NO. 25109

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

In the Interest of JOHN DOE,
Born on March 1, 1990, a Minor

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 99-05825)

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

The father (Father) and mother (Mother) (collectively, the parents) of John Doe, born on March 1, 1990 (John Doe), each appeal from the following two orders entered by Family Court Judge John C. Bryant, Jr.: (1) the April 8, 2002 Order Awarding Permanent Custody (April 8, 2002 Order) awarding permanent custody of their son, John Doe, to the State of Hawaiʻi, Department of Human Services (DHS or State), and (2) the April 30, 2002 Orders Concerning Child Protective Act denying their motions for reconsideration. We affirm.

BACKGROUND

February 16, 1999 John Doe, age nine, and his half-sister, Jane Doe, age eleven (collectively, "the children"), were taken into police protective custody, released to DHS, and placed in foster homes because of suspected parental drug use and the alleged failure of the parents to provide for the children's medical and educational needs. John Doe has severe visual, motor, and cognitive disabilities.

February 19, 1999	DHS filed a petition for temporary foster custody alleging there was a "reasonable foreseeable substantial risk that harm may occur to the children[.]"
February 23, 1999	At a hearing, Judge Karen Radius determined that there was reasonable cause to continue placement in the foster homes to protect the children from imminent harm and ordered both parents to undergo urinalysis (UA) testing.
February 26, 1999	Jeffrey R. Buchli was appointed counsel for the parents.
March 1, 1999	Kevin S. Adaniya was appointed Guardian Ad Litum (GAL) for the children.
March 12, 1999	Judge Radius continued foster custody, ordered the implementation of the February 17, 1999 service plan, permitted parental visitation with the children, and ordered both parents to participate in evaluations by DHS.
July 14, 1999	Judge Paul T. Murakami ordered the implementation of the February 17, 1999 service plan (modified to increase the number of visits between the parents and the children) and the start of unsupervised visitation, subject to DHS and the GAL's approval. Judge Murakami denied the parents' request for family supervision, ordered both parents to take a drug test that day, and to participate in a psychological evaluation.
October 6, 1999	Judge Radius ordered the continuation of foster custody and implementation of the October 4, 1999 service plan.
December 13, 1999	The family court appointed Byron K. H. Hu as counsel for Mother.
January 28, 2000	Judge Radius ordered the continuation of foster custody and implementation of the January 25, 2000 service plan.

February 23, 2000	Judge Radius ordered the continuation of foster custody and the continued implementation of the January 25, 2000 service plan.
May 17, 2000	Judge Radius ordered the continuation of foster custody, the implementation of the May 12, 2000 service plan, and a reunification/visitation plan and agreement. Visits with John Doe were ordered increased by one overnight per month. Subject to DHS and GAL approval, Jane Doe was allowed extended visitation in hopes of awarding family supervision if "visitation goes well."
August 8, 2000	Judge Radius continued foster custody for John Doe but revoked foster custody for Jane Doe, awarded the DHS family supervision, and ordered the implementation of the July 28, 2000 service plan.
January 24, 2001	For John Doe, Judge Radius ordered continued foster custody and the implementation of the January 22, 2001 service plan. For Jane Doe, Judge Radius ordered family supervision revoked and family court jurisdiction terminated.
June 14, 2001	For John Doe, Judge Lillian Ramirez-Uy ordered foster custody to continue, the implementation of a June 7, 2001 service plan, and a July 15, 2001 target date for the reunification of John Doe with his parents, provided Mother entered outpatient treatment immediately and remained until clinically discharged.
August 9, 2001	Judge Marilyn Carlsmith ordered foster custody to continue, the August 3, 2001 service plan implemented, and unsupervised visits between the parents and John Doe.
November 29, 2001	Judge Bryant ordered foster custody to continue and the November 23, 2001 service plan implemented. Judge Bryant also ordered the DHS to file a motion for permanent custody, and set December 12, 2001, as the

	date for a contested hearing on visitation and March 5, 2002, as the date for a permanent custody trial.
December 12, 2001	Judge Bryant ordered overnight visits, a visitation schedule, and the continued implementation of the November 23, 2001 service plan.
January 8, 2002	Judge Bryant ordered foster custody and visitation to continue.
February 5, 2002	DHS filed a "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan" asking the family court to award permanent custody to "an appropriate authorized agency[.]"
February 25, 2002	Pretrial conference held.
March 5, 2002	Trial began on the motion for permanent custody, continued on April 2, 2002, and ended on April 3, 2002.
April 8, 2002	Judge Bryant found, by clear and convincing evidence, that the parents were not presently willing and able to provide John Doe with a safe family home even with the assistance of a service plan, that it was not reasonably foreseeable that they would be able to within a reasonable period of time, and that the proposed permanent plan was in the best interests of John Doe. Consequently, Judge Bryant granted the motion for permanent custody, divested the parents of their parental and custodial duties and rights, and ordered the February 4, 2002 Permanent Plan implemented. Judge Bryant allowed the parents continued weekend visits at the discretion of DHS and the GAL.
April 23, 2002	Father filed "Father's Motion for Reconsideration."
April 25, 2002	Mother filed a "Motion for Reconsideration of Order Awarding Permanent Custody."

April 30, 2002 — After a hearing, Judge Bryant denied both motions for reconsideration.

May 17, 2002 — Father filed a notice of appeal.

May 29, 2002 — Mother filed a notice of appeal.

July 8, 2002 — Judge Bryant filed the family court's Findings of Fact (FsOF) and Conclusions of Law (CsOL), in relevant part, as follows:

FINDINGS OF FACT

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14. At a hearing on March 12, 1999, the court found there was an adequate basis to sustain the petition, asserted jurisdiction over the family, and awarded foster custody of the children to DHS. The service plan dated February 17, 1999 was ordered without objection. Court-ordered services included anger management groups at the Family Peace Center, psychological evaluations, drug assessments and random drug screens, and parenting classes/groups for both parents.

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33. [John Doe] was born on March 1, 1990 at twenty-four weeks' gestation and presently suffers multiple special needs and complications of prematurity including blindness, developmental delays, mental retardation and autism.

. . . .

37. A psycho-social assessment of [John Doe] dated July 18, 2000 resulted in the following diagnoses: Pervasive Developmental Disorder, Not Otherwise Specified; Provisional Autistic Disorder; Mental Retardation, Severity Unspecified; Blindness, Psychogenic constipation with encopresis; Problems with primary support group, Self-injurious behavior, harm to others, thought/communication problems, social problems, difficulty learning.

38. In the July 18, 2000 assessment it was recommended that [John Doe] be provided with a highly structured environment with only gradually introduced changes, as he is at very high risk of regression if not in a highly structured, supportive environment with multiple sources of support.

39. Although he is severely retarded, [John Doe] has made significant gains since placement in foster care in communication and behavioral skills, including learning to drink from a cup and feed himself with supervision, walking with a cane for navigation, using words to communicate, and has [begun] toilet training, thanks to the patient efforts of his teacher and foster mother and consistency in his home and school environments. [John Doe] works with numerous

therapists during the school day and receives in-home Felix services from a theraputic [sic] aide and psychologist.

40. [John Doe] displays tantrum and acting-out behavior when he is frustrated and upset and engaged in self-injurious behavior (head banging) in the past.

41. [John Doe] continues to have special needs in all aspects of his life including very high medical, psychological and educational needs.

42. Regular appointments with [John Doe's] medical providers are very important to monitoring [John Doe's] many health problems and maintaining [John Doe's] health and well-being.

43. Appropriate management of [John Doe's] psychogenic constipation requires constant monitoring and daily communication between home and school and adjustment of the treatment.

44. Failure to maintain consistent treatment of [John Doe's] medical problems affects his emotional stability and his ability to learn and causes him to regress.

45. [John Doe] needs consistency and stability in his full-time family home and a calm environment to maintain his emotional stability.

46. Even apparently minor disruptions in [John Doe's] routine affect [John Doe].

47. [John Doe] has thrived in his foster home . . . .

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52. [John Doe] takes pleasure in listening to music, dancing and swimming as well as other activities.

53. [John Doe] displays echoliac or "parrot-like" speech at school and has recently been repeating foul language and swearing after his weekend visits with parents.

54. A reunification plan for parents to assume full-time custody of [John Doe] on July 15, 2001 was halted by DHS and the GAL and not reinstated due to numerous concerns including Mother's missed drug tests and failure to enter a substance abuse treatment program, missed medical appointments for [John Doe], a severe drop in [John Doe's] blood level for anti-seizure medication, poor care of [John Doe's] hygiene needs, and marital instability including Mother's continued involvement with her boyfriend.

55. The Kapiolani Child Protection Center Multidiscipinary [sic] Team Conference reviewed [John Doe's] and the family's circumstances at a meeting held October 11, 2001 and concluded that DHS should pursue permanent out-of-home placement of [John Doe].

56. Although [John Doe] has regressed at times and shown signs of uneven care after visits, at the present time Mother and Father are able to care for [John Doe] for overnight weekend visits, as long as he returns to the foster home on a full time basis.

57. DHS is not obligated to provide Mother and Father with permanent monitoring or supervision by a care provider or agency for the purpose of protecting [John Doe] from long-term medical, dental or educational neglect.

58. Monitoring by an outside care provider or agency would not protect [John Doe] from emotional instability in the home including marital conflict, arguing or swearing, or from the risk of neglect due to Mother's unresolved substance dependence.

59. After thirty-eight months in foster care at the time of trial, it is not in [John Doe's] best interest for him to wait any longer for Mother and Father to possibly become able to provide him with a safe home at some future time.

60. There is no doubt that parents love [John Doe] and he loves them, but the fundamental health and safety needs of [John Doe] and his extraordinarily high physical, medical and psychological needs must be considered in light of Mother and Father's problems and history, which DHS, and their experts, and the GAL, and this Court have done.

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62. Mother suffers from Polysubstance Dependence, Dysthymic Disorder, and Personality Disorder NOS (not otherwise specified), ...

63. Dr. [John L.] Wingert's clinical profile of Mother's personality, including features of psychological immaturity and impulsiveness, with behavior characterized by poor judgment and risk taking and difficulty profiting from experience (thereby finding herself in the same troubles over and over again), is consistent with the observations of other witnesses and the reports of service providers.

64. Mother's psychological problems make her unreliable in sustaining responsibility for her obligations in the long term, including her obligations to [John Doe].

65. Mother and Father have similar personality features and their diagnoses indicate that both of them tend to be largely self-focused and resistant to psychological change.

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67. The combination of Mother and Father's psychological problems in the family home raises a safety concern in caring for this very needy child because of their resistance to change and because neither of them are able to provide an objective reality check for the other.

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71. Mother has a long history of drug use including methamphetamine ("ice"), valium, alcohol and marijuana.

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80. Mother and Father reconciled in April or May of 2000 after more than a year of separation. Marital conflict was reported by their counselor soon after the reunion.

81. Mother and Father's marital instability is chronic, as evidenced by the fact that Father is not the biological father of [John Doe's] older half-sister.

82. Conflict in the marital relationship between Mother and Father interferes with the calm, stable environment needed by [John Doe].

83. Mother and Father's continued marital instability is evidenced by Mother's leaving the family home for seven days in September of 2001 and reported continued involvement with her boyfriend.

84. Although Mother and Father report marital harmony as of the time of trial, based on their long history there is no reason to believe that marital problems might not recur in the future.

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95. Mother has avoided drug treatment by representing to clinical assessors that she has a long period of abstinence, and by declined residential drug treatment which was offered to her in July of 2001.

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114. Mother has not successfully addressed her problem with substance dependence as of the time of trial.

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118. Dr. [Thomas] Anthony concentrated most of his time with the family on providing marital counseling to Mother and Father for the purpose of trying to resolve their psychological and marital issues, because family stability is so necessary for [John Doe's] well-being.

119. According to Dr. Anthony, it will take quite a bit of time to resolve Mother and Father's psychological problems.

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124. Father suffers from Personality Disorder, NOS . . . . The personality disorder NOS designation (as to both Father and Mother) refers to certain paranoid, antisocial and narcissistic traits that have become maladaptive, rigid and resistant to change over the years.

125. Dr. Wingert's clinical profile of Father's personality, including features of impatience, emotional explosiveness and moodiness, strong sensitivity to rejection or criticism, tendency to be selective in reporting what is going [on] in his life and to view himself with rose colored glasses, and toward minimization and blaming others for his problems, is consistent with the observations of other witnesses and reports of service providers.

126. Father served with the Honolulu Police Department for more than ten years, resigned while under investigation for drug-related charges, and was convicted of felony drug offenses in 1985.

127. Father's employment has been irregular and the family has experienced financial instability in recent years including several evictions, foreclosure, and dependence on extended family for housing.

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129. On November 20, 2000, Father successfully completed the anger management program of Catholic Charities Family Services; the program reported that Father maintains a level of minimizing but appeared committed to diminishing some of his power and control behaviors.

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131. Father has been given every reasonable opportunity to successfully address the problems which brought him under court jurisdiction and to become able to provide a safe family home for [John Doe].

132. Father has made progress in addressing his problems and understanding [John Doe's] needs, but his progress is not sufficient to ensure a safe and stable home for [John Doe] on a full-time basis over an extended period of time.

133. Father is not presently willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, because he is unable to provide [John Doe] with a calm, stable and consistent environment in the long term and is unable to protect [John Doe] from risk of instability, disruption and neglect.

134. It is not reasonably foreseeable that Father will become willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed three years from the date upon which [John Doe] was first placed under foster custody by the court, because [John Doe] was first placed

under foster custody more than three years ago, and therefore there is no additional future period of time within which to foresee future change, and it is not likely that Father will successfully address his problems and increase his protective ability within any identifiable period of time.

. . . .

135. The permanent plan proposed by DHS, which recommends guardianship by his current caretaker, is in the best interest of [John Doe] because of his special needs and his need for a prompt and permanent safe and secure home with responsible, stable and competent substitute parents and family.

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140. Dr. Thomas Anthony was a credible witness but his testimony was of limited help to the court because he was very, very evasive about his concerns about parents, and his involvement with the family is so recent that he lacks perspective.

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CONCLUSIONS OF LAW

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2. [Mother] . . . is not presently willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, ...

3. [Father], [John Doe's] legal father as defined under [Hawaii Revised Statutes (HRS)] Ch. 578, is not presently willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, upon due consideration given to the information pertaining to the safe family home guidelines as set forth in HRS § 587-25 [(1993)].

4. It is not reasonably foreseeable that [Mother] will become willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed three years from the date upon which [John Doe] was first placed under foster custody by the court.

5. It is not reasonably foreseeable that [Father] will become willing and able to provide [John Doe] with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed three years from the date upon which [John Doe] was first placed under foster custody by the court.

> 6. The permanent plan dated February 4, 2002 will assist in achieving the goal which is in the best interests of [John Doe].
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> 7. In arriving at its decision, the court first made a determination pursuant to HRS § 587-73(a)(1) and (2) [(Supp. 2002)] as to Mother and Father, prior to its determination under HRS § 587-73(a)(3).

POINTS ON APPEAL

Mother challenges FOF No. 135 and CsOL Nos. 4, 5, 6, and 7.

Mother argues that the family court failed "to use reasonable efforts to reunify [John Doe] with [his] mother[.]"

Father challenges the denial of Father's Motion for Reconsideration and the following FsOF and CsOL for the following reasons:

FOF No. 14: "The parents agreed to the court taking jurisdiction over the case and to the service plan."

FOF No. 56: "Father was never given the opportunity to demonstrate that he is able to care for John [Doe] on a full time basis."

FOF No. 57: "Monitoring of Father's care of John [Doe] can be provided by the Department of Health through the Public Health Nurse and its Children with Special Needs Program."

FOF No. 58: "The court found that the marital discord had abated. Father does not have unresolved substance dependence."

FOF No. 59: "The court stated that '[m]aybe there's a good reason for him to wait another year or two or three.'"

FOF No. 60: "Dr. Thomas Anthony testified that the parents together or Father, individually, were able to adequately care for John [Doe]. The court found Dr. Anthony's testimony credible."

FOF No. 67: "The psychological evaluation found no major concerns regarding Father's parenting ability. Furthermore, that psychological evaluation recommended parenting and anger management classes for Father, which he successfully completed."

FOF No. 80: "Mother and Father had not been separated for more than a year. Their counselor did not report marital conflict soon after they reconciled."

FOF No. 81: "The court found that the marital discord had abated."

FOF No. 82: "The court found that the marital discord had abated."

FOF No. 83: "The court found that the marital discord had abated."

FOF No. 84: "Mother and Father's marital harmony as of the time of trial was due to the counseling they were receiving from Dr. Anthony."

FOF No. 118: "Dr. Anthony concentrated most of his time with the family teaching the parents how to meet [John Doe's] needs. His focus was on John [Doe]. Dr. Anthony also provided Mother and Father with counseling. Dr. Anthony testified that Mother and Father were able to meet John [Doe's] needs. He further testified that Mother and Father's marital relationship was improving as a result of his counseling."

FOF No. 119: "No where in the record does Dr. Anthony state it will take quite a bit of time to resolve Mother and Father's psychological problems."

FOF No. 131: "Father completed the services he was asked to do. He was never given the opportunity to demonstrate that he is able to provide a safe home for John [Doe]."

FOF No. 132: "Father was never given the opportunity to demonstrate that he is able to provide a safe and stable home for [John Doe] on a full-time basis over an extended period of time."

FOF No. 133: "The evidence was not clear and convincing that Father is not presently willing and able to provide [John Doe] with a safe family home even with the assistance of a service plan. He was never given the opportunity to demonstrate that he could provide [John Doe] with a safe family home even with the assistance of a service plan."

FOF No. 134: "Dr. Anthony, the person with the most contact with Father, testified that Father is willing and able to provide a safe home for [John Doe]."

FOF No. 135: "Father is willing and able to provide a safe home for [John Doe] with the assistance of a service plan."

FOF No. 140: "Dr. Anthony had no concerns about the parents' ability to care for John [Doe]. He had been working with the family since December 2000 and he was fully aware of the family history."

COL No. 3: "The evidence was not clear and convincing that Father is not willing and able to provide a safe home for [John Doe] with the assistance of a service plan."

COL No. 5: "The evidence was not clear and convincing that Father is not willing and able to provide a safe home for [John Doe] with the assistance of a service plan."

COL No. 6: "The permanent plan was not in the best interests of [John Doe] because the evidence was not clear and convincing that Father is not willing and able to provide a safe home for [John Doe] with the assistance of a service plan."

COL No. 7: "The evidence was not clear and convincing that Father is not willing and able to provide a safe home for [John Doe] with the assistance of a service plan."

RELEVANT STATUTES AND PRECEDENT

§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:

(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;

(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.

. . . .

§587-73 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 three years from the date upon which the child was first placed under foster custody by the court;

(3) The proposed permanent plan will assist in achieving the goal which is in the best interests of the child; provided that the court shall presume that:

(A) It is in the best interests of a child to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes; and

(B) The presumption increases in importance proportionate to the youth of the child upon the date that the child was first placed under foster custody by the court; and

(4) If the child has reached the age of fourteen, the child is supportive of the permanent plan.

(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;

(B) Be placed under guardianship pursuant to chapter 560; or

(C) Remain in permanent custody until the child is subsequently adopted, placed under a guardianship, or reaches the age of majority, and that such status shall not be subject to modification or revocation except upon a showing of extraordinary circumstances to the court;

(4) That such further orders as the court deems to be in the best interests of the child, including, but not limited to, restricting or excluding unnecessary parties from participating in adoption or other subsequent proceedings, be entered; and

(5) Until adoption or guardianship is ordered, that each case be set for a permanent plan review hearing not later than one year after the date that a permanent plan is ordered by the court, or sooner if required by federal law, and thereafter, that subsequent permanent plan review hearings be set not later than each year,

or sooner if required by federal law; provided that at each permanent plan review hearing, the court shall review the existing permanent plan and enter such further orders as are deemed to be in the best interests of the child.

(c) If the court determines that the criteria set forth in subsection (a) are not established by clear and convincing evidence, the court shall order that:

(1) The permanent plan hearing be continued for a reasonable period of time not to exceed six months from the date of the continuance or the case be set for a review hearing within six months;

(2) The existing service plan be revised as the court, upon such hearing as the court deems to be appropriate and after ensuring that the requirement of section 587-71(h) is satisfied, 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;

(3) The authorized agency submit a written report pursuant to section 587-40; and

(4) Such further orders as the court deems to be in the best interests of the child be entered.

(d) At the continued permanent plan hearing, the court shall proceed pursuant to subsections (a), (b), and (c) until such date as the court determines that:

(1) There is sufficient evidence to proceed pursuant to subsection (b); or

(2) The child's family is willing and able to provide the child with a safe family home, even with the assistance of a service plan, upon which determination the court may:

(A) Revoke the prior award of foster custody to the authorized agency and return the child to the family home;

(B) Terminate jurisdiction;

(C) Award family supervision to an authorized agency;

(D) Order such revisions to the existing service plan as the court, upon such hearing as the court deems to be appropriate and after ensuring that the requirement of section 587-71(h) is satisfied, 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;

> (E) Set the case for a review hearing within six months; and
>
> (F) Enter such further orders as the court deems to be in the best interests of the child.

In the case of In re Jane Doe, Born on June 20, 1995, 95 Hawai‘i 183, 20 P.3d 616 (2001), the Hawai‘i Supreme Court concluded that

> the [Child Protective Act (CPA)] does not authorize the divestiture of parental rights based, without more, on a determination either that the child's *family* is unable to provide the child with a safe family home or that divestiture is in the child's best interests.
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> . . . [T]he focus of a permanent plan hearing conducted pursuant to HRS § 587-73(a) is whether the child's "mother" or "father" can provide a safe family home. See § HRS 587-73(a)(1). If not, the focus shifts to whether it is reasonably foreseeable that the child's "mother" or "father" will become willing and able to provide a safe family home within a reasonable period of time. See HRS § 587-73(a)(2). Only after the family court has found, by clear and convincing evidence, that neither criteria has been established, does the court then consider whether the proposed goal of the permanent plan is in the best interests of the child. See HRS § 587-73(a)(3).
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> . . . .
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> . . . Nevertheless, nothing in the CPA authorizes an award of permanent custody solely on the basis of a finding that a parent has not strictly complied with the terms and conditions of a service plan.

Id. at 194, 20 P.3d at 627 (emphasis in original).

STANDARDS OF REVIEW

Findings of Fact/Conclusions of Law

Findings of fact are reviewed under the "clearly erroneous" standard. In re Jane Doe, 84 Hawai‘i 41, 46, 928 P.2d 883, 888 (1996) (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 (1999). Substantial evidence is "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 Prods., 86 Hawai‘i 214, 253, 948 P.2d 1055, 1094 (1997) (citations, internal quotation marks, and original brackets 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).

Abuse of Discretion

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. Fujikane v. Fujikane, 61 Haw. 352, 355, 604 P.2d 43, 45 (1979). Under the abuse of discretion standard of review, the family court's decision will not be disturbed 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." Bennett v. Bennett, 8 Haw. App. 415, 416, 807 P.2d 597, 599 (1991).

In the Interest of Doe, 77 Hawai‘i 109, 115, 883 P.2d 30, 36 (1994).

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. Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai‘i 97, 110, 58 P.3d 608, 621 (2002) (citations, internal quotations, and brackets omitted). We review "[a] trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Id.

Termination of Parental Rights

> [T]he family court's determinations pursuant to HRS § 587-73(a) with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact; thus, inasmuch as the family court's determinations in this regard are dependant upon the facts and circumstances of each case, they are reviewed on appeal under the "clearly erroneous" standard.

In re Jane Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (citations omitted).

DISCUSSION

"Unchallenged [FsOF] are binding on appeal." Poe v. Haw. Labor Relations Bd., 97 Hawaii 528, 536, 40 P.3d 930, 938 (2002) (citing Robert's Haw. School Bus, Inc. v. Laupahoehoe Trans. Co., Inc., 91 Hawai‘i 224, 239, 982 P.2d 853, 868 (1999) ("[FsOF] that are unchallenged on appeal are the operative facts

of a case.") (citation omitted)). Mother challenged only one FOF. Father challenged only twenty FsOF.

Mother's Appeal

(1)

Mother argues that the "State failed to prove by clear and convincing evidence[1] that Mother could not provide a safe family home for [John Doe]." (Footnote added.) Specifically, Mother argues that the family home is safe for John Doe, otherwise, the family court would not have allowed Jane Doe to return and to continue unsupervised weekend visits.[2] We disagree.

[1/] "Clear and convincing" evidence is an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. Iddings v. Mee-Lee, 82 Hawai'i 1, 13, 919 P.2d 263, 276 (1996). "It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable." Id. (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 575 (1989) (citations omitted)).

"[C]onflicting evidence *per se* [does not] preclude . . . it from being clear and convincing. The trier of fact must resolve 'the conflicting evidence based on the credibility of the witnesses and the weight of the evidence.'" Almeida v. Almeida, 4 Haw. App. 513, 518, 669 P.2d 174, 179 (1983) (citations omitted). It is well established that Hawai'i appellate courts "will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence" because that is the province of the trier of fact. State v. St. Clair, 101 Hawai'i 280, 287, 67 P.3d 779, 786 (2003) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 117, 839 P.2d 10, 28, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citations and internal quotation marks omitted)).

[2/] Mother suggests that the State of Hawai'i, Department of Human Services (State or DHS), and the Guardian Ad Litem (GAL) should have lengthened the unsupervised visits to give the parents an opportunity to prove they were able to provide a "full-time" safe family home. Mother also states that "safe family home" is not statutorily defined. We note that although Hawaii Revised Statutes (HRS) § 587-2 does not define "safe family home," HRS § 587-25 provides safe family home guidelines.

The family court "is given much leeway in its examinations of the reports concerning [a child's] care, custody[,] and welfare[.]" In the Interest of Jane Doe, 95 Hawai‘i at 197, 20 P.3d at 630 (quoting In re John Doe, Born on September 14, 1996, 89 Hawai‘i 477, 487, 974 P.2d 1067, 1077 (App. 1999) (citations omitted)). After reading reports from various service providers and hearing testimony from expert and lay witnesses,[3] the family court was aware that numerous problems affected the parents' ability to adequately care for John Doe. For example, Mother and Father have a history of substance abuse.[4] On July 12, 2001, Maureen A. Reese, a Certified Substance Abuse Counselor (CSAC) with Hina Mauka, the largest substance abuse treatment organization in Hawai‘i, wrote John Doe's DHS case manager, Leona Teale (Teale), stating that

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[3/] The trial court found that Leona Teale (Teale), M.S.W., DHS case manager for John Doe, Born on March 1, 1990 (John Doe); Dr. John L. Wingert, a licensed clinical psychologist; Patrick Wade, Certified Substance Abuse Counselor and co-director of Hina Mauka, Hawai‘i's largest substance abuse treatment organization; and Vanessa Roth, John Doe's special education teacher, "were unbiased, credible witnesses whose expert testimony was helpful to the court" and that the "testimony and reports of [John Doe's] GAL . . . were helpful to the court." The trial court found that Dr. Thomas Anthony, Ph.D., John Doe's Felix-provided in-home therapist, "was a credible witness but his testimony was of limited help to the court because he was very, very evasive about his concerns about parents, and his involvement with the family is so recent that he lacks perspective." The trial court also noted that "Mother and Father expressed their sincere love for [John Doe] and the Court has given appropriate weight to their testimony."

[4/] During the time period John Doe has been in foster care, both parents missed several appointments with school officials, service providers, and healthcare professionals. Mother failed to appear for drug-testing twenty-three times out of fifty-one scheduled tests during the period December 18, 2000, to March 5, 2002, and tested positive for drugs as recently as June 6, 2001. Diagnosed as substance dependent, residential treatment was recommended but Mother had problems entering a residential program.

"[Mother's] behaviors since December 2000 are classic symptoms of one with an active substance dependence problem." As part of her efforts to get help with her substance abuse problem, Mother began seeing Dr. Antonio Gino, a licensed clinical psychologist and CSAC, on or about August 9, 2001. On November 15, 2001, Dr. Gino wrote a letter stating that Mother had "completed all requirements for a clinical discharge from substance abuse counseling." On December 7, 2001, however, Teale wrote Judge Bryant questioning Dr. Gino's opinion, stating that Mother's efforts did not warrant a clinical discharge given her lengthy drug use, missed drug screenings, conflicting statements about drug use, and positive drug test on June 6, 2001. Patrick Alan Wade, CSAC and Co-Director of Adult Services at Hina Mauka, testified at the March 5, 2002 trial that "fifteen weeks of individual psychotherapy, mostly every other week with no [Alcoholics Anonymous (AA)] or [Narcotics Anonymous (NA)]" would not provide effective treatment for Mother's substance abuse problem.

In addition to problems of substance abuse, there has been chronic marital instability because of episodes of domestic violence and Mother's infidelity and repeated absences from the family home. Father argues that the parents' marital discord has abated, but evidence suggests the likelihood of further conflict. At one point, Father did not support Mother attending AA/NA

meetings because he felt she was lying about her whereabouts. On February 22, 2000, for example, Dr. Wingert, a licensed clinical psychologist, conducted a psychological evaluation of Mother and concluded that Mother has "difficulty benefiting [sic] from experience; she may find herself in the same difficulties again and again and be prone to impulsiveness and pleasure seeking behavior at the expense of responsibility to others." Dr. Anthony, a therapist working with the parents to help them improve their relationship and training them to care for John Doe's special needs, testified on cross-examination during the trial to determine permanent custody, that the parents still had "issues I don't think they have solved completely[.]"

Although she has had problems in school, John Doe's half-sister, Jane Doe, attends regular education classes and is generally characterized as a "bright, personable, energetic, athletic, and happy" child. John Doe is a special needs child with severe visual, physical, and cognitive disabilities.[5] Obviously, John Doe requires more specialized care, but evidence suggests that during his unsupervised visits to the family home,

[5/] Neither parent challenged the family court's Finding of Fact (FOF) No. 34 which states that John Doe "came to the attention of the [Department of Education (DOE)] because [he] was enrolled but did not attend school regularly from 1993 to 1996, was not sent to school at all until the Fall of 1998, and did not attend regularly from October 1998 through the filing of the petition, and Mother and Father were not responsive to DOE efforts to get [John Doe] to school regularly." Neither parent challenged FOF No. 35 which states that, "[a]t the time [John Doe] came to the attention of DHS he had suffered from severe and chronic medical, dental and educational neglect." FOF No. 41 establishes that "[John Doe] continues to have special needs in all aspects of his life including very high medical, psychological and educational needs."

the parents did not maintain the standard of care John Doe requires. Although the parents have shown progress in resolving their problems by complying with the various service plans, evaluations by service providers state that both parents are "unable to meet [John Doe's] medical and behavioral needs." Reports by DHS conclude the parents are "working on their own emotional needs and are ill equipped . . . to meet [John Doe's.]" Upon careful review of the record, it is apparent that the family court's decision to terminate Mother's parental rights was supported by substantial evidence. In light of the above, the family court's decision was not clearly erroneous.

(2)

Mother argues the family court failed "to use reasonable efforts to reunify [John Doe] with [his] mother" as required by HRS § 587-1 (Supp. 2002).[6] The record shows otherwise.

[6/] HRS § 587-1 (Supp. 2002) provides, in relevant part, the following:

> The policy and purpose of this chapter is to provide children with prompt and ample protection from the harms detailed herein, with an opportunity for timely reconciliation with their families if the families can provide safe family homes, and with timely and appropriate service or permanent plans to ensure the safety of the child so they may develop and mature into responsible, self-sufficient, law-abiding citizens. The service plan shall effectuate the child's remaining in the family home, when the family home can be immediately made safe with services, or the child's returning to a safe family home. The service plan should be carefully formulated with the family in a timely manner. Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems which put the child at substantial risk of being harmed in the family home. Each appropriate resource, public and private, family and friend, should be considered and used to maximize the legal custodian's potential for providing a safe family home for the child. Full
>
> (continued...)

From February 16, 1999, to April 8, 2002, pursuant to service plans dated February 17, 1999, October 4, 1999, January 25, 2000, May 12, 2000, July 28, 2000, January 22, 2001, June 7, 2001, August 3, 2001, and November 23, 2001, DHS provided or recommended services designed to protect the children from further harm and assist the parents in their efforts at reunification. The DHS engaged various service providers including: the Family Peace Center for anger management classes; the Salvation Army Addiction Treatment Services (ATS) for drug assessments and random UAs; Diagnostic Laboratory Services, Inc. for urine screens; P.A.R.E.N.T.S. to teach parenting skills; the Kapiolani Child Protection Center (KCPC) to provide case analysis and recommendations; Catholic Charities to aid with visitation and issues of domestic violence; Dr. Wingert for psychological evaluations; and Hina Mauka to help with the parents' substance abuse problems.

At the June 14, 2001 review hearing, the family court stated that after "reading the GAL report, it appears that

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[6/](...continued)
and careful consideration should be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated. Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child will be permanently placed in a timely manner.

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

reasonable efforts have been expended by the [DHS]." The family court also stated that "based on the circumstances, the court will keep the 7/15 target date [for reunification], on condition, that mother enters [a] substance abuse treatment program, that means forthwith[,]" be available for random UAs seven days a week, and attend AA/NA meetings three times a week and provide proof of attendance. Mother failed to meet the conditions set forth by the family court.

Mother argues that her alleged illicit drug use was never proven by random urinalysis. The record shows that, on October 3, 2000, Mother was discharged from The Salvation Army ATS for testing positive for Benzodiazepines after denying that she used any prescribed or over-the-counter medication containing Benzodiazepines.[7] As mentioned, Mother failed to appear for drug testing twenty-three times out of fifty-one scheduled tests during the period December 18, 2000, to March 5, 2002. The June 7, 2001 Family Service Plan stated that Mother must "[c]ontinue random urinalysis with Hina Mauka. **DO NOT MISS ANY. A MISSED ONE WILL BE COUNTED AS POSITIVE.**" (Emphasis in the original.) Mother signed the June 7, 2001 Family Service Plan acknowledging that she had "read and received" it. KCPC issued a

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[7/] At the August 9, 2001 hearing, as proof that the June 6, 2001 positive test was not substance abuse, Mother stated she had a letter from her doctor who prescribed the Valium that caused the positive urinalysis. Mother's attorney stated that he had seen the letter, however, the letter is not in the record and the trial court did not discuss the letter in its findings of fact.

Multidisciplinary Team Conference Report on October 22, 2001, noting that Mother "has consistently been made aware that a 'no show' counts as a positive drug test." Mother knew and understood that each missed screening counted as a presumed positive test.

Mother also argues that because the DHS would not pay for treatment when Mother's resources proved insufficient, it did not use reasonable efforts to provide treatment. The record shows otherwise. At the review hearing on August 9, 2001, Mother's efforts to enter a substance abuse program were discussed:

> THE COURT: Just a minute. Ms. Teale, why can't [Mother] get into a program if she's been trying so hard?
>
> MS. TEALE: Well, because she's been in many programs, and was released and never completed.
>
> [MOTHER]: Your Honor, if I get to.
>
> THE COURT: If they get to a certain point of no completions, are they no longer able to get into a program because of that?
>
> [DEPUTY ATTORNEY GENERAL (DAG)]: Your Honor, I'm sorry, if I may. ATS was willing to take [Mother] on July 27th, and if she had said yes, she would have been in.
>
> She said she didn't want to go, and six days later, they said, they declined to take her for reasons, including the fact that she had an unsuccessful track record.
>
> But the information DHS has is that she didn't want to go into that program. She wanted another program.
>
> The Department will continue to work with her . . . .
>
> . . . .
>
> [MOTHER]: That is not true, Your Honor. At no time did I state -- I did, when we first went in for the assessment, I did state, he said, Well, we have a bed right now, and he laughed, but he also --

> THE COURT: What does it matter if he laughed?
>
> [MOTHER]: No, he gave me this, and this is what I followed for two weeks. I called him every day. In fact, there are days that I called him twice. I did not --
>
> THE COURT: If there was a bed there, why didn't you go anyway?
>
> [MOTHER]: I was not able to get in at that time. It was -- this was the motivation that I needed to work with before I could even get in, and this is the new criteria that they worked with.

Also on August 9, 2001, Mother began seeing Dr. Gino for individualized therapy. On September 25, 2001, Mother was screened at The Queen's Medical Center (QMC) for services from QMC's Day Treatment Dual Diagnosis Program. Mother was not accepted because she reported that she had been clean for two years. QMC recommended continuing individual therapy. Clearly, Mother did not qualify for residential treatment for reasons other than an inability to pay. The record provides numerous examples of the efforts of the DHS to help the parents establish a safe family home during John Doe's three years in foster care, consequently, the family court was not wrong in concluding that the DHS used reasonable efforts to attempt to reunify John Doe with his parents.

Mother asserts that the parents were not given the opportunity to prove they could provide a safe family home in excess of weekends. John Doe was taken into protective custody and placed in a DHS foster home on February 16, 1999. The parents were permitted regular, daytime, supervised, and unsupervised visits with John Doe until the May 17, 2000 hearing

when Judge Radius increased visitation by one overnight visit per month. Visitation continued to increase. By July 2000, John Doe was spending Saturday morning through Sunday evening of every weekend with his parents and entire three-day weekends in the family home. Weekend visits with the parents were temporarily suspended in August 2001 because of John Doe's medical needs. Visitations on Saturdays and Sundays between 9 a.m. and 5 p.m. were resumed after the November 29, 2001 hearing, overnight weekend visits were reinstated after the December 12, 2001 review hearing and allowed to continue at the discretion of the DHS and GAL after the April 8, 2002 Order.

Throughout the time John Doe was in foster care, Mother's inability to resolve her substance abuse problems and frequent periods of marital instability raised questions as to whether the parents could adequately address their own needs in order to see to the special needs of their child. Heide Kiyota, Ph.D., in her psychological assessment, diagnosed John Doe as having Pervasive Developmental Disorder, Not Otherwise Specified with Provisional Autistic Disorder. Dr. Kiyota stated that John Doe

> will benefit best from a highly structured environment with only gradually introduced changes. The complexity of his clinical presentation combined with the severity of his medical difficulties and physical handicap of blindness place him at very high risk for regression, if he is outside of a highly structured, supportive environment with multiple sources of support.

The record indicates that Mother was the primary care giver for the children and that Father provided the financial support but that the parents had frequent financial problems. The record also indicates that Mother needs further treatment to address her substance abuse problems including attending AA/NA meetings and obtaining UA screenings regularly. Moreover, as noted, the potential for marital problems remained high.

(3)

Mother argues that the family court erred in its FsOF and CsOL when it decided that "the permanent plan dated February 4, 2002" was in the best interests of the child. Specifically, Mother argues that John Doe's foster home "does not provide [him] with the necessary attention he needs" and is not safe because he was sexually molested by another child while in the foster home.

The record contains substantial evidence that Mother is not able, nor will she within a reasonable period of time be able, to provide John Doe with a safe family home even with the assistance of a service plan. Over a three-year period, Mother has failed to resolve her own substance abuse problems. In addition, continuing marital discord disrupts the family home

threatening its stability.[8] The GAL, Vanessa Roth (Roth), and Teale, all of whom the family court found to be credible, testified that the parents could not provide a stable environment for John Doe. The GAL also testified that while the biological parents could provide more one-on-one attention than the foster parents, that was not the primary issue. "The primary issue is meeting [John Doe's] physical and medical needs, and that is something that we cannot be assured of."

The GAL testified that John Doe was sexually molested by another child while in the foster home. However, the record does not contain any other reference to the alleged molestation. Over the three-year period John Doe was in the foster parents' care, neither the parents, the GAL, nor the DHS requested a change in foster parents. Moreover, it appears that John Doe

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[8/] Teale testified as follows:

> I think that a lot of the conflict in the home is because [Mother] was seeing another man, and I know that there was a lot of marital discord that I could hear, even on the phone. And I'm sure that [John Doe], who really needs as quiet environment as possible, would definitely get affected by any kind of marital discord that goes on in the home.
>
> . . . .
>
> Q. The question is discord in the home. Has that been resolved to your satisfaction?
>
> A. Well, they told me yesterday that they are going to be together. [Mother], in the presence of Dr. Anthony, said that she will not see her former boyfriend again.
>
> . . . I don't believe that. I don't believe that at all. I believe maybe it will last for a couple of weeks. However, I believe that when [Mother] feels the need for her former boyfriend that she is just as likely to return to him, because I've seen this pattern, and I've heard the same thing before.

"thrived in his foster home." More importantly, the issue before the family court was the ability of the biological parents to care for John Doe, not the ability of the foster parents.

Given the complexity and severity of John Doe's medical and physical difficulties, the high risk of regression, his need for "a highly structured, supportive environment with multiple sources of support," and the family's history of recurrent problems, the family court did not err in deciding "the permanent plan dated February 4, 2002" was in the best interests of the child.

Father's Appeal

(1)

Father argues that the family court erred in FsOF Nos. 56, 67, 131, 132, and 133 because Father completed the recommended parenting and anger management classes, "[t]he psychological evaluation found no major concerns regarding [his] parenting ability[,]" and he "was never given the opportunity to demonstrate that he is able to care for John [Doe] on a full time basis."

Father asserts that he "successfully completed the services recommended by his psychological evaluation and the various services plan"; [sic] that Dr. Anthony who testified "the parents should be given a chance to see how they will care for John [Doe,]" was the expert most qualified to determine if Father

was able to adequately care for John Doe; that "[t]here were no major concerns regarding his ability to parent"; and that he was already providing a safe home for Jane Doe without the assistance of a service plan. Father argues, in light of these reasons, "[t]he evidence was not clear and convincing that [he was] not willing and able to provide a safe home for John [Doe] with the assistance of a service plan." In his reply brief, Father asserts that he should not be faulted for the inability of Mother to provide a safe home because of her failure to complete her substance abuse treatment.

The February 4, 2002 Supplemental Safe Family Home Report states that both parents are "identified as potential perpetrators of harm to [John Doe] because of [Mother's] failure to maintain her sobriety and [Father's] failure to protect [John Doe] from his [Mother's] relapses." We conclude that it is reasonable to fault Father for his inaction regarding Mother's failure to complete her substance abuse treatment. Father and Mother are partners in marriage, live together, and operate as a team. Neither parent can ask to be evaluated separate from the other because neither agreed to separate from the other. As long as Father is with Mother, her disqualification is his disqualification. Mother did not complete treatment for her substance abuse problems, and, as discussed above, the potential for continued marital problems remains high. Clearly, the

parents face serious impediments to their efforts to provide the stable environment and medical care John Doe needs. Notably, The GAL, Roth, and Teale testified that the parents could not do so.

Although Dr. Anthony testified that "the parents should be given a chance to see how they will care for John [Doe,]" Teale and others disputed Dr. Anthony's position. Teale testified, "I think it would have been good if Dr. Anthony had come on two years ago, however, he comes on now. I can see his optimism, because he does not see the history. He does not see the patterns." The family court found that Dr. Anthony "was a credible witness but his testimony was of limited help to the court because he was very, very evasive about his concerns about parents, and his involvement with the family is so recent that he lacks perspective." Dr. Anthony, in cross-examination testimony, admitted the parents still had "issues I don't think they have solved completely[.]"

Father is the primary financial provider and Mother is the primary care giver. The first problem is stated in unchallenged FOF No. 127. The second problem is that Father cannot be employed outside of the home and give John Doe the care and attention he needs.

Even if the roles were reversed and Mother became the family's financial provider, Father does not have the capability of providing John Doe with the level of care required. The

KCPC's November 15, 2001 Multidisciplinary Team Conference Report states that "the feasibility of father assuming the primary care giver role is very low as his financial and living status is unstable, [he] is emotionally committed to the mother, and lacks the necessary informal supports to care for a highly special needs child."

When asked "[s]o long as [Mother] was out of the home, then, [Father] could provide a safe home?", Teale responded, "Technically, yes, but at this point I really don't trust them. Even if they were going to get a divorce, I don't believe that that would be so." Moreover, when questioned about who he would go to if John Doe had problems, Father replied, "Well, I have my wife with me. We have people that we can call and talk to, give information, have assistance."

John Doe has been in foster care for over three years. During that time, Mother and Father have had the opportunity to show that either or both is willing and able to care for John Doe or could be so within a reasonable period of time. Given the substantial evidence in the record to support the family court's decision, the termination of parental rights and award of permanent custody to DHS is not clearly erroneous.

Jane Doe was returned to the parents' custody, but she does not require the expert care and attention required by John Doe. John Doe's demonstrated need for "a highly structured,

supportive environment with multiple sources of support," and the family's history and potential for problems support the family court decision to award permanent custody and decide "the permanent plan dated February 4, 2002" was in the best interests of John Doe.

(2)

Father asserts that the family court erred in FOF No. 14 because the "parents agreed to the court taking jurisdiction over the case and to the service plan." Father fails to recognize that the fact that the parents agreed to it does not change the truth of what is said in FOF No. 14.

Father contends that the family court erred in FOF No. 57 because "[m]onitoring of Father's care of John [Doe] can be provided by the Department of Health through the Public Health Nurse and its Children with Special Needs Program." Even assuming such monitoring could and would occur, Father is mistaken in his belief that it would solve the problem. John Doe's needs are immediate and constant.

Father asserts that the family court erred in FsOF Nos. 58, 80, 81, 82, and 83, because "the court found that the marital discord had abated." At the April 8, 2002 hearing, Judge Bryant stated that "[t]he marital discord has certainly affected your relationships as well as your relationships with [Jane Doe] and with [John Doe]. That, as far as I can tell has abated, the

likelihood of it further occurring is extremely possible." As discussed above, the marital relationship remains problematic.

FOF No. 59 states that after three plus years in foster care, it was not in John Doe's best interests to wait any longer for the parents to possibly became willing and able to provide a safe family home. Father argues that FOF No. 59 is in error because the family court also stated that "[m]aybe there's good reason for [John Doe] to wait another year or two or three." In relevant part, what Judge Bryant stated at the April 8, 2002 hearing on the "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan Filed February 5, 2002," is the following:

> [i]n many ways this is a -- this is a remarkable case.
>
> . . . [John Doe has] been in foster custody for almost 38 months.
>
> I'd be hard pressed to find another kid on my calendar . . . that has been in foster custody that long.
>
> Second thing that's remarkable about it is that his needs are so high in all facets of life, educational, medical, psychological and basically requires much or more supervision, again, than any other child than I have currently on my calendar.
>
> . . . .
>
> Reunification efforts took place in this case, and they did not succeed. And Ms. Teale had a comment, how long do we wait, but more importantly, I think, how long does [John Doe] wait? Maybe there's good reason for him to wait another year or two or three.
>
> . . . .
>
> The Court is concerned on any significant change in [John Doe's] status or situation now would cause undue stress, and it's not in his best interest.
>
> . . . [I]'m going to grant the motion for permanent custody.

It is clear from the context of Judge Bryant's statements that he concluded that waiting another year was not in John Doe's best interests. Substantial evidence in the record supports his decision.

Father argues that FsOF Nos. 60, 84, 118, 119, and 134 are erroneous because Dr. Anthony was the person who had the most contact with Father, "Dr. Thomas Anthony testified that the parents together or Father, individually, were able to adequately care for John [Doe,]" and "[t]he court found Dr. Anthony's testimony credible." Father also argues that Dr. Anthony did not say it would take "quite a bit of time to resolve Mother and Father's psychological problems."

The family court found that Dr. Anthony "was a credible witness but his testimony was of limited help to the court because he was very, very evasive about his concerns about parents, and his involvement with the family is so recent that he lacks perspective." During cross-examination, Dr. Anthony stated that the parents still had "issues I don't think they have solved completely[.]" The family court weighed Dr. Anthony's testimony against the testimony of other witnesses and decided to grant permanent custody to DHS. Hawai‘i's appellate courts will not weigh evidence and/or assess the credibility of witnesses'

testimony, questions of credibility and weight are for the trier of fact. See St. Clair, 101 Hawai‘i at 287, 67 P.3d at 786 (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. at 117, 839 P.2d at 28 (citations and internal quotation marks omitted)).

Father asserts that the family court erred in its FOF No. 135 and CsOL Nos. 3, 5, 6, and 7 because "Father is willing and able to provide a safe home for the child with the assistance of a service plan." Given the substantial evidence to support the family court's decision and without anything in the record to indicate that a mistake was made, this court cannot conclude that the family court's decision was clearly erroneous or wrong.

Father's motion for reconsideration attempted to re-litigate arguments that were brought or should have been brought before the family court during the earlier proceedings. See Ass'n of Apartment Owners of Wailea Elua, 100 Hawai‘i at 110, 58 P.3d at 621. The family court did not abuse its discretion in denying Father's motion.

CONCLUSION

Accordingly, we affirm the April 8, 2002 Order Awarding Permanent Custody of John Doe to the State of Hawai‘i, Department of Human Services, and the April 30, 2002 Orders Concerning Child

Protective Act denying Mother and Father's motions for reconsideration.

DATED: Honolulu, Hawai‘i, September 29, 2003.

On the briefs:

Jeffry R. Buchli
for Father-Appellant/
Cross-Appellee.

Chief Judge

Byron K. H. Hu,
for Mother-Appellant.

Associate Judge

Susan Barr Brandon,
Jay K. Goss, and
Mary Ann Magnier,
Deputy Attorneys General,
for Appellee Department of
Human Services.

Associate Judge