

NOT FOR PUBLICATION

NO. 26933

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

IN THE INTEREST OF JANE DOE,
Born on July 6, 2003, A Minor

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 04-09457)

SUMMARY DISPOSITION ORDER

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

The mother (Mother) of Jane Doe, born on July 6, 2003, appeals from the family court's¹ (1) September 21, 2004 Order Awarding Permanent Custody and (2) October 19, 2004 Orders Concerning Child Protective Act which denied Mother's motion for reconsideration.

Mother was born on August 30, 1984. When Mother was eight years old, she was physically abused by her mother's boyfriend. Mother has a history of angry, hostile, volatile, and assaultive behavior. As a juvenile, Mother was adjudicated a law violator and spent time in the Hawai'i Youth Correctional Facility. The State of Hawai'i Department of Human Services (DHS) became involved with Mother's family in August 2003. At that time, Mother was a heavy user of crystal methamphetamine. On September 4, 2003, after attempting suicide, Mother tested positive for crystal methamphetamine. On October 9, 2003, based upon Mother's voluntary foster custody agreement, Jane Doe was

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placed in foster care with Mother's sister. On January 9, 2004, the DHS filed a Petition for Temporary Foster Custody. This petition was heard and granted on January 13, 2004. Mother did not appear at the hearing. On January 20, 2004, Mother was arrested for Burglary and Unauthorized Control of a Propelled Vehicle and was held in the Oahu Community Correctional Center (OCCC). Prior to that time, she had continuously used crystal methamphetamine. On March 17, 2004, the DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan.

At the April 28, 2004 hearing, Mother requested that the motion for permanent custody not be heard until after her sentencing since there was a possibility that she might be eligible for a drug program as part of her sentencing.

On July 29, 2004, Mother was sentenced to probation for five years and imprisonment for one year with credit for time served. Mother was moved from OCCC to the Women's Community Correctional Center on August 2, 2004. She testified of her plans to start parenting classes and treatment for domestic violence, anger management, and drugs in September 2004. There is evidence that Mother would need at least a year of services to really be able to provide a safe home for Jane Doe.

At both the March 24, 2004 hearing and the June 14, 2004 hearing, Mother informed the court that she would agree to give up her parental rights if Jane Doe would be adopted by Mother's sister. At the August 26, 2004 trial, however, Mother

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modified her position when she testified that "I don't mind if my sister dem [sic] adopt [Jane Doe], but as a parent I still don't wanna lose my rights."

On September 14, 2004, after a hearing on August 26, 2004, the court entered an order granting the motion for permanent custody. The Order Awarding Permanent Custody was entered on September 21, 2004. It ordered the March 10, 2004 Permanent Plan into effect. The goal of this permanent plan is the adoption of Jane Doe. The court's October 19, 2004 Orders Concerning Child Protective Act denied Mother's motion for reconsideration.

Mother filed her notice of appeal on November 4, 2004. On February 9, 2005, the family court entered its Findings of Fact and Conclusions of Law. This case was assigned to this court on August 1, 2005.

The Supreme Court of Hawai'i has stated that

the focus of a permanent plan hearing conducted pursuant to HRS § 587-73(a) is whether the child's "mother" or "father" can provide a safe family home. See [Hawaii Revised Statutes (HRS)] § 587-73(a)(1). If not, the focus shifts to whether it is reasonably foreseeable that the child's "mother" or "father" will become willing and able to provide a safe family home within a reasonable period of time. See HRS § 587-73(a)(2). Only after the family court has found, by clear and convincing evidence, that neither criteria has been established,² does the court then

² This language suggests that the child's parent has the burden of proving that it is reasonably foreseeable that he or she will be come willing and able to provide a safe family home within a reasonable period of time. However, Hawaii Revised Statutes (HRS) § 587-73, the Child Protective Act, imposes the following burden on the agency seeking the termination of the parental rights:

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:

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consider whether the proposed goal of the permanent plan is in the best interests of the child. See HRS § 587-73(a)(3).

In re Doe, 95 Hawai'i 183, 194, 20 P.3d 616, 627 (2001) (footnote added).

In her Opening Brief, Mother contends as follows:

The granting of the Motion for Permanent Custody was premature. [Jane Doe] was in court ordered foster custody for approximately two (2) months at the time the Motion for Permanent Custody was filed. [Jane Doe] had been in court ordered foster custody for only eight (8) months when the Court granted the Motion for Permanent Custody. A Permanent Plan Hearing is not required until a child has been residing out of the home for fifteen of the last twenty-two months.

The court did not order the service plan offered by DHS until forty-two (42) days after the Motion for Permanent Custody was filed. At the time the service plan was ordered Mother was incarcerated at OCCC, which did not offer any of the services in the service plan.

The evidence was not clear and convincing that Mother was unwilling and unable to provide a safe home for the children [sic]. At the time of trial, Mother was enrolled in all the services required by the service plan. She was not given an opportunity to participate in the services because her parental rights were prematurely terminated.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs

(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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submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties, and applying the standard of review stated in Doe,

IT IS HEREBY ORDERED that the September 21, 2004 Order Awarding Permanent Custody and October 19, 2004 Orders Concerning Child Protective Act are affirmed.

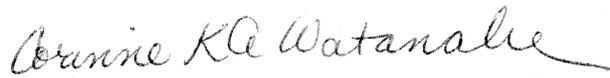
DATED: Honolulu, Hawai'i, April 13, 2006.

On the briefs:

Jeffry R. Buchli,
for Mother-Appellant.

Jay K. Goss and
Mary Anne Magnier,
Deputy Attorneys General
for Department of Human
Services-Appellee.


Chief Judge


Associate Judge


Associate Judge