NO. 25316

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF DOE CHILDREN:
JANE DOE, Born on January 11, 1996,
JOHN DOE, Born on December 11, 1996, and
JANE DOE, Born on January 22, 1999, Minors

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S No. 01-07284)

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

Mother and Father (collectively, the Parents) each appeal the June 18, 2002 order of the family court of the first circuit, the Honorable Kenneth E. Enright, judge presiding, that awarded permanent custody of their three minor children (the Doe children) to the Director of Human Services, State of Hawaiʻi (DHS). The Parents also each appeal the August 21, 2002 order of the family court that denied their respective motions for reconsideration of the June 18, 2002 order.

Upon a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve the points of error raised by the Parents on appeal as follows:

1. Father's Appeal.

A. Father first contends the family court "violated Mother and Father's constitutional rights when it admitted half a dozen DHS exhibits prior to the trial in this case, subject to cross-examination, but did not require DHS to produce the maker of said documents to be cross-examined at trial[.]" Father's Opening Brief at 14. Father cites the Sixth Amendment confrontation clause and the Fifth Amendment due process clause. This point is devoid of merit. First, the confrontation clause does not apply in this civil case. Second, the Parents' due process rights were not violated because the exhibits were admitted well before the permanency trial, subject to cross-examination; and by failing to compel the testimonies of the creators of the documents, the Parents effectively waived their rights of cross-examination. In re Doe, 77 Hawai‘i 109, 116, 883 P.2d 30, 37 (1994) ("having failed to file a motion to compel [the] testimony [of the author of the document] at trial, despite prior notice to Mother by DHS that [the author] would not be called as a witness, Mother effectively waived her right to cross examine"). See also State v. Brooks, 44 Haw. 82, 89, 352 P.2d 611, 616 (1960) ("The right to cross-examine a witness is fundamental and accepted as a right basic to our judicial system. When, however, a party fails to avail himself of the opportunity to cross-examine, he thereby forfeits such right."). Finally, each of the exhibits was admissible subject to cross-examination,

pursuant to Hawaii Revised Statutes (HRS) § 587-40(d) (Supp. 2003).

B. Father asserts that

> the court violated Mother and Father's constitutional rights when it allowed the case to proceed to trial despite being on notice, from the parents' psychological evaluations, that there was substantial evidence that Father and/or Mother were "unfit to stand trial" given that each of them suffered from the physical/mental defect/disorder/disease of substance abuse[.]

Father's Opening Brief at 14-15. In this connection, Father cites several sections of HRS ch. 704 (1993 & Supp. 2003), which is applicable to criminal proceedings. HRS § 704-403 (1993). Even assuming, *arguendo*, that HRS ch. 704 applied in this civil proceeding, Father's point lacks merit. Neither the parties nor the family court raised the least concern below regarding the competence of either parent. "[T]his court on appeal will not consider issues beyond those that are properly raised in the trial court[.]" Demond v. Univ. of Hawai‘i, 54 Haw. 98, 103, 503 P.2d 434, 437 (1972) (citations omitted). And there is absolutely no indication in the record that either parent was unable to understand or assist in the proceedings below. Quite the contrary. Cf. State v. Madden, 97 Hawai‘i 53, 62, 33 P.3d 549, 558 (App. 2001) (listing a set of factors that may be considered in determining a criminal defendant's fitness to proceed).

C. Father's final point on appeal is that the court abused its discretion in terminating the Parents' parental rights, for the following nine reasons:

i & ii. Father first reiterates the points examined in sections 1.A. and 1.B. above. We reiterate our rejection of them there, here.

iii. Father charges that DHS prejudiced the Parents by "stalling in providing services to the [P]arents." Father's Opening Brief at 25. We disagree. We see no indication of such "stalling" in the record.

iv. Father complains that DHS did not provide services that were tailor-made for the Parents. Nonetheless, there is "substantial evidence" in the record to support the family court's finding of fact that "[t]he service plans offered by DHS and ordered by the court were fair, appropriate and comprehensive under the circumstances of this case"; and we are not "left with a definite and firm conviction that a mistake has been made" in this respect. Hence, the family court's finding was not "clearly erroneous[.]" In re Doe, 95 Hawai‘i 183, 190, 20 P.3d 616, 623 (2001) (citation and internal quotation marks omitted).

v. Father argues that "the lower court allowed DHS to shift the standard of service plan compliance from requiring the parents to participate to having them understand how to apply what they learned." Father's Opening Brief at 27. We disagree. There could be no such "shift" because there can never be any sense, common or otherwise, in divorcing the latter "standard" from the former.

vi. Father avers that the family court "penalized" the Parents unfairly for allegations of sexual abuse perpetrated by neither of them, but by another person. On the contrary, it was not unfair for the family court to examine the protection the Parents could afford against such abuse, given that the alleged abuser was a family relative.

vii. Father criticizes the family court for placing a female minor child (not involved in this appeal) with the wife of the alleged perpetrator of the sexual abuse. This point is wholly immaterial.

viii. Father complains that, "The lower court abused its discretion as it allowed DHS to proceed to permanent custody after one year had been given to the parents to comply with services, even though the case target close date was more than a year away." Father's Opening Brief at 30. First, nothing in HRS § 587-73(a)(2) (Supp. 2003) or its legislative history requires that DHS expend the full two years, set by the statute as an outside limit, in attempting to achieve reunification. Cf. In re Doe, 89 Hawai'i 477, 492, 974 P.2d 1067, 1082 (App. 1999). Second, there is "substantial evidence" in the record to support the family court's conclusion that "[i]t was not reasonably foreseeable that the legal mother and legal father . . . will become willing and able to provide the [Doe] children with a safe family home, even with the assistance of a service plan, within a reasonable period of time"; and we are not "left with a definite

and firm conviction that a mistake has been made" in this respect. Hence, the family court's HRS § 587-73(a)(2) conclusion was not "clearly erroneous[.]" In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (citations and internal quotation marks omitted).

ix. Finally, Father avers that "even if none of the above-noted eight errors by the lower court was sufficient to manifest abuse of discretion by itself, all of the above eight taken together did manifest abuse of discretion." Father's Opening Brief at 30. "However, after carefully reviewing the record, we conclude that the individual errors raised by [the Parents] are by themselves insubstantial. Thus, it is unnecessary to address the cumulative effect of these alleged errors." State v. Gomes, 93 Hawai‘i 13, 22, 995 P.2d 314, 323 (2000) (citations and internal quotation marks omitted; original brackets omitted or replaced).

2. Mother's Appeal.

A. Mother avers that the family court abused its discretion in awarding DHS permanent custody of the Doe children. Mother argues that she "substantially complied" with the various service plans, and that she "needed a little more time to successfully complete the recommended services." Mother's Opening Brief at 14-15. This point is devoid of merit. The family court found each DHS witness to be credible and the Parents not credible. "It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of

the witnesses and the weight of the evidence; this is the province of the trier of fact." In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (brackets, ellipsis, citations and internal quotation marks omitted). "In this regard, the testimony of a single witness, if found by the trier of fact to have been credible, will suffice." Id. at 196, 20 P.3d at 629 (citations omitted). Here, not one but four expert witnesses testified for DHS. For example, the DHS case manager, Grace Gabat (Gabat), who worked with the family for approximately fifteen months, testified that although Mother attended the services provided, she was simply not capable of insight and application. There was thus "substantial evidence" in the record with respect to Mother, to support the family court's conclusions that "[t]he legal mother, legal father . . . were not willing and able to provide the [Doe] children with a safe family home, even with the assistance of a service plan"; and that "[i]t was not reasonably foreseeable that the legal mother and legal father . . . will become willing and able to provide the [Doe] children with a safe family home, even with the assistance of a service plan, within a reasonable period of time"; and we are not "left with a definite and firm conviction that a mistake has been made" in this respect. Hence, the family court's HRS § 587-73(a) conclusions were not "clearly erroneous[.]" In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (citations and internal quotation marks omitted).

B. Mother argues that DHS did not exert reasonable and

active efforts to reunify the Doe children with their mother. We disagree. First, we again note the expert testimonies; in particular, Gabat's testimony about Mother's capacity for insight and application with regard to the services DHS provided her. Second, we reiterate our conclusions in connection with Father's appeal, section 1.C.iv. supra, that there is "substantial evidence" in the record to support the family court's finding of fact that "[t]he service plans offered by DHS and ordered by the court were fair, appropriate and comprehensive under the circumstances of this case"; and that we are not "left with a definite and firm conviction that a mistake has been made" in this respect. Hence, the family court's finding was not "clearly erroneous[.]" In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (citation and internal quotation marks omitted).

C. Mother contends the family court abused its discretion in ordering the permanent plans for the Doe children, because "Mother was not allowed a reasonable period of time to demonstrate that she is willing and able to provide a safe home for the children with the assistance of a service plan." Mother's Opening Brief at 18. On this point, we reference our discussion in section 2.A., above.

D. For her final point of error on appeal, Mother argues that her motion for reconsideration was compromised because her attorney revealed to the family court "privileged and confidential" information immediately before the hearing on her

motion; namely, that counsel felt he had to withdraw because he thought the State had presented clear and convincing evidence against Mother at the permanency trial, but Mother did not agree and wanted to proceed. However, this did not prejudice Mother. HRS § 641-16 (1993) ("No order, judgment, or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the appellant."); Hawai‘i Rules of Civil Procedure Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

> As this court has often stated, the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. 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 Apt. Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai‘i 97, 110, 58 P.3d 608, 621 (2002) (citation, internal quotation marks and block quote format omitted). Both Parents essentially conceded at the hearing on their respective motions for reconsideration that they had no "new evidence and/or arguments that could not have been presented" at the permanency trial. Id. (citation, internal quotation marks and block quote format omitted). Hence, Mother's motion for reconsideration could not have been successful in any event.

Therefore,

IT IS HEREBY ORDERED that the family court's June 18,

2002 order awarding DHS permanent custody of the Doe children, and its August 21, 2002 order denying the Parents' respective motions for reconsideration, are affirmed.

DATED: Honolulu, Hawai‘i, March 23, 2004.

On the briefs:

M. Cora Avinante, for father-appellant/cross-appellee.

Jeffry R. Buchli, for mother-appellee/cross-appellant.

Dean T. Nagamine, Guardian Ad Litem for children-appellee/cross-appellee.

David McCormick and Mary Anne Magnier, Deputy Attorneys General, State of Hawai‘i, for appellee/ cross-appellee, DHS.

Acting Chief Judge

Associate Judge

Associate Judge