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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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IN THE INTEREST OF AS

SCWC-11-0001065

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0001065; FC-S NO. 08-11941)

February 14, 2014

CONCURRING OPINION BY ACOBA, J., IN WHICH POLLACK, J., JOINS

The purpose of HRS Chapter 587A is set forth in Hawai'i Revised Statutes (HRS) § 587A-1, and includes the following statements:

"The legislature recognizes that many relatives are willing and able to provide a nurturing and safe placement for children who have been harmed or threatened with harm 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 shall be given to the religious, cultural, and ethnic values of the child's legal custodian when service plans are being discussed and formulated This chapter shall be liberally construed to serve the best interest of the children affected and the purpose and policies set forth herein."

The purpose of HRS § 587A-1 plainly incorporates the central role of relatives,¹ who often may also occupy the role of legal guardian.

Under the present Child Protective Act, DHS can assume custody of a child either (1) when the police take custody of a child due to a threat of imminent harm, HRS § 587A-9(1), or (2) by receiving a report that a child is subject to harm and conducting an investigation, HRS § 587A-11, and subsequently filing a petition with the court. HRS §§ 587A-9(5)(C); 587A-11 § 571A-11(7). When the DHS assumes immediate custody under either section, preference is given to place the child in an emergency placement with "an approved relative." HRS §§ 587A-9(3), 587A-11(6) (emphasis added).

Once the DHS assumes foster custody, HRS § 587A-10 provides that it "shall make reasonable efforts to identify and notify all relatives of the child within thirty days." HRS § 587A-10 (emphasis added). Further, DHS must "provide the child's relative an application to be the child's resource family [i.e., foster parent,] within fifteen days of the relative's request," (emphasis added), and, if the application is denied, DHS "shall provide the applicant with the specific reasons for the denial

¹ "Relative" is defined as: "a person related to the child by blood or adoption, or a hanai relative as defined in this chapter, who, as determined by the court or the [Department of Human Services (DHS)], is willing and able to safely provide support to the child and the child's family." HRS § 587A-4.

and an explanation of the procedures for an administrative appeal." Id.

Accordingly, the statutes indicate that kinship is often determinative in an emergency and in foster parent placements before the permanency decision. See HRS § 587A-11(6) and HRS § 587A-10. Therefore, under the statutory framework, if a child is placed with a relative at the inception of intervention by DHS, custody of the child may likely be with kin through parental termination proceedings, and potentially thereafter as well.

Within 12 months of the child's entry into foster care, the court must conduct a permanency hearing. At a permanency hearing, the court must make findings as to "[w]hether the current placement of the child continues to be appropriate and in the best interests of the child or if another . . . placement should be considered." HRS § 587A-31(c)(2).

Thus, assuming the preference for relatives is established in the emergency and subsequent foster parent stages, such preference will be maintained if "the current placement of the child continues to be appropriate and in the best interest of the child."

The court must order either (1) reunification (with the birth parent), HRS § 587A-31(d)(1), (2) the child's continuing placement in foster care, if "reunification is expected to occur

within a time frame that is consistent with the developmental needs of the child", HRS § 587A-31(d)(2)(A); or (3) a permanent plan. HRS § 587A-31(d)(3).

Once the child has been in foster care for either 12 consecutive months or 15 out of the most recent 22 months, and presumably a permanent plan has been filed, DHS must file a motion to terminate parental rights, unless, inter alia, such a motion is not in the best interest of the child. HRS § 587A-31(g)(1). At the termination hearing, the permanent plan will be adopted if, (1) the child's parents cannot provide a safe family home, (2) the child's parents will not be able to provide a safe family home within two years of the child's entry into foster care, (3) the proposed permanent plan is in the best interests of the child, and (4) the child consents to the proposed permanent plan if the child is fourteen or older. HRS § 587A-33(a).

The permanent plan then must explain that the permanency goal is either adoption, legal guardianship, or permanent custody, and if the goal is not adoption, present a compelling reason why the alternate goal is in the child's best interests. HRS § 587A-32. The permanent plan may establish "other related goals, include those pertaining to the stability of the child's placement; education; health; therapy; counseling; relationship with the child's birth family, including visits, if

any; cultural connections; and preparation for independent living.” HRS § 587A-32(4) (emphasis added).

While widely employed, “the best interests of the child” test invites subjective judgments and factors in the evaluation of what is in the best interest of the child.² Kinship, as exemplified in the statutes, is an anchoring proposition in the sea of circumstances considered in the decision as to adoption, legal guardianship or permanent custody. DHS and the family court are vested with considerable discretion. In that regard, the statutes do not preclude weighing kinship as a substantial factor in considering with whom a child should be placed under a permanent plan. See HRS § 587A-32.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack



² There is no definition of “best interests of the child” in HRS Chapter 587A.