

NOT FOR PUBLICATION

NOS. 24898 AND 24902

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

No. 24898

(FC-S No. 93-02777)

IN THE INTEREST OF JOHN DOE,
Born on September 5, 1992

and

No. 24902

(FC-S No. 92-02546)

IN THE INTEREST OF JOHN DOE,
Born on December 27, 1991

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

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

The State of Hawaii, Department of Human Services (DHS) appeals from the December 13, 2001 Orders Concerning Child Protective Act entered by the Family Court of the First Circuit (the family court), Judge John C. Bryant, Jr. presiding, ordering DHS, among other things, to: (1) "special license" a maternal grandaunt (MGA) as a foster caretaker for two of her grandnephews (grandnephews or the children); and (2) pay MGA "[a]ll foster board and difficulty of care payments . . . as soon as possible, but no later than January 12, 2002[.]"

DHS argues, for the following reasons, that the family court had no authority to order DHS to license and pay MGA as a foster caretaker:

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(1) MGA does not meet state requirements to be licensed as a foster caretaker because she has a prior felony conviction^{1/};

(2) As the court-appointed permanent custodian of MGA's grandnephews, DHS is vested by statute with the exclusive authority to determine where and with whom grandnephews are placed; and

(3) The family court did not have subject-matter jurisdiction to license MGA as a foster caretaker because:

- (a) MGA failed to exhaust her administrative remedies under Hawaii Revised Statutes (HRS) §§ 346-12 (1993)² and 91-14(a) and
- (b) (1993)³ to seek review of DHS's pre-application decision to

^{1/} It appears from the record on appeal that the maternal grandaunt (MGA) was convicted for possession of a controlled substance for sale, following a February 26, 1977 incident in which MGA, at her then-husband's request, disposed of a package in the garbage can. MGA's then-husband was heavily involved in drugs and illegal activities. Unbeknownst to MGA, the package contained narcotics and her home was under police surveillance on the day of her arrest. The conviction against MGA was apparently dismissed by the trial court on April 24, 1979, but following an appeal, the judgment was reversed on March 12, 1982. MGA was then sentenced to serve three hundred days of jail and four years of probation, although her sentence was apparently shortened on June 23, 1982.

^{2/} Hawaii Revised Statutes (HRS) § 346-12 (1993) states:

Fair hearing. An applicant or recipient, deeming oneself aggrieved, shall be entitled to appeal to the director of human services in the manner prescribed by department of human services regulations and shall be afforded reasonable notice and opportunity for a fair hearing.

^{3/} HRS § 91-14(a) and (b) (1993) provides as follows:

Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of

(continued...)

deny her foster caretaker license; and (b) even if MGA had exhausted her administrative remedies, only a circuit court (not the family court) was vested with subject-matter jurisdiction to judicially review DHS's decision.

In light of In re Doe, 101 Hawai'i 220, 65 P.3d 167 (2003), the facts of which are very similar to the present case, we affirm.

A.

In In re Doe, the child in question, Jane, was taken from her biological parents after DHS determined that she had been sexually abused by her father. Jane was subsequently placed temporarily in the custody of her aunt (Aunt) and thrived in such placement. When Aunt applied to DHS for foster custody of Jane, it was discovered that Aunt had previously lost custody of three of her own children because her ex-boyfriend had abused them. Although Aunt subsequently remarried and was apparently a good

^{2/}(...continued)

review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

parent, DHS felt constrained by Hawaii Administrative Rules (HAR) § 17-890-33(b) (4)⁴ to deny Aunt's application for foster custody.

Aunt appealed DHS's decision to the family court. After determining that it would be in Jane's best interest that Jane continue to live with Aunt, the family court ordered DHS to award foster custody to Aunt. However, the family court expressly ruled that it was not going to order DHS to license Aunt as a foster parent before giving her custody of Jane.

On appeal, the supreme court agreed with the family court that Hawaii Administrative Rules (HAR) § 17-890-33(b) (4) did not prevent DHS from licensing Aunt but, instead, gave DHS the discretion to deny her application. Nevertheless, the supreme court vacated the family court's order, holding that

by ordering DHS illegally to place Jane in an unlicensed foster family boarding home, we believe that the family court "'disregarded rules or principles of law or practice to the substantial detriment of DHS and that its decision clearly exceeded the bounds of reason.'"

Id. at 231, 65 P.3d at 178 (brackets and ellipsis omitted)

(quoting In re Doe, 95 Hawai'i 183, 189, 20 P.3d 616, 622

(2001)). The supreme court instructed the family court

to direct DHS to exercise its discretion under HAR § 17-890-33(b) (4) as to whether to license Aunt's home as a foster family boarding home. In the event that DHS opts to license Aunt's home, the family court, without more, may order DHS to place Jane in Aunt's licensed boarding home. In the event that DHS, in the exercise of its discretion, does not license Aunt's home, the family court has two

^{4/} Hawaii Administrative Rules (HAR) § 17-890-33(b) (4) states that "[b]ackground information which shows that the individual has been identified as and substantiated to be the perpetrator of child abuse or neglect may be a basis for denial or revocation of a certificate of approval or a reason to request termination of an employee under section 17-890-5(h)."

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options. The family court may state its reasons for concluding that DHS has committed an abuse of discretion and, pursuant to its "further orders" power under HRS § 587-71(d),⁵ may order DHS to license Aunt's home as a foster family boarding home as it deems appropriate. In the alternative, the family court may order DHS to place Jane in a non-relative, licensed family boarding home.

In re Doe, 101 Hawai'i 220, 231, 65 P.3d 167, 178 (emphasis and footnote added).

B.

In this case, DHS argued during the proceedings before the family court that it was required by HAR § 17-890-33(b) to

^{5/} HRS § 587-71(d) (Supp. 2002) currently provides, as it did when In re Doe, 101 Hawai'i 220, 65 P.3d 167 (2003), was decided, as follows:

If the court determines that the child's family home is not a safe family home, even with the assistance of a service plan, the court shall vest foster custody of the child in an authorized agency and enter such further orders as the court deems to be in the best interests of the child.

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deny a foster caretaker license to MGA.⁶ HAR § 17-890-33(b) states, in relevant part:

(b) Applicants, employees, and foster parents shall be of reputable and responsible character and shall not have a criminal history record, employment history, or background which poses a risk to children in care.

(1) Conviction of a crime involving violence, alcohol or drug abuse, sex offense, offense involving children, and any other conviction, the circumstances of which indicate that the applicant or employee may pose a danger to children, are grounds for denial or revocation of a certificate of approval or a reason to

^{6/} At a December 13, 2001 hearing on the State of Hawai'i, Department of Human Services' (DHS) Motion for Reconsideration, Daniel Pollard (Mr. Pollard), MGA's lawyer, asked the Family Court of the First Circuit (the family court), Judge John C. Bryant, Jr. (Judge Bryant) presiding, to order DHS to specially license MGA as a foster caretaker so that she could receive foster board payments and difficulty of care payments for her grandnephews while MGA's application to adopt them was pending. DHS's lawyer objected, and the following colloquy ensued:

MR. POLLARD: . . .

I don't see any reason why [MGA] cannot be specially licensed to provide foster custody for these children. So I'd ask the [c]ourt to either order DHS to do that or order them to, you know, let her apply and then deny her so that we can do something about that.

THE COURT: Anything from DHS on that issue?

[DEPUTY ATTORNEY GENERAL]: Well, she could apply and then we would deny her. And then she'd have the right for a fair hearing. We wouldn't be looking at replacing her if we can't license her at this time.

And Judge Bryant, you're well aware of if a parent or a grandmother should consider -- have committed a crime, let's say 20, 30, 40 years ago, if it's a felony, you know, based on our certain standards, we're unable to license that relative. You know, it's the same type of thing here. It's -- our procedure doesn't allow us to license her at this time.

THE COURT: Well, the language [of the appropriate administrative rule -- see below] says "may." Doesn't say "shall not." Says "may."

[DEPUTY ATTORNEY GENERAL]: Well, our procedures say, and in getting clarification from our program administrator, that we're unable to license. We've consulted regarding this specific situation and we're told by our administrators no.

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request termination of an employee under section 17-890-5(h).

- (2) Type of criminal offense, when it occurred and evidence of rehabilitation may be considered in determining whether the criminal history record poses a risk to the health, safety, or well-being of children in care.

The foregoing rule gives DHS the discretion to determine whether an applicant's "criminal history record, employment history, or background . . . poses a risk to children in care." Cf. In re Doe, 101 Hawai'i at 230, 65 P.3d at 177. It does not require DHS to reject every potential foster parent with any criminal conviction or other blight on his or her personal record. Indeed, if the rule were applied to automatically deny foster parent licenses to anyone who has ever been convicted of any crime "involving violence, alcohol or drug abuse, sex offense, [or] offense involving children," no matter how minor the crime was or how long ago it occurred,⁷ the rule would be inconsistent with HRS § 346-19.6 (Supp. 2002), which provides, in relevant part:

[Criminal history record checks: child caring institutions, etc.] [DHS] shall develop standards to assure the reputable and responsible character of operators and employees of child caring institutions, child placing organizations and foster boarding homes as defined in this chapter which shall include but not be limited to criminal history record checks.

. . . .

[DHS] may deny a certificate of approval if an operator, employee, or new employee of the facility was

^{7/} The words "shall not" in the HAR § 17-890-33(b) phrase "shall not have a criminal history record, employment history, or background which poses a risk to children in care" simply mandate that DHS refuse to license any potential foster parent whom DHS has already determined poses a risk to the children in care. It does not require that an individual with a criminal history record be disqualified from licensure as a foster parent.

convicted of a crime other than a minor traffic violation involving a fine of \$50 or less and if [DHS] finds that the criminal history record of an operator, employee, or new employee poses a risk to the health, safety or well-being of the children in care.

(Brackets in original, emphasis added.)

The family court thus correctly concluded that the HAR provisions "governing foster family licensing requirements relied upon by DHS to deny placement of the children . . . to [MGA] . . . give DHS discretion to place the children with [MGA] or not."

C.

DHS's claim that it has "exclusive authority" to determine who will be licensed as a foster parent was rejected by the supreme court in In re Doe, 101 Hawai'i at 230-31, 65 P.3d at 177-78. Specifically, the supreme court construed HRS § 587-71(d) as vesting broad powers in the family court to order DHS to license an individual as a foster caretaker. Accordingly, this claim has no merit.

D.

DHS's final argument that the family court had no jurisdiction to order DHS to license MGA as a foster caretaker because MGA had not exhausted her administrative remedies, as required by HRS §§ 346-12 and 91-14(a) and (b), appears, at first glance, to have some merit. Unlike Aunt in In re Doe, MGA has never formally applied for a foster family boarding home license. DHS has therefore never officially "rejected" her application,

and MGA has not had the opportunity to appeal an adverse decision by DHS, as contemplated by DHS's administrative rules.

It is clear from the record on appeal, however, that DHS would not have licensed MGA as a foster caretaker even if she had submitted an application. Additionally, the record overwhelmingly supports the family court's determination that it was in the children's best interest that caretaker be the children's foster or adoptive parent. While the family court may not have had jurisdiction under HRS § 91-14 to decide an appeal from a DHS denial of a foster caretaker application, the family court did have jurisdiction under HRS § 587-71 to order that MGA be licensed as a foster parent. The supreme court explicitly held in In re Doe that "the family court's statutory authority to enter 'further orders' pursuant to HRS § 587-71(d) extends to an order that has the collateral effect of requiring DHS to exercise its discretion under HAR § 17-890-33(b)(4) . . . in a particular way." In re Doe, 101 Hawai'i at 230, 65 P.3d at 177. In a related footnote, the supreme court noted that

in the event that the family court had deemed Mother's home to be safe, HRS § 587-71(c) expressly provides for the family court to restrict DHS's rights and duties as an authorized agency. See supra note 8 ("If the court determines that the child's family home is a safe family home with the assistance of a service plan, the court shall place the child under the family supervision of an authorized agency and enter further orders, including but not limited to restrictions upon the rights and duties of the authorized agency, as the court deems to be in the best interests of the child."). Thus, a reading of HRS § 587-71(c) in pari materia with HRS § 587-71(d) further supports our conclusion that the family court possesses the statutory authority to order that DHS place a foster child in a particular home, based on a finding that the placement is in the best interests of the child, and to "further order" that DHS exercise its discretion and license that

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home in compliance with HRS chapter 587 and DHS's administrative rules.

Id. at 230-31 n.19, 65 P.3d at 177-78 n.19 (emphases added, ellipses omitted).

Given the extreme importance of resolving issues involving custody of children as quickly as possible, it seems counterproductive to remand this case to the family court, with instructions that the case be remanded to DHS to require MGA to file an application for foster family boarding home licensure and then exhaust her administrative remedies if the application is denied. The family court has already decided, based on the evidence adduced below and the recommendations of the children's guardian ad litem, that it is in the best interests of the children that they be placed in the foster custody of MGA.⁸

Affirmed.

DATED: Honolulu, Hawai'i, July 29, 2003.

On the briefs:

Mary Anne Magnier, Jay K. Goss, and Gay M. Tanaka, Deputy Attorneys General, State of Hawai'i, for department of human services-appellant.

Lynne M. Youmans (Legal Aid Society) for volunteer guardian ad litem for minor children-appellees.

^{8/} Since we have affirmed the family court's order to license MGA, DHS's contention that the family court had no authority to order DHS to provide foster care payments to an unlicensed foster parent is moot.