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NO. 25929

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

IN THE INTEREST OF DOE CHILDREN:
JANE, Born on August 22, 1994, and
JOHN, Born on September 18, 1995

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 97-04899)

MEMORANDUM OPINION

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

The appellant in this termination of parental rights case is the father (Father) of the two children in this case. Father appeals from the February 25, 2003 Order Awarding Permanent Custody, February 25, 2003 Letters of Permanent Custody, and June 17, 2003 Orders Concerning Child Protective Act entered by Judge Linda K. C. Luke in the Family Court of the First Circuit.

Stated chronologically, the relevant events occurred as follows:

On September 14, 1990, Father was convicted of a crime, sentenced as a repeat offender, and re-sentenced for prior offenses to prison for concurrent ten-year indeterminate terms and mandatory minimum terms of three years and six months.

On March 30, 1993, Father was released from prison on parole.

On August 22, 1994, the mother (Mother) of the two children in this case gave birth to Jane Doe (Jane).

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On September 18, 1995, Mother gave birth to John Doe (John).

Father and Mother have a "history of drug use and neglect[.]"

In November 1996, Father's parole was revoked.

In July 1997, when John and Jane were abandoned by Mother for the second time in 1997, the State of Hawai'i Department of Human Services (DHS) assumed foster custody of John and Jane.

On October 10, 1997, Father was convicted of two crimes and sentenced as a repeat offender to prison for a maximum term of ten years and a minimum term of three years and four months.

In May 1999, John and Jane were returned to the custody of Mother.

On January 26, 2000, Father was released from prison on parole.

Unchallenged finding of fact no. 16 states: "Mother passed away on her birthday, October 3, 2001, due to an overdose of crystal methamphetamine."

On November 19, 2001, the police found Jane in a drug house, but could not locate Father. Jane was placed in the custody of her maternal aunt (Maternal Aunt).

On December 13, 2001, Father was arrested for violation of his parole. Thereafter, his parole was revoked for possession

of drugs and July 2003 was the earliest Father could again be released on parole.

On December 14, 2001, the DHS placed Jane in the foster care of Maternal Aunt.

On December 18, 2001, John was placed in the foster care of his paternal grandmother (Paternal Grandmother), the person with whom he had been living.

On November 22, 2002, John was placed in the foster custody of Maternal Aunt and her husband because Paternal Grandmother was no longer able to maintain a safe home for him.

On February 24, 2003, the contested permanent plan hearing was held and Father did not testify.

On February 25, 2003, the court entered the Order Awarding Permanent Custody ordering into effect the February 13, 2003 Permanent Plan for Jane and the February 13, 2003 Permanent Plan for John, with the long term goal of both plans being adoption. The court also filed the Letters of Permanent Custody of Jane and John to the State of Hawai'i Director of Human Services.

On March 10, 2003, the court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL).

On June 17, 2003, the hearing on Father's March 10, 2003 motion for reconsideration was held. Counsel for Father advised the court that Father would be released from prison on July 9, 2003, and the court entered its Orders Concerning Child

Protective Act denying Father's motion.

On June 27, 2003, Father filed a notice of appeal.

On March 25, 2004, the appeal was assigned to this court.

DISCUSSION OF FATHER'S POINTS ON APPEAL

Upon a review of the record, we decide as follows:

A. FOF no. 18 states: "Father reportedly told friends at Mother's funeral that he kept Mother alive for a year by giving her crystal methamphetamine." FOF no. 18 is not a finding. Therefore, we order it to be deleted from the FsOF.

B. Father's challenge of FsOF nos. 33, 43, and 44, and COL no. 3¹ are without merit.

¹ Finding of fact (FOF) no. 33 states as follows:

Father did not communicate with DHS [Department of Human Services] about services he may have completed in prison, and did not consent to his prison social worker disclosing information to DHS although court-ordered to do so.

FOF no. 43 states as follows:

Father is not presently willing and able to provide the children with a safe family home, even with the assistance of a service plan, because his problems posing threatened harm to the children continue to exist.

FOF no. 44 states as follows:

It is not reasonably foreseeable that Father will become willing and able to provide the children with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed two years from the time foster custody was first ordered by the court (March 27, 2004).

Conclusion of law no. 3 states as follows:

It is not reasonably foreseeable that [Father] will become willing and able to provide the children with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed two years from the date upon which the children were first placed under foster custody by the court.

C. Father's contention "that DHS could not have met its burden of proving by clear and convincing evidence that Father was not willing and able to provide [Jane and John] with a safe family home, even with the assistance of a service plan because the testimony offered by the State's witnesses simply did not support this conclusion" is without merit.

D. Father's contention that the Honolulu Police Department's November 19, 2001 removal of Jane from the family home and placement of Jane with Maternal Aunt (and not with the DHS), was without statutory authority or Father's consent, and violated (1) Hawaii Revised Statutes (HRS) § 587-22(b) (Supp. 2003)² and (2) Father's HRS § 587-2 (1993)³ and fourteenth

² Hawaii Revised Statutes (HRS) § 587-22 (Supp. 2003) states, in relevant part, as follows:

Protective custody by police officer without court order.

(a)

A police officer may assume protective custody of the child without a court order and without the consent of the child's family regardless of whether the child's family is absent, if in the discretion of the police officer:

- (1) The child has no legal custodian who is willing and able to provide a safe family home for the child[.]

. . . .

(b) A police officer who assumes protective custody of a child immediately shall complete transfer of protective custody to the [DHS] by presenting physical custody of the child to the [DHS]

(c) Upon the completion of the transfer of protective custody of a child by a police officer to the [DHS], the [DHS] shall automatically assume temporary foster custody of the child.

³ HRS § 587-2 (1993) states, in relevant part, as follows:

"Foster custody" means the legal status created pursuant to this section, section 587-21(b)(2), or by an order of court after the court has determined that the child's family is not presently

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willing and able to provide the child with a safe family home, even with the assistance of a service plan.

- (1) Foster custody vests in a foster custodian the following duties and rights:
 - (A) To determine where and with whom the child shall be placed in foster care; provided that the child shall not be placed in foster care outside the State without prior order of the court; provided further that, subsequent to the temporary foster custody hearing, unless otherwise ordered by the court, the temporary foster custodian or the foster custodian may permit the child to resume residence with the family from which the child was removed after providing prior written notice to the court and to all parties, which notice shall state that there is no objection of any party to the return; and upon the return of the child to the family, temporary foster custody, or foster custody automatically shall be revoked and the child and the child's family members who are parties shall be under the temporary family supervision or the family supervision of the former temporary foster custodian or foster custodian;
 - (B) To assure that the child is provided in a timely manner with adequate food, clothing, shelter, psychological care, physical care, medical care, supervision, and other necessities;
 - (C) To monitor the provision to the child of appropriate education;
 - (D) To provide all consents which are required for the child's physical or psychological health or welfare, including, but not limited to, ordinary medical, dental, psychiatric, psychological, educational, employment, recreational, or social needs; and to provide all consents for any other medical or psychological care or treatment, including, but not limited to, surgery, if the care or treatment is deemed by two physicians or two psychologists, whomever is appropriate, licensed or authorized to practice in this State to be necessary for the child's physical or psychological health or welfare, and the persons who are otherwise authorized to provide the consent are unable or have refused to consent to the care or treatment;
 - (E) To provide consent to the recording of a statement pursuant to section 587-43; and
 - (F) To provide the court with information concerning the child that the court may require at any time.

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amendment right to make decisions concerning the care, custody, and control of his children, is not relevant to the appeal from the February 25, 2003 Order Awarding Permanent Custody.⁴ For that reason, we disagree with Father's contention that, "[a]t a minimum, these violations should be sufficient to compel this Court to remand this matter to the Family Court for further proceedings, i.e., to permit Father to appoint a legal guardian for his Children."

- (2) The court, in its discretion, may vest foster custody of a child in any authorized agency or subsequent authorized agencies, in the child's best interests; provided that the rights and duties which are so assumed by an authorized agency shall supersede the rights and duties of any legal or permanent custodian of the child, other than as is provided in paragraph (4).
- (3) An authorized agency shall not be liable to third persons for the acts of the child solely by reason of the agency's status as temporary foster custodian or foster custodian of the child.
- (4) Unless otherwise ordered by the court, a child's family member shall retain the following rights and responsibilities after a transfer of temporary foster custody or foster custody, to the extent that the family member possessed the rights and responsibilities prior to the transfer of temporary foster custody or foster custody, to wit: the right of reasonable supervised or unsupervised visitation at the discretion of the authorized agency; the right to consent to adoption, to marriage, or to major medical or psychological care or treatment, except as provided in paragraph (1)(D); and the continuing responsibility for support of the child, including, but not limited to, repayment for the cost of any and all care, treatment, or any other service supplied or provided by the temporary foster custodian, the foster custodian, or the court for the child's benefit.

⁴ Father's amended opening brief states, in relevant part:

Father also concedes that HPD (Honolulu Police Department) would have been well within its prerogative to remove Jane, book her, and turn her over to DHS for placement. However, in this instance, that did not happen. For approximately twenty-five days, Jane was without a legal guardian when HPD placed her with maternal aunt without statutory authority to do so and without Father's consent. This was clearly a violation of Father's Constitutionally-protected interest.

E. Father's contention that the DHS and the family court violated Father's residual parental rights when they failed to allow him to appoint a legal guardian for his children is without basis in fact or law. At the June 17, 2003 hearing on Father's motion for reconsideration, counsel for Father argued, in relevant part, as follows:

His argument is, Why is it that the [DHS] refuses to allow him to appoint a guardian or to consent to an adoption if his mother or another relative wanted to adopt the children or establish a guardianship over the children, or even listen to his choice of where he would like the children placed[?]

In the amended opening brief,

Father urges this Court to find that his "HRS §587-2" residual parental rights and responsibilities include, at a minimum, his right to appoint a legal guardian for his children. It is logical that a parent, whose children are in foster custody, be able to consent to guardianship of the children, if the parent is able to consent to marriage or adoption, pursuant to statute.

Moreover, in support of Father's argument, HRS §560:5-207(a)(2) . . . requires that "any living legal parent" be given notice of an impending guardianship. Counsel is unable to find provisions for "waiving" the notice requirement, even if the intended ward is in "foster custody" status. . . .

Father asserts that it is logical for a parent, whose child is in foster custody, to be able to consent to a guardianship, because the parent is entitled to notice.

Father asserts that his residual parental rights were intact, up to and including the date of the permanent custody trial. Father should have been allowed to appoint a legal guardian or guardians for the Children. However, this option was never presented to Father and was not explored by DHS or permitted by the Family Court.

Father did not raise this issue until the June 17, 2003 hearing on his motion for reconsideration, long after the family court had entered its February 25, 2003 Order Awarding Permanent Custody divesting Father of his "parental and custodial duties and rights . . . pursuant to HRS 587-2 and 587-73[.]" By then, even assuming it had some merit, it was moot.

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CONCLUSION

Accordingly, we affirm the February 25, 2003 Order Awarding Permanent Custody, February 25, 2003 Letters of Permanent Custody, and June 17, 2003 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, January 24, 2005.

On the briefs:

Thomas A.K. Haia
for Father-Appellant.

Chief Judge

Susan Barr Brandon and
Mary Anne Magnier
Deputy Attorneys General,
for Petitioner-Appellee.

Associate Judge

Associate Judge