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NO. 25074

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

IN THE INTEREST OF JOHN DOE, BORN ON MARCH 25, 1994, A MINOR

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-S NO. 94-03394)

SUMMARY DISPOSITION ORDER

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

Mother and Father appeal the March 28, 2002 order of the family court of the first circuit, the Honorable Kenneth E. Enright, judge presiding, that awarded permanent custody of their son, born on March 25, 1994 (the child), to the Department of Human Services, State of Hawai'i (DHS). Mother and Father also appeal the family court's April 5, 2002 order that denied their respective motions for reconsideration of the March 28, 2002 order.

Upon a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Mother's and Father's points of error on appeal, as follows:

*1. Mother's Appeal.*

Mother presents the following points of error on appeal:

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- A. Did the court below err on March 28, 2002 when it awarded permanent custody of the child to [DHS] without clear and convincing evidence that Mother was unable to provide a safe family home for the child, even with the assistance of a service plan?
- B. Did the court below err on March 28, 2002, by granting [DHS's] motion for an award of permanent custody and establishing a permanent plan when [DHS] failed to present a specific and thorough permanent plan for the child?

Mother's Opening Brief at 9. Mother summarizes her arguments on the foregoing points, as follows:

The court below abused its discretion by failing to recognize that Mother was willing and able to provide a safe family home for the child, even with the assistance of a service plan. Specifically, the court below failed to give adequate consideration to the following facts when deciding to terminate Mother's parental rights:

- (1) Mother's therapist at the Child Sex Abuse Treatment Program . . . informed the DHS social worker that Mother was doing "fine" in therapy and that she could provide a safe family home for the child.
- (2) The DHS social worker's opinion that the child exhibited no fear or anxiety of being with Mother during visits supervised by the DHS social worker.
- (3) Father's inability to harm the child due to his being incarcerated.
- (4) DHS had no permanent placement for the child once permanent custody was awarded.

Mother's Opening Brief at 9-10. We surmise that arguments (1), (2) and (3) relate to Mother's point of error A, and that argument (4) relates to Mother's point of error B.<sup>1</sup>

- A. Mother's essential argument on her point of error A

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<sup>1</sup> Mother also complains, without argument or elaboration, that "the court never received evidence of Father's conviction." Opening Brief at 10. Mother is simply mistaken. The record reflects that the family court admitted Exhibit 43 into evidence for the permanency trial, pursuant to stipulation of the parties, "subject to cross examination." Exhibit 43 is a certified copy of the December 3, 2001 judgment of the circuit court of the first circuit that convicted Father, upon a bench trial, of sexual assault in the first degree on the child, and sentenced him to a twenty-year, indeterminate term of imprisonment, mittimus forthwith.

is that the family court erred in its assessments of credibility and/or the weight of the evidence. However, it is well settled that "an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (citations and internal quotation marks omitted). Furthermore,

the family court is given much leeway in its examination of the reports concerning a child's care, custody, and welfare, and its conclusions in this regard, if supported by the record and not clearly erroneous, must stand on appeal.

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

Here, the evidence before the family court at the permanency trial clearly comprised "substantial evidence" to support its conclusion that Mother is not presently willing and able -- and will not become willing and able within a reasonable period of time -- to provide the child with a safe family home, even with the assistance of a service plan; and we are otherwise not "left with a definite and firm conviction that a mistake has been made." Id. (citation and internal quotation marks omitted).

Hence, the family court's conclusion was not "clearly erroneous[,]" id. (citations and internal quotation marks omitted), and we can discern no "manifest abuse of discretion" in this respect. Id. at 189, 20 P.3d at 622 (citation and internal quotation marks omitted).

B. With respect to Mother's point of error B, there is no law that requires permanent placement of the child before the

family court may terminate parental rights and approve a permanent plan. Further, there was "substantial evidence" before the family court to support its conclusion that the permanent plan proposed was in the best interests of the child, and we are otherwise not "left with a definite and firm conviction that a mistake has been made." Doe, 95 Hawai'i at 190, 20 P.3d at 623 (citation and internal quotation marks omitted). Hence, the family court's conclusion was not "clear error[,]" id. (citation omitted), and there was no "manifest abuse of discretion" in this connection. Id. at 189, 20 P.3d at 622 (citation and internal quotation marks omitted).

*2. Father's Appeal.*

Father raises numerous points of error on appeal, but they are all subsumed in the summary of argument he presents:

[The child] was interviewed by the social worker on November 9, 1998 and again on November 12, 1998. The initial interview was not videotaped or recorded. Without a videotape or an audio recording there is no way to know if [the child] was improperly influenced by the investigating social worker. Furthermore, the initial interview covered the same topics as the subsequent taped interview, including anatomical drawings, and in a [sic] effect was a rehearsal for the taped interview. The whole investigation was irreparably tainted by the social worker's failure to videotape or record the first interview with [the child].

The investigating social worker confirmed sexual abuse of [the child] by Father in November 1998. She stated that there was no reason for her to believe [the child] was being untruthful. However, further investigation would have revealed that [the child] had a history of exaggerating, distorting and fabricating incidences of aggression towards him and falsely accusing others of hurting him.

Once the sex abuse was confirmed [DHS] made no further efforts to determine if the allegation was true. The evidence showed that [the child] tells lies for attention and when confronted will eventually admit to lying. However, he was never confronted about his allegation that he was sexually abused by his Father and his statement was accepted as true.

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At the time that [the child] made the statement the [sic] his Father had sexually abused him, he was four years old with borderline intelligence and verbal delays. He had a history of lying, exaggerating, projecting blame on others, and accusing others of hurting him when in fact they did not. In view of his age, intelligence[, ] verbal delays and history, [the child's] statements are not reliable.

DHS unilaterally discontinued [the child's] therapy with the therapist chosen by his parents. At the time DHS terminated the therapist, he was recommending visits between [the child] and his parents. After therapist was terminated [the child] was isolated and alienated from his parents.

Mother is able to provide a safe home for [the child]. Mother's sex abuse therapist, the person most qualified to determine if Mother is able to protect [the child] from being sexually abused, advised the social worker and her supervisor that Mother is able to provide a safe home for [the child].

The permanent plan with the goal of adoption is not in the best interests of the child. There was no permanent plan because no prospective adoptive home had been identified. The child is strongly bonded to his Mother. Mother's sex abuse therapist has stated that Mother is able to provide a safe home for the child.

The evidence was not clear and convincing that Mother is not presently willing and able to provide the child with a safe home with the assistance of a service plan. Furthermore, DHS isolated and alienated [the child] from his parents. Finally, the evidence was not clear and convincing that the Permanent Plan was in the best interest of the child.

Father's Opening Brief at 17-18.

A. Father first assails the family court's predicate finding that he sexually abused the child. However, the family court<sup>2</sup> conducted evidentiary hearings on the issue before the permanency trial was held, and found that the child had been sexually abused and that Father was the perpetrator. There was "substantial evidence" presented at the hearings to support the family court's findings of fact, and we are otherwise not "left with a definite and firm conviction that a mistake has been

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<sup>2</sup> The Honorable Robert Mark Browning, judge presiding.

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made." Doe, 95 Hawai'i at 190, 20 P.3d at 623 (citation and internal quotation marks omitted). Hence, the family court's findings of fact were not "clearly erroneous[.]" Id. (citation and internal quotation marks omitted). Furthermore, at the permanency trial, the family court had before it Exhibit 43, in evidence by stipulation of the parties, a certified copy of the December 3, 2001 judgment of the circuit court of the first circuit that convicted Father, upon a bench trial, of sexual assault in the first degree on the child, and sentenced him to a twenty-year, indeterminate term of imprisonment.

B. Father also argues that Mother is able to provide a safe home for the child, and that the permanent plan proposed was not in the child's best interests. In light of our discussions in sections 1.A. and 1.B., respectively, supra, we disagree with Father.

Therefore,

IT IS HEREBY ORDERED that the March 28, 2002 order and the April 5, 2002 order of the family court are affirmed.

DATED: Honolulu, Hawai'i, February 17, 2004.

On the briefs:

Thomas A. K. Haia, for  
mother-appellant-cross-appellee. Acting Chief Judge

Jeffry R. Buchli, for  
father-appellee-cross-appellant. Associate Judge

Susan Barr Brandon, Jay K. Goss  
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