NO. 23737

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI I

In the Interest of JOHN DOE,
Born on October 12, 1999

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 99-06226)

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

The appellant in this case is the natural and legal mother (Mother) of the following five children:

Child 1, born on September 21, 1988
Child 2, born on February 24, 1991
Child 3, born on January 29, 1993
Child 4, born on September 7, 1995
Child 5, born on October 12, 1999

Child 5 is the John Doe in this case. Mother appeals the July 28, 2000 Order Awarding Permanent Custody entered by District Family Court Judge Allene R. Suemori, which divests Mother of her parental rights pertaining to Child 5, awarding permanent custody of Child 5 to the Director of Human Services, and ordering the February 3, 2000 Permanent Plan into effect. Mother also appeals Judge Suemori's August 28, 2000 Orders Concerning Child Protective Act denying Mother's August 10, 2000 Motion for Reconsideration. We affirm.

The natural and legal father (Father) of Child 1, Child 2, Child 3, Child 4, and Child 5 was "defaulted and his

parental rights [were] divested" by Orders Concerning Child Protective Act entered on July 25, 2000. Father did not appeal.

BACKGROUND

On October 12, 1999, the State of Hawai i Department of Human Services (DHS) received a report from Castle Medical Center that Mother gave birth to Child 5. On October 13, 1999, due to Child 5 having tested positive for crystal methamphetamine at birth and possible threatened harm to Child 5 by Mother and Father, Child 5 was immediately taken into Police Protective Custody pursuant to Hawaii Revised Statutes (HRS) § 587-22 and placed in a foster home. Child 5 continues to reside in that same foster home. Mother and Father have not seen or visited Child 5 since he was placed in DHS custody.

The Safe Family Home Report (SFHR) dated October 14, 1999, reported that Child 5 was at risk of threatened and imminent harm due to (1) his very young age, (2) Mother's and Father s history of noncompliance with court-ordered services for substance abuse, domestic violence, and mental health, (3) confirmed history of physical, emotional, and sexual abuse by Mother and Father of the older children,[1/] (4) current alcohol and drug abuse by Mother and Father, and (5) domestic violence problems between Mother and Father. At that time, DHS was

[1/] On May 2, 1998, the State of Hawai i Department of Human Services (DHS) confirmed sexual abuse of Child 2 and Child 3 by their natural and legal mother (Mother) and father (Father).

seeking permanent custody of Child 1, Child 2, Child 3, and Child 4.[2/]

On October 15, 1999, DHS filed a Petition for Temporary Foster Custody on behalf of Child 5 alleging that he was subject to threatened harm by Mother and Father because of

> Mother's admitted amphetamine use during her pregnancy with the child, Mother's positive drug test for amphetamine two days before child's birth,[3/] hospital staff observations of Mother and Father reeking of alcohol two days before the child's birth, family member reports of Mother's drug use during her pregnancy with the child, Father's threats at the hospital to harm Mother because of the imminent removal of the child to DHS custody,[4/] the history of three prior drug exposed children born to Mother,[5/] the extensive history of domestic violence and physical abuse in Mother and Father's relationship, the serious mental health problems diagnosed for both Mother and Father, and the history of noncompliance with services by both Mother and Father in pending [Child Protective Services] cases in the interest of the child's older siblings.

(Footnotes Added).

On October 19, 1999, the court found "reasonable cause to believe that continued placement in emergency foster care [was] necessary to protect [Child 5] from imminent harm[,]" awarded temporary foster custody to DHS, and set the matter for hearing on November 16, 1999. The court left visits between

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[2/] On June 6, 2000, the family court awarded permanent custody of the four older siblings to the DHS.

[3/] Mother alleged that the October 10, 1999 positive urinalysis for amphetamines was due to her taking Percodan (a pain killer) for her teeth. However, Diagnostic Laboratory Services, Inc. and a medical doctor both stated Percodan did not account for Mother testing positive for amphetamine.

[4/] On October 13, 1999, several members of the hospital staff overheard Father threatening Mother that if "you ever show your face in Waimanalo, I'll shoot you!"

[5/] To the best of the DHS social worker's knowledge, Child 5 is Mother's fourth *in utero* drug-exposed child.

Mother and Child 5 to the discretion of Child 5's Guardian Ad Litem (GAL) and DHS, but conditioned Mother's visitation rights upon Mother testing negative for drugs in a urinalysis (UA) following the hearing. Mother failed to appear for the court-ordered drug test later that afternoon and a "presumptive positive" result was recorded. On November 2, 1999, DHS suspended visitation between Child 5 and Mother because Mother did not appear for the drug test, failed to contact DHS, and DHS could not reach Mother.

On November 16, 1999, the family court found "an adequate basis to sustain the petition in that the child was a child whose physical or psychological health or welfare had been harmed or was subject to threatened harm by the acts or omissions of the child's family[,]" concluded that there was jurisdiction pursuant to HRS §§ 571-11(9) and 587-11, and awarded temporary foster custody of Child 5 to DHS. The court also found that Mother and Father understood at the hearing that unless they were "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 stated in the service plan, their parental and custodial duties and rights shall be subject to termination." The court ordered Mother to participate in the January 7, 1998 Service Plan requiring, among other things, (1) substance abuse treatment until clinical discharge, (2) individual, marital,

and/or family counseling until clinical discharge, (3) anger management/domestic violence program until clinical discharge, (4) parenting services until recommended for discharge. A review hearing on February 11, 2000 was ordered.

DHS' Settlement/Pretrial Statement filed on January 18, 2000, requested permanent custody of Child 5 based on the following alleged facts:

> Parents are not willing and able to provide their child with a safe family home. Parents' unresolved substance abuse and domestic violence issues, the sex abuse of [Child 2], and parents' refusal to recognize the harm they pose to the child and his siblings, place all the children at risk. Mother tested positive for amphetamines in October 1999 before giving birth to this child. Mother admitted to using drugs during her recent pregnancy. Parents have not successfully engaged in services, and despite the four older children remaining outside their home since December 1997, and the baby having been removed at birth, parents' motivation to participate in services remains practically non-existent. Further, parents have not requested visits with [Child 5] since removal at birth.

The Supplemental SFHR dated January 21, 2000, reported that the risk of harm to Child 5 remained very high based on Mother's and Father's failure to contact DHS regarding supervised visits with Child 5, continued noncompliance with court-ordered services, refusal to accept any responsibility for Child Protective Services (CPS) involvement, and denial of any harm or threatened harm to Child 5 and his older siblings.

In a January 24, 2000 Settlement/Pretrial Statement, Child 5's GAL reported that Mother and Father were not willing and able to provide Child 5 with a safe family home because of their lack of participation in and completion of substance abuse

and domestic violence services and failure to provide a safe family home for the older siblings since 1996.

After consulting with Child 5's GAL, DHS determined that it was in Child 5's best interests to pursue a Permanent Plan because of Child 5's young age, and Mother and Father s noncompliance with services for five years, failure to provide documentation of compliance with services, lack of contact with the GAL or DHS to arrange for visits with Child 5, unresolved safety issues, and confirmed relapse into substance abuse. On February 14, 2000, the DHS filed its Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan (February 14, 2000 Motion).

The April 6, 2000 report of the GAL for Child 5 recommended the award of permanent custody of Child 5 to DHS.

On May 18, 2000, the Waimanalo Health Center recommended the adoption of Child 5 by his foster parents.

On July 25, 2000, at the permanent custody hearing,[6/]

[6/] Hawaii Revised Statutes (HRS) § 587-73 (Supp. 2000) states in pertinent 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 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 . . . [is] 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 . . . 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 fist 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;
>
> (3) That an appropriate permanent plan be implemented concerning the child whereby the child will:
>
> (A) Be adopted pursuant to chapter 578; provided that the court shall presume that it is in the best interests of the child to be adopted[.]

Mother admitted that she used "ice" two weeks prior to the trial and, in an effort to cope with her problems, used "ice" approximately every other weekend. Mother testified that she entered drug rehabilitation three months before the trial because prior to that time she was in denial that she had lost her son. If reunited with Child 5, Mother plans to support herself and Child 5 with welfare assistance and eventually find work. Mother further testified that she has continued to attend AA/NA (Alcoholics Anonymous/Narcotics Anonymous) meetings since a month after giving birth to Child 5 and had obtained signatures verifying her attendance at the meetings but left the verification at home. Despite the lack of contact between Mother and Child 5 since the day he was born, Mother testified that she did not discuss visitation plans with the DHS social worker because she hated CPS "'cause they took [her] son."

Although services specified in the court-ordered January 7, 1998 Service Plan have been available to Mother since 1998 to the present, she has not completed individual psychotherapy to clinical discharge, the substance abuse program until clinical discharge, the domestic violence program, or the parenting program. According to the July 18, 2000 Supplemental SFHR and Mother s testimony at the hearing, Mother continually resisted services offered by DHS and blamed CPS for their involvement. Mother did not participate in the domestic violence

program because she believed she deserved to be hit and acclimated herself to domestic violence.

Although clinically discharged from substance abuse treatment at Hina Mauka in October of 1997, on December 22, 1997, Mother tested positive for amphetamines, methamphetamine, codeine, morphine and THC (marijuana). Mother testified that she sporadically participated in psychological counseling with a therapist for the past two years but stopped during the eighth month (in September 1999) of her pregnancy with Child 5 because she tried "to deal with it on [her] own." Despite CPS' involvement with the family for the past five years, Mother testified the situation in the family home would be different because of Father's absence in her life.[7/]

[7/] At the July 25, 2000, hearing, Mother testified, in relevant part, as follows:

> Q. . . . Now, you've been dealing with CPS for about the past five years, yeah?
>
> A. Mh-hm.
>
> Q. About. So what's different now?
>
> A. [Father] was dealing with CPS. I had no say-so.
>
> Q. What do you mean?
>
> A. It was where what they -- what he said went. What I said did not count. But with this - this - with [Child 5], it's different. It's where what I say goes. He's not standing behind me with this one so it's I'm doing this on my own, kind of thing. To me, it's better that way.
>
> Q. Well, prior [to] today, were you not able to take your UA or were you not able to make an appointment with Yumi to see your son?
>
> A. Like I said, I had no say-so.

(continued...)

The DHS social worker who has worked with the family for five years testified that it is not reasonably foreseeable that Mother will become willing and able to provide a safe family home for Child 5 within a reasonable period of time, even with a service plan. The DHS social worker noted that Mother relapsed into substance abuse after clinical discharge in 1998, Mother is unwilling and unable to accept responsibility for positive drug screens and denies that any problems exist, Mother continues to use substances to cope, Mother does not comprehend the effects of domestic violence, Mother fails to see Father as a perpetrator of harm, and Mother continues to associate with substance-abusing friends.

The DHS social worker also testified that a new Service Plan was not written for Child 5 because everything in the January 7, 1998 Service Plan addressing Mother, Father, and the older siblings was the same for Child 5. While the January 7, 1998 Service Plan did not specifically address Mother as a

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[7/](...continued)

> Q. Up till today?
>
> A. Up to I had my son, yeah. That's when I said hell with this. I am an adult. I can make up my own decisions.
>
> Q. Right. Okay. But after he was born, I mean why didn't you start sooner?
>
> A. At first, I was in denial that I lost my son because everyone asked. I couldn't face everybody. It was where I had to pick up myself before I could pick up anything else. And it's where I can pick myself, where I can walk and know that what I did was wrong. With before, it was different. I couldn't do that.

battered woman and Father may have caused Mother to experience difficulty in completing some of the services, the DHS social worker testified that the January 7, 1998 Service Plan refers to a domestic violence group which includes a battered woman's group. Thus, although DHS offered Mother therapy to address domestic violence issues, Mother chose to discontinue therapy. Furthermore, Mother and Father told the DHS social worker on numerous occasions that they did not do anything wrong, repeatedly denied the positive results in their previous drug screens, and believed services were neither needed nor indicated.

Dr. Steven J. Choy, M.D. (Dr. Choy), a licensed psychologist, also testified that if Mother failed to remain clean and sober or failed to participate in the services recommended by him, then the risk of harm to Child 5 remained high and Mother s prognosis for recovery from substance abuse was poor. According to the psychological evaluation performed by Dr. Choy and a resident post-doctoral psychologist, dated October 9, 1997, Mother was diagnosed with: Amphetamine Dependence in Early Remission; Dysthymic Disorder; Dissociative Disorder Not Otherwise Specified; Learning Disorder Not Otherwise Specified, Reading and Written Expression; and Personality Disorder Not Otherwise Specified, with Borderline and Avoidant Features. The psychologists recommended the following:

> 1. Given [Mother s] lack of healthy coping skills, her significant emotional discomfort, and her pronounced level of parenting stress, she continues to be at high risk for drug

> relapse. . . . As her children are likely to be at pronounced risk for neglect, should she be unable to refrain from drug use, lack of sobriety should not be tolerated.
>
> 2. . . . [Mother] is currently moderately depressed, feels negatively about herself, and is mistrustful of others. These findings, combined with her dissociative tendencies, place her at risk for maladaptive parenting and neglect. Given this, it is strongly recommended that she receive extensive, long-term psychotherapy . . . .
>
> 3. Because [Mother] appears to have a restricted knowledge of parenting and child development, it is recommended that she receive parenting classes and become involved with a parenting support group. . . .
>
> 4. Because the [Doe] family continues to be at high risk for dysfunctional parenting behaviors, in-home services and ongoing family monitoring are strongly encouraged. This family is not currently equipped to function autonomously [and] is likely to require assistance for an extended period.

Dr. Choy estimated that even if Mother began treatment immediately, it would take at least three to five years for Mother to recover to a point where she would no longer pose a risk of harm to Child 5.

On July 28, 2000, after taking judicial notice of the records and files in FC-S No. 95-03752, In the Interest of the Doe Children (Child 1, born September 21, 1988, Child 2, born February 24, 1991, and Child 3, born January 29, 1993) and FC-S No. 95-04087, In the Interest of John Doe III (Child 4 born September 7, 1995), the court terminated Mother s parental rights pertaining to Child 5, granted the DHS' February 14, 2000 Motion awarding Permanent Custody of Child 5 to DHS, and ordered the February 3, 2000 Permanent Plan into effect.

A motion for reconsideration was filed by Mother on August 10, 2000, and denied by the court on August 28, 2000.

On November 3, 2000, the court filed its Findings of Fact and Conclusions of Law (FsOF and CsOL). While Mother does not explicitly challenge the court s findings, it appears from the text of Mother s opening brief that Mother challenges the following findings and conclusions:

FINDINGS OF FACT

. . . .

48. Mother is not presently willing and able to provide [Child 5] with a safe family home, even with the assistance of a service plan because she poses a high risk of harm to her child due to her drug use and untreated mental health, domestic violence, and sex offender problems.

49. It is not reasonably foreseeable that Mother will become willing and able to provide [Child 5] with a safe family home, even with the assistance of a service plan, within a reasonable time because even if Mother were to suddenly change her long standing behavior and immediately seek drug and mental health treatment, it would take a minimum of three to five years at best, from the beginning of treatment, for her to sufficiently resolve her mental health problems, after which other problems may need to be addressed.

. . . .

61. DHS exerted reasonable and active efforts to reunify [Child 5] with Mother and Father by offering services to them since [Child 5's] birth.

62. The January 7, 1998 service plan offered by DHS and ordered by the court on November 16, 1999 was fair, appropriate, and comprehensive.

. . . .

64. The permanent plan proposed by the DHS, which recommends adoption, is in the best interests of [Child 5] because it is in the best interests of [Child 5] to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes, and because no evidence exists to overcome the statutory presumption that adoption is in the best interests of this child.

CONCLUSIONS OF LAW

. . . .

2. The child's legal mother . . . [is] not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan.

3. It is not reasonably foreseeable that the child's legal mother . . . 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[.]

4. The permanent plan dated February 3, 2000 is in the best interests of the child.

QUESTIONS ON APPEAL

1. Is there substantial evidence to support the decision, pursuant to HRS § 587-73(a)(1), that clear and convincing evidence proved that Mother was not presently willing and able to provide Child 5 with a safe family home, even with the assistance of a service plan?

2. Is there substantial evidence to support the decision, pursuant to HRS § 587-73(a)(2), that clear and convincing evidence proved that it was not reasonably foreseeable that Mother would become willing and able to provide Child 5 a safe family home, even with the assistance of a service plan, within a reasonable period of time?

3. Is there substantial evidence to support the decision, pursuant to HRS § 587-73(a)(3), that clear and convincing evidence proved that the proposed permanent plan dated February 3, 2000, is in the best interests of Child 5?

STANDARDS OF REVIEW

The relevant standards of review are stated in In re Jane Doe, Born on June 20, 1995, 95 Hawai i 183, 190, 20 P.3d

616, 623 (2001).[8/] CsOL 2, 3, and 4 present mixed questions of fact and law and are reviewed under the clearly erroneous standard of review. Id. "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." Id. (quoting State v. Okumura, 78 Hawai i 383, 392, 894 P.2d 80, 89 (1995)) (citation omitted).

The family "court is given much leeway in its examination of 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 John Doe, Born on September 14, 1996, 89 Hawai i 477, 487, 974 P.2d 1067, 1077 (App. 1999) (quoting Woodruff v. Keale, 64 Haw. 85, 99, 637 P.2d 760, 769 (1981) (citing In re Mary Doe II, 52 Haw. 448, 454, 478 P.2d 844, 848 (1970), and Turoff v. Turoff,

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[8/] 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 dependent 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.

In re Jane Doe, Born on June 20, 1995, 95 Hawai i 183, 190, 20 P.3d 616, 623 (2001) (citations omitted).

56 Haw. 51, 55, 527 P.2d 1275, 1278 (1974))) (internal quotation marks and brackets omitted).

DISCUSSION

1. There is substantial evidence to support the decision, pursuant to HRS § 587-73(a)(1), that clear and convincing evidence proved that Mother was not presently willing and able to provide Child 5 with a safe family home, even with the assistance of service plan.

Mother contends the court-ordered January 7, 1998 Service Plan formulated for Mother, Father, and the older siblings violated the purpose and policy of Chapter 587 and HRS § 587-26[9/] because the plan was not specifically tailored to the

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[9/] HRS § 587-26 (1993) states in pertinent part:

> **Service plan.** (a) A service plan is a specific written plan prepared by an authorized agency and child's family and presented to such members of the child's family as the appropriate authorized agency deems to be necessary to the success of the plan, ...
>
> (b) The service plan should set forth:
>
> (1) The steps that will be necessary to facilitate the return of the child to a safe family home, if the proposed placement of the child is in foster care under foster custody;
>
> . . . .
>
> (3) The steps that will be necessary to make the family home a safe family home and to terminate the appropriate authorized agency's intervention into the family and eliminate, if possible, the necessity for the filing of a petition with the court under this chapter.
>
> (c) The service plan should also include, but not necessarily be limited to:
>
> (1) The specific, measurable, behavioral changes that must be achieved by the parties; the specific services or treatment that the parties will be provided and the specific actions the parties must take or specific responsibilities that the parties must assume; the time frames during which services

(continued...)

needs of Child 5 and Mother. Additionally, Mother argues that the January 7, 1998 Service Plan did not take into account Mother's "victimization by [F]ather" and failed to assist her in addressing this issue and "to allow her to become independent of [F]ather's influences."

Nothing in HRS § 587-26 states the service plan must be written specifically for each child in the family. The phrases, "service plan . . . presented to such members of the child's family[,]" "measurable, behavioral changes that must be achieved by the parties[,]" "services or treatment that the parties will be provided[,]" "actions the parties must take," and

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[9/](...continued)

> will be provided and such actions must be completed and responsibilities must be assumed; provided that, services and assistance should be presented in a manner that does not confuse or overwhelm the parties;
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> (2) The specific consequences that may be reasonably anticipated to result from the parties' success or failure in making the family home a safe family home, including, but not limited to, the consequence that, unless the family is willing and able to provide the child with a safe family home within the reasonable period of time specified in the service plan, their respective parental and custodial duties and rights shall be subject to termination by award of permanent custody; and
>
> . . . .
>
> (d) The service plan should include steps that are structured and presented in a manner which reflects careful consideration and balancing the priority, intensity, and quantity of the services which are needed with the family's ability to benefit from those services.
>
> (e) After each term and condition of the service plan has been thoroughly explained to and is understood by each member of the child's family . . . , the service plan shall be agreed to and signed by each family member[.]

"responsibilities that the parties must assume" all refer to the actions Mother must engage in to be reunified with her children. Thus, service plans are specifically formulated to address and resolve the problems and issues of the parents so that they, in turn, can provide their children with a safe family home. A separate service plan for Child 5 was unnecessary and redundant because at the time Child 5 was born, the DHS already had a service plan addressing Mother s sundry deficiencies in parenting. The services required in the January 7, 1998 Service Plan applied as much to Child 5 as they did to the older children. Therefore, substantial evidence supports FOF no. 62 that "[t]he January 7, 1998 service plan offered by DHS and ordered by the court on November 16, 1999 was fair, appropriate, and comprehensive" as applied to Child 5.

Although the January 7, 1998 Service Plan did not explicitly provide assistance for Mother's victimization by Father,[10/] Mother and Father were ordered to participate in the anger management/domestic violence program until clinical discharge.[11/] By her own volition, however, Mother discontinued seeing a therapist addressing domestic violence issues, abandoned

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[10/] According to the Supplemental Safe Family Home Report [SFHR] dated February 23, 1998, the DHS social worker confirmed on-going domestic violence in the family home.

[11/] The DHS social worker observed Mother "with bruises on her arms and legs" on February 10, 1998 and Mother admitted to domestic violence and being afraid. On February 9, 1998, the Father's uncle reported to DHS that he observed on-going domestic violence and heard Father beating Mother.

services offered by DHS, and tried to deal with the problem on her own.[12/]

Mother also contends that her completion of the Hina Mauka substance abuse program in 1997 and ability to care for the older siblings from December 1996 to December 1997 demonstrated her willingness and ability to provide Child 5 with a safe family home.

CPS has been involved with the family since 1994. Mother has had since 1996 to complete DHS services. Two months after discharge from Hina Mauka in October 1997, Mother tested positive for drugs. On December 26, 1997, three of the older siblings were placed in foster care due to Mother's and Father's noncompliance with court-ordered services and presumptive positive and confirmed positive UAs. On February 6, 1998,

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[12/] The DHS social worker testified, in relevant part, as follows:

> Q. Did [Mother] ever tell you why she didn't want to do domestic violence services?
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> A. She told me that I'm quite shocked actually. She had made a comment about if you've been with this family for this long, it's normal, you get used to it. I see mom nodding her head right now actually. And so she basically said you get used to it, it doesn't bother me anymore. And so she didn't feel that she needed the services because she could handle it and that, at times, she deserved it.
>
> Q. What did she say about deserving it?
>
> A. That she deserved to be hit because there were times when she hit first. And I when I told her people don't deserve to be hit, you know, and and and she just said I did. Or sometimes she would say she started it. And other times when I told her about the violence I had seen being between her and paternal grandmother during a home visit, she just, you know, kind of smiled and shook her shrugged her shoulders and basically said you get used to it.

Child 1 was placed in foster care for the same reasons. Finally, on June 6, 2000, DHS was awarded permanent custody of the older siblings. Not only was Child 5 Mother's fourth *in utero* drug exposed child, but Mother also admitted to using crystal methamphetamine during her sixth month of pregnancy with Child 5 and testified that she continues to use drugs every other weekend. Thus, Mother's completion of the Hina Mauka program and her caring for the older siblings in 1996-97, for a period of one year, does not illustrate Mother's ability to care for Child 5. Therefore, the record contains substantial evidence supporting the court's decision that Mother was not willing and able to provide Child 5 with a safe family home, even with the assistance of the January 7, 1998 Service Plan.

> 2. There is substantial evidence to support the decision, pursuant to HRS § 587-73(a)(2), that clear and convincing evidence proved that it was not reasonably foreseeable that Mother would become willing and able to provide Child 5 with a safe family home, even with the assistance of a service plan, within a reasonable period of time.

In her second point, Mother argues that the "[t]he trial court was clearly erroneous in finding that it was not reasonably foreseeable that [Mother] would become willing and able to provide a safe family home for her son, even with the assistance of a service plan." Although Mother s brief did not explicitly state so, it appears that Mother is contesting FOF no. 61 and COL no. 3. Mother contends that DHS violated the

purpose and policy of Chapter 587 by failing to provide reasonable opportunities for Mother "to succeed in remedying the problems which put [Child 5] at substantial risk of being harmed in the family home". See HRS § 587-1 (1993).

HRS § 587-1 (Supp. 2000) states, in pertinent part:

> The policy and purpose of this chapter is to provide children with prompt and ample protection from the harms detailed herein, with an opportunity for timely reconciliation with their families if the families can provide safe family homes, and with timely and appropriate service or permanent plans to ensure the safety of the child . . . . The service plan shall effectuate the child's remaining in the family home when the family home can be immediately made safe with services, or the child's returning to a safe family home. . . . Every reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems which put the child at substantial risk of being harmed in the family home. . . . Where the court has determined, by clear and convincing evidence, that the child cannot be returned to a safe family home, the child will be permanently placed in a timely manner.
>
> The department's child protective services provided under this chapter shall make every reasonable effort to be open, accessible, and communicative to the persons affected in any manner by a child protective proceeding; provided that the safety and best interests of the child under this chapter shall not be endangered in the process.

Mother's contention that DHS failed to provide every reasonable opportunity for Mother to be reunited with her son is baseless. At the time the permanent plan hearing relating to Child 5 was conducted, DHS had been involved with the family for more than four years. Since February of 1998, Mother has had the opportunity to complete the court-ordered services. These services would have assisted Mother in remedying the problems that put Child 5 and his older siblings at substantial risk of being harmed. Although all four of the older siblings had been taken away from Mother prior to February 7, 1998, Mother still

failed to change her behavior and substantially comply with any of the services ordered in the January 7, 1998 Service Plan. Although the court granted visitation rights between Mother and Child 5 on October 19, 1999, Mother failed to appear for the court-ordered drug test, resulting in the suspension of visitation between Child 5 and Mother on November 2, 1999, and Mother never contacted DHS to reinstate visitation rights. At trial, Mother testified that she continues to use "ice." Therefore, substantial evidence exists to support the court s finding that DHS exerted reasonable efforts and provided reasonable opportunities to reunify Mother with Child 5.

HRS § 587-73(a)(2) (Supp. 2000) requires the court to determine whether it is

> reasonably foreseeable that . . . [Mother] 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[.]

DHS was awarded foster custody of Child 5 on November 16, 1999. Thus, under HRS § 587-73(a)(2), the court was required to consider whether it was reasonably foreseeable that Child 5 could be reunited with Mother no later than two years from November 16, 1999, or by November 16, 2001.

The DHS social worker and Dr. Choy testified that it was not reasonably foreseeable that Mother would become willing and able to provide a safe family home for Child 5 within a reasonable period of time. Mother continues to abuse drugs,

fails to comprehend the negative effects of domestic violence, remains in denial regarding problems within the family, and refuses to comply with the court-ordered service plan. Dr. Choy further testified, in relevant part, as follows:

> The problem with the . . . amphetamine dependency, [is that] the prognosis already is extremely poor. And so [when] someone doesn't engage in treatment immediately, then that prognosis even gets worse. Generally, we're talking about one year for most people who engage immediately. And if they don't get engaged immediately, you may be talking three to five years of the continuous relapse and continuous drug usage. And so in . . . taking everything altogether, you're talking a minimum of three to five years.

Finally, notwithstanding the involvement of CPS and the DHS social worker with the family for the past five years, Mother s parental rights pertaining to the older siblings were terminated on June 6, 2000. Therefore, more than sufficient evidence supports the family court's decision that Mother was unable to provide a safe home for Child 5 within a reasonable period of time.

Mother also argues that she should have been allowed more time to demonstrate her willingness and ability to provide a safe family home for Child 5 since the court did not base its decision on "aggravated circumstances" and only nine months had passed between Child 5's birth and the court's decision terminating Mother's parental rights.

In In the Interest of John Doe, 89 Hawai i 477, 492, 974 P.2d 1067, 1082 (App. 1999), this court stated (based on

prior law allowing three rather than two years), in pertinent part:

> [N]othing in the HRS § 587-73(a)(2) or its legislative history indicates that DHS must expend three years in attempting to achieve reunification. . . . [T]he three-year period defines the limits of that "reasonable period of time" for which a parent's willingness and ability to provide a safe family home must be forecasted. HRS § 587-73(a)(2), therefore, does not apply to reunification efforts per se, but establishes the period of time which must be taken into account in predicting when a safe home will become available for the purpose of determining whether parental rights should be terminated.

DHS is not required to allow two years in the reunification effort. Two years is not a minimum time requirement. In this case, there was no reason for allowing Mother additional time to eliminate the risks of harm to Child 5 in the family home. Mother had been offered services for more than four years prior to Child 5 s birth and Mother had failed to provide a safe family home for Child 5 and his older siblings. Therefore, the reports submitted by DHS and the testimony at the permanent plan hearing amply support FOF No. 49 that

> [i]t is not reasonably foreseeable that Mother 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 time because even if Mother were to suddenly change her long standing behavior and immediately seek drug and mental health treatment, it would take a minimum of three to five years at best, from the beginning of treatment, for her to sufficiently resolve her mental health problems, after which other problems may need to be addressed.

3. There is substantial evidence to support the decision, pursuant to HRS § 587-73(a)(3), that clear and convincing evidence proved that the proposed permanent plan dated February 3, 2000, is in the best interest of Child 5.

Mother contends that the February 3, 2000 permanent plan is not in Child 5's best interest because the "child is to

be adopted by a non-family member" which "violates the policy and purpose of Chapter 587[.]" Mother cites the statement in HRS § 587-1 (1993) that the court "should consider the fact that the child's best interests may well be forever intertwined with those of the child's birth family, even where the legal custodian is determined to be either unwilling or unable to provide the child with a safe family home."

Mother s contention is without merit because the statute in support of her argument was amended by Act 134 on June 24, 1998, and HRS § 587-1 no longer contains the quoted provision. See HRS § 587-1 (Supp. 2000).

Recently, in In Re Jane Doe, Born on June 20, 1995, supra, the Hawai i Supreme Court stated that the Child Protective Act

> does not allow for the divestiture of parental rights absent clear and convincing evidence, adduced by the state, that the parent is "unfit," or, in other words, both that the parent is unwilling or unable to provide his or her child with a safe family home at the time a permanent plan hearing is conducted and that the parent will not become willing or able to do so within a reasonable period of time.

(Emphasis in original.)

The family court has determined, by clear and convincing evidence, that Mother is unwilling and unable to provide Child 5 with a safe family home and that Mother cannot do so within a reasonable period of time. HRS § 587-73 (Supp. 2000) states, in pertinent 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 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:
>
> . . . .
>
> (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[.]

Therefore, Child 5 should be permanently placed in a timely manner.

Child 5 was born on October 12, 1999, and placed in foster care on October 13, 1999. Child 5 continues to reside in the same foster home and Mother has had no contact with Child 5 since the day of his birth. DHS and the Waimanalo Health Center recommended Child 5's adoption by his foster parents. Based on the tender age of Child 5, the placement of Child 5 with his foster parents when he was a day old, the qualifications of the foster parents, and the lack of contact and bonding of Child 5 with Mother, the court validly decided that the proposed permanent plan, dated February 3, 2000, was in the best interest of Child 5.

CONCLUSION

Accordingly, we affirm the family court's July 28, 2000 Order Awarding Permanent Custody of Child 5 to DHS, August 28,

2000 Orders Concerning Child Protective Act denying Mother's August 10, 2000 Motion for Reconsideration, and November 3, 2000 Findings of Fact and Conclusions of Law.

DATED: Honolulu, Hawai i, September 14, 2001.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge