what's going to happen after she terminated her parental rights."

At the conclusion of the hearing, MC argued "in the alternative, that [Mother] simply changed her mind and that she should be able to have relief from the agreement under Rule 60(b) of the Hawaii Family Court Rules."

At the conclusion of the November 13, 2001 hearing, Judge Ramirez-Uy orally found "[that] [Mother] did in fact agree voluntarily, knowingly and intelligently to the substance of the agreement" and denied Mother's Motion for Reconsideration. On November 20, 2001, Mother filed a notice of appeal. On January 4,

2002, the court entered its "Findings of Fact and Conclusions of Law" (FsOF and CsOL).

STANDARDS OF REVIEW

Motion for Reconsideration

The purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments, not to re-litigate old matters or raise arguments or evidence that could and should have been brought during the earlier proceeding. Association of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002). We review "[a] trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Id.

Abuse of Discretion - Family Court

When reviewing family court decisions for an abuse of discretion, it is well established that

> [t]he "family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion." Thus, we will not disturb the family court's decisions on appeal unless "the family court 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, Born on June 20, 1995, 95 Hawai'i 183, 189-90, 20 P.3d 616, 622-23 (2001) (citations omitted).

Findings of Fact and Conclusions of Law - Family Court

Findings of fact are reviewed under the "clearly erroneous" standard. In re Jane Doe, Born on May 22, 1976, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (citations omitted). "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, 777-78 (App. 1999). "Substantial evidence" is defined as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (quoting Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 253, 948 P.2d 1055, 1094 (1997) (internal quotation marks and block quotation format omitted)).

Conclusions of law are reviewed *de novo* under the right/wrong standard. In re Jane Doe, 84 Hawai'i at 46, 928 P.2d at 888 (citations omitted).

DISCUSSION

A.

Citing In re Jane Doe, Born on June 29, 1994, 90 Hawai'i 200, 978 P.2d 166 (App. 1999),[2] Mother contends that the October 5, 2001 agreement was a settlement agreement designed to resolve the

[2/] A settlement agreement is "an agreement to terminate, by means of mutual concessions, a claim [that] is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation." In re Jane Doe, Born on June 29, 1994, 90 Hawai'i 200, 208, 978 P.2d 166, 174 (App. 1999) (quoting Sylvester v. Animal Emergency Clinic of Oahu, 72 Haw. 560, 565-66, 825 P.2d 1053, 1056 (1992) (internal quotation marks omitted)).

dispute between her and the DHS over custody of the Doe Children. Mother avers that because it was a settlement agreement, "the family court was required to set a confirmation hearing in order to scrutinize the terms of the agreement to assess the appropriateness and enforceability of the agreement[.]" In support of her argument, Mother cites In re Jane Doe, 90 Hawai'i at 211, 978 P.2d at 177, wherein this court stated that "[w]e agree that a confirmation hearing should have been held[.]" In that case, however, unlike the instant case, the parties stipulated and the court ordered, *inter alia*, "[that] *all parties shall appear for a confirmation hearing on this Stipulation and Order for Permanent Custody of [Child][.]*" (Emphasis in original.) Id. at 205, 978 P.2d at 171. The command in the cited opinion that "before he or she approves of and orders a settlement agreement into effect, a family court judge is duty bound, independent of the request or acquiescence of any party, to scrutinize the settlement agreement for the purpose of determining whether it is appropriate and enforceable[,]" Id. at 211, 978 P.2d at 177, does not require a confirmation hearing.

The terms of the agreement were simple. Mother relinquished permanent custody of Jane Doe 1 and John Doe, the DHS agreed to meet with the proposed prospective guardians to facilitate contact between Mother and Jane Doe 1 and John Doe at the discretion of the guardians, and the DHS withdrew its motion

for permanent custody as to Jane Doe 2. Statements were made by all parties indicating that they understood the agreement, the agreement was read into the record, and Mother stipulated to the DHS' permanent custody of Jane Doe 1 and John Doe. Further scrutiny and a separate confirmation hearing by the family court were not required.

B.

Mother asserts that the family court erred because it did not engage in a colloquy with her and inquire "as to the nature of [her] assent to the agreement." We disagree.

Parental custody of minor children is a fundamental right and any waiver thereof must be voluntarily, knowingly, and intelligently given. The Hawai‘i Supreme Court has said "'[t]o determine whether a waiver was voluntarily and intelligently undertaken, this court will look to the totality of facts and circumstances of each particular case.'" State v. Friedman, 93 Hawai‘i 63, 68-69, 996 P.2d 268, 273-74 (2000) (citations omitted).

At the October 5, 2001 hearing, Mother indicated she understood the terms of the agreement and was willing to abide by them. In contrast, at the November 13, 2001 hearing, Mother stated that her "waiver" was not voluntary, that she was "tired, exhausted, and stressed out," and that she was pressured into relinquishing custody.

In a criminal context, the Hawai‘i Supreme Court has stated that a party's "mental and physical condition can be part of the 'totality of circumstances' relevant to the issue of the voluntariness of his or her custodial statements[,]" State v. Kelekolio, 74 Haw. 479, 503, 849 P.2d 58, 69 (1993) (citations omitted), and that lack of sleep, by itself, does not render statements involuntary as long as the deprivation was "not the product of any impermissible scheme on the part of [government officials] to lower [the person's] resistance or render him susceptible to improper suggestion[.]" *See* Id. at 504, 849 P.2d at 70.

The same rule applies in the context of a parent consenting to permanent custody of the parent's child by the DHS. Assuming, as stated by Mother, that Mother worked from 5:30 p.m. on October 4, 2001, to 6:00 a.m. on October 5, 2001, and then caught the bus straight to the courthouse where the hearing commenced at 11:11 a.m., her lack of sleep was only a part of the "'totality of circumstances'" relevant to the issue of whether Mother entered into the agreement voluntarily, knowingly, and intelligently.

Although Mother alleged that she was "cornered" and "pressured" by Tomoyasu and the GAL, Mother admitted testifying at the October 5, 2001 hearing that no one forced her to make the agreement. During cross-examination at the November 13, 2001 hearing, Mother also testified, in relevant part, as follows:

> Q. You also do not mention in [the] declaration that you

filed in support of this motion [for reconsideration] that you didn't feel like you had a choice no matter what you do, is that correct?

A. Yes.

Q. And you don't say in there that Ms. Tomoyasu pressured you in any way, is that correct?

A. Yes.

. . . .

Q. You don't say anything in that declaration about being cornered in the mediation room by the GAL, the mediator, the social worker and [your] attorney, is that correct?

A. Yes.

Q. And you don't say anything about feeling like you were under too much stress, do you?

A. No.

. . . .

Q. This declaration does not say your agree -- your agreement was involuntary, correct?

A. I changed my mind.

Q. . . . . In fact, at the time you made your agreement, that was what you wanted to do, correct?

A. Yes.

. . . .

Q. . . . [On] October 5th you willingly made this decision because you believed it was in [the Doe Children's] best interest to be able to go into a guardianship, correct?

A. With the assumption that they'd be able to keep in contact with me.

Q. You testified that you wanted the two to keep in touch with you, but you also testified that you understood that [Tomoyasu] was going to place the children wherever she felt it was best, whether that would be with relatives or not. . . .

A. Yes.

As stated above, both Tomoyasu and the GAL denied pressuring Mother.

Although a colloquy may have avoided the motion at issue in this appeal, a colloquy was not required. The October 5, 2001 hearing provided ample information for the judge to decide that Mother entered into the agreement voluntarily, knowingly, and intelligently. The November 13, 2001 hearing provided ample information for the judge to decide that Mother's Motion for Reconsideration was motivated by the fact that Mother later "changed [her] mind."

Mother also argues that the agreement was "unenforceable because there was no 'meeting of the minds' as to the essential terms of the agreement." This argument is without merit. The testimony from the October 5, 2001 and November 13, 2001 hearings indicate that Mother was aware of those terms and voluntarily, knowingly, and intelligently agreed to them.

C.

1.

FOF No. 4 states, in relevant part, that "[a]t the review hearing on November 20, 2000, . . . [b]oth Mother and Father agreed to the February 12, 2001 service plan, which, along with continued foster custody, was ordered."

Mother states that "[FOF] No. 4 is clearly erroneous because [Mother] and [Father] agreed to Service Plan No. 2 dated October 25, 2000, not the February 12, 2001 service plan. . . .

Additionally, the February 12, 2001 service plan was not ordered following the November 20, 2000 hearing."

We agree that there was no "February 12, 2001 service plan" and that FOF No. 4 is, to that extent, erroneous. After the November 20, 2000 hearing, Mother and Father agreed to, and the court ordered, the October 25, 2000 Service Plan #2 into effect. In its FsOF, the court erred in naming the date.[3] The Hawai'i Supreme Court has said that appellate courts should not review error in isolation, but should examine it in the light of the entire proceedings and give it the effect to which the entire record shows it is entitled. State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981). Complying with that instruction in the instant case, we conclude that the court's error as to the date of Service Plan #2 was harmless.

2.

FOF No. 10 states, in relevant part, that "[w]hen the parties went into the hearing to put the stipulation on record in front of the Court, Mother, with her counsel present, voluntarily, knowingly, and intelligently agreed to have her parental rights to [John Doe] and [Jane Doe 1] terminated." Mother argues that FOF No. 10 is erroneous because the court never inquired or determined whether Mother voluntarily, knowingly, and intelligently agreed to

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[3/] The court's reference to a "February 12, 2001 service plan" was *de facto* accurate. At the February 12, 2001 hearing, Service Plan #3, dated January 26, 2001, was ordered. The record shows that both Father and Mother agreed to Service Plan #3.

terminate her parental rights. As noted above, the court was not required to conduct a colloquy with Mother. FOF No. 10 is not clearly erroneous.

Mother makes the same argument regarding FsOF Nos. 34 and 49 and we render the same decision regarding them.

3.

Mother challenges FOF No. 13. It states, in relevant part, that "Mother's feelings of guilt brought on by her decision to give up her parental rights and her subsequent change of heart did not invalidate Mother's voluntary, knowing and intelligent agreement to permanent custody." Mother contends that "there was never a determination that [Mother] voluntarily, knowingly and intelligently entered into the permanent custody agreement as to John Doe and Jane Doe 1." It appears that Mother does not understand that, pursuant to Hawai‘i Family Court Rule 52(a), the family court is not required to enter findings and conclusions until a notice of appeal is filed with the court and that the FsOF and CsOL are the findings and conclusions in the case.

4.

FsOF Nos. 22 and 23 state, in relevant part, as follows:

> 22. . . . [John Doe] experiences nightmares, intrusive flashbacks, and repetitive acting out of physical and verbal abuse, all of these are attributed to his history of abuse, trauma, and neglect from his family of origin. His behaviors tend to deteriorate after each visit with Mother.
>
> 23. . . . . [Jane Doe 1] experiences temper tantrums, was not properly toilet trained, and still experiences periodic episodes of encopresis. She masturbates frequently. Her behaviors tend to deteriorate after each visit with Mother.

Mother argues that FsOF Nos. 22 and 23 are erroneous because the family court did not find a causal relationship between John Doe and Jane Doe 1's inappropriate behaviors and visits with their Mother. We agree that the family court did not find a causal relationship but see no error.

5.

Mother asserts that FsOF Nos. 35 and 36 are erroneous because, contrary to the court's findings, Mother is currently able and, in the foreseeable future, will be able to provide a safe family home for the Doe Children. Mother argues that the DHS would not have withdrawn its motion for permanent custody as to Jane Doe 2 and would not be trying to reunify Mother and Jane Doe 2, if Mother were not able to provide a safe family home.

Mother's logic is flawed. John Doe and Jane Doe 1 have serious mental and physical disorders and require specialized care by experienced, professional caregivers. Although Jane Doe 2 does not face the same difficulties and has been improving in all areas since being placed in foster care, even she requires special education classes and constant attention. In light of each child's special needs, there is substantial evidence that Mother cannot provide a safe family home for all three even with the services afforded her. She may, with assistance, eventually be able to provide a safe environment for Jane Doe 2.

6.

FsOF Nos. 46, 47, and 48 find that the DHS made reasonable efforts on behalf of the family by offering services that were fair, appropriate, and comprehensive and that "there [was] nothing more that the social workers could have done to work towards reunification."

Mother argues FsOF Nos. 46, 47, and 48 are erroneous because the DHS did not exert reasonable efforts to reunify the family and resolve the parents' problems. Mother asserts that the fact that the three service plans provided by the DHS are identical shows that "no thought was put into what services were to be recommended." (Emphasis in original.)

Service Plans #2 and #3 were reviewed and updated prior to August 31, 2001, to address problems related to Mother's visits with the Doe Children[4] and to reflect the addition of Boyfriend as a party. Even assuming the three service plans are essentially the same, that fact does not prove Mother's point. Moreover, we note that Mother does not specify any changes she thinks should have been made.

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[4] Service Plan #2 (October 25, 2000), filed November 20, 2000, as "Exhibit A," under "Section IV. Visitation Schedule," added the following to Service Plan #1 (June 1, 2000):

> 6. Visits scheduled with PACT (Parents And Children Together) will be conducted according to the procedures and policies of PACT. Parents are required to abide by those policies and procedures.

Dr. Lynne G. Nelson, Licensed Clinical Psychologist, in her August 10, 2001 Psychological Update filed August 29, 2001, recommended sexual abuse,[5] neurological,[6] and hearing evaluations[7] for Jane Doe 1. Mother argues that the DHS did not make reasonable efforts to help Jane Doe 1 because these evaluations were not conducted. Mother ignores two relevant facts. First, Jane Doe 1 was undergoing regular physical and psychological examinations. Second, Dr. Nelson's report also stated, in relevant part, as follows:

> After the above suggestions of a sexual abuse evaluation, a hearing test, and a neurological evaluation have been completed, the appropriateness of reunification should be considered. It should be taken into account at that time, that if reunification with [Mother] is decided upon, [Jane Doe 1] will continue to need much individual attention. This will be difficult with only [Mother] to care for three high needs children and intensive and long term supportive services will need to be put in place if this is the decision.

[5/] In her August 10, 2001 Psychological Update, Dr. Lynne G. Nelson, Licensed Clinical Psychologist, stated that "[b]ecause of her history of allegations of sexual abuse by her father and brother, I have suggested that a thorough sexual abuse evaluation be conducted. . . . I have been informed that although an investigation was requested that this could not be looked into until a specific perpetrator was named."

[6/] In her August 10, 2001 Psychological Update, Dr. Nelson stated that "[a] neurological examination is recommended to see if [Jane Doe 1's] behaviors are due to a previous drowning incidence wherein she was reported to be unconscious for 10 minutes." She further stated that "[Mother's] explanation for the near drowning incidence in the bathtub . . . [was that] [Jane Doe 1] and [John Doe] [were] . . . left with [Father] and [John Doe] pulled [Jane Doe 1] in the bathtub with him."

[7/] In her August 10, 2001 Psychological Update, Dr. Nelson stated that "[i]f [Jane Doe 1] has not had a hearing test in the past, it is recommended that she have one as soon as possible." She further stated that "[i]t is recommended that a hearing test be administered to assess if [Jane Doe 1's] behaviors or delayed receptive and expressive language are related to a hearing loss due to previous ear infections."

7.

FOF No. 50 states that "[t]he permanent plan proposed by the DHS which recommends adoption is in the best interests of the children because it affords the stability and security which the children need and deserve, and which their parents cannot provide." Mother argues that FOF No. 50 is erroneous because "[a]lthough the permanent plan dated June 23, 2001 identifies adoption as the goal, at the October 5, 2001 hearing, the [DAG] stated that the permanency goal was amended to be legal guardianship."

We agree that the court erred. As noted above, at the October 5, 2001 hearing, the DAG stated as follows:

> It's my understanding that the permanent plan is to be amended such that legal guardianship is now the goal of the permanent plan for the two children. They're both in two separate homes at this time and that's going to continue at best in the foreseeable future.
>
> And that we set this matter for a permanent plan review to be held in six months, your Honor.
>
> . . . .
>
> These terms set forth in the permanent plan as modified by the new goal of legal guardianship dated January 23rd, 2001 is ordered by the Court and a copy of the plan is attached to the order [as] Exhibit A incorporated therein and made a part of the order.

When the court filed its FsOF and CsOL on January 4, 2002, it relied on the June 23, 2001 Permanent Plan filed with the court as Exhibit A. That plan did not contain the amended provision changing the goal to legal guardianship.

For two reasons, however, we conclude that the error is harmless. First, the DAG, in reading the terms of the agreement into the record, said, in relevant part: "The Director of the

[DHS] is appointed as permanent custodian. . . . [U]ntil the children reach the age of eighteen or are adopted[,] the permanent custodian is awarded each of the parental and custodial duties and rights set forth in [HRS §] 587-2. . . .[8] [T]ransfer of permanent custody shall continue in effect until the children are legally adopted." (Footnote added.) Clearly, adoption was contemplated as part of the agreement.

Second, HRS § 571-2 (1993), in relevant part, defines the "guardianship of the person of a minor" as:

> the duty and authority to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned about the minor's general welfare. It includes but shall not necessarily be limited in either number or kind to:
>
> . . . .
>
> (4) The authority to consent to the adoption of the minor and to make any other decision concerning the minor which the minor's parents could make, when the rights of the minor's parents, only living parent, have been judicially terminated as provided for in the statutes governing termination of parental rights to facilitate legal adoption[.]

[8/] Hawaii Revised Statutes § 587-2 (1993) provides, in relevant part, the following:

> "Permanent Custody" means the legal status created under this chapter by order of the court after the court has considered the criteria set forth in section 587-73(a) or (e) and determined by clear and convincing evidence that it is in the best interests of the child to order a permanent plan concerning the child.
>
> (1) Permanent custody divests from each legal custodian and family member who has been summoned pursuant to section 587-32(a), and vests in a permanent custodian, each of the parental and custodial duties and rights of a legal custodian and family member, including, but not limited to, the following:
>
> . . . .
>
> (E) To provide consent to adoption[.]

It is within the legal guardian's authority to consent to adoption if that is in the children's best interests. Modification of the permanent plan to change the goal from adoption to legal guardianship does not affect the termination of Mother's parental rights or the responsibility of the legal guardian to recommend adoption if that is in the children's best interests.

Mother contends that CsOL Nos. 3 through 6 are wrong because they are based on clearly erroneous FsOF. Our decision that the cited errors in the FsOF are harmless and that the FsOF are otherwise not clearly erroneous moots this point.

CONCLUSION

Accordingly, we affirm the family court's January 4, 2002 "Order Awarding Permanent Custody as to [John Doe and Jane Doe 1]," and the November 13, 2001 "Orders Concerning Child Protective Act."

DATED: Honolulu, Hawai‘i, June 5, 2003.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge