

NOT FOR PUBLICATION

NO. 26481

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

IN THE INTEREST OF JOHN DOE,
Born on March 2, 2003, a Minor

NOHMAI YARA
CLERK, INTERMEDIATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 03-08892)

SUMMARY DISPOSITION ORDER

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

The father (Father) of John Doe, born on March 2, 2003, appeals from the following orders entered in the Family Court of the First Circuit by Judge Linda K.C. Luke: the February 20, 2004 Order Awarding Permanent Custody, the February 20, 2004 Letters of Permanent Custody, and the March 5, 2004 Orders Concerning Child Protective Act.

The relevant events occurred as follows:

- March 2, 2003 John Doe was born. His mother (Mother) tested positive for crystal methamphetamine.
- March 14, 2003 A drug assessment showed that Mother suffers from amphetamine dependence. Mother admits that she has been unsuccessful in abstaining from methamphetamine usage and will continue to use when under stress.
- March 24, 2003 Mother tested positive for amphetamine and methamphetamine.
- March 25, 2003 John Doe was removed from Mother and placed with Father. A few hours after John Doe was placed with Father, Father allowed John Doe to stay with Mother.
- March 27, 2003 John Doe was removed from Father, taken into police protective custody, and placed in a

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foster home licensed by the State of Hawai'i Department of Human Services (DHS).

April 7, 2003 The court granted the April 1, 2003 petition by the DHS for temporary foster custody of John Doe.

September 9, 2003 The following are unchallenged facts stated in the Findings of Fact and Conclusions of Law entered by the court on March 15, 2004:

70. Due to Father's progress in his services, the DHS arranged an unsupervised overnight visit between Father and [John Doe] for September 9, 2003.

71. After six months of working with the DHS and engaging in appropriate services, within hours, Father again allowed Mother unauthorized contact with [John Doe] during his unsupervised overnight visit.

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73. When confronted by the DHS on September 10, 2003, about the unauthorized contact, Father was intentionally deceptive and denied that he allowed Mother to have contact with [John Doe].

74. Only after being told that the DHS received information about the unauthorized contact did Father admit to allowing Mother to see [John Doe].

September 18, 2003 The DHS moved for an order awarding it permanent custody and establishing a permanent plan.

February 20, 2004 The court entered an Order Awarding Permanent Custody, thereby effectuating the September 15, 2003 Permanent Plan. In relevant part, that permanent plan states that "[t]he goal for this child is Adoption. At the present time, the DHS is not considering family members due to concerns relating to their ability to be protective of him."

The court also entered Letters of Permanent Custody.

February 24, 2004 Father filed a motion for reconsideration. One of his arguments was that "[t]he reasons for not placing [John Doe] with his paternal relatives are specious."

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March 5, 2004 The court entered its Orders Concerning Child Protective Act. This order stated, in relevant part:

Based upon the record and/or the evidence presented, the Court finds that:

. . . .

B. Father's inability to say no to Mother leaves Father inadequate to protect [John Doe] from harm.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Father's Motion for Reconsideration filed 2/24/04 is denied;
2. DHS shall consider all applicants for placement including paternal grandmother; the court shall review the DHS' placement decision[.]

March 15, 2004 The court entered its Findings of Fact and Conclusions of Law.

March 31, 2004 Father filed his notice of appeal.

December 8, 2004 This appeal was assigned to this court.

In his opening brief, Father summarizes his grounds for this appeal as follows:

The granting of permanent custody was premature. John [Doe] was in court ordered foster custody for approximately five and a half months at the time the Motion for Permanent Custody was filed. John [Doe] had been in court ordered foster custody for only ten months when the Court granted the Motion for Permanent Custody. A Permanent Plan Hearing is not required until a child has been residing out of the home for fifteen of the last twenty-two months.

The service plans offered by DHS and ordered by the court was [sic] not timely and comprehensive. The psychological evaluation was not ordered until approximately three months after the Motion for Permanent Custody was filed. The services recommended by the psychological evaluation were not offered or provided to Father.

The evidence was not clear and convincing that Father was unwilling and unable to provide a safe home for [John Doe]. Father had fully complied with the service plan. Father testified that he could be protective of John [Doe]. Father had taken action to prevent Mother from contacting him. He stopped his cell phone service so Mother could not call him. Father would file a TRO against Mother if she persisted in attempting to contact him.

The DHS did not exert reasonable efforts to reunite Father with John [Doe]. The DHS did not take into consideration that

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English was not Father's first language. The DHS did not request a psychological evaluation of Father until the Volunteer Guardian Ad Litem requested it. The DHS did not offer or provide Father with the services recommended by the psychological evaluation.

It was an abuse of discretion to order the Permanent Plan under the circumstances of this case. The Permanent Plan of adoption by non-family members was not in John's best interests.

It appears that Father fails to recognize that although the March 5, 2004 Orders Concerning Child Protective Act stated that it denied Father's motion for reconsideration, it amended the September 15, 2003 Permanent Plan by requiring the DHS to consider all applicants for placement, including paternal grandmother.

The following challenged finding of fact is not clearly erroneous:

76. Father's inability to say "no" to Mother renders him inadequate to protect [John Doe] from further exposure to threatened harm.

In addition to Finding of Fact nos. 70, 71, 73, and 74 quoted above, the following are unchallenged findings of fact:

80. Father suffers from a mood disorder, not otherwise specified.
84. Although Father may understand the developmental capabilities of children, he does not appear to have an empathic awareness of [John Doe's] needs or how to meet those needs.
86. Father presents as a very needy parent who views his child as a way to meet his own needs.
91. Despite successful completion of a parenting class in November of 2003, Father's psychological evaluation done on December 16, 2003 recommends that Father participate in parenting classes to understand his child's needs.
92. Father's lifestyle is more like that of a teenager than of a responsible adult parent of an infant as he has few responsibilities and spends much of his free time with friends.

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In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and having given due consideration and analysis to the laws relevant to the issues raised and arguments made, we agree with the family court that, on February 20, 2004, it was "not reasonably foreseeable that [Father] [would] become willing and able to provide [John Doe] 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 April 7, 2003 date upon which John Doe was first placed under foster custody by the court.

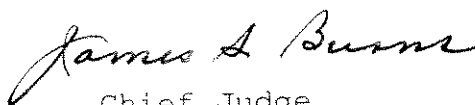
Therefore, IT IS HEREBY ORDERED that the February 20, 2004 Order Awarding Permanent Custody, the February 20, 2004 Letters of Permanent Custody, and the March 5, 2004 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, March 31, 2005.

On the briefs:

Jeffrey R. Buchli
for Father-Appellant

Nicole K. Cummings and
Mary Anne Magnier,
Deputy Attorneys General
for Petitioner-Appellee


Chief Judge


Associate Judge


Associate Judge