NO. 27793

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST OF P.M.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 01-07272)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Fujise, JJ.)

The natural and adjudicated father (Father) of P.M., a male child born on May 1, 1999, appeals from the (1) January 11, 2006 Order Awarding Permanent Custody and (2) February 14, 2006 Orders Concerning Child Protective Act denying Father's motion for reconsideration. These orders, entered in the Family Court of the First Circuit,[1] terminated Father's parental and custodial rights and duties to, and awarded permanent custody of, P.M. to the State of Hawai'i Department of Human Services (DHS). We affirm.

BACKGROUND

For allegedly having sexually abused minor girls, Father has been incarcerated since February 9, 2001. On that date, DHS first intervened to protect P.M. On March 9, 2001, DHS filed a Petition for Family Supervision. On March 19, 2001, Judge Karen M. Radius granted the petition. On January 23, 2002, after a hearing, Judge John C. Bryant, Jr., ordered that Father

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[1] Judge Linda K.C. Luke presided.

shall not have any visits with P.M. until further order of the court. On September 30, 2002, Judge Lillian Ramirez-Uy entered an order terminating the family court's jurisdiction.

On August 18, 2004, the mother (Mother) of P.M. voluntarily placed P.M. and his half-sister in the foster custody of DHS. On September 7, 2004, DHS commenced this case by filing a Petition for Foster Custody. On September 13, 2004, the family court ordered that Father shall not have any contact with P.M. On September 8, 2005, DHS filed a "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan". P.M. is a special education student. On January 11, 2006, after a hearing, the court entered the Order Awarding Permanent Custody which ordered the July 23, 2005 Permanent Plan into effect. The goal of that permanent plan is permanent custody to DHS with the subsequent goal of adoption.

On January 30, 2006, Father filed a "Motion for Reconsideration of Order Awarding Permanent Custody Entered January 11, 2006". The February 14, 2006 Orders Concerning Child Protective Act denied this motion.

On February 28, 2006, Father filed a Notice of Appeal. On March 9, 2006, the court entered the Findings of Fact (FsoF) and Conclusions of Law. The FsOF state in part:

> 46. [P.M.'s] paternal grandmother[(Grandmother)] has expressed an interest in caring for [P.M.] on a long-term basis. At the time of the January 11, 2006 trial, DHS was not able to assess [Grandmother] due to her working in New Orleans, Louisiana on Hurricane Katrina relief on a voluntary basis.

. . .

47. [P.M.] is subject to threatened sexual harm by [Father].

. . . .

110. On December 17, 2004, [Father] was convicted of sexual assault in the third degree in CR No. 01-1-0350 and CR No. 99-2253, and sentenced to a five-year period of incarceration in each case, to be served consecutively. [Father] appealed his convictions in both cases: S.C. No. 27064 (CR No. 01-1-0350) and S.C. No. 27065 (CR. No. 99-2253).

111. [Father's] period of incarceration for his above convictions will end on February 9, 2011, subject to the disposition of his appeals.

. . . .

114. [Father] does not expect to be paroled because he would have to leave protective custody to participate in sexual offender treatment because sexual offender treatment is not available at the Halawa High Security Correctional Facility. According to [Father], there is a three-year waiting list for sexual offender treatment . . . .

115. Due to the length of [Father's] period of incarceration, he would not be able to provide [P.M.] with a safe family home, in the reasonably foreseeable future.

116. As a convicted sexual offender of minor children, [Father] poses a risk of threatened sexual harm to [P.M.], as long as he remains an untreated sexual offender of minor children. Regardless of his period of incarceration, [Father's] convictions for sexual assault to minor children and his not being treated for his sexual assault to minor children are safety issues that prevent him from providing a safe family home for [P.M.].

. . .

117. Under the circumstances presented by FC-S No. 01-7272, [Father] was given every reasonable opportunity to effect positive changes to provide a safe family home and to reunify with [P.M.].

118. [Father] is not presently willing and able to provide [P.M.] with a safe family home, even with the assistance of a service plan because his foregoing problems continue to exist.

119. It is not reasonably foreseeable that [Father] will become willing and able to provide [P.M.] with a safe family home, even with the assistance of a service plan.

120. The Court's above "parental unfitness" findings of fact regarding [Father} is not solely based on [Father's] incarceration alone. The court also considered the length of [Father's] incarceration, the risk of threatened sexual harm that [Father] poses to [P.M.] due to his being an untreated sexual

> offender of minor children, and the uncertainty of whether [Father] will successfully complete sexual offender treatment in the reasonably foreseeable future.
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> . . .
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> 132. The goal of the Permanent Plan, dated July 23, 2005, as to [P.M.], is permanent custody with the ultimate goal of adoption. The ultimate goal of the permanent plan is in accord with the presumption in [Hawaii Revised Statutes (HRS) Section] 587-73(b)(3)(A) that the goal of adoption in the permanent plan is in a child's best interests.
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> 133. The Permanent Plan, dated July 23, 2005, as to [P.M.], assists in and facilitates in the achievement of the ultimate goal of the permanent plan: adoption.
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> . . .
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> 139. Under the circumstances presented by the instant cases, DHS has exerted reasonable and active efforts to reunify the Children with Mother and the Children's respective fathers by identifying necessary, appropriate and reasonable services to address Mother and the Children's respective fathers' identified safety issues, and making appropriate and timely referrals for these services. Under the circumstances presented by the instant cases, DHS gave Mother and the Children's respective fathers every reasonable opportunity to succeed in remedying the problems which put the Children at substantial risk of being harmed in the family home and to reunify with the Children.
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> STANDARDS OF APPELLATE REVIEW
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> The family court's [Findings of Fact] are reviewed on appeal under the "clearly erroneous" standard. A [Finding of Fact] is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. "Substantial evidence" is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In re Jane Doe, 101 Hawai'i 220, 227, 65 P.3d 167, 174 (2003) (internal quotation marks, citations, and ellipsis omitted).

The family court's Conclusions of Law are reviewed *de novo* under the right/wrong standard. Doe, 101 Hawai'i at 227, 65 P.3d at 174. Conclusions of Law, "consequently, are not binding upon an appellate court and are freely reviewable for their

correctness." Id. (internal quotation marks, citation, and brackets omitted).

> However, the family court's determinations pursuant to HRS § 587-73(a) with respect to (1) whether a child's parent is willing and able to provide a safe family home for the child and (2) whether it is reasonably foreseeable that a child's parent will become willing and able to provide a safe family home within a reasonable period of time present mixed questions of law and fact; thus, inasmuch as the family court's determinations in this regard are dependant upon the facts and circumstances of each case, they are reviewed on appeal under the "clearly erroneous" standard. Likewise, the family court's determination of what is or is not in a child's best interests is reviewed on appeal for clear error.
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> Moreover, the family court is given much leeway in its examination of the reports concerning a child's care, custody, and welfare, and its conclusions in this regard, if supported by the record and not clearly erroneous, must stand on appeal.

In re Jane Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (internal quotation marks, citations, and brackets omitted).

DISCUSSION

In his opening brief, Father argues that (1) his incarceration precludes him from being a present threat to P.M.; (2) his parental rights were terminated because of his incarceration and without providing him the opportunity to show he can provide a safe family home; (3) the permanent plan is not in the best interest of P.M.; and (4) the weight of the evidence shows he is willing and able to provide a safe family home through Grandmother.

Father challenges FsOF nos. 47, 115, 116, 117, 118, 119, 120, 132, 133 and 139. Upon a review of the record, we conclude that none of these challenged FsOF are clearly erroneous.

In challenging FOF no. 120, Father argues that his parental rights were terminated solely because of his incarceration to February 9, 2011, and he should have been given more time to obtain a psychological evaluation and to undergo sexual offender treatment. This argument is not supported by the record.

The following is the applicable precedent:

> We note, first, that involuntary confinement, a criminal charge, or conviction for a criminal offense does not mandate a per se forfeiture of a parent's rights to a child. See *In re J.M.S.*, 83 S.W.3d 76, 83 (Mo.Ct.App.2002) (citing to a governing statute and holding that incarceration by itself is not grounds for termination of parental rights); *In re Brian D.*, 209 W.Va. 537, 550 S.E.2d 73, 76 (2001) ("[I]ncarceration, *per se*, does not warrant the termination of an incarcerated parent's parental rights.") (Italics in original.); *In re F.N.M.*, 951 S.W.2d 702, 706 (Mo.Ct.App.1997) (holding that incarceration, in and of itself, may not be grounds for termination of parental rights); *In re Staat*, 287 Minn. 501, 178 N.W.2d 709, 713 (1970) ("[S]eparation of child and parent due to misfortune and misconduct alone, such as incarceration of parent" is not per se grounds for termination); *Diernfeld v. People*, 137 Colo. 238, 323 P.2d 628, 630 (1958) ("We cannot hold that every convicted felon, by that fact alone, loses all parental rights in children."). For instance, an imprisoned parent may have other family members who would be able to care for the child during the confined parent's absence.
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> However, incarceration may be considered along with "other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect." *In re Brian D.*, 550 S.E.2d at 77. Thus, if the sole caretaker of a child is confined for a long period of time, the lack of permanence or guidance in the child's life may be a factor in considering whether the parent may be able to provide a safe family home within a reasonable period of time.

In re Doe, 100 Haw. 335, 345, 60 P.3d 285, 295 (2002). This precedent must be read and applied in the light of, and subject to, HRS § 587-73 (Supp. 2005) which states in part:

> **Permanent plan hearing.** (a) At the permanent plan hearing, the court shall . . . 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[.]

While it is true that incarceration "does not mandate a per se forfeiture of a parent's rights to a child," "incarceration may be considered along with 'other factors and circumstances impacting the ability of the parent to remedy the conditions of abuse and neglect.'" Doe, 100 Hawai'i at 345, 60 P.3d at 295. Here, several "other factors" played into the family court's decision. Father is an untreated sexual offender who is unable to obtain treatment. "[I]t is not reasonable to expect [DHS] to provide services beyond what was available within the corrections system[.]" Id. Furthermore, the length of time a parent is expected to be incarcerated is a factor that may be considered in deciding whether to terminate parental rights. Id. When, as here, the parent is not presently willing and able to provide the child with a safe family home and it is not

reasonably foreseeable that the parent will become willing and able to provide the child with a safe family home 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, the statutory grounds for termination have been established.

Father also argues that the permanent plan is not in the best interests of P.M. and that the weight of the evidence was that two of his relatives were willing and able to provide a safe home for P.M. until Father was able to do so. This argument also ignores the time limitation imposed by the statute. Moreover, Father's assertions that Grandmother or his sister (Aunt) could have provided a safe family home for P.M. while Father was incarcerated are not supported by the record.

FOF no. 46 refutes Father's assertion regarding Grandmother.[2] The record refutes Father's assertion regarding

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[2] The letter from the paternal grandmother of P.M. states in part:

> I live in a 4 bedroom townhouse in Nanakuli so [P.M.] would have his own room. I do at this time have roommates so that there would always be someone there when [P.M.] would get home from school. That is as long as the state approves of them if not they will move out. I also have friends willing to help watch [P.M.] for me when Iam [sic] working. At this time, I work 3 jobs. I am a Life Guard at Hawaiian Waters. I have been there for over 3 years. I also work part time at The Hobby Company as a cash[i]er. I have been there for a little more then [sic] 2 years and I work seasonal for E.K. Fernandaz [sic] Shows as a Carnival Ride Operator. I have been there for more then [sic] 16 years. I also sell gift and collectables [sic] and crafts on the internet. Iam [sic] also an American Red Cross Volunteer. In fact at this time Iam [sic] helping the people of the gulf coast recover from Hurricane Katrina. Iam [sic] in Baton Rouge[,] Louisiana but I will be home on March 1st[.]

Aunt. Prior to January 6, 2006, DHS spoke with Aunt, who lives in Fort Benning, Georgia. Because Aunt and her husband were expecting their second child in April 2006, Aunt and her husband decided that they were unable to provide P.M. with the support he would require.

CONCLUSION

Accordingly, we affirm the (1) January 11, 2006 Order Awarding Permanent Custody and (2) February 14, 2006 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, January 23, 2007.

On the briefs:

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Chief Judge

Associate Judge

Associate Judge