NO. 24854

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

In the Interest of
JANE DOE, Born on January 20, 1984
(FC-S NO. 92-011)

In the Interest of
JANE DOE, Born on December 21, 1993, and
JANE DOE, Born on November 11, 1995
(FC-S NO. 97-020)

APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT

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

The mother (Mother) of two girls, one born on December 21, 1993 (Jane Doe II), and the other born on November 11, 1995 (Jane Doe III), appeals from the family court's November 14, 2001 Order Awarding Permanent Custody and Establishing a Permanent Plan. We affirm.

RELEVANT STATUTES

The relevant statutes are stated in footnote 1.[1]

[1/] Hawaii Revised Statutes (1993 & Supp. 2002) state, in relevant part, as follows:

> **§587-25 Safe family home guidelines.** (a) The following guidelines shall be fully considered when determining whether the child's family is willing and able to provide the child with a safe family home:

(continued...)

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(1) The current facts relating to the child which include:

(A) Age and vulnerability;

(B) Psychological, medical and dental needs;

(C) Peer and family relationships and bonding abilities;

(D) Developmental growth and schooling;

(E) Current living situation;

(F) Fear of being in the family home; and

(G) Services provided the child;

(2) The initial and any subsequent reports of harm and/or threatened harm suffered by the child;

(3) Date(s) and reason for child's placement out of the home, description, appropriateness, and location of the placement and who has placement responsibility;

(4) Historical facts relating to the alleged perpetrator and other appropriate family members who are parties which include:

(A) Birthplace and family of origin;

(B) How they were parented;

(C) Marital/relationship history; and

(D) Prior involvement in services;

(5) The results of psychiatric/psychological/developmental evaluations of the child, the alleged perpetrator and other appropriate family members who are parties;

(6) Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the family home;

(7) Whether there is a history of substance abuse by the child's family or others who have access to the family home;

(8) Whether the alleged perpetrator(s) has acknowledged and apologized for the harm;

(9) Whether the non-perpetrator(s) who resides in the family home has demonstrated the ability to protect the child from further harm and to insure that any current protective orders are enforced;

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(10) Whether there is a support system of extended family and/or friends available to the child's family;

(11) Whether the child's family has demonstrated an understanding and utilization of the recommended/court ordered services designated to effectuate a safe home for the child;

(12) Whether the child's family has resolved or can resolve the identified safety issues in the family home within a reasonable period of time;

(13) Whether the child's family has demonstrated the ability to understand and adequately parent the child especially in the areas of communication, nurturing, child development, perception of the child and meeting the child's physical and emotional needs; and

(14) Assessment (to include the demonstrated ability of the child's family to provide a safe family home for the child) and recommendation.

(b) The court shall consider the likelihood that the current situation presented by the guidelines set forth in subsection (a) will continue in the reasonably foreseeable future and the likelihood that the court will receive timely notice of any change or changes in the family's willingness and ability to provide the child with a safe family home.

§587-26 Service plan. (a) A service plan is a specific written plan prepared by an authorized agency and child's family and presented to such members of the child's family as the appropriate authorized agency deems to be necessary to the success of the plan, including, but not limited to, the member or members of the child's family who have legal custody, guardianship, or permanent custody of the child at the time that the service plan is being formulated or revised under this chapter.

(b) The service plan should set forth:

(1) The steps that will be necessary to facilitate the return of the child to a safe family home, if the proposed placement of the child is in foster care under foster custody;

(2) The steps that will be necessary for the child to remain in a safe family home with the assistance of a service plan, if the proposed placement of the child is in a family home under family supervision; and

(3) The steps that will be necessary to make the family home a safe family home and to terminate the appropriate authorized agency's intervention into the family and eliminate, if possible, the necessity for the filing of a petition with the court under this chapter.

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(c) The service plan should also include, but not necessarily be limited to:

(1) The consideration given to the use of ohana conferences for family decision making;

(2) The specific, measurable, behavioral changes that must be achieved by the parties; the specific services or treatment that the parties will be provided and the specific actions the parties must take or specific responsibilities that the parties must assume; the time frames during which the services will be provided and such actions must be completed and responsibilities must be assumed; provided that, services and assistance should be presented in a manner that does not confuse or overwhelm the parties;

(3) The specific consequences that may be reasonably anticipated to result from the parties' success or failure in making the family home a safe family home, including, but not limited to, the consequence that, unless the family is willing and able to provide the child with a safe family home within the reasonable period of time specified in the service plan, their respective parental and custodial duties and rights shall be subject to termination by award of permanent custody; and

(4) Such other terms and conditions as the appropriate authorized agency deems to be necessary to the success of the service plan.

(d) The service plan should include steps that are structured and presented in a manner which reflects careful consideration and balancing the priority, intensity, and quantity of the services which are needed with the family's ability to benefit from those services.

(e) After each term and condition of the service plan has been thoroughly explained to and is understood by each member of the child's family whom the appropriate authorized agency deems to be necessary to the success of the service plan, the service plan shall be agreed to and signed by each family member. Thereafter, a copy of the service plan shall be provided to each family member who signed the service plan.

(f) If a member of a child's family whom the appropriate authorized agency deems to be necessary to the success of the service plan cannot or does not understand or agree to the terms and conditions set forth in the service plan, the authorized agency shall proceed pursuant to section 587-21(b).

§587-27 Permanent plan. (a) Permanent plan is a specific written plan, prepared by an appropriate authorized agency, which should set forth:

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(1) A position as to whether the court should order an adoption, guardianship, or permanent custody of the child and specify:

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§587-40 Reports to be submitted by the department and authorized agencies; social worker expertise. (a) The department or other appropriate authorized agency shall make every reasonable effort to submit written reports, or a written explanation regarding why a report is not being submitted timely, to the court with copies to the parties or their counsel or guardian ad litem:

(1) Within forty-eight hours, excluding Saturdays, Sundays, and holidays, subsequent to the hour of the filing of a petition for temporary foster custody pursuant to section 587-21(b)(3);

(2) Upon the date of the filing of a petition pursuant to section 587-21(b)(4); and

(3) At least fifteen days prior to the date set for each disposition, review, permanent plan, and permanent plan review hearing, until jurisdiction is terminated, unless a different period of time is ordered by the court or the court orders that no report is required for a specific hearing; or

(4) Prior to or upon the date of a hearing if the report is supplemental to a report that was submitted pursuant to paragraph (1), (2), or (3).

(b) Report or reports pursuant to subsection (a) specifically shall:

(1) Assess fully all relevant prior and current information concerning each of the safe family home guidelines, as set forth in section 587-25, except for a report required for an uncontested review hearing or a permanent plan review hearing that need only assess relevant current information including, for a review hearing, the degree of the family's progress with services;

(2) In each proceeding, subsequent to adjudication, recommend as to whether the court should order:

(A) A service plan as set forth in section 587-26 or revision to the existing service plan and, if so, set forth the proposed service or revision and the pertinent number of the guidelines considered in the report, made pursuant to paragraph (1), which guideline or guidelines provide the basis for recommending the service or revision in a service plan or revised service plan; or

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(B) A permanent plan or revision to an existing permanent plan and if it is an initial recommendation, set forth the basis for the recommendation that shall include, but not be limited to, an evaluation of each of the criteria set forth in section 587-73(a), including the written permanent plan as set forth in section 587-27; and

(3) Set forth recommendations as to other orders deemed to be appropriate and state the basis for recommending that the orders be entered.

(c) A written report pertaining to cases pending before the family court submitted by the department pursuant to subsection (a) shall be submitted to the court in its entirety, and shall include the following:

(1) Any report, or medical or mental health consultation, generated by a child protective services multidisciplinary team or consultant in its entirety; and

(2) All other relevant information on placement of the child.

(d) A written report submitted under this section shall be admissible and may be relied upon to the extent of its probative value in any proceeding under this chapter; provided that the person or persons who prepared the report may be subject to direct and cross-examination as to any matter in the report, unless the person is unavailable.

(e) A person employed by the department as a social worker in the area of child protective or child welfare services is qualified to testify as an expert in the area of social work and child protective or child welfare services.

PART V. BURDEN OF PROOF

§587-41 Evidentiary determination; burden of proof. (a) In a temporary foster custody hearing, a determination that there exists reasonable cause to believe that a child is subject to imminent harm may be based upon relevant evidence, including, but not limited to, hearsay evidence when direct testimony is unavailable or when it is impractical to subpoena witnesses who will be able to testify to facts from personal knowledge.

(b) In an adjudication hearing, a determination that the child has been harmed or is subject to threatened harm shall be based on a preponderance of the evidence.

(c) In subsequent hearings, other than a permanent plan hearing, any determination shall be based on a preponderance of the evidence.

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(d) In a permanent plan hearing, a determination that a permanent plan shall be ordered based upon clear and convincing evidence.

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§587-63 Adjudication hearing; interim orders. (a) The court shall consider the evidence which is relevant to the adjudication; provided that 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 and the report or reports submitted pursuant to section 587-40, in rendering a determination concerning adjudication.

(b) If facts sufficient to sustain the petition under this chapter are:

(1) Established in accordance with this chapter, the court shall enter an order sustaining the petition and a finding that the child is a child whose physical or psychological health or welfare has been harmed or is subject to threatened harm by the acts or omissions of the child's family; provided that if the parties consent, the facts for the finding may be based upon the report or reports submitted pursuant to section 587-40 or other stipulated evidence deemed by the court to constitute an adequate basis for sustaining the petition, which report or reports or stipulated evidence may be admitted into evidence subject to reservation by the parties of their right to cross-examination subject to section 587-40(c), or

(2) Not established, the court shall enter an order dismissing the petition and shall state the grounds for dismissal.

(c) If the court sustains the petition and does not commence immediately the disposition hearing, it shall:

(1) Determine, based upon the facts adduced during the adjudication hearing and any other additional facts presented to it, whether a temporary foster custody order should be continued or should be entered pending an order of disposition. The court shall consider all relevant prior and current information pertaining to the safe family home guidelines, as set forth in section 587-25 and the report or reports submitted pursuant to section 587-40, and proceed pursuant to section 587-53(f) or (g) prior to rendering a determination; and

(2) Enter such orders regarding visitation and the provision of services to the child and the child's family and the child's and family's acceptance and cooperation with such services as the court deems to

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be appropriate and consistent with the best interests of the child.

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PART VIII. DISPOSITION AND REVIEW HEARINGS AND ORDERS

§587-71 Disposition hearing. (a) The court may consider the evidence which is relevant to disposition which is in the best interests of the child; provided that the court shall determine initially whether the child's family home is a safe family home. 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 and the report or reports submitted pursuant to section 587-40, in rendering such a determination.

(b) If the court determines that the child's family is presently willing and able to provide the child with a safe family home without the assistance of a service plan, the court shall terminate jurisdiction.

(c) If the court determines that the child's family home is a safe family home with the assistance of a service plan, the court shall place the child and the child's family members who are parties under the family supervision of an authorized agency, return the child to the child's family home, and enter further orders, including but not limited to restrictions upon the rights and duties of the authorized agency, as the court deems to be in the best interests of the child.

(d) If the court determines that the child's family home is not a safe family home, even with the assistance of a service plan, the court shall vest foster custody of the child in an authorized agency and enter such further orders as the court deems to be in the best interests of the child.

(e) If 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 consecutive months shall, set the case for a show cause hearing as deemed appropriate by the court at which the child's family shall have the burden of presenting evidence to the court regarding such reasons and considerations as the family has to offer as to why the case should not be set for a permanent plan hearing. Upon such show cause hearing as the court deems to be appropriate, the court shall consider the criteria set forth in section 587-73(a)(1), (2), and (4), and:

(1) Set the case for a permanent plan hearing and order that the authorized agency submit a report pursuant to section 587-40; or

(2) Proceed pursuant to this section.

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(f) Except as provided in subsection (e)(1), if the court does not terminate the court's jurisdiction, the court shall order in every case that the authorized agency make every reasonable effort, pursuant to section 587-40, to prepare a written service plan, as set forth in section 587-26.

(g) The court may continue the disposition hearing concerning the terms and conditions of the proposed service plan to a date within forty-five days from the date of the original disposition hearing, unless the court deems a later date to be in the best interests of the child; provided that if the court is convinced that a party has signed and fully understands and accepts the service plan, the court may order that the service plan shall constitute the service plan by court order concerning such party and that the service plan be entered into evidence with such party's presence being waived for good cause shown at the continued disposition hearing.

(h) Prior to ordering a service plan at the disposition or continued disposition hearing, the court shall make a finding that each term, condition, and consequence of the service plan has been thoroughly explained to and is understood by each party or a party's guardian ad litem; provided that the court need not enter the findings if the court finds that aggravated circumstances are present.

(i) After a hearing that the court deems to be appropriate, the court may order terms, conditions, and consequences to constitute a service plan as the court deems to be in the best interests of the child; provided that a copy of the service plan shall be incorporated as part of the order. The court need not order a service plan if the court finds that aggravated circumstances are present.

(j) If the court makes a determination that aggravated circumstances are present under this section, the court shall set the case for a show cause hearing as deemed appropriate by the court within thirty days. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing.

(k) The court may order that any party participate in, complete, be liable for, and make every good faith effort to arrange payment for such services or treatment as are authorized by law and are deemed to be in the best interests of the child.

(l) At any stage of the child protective proceedings, the court may order that a child be examined by a physician, surgeon, psychiatrist, or psychologist, and it may order treatment by any of them of a child as is deemed to be in the best interests of the child. For either the examination or treatment, the court may place the child in a hospital or other suitable facility.

(m) The court shall order reasonable supervised or unsupervised visitation rights to the child's family and to any

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person interested in the welfare of the child and that the visitation shall be in the discretion of an authorized agency and the child's guardian ad litem, unless it is shown that rights of visitation may be detrimental to the best interests of the child; provided that the court need not order any visitation if the court finds that aggravated circumstances are present.

(n) Each of the natural parents shall be ordered to complete the medical information forms and consent to release medical information required under section 578-14.5 and shall return the completed forms to the department.

(o) In any case that a permanent plan hearing is not deemed to be appropriate, the court shall:

(1) Make a finding that each party understands that unless the family is willing and able to provide the child with a safe family home, even with the assistance of a service plan, within the reasonable period of time specified in the service plan, their respective parental and custodial duties and rights shall be subject to termination; and

(2) Set the case for a review hearing within six months.

(p) Nothing 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.

§587-72 Review hearings. (a) Except for good cause shown, the court shall set each case for review hearing not later than six months after the date that a service plan is ordered by the court and, thereafter, the court shall set subsequent review hearings at intervals of no longer than six months until the court's jurisdiction has been terminated or the court has ordered a permanent plan and has set the case for a permanent plan review hearing; the court may set a case for a review hearing upon the motion of a party at any time if the hearing is deemed by the court to be in the best interests of the child.

(b) Notice of review hearings shall be served upon the parties and upon the present foster parent or parents, each of whom shall be entitled to participate in the proceedings as a party. Notice of the review hearing shall be served by the department upon the present foster parent or parents no less than forty-eight hours before the scheduled hearing. No hearing shall be held until the foster parent or parents are served. For purposes of this subsection, notice to foster parents may be effected by hand delivery or by regular mail; and may consist of the last court order, if it includes the date and time of the hearing.

(c) Upon each review 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,

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including but not limited to the report submitted pursuant to section 587-40, and:

(1) Determine whether the child's family is presently willing and able to provide the child with a safe family home without the assistance of a service plan and, if so, the court shall terminate jurisdiction;

(2) Determine whether the child's family is presently willing and able to provide the child with a safe family home with the assistance of a service plan and, if so, the court shall return the child or continue the placement of the child in the child's family home under the family supervision of the appropriate authorized agency;

(3) If the child's family home is determined, pursuant to subsection (c)(2) not to be safe, even with the assistance of a service plan, order that the child remain or be placed under the foster custody of the appropriate authorized agency;

(4) Determine whether the parties have complied with, performed, and completed every term and condition of the service plan that was previously court ordered;

(5) Order revisions to the existing service plan, after satisfying section 587-71(h), as the court, upon a hearing that the court deems to be appropriate, determines to be in the best interests of the child; provided that a copy of the revised service plan shall be incorporated as part of the order;

(6) Enter further orders as the court deems to be in the best interests of the child;

(7) Determine whether aggravated circumstances are present and, if so, the court shall set the case for a show cause hearing as the court deems appropriate within thirty days. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing; and

(8) If the child has been residing outside the family home for twelve consecutive months from the initial date of entry into out-of-home care, set the case for a show cause hearing as deemed appropriate by the court. At the show cause hearing, the child's family shall have the burden of presenting evidence to the court regarding the reasons and considerations as to why the case should not be set for a permanent plan hearing.

(d) In any case that a permanent plan hearing is not deemed to be appropriate, the court shall:

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(1) Make a finding that the parties understand that unless the family is willing and able to provide the child with a safe family home, even with the assistance of a service plan, within the reasonable period of time specified in the service plan, their respective parental and custodial duties and rights shall be subject to termination; and

(2) Set the case for a review hearing within six months.

(e) If the child has been residing outside of the family home for an aggregate of fifteen out of the most recent twenty-two months from the initial date of entry into out-of-home care, the department shall file a motion to set the matter for a permanent plan hearing unless:

(1) The department has documented in the safe family home guidelines prepared pursuant to section 587-25(a), a compelling reason why it would not be in the best interests of the child to file a motion; or

(2) The State has not provided to the family of the child, consistent with the time period in the service plan, such services as the department deems necessary for the safe return of the child to the family home;

provided that nothing in this section shall prevent the department from filing such a motion to set a permanent plan hearing if the department has determined that the criteria in section 587-73(a) are present.

§587-73 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;

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BACKGROUND

Mother has six daughters. Only the youngest two have the same father. Mother is married but her husband (Husband) is not the father of any of her daughters.

1975 or 1976	In her childhood, Mother was sexually abused. After running away from home and being raped at the age of 13 and in the eighth grade, Mother gave birth to a girl (First Half-Sister).
1977 or 1978	At the age of 15, Mother gave birth to a girl (Second Half-Sister).
1981 or 1982	Mother gave birth to a girl (Third Half-Sister).
January 20, 1984	Mother gave birth to a girl (Jane Doe I).
April 21, 1992	In FC-S No. 92-011, the Department of Human Services of the State of Hawai‘i (DHS) petitioned for Temporary Foster Custody of Jane Doe I. The petition noted that First

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[1/] (...continued)

(b) If the court determines that the criteria set forth in subsection (a) are established by clear and convincing evidence, the court shall order:

(1) That the existing service plan be terminated and that the prior award of foster custody be revoked;

(2) That permanent custody be awarded to an appropriate authorized agency;

(3) That an appropriate permanent plan be implemented concerning the child whereby the child will:

(A) Be adopted pursuant to chapter 578; provided that the court shall presume that it is in the best interests of the child to be adopted, unless the child is or will be in the home of family or a person who has become as family and who for good cause is unwilling or unable to adopt the child but is committed to and is capable of being the child's guardian or permanent custodian[.]

	Half-Sister, age 16, had been placed in the permanent custody of the DHS on or about February 6, 1992, that Second Half-Sister, age 15, had been placed in the foster custody of the DHS, and that Third Half-Sister, age 11, had been placed in the protective custody of the DHS on April 16, 1992, because Mother had inflicted severe physical harm upon her.
April 22, 1992	Judge Ben H. Gaddis awarded Temporary Foster Custody of Jane Doe I to DHS.
November 22, 1993	Judge Gaddis terminated the family court's jurisdiction in the case of Jane Doe I.
December 21, 1993	Mother gave birth to Jane Doe II.
November 11, 1995	Mother gave birth to Jane Doe III.
February 10, 1997	In FC-S No. 92-011, the DHS petitioned for family supervision of Jane Doe I. The petition noted that Third Half-Sister, age 16, was in a therapeutic foster home. In FC-S No. 97-020, the DHS petitioned for family supervision of Jane Doe II and Jane Doe III.
February 27, 1997	Judge Gaddis entered an Order for Protection of Jane Doe II and Jane Doe III from their father (Father) and awarded temporary legal and physical custody of Jane Doe I, Jane Doe II, and Jane Doe III to Mother subject to family supervision by DHS.
March 5, 1997	Judge Gaddis entered an order continuing temporary family supervision by the DHS.
March 6, 1997	Judge Gaddis ordered the February 7, 1997 service plan into effect.
March 31, 1998	Guardian Ad Litem Clayton E. Chong (GAL) reported that

> [s]ocial worker Stuart Maeda called and stated that [Jane Doe I] was being physically abused by [Mother] two to three times a month and that it was increasing since the beginning of the school year to several times a week. According to Maeda, [Jane Doe I] was being hit on her arms and back area by [Mother's] open hand.

> Mother would call [Jane Doe I] names like "weakling, lazy, bitch, whore" and would be angry at her about not doing chores and not taking care of her younger sisters.

April 1, 1998 — In a Supplemental Safe Family Home Report, the DHS reported that

> Mother has a long history with the DHS and Family Court. Interestingly, the GAL had predicted that problems would arise with [Jane Doe I] and Mother as [Jane Doe I] matured.
>
> The DHS, like [Jane Doe I], wonders about the younger children, [Jane Doe II] and [Jane Doe III], although for the time being it appears that the situation is safe given FSS [Family Support Services] involvement with the family.

September 24, 1998 — Judge Gaddis revoked DHS family supervision over Jane Doe I and awarded foster custody of Jane Doe I to DHS.

October 19, 1998 — Judge Gaddis ordered the October 6, 1998 service plan into effect.

November 16, 1998 — Judge Gaddis entered an order that Husband, who then was Mother's boyfriend and later became Mother's husband[2], "agrees to participate in this proceeding as a party."

February 1, 1999 — Pursuant to a hearing on January 21, 1999, Judge Gaddis entered an order stating, "[Mother] informed the court that she has firm plans to move the family to West Virginia and [Mother] was notified that she may not take the children out of the county of Hawaii without the court's approval."

August 16, 1999 — Judge Gaddis entered an order reminding the Mother and Husband "that they shall not remove the children from the island of Hawaii without prior court approval[.]"

September 17, 1999 — Judge Gaddis ordered the July 21, 1999 service plan into effect. It continued the foster custody of Jane Doe I and the family supervision of Jane Doe II and Jane Doe III, and stated, in relevant part, as follows:

[2/] The record reveals that the mother of the children in this case married her boyfriend but does not reveal when the marriage occurred.

> Based upon the records and/or evidence presented and having fully considered all relevant prior and current information pertaining to the guidelines for determining whether the child/ren's family is willing and able to provide the child/ren with a safe family home, the court finds that:
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> . . . .
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> D The child/ren's family is presently willing and able to provide [Jane Doe II] and [Jane Doe III] with a safe family home, with the assistance of a service plan.
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> . . . .
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> F Each party present at the hearing understands that unless the family is willing and able to provide the child/ren with a safe family home, even with the assistance of a service plan within a reasonable period of time, that their respective parental and custodial rights shall be subject to termination[.]

January 7, 2000 — Without the knowledge or permission of the DHS, the GAL, or the Court, Mother and Husband departed Hawai‘i with Jane Doe II and Jane Doe III.

February 7, 2000 — The GAL reported that when Jane Doe I had last been seen by the DHS, "the child's legs and hands were shaking, and she did not look good" and recommended that "if [Mother] and [Husband] took [Jane Doe II] and [Jane Doe III] to the mainland despite the Court's previous warnings not to do so, that the [DHS] obtain foster custody of both children upon their return to Hawaii."

February 9, 2000 — The DHS filed a Safe Family Home Report stating, in relevant part, as follows:

> [Husband] has been mostly resistant to fully cooperate with DHS. Historically, he's had problems parenting his own teenage daughter and he's also had incidents of domestic violence with this child's mother (his previous wife). In discussions with the social worker [Husband] shows very little insight into the needs of the children or understanding of their development.
>
> There is great concern at this time for the safety of [Jane Doe II] and [Jane Doe III] and warranted by the following reasons: 1) [Mother's] history of physical abuse of her children; 2) her inability to parent adolescents; 3) [Mother's] and [Husband's] continued use of corporal punishment on the younger children; 4) her apparent domestic difficulties with [Husband]; 5) her

indifference to her older daughters; 6) the fact that she absconded with the younger children.

February 14, 2000 Based on a February 10, 2000 hearing, Judge Gaddis, for Judge William S. Chillingworth, entered an order stating, in relevant part, as follows:

> D The child/ren's family is not presently willing and able to provide [Jane Doe II] and [Jane Doe III] with a safe family home, with the assistance of a service plan;
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> . . . .
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> F Three calls were made for [Mother] and [Husband] and they failed to appear.
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> . . . .
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> Based on the foregoing considerations and findings, and good cause appearing therefor;
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:
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> 1 Family supervision of [Jane Doe II] and [Jane Doe III] is revoked and DHS is awarded foster custody of [Jane Doe II] and [Jane Doe III].
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> . . . .
>
> 8 Bench warrants shall issue for Mother and [Husband].

February 24, 2000 The DHS informed the GAL that Jane Doe I "tested positive for ice" and that Mother had been located in West Virginia with Jane Doe II and Jane Doe III.

April 17, 2000 In West Virginia, Jane Doe II and Jane Doe III were removed from Mother and Boyfriend/Husband by Child Protective Services and placed in foster care.

May 5, 2000 The DHS filed a Safe Family Home Report noting that Jane Doe I was in a Residential Substance Abuse Facility and stating, in relevant part, as follows:

> Mother has demonstrated her inability to change and provide her children with a safe family home by her actions. She has shown little regard for the Family Court order preventing her from taking the children out of the State of Hawaii. She appears to have shown little regard for [Jane Doe I], leaving the State without any idea of where [Jane Doe I] was or if she was safe.

> [Jane Doe I] had no idea her family left or how to contact [Mother] and sisters. It appears that Mother can easily detach and leave her children when the going gets tough. She has done it with her four eldest children and will probably do it to [Jane Doe II] and [Jane Doe III] if she were to continue as their caretaker.
>
> If the family were never found in West Virginia and something were to happen to Mother, the children would be left with [Husband], which is not a very desirable alternative for them given what DHS knows about him. This potential appears to have been fine with Mother as she had no intention of contacting DHS, her attorney or any other party regarding her children. Mother has little insight or forethought, which could leave her children in a dangerous situation. She has acted in a very egocentric manner giving little thought to her children and their needs.

May 5, 2000 — The DHS filed a Permanent Plan stating that "[t]he goal for [Jane Doe I, Jane Doe II, and Jane Doe III] is adoption or guardianship to an appropriate family member."

May 25, 2000 — After a hearing on May 11, 2000, Judge George S. Yuda entered an order finding, in relevant part, that "[t]he child/ren's family is not presently willing and able to provide the child/ren with a safe family home, even with the assistance of a service plan[.]"

May 16, 2000 — Jane Doe II and Jane Doe III were returned to Hawai‘i.

June 2000 — During the first week of June 2000, Mother returned to Hilo for a short stay.

June 26, 2000 — The DHS filed a Supplemental Safe Family Home Report stating, in relevant part, as follows:

> At this point, [Mother] does not believe that she has done anything wrong by leaving the State of Hawaii with her children. She has this opinion, despite clear warnings by the Court, her attorney and DHS, informing her not to leave the state. Issues such as these have been the ongoing concern of the DHS. [Mother] is self-centered and has difficulty putting her children's needs before her own. [Mother] does love [Jane Doe II] and [Jane Doe III] and in her own way she probably loves [Jane Doe I] as well. However, her feelings toward [Jane Doe I] are unhealthy for [Jane Doe I]. [Mother] continues to blame [Jane Doe I] and has little insight to what has caused her children's problems. She does not seem to see that she has the majority of the responsibility for her children's difficulties, not only [Jane Doe I] but her adult children as well. DHS does not want to see

> [Jane Doe II] and [Jane Doe III] suffer the same fate as their older siblings.

July 12, 2000 — Mother contacted DHS and requested the preparation of a service plan for Mother in West Virginia.

July 14, 2000 — Judge Gaddis entered an order withdrawing the bench warrant for Mother and ordering that "Mother shall not remove the children from the island of Hawaii without prior court approval, and doing so would be a felony in the State of Hawaii." The order scheduled a "Combined OSC/Permanent Plan" hearing to occur on October 23, 2000.

October 23, 2000 — Judge Gaddis commenced a combined Order to Show Cause (OSC)/Permanent Plan hearing. Mother objected because she was living in West Virginia and no determination had been made whether the West Virginia home was a safe family home. Mother requested "that the [DHS] initiate the ICPC compact [Interstate Compact on the Placement of Children, Hawai‘i Revised Statutes, Chapter 350E (1993)] right now and get moving in a service plan." Mother then revealed her West Virginia address. Judge Gaddis responded:

> Well, it's apparent to me that I'm going to have to, uh, re-schedule this matter. And we're gonna have to find another date. And it would appear to me to be prudent on the [DHS] to initiate an ICPC request. Uh, we know they take a long time. Uh, should the Department not prevail at the OSC/Permanency Hearing, then at least hopefully the [DHS] will have [a] worker in place and will, uh, have a situation where they can initiate some services.

November 13, 2000 — Judge Gaddis entered an Order Denying Mother's Oral Motion to Dismiss Combined Order to Show Cause/Permanent Plan Hearing.

January 20, 2000 — As a result of a conference on December 18, 2000, Judge Gaddis postponed the OSC/Permanent Plan hearing.

February 12, 2001 — As a result of a conference on January 29, 2001, Judge Gaddis postponed the OSC/Permanent Plan hearing.

April 24, 2001 — DHS reported to the court that "[a]n ICPC was generated on November 24, 2000."

May 3, 2001 — The home study done pursuant to the ICPC by Kelli Holbrook Nichols (Nichols) was completed. It did not approve of the home of Mother and Husband "as a placement resource for the children." It reported, in relevant part, as follows:

> [Mother and Husband] have moved into a very small apartment that will not be adequate for her children, if returned to her custody. Their sole income is that of [Mother's] SSI check.[3] [Husband] has been unemployed for the past four months and has no additional income. He recently turned down employment.
>
> There appears to be little preparation made for the possibility of [Mother] regaining custody of her children. [Mother] seems to believe that circumstances will improve once the children are back with her, with no provision for how that will happen.
>
> . . . .
>
> [Husband] was born and reared in West Virginia. . . .
>
> . . . .
>
> **Concerns Regarding Placement:**
>
> . . . .
>
> • [Mother] has a history of physically and emotionally abusing her older children, including [Jane Doe I]. When they reported sexual abuse by her various spouses and husbands, she turned on them and felt she could not [sic] longer trust them because they did not confide in her. She also accused her older children of "looking at" and seducing her boyfriends.
>
> . . . .
>
> • [Husband] is an unemployed laborer. . . .
>
> • [Husband] has refused to take part in the parenting training offered by AYC. When the social worker came for visits, he would leave the room. He also refused to participate in similar parenting classes in Hawaii.
>
> . . . .

[3/] The report noted that Mother "is considered disabled and receives SSI benefits of $530.00 a month and $230.00 in food stamps." Mother testified that if the children were in the home, her income would be supplemented by welfare in the form of Aid to Families with Dependent Children.

- [Husband] has been designated at [sic] the disciplinarian for the children. He has a history of using corporal punishment on [Jane Doe II] and [Jane Doe III]. He states that he was punished with a belt and paddle as a child.

- [Mother] has been a resident at the Women's Resource Center in the past, and reported to their social worker that [Husband] was controlling and physically abusive to her. She later denied this and stated that he would not talk to her when she would want to work out their problems.

(Footnote added.)

September 7, 2001 Trial.

September 10, 2001 Trial.

October 17, 2001 Judge Gaddis entered Findings of Fact and Conclusions of Law (FsOF and CsOL). Although not noted in its title, this document also contains fifteen (15) orders.

November 14, 2001 Judge Gaddis entered the Order Awarding Permanent Custody and Establishing a Permanent Plan terminating Mother's parental and custodial duties and rights regarding Jane Doe II and Jane Doe III, and appointing the Director of the DHS as permanent custodian of Jane Doe I, Jane Doe II, and Jane Doe III. The goal of the Permanent Plan "is adoption or guardianship to an appropriate family member."

November 26, 2001 Mother filed a motion for reconsideration.

January 16, 2002 Mother filed a notice of appeal.

January 17, 2002 Judge Gaddis filed the Order Denying Motion for Reconsideration.

RELEVANT UNCHALLENGED FINDINGS OF FACT

Mother does not challenge the following FsOF:

> 15. In 1998, [Jane Doe I] refused to return to the home of [Mother] because she was afraid. [Mother] had been hitting [Jane Doe I] repeatedly on her back and arms. [Mother] also called [Jane Doe I] names such as "weakling", "bitch", and "whore." [Jane Doe I] was fearful of [Mother].

. . . .

19. In June, 1998, [Mother] advised the DHS social worker that she was planning to move to Virginia with [Husband]. She said that the statements made to the [GAL] about moving without permission were made out of frustration. She told the social worker that if she planned to move she would make everyone aware of her plans.

. . . .

27. At court hearing on August 9, 1999, [Mother] advised the Court that she had decided not to attempt to reunify with [Jane Doe I]. She indicated that she did not want to do any more services and wanted to move to West Virginia. This Court expressed great concern about the recent corporeal punishment of [Jane Doe II] by [Mother]. The Court was very concerned about [Mother] spanking [Jane Doe III] because past attempts by [Mother] to physically discipline her older children rapidly escalated into severe physical abuse. . . .

. . . .

33. At the time that [Jane Doe II] and [Jane Doe III] were removed from her care [Mother] elected not to return to Hawaii. She has remained in West Virginia with [Husband] although she did make one brief trip to Hawaii in June, 2000.

. . . .

37. [Mother] has been infected with the HIV virus for many years. At present her condition is stable. [Mother] and [Husband] take appropriate precautions to prevent the spread of the virus and [Mother] takes her medications as prescribed. . . .

. . . .

42. [Mother] has repeatedly failed to care for and parent her older children. While she can provide appropriate care for very young children as children grow older and more assertive and demanding, [Mother] reacts by treating her children as peers. [Mother] is very suspicious of the relationship of her older girls with the men in her life and this has lead to repeated confrontations and arguments in the home. If her children rebel and challenge her authority, [Mother] reacts by either becoming verbally and physically abusive or by refusing to have any contact with her children. She frequently acts to satisfy her own needs at the expense of the needs of her children.

. . . .

45. While [Husband] does have family in West Virginia, his family has refused to become involved in this case and appear to offer little support to the couple at this time. . . .

. . . .

> 47. [Jane Doe II] and [Jane Doe III] are happy and well adjusted in their present placement. . . .
>
> 48. [Mother] has not been able to raise three other older girls successfully and has ultimately physically abused each of them. [Jane Doe II] and [Jane Doe III] are subject to threat of harm of physical abuse by [Mother] for the same reasons. [Mother] has been emotionally abusive to her older children and it appears likely that she will emotionally abuse her younger girls in a similar fashion as they grow older.
>
> . . . .
>
> 51. The proposed permanent plans for the children are in the best interests of the children.

APPELLATE STANDARD OF REVIEW

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai‘i 423, 428, 879 P.2d 528, 533 (1994). This is true of its implicit and explicit findings.

> 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 nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Okumura, 78 Hawai‘i 383, 392, 894 P.2d 80, 89 (1995) (citations and internal quotation marks omitted).

DISCUSSION

I.

Mother challenges FsOF nos. 18, 36, 39, 40, 43, 44, and 49. We will discuss them in order. FOF no. 18 states as follows:

> [Mother's] new relationship was a source of concern for the Court. [Husband] had serious conflicts and relationship problems with his first wife and his daughter from that relationship had severe emotional problems. [Husband] had failed to provide any emotional support for his teenage daughter at [the] time when she badly needed it.

Mother contends that this finding is improperly based on the court's knowledge obtained when it presided over Husband's divorce case. It appears that Mother did not seek the removal of the judge who heard this case. In this appeal, Mother is not arguing that the judge who heard this case should not have done so. The question presented is whether the record in this case supports this finding. The answer is yes.

II.

FOF no. 36 states as follows:

> After [Jane Doe II and Jane Doe III] were removed from [Mother] in West Virginia, DHS requested a home study of the home of [Mother] and [Husband] by the West Virginia Department of Human Resources. On May 3, 2001, [Nichols], Regional Home finding Supervisor, for the West Virginia Department of Human Resource refused to approve the home of [Mother and Husband] as a placement resource for [Jane Doe II and Jane Doe III] due to numerous concerns about the parenting capabilities of both [Mother and Husband].

Mother contends that the finding that Nichols "refused to approve the home of [Mother and Husband] as a placement resource for [Jane Doe II and Jane Doe III] due to numerous concerns about the parenting capabilities of both [Mother and Husband]" is clearly erroneous. Mother makes this contention notwithstanding that the report filed by Nichols states that "[t]he decision of the Regional Home Finding unit was NOT to approve this home as a placement resource for the children." What Mother really is challenging is the validity of the decision made by Nichols. Mother's mistake is her failure to recognize

that she is appealing the decision of the family court, not the decision of Nichols.

III.

FOF no. 39 states as follows: "Recently [Mother] has completed a parenting program with Action Youth Care, Inc. twice. She continues to receive supportive services and parenting training from that agency due to anger issues and depression."

Mother contends that this finding is clearly erroneous because it implies that Mother was not "receiving in West Virginia the same services she was ordered to receive by the Hawaii service plan." We disagree with Mother's interpretation.

IV.

Mother challenges FsOF nos. 40, 43, and 44. They state as follows:

> 40. [Mother] has suffered from long term psychological problems for many years. Her intellectual functioning is low average to borderline and she is immature and emotionally reactive. She suffers from long term chronic depression which can be severe at times and can cause her to be suicidal. Despite years of supportive services she continues to show little understanding of the emotional needs of her children. [Mother] has a very bad temper and small difficulties or incidents can cause her to react in a very violent manner. As a result normal discipline by [Mother] such as spanking has quickly escalated into severe physical abuse in the past and may do so again.
>
> . . . .
>
> 43. [Mother] has repeatedly been untruthful with social workers and service providers in the past. [Husband] has been very resistant to services and strongly resents state intervention in his family situation. It is highly unlikely that either [Husband] or [Mother] would voluntarily report or seek help for problems in the home if the children were placed with them in the future. [Mother] continues to view the matter of child discipline as a family matter that is between herself and her children.

> 44. At present no one in the family home has the ability or motivation to protect the children from harm or to insure that court orders are enforced.

Mother challenges these findings based on evidence in the record to the contrary. It appears that Mother does not understand the applicable standard of review. These FsOF are not clearly erroneous.

V.

Mother contends that the court erred when it denied what was, in effect, her motion to cancel the OSC/Permanent Plan hearing. She states that

> [t]he record is clear that after Mother left Hawaii, DHS made no effort to devise a service plan for Mother and her new home, despite Mother's requests.
>
> Mother's argument in support of her motion to dismiss was simple. Without a service plan for her home, she has not been provided the opportunity to demonstrate whether she can keep her home safe with the assistance of a service plan.

We disagree. This case commenced in February 1997. In September 2002, a new service plan was not a prerequisite to the family court's adjudication of Mother's and Husband's ability to provide Jane Doe II and Jane Doe III "with a safe family home[.]"

VI.

Mother challenges FOF no. 49. It states as follows:

> The parents are not currently willing or able to provide these children with a safe family home even with the assistance of a service plan and it is not reasonably foreseeable that the parents will become willing or able to provide the children with a safe family home even with the assistance of a service plan within a reasonable period of time.

A.

Mother contends as follows:

> Finding 49 is clearly erroneous, at least with respect to Mother. This finding refers to the "parents" without indicating whether it is referring to Mother and [Husband], to Mother and father of Jane Doe [I], or to Mother and father of Jane Doe[s II] and [III].

It appears that Mother does not understand that the "family home" includes both Mother and Husband and that FOF No. 49 cannot be clearly erroneous unless it is clearly erroneous with respect to both Mother and Husband.

We agree that FOF no. 49 could have been more specific. However, the fact that, on November 16, 1998, the family court entered an order that Husband "agrees to participate in this proceeding as a party" combined with the fact that, in its FsOF and CsOL, the family court's order no. 12 states that "[t]he parents are dismissed as parties in the above entitled matter" makes it obvious that the family court's use of the word "parents" in FOF no. 49 referred to all "parents" who were parties in the case.

B.

The essence of Mother's appeal is her contention that the record does not contain clear and convincing evidence supporting FOF no. 49.

Mother notes that on September 17, 1999, the family court decided that "[t]he child/ren's family is presently willing and able to provide [Jane Doe II] and [Jane Doe III] with a safe

family home, with the assistance of a service plan" and then on February 14, 2000, the family court decided that "[t]he child/ren's family is not presently willing and able to provide [Jane Doe II] and [Jane Doe III] with a safe family home, with the assistance of a service plan[.]" Mother contends that the only difference between the two dates was the location of the "family home" and argues that the difference is insufficient for the change in the court's decision.

For comparison, the relevant dates are September 17, 1999, and October 17, 2001. We conclude that Mother ignores the following three relevant differences. First, Mother ignores the fact that the September 17, 1999 decision pertained only to that particular time and was temporary, whereas the February 14, 2000 decision pertained to both that particular time and the future and was permanent.

Second, Mother ignores her total abandonment of Jane Doe I at a crucial time in Jane Doe I's life. This act is clear evidence of Mother's selfish priorities.

Third, Mother ignores her intentional violation of the family court's order not to move Jane Doe II and Jane Doe III out of the court's jurisdiction without the court's prior permission. This act demonstrates the unreliability of Mother's promises, commitments, alleged reforms and changes, her willingness to violate the law whenever she decides to do so, and her

willingness to subordinate the interests of Jane Doe II and Jane Doe III to her own interests. If the move of the family to West Virginia was such a good idea, Mother should have convinced the court of that fact before she moved. Predictably, the route she chose unreasonably caused serious disturbances in the lives of Jane Doe II and Jane Doe III.

CONCLUSION

Accordingly, we affirm the family court's November 14, 2001 Order Awarding Permanent Custody and Establishing a Permanent Plan.

DATED: Honolulu, Hawai‘i, August 8, 2003.

On the briefs:

Lloyd Van De Car
for Respondent-Appellant.

Chief Judge

Marlene Q. F. Young,
Jay K. Goss, and
Mary Anne Magnier,
Deputy Attorneys General,
for Appellee Department of
Human Services.

Associate Judge

Clayton E. Chong,
Guardian Ad Litem.

Associate Judge