

NOT FOR PUBLICATION

NO. 27135

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

IN THE INTEREST OF JANE DOE,
Born on November 13, 1995, a Minor

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2006 MAY 16 AM 10:31

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 04-09455)

SUMMARY DISPOSITION ORDER

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

The father (Father) of Jane Doe, born on November 13, 1995, appeals from the family court's^{1/} December 23, 2004 Order Awarding Permanent Custody, and January 26, 2005 Orders Concerning Child Protective Act.

On November 1, 2003, when the mother (Mother) of Jane was homeless and Jane was living with Father, the Honolulu Police Department executed a drug raid on Father's home and arrested Father. Ever since then, Father has been incarcerated. Testimony was presented that Father has an extensive criminal history, including burglary and theft offenses.

On November 4, 2003, Mother signed a voluntary foster custody agreement placing Jane in the custody of the State of Hawai'i Department of Human Services (DHS). On January 15, 2004, the court awarded foster custody of Jane to the DHS. On December 23, 2004, after a trial, the court entered the Order Awarding Permanent Custody terminating Mother's and Father's parental and

^{1/} Judge William K. Wallace III presided.

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custodial rights and duties regarding Jane. On January 26, 2005, the court entered the Orders Concerning Child Protective Act denying Father's motion for reconsideration.

Father filed a notice of appeal on February 23, 2005. On March 21, 2005, the court filed the Findings of Fact and Conclusions of Law (FsOF and CsOL). This case was assigned to this court on November 10, 2005.

Father challenges various FsOF and CsOL and contends that (1) he was denied a reasonable period of time to complete a service plan to be able to provide a safe home for Jane, (2) the DHS failed to make reasonable efforts to assist him in providing a safe home for Jane when it failed (a) at the start of this case in November 2003 to consider Ms. Violet Maio (Maio) for placement of Jane, and (b) just prior to trial in December 2004 to determine whether Maio's home was a safe home for Jane. With respect to (a), Father does not explain why he waited until this appeal in 2005 to complain about the inaction of the DHS in November 2003.

Maio testified that (1) she has known Father "from when we was little," but has known Jane for only three years prior to December 23, 2004; (2) Father is Maio's sister's fiancé; (3) she is divorced and works full-time as a custodian at a public high school; (4) she lives in a two bedroom townhouse with her six boys, ages 6 to 16; and (5) she goes to the University of Phoenix once a week, 6 p.m. to 10 p.m., while her fiancé watches her sons.

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With respect to this appeal, the following are the most relevant FsOF. Father challenges only those that are in bold print.

51. Mother is a chronic drug user.

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75. Father will not be released from prison in the reasonably foreseeable future and will remain confined for a long period of time.

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94. In light of [Child's] need for stability, and parents' lack of progress in services, further delay in determining whether parents can regain custody of [Child] is not in [Child'] best interest.

95. [Child's] guardian ad litem recommended that permanent custody of [Child] be awarded to DHS.

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102. **Cynthia Pierce was an expert witness who was a credible witness**

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105. **Violet Maio's testimony was credible.**

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108. **Ms. Maio testified that she babysat Child in the past but she has not seen Child in three years.**

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112. Cynthia Pierce, DHS expert social worker, testified that Ms. Maio was determined not to be an appropriate placement for Child.

The DHS concedes, and we agree, that the following part of FOF no. 108 is clearly erroneous: "Ms. Maio testified that . . . she has not seen [Jane] in three years." Maio testified, in relevant part, "There was times when [Jane] came over. And before whatever's happened, I didn't know -- she was over my

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house, and she comes often and stays with me and my kids and sleeps over, and we do things together." We further conclude that FOF no. 112 is clearly erroneous, but that the two erroneous findings are harmless.

Father contends that Maio meets the definition of a family member as is stated in Hawaii Revised Statutes § 587-2 (Supp. 2005)^{2/} "by being a person responsible for the child's care." We disagree. Maio was responsible for Jane's care only when Jane was visiting her.

THEREFORE, in accordance with Hawai'i Rules of Appellate Procedure Rule 35 (2006), 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, and considering the relevant findings of fact,

IT IS HEREBY ORDERED that:

(1) The last nine words of finding of fact no. 108 and all of finding of fact no. 112, entered on March 21, 2005, are vacated.

^{2/} Hawaii Revised Statutes § 587-2 (Supp. 2005) states as follows:

"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.

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(2) The December 23, 2004 Order Awarding Permanent Custody, and the January 26, 2005 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, May 16, 2006.

On the briefs:

Herbert Y Hamada
for Father-Appellant.

Michael G.K. Wong and
Mary Anne Magnier,
Deputy Attorneys General
for Department of Human
Services-Appellee.


Chief Judge


Associate Judge


Associate Judge