NO. 24769

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF JANE DOE, BORN ON NOVEMBER 27, 1991, A MINOR

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 98-05387)

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

Father and Mother (collectively, the Parents) each appeal the October 23, 2001 order of the family court of the first circuit[1] that awarded permanent custody of their daughter, born on November 27, 1991 (the Child), to the Director of the Department of Human Services (DHS). The Parents also each appeal the December 7, 2001 order of the family court that denied their respective motions for reconsideration.

After a careful 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 Parents' points of error as follows:

A. Father's Appeal.

1. Father avers that the family court clearly erred when it found (finding of fact (FOF) 103):

[1] The Honorable Lillian Ramirez-Uy, judge presiding.

> DHS had exerted reasonable and active efforts to avoid foster placement of the Child by offering Mother and Father services immediately and by continuing to offer her [(sic)] services.

Father contends that DHS prejudicially: (1) delayed retaining Dr. Craig Robinson (Dr. Robinson) to replace Anthony Troche (Troche) as Father's sexual abuse therapist,[2] and (2) failed to facilitate the court-ordered psychological evaluation by Dr. June Ching (Dr. Ching). We disagree. DHS provided Father a reasonable opportunity to immediately receive sexual abuse counseling from Troche, which would have consisted of psychosexual education regarding the dynamics of sexual abuse and its effects upon victims. Father chose not to attend this program, which would have accepted him even though he was unwilling to admit he had sexually abused the Child (FOF 95).[3] That Dr. Robinson was not retained as quickly as Father would have liked does not render DHS's efforts unreasonable, because DHS arranged, within one month of court order, alternative sexual abuse counseling which was carefully considerate of Father's refusal to admit. That Dr. Ching did not conduct the psychological evaluation ordered by the court does not reflect a lack of reasonable effort on the part of DHS to provide

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[2] The family court found that Father had sexually abused the Child (findings of fact (FsOF) 13, 92 & 94; conclusion of law 8). In addition, the family court found that Mother and Father were not credible witnesses (FsOF 114 & 115, respectively).

[3] An unchallenged finding of fact is binding, and any conclusion which follows from it and is a correct statement of law is valid. Taylor-Rice v. State, 91 Hawai‘i 60, 65, 979 P.2d 1086, 1091 (1999).

appropriate services. It was Dr. Ching who declined to accept the case for evaluation. Father's insinuation below that DHS somehow tainted Dr. Ching's perception of the case, and thus her willingness to participate, has no independent basis in the record. We therefore conclude there was substantial evidence to support the family court's finding that DHS exerted reasonable and active efforts to provide appropriate services, and nothing in the record leaves us with a definite and firm conviction that a mistake was made. In re Doe, 95 Hawai‘i 183, 190, 20 P.3d 616, 623 (2001).

2. Father contends the family court clearly erred when it found (FOF 104):

> DHS has exerted reasonable and active efforts to reunify the Child with the Mother and the Father by making available parenting classes, individual therapy, couple's counseling, domestic violence programs, and sexual abuse offender treatment to address the problems and risks the Mother and Father have posed to the Child to ensure a safe family home.

Specifically, Father seems to argue that fundamental due process required DHS to provide him the opportunity to choose a congenial sexual abuse treatment program. Father does not cite, nor have we located, any authority for the proposition that DHS must offer a variety of service providers from which a parent may select to his or her liking. Here, DHS's efforts to provide Father appropriate sexual abuse treatment were fundamentally fair. Santosky v. Kramer, 455 U.S. 745, 754 (1982); Woodruff v. Keale, 64 Haw. 85, 100, 637 P.2d 760, 770 (1981) (noting "the natural relationship between parents and their children is protected by

the Due Process and Equal Protection clauses of the fourteenth amendment, and the ninth amendment.") It was Father who thwarted those efforts by, *inter alia*, failing to attend therapy with Troche, who had agreed to treat Father without requiring an admission of sexual abuse, and refusing to even discuss the subject of sexual abuse with Dr. Robinson, his second court-appointed therapist (FOF 96). Here again, we conclude there was substantial evidence to support the family court's finding that DHS exerted reasonable and active efforts to provide appropriate services, and nothing in the record leaves us with a definite and firm conviction that a mistake was made. In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623.

3. Father next argues that the family court committed clear error when it found (FOF 106):

> The social workers involved in this case treated the [P]arents fairly and serviced the family intensively for two and a half years.

Father explains that, because DHS failed to exert reasonable efforts in providing him appropriate services, "it only follows that DHS in fact failed to act fairly in its duties to Father." This argument is devoid of merit, as we have already concluded that DHS did, in fact, exert reasonable efforts in providing appropriate services to Father.

4. Father's fourth point of error is that the family court committed clear error when it found (FOF 102):

> Father cannot now nor in the reasonably foreseeable future become willing and able to provide the Child with a safe family

> home, even with the assistance of a service plan because of his unresolved domestic violence problem, his anger management problem, and his need for sexual abuse offender treatment.

We disagree. Although Father completed the Family Peace Center's domestic violence program, which included an anger management component, it was reported that the therapy was not successful and attempts to effect a decrease in Father's anger had been "largely thwarted." As for sex offender treatment, Father failed to complete therapy that would have enabled him "to demonstrate skills in sex abuse prevention, victim empathy, stress management, and red flag recognition of inappropriate actions and conduct[,]" as ordered by the court. Because there was substantial evidence to support the family court's finding and nothing in the record leaves us with a definite and firm conviction that a mistake was made, we conclude the family court did not clearly err in this respect. In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623.

5. Father challenges the family court's conclusions of law 6 and 7, which we address together, and which concluded as follows:

> 6. [Father] is not presently willing and able to provide the Child with a safe family home, even with the assistance of a service plan.
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> 7. It is not reasonably foreseeable that [Father] 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.

Father avers that, "Given DHS'[s] lack of reasonable efforts and provision of appropriate services to Father," the foregoing

conclusions are "clearly erroneous as a matter of law." Again, because we have already concluded that DHS exerted reasonable efforts in providing Father with appropriate services, this argument lacks merit. Father's argument does not speak to the issue at the hearing on permanent custody, which was, whether there exists clear and convincing evidence that Father cannot now, nor in the reasonably foreseeable future, provide the Child with a safe family home, even with the assistance of a service plan. HRS § 587-73(a) (Supp. 2003); In re Doe, 95 Hawai‘i at 191-92, 20 P.3d at 624-25. Barbara Service and Dr. Patti Shirakawa, whom the court found to be credible witnesses (FsOF 108 & 109, respectively), testified in sum that Father's denial of his sexual abuse of the Child, coupled with his blaming the Child for the breakup of the family, precluded him from providing a safe family home, now or in the reasonably foreseeable future. "Because it is not the province of the appellate court to reassess the credibility of the witnesses or the weight of the evidence, as determined by the family court," In re Doe, 95 Hawai‘i at 197, 20 P.3d at 630 (citation omitted), and because "the testimony of a single witness, if found by the trier of fact to have been credible," can be substantial evidence, id. at 196, 20 P.3d at 629 (citations omitted), we are satisfied that the family court's HRS § 587-73(a) determination was not clearly erroneous. In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623.

6. Father next argues that the family court "clearly

erred" in denying his Motion for Immediate Review to Extend Time for Permanency Decision. Father asserts that because various health problems had precluded him from meaningfully participating in sex offender treatment, the family court should have granted his request for a continuance so that he could continue therapy. In this connection, however, the family court expressly found (FOF 101) that "Father's excuse of having a medical condition that prevented him from completing the sexual offender therapy was not credible." See In re Doe, 95 Hawai‘i at 197, 20 P.3d at 630. Hence, the family court did not abuse its discretion, Kam Fui Trust v. Brandhorst, 77 Hawai‘i 320, 324, 884 P.2d 383, 387 (App. 1994), in denying Father's motion to continue the permanency hearing.

7. Father's final point is that the family court "clearly erred" in denying his motion for reconsideration of the permanency decision. "[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Ass'n of Apt. Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai‘i 97, 110, 58 P.3d 608, 621 (2002) (citation, internal quotation marks and block quote format omitted). Consonantly, Father argues on appeal that, "Matters regarding illness, being developments accruing after the permanency trial and during the six-month interim before the permanency decision, were a clearly appropriate basis for

reconsideration." Similarly, at the hearing on the motion for reconsideration, Father asserted that he could not have argued at trial that his medical condition precluded compliance with his service plan, because his health had not yet become an issue. However, Father conceded that "all parties were aware of it [(his medical concerns)]," during trial. Hence, Father could have raised the impediment of his medical condition at trial; accordingly, we conclude the court did not abuse its discretion when it denied Father's motion for reconsideration. Wailea Elua, 100 Hawai‘i at 110, 58 P.3d at 621.

B. Mother's Appeal.

1. Mother's opening brief lacks accurate record references. See Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(3) (requiring in the opening brief a "concise statement of the case," which must contain, *inter alia*, "record references supporting each statement of fact or mention of court or agency proceedings"); HRAP Rule 30 ("When the brief of an appellant is otherwise not in conformity with these rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court."); Bettencourt v. Bettencourt, 80 Hawai‘i 225, 228, 909 P.2d 553, 556 (1995) (citing, *inter alia*, the lack of record references in appellant's opening brief as a valid cause for dismissing an appeal for noncompliance with HRAP Rule 28).

2. Mother's opening brief also lacks discernible

argument. See HRAP Rule 28(b)(7) (requiring in the opening brief argument on the points of error presented, and providing that points not argued "may be deemed waived"); HRAP Rule 30; State v. Moore, 82 Hawai‘i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996) (where appellant "presents no discernable argument in support of his contention; . . . it is our prerogative to disregard this claim"); Bank of Hawaii v. Shaw, 83 Hawai‘i 50, 52, 924 P.2d 544, 546 (App. 1996) ("We will disregard a point of error if the appellant fails to present discernible argument on the alleged error." (Citation omitted.)).

3. After repeated examination of Mother's points of error collectively, we surmise that Mother's essential point on appeal is that the family court clearly erred in concluding there was clear and convincing evidence that Mother cannot now, nor in the reasonably foreseeable future, provide the Child with a safe family home, even with the assistance of a service plan. However, to cite just one example, social worker Memrey Casey (Casey) reported that

> [Mother] exhibited poor insight regarding child sexual abuse dynamics and how her behavior may have contributed to it. She exhibited a limited lack of parental skills and knowledge. She clearly has placed her relationship with [Father] over her parental responsibilities with regards to her daughter.

The family court found Casey to be a credible witness (FOF 110), In re Doe, 95 Hawai‘i at 197, 20 P.3d at 630, and because the testimony of just this single witness can be substantial evidence, id. at 196, 20 P.3d at 629, we are satisfied that the

family court's HRS § 587-73(a) determination was not clearly erroneous. In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623. In the conclusion to her opening brief, Mother complains:

> The evidence showed that [F]ather was ordered by the lower court to . . . take sex therapy without making an admission. Mother was supportive of his efforts but this could not be consistent with [DHS's] and the [guardian ad litem's] position that [M]other could not support his arguments and still be protective of [the Child].

Precisely.

Therefore,

IT IS HEREBY ORDERED that the family court's October 23, 2001 order awarding permanent custody, and its December 7, 2001 order denying the Parents' respective motions for reconsideration, are affirmed.

DATED: Honolulu, Hawai‘i, January 29, 2004.

On the briefs:

Glenn D. Choy, for father-appellant.

Acting Chief Judge

M. Cora Avinante, for mother-appellant-cross-appellee.

Associate Judge

Jay K. Goss and Mary Ann Magnier, Deputy Attorneys General, State of Hawai‘i, for appellee.

Associate Judge