

NOT FOR PUBLICATION

NOS. 26872 and 26873

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

NO. 26872

IN THE INTEREST OF DOE CHILDREN:
JOHN DOE, Born on December 20, 1999; and
JANE DOE, Born on December 30, 2000; Minors
(FC-S NO. 01-07537)

AND

NO. 26873

IN THE INTEREST OF DOE CHILDREN:
JANE DOE, Born on August 7, 1992; and
JANE DOE, Born on April 4, 1998; Minors
(FC-S NO. 01-07536)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

The father (Father) of the Doe Children appeals from the following orders entered by the Family Court of the First Circuit:¹ (1) the Order Awarding Permanent Custody entered on August 5, 2004, which awarded the State of Hawai'i Department of Human Services ("DHS") permanent custody of the four Doe Children; and (2) the Orders Concerning Child Protective Act entered on September 15, 2004, which denied his August 11, 2004 motion for reconsideration.²

¹ Judge Linda K.C. Luke presided.

² In Hawaii Revised Statutes § 587-73 (Supp. 2005), the Child Protective Act provides, in relevant part:

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

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At the trial on O'ahu on May 26, 2004, Father was present via telephone from the island of Hawai'i (the Big Island). On September 28, 2004, the court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL). Father does not challenge the following FsOF:

1. [The mother (Mother) of the Doe Children] and Father had been in a relationship since 1992 and were married on May 12, 1998. In November 1998 the family moved to the Big Island, Hawaii. However, in March of 2001, Mother and [the Doe Children] left the Big Island because of the domestic violence in Mother and Father's relationship. Father was convicted of Abuse of a Family/Household Member in 1998. Mother and Father have no current plans for reconciliation; both have entered into new relationships with others, and are seeking a divorce.

2. On June 24, 2001 DHS received a report of physical neglect and lack of supervision to the [Doe Children] by Mother. . . .

. . . .

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;

. . . .

(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[.]

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6. On June 29, 2001, Mother participated in a drug screen and tested positive for marijuana and methamphetamines.

7. Upon further DHS interviewing, Father admitted that he had been abusive to Mother in the beginning of the relationship. Father also admitted to buying "ice" and marijuana for Mother as recent as the beginning of 2001.

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8. On June 28, 2001, protective custody of the [Doe Children] was assumed by the Honolulu Police Department and immediately thereafter temporary foster custody of the [Doe Children] was assumed by DHS pursuant to HRS §587-22(c).

9. On July 3, 2001, DHS filed a "Petition for Temporary Foster Custody" ("Petition") on behalf of the [Doe Children] pursuant to HRS §587-21(b)(3).

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73. The [Doe Children] have been in limbo for approximately three years and in light of Mother and Father's lack of follow-through and progress in services, further delay in determining whether Mother or Father could regain custody is not in the best interest of these [Doe Children].

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93. Father is currently in a relationship with his live-in girlfriend, . . . who has not made herself available for assessments and failed to show-up at a mandatory drug screen on October 22, 2003.

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95. Father participated in a psychological evaluation with Dr. Joe Bratton, Ph.D. on December 11, 2001. Father was diagnosed on Axis II as having a personality disorder, not otherwise specified with some dependent tendencies.

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98. Father presented with signs of a persisting personality disorder in his chronic difficulties in developing compatible relationships, failure to continue his parental responsibilities with his [Doe Children], his distorted view of social responsibilities by his resistance to and anger over his required participation in the CPS parental assessment process, and some failure to develop normal adult sense of responsibilities, along with adequate coping skills.

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101. Father was also noted to lack much insight in children and their needs and was posed as someone who could benefit from supervision and training until acquiring parenting skills.

102. Dr. Bratton stated in his recommendations that Father would not benefit from generalized individual psychotherapy in that Father suffers from a type of personality disorder characterized by chronic delays in social emotional development, leaving Father with large gaps in his understanding of

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interpersonal relationships, and that without specific treatment goals he is unlikely to make many changes.

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106. Father started the Alternatives to Violence Program yet was terminated from the program due to excessive absences.

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108. Father did not complete any other domestic violence/anger management class nor did he seek to re-engage in such service after being discharged up until the time of trial.

109. Father tested positive for methamphetamines and marijuana on October 22, 2003 and also had a presumptive positive test result on December 11, 2003. Father also testified at trial that he resorted to drug use shortly after learning of his second failed home study.

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111. Father was admitted to an intensive out-patient substance abuse treatment services [sic] on February 20, 2004.

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113. Father's date of successful completion of drug treatment at the time of trial was uncertain.

114. DHS completed two home studies for Father and Father's Home was not approved for placement of [the Doe C]hildren for both home studies. . . . Subsequently and of grave concern in the second home study was Father['s] positive drug screen result of October 22, 2003 and Father's Girlfriend's presumptive positive of October 22, 2003.

115. Father has frustrated DHS's attempts to remain in contact with him in that he has not maintained stable housing, nor has he maintained a regular, reliable contact number or information, making it extremely difficult to keep in contact with him.

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125. Dr. Joe Bratton, Ph.D. testified very credibly at trial that, inter alia, in his expert opinion, Father's personality disorder was of a type highly resistant to treatment and that it was unlikely that Father would change his behavior patterns of demonstrated instability.

This appeal was commenced on October 7, 2004 and was assigned to this court on May 25, 2005.

Despite the passage of almost three years during which there were nine review hearings and two home studies, Father contends that the family court abused its discretion in awarding

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permanent custody to the DHS and denying his motion for reconsideration because (1) the DHS had not exerted reasonable and active efforts to reunify the Doe Children with Father, and (2) the evidence was not clear and convincing that Father was unwilling and unable to provide the Doe Children with a safe home with the assistance of a service plan.

Specifically, Father challenges the following FsOF:

33. On July 9, 2004, the court issued its findings and orders by Minute Order, stating that after full consideration of the evidence adduced and the respective arguments, both spoken and written of counsel, the court granted the DHS's Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan filed April 1, 2004 and found that by clear and convincing evidence there is an adequate legal and factual basis in support thereof. The Minute Order further ordered all parties to appear for a permanent plan review hearing on November 23, 2004.

. . . .

43. For approximately three years, DHS has provided Mother and Father reasonable opportunity to succeed in addressing the problems, which seriously harm the children and continued to place them at risk of harm.

44. The DHS made reasonable and active efforts to reunify the children with Mother and Father by offering service plans to address the safety issues in the case.

45. The DHS made reasonable efforts and active efforts to engage Mother and Father in the recommended services and gave them more than ample time to follow through with these services.

46. The DHS Oahu social worker actively made efforts to assist Father with reunification by leaving Father numerous reminders, including messages at his landlord's place, to remind him to contact the Big Island social worker who was attempting to schedule an appointment to complete his home study.

47. The DHS made active efforts to provide services to Father by providing transportation expenses for both Father and Father's girlfriend to attend the drug screen required to complete the second home study.

48. The DHS made reasonable efforts and active efforts to communicate with service providers.

Specifically, Father challenges the following CsOL:

3. [Mother] and [Father] . . . are not presently willing and able to provide the [Doe Children] with a safe family home, even with the assistance of a service plan.

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4. It is not reasonably foreseeable that [Mother] or [Father], [sic] 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 not to exceed two years from the date upon which the [Doe Children] were first placed under foster custody by the court[.]

5. The permanent plan dated March 28, 2004 ordered by the court will assist in achieving the goal of adoption, which is in the best interests of the [Doe Children].

6. In arriving at its decision, the court first made a determination pursuant to HRS sections 587-73(a)(1) and (2) as to parents, prior to its determination under HRS section 587-73(a)(3).

A.

First, Father points out that the DHS supervisor in Honolulu, Raymond Nishimiya, testified at the trial that he was "not sure" what services were provided to Father by the Big Island DHS social worker. In light of the record, however, Raymond Nishimiya's knowledge of what was done by the DHS on the Big Island is inconsequential.

Second, Father alleges that he completed parenting classes but stopped anger management (Alternatives to Violence or ATV) classes due to lack of transportation and money. This allegation is contradicted by Father's testimony at trial as follows:

[Counsel for Father] Q: What kind of programs have you participated in?

A: I participated in a psych evaluation, participated in parenting classes I have completed, participated in ATV class which I have failed or have not completed, have dropped out of it. I plan to go back into it. I'm currently in drug rehab right now at Hui Oola.

Q: Okay. You mentioned that you started the ATV class. That's an anger management class, right?

A: Yes. Anger Management.

Q: And you dropped out of it?

A: Yes.

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Q: Why did you drop out of it?

A: I -- I fell back. I did drugs and I gave up hope basically 'cause I thought I would not be able to get the kids because the [social worker] told me that my place did not pass for a safe place for my kids. So, I kinda just gave up on everything.

Q: Okay. So, that resulted in your dropping out of the ATV class?

A: Yes. Dropped out of the ATV class and doing drugs.

Third, Father states that the family court ordered DHS to "assist him not only in terms of referral but as to [ATV] fees." This is a misrepresentation of the record. Although the court³ did indicate from the bench during the May 9, 2003 review hearing that it would enter such an order, that statement was immediately followed by a discussion in which the O'ahu DHS explained their need to first assess whether the Big Island DHS uses a "sliding scale" approach to determine how much Father could afford. The court, in its Orders Concerning Child Protective Act filed May 9, 2003, ordered DHS to "look into whether DHS [O'ahu] or Big Island can assist Father with the fee/cost of the ATV classes and provide the court with a letter within 10 days explaining their results." Whether or not DHS complied with the order and provided the letter to the family court is not indicated in the record. Similarly, there is no indication in the record of any subsequent complaint by Father on this subject.

Fourth, Father avers that the DHS failed to timely complete the results of its home studies from the Big Island.

³ Judge Lillian Ramirez-Uy presided.

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One home study was completed on January 17, 2003. Another was completed on October 21, 2003. The record reveals that the delays in completing both the first and second home studies were attributable to (1) difficulties arising from Father's unstable and unreliable contact information, (2) Father's temporary decision to relocate to Las Vegas, and (3) accommodation of Father's inconsistent work schedule.

At the review hearing on November 22, 2002, Father's counsel stated that Father had stabilized his residence and requested a home study:

[Father] informed me as well as informed the [DHS] social worker [of his intentions to relocate to] Las Vegas . . . he was having a very difficult time finding work on the Big Island and

. . . .

. . . Las Vegas has way more opportunities and that's what he was thinking about.

. . . .

I did inform [Father] when I heard of those plans by letter that if he were to do that at this point in the case that it would . . . make reunification even more difficult than it already was with him being on the Big Island.

. . . I understand that [Father] has now found a job on the Big Island that I believe is more stable than he had before.

He's also found a stable residence which has been a bit of a problem as well. And he has requested a home study be done of his home so that he can be considered for reunification and apparently we're waiting for [Big Island DHS] to do that.

And our request would be that that be facilitated as quickly as possible so that --

. . . .

-- he can be evaluated.

According to the DHS status update report filed August 1, 2003, "[Father] did not make himself available to complete [the first] home study until 1/03[.]" On January 17,

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2003, less than two months following the November 22, 2002 review hearing, the first home study of Father's residence was completed.

At the review hearing on May 9, 2003, Father's Counsel stated that [Father] had been working to correct the deficiencies noted in the first home study and requested a second home study. At the review hearing on August 1, 2003, the family court ordered, "as part of reasonable efforts, [O'ahu] DHS will try to expedite Father's [second] home study on the Big Island; if it cannot be done in a timely manner, DHS will either send someone from [O'ahu] or retain a private agency to do the home study." In a status update report by the DHS, filed October 24, 2003, DHS informed the family court, in length and detail, of its difficulty in contacting Father and scheduling the second home study. The report read, in relevant part, as follows:

It was anticipated that the home study for [Father] would be completed by 10/1/03, as this was court-ordered at the Family Court hearing on 8/1/03. [Father] stated . . . he would fully cooperate with the [DHS Big Island] social worker and make himself available so the home study could be completed. He agreed to contact the [DHS Big Island] social worker, Cheryl Uyeda, on 9/15/03, as it was discussed that it was imperative that he and Ms. Uyeda make an appointment to complete the home study by 10/1/03. The DHS social worker [Colleen Cheeseman] shared that Ms. Uyeda had indicated that she had left a message with [Father's] landlord, Mr. Capello, on 8/13/03, requesting that [Father] contact her. [Father] stated that he had not received a message regarding contacting Ms. Uyeda.

. . . .

[Ms. Cheeseman] spoke to [Father] on 9/17/03 and asked him if he had contacted the [DHS big Island] social worker, Ms. Uyeda. He stated that he had not, as he had been busy; he had to work. [Ms. Cheeseman] informed him that he needed to contact Ms. Uyeda, so that the home study could be set up. . . . He was given Ms. Uyeda's direct phone number as well as Ms. Uyeda's office secretary's phone number and her office clerk's phone number as alternative phone numbers to reach Ms. Uyeda. . . .

[Ms. Cheeseman] spoke with Ms. Uyeda on 9/23/03 at approximately 9:20a.m. Ms. Uyeda informed [Ms. Cheeseman] that she spoke with

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[Father] on 9/22/03 and had requested that he contact her on 9/23/03 at 7:45 a.m., to set up an appointment for the [second] home study, and he agreed to do this. Ms. Uyeda stated that she planned to do the home study on 9/24/03, if she could confirm this with [Father]. . . . Ms. Uyeda called [Father] on 9/23/03 following the telephone [call] with [Ms. Cheeseman] that morning and left a message for [Father] to return her call. Ms. Uyeda left a message on [Father's] landlords' answering machine ([Father] does not have a phone; contact for him is through his landlords', Mr. and Mrs. Capello's, phone, who resides [sic] behind him) leaving her name and phone number.

[Ms. Cheeseman] tried contacting [Father] on 9/24/03 at approximately 7:55a.m. and spoke with [Father's] landlord, Mr. Capello. Mr. Capello did not know if [Father] was having a home study completed that day. He stated that [Father] was not home, he had left early that morning. [Ms. Cheeseman] left a message with Mr. Capello that it was very important that [Father] contact the [DHS Big Island] social worker as she wanted to complete a home study that day, and provided Mr. Capello with the name and phone number for Ms. Uyeda. [Father] did not contact Ms. Uyeda that day and [Ms. Cheeseman] left a message for him on 9/24/03 at approximately 5:30p.m. that it was very important that he call Ms. Uye[da] as soon as possible regarding completing a home study. [Ms. Cheeseman] tried contacting [Father] on 9/25/0[3] at approximately 7:55a.m. [Ms. Cheeseman] spoke with Mr. Capello and he stated that [Father] was not home. [Ms. Cheeseman] asked Mr. Capello if he knew whether [Father] had gotten his message and called [DHS Big Island] social worker, [Ms.] Uyeda. He stated that he was not sure as [Father] had come home late from work that evening. . . . [Ms. Cheeseman] gave Mr. Capello' [sic] Ms. Uyeda's phone number as well as Ms. Uyeda's office secretary's phone number and Ms. Uyeda's office clerk's phone number also, and stated that importance of [Father] calling Ms. Uyeda as soon as possible and keep [sic] his schedule open so that a home study could be completed. . . . [Ms. Cheeseman] left a message for [Father], on the Capello's answering machine on 9/26/03, at 9:10am to contact Ms. Uyeda as soon as possible, so that a home study could be completed. Ms. Uyeda left a message on 9/26/03 at approximately 3:22 p.m. for [Father] to call her . . . regarding the home study and the importance of the call.

Ms. Uyeda called [Father] on 9/29/03 at approximately 4:55 p.m. She informed him that she would do his home study on 9/30/[03] He stated that a days [sic] notice was too short to be informed about the appointment for the homestudy, and that it was a hard decision to make regarding completing the home study on [9]/30/03 as he needed the money to pay for things he had already purchased and that the job would allow him to "make good money". Ms. Uyeda connected [Ms. Cheeseman] through a conference call and informed [Ms. Cheeseman] about [Father] possibly being unable to complete the home study. [Ms. Cheeseman] reiterated to [Father] the importance of completing the home study and that it was court-ordered that the home study b[e] done by 10/1/03. . . . He was informed by Ms. Uyeda and [Ms. Cheeseman] that while he did need to work, he also needed to make himself available to complete the home study, and that that [sic] attempts had been made to contact him and do the home study earlier. Ms. Uyeda asked [Father] if he would be able to take time off on [9]/30/03 to do the home study. . . . He stated that he was unsure . . . but agreed to call Ms. Uyeda on 9/30/03 to confirm if he was able to able to meet with her that day to do the home study. [Father] called Ms. Uyeda on 9/30/03 at approximately 8 a.m., and left a message stating that

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he would be unable to meet with Ms. Uyeda on 9/30/03 as he needed to finish the job. [Father] did not contact [Ms. Cheeseman] or Ms. Uyeda following his call on 9/30/03 to request for a home study or state concerns regarding the home study not being completed. [Ms. Cheeseman] requested that Ms. Uyeda continue to try to complete a home study for [Father] prior to the next Family Court hearing set for 10/24/03. . . .

[Ms. Cheeseman] spoke to Mr. Capello on 10/9/03 and left a message for [Father] to call Ms. Uyeda as she would like to complete a home study for [Father] on 10/17/03 and he needed to call Ms. Uyeda by 4:30p.m. the next day. [Ms. Cheeseman] informed Mr. Capello that it was very important that [Father] call Ms. Uyeda as soon as possible.

. . . .

. . . [Father] stated . . . he would not be able to complete a home study on 10/17/03. . . . [Ms. Cheeseman] requested that he be diligent about checking for messages and checking in with Ms. Uyeda even if it is after work hours as he can leave messages on her voice mail.

Fifth, Father complains that "[t]he services recommended by the psychological evaluation were not offered or provided to Father." He does not explain his basis for concluding that such services should have been offered or provided to him. We conclude that it was his duty to obtain such services. Moreover, as noted in the answering brief, in-home parenting services could not have been provided to Father as Father was never approved for reunification with the Doe Children.

B.

Father argues that the evidence was not clear and convincing that Father was unwilling and unable to provide the Doe Children with a safe family home with the assistance of a service plan.

First, Father states that he completed a parenting education program, submitted to a psychological evaluation, completed a drug assessment, submitted to random urine tests, and

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engaged in anger management classes. However, Father ignores the facts that (1) the psychological evaluation revealed an Axis 2, dependent tendency personality disorder; (2) on October 22, 2002, Father tested positive for methamphetamine and marijuana use; and (3) Father's failure to participate in the court-ordered urinary analysis on December 11, 2003 resulted in a presumptive positive report.

Second, Father states that throughout the three-year period when the Doe Children were under foster care, he attended and/or made himself available for all the review hearings on Oahu. This statement is contradicted by the fact that Father failed to appear at the October 24, 2003 review hearing.

Third, Father notes that the DHS reported at the June 6, 2002 review hearing that Father was doing well in his programs, and DHS's primary focus had turned to Father's reunification with the Doe Children. Father fails to note, however, that at the next review hearing on November 22, 2002, DHS reported as follows:

It was anticipated that [the Doe Children] would be reunified with [Father], at this time. [Father]'s situation does not appear to [be] stable. He has had intermittent contact with the DHS social worker on the Big Island and it has been difficult to contact him as he has not had a home phone and his residence has been unclear. The DHS will begin concurrent planning for [the Doe Children] as they are in need of a permanent home so that they may have a sense of security. The DHS will file a motion for Permanent Custody over [the Doe Children] after the Central Child Welfare Services Section Administrator has reviewed the [Doe Children's] situation, and . . . approves that DHS pursue Permanent Custody over them.

Moreover, at that same hearing, the Guardian Ad Litem recommended the following: "Continue foster custody. Since it appears that neither parent is making substantial progress towards

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reunification, permanency planning should be started."

THEREFORE, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

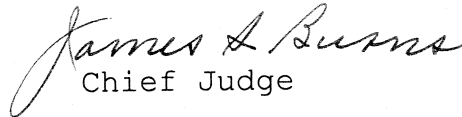
IT IS HEREBY ORDERED that the August 5, 2004 Order Awarding Permanent Custody and September 15, 2004 Orders Concerning Child Protective Act are affirmed.


DATED: Honolulu, Hawai'i, April 27, 2006.

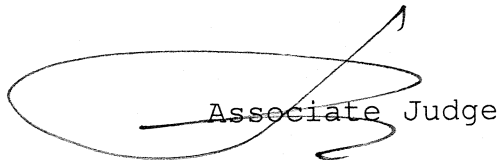
On the briefs:

Tae W. Kim
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Chief Judge


Associate Judge


Associate Judge