NOT FOR PUBLICATION

NOS. 24869 AND 24877

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

No. 24869
In the Interest of Jane Doe,
Born on September 25, 1991
(FC-S NO. 91-02204)

and

No. 24877
In the Interest of JOHN DOE,
Born on March 1, 1998, Minor
(FC-S NO. 99-05839)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

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

Appellant mother (Mother) of Jane Doe (Daughter) and John Doe (Son II) appeals from (a) the November 21, 2001 "Order Awarding Permanent Custody" of Daughter and Son II to Appellee State of Hawaiʻi, Department of Human Services (DHS or State), "with the subsequent goal of adoption . . . within six months of the award of permanent custody" and (b) the January 4, 2002 "Orders Concerning Child Protective Act" denying Mother's December 7, 2001 motion for reconsideration. Both appealed orders were entered by Judge Marilyn Carlsmith. We affirm.

RELEVANT EVENTS LISTED CHRONOLOGICALLY

September 1986 — Mother gave birth to Son I, fathered by Father I.

May 11, 1988 — DHS intervened to address physical harm to Son I.

December 8, 1989 — DHS again intervened to address physical harm to Son I.

September 25, 1991 — Mother gave birth to Daughter, fathered by Father II.

October 10, 1991 — In case no. 91-02204, DHS filed a petition regarding Daughter alleging, in relevant part:

> On August 30, 1991, . . . [Son I, age] (5), was voluntarily placed in a DHS foster home by [Mother] [age] (33).
>
> [Mother] has stated that [Father II] sexually assaulted her during her pregnancy and was the perpetrator of physical harm to [Son I]. However, [Mother] has separated from [Father II] numerous times and has always returned to live in [Father II's] home. Another child, born to [Mother] and [Father II] was adopted in April, 1990, in the State of Kentucky.
>
> . . . .
>
> On October 7, 1991, [Mother] started personal therapy with Dr. Silke Vogelmann-Sine and with Women Infant Children program (WIC). . . .
>
> b. . . . [Son I] is the subject child in a Chapter 587 case, FC-S No. 91-02203.

October 14, 1991 — The Court appointed Lucia Berrones as Guardian Ad Litem (GAL) for Daughter.

October 22, 1991 — The Court appointed Reinette Cooper as counsel for Mother.

November 1, 1991 — Daughter's GAL filed a pretrial statement stating, in relevant part, as follows:

> [Mother] has an ongoing relationship with [Father II]. [Father II] is abusive to [Mother] and to [Son I]. Mother has separated from [Father II] numerous times but continues to return and seek out the relationship with [Father II]. Mother's inability to refrain from any contact with [Father II] demonstrates [Mother's] inability to set her own safety and that

> of her son as a priority. This inability to protect herself or [Son I] from [Father II's] abusive conduct places [Daughter] at high risk. . . . Mother does not deny that [Father II] has abused her or [Son I].

November 27, 1991 — Daughter's GAL filed a report stating, in relevant part, that "[Mother] admits that her boyfriend, [Father II,] and [Father I], [Son I's] alleged natural father, have physically abused [Son I]."

November 27, 1991 — Judge Lillian Ramirez-Uy entered an order deciding that Daughter came under the family court's jurisdiction pursuant to HRS §§ 571-11(9) and 587-11.

December 3, 1991 — Judge Marjorie Higa Manuia ordered the November 22, 1991 Service Plan and Agreement into effect.

December 10, 1991 — A psychological evaluation of Mother stated, in relevant part, that Mother's

> profile on the Parenting Stress Index yielded significantly elevated scores suggesting that she is under an extreme degree of stress and the probability of dysfunctional parenting behavior is very high. . . .
>
> . . . [Mother] first became involved in mental health services when she was 16 years old, following a runaway from the family home and she stated that because of substance abuse at that time, she was [hospitalized] for about 6 weeks, followed by outpatient psychotherapy. She apparently was not involved in mental health services again until following a suicide attempt in 1985. She stated at this time that she was extremely depressed because there was no one within the temple for her to marry and she then overdosed on aspirin.

May 20, 1992 — A Safe Home Guidelines report noted that Son I "is a special needs child due to his diagnosis of Attention Deficit Hyperactivity Disorder and his hearing impaired condition."

June 2, 1992 — Judge Bode Uale ordered the May 19, 1992 Service Plan and Agreement into effect.

October 14, 1992 — A Safe Home Guidelines Report noted that, on this date,

> [Mother] placed [Son I] in Foster Custody with the [DHS]. She stated that [Son I] kicked [Daughter] "for no reason". [Mother] sent him to time out but he refused to go. She became angry. She stated that [Son I] was seated on a chair. [Mother] grabbed him by the ankles and pulled him off of the chair. He hit his head on the concrete floor. She said that he cried and she told him "you're just like your father". [Son I] had a lump on his head about the size of a golf ball. [Mother] asked that the [DHS] place [Son I] in a foster home because she was afraid [t]hat she would hurt him. She said that she was having difficulty managing her anger and also admitted to leaving [Son I] home alone two to three times per week for a few hours while she ran errands. She stated that she is not able to control his behavior. . . .
>
> . . . .
>
> . . . [Mother] explained that . . . she is always being thrown out of stores because [Son I] gets into everything. She said she was not even able to go to the grocery store with him. She said she has been leaving him home alone for "about a year". She understands that this is not safe for [Son I].

November 6, 1992 — Son I was returned home.

November 27, 1992 — Judge Uale ordered the November 24, 1992 Service Plan and Agreement into effect.

June 14, 1993 — Judge Albert Gould terminated family court jurisdiction.

July 22, 1996 — "[T]he DHS received a report alleging high-risk to [Daughter]. [Mother] was admitted to Castle Hospital because of schizophrenic and delusional thoughts and she was reporting being pregnant. This was her second hospitalization that month; the prior one at Queen's Medical Center."

March 1, 1998 — Mother gave birth to Son II, fathered by Father III. The case involving Son II is FC-S No. 99-05839.

February 1999 — Father III left the family home because Mother threatened to kill herself, the children, and him.

February 16, 1999 — Mother stated that "her mother committed suicide by drowning" and "that she would never do that to the children but would kill them and then kill herself."

February 19, 1999 — Mother was admitted to the Queen's Medical

	Center psychiatric ward.
February 22, 1999	Daughter and Son II were placed in Temporary Foster Custody.
February 25, 1999	DHS filed a petition for temporary foster custody of Daughter and Son II. The petition noted that "[f]or some time, [Son I] (now 12) has been living with his father, [Father I]," and that "[o]n February 19, 1999, Mother was admitted to [the hospital] due to chronic homicidal and suicidal ideations against her children, her ex-husbands, and herself. Mother remains hospitalized."
March 1, 1999	Judge John C. Bryant, Jr., awarded DHS temporary foster custody of Daughter and Son II pursuant to HRS § 587-53(c).
March 1, 1999	Judge Karen M. Radius appointed Kimberly Ayoung, Advocate, Domestic Violence Clearinghouse and Legal Hotline, as GAL for Daughter and Son II.
March 10, 1999	At a court hearing, Father II requested that his parental rights to Daughter be terminated and Judge Bryant granted his request.
March 15, 1999	Judge Bryant ordered that (a) Mother shall not have any contact with Father III, (b) "Mother shall participate in a psychological evaluation as arranged by DHS[,]" and (c) Mother shall have supervised visits with Daughter and Son II as arranged by DHS.
March 25, 1999	After a hearing on March 10, 1999, Judge Bryant awarded DHS foster custody of Daughter and Son II, ordered that Mother shall not have further contact with Daughter, Son II, and Father III until further order of the court, and ordered the February 24, 1999 service plan into effect.
May 12, 1999	"[Mother] was evaluated by John Wingert, Ph.D. on 12/10/91 and 5/12/99. Dr. Wingert's first diagnostic impression was dependent personality disorder and features of

	dysthymia. His second diagnostic impression was dipolar [sic] disorder, nos; and the axis II diagnosis was deferred."
May 21, 1999	The court appointed Byron Hu as counsel for Mother.
May 26, 1999	Judge Bryant ordered (a) the May 24, 1999 service plan into effect and (b) "Mother shall have 3 supervised visits per week for 1 hr after signing consents to release information to DHS[.]" Father III requested that his parental rights to Son II be terminated and Judge Bryant granted his request.
August 11, 1999	DHS filed motions for permanent custody of Daughter and Son II.
November 9, 1999	Judge Carlsmith ordered the November 5, 1999 service plan into effect.
March 22, 2000	In a report, Daughter's GAL noted that "[Mother's] parenting skills are still questionable."
March 29, 2000	Judge Carlsmith ordered the March 28, 2000 service plan into effect. This service plan noted Mother's "psychiatric instability, history of substance use, inappropriate use of prescribed medication and her life choices resulted in the children's threat of abuse and neglect."
March 29, 2000	The DHS' Supplemental Safe Family Home Report stated, in relevant part, as follows:

> The DHS is concerned that [Mother's] mental health is dependent on her relationships and until individual stability is achieved the DHS has grave concerns about [Mother's] ability to provide a safe stable nurturing environment for [Daughter] and [Son II]. Now that [Mother] has a new therapist the DHS believes that specific issues will be address[ed]. Topics that will be addressed are [Mother's] anxiety concerning being alone, relapse and history of suicide.

> Even with a new therapist, the DHS believes that [Mother] has not made sufficient progress toward effectuating a safe stable home environment for [Daughter] and [Son] and that the DHS will be proceeding with permanency planning.

August 11, 2000 — DHS filed a "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan" seeking an order awarding DHS permanent custody of Daughter and a similar motion regarding Son II.

August 16, 2000 — Judge Diana L. Warrington ordered the August 1, 2000 service plan into effect.

November 8, 2000 — Trial was set to occur on February 12, 2001.

February 7, 2001 — DHS filed a motion to postpone the trial.

February 12, 2001 — Judge Warrington ordered the February 12, 2001 service plan into effect and postponed the trial indefinitely.

March 15, 2001 — A Multidisciplinary Team Conference Report stated, in relevant part, as follows:

> [Mother] has been diagnosed with a Bipolar Disorder NOS. . . . She has had multiple psychiatric admissions and several suicide attempts. The latest admissions were in 1999 due to noncompliance with medications. Her psychosocial history has been unstable, as seen in multiple marriages (two husbands had been abusive). She has a significant trauma background as her father was alcoholic, mother committed suicide, and she herself was sexually assaulted at age 19, precipitating her first hospitalization.
>
> Currently [Mother] has been compliant with medication management, taking Depakote twice a day. Her therapist has been seeing her twice a month but no specific progress report was made available at the time of this conference. Other services include CCS, CODA support group, and home-based support services. Her CCS care coordinator and others who are working with her reported that [Mother] has been quite stable for the past 18 months on medication and treatment. She has not been involved with any partner and has been maintaining an apartment on her own. . . .
>
> . . . .
>
> . . . Although [Mother] has made enormous strides in self-care, the social system remains inadequate given the lack of information to document her capacity to effectively parent the children. If [Mother] makes strides in this area with increased home visits supervised by the homebased worker, and maintains compliance to the existing services to maintain social stability, then gradual reunification is supported.

. . . .

> Given [Mother's] stabilization and the children's need for an established home, it is critical that reunification be aggressively explored within the next few months. If [Mother] is unable to demonstrate development of limit-setting, setting up structured time with the children on extended visits, and establishing an authoritative role with the children, then reunification would not be seen as viable as the risk of threatened harm or neglect would still be too high. If [Mother] is able to show positive growth, however, then a graduated return of the children home to her would be supported.

June 18, 2001 — A Supplemental Safe Family Home Report stated, in relevant part, that "Gregory Yuen, M.D. psychiatrist reports that [Mother's] current diagnosis is Bipolar II Disorder. She is prescribed Depakote 500 mg. BID. Dr. Yuen reported that [Mother] must take psychotropic medications for the rest of her life."

June 20, 2001 — Judge Warrington ordered the June 18, 2001 service plan into effect.

July 2001 — The court appointed Sheri L. Ritter to replace Kimberly Ayoung as GAL.

July 5, 2001 — Judge Warrington ordered that "[t]he prior award of foster custody is revoked and DHS will be awarded family supervision over the child(ren) by July 11, 2001" and that "[Son II's] visits shall be adjusted with the goal of reunification by the end of August and after consultation between DHS and GAL."

July 11, 2001 — Daughter was returned to Mother's custody.

August 2, 2001 — DHS removed Daughter from Mother's custody and assumed foster custody of Daughter.

August 3, 2001 — GAL advised the court, in relevant part, that

> yesterday when I went to visit [Daughter] she shared with me that she and [Mother] had gotten into some physical fight.
>
> . . . .
>
> [GAL]: She had shared that [Mother] had hit her and that they'd gotten into a physical altercation with -- including pulling hair.

> . . . .
>
> [GAL]: . . . [Daughter] was very upset and she did not want to be left.
>
> So, I called [DHS] to ask what I should do because I did not want to leave her there. I was very, very afraid that something would happen if I left her there in the home and was instructed to bring them [sic] to CPS.
>
> . . . .
>
> I had no idea that already there would be huge problems. And my concern at this point is that [Daughter] has been in foster care for two years. She really, really needs a stable and structured home environment to succeed.
>
> And I don't want to have to drag this case on too much longer. I don't believe that's in her best interest.

	Judge Warrington approved the foster custody of Daughter and Son II to DHS.
October 12, 2001	Judge Warrington set the permanent custody trial to occur on November 20, 2001.
November 20, 2001	A trial was held and on November 21, 2001, Judge Carlsmith entered an "Order Awarding Permanent Custody" terminating Mother's parental rights pursuant to HRS §§ 587-2 and 587-73 and awarding permanent custody of Daughter and Son II to the DHS "with the subsequent goal of adoption . . . within six months of the award of permanent custody[.]"
December 7, 2001	Mother filed a motion for reconsideration.
January 4, 2002	Judge Carlsmith entered an order denying Mother's motion for reconsideration.
January 2002	Attorney Chris China was appointed to represent Mother on appeal.
January 25, 2002	Mother filed her Notice of Appeal.
February 1, 2002	The Court Reporter for the trial noted the absence of tape no. 2 of the November 20, 2001 trial.
March 5, 2002	Judge Carlsmith filed her "Findings of Fact and Conclusions of Law."

April 2, 2002 — Justice Simeon Acoba consolidated appeal nos. 24869 and 24977 for briefing and disposition under appeal no. 24869.

April 18, 2002 — The DHS filed "Appellee's Proposed Amendments to Statement of the Evidence Pursuant to Rule 10(C), [Hawai‘i Rules of Appellate Procedure (HRAP)]" based on the Deputy Attorney General's "recollection and personal notes[.]" It pertained to the cross-examination of the DHS Social Worker, a statement by the GAL, the closing arguments, and the court's oral findings and decision.

June 4, 2002 — Justice Acoba entered an order stating:

> [Mother's] request to supplement the record pursuant to HRAP 10(c), with the statement of the evidence of the November 20, 2001 proceedings, as approved and settled by the family court, is granted. The clerk of the family court shall supplement the record with the statement of evidence, as approved and settled by the family court, by July 3, 2002.

July 5, 2002 — Justice Acoba entered an order stating that "[Mother's] request to extend time to supplement the record is granted. The clerk of the family court shall supplement the record with the statement of evidence, as approved and settled by the family court, by August 2, 2002."

September 11, 2002 — Justice Acoba entered an order stating, in relevant part, as follows:

> 2. This case is temporarily remanded to the Family Court of the First Circuit for a hearing on the settlement and approval of the statement of evidence for the portion of the November 20, 2001 hearing that is unavailable. The clerk of the supreme court shall transmit the record to the clerk of the family court forthwith.
>
> 3. Within fifteen days from the date of this order, the family court shall commence a hearing to settle and approve the statement of evidence for the portion of the November 20, 2001 hearing that is unavailable.
>
> 4. Within ten days after the hearing, the court shall file a statement of evidence that indicates the names of the witnesses, the testimony received into evidence, and the exhibits submitted or rejected during the portion of the November 20, 2001 hearing that is unavailable.

5. Within five days after the court files the settled and approved statement of evidence, the clerk of the family court shall retransmit the record, including a supplemental record containing the settled and approved statement of evidence and any other documents submitted on remand, to the clerk of the supreme court.

September 24, 2002 Judge Carlsmith, after a hearing "to settle the record on appeal pursuant to the Supreme Court order of September 11, 2002," entered the "Orders Concerning Child Protective Act" as follows:

1. The court settles and approves the statement submitted by the State filed April 18, 2002 - Exhibit 56, as being the record on appeal in this case. No exhibits were received and the statement reflects the witnesses who testified.

2. All prior consistent orders shall continue.

3. Within five days from today, the clerk shall transmit the record from today's proceedings to the Supreme Court pursuant to order.

September 27, 2002 A Third Supplemental Record on Appeal was filed transmitting to the Hawai'i Supreme Court the State's April 18, 2002 statement (Exhibit 56).

With the findings and conclusions challenged by Mother emphasized in bold print, the March 5, 2002 Findings of Fact and Conclusions of Law state, in relevant part, as follows:

FINDINGS OF FACT

. . . .

PROCEEDINGS

9. . . . [Temporary foster custody of the children was assumed February 22, 1999 due to threatened harm from Mother's severe mental illness, her non-compliance with psychiatric treatment, and neglect.

10. . . . [T]he court finds, that Mother's pattern of poor compliance with psychiatric treatment aimed at treating/managing her longstanding psychiatric condition, her inability to provide for the children's or her own needs, her threats to harm the children and her present and past partners, in combination with Father's problems, pose threatened harm to the child.

11. At an initial return hearing on March 1, 1999, the court continued temporary foster custody of [Son II] . . . ; all proceedings of [Son II] and [Daughter] were consolidated for hearing.

. . . .

22. [Daughter] was returned to Mother's care on July 11, 2001, but DHS again assumed foster custody on August 2, 2001 at the recommendation of her guardian ad litem because Mother was not able to provide a safe family home for [Daughter].

. . . .

25. Trial on the DHS motion for permanent custody was held November 20, 2001; . . . .

26. The DHS social worker testified at trial the DHS position and her expert opinion that Mother is not presently willing and able to provide a safe family home for [Son II] even with the assistance of a service plan, that it is not reasonably foreseeable that she will become willing and able to provide a safe family home for [Son II] within a reasonable period of time, even with the assistance of a service plan, and that the permanent plan for [Son II] is in his best interest.

. . . .

28. At the conclusion of the trial, the children's guardian ad litem recommended that permanent custody [Son II] be awarded to DHS based on her own evaluation and her consultation with [Son II's] former guardian ad litem.

[SON II]

29. [Son II] remained in his initial foster placement from February 22, 1999 to March 20, 2000, when he was hospitalized after he suffered a fall while unsupervised causing a broken leg.

30. [Son II] has resided with his present foster family (and [Daughter]) from March 23, 2000 to the present.

31. The permanent plan for [Son II] is adoption by his present foster parents.

32. In September of 2001, [Son II] began attending preschool and it was observed by school personnel that he was not playing with the other children; he was then evaluated . . . and diagnosed with reactive attachment disorder, disinhibited type.

33. [Son II] suffered from poor parenting as an infant and was neglected while in Mother's care prior to February 22, 1999.

34. To be successfully treated for reactive attachment disorder, [Son II] requires very stable, consistent nurturing, predictable schedules and responses from his caretakers, and a calm, secure home environment.

35. In addition, [Son II] requires a permanent primary caretaker who understands the nature of reactive attachment disorder and is willing to participate in his therapy sessions as well as follow through at home in to promote a progressively more secure attachment.

. . . .

37. Further delay in deciding who will have permanent custody of [Son II] would be harmful to him because he needs to learn to attach to a permanent caretaker as part of the reactive attachment disorder treatment.

38. Delaying the permanency decision to allow Mother time to do more treatment or services would not be in [Son II's] best interest.

39. [Daughter] suffers from a disruptive behavior disorder which makes her a higher than average needs child, especially for Mother who is unable to contain her tantrums and meet her needs due to the dynamics of their relationship.

40. [Daughter] is very jealous of [Son II] which complicates the parenting demands on Mother.

. . . .

42. The July, 2001 reunification effort failed because of the dynamics between [Daughter] and [Mother], not because of the way that DHS managed [Son II's] extended visits.

43. Further reunification attempts with Mother are not in [Daughter's] best interest because she suffered a severe upheaval after the failed reunification and required hospitalization.

44. It would be harmful to [Daughter] if [Son II] alone (and not [Daughter]) were returned to Mother's custody.

45. Being separated from [Daughter] is not in [Son II's] best interest.

PARENTS

46. Mother has chronic and longstanding mental health problems with several prior hospitalizations and diagnoses including Bipolar Disorder.

47. In February of 1999 when she was admitted to the Queen's Medical Center for psychiatric hospitalization, Mother was not taking her prescribed medication, and suffered from depression and suicidal and homicidal ideation.

. . . .

50. As recently as the Spring of 2001 it was reported to DHS that Mother was not completely attentive to [Son's] physical needs . . . , and that Mother continues to turn to [Daughter] for advice about caring for [Son II]; Mother was also disorganized and unstable with the visit schedules as recently as [of] July of 2001.

. . . .

52. In November of 2001 Mother's new psychologist reported to DHS that after eight sessions of treatment, he has diagnosed her as suffering from Major Depressive Disorder (recurrent and moderate) and Social Phobia, and that she has a lot of work to do and they are just getting started.

53. Over the time since the children have been in foster custody, Mother has tried very hard to become able to meet the challenges of parenting her children.

54. Mother is presently able to care for herself, but is not able to provide the safe and stable parenting and calm secure environment that [Son II] needs.

55. Mother is willing, but not able, and therefore is not presently willing and able, to provide [Son II] with a safe family home, even with the assistance of a service plan, because she is not able to demonstrate the skilled parenting, stability, predictability and close attention that he requires.

56. It is not reasonably foreseeable that Mother will become willing and able to provide [Son II] with a safe family home, even with the assistance of a service plan, within a reasonable period of time, because [Son II] was first placed in foster custody on February 22, 1999, and there is no additional future period of time for which it would be reasonable to delay the permanency decision.

. . . .

OTHER

59. DHS has provided Mother and Father with every reasonable opportunity to succeed in remedying the problems which put the child at risk of harm.

60. The permanent plan proposed by DHS, which recommends adoption, is in the best interests of the child because of his very young age and his need for a permanent safe and secure home with responsible and competent parents and family.

The court's March 5, 2002 Findings of Fact and Conclusions of Law pertaining to Son II are essentially the same as those for Daughter except that the "[DAUGHTER]" section replaced the "[SON II]" section, as follows:

> [DAUGHTER]
>
> 28. [Daughter] remained in her initial foster placement from February 22, 1999 to March 31, 2000, when she and [Son II] were moved . . . .
>
> 29. [Daughter] has resided with her present foster family (and [Son II]) from March 31, 2000 to July 11, 2001, and from August 2, 2001 to the present.
>
> 30. The permanent plan for [Daughter] is adoption by her present foster parents.
>
> 31. [Daughter] currently suffers from Disruptive Behavior Disorder (severe tantrums) and Disorder of Infancy, Childhood and Adolescence, Not Otherwise Specified.
>
> 32. [Daughter] needs a firm, structured yet loving home environment and a stable emotional anchor for successful treatment of her disorders.
>
> 33. [Daughter] is a very intelligent, competent, stubborn and strong-willed pre-teenager who needs very strong-willed parenting to contain her disruptive behavior.
>
> 34. [Daughter] is unable to accept parental control from [Mother] because of their family history.
>
> 35. The family history includes [Daughter] and [Mother] interacting as peers and [Daughter] taking a parental role toward [Mother] and [Son II].
>
> 36. [Daughter] has reported that Mother continued to turn to her and [Son I] for advice and support during visits.
>
> 37. [Daughter] feels responsible for [Mother's] functioning and for [Mother's] happiness, which is not healthy psychologically for [Daughter].
>
> 38. [Son II] has recently been diagnosed with reactive attachment disorder, disinhibited type, for which he requires very stable, consistent nurturing, predictable schedules and responses from his caretakers, and a calm, secure home environment.
>
> 39. [Daughter] exhibits extreme jealousy of [Son II] which complicates the parenting demands on Mother.

40. It would be harmful to [Daughter] if [Son II] alone (and not [Daughter]) were returned to Mother's custody.

41. [Son I], who is in the legal custody of [Father I] but who has regularly spent time with Mother for respite care, also has special needs due to multiple disabilities.

. . . .

44. Mother was unable to handle [Daughter's] behavior on August 1 and 2, 2001; on August 1, 2001 [Daughter] called the police and her foster parents, and on August 2, 2001 Mother called DHS in tears asking for help because [Daughter] was out of control.

45. On August 1 and 2, 2001, [Daughter] reported that [Mother] hit her, scratched her, pulled her hair, and that she did not have enough to eat and was afraid to bathe because of the cockroaches in the plumbing.

46. DHS assumed foster custody of [Daughter] on August 2, 2001 at the recommendation of her guardian ad litem, who went to the family home, and after investigating the matter, concluded that [Daughter] should be removed from [Mother's] care for her own safety.

47. [Daughter] was hospitalized from August 14 to 17, 2001 at Kahi Mohala because she was very angry and distressed and exhibited an escalation of disruptive behavior.

48. Since the hospitalization [Daughter] has settled down but recently has expressed to her therapist and others the desire to know where she belongs and where she will live permanently.

. . . .

50. Any further attempt at reunification would be harmful to [Daughter] because of the remote likelihood of success and the emotional and psychological upheaval she suffered requiring her to be hospitalized in August of 2001.

51. Further reunification attempts with Mother are not in [Daughter's] best interest because of the threatened harm of failure and because time is of the essence in providing stability for [Daughter].

52. Further delay in deciding who will have permanent custody of [Daughter] would be harmful to [Daughter] because she is asking for stability and needs a permanent home without delay.

53. Delaying the permanency decision to allow Mother time to do more treatment or services would not be in [Daughter's] best interest.

DISCUSSION

I.

Mother contends that the answer to each of the following questions is no.

> Did [DHS] prove, by clear and convincing evidence, that Mother was not *presently* willing and able to provide the Child with a safe family home, even with the assistance of a service plan as per section 587-73(a)(1), HRS[?]
>
> Did [DHS] prove, by clear and convincing evidence, that it was not *reasonably foreseeable* that Mother would be willing and able to provide Children with a safe family home, even with the assistance of a service plan as per section 587-73(a)(2), HRS[?]
>
> Did [DHS] prove, by clear and convincing evidence, that terminating Mother's parental rights was in the *best interest* of the Children per section 587-73(a)(3), HRS[?]

In light of the record, we disagree with Mother.

II.

Mother cites precedent that (a) "parental rights may not be terminated solely on basis of mental disability" and (b) the fundamental nature of

> parental rights to their children demands that attention be shifted from attaching a label to the parent to a showing of how that condition affects the fitness of the parent, the manner in which the condition is detrimental to the child, and the likelihood of correction or control of the condition so that a parent would again be capable and fit to care for his children.

In the Matter of J.N.M., 655 P.2d 1032, 1036 (Okla. 1982).

Mother contends that her mental disability qualifies as a disability as defined in the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2000) (ADA) and that DHS failed to meet ADA's "reasonable accommodation" test for servicing of a disabled mother when it (a) failed to provide her with the services required by the ADA or (b) excluded or denied her the benefits of

DHS' services or programs due to Mother's mental disability. Mother contends that she was not offered services comparable to In re Welfare of A.J.R., 896 P.2d 1298 (Wash. App. 1995). That opinion states, in relevant part, as follows:

> Sharon and Marty Robinson appeal an order terminating their parental rights in their daughter A.R. They contend the State failed to prove that necessary services were offered or provided to help them correct their parenting deficiencies. They also argue the State failed to comply with the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, by making no effort to modify parenting classes or other training services to accommodate their mental impairments. We affirm.
>
> FACTS AND PROCEDURAL POSTURE
>
> A.R., born December 1, 1990, is the only child of the Robinsons. Sharon Robinson is moderately developmentally disabled and her husband Marty is borderline developmentally disabled. Their daughter also has special needs and requires special education and treatment to develop to her full potential.
>
> . . . A second dependency petition was filed on September 17, 1991, alleging Sharon and Marty neglected and/or abused A.R. The petition also alleged A.R. had no parent capable of adequately caring for her at that time.
>
> A.R. was found to be a dependent child on October 10, 1991. The dispositional plan adopted by the court placed her in foster care arranged by the Department of Social and Health Services (DSHS) and allowed parental visitation. The court ordered the following services for the parents: caseworker services, guardian ad litem services, parenting classes, psychological evaluations and counseling services, including a drug and alcohol evaluation and follow-up treatment for Marty.
>
> Dependency review hearings were held on February 27 and April 2, 1992. Additional services were offered to the Robinsons during this period, including marriage counseling, Department of Developmental Disabilities (DDD) services for Sharon and A.R., classes for A.R. at the Developmental Center, and public health services.
>
> . . . .
>
> Public Health Nurse Susan Dezember testified she provided Sharon with prenatal and postnatal care and in-home infant care for the first 8 months of A.R.'s life. Ms. Dezember made over 50 contacts with the family during this time . . . .
>
> When she realized Sharon was unable to remember how to dilute the baby formula, Ms. Dezember arranged to supply her premixed formula. Recognizing the limitations of the Robinsons,

Ms. Dezember explained step-by-step basic nutrition, health care, cleanliness, and child care to Sharon. Marty was often gone when Ms. Dezember arrived, so she drew pictures describing her instructions and attached them on the refrigerator for him to see.

In Ms. Dezember's opinion, the best option for keeping the family together while ensuring provision for A.R.'s special needs was live-in supervision, but that option was not available. She therefore felt that termination was in the best interests of A.R.

DSHS caseworker Teresa St. John testified that in the few months before A.R. was removed from the home, some kind of care provider came into the home every day, especially to make sure the baby was fed. . . .

DDD caseworker Mary Jo Byers . . . developed an individual service plan for the alternative living providers to train Sharon to cook, clean, and arrange appointments independently. . . . Another alternative living provider, Elena Alexander, testified she gave Sharon cooking, cleaning, and basic child care lessons in the home. . . .

Sharon Hickman taught the parenting class the Robinsons attended in the spring of 1992. . . . Sharon and Marty attended all but one of the classes and received their certificate, but Ms. Hickman felt the couple made no progress in their capability to parent A.R.

The guardian ad litem reported the Robinson home continued to be filthy after A.R.'s removal, smelling overwhelmingly of dog feces, urine and dirty dishes. . . . In the guardian ad litem's opinion, A.R. could not be returned to the Robinson home under these conditions.

Dr. Bruce Duthie, a psychologist, conducted psychological evaluations of Sharon and Marty. He testified that Sharon did not have the capacity to parent A.R. in an effective manner long term. He also stated he felt it was highly unlikely her parental deficiencies could be remedied so that A.R. could return home. Dr. Duthie testified Marty's parental deficiencies could not be corrected in the near future and recommended terminating the parental rights of both parents.

After hearing the testimony of the State's witnesses as well as the testimony of the parents and Marty's mother, father, and uncle, the court entered an order terminating parental rights on December 3, 1992. Both parents appeal.

DISCUSSION

. . . .

The Robinsons contend the State failed in its burden to prove that all the services "reasonably available" had been offered or provided. RCW 13.34.180(4). They argue that the services offered did not address their special needs as developmentally disabled parents. We disagree. The State provided services which were modified to accommodate the

> Robinsons' specific disabilities. Pictorial instructions were left on the refrigerator. Daily lessons on basic hygiene, cooking, and child care were provided. Visual rather than literary teaching aids were used in the parenting class.
>
> For the same reasons, we reject the Robinsons' Americans with Disabilities Act (ADA) claim. They contend that the State's failure to provide specialized parenting classes violated the ADA. The ADA prohibits a public entity from discriminating against disabled persons by excluding them from participation in or denying them the benefits of public services and programs. 42 U.S.C. § 12132. The Act requires the state or other public entity to make reasonable accommodations to allow the disabled person to receive the services or to participate in the public entity's programs. 28 C.F.R. § 35.130(b)(7) (1994). As applied by the various State agencies here, RCW 13.34.180(4) resulted in reasonable accommodation of the Robinsons' disabilities. We have already outlined in some detail the specific services tailored to their developmental disabilities.

Mother contends that "Mother was either excluded or denied the benefits of [DHS'] services or programs." She further contends as follows:

> Mother's success in services offered, being insufficient in [DHS'] estimation, requires an explanatory showing by DHS to justify her exclusion for other services. DHS must: identify other available services; identify the relevance/non-relevance of these other services to her case; and show why any identified relevant services need not be offered. It is equitable to require an explanation and Mother is entitled to it.
>
> . . . Discriminatory intent, expressed on the record above, at the first hearing on March 1, 1999 based on Mother's mental condition is *De Jure* discriminatory intent or purpose. A Prima Facie case, based on *De Jure* discriminatory intent or purpose, shifts the burden of proof (clear and convincing) to DHS.
>
> Furthermore, *disparate treatment* and/or *disparate effect*, alternate means of showing discriminatory intent or purpose, is present. Substantial compliance of service plan would result in the return of Children to Mother. Instead, DHS, consistent with their discriminatory intent of March 1, 1999 above, declared termination of parental rights as a goal eight months later (11/9/99 review hearing) and the sole goal after a year (3/29/00 review). [DHS'] hurried decision to terminate Mother's parental rights, in the face of her substantial compliance with service plan, constitutes *disparate* treatment . . . .
>
> Experience indicates a significant population of abusive parents have physical and/or mental issues. Reunification may require treatment of their pre-existing physical or mental issues. . . . [DHS'] failure to Reasonable [sic] Accommodate Mother's

> disability and/or the disability of other parents similarly situated is shortsighted under Chapter 587 philosophy as well as violative of the ADA regulations.

(Citations omitted, emphases in original.)

The State responds that the majority of states deciding this question have held that the ADA is not a "defense" to a proceeding for termination of parental rights. We do not reach this issue. We agree with the State's second argument that "HRS Chapter 587 provides [Mother] with more protection than the ADA[.]" HRS § 587-1 (Supp. 2002) states as follows:

> This chapter creates within the jurisdiction of the family court a child protective act to make paramount the safety and health of children who have been harmed or are in life circumstances that threaten harm. Furthermore, this chapter makes provisions for the service, treatment, and permanent plans for these children and their families.
>
> The legislature finds that children deserve and require competent, responsible parenting and safe, secure, loving, and nurturing homes. The legislature finds that children who have been harmed or are threatened with harm are less likely than other children to realize their full educational, vocational, and emotional potential, and become law-abiding, productive, self-sufficient citizens, and are more likely to become involved with the mental health system, the juvenile justice system, or the criminal justice system, as well as become an economic burden on the State. The legislature finds that prompt identification, reporting, investigation, services, treatment, adjudication, and disposition of cases involving children who have been harmed or are threatened with harm are in the children's, their families', and society's best interests because the children are defenseless, exploitable, and vulnerable.
>
> 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 so they may develop and mature into responsible, self-sufficient, law-abiding citizens. 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. The service plan should be carefully formulated with the family in a timely manner. 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. Each appropriate resource, public and private, family and friend, should be considered and used to maximize the legal custodian's potential for providing a safe family home for the child. Full and careful consideration should be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated. 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.
>
> This chapter shall be liberally construed to serve the best interests of the children and the purposes set out in this chapter.

Therefore, the sole question is whether the DHS and the family court complied with HRS Chapter 587.

III.

Mother contends that the DHS,

> consistent with their discriminatory intent of March 1, 1999 . . . , declared termination of parental rights as a goal eight months later (11/9/99 review hearing) and the sole goal after a year (3/29/00 review). [DHS'] hurried decision to terminate Mother's parental rights, in the fact of her substantial compliance with service plan, constitutes *disparate* treatment[.]

Again, the question is whether the DHS and the family court complied with HRS Chapter 587. The relevant facts do not support Mother's allegation of a prejudiced rush to judgment. Mother cites the hearings of March 1, 1999, November 9, 1999, and March 29, 2000. The transcripts do not support her allegation.

The petitions were filed on February 25, 1999. Father III was at the hearing on March 1, 1999. Mother was not served until March 4, 1999. At the March 1, 1999 hearing in the

court of Judge Bryant, the following was stated, in relevant part:

> THE COURT: [Daughter's] case right now looks like a permanent custody case.
>
> [SOCIAL WORKER]: Unfortunately, yes, your Honor.
>
> THE COURT: Okay.
>
> We'll see. [Father III,] [y]ou can raise [Son II] or not?
>
> [FATHER III]: Oh, yeah.
>
> THE COURT: You think you can by yourself?
>
> [FATHER III]: (No audible response.)
>
> THE COURT: Okay. Let's see what happens.
>
> . . . .
>
> THE COURT: . . . .
>
> Mother's mental illness, I don't know if it's gonna work for her. I don't know if we're gonna be able to write sufficient services such that she can provide a safe family home for . . . either child.

At the November 9, 1999, hearing in Judge Bryant's court, the social worker noted that when Daughter and Mother are together, the Daughter assumes the role of Mother. The GAL noted the therapist's failure to make a report and that she and the DHS were of the opinion that Mother did not have the right therapist. The social worker further noted Mother's (1) failure to evict alcoholic abusive Father III and (2) history of bringing home strange men off the beach. The court ordered, "Get therapy going with somebody else so that we have movement and know which way we're going positive because we can't drag it on for you or for the kids forever[.]"

At the March 29, 2000 hearing in Judge Bryant's court, the following was stated, in relevant part:

> THE COURT: . . . .
>
> . . . The heavy duty question is is this ever going to be a case where we're going for reunification?
>
> [DEPUTY ATTORNEY GENERAL]: No, your Honor.
>
> The [DHS] is in the process . . . of going and getting prospective signatures and then we will be filing for permanent custody of both children, your Honor.
>
> THE COURT: What they're saying, [Mother], that in spite of the many, many things you've done for whatever reasons they feel that you are not now or ever going to be able to provide [Son II] . . . with a safe family home. So, they're in the process of filing for permanency.
>
> I'm not making that decision today. I'm just trying to find out where the case is going.
>
> . . . .
>
> THE COURT: It certainly will be a tough decision and those are the hardest cases when you get a person who is doing what they're supposed to do and trying so hard to say that it's not in the best interest of the child.
>
> . . . .
>
> And I'm not gonna jump the gun and . . . do that today but I just wanted to be frank about where it was going.

The decision by Judge Carlsmith was not made until the trial on November 20, 2001. Mother had "[e]very reasonable opportunity . . . to succeed in remedying the problems which put the [children] at substantial risk of being harmed in the family home." HRS § 587-1.

IV.

Mother contends that (1) the service plan agreement became enforceable under law, (2) Mother's performance of the service plan created contractual obligations binding DHS to

fulfill agreed unification (FOF no. 59) obligations, and (3) DHS breached the service plan agreement in violation of AAA[1] and/or Chapter 587, HRS, and/or contract law. In other words,

> Reunification of children with Mother was the "benefit of the bargain" promised by DHS per service plan. Mother fulfilled her obligations. DHS, duty bound to perform in good faith, was then required to reunify children with Mother forthwith. Time for DHS performance was of-the-essence. DHS, instead of fulfilling their statutory, contractual promises forthwith, elected to terminate. [DHS'] non-performance, contrary statements and actions constituted a breach of their statutory and contractual duties under Chapter 587, AAA, and/or contract law on or about August 2000.

We conclude that the duty Mother alleges was breached is a statutory duty, not a contractual duty. Moreover, the June 18, 2001 Family Service Plan required more than mere successful completion and utilization of the outlined services. That service plan stated, in relevant part, as follows:

> A. If you successfully complete and utilize the services that are outlined in this service plan, you should then be able to demonstrate that [Daughter] and [Son II] are no longer at risk of abuse or neglect, the DHS will then recommend that [Daughter] and [Son II] be returned to the family home under Family Supervision. Once you are able to demonstrate you can provide a safe family home for [Daughter] and [Son II] without further protective services, the [DHS] can then recommend that this case be closed.

As noted by the GAL,

> Mother was given an opportunity to show that after two [and] one-half years of services she could parent her children. The result of which was that [Daughter] ended up at Kahi Mohala. The grave risk of harm to these two children and the amount of time they have spent in foster care is too great to attempt reunification again.

[1] In her opening brief, Appellant uses "AAA" as short for (a) 42 U.S.C.A. § 671, 675 and (b) the First Circuit Family Court's July 25, 1988 Policy of "Reasonable Efforts" Requirement of Public Law 96-272.

V.

In the Declaration of Counsel in support of Mother's December 7, 2001 motion for reconsideration, counsel stated, in relevant part, as follows:

> 5. Mother believes that reasonable efforts were not undertaken to reunify Mother with her children including, but not limited to gradually transitioning the children in to her care.
>
> 6. Although a gradual transition was so vital to bonding, Mother believes the transition did not adequately prepare Mother and her children for the stresses of instant reunification, in the manner that reunification was handled.
>
> 7. Delayed home based services were inadequate to prepare Mother for the stresses of instant reunification.
>
> . . . .
>
> 9. Mother believes she should be now permitted the gradual reunification that had not occurred, with the inclusion of adequate home based services.

We conclude that the record does not support Mother's allegations.

VI.

Citing Judge Gould's termination of family court jurisdiction over Daughter on June 14, 1993, Mother contends that the "[r]ecord is devoid of material facts sufficient to explain [DHS'] about-face position" in the year 2000. Mother also contends that: "[Daughter] . . . sabotaged her reunification with Mother for multiple reasons"; "[Son II's] disorder emerged in 2001 - *after* he had been removed from Mother's care"; "primary culpability for emergence of [Son II's] disorder rests with DHS - not Mother"; "[Daughter's] disorder did not emerge until 2000 - *after* she had been removed from Mother's care. . . . Therefore,

as with [Son II] above, DHS, as the legal custodian, must bear the responsibility for [Daughter's] disorder"; and

> Mother, victimized by father's abuse of [Daughter] and another child in 1993, was serviced by DHS until case closure on June 14, 1993. Based on this past experience, Mother held a reasonable expectation that similar benevolent response from DHS during this later (2/10/99) crisis episode would result in supportive services to children during her brief hospitalization and in family's reunification thereafter. DHS turned Mother's acquiescence of promised interim custodial care into the plan to terminate her parental rights. [DHS'] action was not fair under In re Valerie, [223 Conn. 492, 613 A.2d 748 (1992)][.][2]

(Emphases in original, footnote added.) In light of the record, all of these contentions are without basis in fact.

---

[2] In the case of In re Valerie, 223 Conn. 492, 613 A.2d 748 (1992), the mother's parental rights were terminated on the ground of an absence of an ongoing parent-child relationship, i.e., there was no ongoing parent-child relationship that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child. The reason there was an absence of an on going parent-child relationship was because, under a different statute, the state obtained custody of the child at birth due to the mother's use of cocaine within hours prior to beginning labor. The court concluded "that, as a matter of statutory construction, the state may not, under the circumstances of this case, obtain and maintain custody of the child so as to create a lack of an ongoing parent-child relationship[.]" The court stated, in relevant part, as follows:

> We recognize, as the petitioner points out, that the intermediate appellate courts of some other jurisdictions have approved of custodial commitment petitions, and in at least one case a termination petition, based upon prenatal drug use by the mother. See, e.g., In re Troy D., 215 Cal.App.3d 889, 263 Cal.Rptr. 869 (1989) (commitment petition); In re Solomon L., 190 Cal.App.3d 1106, 236 Cal.Rptr. 2 (1987) (both commitment and termination petitions); In re Nash, 165 Mich.App. 450, 419 N.W.2d 1 (1987) (commitment petition); In the Matter of Baby X, 97 Mich.App. 111, 293 N.W.2d 736 (1980) (commitment petition); Matter of Stefanel Tyesha C., 157 App.Div.2d 322, 556 N.Y.S.2d 280 (1990) (commitment petition). We are unpersuaded by the reasoning of these decisions because they do not rely, as do we, on a close examination of the language, constitutional background and available legislative history of the statutory framework purporting to support a petition for termination of parental rights.

VII.

Mother contends that Mother's constitutional right of appeal was prejudiced by loss of tape no. 2 of the November 20, 2001 trial. We disagree. There is no evidence of prejudice.

CONCLUSION

Accordingly, we affirm (a) the November 20, 2002 "Order Awarding Permanent Custody" terminating Mother's parental rights to, and awarding permanent custody of, Daughter and Son II to the DHS "with the subsequent goal of adoption . . . within six months of the award of permanent custody" and (b) the January 4, 2002 "Orders Concerning Child Protective Act" denying Mother's December 7, 2001 motion for reconsideration.

DATED: Honolulu, Hawai‘i, September 30, 2003.

On the briefs:

Chris C. China
for Appellant.

Chief Judge

Susan Barr Brandon,
Jay K. Goss, and
Mary Ann Magnier,
Deputy Attorneys General,
for Appellee Department
of Human Services.

Associate Judge

Associate Judge