

**NOT FOR PUBLICATION**

---

NOS. 25234 and 26280

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

NOS. 25234 AND 26280

IN THE INTEREST OF DOE CHILDREN:  
JANE, Born on July 1, 1996, and  
JANE, Born on May 19, 1999  
(FC-S No. 99-05989)

AND

No. 26283

IN THE INTEREST OF DOE CHILDREN:  
JOHN, Born on December 14, 1988,  
JANE, Born on May 4, 1991, and  
JANE, Born on March 28, 1998  
(FC-S No. 99-05987)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

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

The parental rights of the Father and Mother were terminated as to their following five children: John Doe (John), born on December 14, 1988; Jane Doe 1 (Jane 1), born on May 4, 1991; Jane Doe 2 (Jane 2), born on July 1, 1996; Jane Doe 3 (Jane 3), born on March 28, 1998; and Jane Doe 4 (Jane 4), born on May 19, 1999.

Father and Mother each appeal from the following orders entered in the Family Court of the First Circuit, Judge Paul T. Murakami presiding:

**NOT FOR PUBLICATION**

---

1. In appeal no. 25234, the Order Awarding Permanent Custody, Re: [Jane 4] entered on May 28, 2002 in FC-S No. 99-05989;

2. In appeal no. 26280, the Order Awarding Permanent Custody, Re: [Jane 2] entered on October 20, 2003 in FC-S No. 99-05989; and

3. In appeal no. 26283, the Order Awarding Permanent Custody of John, Jane 1, and Jane 3, entered on October 20, 2003 in FC-S No. 99-05987.

All three orders being appealed from awarded permanent custody of the children to the State of Hawai'i Director of Human Services.

RELEVANT STATUTES

Hawaii Revised Statutes (HRS) § 587-73 (Supp. 2003)

states as follows:

**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 . . . 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, . . . 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;
- (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:

**NOT FOR PUBLICATION**

---

- (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[.]

HRS § 587-25 (1993) states as follows:

**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;

## NOT FOR PUBLICATION

---

- (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.

### RELEVANT STANDARDS OF REVIEW

The 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 are reviewed on appeal under the "clearly erroneous" standard. In re Doe, 89 Hawai'i 477, 486-87, 974 P.2d 1067, 1076-77 (App. 1999).

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) (citation omitted)."

BACKGROUND

The family in this case first came to the attention of the Department of Human Services (DHS) on July 1, 1996, when Mother's urine toxicology test taken during the delivery of Jane 2 indicated positive for methamphetamines.<sup>1</sup>

---

<sup>1</sup> HRS § 350-1.1 (Supp. 2003) states as follows:

**Reports.** (a) Notwithstanding any other state law concerning confidentiality to the contrary, the following persons who, in their professional or official capacity, have reason to believe that child abuse or neglect has occurred or that there exists a substantial risk that child abuse or neglect may occur in the reasonably foreseeable future, shall immediately report the matter orally to the [Department of Human Services (DHS)] or to the police department:

- (1) Any licensed or registered professional of the healing arts and any health-related occupation who examines, attends, treats, or provides other professional or specialized services, including but not limited to physicians, including physicians in training, psychologists, dentists, nurses, osteopathic physicians and surgeons, optometrists, chiropractors, podiatrists, pharmacists, and other health-related professionals;
- (2) Employees or officers of any public or private school;
- (3) Employees or officers of any public or private agency or institution, or other individuals, providing social, medical, hospital, or mental health services, including financial assistance;
- (4) Employees or officers of any law enforcement agency, including but not limited to the courts, police departments, correctional institutions, and parole or probation offices;

**NOT FOR PUBLICATION**

---

On March 28, 1998, Mother gave birth to Jane 3 and both tested positive for methamphetamines.

On May 19, 1999, Mother gave birth to Jane 4. During her pregnancy, Mother exposed Jane 4 in utero to methamphetamines.

On June 3, 1999, the DHS (1) commenced FC-S No. 99-05987 by filing a Petition for Family Supervision of John, Jane 1, and Jane 3, and (2) commenced FC-S No. 99-05989 by filing

- 
- (5) Individual providers of child care, or employees or officers of any licensed or registered child care facility, foster home, or similar institution;
  - (6) Medical examiners or coroners; and
  - (7) Employees of any public or private agency providing recreational or sports activities.

(b) Whenever a person designated in subsection (a) is a member of the staff of any public or private school, agency, or institution, that staff member shall immediately notify the person in charge, or a designated delegate, who shall immediately report, or cause reports to be made, in accordance with this chapter.

(c) The initial oral report shall be followed as soon as possible by a report in writing to [DHS]. If a police department is the initiating agency, a written report shall be filed with [DHS] for cases that the police take further action on or for active cases in [DHS] under this chapter. All written reports shall contain the name and address of the child and the child's parents or other persons responsible for the child's care, if known, the child's age, the nature and extent of the child's injuries, and any other information that the reporter believes might be helpful or relevant to the investigation of the child abuse or neglect. This subsection shall not be construed to serve as a cause of action against [DHS] or the police.

(d) Any person subject to subsection (a) shall, upon demand of [DHS] or any police department, provide all information related to the alleged incident of child abuse or neglect, including, but not limited to, medical records and medical reports, which was not included in the written report submitted pursuant to subsection (c).

(e) The [Director of Human Services] may adopt, amend, or repeal rules, subject to chapter 91, to further define or clarify the specific forms of child abuse or neglect enumerated in section 350-1 for use in implementing this chapter; provided that rules adopted under this subsection shall be limited to such further or clarifying definitions.

a Petition for Temporary Foster Custody of Jane 4 and Family Supervision of Jane 2.

On January 16, 2001, in both cases, the DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. A trial of both cases was held on March 22, 2002, April 5, 2002, and April 9, 2002. On April 23, 2002, in both cases, the court filed the same written decision. It stated, in relevant part, as follows:

DHS clarified its position to indicate that it was moving the Court for permanency only as to the last child, [Jane 4], and requesting reunification efforts be continued as to the other four children. . . .

. . . .

This Court . . . **HEREBY FINDS AND ORDERS AS FOLLOWS:**

. . . .

d) The Court thereby grants the Motion as to [Jane 4] and awards permanent custody to the DHS pursuant to their request. [Jane 4's] case is to be bifurcated from those of the other siblings for purposes of future hearings.

The Order Awarding Permanent Custody, Re: [Jane 4] was entered on May 28, 2002. On June 25, 2002, the family court denied Father's and Mother's separate May 13, 2002 motions for reconsideration. Father's and Mother's notices of appeal commenced appeal no. 25234 which was assigned to this court on April 23, 2003.

On September 20, 2002, the family court entered its findings of fact and conclusions of law which state, in relevant part, as follows:

**NOT FOR PUBLICATION**

---

97. Mother cannot be reunified with [Jane 4] based on [Jane 4's] serious psychological needs. Reunification efforts will in all likelihood cause [Jane 4] to suffer further serious psychological trauma and problems, and set back any gains that she had made in therapy.

. . . .

106. . . . Father had an opportunity to be reunited with [Jane 4] on a permanent basis when [Jane 4] was returned to Mother's care in December 1999. However, Father subjected [Jane 4] to neglect, especially failure to provide sufficient nutrition, and continued to deny his substance abuse problems. Father, along with Mother, also caused [Jane 4] to live with the foster parents for a significant amount of time while [Jane 4] was in their care. This caused [Jane 4] to suffer emotional harm which manifested itself in [Jane 4's] severe reaction (anxiety and self-mutilation) to contacts with Mother and Father. If Father had provided [Jane 4] with proper care and had not relapsed into drug use, in all likelihood, [Jane 4] would not had [sic] developed her current psychological problems.

. . . .

112. Father cannot be reunified with [Jane 4] based on [Jane 4's] serious psychological needs. Reunification efforts will in all likelihood cause [Jane 4] to suffer further serious psychological trauma and problems, and set back any gains that she had made in therapy.

On March 31, 2003, the DHS filed motions for permanent custody of John, Jane 1, Jane 2, and Jane 3. On October 20, 2003, after a trial on July 28, 2003, July 31, 2003, September 24, 2003, and October 20, 2003, the court entered its (1) Order Awarding Permanent Custody, Re: [Jane 2], and (2) Order Awarding Permanent Custody of John, Jane 1, and Jane 3.

On December 4, 2003, the court denied Father's and Mother's separate motions for reconsideration. Father's and Mother's December 15, 2003 notices of appeal from (1) the orders pertaining to Jane 2 (FC-S No. 99-05989) commenced appeal no. 26280, and (2) the orders pertaining to John, Jane 1, and Jane 3 (FC-S No. 99-05987) commenced appeal no. 26283.



**NOT FOR PUBLICATION**

---

On February 4, 2004, in each case, the family court entered the same findings of fact and conclusions of law and therein stated, in relevant part, as follows:

204. Through her participation in services, such as substance abuse treatment, parenting education, anger management classes and other services, both through DHS or voluntary services obtained by Mother and Father, Mother learned the skills to provide a safe home for her children, including accessing a support system and services, and problem-solving. However, Mother failed to show the motivation to apply and to sustain the skills she learned over a prolonged period of time.

205. Mother has shown a pattern of behavior throughout the pendency of these cases. After the Children are removed from Mother and Father's care, they would appear motivated to participate in services to address their safety issues. Mother would make sufficient progress to reunify with one or more of her children. Once a child is returned to her care, she would relapse to using drugs and engage in behavior that would result in the removal of the child(ren) in her care. Mother would again participate in services and demonstrate positive lifestyle changes, and be reunified with one or more of her children. Unfortunately, Mother would engage in behavior that would result in those children in her care being placed again in foster care. . . .

206. With the last removal of the four oldest [Doe] Children from Mother and Father's care, Mother and Father are again repeating this pattern of behavior by appearing to be motivated to make changes in services.

. . . .

239. Father has shown a pattern of behavior throughout the pendency of these cases. After the Children are removed from Father and Mother's care, they would appear motivated to participate in services to address their safety issues. Father would make sufficient progress to reunify with one or more of her [sic] children. Once a child is returned to his care, he would engage in behavior that would result in the removal of the child(ren) in his care. Father would again participate in services and demonstrate positive lifestyle changes, and be reunified with one or more of his children. Unfortunately, Father would engage in behavior that would result in those children in his care being placed again in foster care. . . .

240. With the last removal of the four oldest [Doe] Children from Father and Mother's care, Father and Mother are again repeating this pattern of behavior by appearing to be motivated to make changes[.]

On February 19, 2004, the Hawai'i Supreme Court entered an order consolidating appeal nos. 26280 and 26283 under appeal

no. 26280. Appeal no. 26280 was assigned to this court on July 16, 2004.

In essence, Mother contends that

[t]he evidence was not clear and convincing that the parents were unwilling and unable to provide the children with a safe home with the assistance of a service plan. The evidence adduced at trial showed that the parents had very good parenting skills and that the children were extremely bonded to them. Although Mother had relapsed in January 2003, she was back in services within two weeks of her relapse. She was participating in individual therapy. Mother and Father were participating in couple's therapy. The parents were doing random drug tests and all the tests were negative for the use of drugs.

In essence, Father contends that the

DHS has not exerted reasonable or active efforts to avoid foster placement of the Children. DHS did not provide essential services such as individual therapy for Mother and/or Father in a reasonable or active manner. DHS has not even look[ed] into the possibility of whether Father could and would care for his children by himself, and asking Mother to remove herself from the family home.

Upon a review of the record, we conclude that none of the findings of fact challenged by Mother and Father in this appeal are clearly erroneous. In light of the relevant facts and the applicable law, we disagree with Mother and Father and affirm the three family court orders appealed from. If Father wanted the DHS to look into the possibility of whether Father could and would care for his children by himself, he failed his burden of making that request and taking the appropriate action to be by himself. Moreover, the record is clear that, even if he was then by himself, Father was not, and would not be within the period of time specified by law, willing and able to provide the children with a safe family home.

CONCLUSION

Accordingly, we affirm the following family court orders:

1. In appeal no. 25234, the Order Awarding Permanent Custody, Re: [Jane 4] entered on May 28, 2002 in FC-S No. 99-05989;

2. In appeal no. 26280, the Order Awarding Permanent Custody, Re: [Jane 2] entered on October 20, 2003 in FC-S No. 99-05989; and

3. In appeal no. 26283, the Order Awarding Permanent Custody of John, Jane 1, and Jane 3 entered on October 20, 2003 in FC-S No. 99-05987.

DATED: Honolulu, Hawai'i, February 9, 2005.

On the briefs:

Jeffry R. Buchli  
for Mother-Appellant.

Chief Judge

Byron K. H. Hu  
for Father-Appellant.

Patrick A Pascual and  
Mary Anne Magnier,  
Deputy Attorneys General,  
State of Hawaii,  
for Department of Human  
Services-Appellee.

Associate Judge

Associate Judge

Kimberly S. Towler  
Volunteer Guardian Ad Litem-  
Appellee