

NOT FOR PUBLICATION

NOS. 26348 and 26349

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

NO. 26348

IN THE INTEREST OF JOHN DOE,
Born on April 29, 2002, a Minor

(FC-S No. 02-08252)

AND

NO. 26349

IN THE INTEREST OF DOE CHILDREN:
JANE, Born on May 7, 1997,
JOHN, Born on April 4, 1999, and
JANE, Born on May 18, 2000, Minors

(FC-S No. 00-06974)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

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

The maternal aunt (Maternal Aunt) of four minor children (collectively, the Four Children) who were involved in two family court cases appeals from the family court's December 22, 2003 Orders Concerning Child Protective Act that were entered in each case.¹

Appeal no. 26349 involves family court case FC-S no. 00-06974 and the following children: Jane Doe, born on May 7,

¹ In her opening brief, Maternal Aunt contends that she is also appealing from the family court's "Orders Concerning Child Protective Act filed on December 4, 2003". In fact, these orders were entered with regard to a trial held on December 4, 2003 and were then filed on December 22, 2003.

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1997 (First Child); John Doe, born on April 4, 1999 (Second Child); and Jane Doe, born on May 18, 2000 (Third Child).

Appeal no. 26348 involves family court case FC-S no. 02-08252 and John Doe, born on April 29, 2002 (Fourth Child).

Appeal nos. 26348 and 26349 have been consolidated by order entered on March 24, 2005.

We affirm.

BACKGROUND

After the mother (Mother) of the Four Children tested positive for amphetamines at Third Child's birth, the Honolulu Police Department assumed protective custody of the three older children on September 26, 2000. Thereafter, the Department of Human Services, State of Hawai'i (DHS) assumed temporary foster custody pursuant to Hawaii Revised Statutes (HRS) § 587-22(c). These three children were placed with the sister of their maternal grandmother (Maternal Grandaunt). Other placement options included the following persons living in San Francisco: maternal grandmother, Maternal Aunt, and paternal grandfather.

On October 10, 2000, DHS filed a Petition for Foster Custody of First Child, Second Child, and Third Child. After a hearing on October 23, 2000, an order granting the petition was entered by Judge Linda K.C. Luke.

DHS sent a request to California's Interstate Compact on the Placement of Children (ICPC) office on November 13, 2001

to review placement options and adoptive homestudies in San Francisco.

After a hearing on December 12, 2001, Judge Frances Q.F. Wong entered an Order Awarding Permanent Custody of First Child, Second Child, and Third Child to DHS, terminating Mother's parental and custodial duties and rights, and ordering the September 22, 2001 Permanent Plan into effect. The goal of this permanent plan was adoption.

When Mother gave birth to Fourth Child, both tested presumptive positive for methamphetamines. Fourth Child was placed in a non-relative DHS general licensed foster home. On May 8, 2002, DHS filed a petition for foster custody of Fourth Child. On June 17, 2002, Judge Paul T. Murakami entered an order awarding foster custody of Fourth Child to DHS.

An August 22, 2002 report from San Francisco notified DHS "that the home of [Maternal Aunt] and her fiancé . . . failed inspection due to unsafe conditions in the home."

On September 25, 2002, after DHS determined that Maternal Grandaunt's home "was completely inappropriate for the care of young children[,] " First Child, Second Child, and Third Child were removed from Maternal Grandaunt's home and commenced residing with a married couple (Prospective Adoptive Parents) interested in adopting them.

Maternal Aunt and her fiancé (Spouse) were married on or about October 5, 2002.

On November 1, 2002, Maternal Aunt filed a Motion to Intervene and for Order Directing the Department of Human Services to Request a Follow Up Home Study. At the hearing on November 18, 2002, the court ordered DHS to make a follow-up ICPC referral.

On November 6, 2002, Fourth Child commenced residing with Prospective Adoptive Parents, and they were interested in adopting him.

On December 2, 2002, Maternal Grandaunt filed a petition for the adoption of the Four Children.

In January of 2003, DHS sent a second ICPC request. The letter of response from Theresa McGovern, San Francisco ICPC Liaison, Supervisor in Family and Children's Services Program, San Francisco County, is dated June 17, 2003. It states, in relevant part, as follows:

As of 9:30am today, Pacific Standard Time, I have not received a returned agency phone call from ASPIRA Foster Family Certifying Agency . . . to inquire about the fact that [Maternal Aunt and Spouse] are in the process of attaining a "Certification" (not a License) from this agency.

I am stating, for the record, that I am actively cross-reporting the ASPIRA agency to the Community Care Licensing Agency in the State of California to guarantee that this home does not receive a "Certification" unless the home meets Title 22 Regulations.

I am also stating for the record that on 8/22/02, I denied the home of [Maternal Aunt and Spouse] because the home did not meet the same standards required by Title 22 Foster Family Licensing Agency as a Relative Placement.

On June 17, 2003, after a trial on June 16, 2003, Judge Linda K.C. Luke entered an order terminating parental and custodial duties and rights regarding Fourth Child, awarding DHS permanent custody of him, and ordering the November 22, 2002 Permanent Plan into effect.

On July 2, 2003, Mother filed a motion for reconsideration of the family court's June 17, 2003 order awarding permanent custody of Fourth Child. On July 15, 2003, after a hearing on July 14, 2003, Judge Luke (1) denied Mother's motion for reconsideration, and (2) granted the motion to intervene made by Maternal Aunt.

On July 17, 2003, Judge Lillian Ramirez-Uy presided over a trial on the issue of "whether [DHS] abused its discretion in maintaining the placement with the current foster family."

On October 23, 2003, after a hearing on October 22, 2003, Judge Luke (1) scheduled a November 5, 2003 trial, and (2) ordered that the issues at trial would be (a) whether DHS has sole power and authority to determine placement, and (b) where the Four Children should be placed. On November 12, 2003, Judge Luke entered a stipulated order rescheduling the trial to December 4, 2003.

The State of California Department of Social Services issued to Maternal Aunt and Spouse a License to operate and maintain a Foster Family Home. The effective date of the License was October 30, 2003.

On December 2, 2003, DHS moved for permission "to allow the children to relocate to Colorado with their current foster family who were being transferred by the Army."

On December 4, 2003, at the conclusion of the trial, Judge Ramirez-Uy orally disagreed with the position "that DHS, once it awarded permanent custody, has the sole authority to place children no matter what." Judge Ramirez-Uy also ordered permanent custody to continue and authorized "relocation" of the Four Children to Colorado.

On December 17, 2003, Maternal Aunt filed a motion for reconsideration of the December 4, 2003 oral order.

On December 22, 2003, after a trial, Judge Ramirez-Uy entered an order denying Maternal Aunt's motion for reconsideration of the December 4, 2003 oral order. Judge Ramirez-Uy also entered another order (1) continuing (a) permanent custody to the DHS, and (b) the October 8, 2003 Permanent Plan; (2) granting the December 2, 2003 motion filed by the DHS; (3) ordering that "[a] closing transitional visit shall be held with Dr. Labasan [the children's therapist] for [Maternal Aunt and Spouse] before the children leave for Colorado"; and (4) dismissing Maternal Aunt and Spouse from the cases following the closing visit. The October 8, 2003 Permanent Plan concluded that "[a]doption is in the best interest of the children[.]"

On January 20, 2004, Maternal Aunt filed a notice of appeal from the December 22, 2003 Orders Concerning Child

Protective Act. On September 20, 2004, this case was assigned to this court.

On February 19, 2004, Judge Ramirez-Uy entered Findings of Fact and Conclusions of Law (FsOF and CsOL). FsOF 101 through 139 and CsOL 8 and 9 consider the "[s]afe family home guidelines" of HRS § 587-25 and state the family court's basis for deciding that Maternal Aunt and Spouse were not an appropriate placement. Other relevant FsOF state as follows:

169. Placement with the [Prospective Adoptive Parents] has proven to be a successful placement.

170. The children view [the Prospective Adoptive Parents] as their psychological parents.

. . . .

174. After much thought and consideration, the children's guardian ad litem recommends that the children be allowed to remain with and be adopted by the [Prospective Adoptive Parents].

In this appeal, Maternal Aunt's points on appeal do not expressly challenge any of the FsOF and CsOL. Her points on appeal assert generally that the family court reversibly erred:

1. When it granted DHS's motion to permanently place the children with non-relatives instead of Maternal Aunt;
2. When it allowed DHS to violate Maternal "Aunt's statutory custodial rights" giving priority in child placement to families over non-families;
3. When it violated Maternal Aunt's due process rights by "upholding . . . DHS's placement of the children with the non-relative foster parents"; and

4. When it upheld DHS's placement of the children with the non-relative foster parents instead of with Maternal Aunt and thereby "allowed DHS to violate the doctrine of unclean hands."

RELEVANT STATUTES

HRS § 587-2 (1993) states, in relevant part, as follows:

"Department" means the department of human services and its authorized representatives.

"Family" means each legal parent, the natural mother, the natural father, the adjudicated, presumed, or concerned natural father as defined under section 578-2, each parent's spouse, or former spouses, each sibling or person related by consanguinity or marriage, each person residing in the same dwelling unit, and any other person who or legal entity which is a child's legal or physical custodian or guardian, or who is otherwise responsible for the child's care, other than an authorized agency which assumes such a legal status or relationship with the child under this chapter.

"Family home" means the home of the child's legal custodian where there is the provision of care for the child's physical and psychological health and welfare.

HRS § 587-24 (Supp. 2004) states, in relevant part, as follows:

Temporary foster custody without court order. (a) When the department receives physical custody of a child from the police pursuant to section 587-22(b), the department shall assume temporary foster custody of a child without an order of the court and without the consent of the child's family regardless of whether the child's family is absent, if in the discretion of the department the child is in such circumstance or condition that the child's continuing in the custody or care of the child's family presents a situation of imminent harm to the child.

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(c) Upon assuming temporary foster custody of a child under this chapter, the department shall place the child in emergency foster care, unless the child is admitted to a hospital or similar institution, while it conducts an appropriate investigation.

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(e) Within three working days, excluding Saturdays, Sundays, or holidays, after the date of its assumption of temporary foster custody, the department shall:

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- (1) Relinquish its temporary foster custody and return the child to the child's legal custodian and proceed pursuant to section 587-21(b)(1), (2), or (4);
- (2) Continue its assumption of temporary foster custody of the child with the child being voluntarily placed in foster care by the child's legal custodian and proceed pursuant to section 587-21(b)(2) or (4); or
- (3) Continue its assumption of temporary foster custody of the child and proceed pursuant to section 587-21(b)(3).

HRS § 587-21(b) (Supp. 2004) states as follows:

Upon satisfying itself as to the course of action that should be pursued to best accord with the purpose of this chapter, the department shall:

- (1) Resolve the matter in an informal fashion appropriate under the circumstances;
- (2) Seek to enter into a service plan, without filing a petition in court, with members of the child's family and other authorized agency as the department deems necessary to the success of the service plan, including but not limited to, the member or members of the child's family who have legal custody of the child. The service plan may include an agreement with the child's family to voluntarily place the child in the foster custody of the department or other authorized agency, or to place the child and the necessary members of the child's family under the family supervision of the department or other authorized agency; provided that if a service plan is not successfully completed within six months, the department shall file a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter and the case shall be reviewed as is required by federal law;
- (3) Assume temporary foster custody of the child pursuant to section 587-24(a) and file a petition with the court under this chapter within three working days, excluding Saturdays, Sundays, and holidays, after the date of the department's assumption of temporary foster custody of the child; or
- (4) File a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter.

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:

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- (1) The current facts relating to the child which include:
 - (A) Age and vulnerability;
 - (B) Psychological, medical and dental needs;
 - (C) Peer and family relationships and bonding abilities;
 - (D) Developmental growth and schooling;
 - (E) Current living situation;
 - (F) Fear of being in the family home; and
 - (G) Services provided the child;
 - (2) The initial and any subsequent reports of harm and/or threatened harm suffered by the child;
 - (3) Date(s) and reason for child's placement out of the home, description, appropriateness, and location of the placement and who has placement responsibility;
 - (4) Historical facts relating to the alleged perpetrator and other appropriate family members who are parties which include:
 - (A) Birthplace and family of origin;
 - (B) How they were parented;
 - (C) Marital/relationship history; and
 - (D) Prior involvement in services;
 - (5) The results of psychiatric/psychological/developmental evaluations of the child, the alleged perpetrator and other appropriate family members who are parties;
 - (6) Whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the family home;
 - (7) Whether there is a history of substance abuse by the child's family or others who have access to the family home;
 - (8) Whether the alleged perpetrator(s) has acknowledged and apologized for the harm;
 - (9) Whether the non-perpetrator(s) who resides in the family home has demonstrated the ability to protect the child from further harm and to insure that any current protective orders are enforced;
 - (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)

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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.

HRS § 587-73 (Supp. 2004) 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, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan;
- (2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court;
- (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 consents to the permanent plan, unless the court, after consulting with the child in camera, finds that it is in the best interest of the child to dispense with the child's consent.

(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.

HRS Chapter 350-E-1 (1993) states, in relevant part, as follows:

ARTICLE III. Conditions for Placement.

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

- (1) The name, date and place of birth of the child.
- (2) The identity and address or addresses of the parents or legal guardian.
- (3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.
- (4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

DISCUSSION

A temporary misunderstanding in this case was created when Judge Ramirez-Uy orally decided, at the conclusion of the December 4, 2003 trial, in relevant part, as follows:

I disagree with the statement that says that this is an easy case because I find it to be very difficult. Part of that difficulty is because it appears now that there are two families who are both interested, both qualified. So then that makes the job of the trier of fact to be a little bit more difficult than if it were otherwise.

FsOF nos. 101 through 139 terminated this misunderstanding. They make it clear that Judge Ramirez-Uy decided that Maternal Aunt and Spouse were not qualified under Hawai'i law. These are the applicable findings.

With respect to First Child, Second Child, and Third Child, HRS § 587-73(a)(2)'s "two years from the date upon which the child was first placed under foster custody by the court" ended on October 23, 2002. In light of the August 22, 2002 report notifying DHS "that the home of [Maternal Aunt] and her fiancé . . . failed inspection due to unsafe conditions in the home[,] " the DHS did not abuse its discretion when, on September 25, 2002, it finally decided (a) not to place First Child, Second Child, and Third Child with Maternal Aunt and Spouse, and (b) to place First Child, Second Child, and Third Child with Prospective Adoptive Parents. Similarly, the DHS did

not abuse its discretion when, on November 6, 2002, it finally decided to place Fourth Child with Prospective Adoptive Parents. There is no merit to Maternal Aunt's argument that "DHS placed the children directly from [Maternal Grandaunt] to allegedly non-problematic non-relatives. In so doing, DHS permanently bypassed [Maternal] Aunt in spite of her extraordinary measures to qualify as a placement. In allowing DHS to act in this manner, the family court violated [Maternal A]unt's due process rights." When the family court removed the children from Maternal Grandaunt and placed them with Prospective Adoptive Parents, "the home of [Maternal Aunt] and her fiancé . . . failed inspection due to unsafe conditions in the home." Pursuant to the definitions of "Family" and "Family home" stated in HRS § 587-2 quoted above, when the children were placed with Prospective Adoptive Parents, Prospective Adoptive Parents thereby became a part of the relevant statutory "Family". From that day forward, Maternal Aunt had no "priority" over them.

Essentially, Maternal Aunt and Spouse seek (a) to fault DHS for allegedly not making sufficient efforts to assist them to be able to satisfy the requirements of HRS § 587-73(a)(2), and (b) to fault the court for allegedly having "rubber-stamped the social worker's thinking and, in so doing, exhibit[ing] its own thinking that was illogical and exceeded the bounds of reason." It appears that Maternal Aunt and Spouse fail to comprehend (a)

the applicable Hawai'i law, and (b) the impact of the provisions of HRS § 350E-1 Article III on the duties and obligations of DHS in this case resulting from the fact that Maternal Aunt and Spouse reside in California, not Hawai'i. Having been unable to cause their home state of California to support their application prior to October 30, 2003, they have no legitimate basis for complaining that Hawai'i has failed to support their application.

Upon careful review of the record, we conclude that the evidence supports the relevant findings of fact, which support the relevant conclusions of law, which support the family court's December 22, 2003 Orders Concerning Child Protective Act.

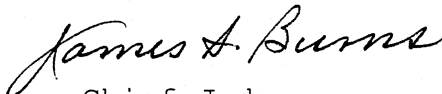
CONCLUSION

Accordingly, we affirm the family court's December 22, 2003 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, May 26, 2005.

On the briefs:

Carl F. Debo
for Maternal Aunt-Appellant.


Chief Judge

Gay M. Tanaka and
Mary Anne Magnier,
Deputy Attorneys General,
State of Hawaii,
for Petitioner-Appellee.


Associate Judge


Associate Judge