

CONCURRING AND DISSENTING OPINION BY LEONARD, J.

I concur with the majority's conclusions regarding Father's telephone participation in the proceedings and the Child Protective Pilot Project Rules. However, I respectfully dissent from the majority's rejection of Father's argument that DHS failed to make any reasonable opportunity available for Father and A.W. to be reunited upon the completion of Father's incarceration, which was imminent and substantially less than the maximum reasonable period of time, not to exceed two years from the date the child was placed in foster custody.

Father relies primarily on In re [Jane] Doe, 100 Hawai'i 335, 60 P.3d 285 (2002) (Jane Doe), which rejects the notion of a *per se* termination of parental rights based on incarceration and clearly recognizes DHS's obligation to make available "every reasonable opportunity" for parent and child to reunite. The Hawai'i Supreme Court's discussion in that case is instructive:

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.

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.

While there is no dispute that DHS had an obligation to make every reasonable opportunity to reunite Father and Jane, it is not reasonable to expect it to provide services beyond what was available within the corrections system. Obviously, an incarcerated parent is incapable, by himself or herself, of maintaining a safe family home until he or she has been released from prison. Therefore, the completion of a service plan is an empty pursuit until the parent has been released and is capable of raising a child again. At that point, the parent would be able to participate in a service plan with DHS's assistance.

In the present case, DHS established that it was willing to assist Father once his incarceration ended. In addition, the court delayed the award of permanent custody, specifically so Father would have an opportunity to meet the terms of the service plan. However, it was subsequently determined that Father would not be released within the foreseeable future. Accordingly, we conclude DHS made reasonable efforts, under the circumstances, to reunify Father and Jane.

Jane Doe, 100 Hawai'i at 345-46, 60 P.3d at 295-96 (emphasis added).

In Jane Doe, the supreme court ultimately concluded that DHS had made reasonable efforts, under the circumstances, to reunify Father and Jane. However, the circumstances present in the case at bar are quite distinct from the circumstances in Jane Doe. Jane Doe's Father was years away from being released. A.W.'s Father was less than a month from being released from prison and between one and six months from completing his halfway house transition period. There was no evidence that Jane Doe's Father had family members who would have been able to care for

Jane. In this case, other family members (A.W.'s paternal uncle and aunt) - whose home had been approved by the Indiana Department of Child Services and had been recommended for placement by DHS - were able to care for A.W. during Father's transition period. It also appears that upon Father's release from the halfway house, he was approved by his probation officer to reside in his mother's home, where relatives and resources were available to help Father meet A.W.'s needs upon her reunion with Father. It is noteworthy that Father had bonded with A.W. through visitations conducted through the foster mother at least twice weekly, no easy feat considering Father's incarceration. The record includes testimony that Father had completed a psychological evaluation, drug test, and drug treatment, and DHS could have arranged for supervision from Indiana to monitor and implement services. Most importantly, in Jane Doe, DHS "established that it was willing to assist Father once his incarceration ended." In this case, DHS refused to offer or consider any post-incarceration services or assistance to A.W.'s Father, even though such services could have assisted Father in providing a safe family home to A.W. within a reasonable period of time, not to exceed two years from the date A.W. was placed in foster care.^{1/} At the time of this decision, Father and A.W. are

^{1/} In addition, I respectfully disagree with the majority's conclusion that there was "substantial evidence" to support the determination that Father was an unfit parent. Father's "lack of insight" into A.W.'s needs is based entirely on his desire to reunify with A.W., rather than have her placed for adoption. Father's limited involvement with two prior children may
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still within the two-year "maximum" reasonable period during which Father could provide a safe family home for A.W. with the assistance of a service plan, assuming that Father has stayed the rehabilitative course necessary for him to be a fit parent.

For these reasons, I would vacate the family court's order and remand this case for further proceedings consistent with the supreme court's explanation of DHS's obligations, as set forth in Jane Doe.

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^{2/}(...continued)

also stem from his incarceration and, although there was a report of an arrest (not a conviction) for abuse of a household member stemming from an incident with Father's ex-wife, these thin facts do not warrant DHS's refusal to provide any form of assistance or make any efforts toward reunification.