

NOT FOR PUBLICATION

NO. 26475

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

IN THE INTEREST OF DOE CHILDREN:
JOHN DOE, Born on March 27, 1997, and
JANE DOE, Born on July 19, 1998, Minors.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 02-08025)

NORRHA L. YARA
CLERK APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

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

In this termination of parental rights case, the mother (Mother) of a male child (John Doe), born on March 27, 1997, and a female child (Jane Doe), born on July 19, 1998, appeals from the family court's¹ December 19, 2003 Order Awarding Permanent Custody and February 27, 2004 Orders Concerning Child Protective Act.

Two adult males are involved in this case. One is the father (Father) of John and Jane Doe. The other is Mother's husband, who is the stepfather of John and Jane Doe (Stepfather) and the natural and legal father of a male child (Stepbrother), born on December 28, 1989, and a male child (Halfbrother), born on March 23, 2002.

The relevant events occurred in the following order:

- December 28, 1989 Stepbrother was born. Mother is not Stepbrother's natural mother.
- August 24, 1994 Mother gave birth to a male child, tested positive for methamphetamine, and was

¹ Judge Paul T. Murakami presided.

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essentially homeless. Mother entered into a voluntary service plan with the State of Hawai'i Department of Human Services (DHS) and participated in residential substance abuse treatment and other services.

- September 26, 1995 The male child born on August 24, 1994 died of suffocation due to food obstructing his respiratory tract.
- March 27, 1997 Mother gave birth to John Doe.
- July 19, 1998 Mother gave birth to Jane Doe.
- January 22, 2002 Stepbrother and John and Jane Doe were placed in a foster home licensed by the DHS. At the time, Stepfather was Mother's boyfriend. Prior to the trial, they were married.
- January 25, 2002 The DHS filed a Petition for Temporary Foster Custody of John and Jane Doe.
- January 29, 2002 Per stipulation, the family court² entered its Orders Concerning Child Protective Act awarding foster custody of John and Jane Doe to DHS, and ordering the January 25, 2002 service plan.
- March 23, 2002 Mother gave birth to Halfbrother. Stepfather is the natural and legal father of Halfbrother.
- June 2002 Mother was arrested and subsequently convicted of Abuse of Family and Household Member, namely Stepfather. The DHS assumed foster custody of Stepbrother and temporary foster custody of Halfbrother.
- April 4, 2003 Halfbrother died.
- December 18, 2003 The first day of trial.
- December 19, 2003 The second day of trial.
- The court entered its Order Awarding Permanent Custody in which it ordered the

² Judge Marilyn Carlsmith presided.

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December 16, 2002 Permanent Plan into effect. The goal of this plan was the adoption of Stepbrother, John and Jane Doe, and Halfbrother. The court also entered its Letters of Permanent Custody to the State of Hawai'i Director of Human Services.

January 7, 2004 Mother filed a motion for reconsideration.

February 27, 2004 The family court entered its Orders Concerning Child Protective Act denying Mother's motion for reconsideration.

March 24, 2004 Mother filed a notice of appeal.

April 2004 In this month, Mother was expected to give birth to another child.

May 4, 2004 The family court entered its Findings Of Fact and Conclusions of Law.

October 28, 2004 This appeal was assigned to this court.

There are 169 findings of fact (FOF). Mother appeals from the following nine.

FOF nos. 151 and 152 state as follows:

151. Mother is not presently willing and able to provide the Children with a safe family home, even with the assistance of a service plan because her foregoing problems continue to exist. She has frustrated and failed to benefit from the services that have been provided to her since the start of the case.

152. It is not reasonably foreseeable that Mother will become willing and able to provide the Children with a safe family home, even with the assistance of a service plan because even if Mother were to suddenly change her long standing pattern of behavior, there is no likelihood that she would sufficiently resolve her problems at any identifiable point in the future.

Mother contends that "[t]he record is insufficient to prove by clear and convincing evidence that [Mother] was unable or unwilling to provide a safe home because [Mother] had completed all required services."

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FOF nos. 116, 129, and 131 state as follows:

116. Despite participating in a parenting education class and an anger management class and completing these classes in the Summer of 2002, Stepfather showed that he did not benefit from these classes due to his inappropriate parenting and inappropriate use of physical discipline of [Stepbrother] in the Fall of 2002.

129. Although there has been testimony that Stepfather has made positive changes in controlling his anger, the court does not place much weight on the testimony of [Stepfather's neighbor] and [Mother's cousin], and [decides that] the testimony of Stepfather and Mother regarding Stepfather's anger management not to be credible.

131. Stepfather has not demonstrated that he has made appropriate lifestyle changes to care for the special needs of the Children and to parent them without resorting to inappropriate discipline. Stepfather continues to be a risk of harm to the Children.

Mother contends that "credible testimony showed that [Stepfather] had made changes regarding his anger.

FOF nos. 148 and 163 state as follows:

148. The court does not find Mother's testimony that she can protect the Children from Stepfather to be credible.

163. Mother and Stepfather are found by the court not to be credible witnesses.

Mother contends that "she could be protective of the minors with [Stepfather] in the family home."

FOF nos. 153 and 154 state as follows:

153. The goal of the proposed permanent plan is adoption, which is in the best interests of the Children.

154. The proposed permanent plan facilitates and assists in the achievement of the goal of the permanent plan.

Mother contends that "[t]he Permanent Plan dated December 16, 2002 is not in the children's best interest because it does not address the death of [Halfbrother] while in the prospective adoptive home."

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Mother states that her appeal presents the following questions:

1. Is there clear and convincing evidence that Mother is unwilling and unable to provide a safe home for her children because her husband [Stepfather] has an anger problem that poses a risk of harm to her children?

2. Is there clear and convincing evidence that Mother is unwilling and unable to provide a safe home for her children because she is unable to be protective of the children against her husband [Stepfather]?

3. Whether the permanent plan is inappropriate to assess the best interests of the children when the plan was prepared while [Halfbrother] was alive?

Mother's appeal is focused on the question as to whether she is able to protect John and Jane Doe against Stepfather, her husband. In our view, that is only a part of the problem. The unchallenged findings show that both John and Jane Doe are special needs children and that Mother is unable to provide them with a safe family home. The following findings are among those that Mother did not challenge:

69. . . . There appears to be no appropriate services or combination of services that would allow [John Doe], taking into account his psychological condition that would allow him to be reunified with Mother and/or Father.

92. . . . There appears to be no appropriate services or combination of services that would allow [Jane Doe,] taking into account her psychological condition that would allow [her] to be reunified with Mother and/or Father.

142. Based on the psychological evaluation by Dr. Wingert, Mother was shown to suffer from Features of Dysthymic Disorder (a form of depression).

144. In the parenting assessment, Mother presented with a profile consistent with a person who was at increased risk for physical child abuse.

149. Mother cannot be reunified with [John and Jane Doe] due to their psychological needs (including the needs of [John and Jane Doe] to be placed together). Further reunification efforts would cause [John and Jane Doe] to suffer further psychological harm and may set back any gains they made in therapy.

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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 duly considering and analyzing the law relevant to the arguments and issues raised by Mother, we conclude that Mother's points do not have merit. Therefore,

IT IS HEREBY ORDERED that the family court's December 19, 2003 Order Awarding Permanent Custody and February 27, 2004 Orders Concerning Child Protective Act are affirmed.

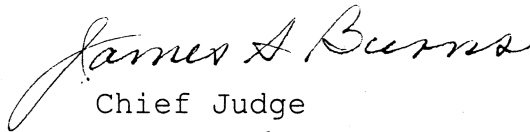
DATED: Honolulu, Hawai'i, April 18, 2005.

On the briefs:

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for Mother-Appellant

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Dean T. Nagamine
Guardian Ad Litem


Chief Judge


Associate Judge


Associate Judge