NOS. 25263 AND 25267

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF DOE CHILDREN:
JOHN DOE, Born on May 8, 2000, and
JANE DOE, Born on February 6, 2001, Minors

(FC-S NO. 01-07428)

AND

IN THE INTEREST OF JOHN DOE,
Born on October 25, 2001, Minor

(FC-S NO. 02-08030)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

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

In FC-S No. 01-07428, Mother is appealing from the July 2, 2002 Order Awarding Permanent Custody of her two older minor children to the Director of Human Services, State of Hawaiʻi (Director). The first child is John Doe, born on May 8, 2000 (hereinafter John Doe I). The second is Jane Doe, born on February 6, 2001.

In FC-S No. 02-08030, Mother is appealing from the July 2, 2002 Order Awarding Permanent Custody of her youngest child, John Doe, born on October 25, 2001 (hereinafter John Doe II), to the Director.

In each case, Mother is also appealing the July 16, 2002 Orders Concerning Child Protective Act denying her July 11,

2002 motion for reconsideration.[1]

We affirm.

BACKGROUND

According to Mother, she used drugs for the first time about one week before Jane Doe's birth. When Jane Doe was born on February 6, 2001, about eight weeks premature, Jane Doe had respiratory difficulties and was transferred to the Kapiolani Medical Center for Women and Children, Newborn Special Care Unit. On February 7, 2001, the Department of Human Services, State of Hawai‘i (DHS), received a report alleging threats of child abuse and neglect by Father and Mother. Jane Doe was discharged to Mother's care on February 23, 2001. Mother tested positive for amphetamines on March 22, 2001, April 6, 2001, April 16, 2001, and May 8, 2001. Father tested positive for amphetamines and marijuana on March 22, 2001, and for amphetamines and methamphetamines on April 16, 2001.

On March 23, 2001, DHS received a report of "an incident of domestic violence . . . when Father became physical with Mother during an argument."[2] Mother and Father did not

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[1] The July 2, 2002 and July 16, 2002 orders from which this appeal is brought were entered in the Family Court of the First Circuit, Judge Paul T. Murakami presiding.

[2] Regarding domestic violence, the April 30, 2001 Safe Family Home Report submitted by Gail Tomita, Social Worker for the Department of Human Services, State of Hawai‘i, stated the following:

> [Mother], at first denied any domestic violence between herself and [Father]. She later stated that [Father] has hit her and that she has sustained marks such as a black eye and bruising.

participate in recommended services (random urine screens, domestic violence/anger management education, and parenting education) to address their substance abuse and domestic violence issues.

On May 11, 2001, the court appointed attorney Michael A. Tongg (Tongg) as Guardian Ad Litem (GAL) for John Doe I and Jane Doe (the two children).

On May 21, 2001, Judge Diana L. Warrington awarded family supervision of the two children to DHS and ordered the April 30, 2001 service plan into effect. The two children were to stay with Mother in the house of their maternal grandaunt (Maternal Grandaunt). Father was permitted supervised visitation with the two children. Mother and Father were ordered to enroll in domestic violence and parenting classes and undergo a substance abuse assessment.

On May 29, 2001, GAL filed a Motion for an Immediate Review Hearing requesting the following orders:

> 1. Obtaining a Court Order requiring the immediate return of the [children] to the possession of DHS and changing family supervision to foster custody.

> Maternal family has reported that they have seen [Mother] with bruises and that she has sought sanctuary with them from time to time due to the abuse.
>
> [Father] has a history of assaultive behavior. He also has been convicted of theft 3rd degree once, reckless endangerment 2nd degree twice, and an accident involving damages to vehicle or property once. [Father] reported that he has been physically violent with [Mother] usually when he is coming down after using methamphetamines. In [sic] recent incident of domestic violence involving [Father] and [Mother] has resulted in [Father] being asked by DHS to remove himself from the home. [Father] has yet to enroll in a domestic violence program.

> 2. Issuing a bench warrant for the arrest of [Mother] and [Father].
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> 3. Issuing a temporary restraining order on behalf of maternal great [sic] grand aunt [sic] . . . against Mother and Father.
>
> 4. Taking under advisement the issuing of contempt of court charges for parents removing these children from the home without the approval of DHS.

On June 6, 2001, Judge Warrington heard GAL's Motion for an Immediate Review Hearing. GAL informed the court that, during his unannounced visit on or about May 26, 2001, Maternal Grandaunt informed GAL that "[M]other and [F]ather had taken the kids from the home against the wishes of the caretakers and did not bring the children back." GAL stated that his main concerns were "Father's inability to comply with [Maternal Grandaunt's] wishes, the fact that he's been threatening them, the fact that he doesn't keep in touch with [DHS], nor does [Mother] keep in touch with [DHS] . . . which leads me to believe that would be in the children's best interest that the children be put on a foster custody status with foster custody being given to [DHS] . . . ."

Father responded that "[w]hat happened was [Mother] and the kids was [sic] sleeping upstairs. [Maternal Grandaunt] wanted to see [Jane Doe] but they was [sic] all sleeping. [Maternal Grandaunt] kicked the door in and . . . she said get all the stuff and get out of the house, so we took the kids and some of the clothes and we went . . . ."

On June 6, 2001, Judge Warrington entered a Family Court Restraining Order prohibiting Mother and Father from

"personally contacting [John Doe I], [Jane Doe], [Maternal Grandaunt]" and permitting Mother and Father to have limited contact with the two children for the purpose of visitation as arranged and approved by the DHS in consultation with GAL.

Also on June 6, 2001, Judge Warrington entered Orders Concerning Child Protective Act that continued foster custody assumed by DHS on June 5, 2001, ordered the April 30, 2001 service plan into effect, and ordered Mother and Father to "participate in psychological evaluations as arranged by DHS with copies of the reports to be provided to the Court and all parties . . . ."

On October 8, 2001, Father and Mother were married.

On November 7, 2001, Judge Paul T. Murakami conducted a review hearing. Mother was not present because, on October 25, 2001, Mother gave birth to a son (John Doe II). According to a November 3, 2001 Supplemental Safe Family Home Report,

> [Mother] gave birth to another premature (27 weeks) baby boy on 10-25-01. Mother and child, according to the OBGYN who delivered the baby, . . . , were at risk of death. He . . . delivered the baby via an emergency 'C' section because of a massive abruption and hemorrhaging due to [M]other's use of crystal methamphetamine.
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> . . . .
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> . . . [Mother] was admitted to the Hina Mauka program for the first time on 6-29-01 and was discharged on 7-14-01 for non-compliance. She was admitted to a second treatment program on 9-10-01 with the Salvation Army and discharged for non-compliance on 10-18-01. [Mother] was not attending the program because she claimed medical problems associated with her pregnancy prevented her from attending. The staff at Salvation Army felt this could be an excuse to avoid treatment and so decided to discharge until her medical problems no longer presented barriers to her participation.

> . . . .
>
> On or about July 19, 2001, [Mother] stated that she was beaten up by [Father], . . . and entered a spouse abuse shelter. She stayed only over night and then returned to the home of [Father's] parents. [Father] was arrested for abuse of household member. He was in jail for about one month and released on or about 8-21-01. [Mother] was encouraged to apply for admission to the Womens Way residential program to which she was previously referred. She failed to schedule and [sic] intake appointment despite saying she would. She reunited with [Father] upon his release from jail.
>
> Neither she nor [Father] followed through with the recommendation that they participate in the Catholic Charities domestic violence program.

The court scheduled a hearing to occur on April 24, 2002, and ordered DHS to "file a motion for termination of parental rights unless there is . . . substantial compliance with court orders before the next hearing." The court advised both Father and Mother, "You folks are on notice. You folks know what you have to do."

On January 31, 2002, in FC-S No. 02-08030, DHS filed a Petition for Temporary Foster Custody of John Doe II. This petition noted, in relevant part, as follows:

> 3. On October 29, 2001, Mother and Father signed a DHS Voluntary Placement Agreement for the child's placement in foster care. Since then, Mother and Father have not been fully compliant with court-ordered services and the safety issues remain unresolved. On January 28, 2002, [John Doe II] was taken into police protective custody, released to DHS, and allowed to remain at a Catholic Charities Hale Malama foster home due to threatened harm and/or neglect by Mother and Father.
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> . . . .
>
> 15. Mother and Father are unemployed, receive welfare benefits, and currently reside with Father's parents.

On February 4, 2002, the court appointed Tongg as Guardian Ad Litem (GAL) for John Doe II.

In FC-S No. 02-08030, the January 31, 2002 petition was heard by Judge Kenneth E. Enright on February 4, 2002. At that hearing, the following was stated:

> [COUNSEL FOR MOTHER]: Your Honor, my client's in agreement with the jurisdiction and the service plan. She understands that she's got to get into drug treatment as soon as possible and that's the critical element, and once she completes the drug treatment then she can work on the other services.
>
> . . . .
>
> THE COURT: [Mother], you've gone over the service plan with your attorney?
>
> [MOTHER]: Yes, I have.
>
> THE COURT: Do you have any questions about it? . . .
>
> [MOTHER]: No, I don't.
>
> THE COURT: So you are satisfied you completely understand it?
>
> [MOTHER]: Yes, I do.
>
> THE COURT: And you agree to it?
>
> [MOTHER]: Yes.
>
> THE COURT: And do you know when you are going to get into drug treatment?
>
> [MOTHER]: I'm not sure but I'm going to call them today. I'm not sure but I'm going to call them today.
>
> THE COURT: Okay. Today is a must. The drug treatment cannot wait another moment. Do you understand how important that is?
>
> [MOTHER]: Yes, I do.

In its April 16, 2002 Safe Family Home Report, DHS reported that Mother

> admitted she was still using amphetamine. The CCSS [Comprehensive Counseling and Support Services] social worker stated that on 3-20-02 both parents completed the six-week Salvation Army parenting classes for parents in recovery. At the last class [Mother] is reported to have informed the group that she planned to enter drug treatment. At [Mother's] request other CCSS services were placed on hold until she completed drug treatment. In addition, the visits and parent education for [John Doe II] via

> the Hale Malama program was also suspended due to [Mother's] ongoing drug use. At this point in time the DHS concludes that the parents lack sufficient parenting knowledge and skills to provide any of the children with a safe home.
>
> . . . .
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> . . . [Mother] entered the Salvation Army Intensive OutPatient drug treatment program on 9-10-01 and was discharged on 10-18-01. The Salvation Army discharge summary dated 10-25-01 stated, "[Mother] reported that her last use of crystal meth amphetamine was on 6/28/01, however smoked approximately a ½ gram daily for the past 2 years." If [Mother] were honest in her statement, it would mean she was using since at least 10-99. At the request of this writer [Mother] was re-assessed by Salvation Army on 12-18-01. Based on her self-report Salvation Army determined [Mother] did not me[e]t the criteria for treatment. She last tested positive for amphetamines on 1-7-02 and 2-1-02. She was a "no show for drug screens on 1-14-02, 1-21-02, 1-30-02, 2-12-02, 2-26-02, 3-6-02, 3-15-02 and 3-19-02." She was subsequently dropped from the Hina Mauka drug-testing program for non-participation.

DHS's April 17, 2002 Permanent Plan stated the following goal:

> Permanent Custody of [the three children] by July 2002 with the subsequent goal of adoption. Adoption should be completed by January 2003 or six months after Permanent Custody is awarded whichever date is later. A maternal grandmother and maternal uncle and his wife have expressed interest in adopting the children.

It stated the following reasons for the stated goal:

> Neither parent successfully completed the court ordered service plan. [Jane Doe] and [John Doe I] have been in foster care for 10 months and the parents have not demonstrated they can provide the children with a safe home free of drug use and domestic violence. It is essential for the children's emotional and psychological development they have a sense of belonging to a **permanent family**, which will provide them a sense of trust and security. Without this they will be at risk, in the future, of developing social and emotional problems, including problems with attachment.

(Emphasis in original.)

On April 22, 2002, in each case, DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. Each motion included an affidavit from DHS Social Worker Walter Tennant (Tennant), stating that Mother and Father "are not

presently willing and able to provide the children with a safe family home, even with the assistance of a service plan"; and "it is not reasonably foreseeable that [Mother] and [Father] will become willing and able to provide the children with a safe family home, even with a service plan, within a reasonable period of time[.]"

On April 24, 2002, Judge Marilyn Carlsmith conducted a hearing. Both Mother and Father were not present, and both were found to be in default. In each case, on April 24, 2002, the court entered (1) an Order Awarding Permanent Custody terminating the parental rights of Mother and Father regarding the three children and ordering the April 17, 2002 Permanent Plan into effect, and (2) Letters of Permanent Custody appointing the State of Hawai'i Director of Human Services as permanent custodian of the three children.

On May 1, 2002, Father filed a Motion for Reconsideration of Order Awarding Custody. In support thereof, Father's attorney wrote that "following the court hearing on 4/24/02, [F]ather called [him] and stated that he mistakenly believed that the hearing date to be on 4/25/2002."

On May 6, 2002, Mother filed a Motion for Immediate Review.[3] Mother's attorney wrote, in relevant part, as follows:

[3] The court appropriately recognized that this motion was erroneously named and construed it as a motion to set aside the default.

> 6. On April 24, 2002, the family court defaulted Mother and granted the Motion for Permanent Custody over my objection. Later that day, at 1:25 p.m. I received a telephone message from Mother, that it was important that I call her. I returned her call at 4:34 p.m. and was advised that Mother had been rushed to the hospital."
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> . . . .
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> 8. On May 3, 2002, Karen Tyson, a case manager at the Institute of Human Services ("IHS"), advised that Mother was residing at IHS and that she was assisting her get into services.

Judge Carlsmith heard the motions on May 10, 2002. Father's attorney stated that Father believed that "the hearing was scheduled for the 25th, not the 24th." Mother's attorney stated that

> [Mother's] understanding also was that the hearing was on the 25th instead of the 24th. My client called me -- I got a call from [Mother] after the hearing on the 24th. When I returned the call I was told that she was rushed to the hospital because [F]ather had beaten her up when he found out that his rights had been terminated.
>
> Mother is now doing drug treatment. She looks clean and sober. She is early in her -- her treatment. With [F]ather in prison, [M]other will be able to focus on her treatment. We'll be requesting a TRO be issued. Also, if the Court is going to allow us to -- set aside the default and allow us to have a trial on the merits, in the meantime it will allow her to work several issues just to initiate it.

In its Orders Concerning Child Protective Act filed on May 13, 2002, the court granted both motions, set aside the April 24, 2002 Order Awarding Permanent Custody, and reinstated foster custody of the children to DHS.

On July 2, 2002, Judge Paul T. Murakami conducted a hearing. Tennant testified that the prognosis for change in both parents is "fairly poor."

> Q. Okay. You mentioned or you talked earlier about parents' behaviors. Does DHS have an assessment on whether it's recognized parents' behavior on part --on the part of mom and father in this case that raises a concern to DHS?

A. Well, it does because starting with [Father] first, he had previously been involved with the courts and had both a drug treatment history as well as an anger management history. I think it's stated in one of the safe family home reports that he had completed a drug treatment program with Hina Mauka in August and then had started using methamphetamine and marijuana again in December, four months later.

He had also completed an anger management program but then has proceeded to being arrested for abuse of household member on -- on [Mother] three times almost in the past year. So given that history and seeing that those behaviors continue, I've concluded that his past behavior is a good predictor of future behavior and that the assessment and prognosis for him is -- is fairly poor. There's a high likelihood that he would continue.

The same is with regards to substance abuse for [Mother]. That's -- that's the same assessment. She's given birth to two drug-exposed children. After the first one we had hoped that she had understood -- had been educated to the negative impact that drug use has on -- on children. Um, she then went through some drug treatment program, was unsuccessful with both the Hina Mauka and the Salvation Army program. She then gave premature birth that almost cost her and her baby's life, according to her OB/GYN. That was a drug-induced abruption for [John Doe II] and since his birth we have information from other service providers, as well as [Father's] mother, that they both continued using drugs.

There's a series that's documented of -- in the safe family home guidelines of missed drug screens that are presumed positive for both of them, so, again, the prognosis for [Mother] is also poor.

Q. You are aware that . . . [F]ather forwarded a copy of a certificate of completion for, I believe, drug treatment as recently as April -- I believe April of this year. Does that change DHS's assessments regarding [F]ather's ability to address the substance abuse in a reasonable period of time?

A. No, because in that instance -- I mean he again had difficulty even completing the after-care portion. The counselor for [Father] stated that he was thinking of having him complete or start the program over again, that he went through the program kind of just going through the motions. We had tried to get both [Father] and [Mother] rescheduled to start drug assessments with Hina Mauka; both of them failed to keep their intake appointments with Hina Mauka, indicating again that there's a high probability that both were using.

Q. And you are aware that [M]other forwarded a copy of a certificate of completion for, I believe, parenting. Does that change your assessment regarding [M]other?

A. No, because this is with the Salvation Army program for parents in recovery. One of the service providers, Kathy Coxx, indicated that [M]other had stated to her and to the group that she was still using, that she hoped after the competition of that program in -- in mid-March or so that she would enter a drug rehabilitation program.

. . . .

Q. Okay. With regards to his -- their ability to parent for their children, okay, there's three children that are involved in this case. First, if I look at [John Doe II], the report is real clear on the kinds of effects that [John Doe II] had at birth and what she [sic] suffers and you've also testified that she [sic] was just taken off the oxygen monitoring system. The parent -- would you -- would you say that [John Doe II] is a special needs child?

A. Yes.

Q. Would you say based upon the background in terms of her [sic] exposure to drugs that she [sic] is going to need a lot of care?

A. Yes.

Q. With that in mind, given the situation of where both parents are living or staying and given your testimony on the fact that in terms of her [sic] requirement for a home . . . your testimony was maybe no other children in the home, a caretaker has to be available 24-7 based upon the current placement or even the history of both parents within the last year, what is your belief as to their ability to come up with a home to home -- to provide for the needs of [John Doe II]?

A. I feel they, based again on their history, they have an unstable lifestyle, they engage in high-risk lifestyle behaviors, drug use, domestic violence. [Mother] already said today that she has no stable living arrangements. She is back living at IHS. [Father's] mother stated to me that she's doubtful that she will allow [Father] and [Mother] to live with them, so given all that history I feel that, again, the prognosis is pretty poor for them to be able to meet the safety needs of these three children, especially [John Doe II].

Q. With respect to [John Doe I] and [Jane Doe], given the fact of their ages and their needs, would your conclusion also be the same?

A. Yes.

Mother testified in relevant part as follows:

Q. And what programs are you being helped on?

A. It's called Kokua Corner.

Q. And what is that?

A. It's, um, a counselor from Hina Mauka comes there and teaches the class.

. . . .

Q. And you stopped attending them?

A. Yes, I did.

Q. And why did you stop attending them?

A. 'Cause of my work.

Q. And where were you working?

A. At the State Fair.

Q. And what were your work days?

A. Whenever they call me to come in.

Q. And what were your work hours?

A. Like 9:00, 10:00, 11:00 in the morning until 12:00 midnight.

Q. And how often did they call you?

. . . .

A. They -- maybe every other day to once a week.

Q. So how many days did you work?

A. Like three days out of the week.

Q. And you did the parenting class which you got a certificate for; right?

A. Yes, I did.

Q. And now you think you can provide a safe home for your children?

A. Yes, I can.

Q. Why do you think that?

A. Because I have a placement waiting for me at Kuhio Park Terrace.

. . . .

Q. And what other plans do you have if you get the children back?

. . . .

A. Um, I will be putting money on the side, stuff laddat. [sic] I will continue working, like, maybe I will cut my hours.

. . . .

Q. So are you planning on getting back with [Father] when he gets out of jail?

A. Not really.

. . . .

Q. . . . [Y]ou indicated when the question was asked what is your intentions for that relationship with [Father] and I believe your answer was "not really"?

A. Yeah, that was my answer but it's no.

. . . .

Q. And isn't it true that your mom, your paternal aunt, even your sisters and your uncle have told you that you need to stay away from [Father]?

A. Yes.

Q. And yet you continue to still come back to him; right?

A. Yes.

Q. Okay. And what you are saying now to this Court is you believe that that will change if you get your child back and you move into Kuhio Park Terrace?

A. Meaning -- what do you mean by that?

Q. . . . [W]hat are the safety guarantees that you can give to the Court that if the Court gave the kids back and you move into Kuhio Park and [Father] gets out of jail that there won't be any more domestic violence?

A. So long as he don't know where in KPT [Kuhio Park Terrace] I will be staying at.

. . . .

Q. And when do you intend to return to drug treatment?

A. Maybe after today.

Q. Maybe after today, so is that your answer?

A. Actually, after today.

. . . .

Q. Okay. And when did the State Fair start?

. . . .

A. . . . I started on May 21st.

. . . .

Q. Isn't the State Fair finished already?

A. Yes, yes.

> . . . .
>
> Q. Okay. What are you going to do to make sure that [Father] doesn't come and find you and bother you?
>
> A. Hmm. I've been pressured to put a restraining order on him, so I guess I will do that.
>
> Q. When do you plan to do that?
>
> A. I'm not sure.
>
> Q. Okay. And did you plan to continue working if . . . the court allows [John Doe II] to live with you, do you plan to continue working?
>
> A. Yes, I will plan to continue working, but then I will cut my hours if I have to.
>
> Q. And what's your child care -- when you are working, who is going to care for [John Doe II]?
>
> A. Hmm. I can take him to special programs.
>
> . . . .
>
> Q. Okay. And what are [John Doe II's] special needs right now?
>
> A. Nobody specifically told me, but I don't really know.

Father testified his early release date if he gets into a drug program is November 11, 2002. If not, he stays another six months. Father stated that "[a]ll I want to do is see [Mother] happy and have the kids back" and he is willing to leave Mother and the children alone. When asked "Why should we believe you that you are not going to use drug or abuse [Mother] again or chase after [Mother]?", Father responded:

> A. This -- this time around, um, you know, being in prison this time it was really hard at first and a couple other guys in prison brought me into this church group that they attend, so since then I became a born-again Christian and letting the Lord work in my life and changing my life for the better.
>
> . . . .
>
> A. I have been changing and just people in OCCC sees a change in my life, my mom, you know, and other people, my job, the people I work for, stuff like that.

Father stated that he has been clean for about nine months. He testified that he had previously attended drug programs and relapsed with problems leading to his current imprisonment.

The court granted the motion for permanent custody, advising Father and Mother that "your histories indicate that the change necessary to lead the kind of life to take care of children, especially in [John Doe II's] case, a very fragile child, that kind of change takes time and although the spirit may be such that you want that, the children -- any child cannot wait; it shouldn't be asked to."

On July 2, 2002, in each case, the court entered (1) an Order Awarding Permanent Custody terminating the parental rights of Mother and Father and ordering the April 17, 2002 Permanent Plan into effect, and (2) Letters of Permanent Custody appointing the Director as permanent custodian of the children.

On July 11, 2002, in each case, counsel for Mother filed a Motion for Reconsideration. In his supporting declaration, counsel for Mother argued that "the evidence was not clear and convincing that she was unable to provide a safe home for the children even with the assistance of a service plan, that the DHS made reasonable efforts to reunite Mother and the children and that the permanent plan is in the best interests of the child." On July 15, 2002, in each case, Father filed a

"Notice of Father's Joinder in Mother's Motion for Reconsideration of Order Awarding Permanent Custody."

Judge Murakami heard both motions on July 16, 2002. At that hearing, the following was stated:

> [COUNSEL FOR MOTHER]: . . . [M]other is currently in intensive outpatient at Hina Mauka and that she feels that given more time she'd be able to provide a safe home for the children with the assistance of a service plan.
>
> . . . .
>
> [COUNSEL FOR DHS]: . . . Most notably, [John Doe II] was born during the pendency of [Jane Doe and John Doe I's] case, drug-exposed. We do have a history of treatment, relapse -- treatment relapse and based on the history, Your Honor, the Court correctly ruled that she would not be able to do so in the recent foreseeable future. . . .
>
> . . . .
>
> [GAL]: Yes, Your Honor. As indicated earlier, I'm real happy for mom to be making the strides. I think one of the concerns that I had, even in light of all of the services provided, the fact that parents are making some progress. Now I think what is . . . important is with regards to the domestic violence and I know that to father's credit he has completed classes in many other services. However, the likelihood of when he gets out and then what is a great concern to the GAL is what's going to happen between the mother and the father if they get back together or not and then the lifestyle, i.e., the drugs, and then the domestic violence will greatly impact the kids if no changes have been made, even in light of the completion of the classes; and given that, I just believe that it's just too long to wait. So in terms of the facts and how they've been presented, I think the evidence is clear and I would take the position that the motion for reconsideration be denied.

On July 16, 2002, the court entered Orders Concerning Child Protective Act denying Mother's and Father's motions for reconsideration.

On August 14, 2002, Mother filed notices of appeal.

On September 27, 2002, the family court filed its Findings of Fact and Conclusions of Law (FsOF and CsOL). With the FsOF challenged by Mother in this appeal printed in bold, the

relevant FsOF state as follows:

> 44. In late February 2001, [Jane Doe] was taken to the Kapiolani Medical Center because she had a 103 degree fever and was unconscious. . . . She is currently being monitored for a seizure disorder.
>
> 45. . . . [A]n uncle and his spouse have expressed an interest in adopting [Jane Doe] and [John Doe I]. DHS is in the process of placing [Jane Doe] and [John Doe I] into the home of this uncle.
>
> . . . .
>
> 51. . . . [John Doe II] is a special needs child. His medical needs must be constantly monitored. [John Doe II] needs caretakers who are knowledgeable about his special medical needs and cues, and must have the ability to react to any emergency situations.
>
> . . . .
>
> 57. Mother has a substance abuse problem. Mother has a long history of drug use and unsuccessful substance abuse treatment. After [Jane Doe's] birth, Mother first denied any drug use but later stated that she first used methamphetamines one week before giving birth to [Jane Doe]. During substance abuse treatment with Salvation Army in September to October 2001, Mother stated that during the previous two-year period, mother smoked approximately one-half gram of methamphetamine daily, contradicting her previous statement that she first started using methamphetamines one week before giving birth to [Jane Doe].
>
> 58. Mother exposed [Jane Doe] to methamphetamines in utero.
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> 59. Mother failed to successfully participate in substance abuse treatment on a voluntary basis after giving birth to [Jane Doe] in February 2001. Mother continued to use drugs, specifically methamphetamines, despite being counseled by DHS in March 2001 about the detrimental affects of drug use on her ability to provide a safe home for her children.
>
> 60. On approximately June 29, 2001, Mother started substance abuse treatment at Hina Mauka. She was discharged from Hina Mauka on July 14, 2001 for non-compliance. At this time, Mother was pregnant with [John Doe II].
>
> 61. On approximately September 10, 2001, Mother started intensive outpatient substance abuse treatment with Salvation Army. On October 18, 2001 (approximately one week before giving birth to [John Doe II]), Mother was discharged from the Salvation Army program for non-compliance.
>
> 62. Despite DHS and family court intervention, Mother failed to address her substance abuse problems and failed to refrain from using drugs during her pregnancy with [John Doe II]. Mother exposed [John Doe II] to methamphetamines in utero.

63. Mother participated in a substance abuse assessment in December 2001. Based on Mother's self report on her current drug use, the assessment only recommended that Mother participate in a twelve-step Alcoholics Anonymous/Narcotics Anonymous program.

64. Mother was referred to the Hina Mauka program for drug urinalysis. During her pregnancy with [John Doe II], Mother tested positive for methamphetamines on March 22, April 6, 16, 2001, and failed to participate in urinalys[i]s in June and July 2001. Mother last tested positive for methamphetamines on January 7 and February 2, 2002. Mother failed to participate in drug urinalys[i]s on January 14, 21, 30, 2002, February 13, 26, 2002 and March 6, 15, 19, 2002. Mother's failure to participate in a urinalysis on the dates stated above constitute positive urinalysis tests for drugs. Mother was dropped from the Hina Mauka urinalysis program for non-patricipation [sic].

65. During the early part of 2002, Mother lived at the Institute for Human Services ("IHS") (a homeless shelter). Through IHS, Mother started substance abuse treatment with Hina Mauka. Mother stopped participating in substance abuse treatment with Hina Mauka when she started working.

66. Although Mother stated that she is committed to living a sober lifestyle, the court cannot ignore Mother's history of substance abuse and history of unsuccessful substance abuse treatment.

67. Mother has been in an abusive relationship with Father, and is the victim of domestic abuse by Father. At the start of DHS's intervention in February 2001, Mother did not reveal her abusive relationship with Father to DHS. Mother admitted that Father has hit her, resulting in bruising and a black eye. Maternal family members reported seeing Mother with bruises and stated Mother sought shelter with them. In March 2001, DHS counseled Mother on the detrimental effects of domestic violence on her ability to provide a safe home for her children.

68. On approximately July 19, 2001, Mother stated that Father beat her up, and that she left the home of Paternal Grandparents and entered a spouse abuse shelter. Mother returned to Paternal Grandparent's home the next day. Father was convicted for Abuse of Family or Household Member and sentenced to a period of incarceration for approximately one month. Despite encouragements to apply for admission into the Salvation Army Women's Way residential substance abuse treatment program, Mother chose to reunite with Father after his release from incarceration.

69. Mother was again involved in a domestic violence incident with Father in approximately April 2002. Father was convicted for Abuse of Family or Household member and sentenced for a period of incarceration of 120 days.

70. Mother has a history of leaving Father after a domestic violence incident and returning to Father. Although Mother stated that [she] does not intend to re-unite with Father after his release from his current incarceration, the court cannot ignore her historical pattern of returning to Father after incidents of domestic violence.

71. Mother has not completed a domestic violence program for victims of domestic violence.

72. Mother has completed parenting education for parents in recovery with Salvation Army in March 2002. During the classes, Mother told the class that she was still using methamphetamine but was planning to enter substance abuse treatment. Mother completed a "Redirecting Children's Behavior Course" through the International Network for Children and Families on March 28, 2002.

73. Throughout this case, Mother has exhibited a pattern of alternating between insight and denial, compliance and non-compliance, participation and non-participation, improvement and regression, and insight and lack of insight into her children's needs.

74. Mother's visits with the Children were suspended on February 5, 2002. Mother was warned on January 29, 2002 that if she missed another visit, her visits would be suspended. Mother failed to attend a visit on January 31, 2002. Prior to the February 5, 2002 suspension of visits, Mother's visits with the Children were inconsistent.

75. Mother failed to fully participate in visits with [John Doe II] through the Hale Malama program, where Mother would had been educated on caring for [John Doe II's] special needs. Mother was not consistent in visits and follow-through with the Hale Malama program. Hale Malama suspended Mother's visits through that program until Mother participated in substance abuse treatment.

76. Mother was referred to the Comprehensive and Counseling Support Services ("CCSS") for parenting education classes and home-based parenting education in June 2001. Mother failed to respond to letters to set-up an intake interview and was terminated in August 2001. Mother was re-referred to CCSS in November 2001. CCSS had difficulty engaging Mother in a parenting education program. In January 2001, the CCSS social worker was concerned about Mother's continued drug use; Mother admitted to using methamphetamine on January 27, 2001. In February 2001, CCSS services were put on hold until Mother completed substance abuse treatment.

77. Mother did not successfully complete all the services she was ordered to participate in and complete. All of the court-ordered services for Mother was appropriate to address her safety issues.

78. Due to Mother's drug use, psychological evaluation for Mother was deferred.

79. Mother has frustrated DHS's attempts to remain in contact with her.

80. Under the circumstances presented by these cases, Mother was given every reasonable opportunity, with necessary, appropriate and reasonable services in the community, to effect positive changes to provide a safe family home and to reunify with the Children.

81. Mother is not presently willing and able to provide the Children with a safe family home, even with the assistance of a service plan because her foregoing problems continue to exist and she has refused, frustrated, and failed to benefit from the services which have been provided to her since February 2001.

82. It is not reasonably foreseeable that Mother will become willing and able to provide the Children with a safe family home, even with the assistance of a service plan because even if Mother were to suddenly change her long standing pattern of behavior, there is no likelihood that she would sufficiently solve her problems at any identifiable point in the future.

. . . .

106. DHS's social work and child protective and welfare assessments, opinions, and recommendations are based on the joint expertise of the social worker and the social worker supervisor through the social worker's consultation with the social worker supervisor and the social worker supervisor's supervision and approval.

107. Under the circumstances presented by these cases, DHS has asserted reasonable and active efforts to avoid foster placement of the Children by attempting to engage Mother and Father in services on a voluntary basis where DHS first intervened on behalf of [John Doe I] and [Jane Doe]. When DHS filed its petition on behalf of [John Doe I] and [Jane Doe], DHS allowed [John Doe I] and [Jane Doe] to remain in the family home. DHS assumed foster custody of [John Doe I] and [Jane Doe] in June 2001 when Mother and Father failed to participate in services. DHS was providing services to Mother and Father during Mother's pregnancy with [John Doe II]. Despite DHS and family court intervention, Mother continued to use drugs during her pregnancy with [John Doe II].

108. Under the circumstances presented by these cases, DHS has exerted reasonable and active efforts to reunify the Children with Mother and Father. DHS gave Mother and Father every reasonable opportunity to succeed, with appropriate, necessary and reasonable services in the community, in remedying the problems which put the Children at substantial risk of being harmed in the family home and to reunify with the Children. DHS actively encouraged Mother and Father to participate in appropriate, necessary and reasonable services and to consistently visit with the children.

109. Each of the service plans offered by DHS and ordered by the court in both cases was fair, appropriate and comprehensive.

110. The social workers involved in this case treated Mother and Father fairly and serviced the entire family intensely since February 2001.

Permanent Plan

111. Having found that Mother and Father are unfit pursuant to HRS §§ 587-73(a)(1) and (2), the court makes the following findings of fact regarding the permanent plan pursuant to HRS § 587-73(a)(3).

112. The permanent plan proposed by the DHS which recommends adoption is in the best interests of the Children because of the young ages of the Children and because adoption provides legal and psychological permanency for the Children. This is in accord with the presumption that adoption is in the best interests of the Children pursuant to HRS §587-73(b)(3)(A).

. . .

116. Mother and Father are found by the court not to have been credible witnesses, specifically regarding their ability to provide a safe home for the Children, now and in the reasonably foreseeable future, even with the assistance [of] a service plan.

With the CsOL challenged by Mother in this appeal printed in bold, the relevant CsOL are quoted below:

8. The Court and DHS does not have to expend two years from the date upon which a child was first placed in foster custody by the court. The two-year period, as stated in HRS § 587-73(a)(2), defines the outer limits of "reasonably foreseeable future" and is used to forecast/predict whether a parent will be able to provide a safe family home in the reasonably foreseeable future. In re Doe, 89 [Hawai'i] 477, 492 [974] P.2d 1067, 1082 (App. 1999); cert. denied March 17, 1999.[4]

[4] In the case of In re Doe, 89 Hawai'i 477, 492, 974 P.2d 1067, 1082 (App. 1999), this court cited to HRS § 587-73(a)(2)(1993) and stated that

> nothing in HRS § 587-73(a)(2) or its legislative history indicates that DHS must expend three years in attempting to achieve reunification. While a three-year period is common to both HRS §§ 571-61(b)(1)(E) and 587-73(a)(2), in the latter, the three-year period defines the limits of that "reasonable period of time" for which a parent's willingness and ability to provide a safe family home must be forecasted. HRS § 587-73(a)(2) therefore, does not apply to reunification efforts per se, but establishes the period of time which must be taken into account in predicting when a safe home will become available for the purpose of determining whether parental rights should be terminated.

Although the prior 1993 statute refers to a three-year period instead of a two-year period, the rest of the statutory language remains the same. As in the prior statute, there is nothing in the current HRS § 587-73(a)(2) which states that DHS must "expend two years in attempting to achieve reunification."

> **9. The legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the Children with a safe family home, even with the assistance of a service plan.**
>
> **10. It is not reasonably foreseeable that the legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the Children with a safe family home, even with the assistance of a service plan, within a reasonable period of time;**
>
> **11. That the permanent plan dated April 17, 2002 is in the best interests of the Children.**
>
> **12. Having made findings of fact that Mother and Father are unfit pursuant to HRS § § 587-73(a)(1) and (2), the presumption in HRS § 587-73(a)(3)(A) that it is important that a child be promptly and permanently placed with responsible and substitute parents and families in safe and secure homes has increased in importance based on the Children's young ages upon the date they were first placed in foster custody by the court. HRS § 587-73(a)(3)(B).**

(Footnote added.)

On October 17, 2002, the Hawai‘i Supreme Court granted Mother's motion to consolidate appeals nos. 25263 and 25267.

RELEVANT STATUTE

Hawaii Revised Statutes § 587-73(a) (Supp. 2003)[5] states, in relevant part, the following:

> **§ 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 578-40 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan.

[5] In 1999, the legislature revised § 587-73(a)(2) and reduced the reasonable period from "three years" to "two years". H.B. 1117, 1999 Legis., 20th Sess. (Haw. 1999).

> (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[.]

STANDARDS OF REVIEW

"We review a trial court's findings of fact (FOFs) under the 'clearly erroneous' standard." In re Doe, 84 Hawai‘i 41, 46, 928 P.2d 883, 888 (1996). Additionally, in In re Doe, 7 Haw. App. 547, 558, 784 P.2d 873, 880 (1989), this court concluded that "the decision as to what custodial arrangements are in the best interests of a child is a matter or question of ultimate fact reviewable under the clearly erroneous standard of review." Thus, "[t]he court is given much leeway in its examination of reports concerning the child's care, custody and welfare, and its conclusion, if supported by the record and not clearly erroneous, must stand on appeal." Woodruff v. Keale, 64 Haw. 85, 99, 637 P.2d 760, 769 (1981) (citation omitted).

In In re Doe, this court held:

> 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. In this case, because conclusions are treated as "questions of ultimate fact," such an analysis would apply not only to the court's findings, but also to its conclusions.

89 Hawai‘i 477, 487, 974 P.2d 1067, 1077 (App. 1999) (internal quotation marks and citation omitted).

Conclusions of law are reviewed *de novo* under the right/wrong standard. In re Doe, 84 Hawai‘i at 41, 928 P.2d at 888 (1996) (citations omitted).

> [T]he family court's determinations pursuant to [Hawaii Revised Statutes (HRS)] § 587-73(a) [(1993 & Supp. 2003)] 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 Doe, 95 Hawai‘i 183, 190, 20 P.3d 616, 623 (2001) (citations omitted).[6]

ARGUMENT

In substance, Mother argues,

> Mother was not allowed a reasonable period of time to demonstrate that she was willing and able to provide a safe home for the children with the assistance of the service plan. Therefore, the family court abused its discretion by granting the Motion for Permanent Custody.
>
> The DHS did not exert reasonable efforts to reunite Mother with her children. The DHS moved for permanent custody after the DOE children had been in foster custody approximately eleven months and [John Doe II] had been in permanent custody for approximately three months. The DHS gave up on Mother depriving her of the opportunity to demonstrate that she was willing and able to provide the children with a safe home with the assistance of a service plan.

---

[6] The facts that (a) mixed questions of fact and law can be separated, (b) the family court's determination with respect to "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" is always dependant upon the facts and circumstances of the case, and (c) the question of what is and is not a "reasonable period of time" in any given factual situation and circumstance is always a question of law because there is and can be only one right answer and the law cannot have opposite right answers to the same question when presented with identical facts and circumstances, did not deter the court from deciding that the family court's determination with respect to "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" is to be reviewed under the clearly erroneous standard.

> . . . .
>
> The DHS did not service Mother intensively since February 2001. It is not unusual that people with substance abuse problems repeatedly fail in drug treatment before they are finally successful. The DHS gave up on Mother because she had failed at drug treatment. It did not even wait one year before moving for permanent custody of the children. The efforts of DHS to reunify the children with their Mother were not reasonable or active . . . .

Upon a careful review of the record and giving due consideration to the issues and the arguments, we decide that the family court's challenged CsOL nos. 9 and 10 are not clearly erroneous. Substantial evidence supports findings of fact supporting both decisions. Those findings of fact not being clearly erroneous, the challenged conclusions of law are right. Mother was not deprived of the opportunity to demonstrate that she was willing and able to provide the children with a safe home with the assistance of a service plan. Mother failed many such opportunities and, by her words, actions and inactions, clearly demonstrated that she was not willing and able to provide the children with a safe home even with the assistance of a service plan.

Regarding Mother's motions for reconsideration, "the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments . . . . Reconsideration is not a device to relitigate old matters or to 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 and internal quotations omitted). Here, Mother did not present any new evidence and/or arguments that she did not and could not have presented at the prior hearing. Therefore, we affirm the July 16, 2002 judgments denying Mother's July 11, 2002 motions for reconsideration.

CONCLUSION

Accordingly, we affirm the following: in FC-S No. 01-07428, the July 2, 2002 Order Awarding Permanent Custody, and the July 16, 2002 Orders Concerning Child Protective Act; in FC-S No. 02-08030, the July 2, 2002 Order Awarding Permanent Custody, and the July 16, 2002 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai‘i, May 18, 2004.

On the briefs:

Jeffry R. Buchli
for Mother-Appellant.

Chief Judge

David McCormick and
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for Department of Human Services-Appellee.

Associate Judge

Associate Judge