***** NOT FOR PUBLICATION *****

NO. 22815

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JANE DOE, Petitioner-Appellant,

vs.

JOHN DOE, Defendant-Appellee.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-P NO. 95-0287)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,
and Circuit Judge Kochi, assigned by reason of vacancy)

Mother appeals from the July 28, 1998 and August 16, 1999 orders of the Family Court of the First Circuit, the Honorable Darryl Y.C. Choy presiding. With respect to the July 28, 1998 order, Mother claims that the family court erred by: (1) finding that Father was a fit and proper parent; (2) finding that Father did not sexually abuse Child; (3) granting Father "Type B" visitation, as defined in the Guidelines for Visitation Schedules published in the Hawai'i Divorce Manual; and (4) denying Mother's motion for reconsideration. With respect to the August 16, 1999 order, Mother claims that the family court erred in denying Mother's motion to set aside the December 17, 1998 entry of default and default judgment. Based on the

following, we affirm the family court's July 28, 1998 order and reverse its August 16, 1999 order.

I. BACKGROUND

Child was born on November 3, 1994. On March 9, 1995, Mother filed a petition to establish paternity. On June 14, 1995, a stipulated judgment was filed in which Father acknowledged paternity, Mother was granted sole legal and sole physical custody, and Father was granted supervised visitation. Later, on August 17, 1995, Father was granted unsupervised visitation.

On May 3, 1996, Father filed a motion seeking additional visitation, including overnight visitation. Mother opposed Father's motion and, in an affidavit, alleged concerns about Father sexually abusing Child. Mother attached to her affidavit a letter by Sue A. Lehrke, Child's psychologist that also indicated concerns of physical or sexual abuse based upon Mother's reports and a videotape, secretly taken by Mother, of Father picking up Child for a visit in March 1996.

On April 18, 1997, the family court appointed Margaret G. Smith as co-guardian ad litem to investigate the case and prepare a report with recommendations as to custody, visitation, and the allegations of abuse. The order also required that "interviews of the child regarding the sex abuse allegations, if any, shall be conducted only as arranged by the child protective service/law enforcement investigation team through the Children's

Advocacy Center pursuant to Chapter 588, Hawaii Revised Statutes, or by Ms. Smith."

On June 18, 1997, Smith filed her report and recommendations with the court. Smith concluded, inter alia, that: (1) there was no evidence that Child was frightened of or hesitant to be in the company of Father; (2) other than the uncorroborated reports of Mother and Child's maternal grandmother, there was no evidence that Father had sexually or otherwise abused Child; and (3) there was no evidence to support limiting Father's access to Child. Smith's recommendations to the court included: (1) Mother and Father share legal custody of Child; (2) Father receive additional visitation on Wednesday afternoons after an assessment of Father's alcohol usage and consultation with Father's therapist, Child's therapist, and the guardian ad litem; and (3) Father be allowed overnight visitation after Child's third birthday and upon consultation with the parties' therapists and the guardian ad litem.

A letter by Dr. Carol T. Hartley, Child's physician, was also filed with the court on June 18, 1997. Hartley reported no physical evidence of sexual or physical abuse, and stated that, while it was not unreasonable to suspect child abuse, "given the lack of cooperation and communication between mother and father, it is equally likely that [Mother's] suspicions of abuse . . . are unfounded." Hartley recommended that Mother, Father, and Child be closely supervised and continue to receive

"supportive services," including parenting classes and counseling.

On November 4, 1997, a stipulated judgment was filed in which the parties agreed that, inter alia: (1) Mother retain sole legal and sole physical custody; (2) any future changes in Father's visitation schedule would be at the recommendation of the guardian ad litem after consulting with all therapists; (3) prior to any increase in visitation, an assessment of Father's alcohol and illegal substance usage shall be provided to the guardian ad litem; (4) overnight visitation may be added, upon approval of the guardian ad litem, after Child turns three; and (5) each of the parties shall enter into therapy with a licensed mental health professional until clinically discharged. The stipulated judgment contained no specific findings or conclusions regarding the allegation of sexual abuse.

A. The Family Court's July 28, 1998 Order

On February 27, 1998, Mother filed a motion to modify the custody and visitation terms because she had been transferred by her employer to Charlotte, North Carolina. In response, on March 3, 1998, Father moved for custody of Child subject to reasonable visitation by Mother. Before the hearing on either of the parents' motions regarding custody of Child, Mother moved to North Carolina and was subsequently given permission to do so by the court.

1. Supplemental Report by the Guardian Ad Litem

On March 5, 1998, Smith filed a supplemental report with the court observing, inter alia, that Child's preschool had written a report regarding Child's behavior at Mother's request, although the school was not concerned about sexual abuse. Smith also reported that, on March 4, 1998, Aimee McCullough, Child's court-appointed therapist, indicated that she had concerns that Child was being sexually abused by Father. However, McCullough would not disclose the basis for her concerns to Smith. Based upon her findings, Smith recommended, inter alia, that joint legal custody be awarded and that a social study be completed to determine whether it was in Child's best interest to remain in Mother's physical custody. Smith's recommendations further indicated that such a study "may include a psychological evaluation of [Mother] to rule out parent[al] alienation and Munchausen's by proxy."[1]

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[1] McCullough described Munchausen's by proxy, also referred to as factitious disorder by proxy, as,

> a disorder where the mother will continually bring the child in with new symptoms and -- and new pathology and presenting the child.
>
> The basis is she presents the child as pathologized (sic) that the child is a sick child and that's the presentation and that she has to find the cure for this sickness.
>
> It's usually a medical situation where they -- they find all these different pains and sometimes they even inject the child with drugs so that it looks like there's a medical problem.
>
> And they continually go from doctor to doctor to doctor presenting different symptoms and different problems
>
> And if one is solved they come up with another problem.

2. Hearing on February 27, 1998

A consolidated hearing on Mother's February 27, 1998 and Father's March 3, 1998 motions was held on June 22, 1998. At the hearing, the court received into evidence: (1) a prior report by Smith, dated October 10, 1997; (2) a report by Kim McKillop, Child's preschool teacher, dated February 19, 1998; (3) McCullough's curriculum vitae; (4) a curriculum vitae of Silke Vogelmann-Sine, Mother's therapist; a supplemental report by McKillop, dated April 1, 1998; and (5) a report by Vogelmann-Sine, dated June 19, 1998.

At the hearing, the court heard testimony by: (1) Vogelmann-Sine; (2) McKillop; (3) McCullough; (4) Mother; (5) Father; and (6) Smith.

a. <u>testimony of Vogelmann-Sine</u>

Vogelmann-Sine had been Mother's therapist from July 26, 1997 through February 24, 1998 and was qualified as an expert in adult therapy. Vogelmann-Sine described Mother as "a typical trauma victim" who "comes across as crying for help, going around and telling everybody, 'Oh, help me, help me, help me. I'm seeing the symptoms, why is nobody helping me?'"

With respect to the possibility of sexual abuse, Vogelmann-Sine could not give an opinion because she had not seen Child personally. However, she stated that Mother was a credible person and believed that Mother's allegations required further investigation.

With respect to Father's ability to care for Child, based on Smith's October 10, 1997 report, Vogelmann-Sine indicated concerns based on Father's reported substance abuse and lack of follow through with treatment. She recommended careful monitoring and evaluation of Father's parenting skills. Vogelman-Sine stated, however, that she had not: (1) spoken to Father at all; (2) observed Mother and Child in a therapy session; or (3) observed Father and Child in a therapy session.

b. McKillop's Testimony

McKillop testified regarding an incident on February 19, 1998 that prompted her to write a report for the school's files. McKillop recounted that she observed, inter alia:

> It was that [Child] was using the rest room in the stall of the bathroom and when she -- I'm in the bathroom with the kids and out of the stall.
> And she came out of the stall and her finger -- her fingers were in [the] crack of her buttocks.
> So, I just kept watching her. I was kinda looking like, what is she doing?
> And then she looked up and saw me looking at her and she -- she was kinda smiling when she was doing it and then she looked at me and . . . just stopped smiling.
> Then she took her hand out of her crack and then she start[ed] slapping her bottom. She put her hand around the back of her, start[ed] slapping her bottom and saying, "Daddy, daddy, daddy. Daddy, daddy, daddy."
> So, then I said -- said -- I started talking to her. I said, "Oh, what are you singing?"
> She said, "Oh, it's just a daddy song."
> And then I said, "Oh" -- and she was still kinda singing, "Daddy, daddy" and still doing the same thing.

McKillop supplemented her written report to document that, on February 24, 1998, McKillop noticed three feathers

inside of Child's pull-up.[2] When asked whether such behavior was unusual, McKillop responded:

> If she was trying to hide it to get it home, that happened before where they'll put something they want to take home in their pull up.
> But if it wasn't for the reason of trying to get it home without the teacher seeing it or something, then, yeah. I wouldn't know why a child would do that, but I don't know.

McKillop's written report was admitted into evidence.

Contrary to Smith's report, McKillop stated that she took it upon herself to document Child's behavior and denied that Mother had requested her to do so. McKillop indicated that she had been watching Child more closely since Mother reported her concerns and that she had been speaking to Mother on an almost daily basis.

c. McCullough's testimony

McCullough was qualified as an expert in the field of child psychology and reported seeing Child on a consistent basis since October 1996 as her court-appointed therapist. McCullough stated that she had met with Father on three occassions, two of which were with Child. McCullough met with Mother and Child together eighteen times. In addition to her personal interactions with Child, Mother, and Father, McCullough stated that she formulated her opinions based upon, inter alia, a report prepared by Lehrke, reports by Child's maternal grandmother, reports from Child's school, and a videotaped evaluation by the

[2] "Pull-up" presumably refers to a pull-up diaper.

Children's Advocacy Center. McCullough testified that she was "very comfortable" with Mother's credibility, but had concerns as to Father's credibility.

McCullough expressed concern about sexual abuse of Child, based on the play themes Child continually came up with in the therapy; the incident reported by McKillop; and the behaviors reported by Mother, including excessive masturbation after visitations, Child's preoccupation with her rectal area, sticking of dolls in the rectal and genital area, and episodes of screaming and dissociation after visits with Father.

McCullough opined that it would be appropriate for Mother to retain custody and that it would be inappropriate for Father to gain custody of Child. McCullough stated that she was comfortable with Father having supervised visitation, but not overnight visits. McCullough further recommended that Father visit Child in North Carolina rather than having Child stay with Father in Hawai‘i.

With respect to Father's ability to care for Child, McCullough stated that she could not evaluate Father because she did not do any testing of him and had only met him on three occasions. However, McCullough indicated that she had concerns based upon Smith's summary of an evaluation of Father.

d. Mother's testimony

Mother expressed concern for Child's safety, citing Father's "disregard for safety, lack of parenting skills, alcohol

and drug abuse, abusive behaviors, verbally, emotionally, psychologically, physically." Mother also testified that Child's behaviors had improved after moving to North Carolina and had only "regressed a couple of times . . . after phone calls."

e. Father's testimony

Father testified that he had attended several parenting classes including sessions for separated parents. Father indicated that he had seen Dr. Jerry Brennan several times regarding his alcohol dependence. Father also stated that he had seen and continued to see Rhoda Fineburg, his psychologist.

f. Smith's testimony

After the parties had presented their cases, the court asked Smith whether granting either of the parents' motions would be in Child's best interests. Smith indicated that it would not be against Child's best interests to grant either of the two motions for custody, but did not recommend granting one over the other.

3. The Court's Ruling and Order

In its ruling from the bench, the court, inter alia: (1) granted Mother's motion to relocate to North Carolina; (2) denied Father's request for a change in custody; (3) found that Father "is fit and proper[;] and (4) found that "there is no sex abuse in this case[;]" (5) granted Father full "Type B" visitation; and (6) discharged Smith. When Father's counsel asked the court to repeat its finding regarding sexual abuse of

Child, the court replied, "This court believed that this issue has been with this couple for at least two to three years. I believe it should be placed to rest unless we have completely new independent information."

After the court issued its oral ruling, Mother's counsel objected, stating:

> I would request that a -- a social study as requested by Maggie Smith or -- or as requested by Aimee McCullough, the child's Court appointed therapist to conduct a full evaluation of the situation given that Dr. McCullough has serious concerns about the safety or safeguard of the child.
>
> I think it's premature to initiate or establish the Type B visitation until those issues are cleared up.

The court denied the request, restated that visitation would commence forthwith, and ordered "Mother to turn child over to father by 12:00 o'clock today, in three minutes."

On July 28, 1998, the family court filed a written order denying Father's motion. The court found that: (1) Father is a fit and proper parent; (2) Father had not sexually abused Child; and (3) Mother's move to North Carolina with Child was not detrimental to Child. The court ordered that: (1) Father receive "Type B" visitation; (2) child support be recalculated based on Mother's new income; and (3) all health care professionals appointed during the proceeding be dismissed.

On July 13, 1998, prior to the filing of the written order, Mother filed a motion to reconsider the court's oral ruling from the June 22, 1998 hearing. The court addressed

Mother's motion to reconsider on February 4, 1999 and denied the motion on August 16, 1999.

B. The December 7, 1998 Proceeding

On December 7, 1998, Father filed a "Motion and Affidavit for Order to Show Cause for Relief After Order or Decree," claiming that Mother had "not let [Father] have unlimited written correspondences and telephone contact with his child as ordered" and had "refused to cooperate with [Father] to schedule a Christmas visit this year." Father requested, inter alia, that the family court: (1) hold Mother in contempt; (2) require Mother to deliver Child to the Charlotte Airport on December 22, 1998 at 10:00 a.m. for Father's Christmas visit; (3) expressly determine the duration of Father's Christmas visit to enable him to obtain the assistance of law enforcement in enforcing his scheduled visit; and (4) require Mother to pay attorney's fees and costs incurred in bringing this motion. Also on December 7, 1998, Father filed a "Motion for Personal Service Without the State" and a "Motion for Service By Mail."

A hearing on Father's motion was held on December 17, 1998.[3] No one appeared on Mother's behalf, and the family court entered default against Mother. The court ordered, inter alia, Mother to pay $803.00 for Father's attorney's fees and costs incurred in bringing his motion with interest accruing at 10% per

[3] The transcript of these proceedings are not part of the record on appeal.

annum until fully paid. Mother filed an untimely appeal from this order on September 14, 1999.

On January 19, 1999, after the twenty-day period for filing a motion for reconsideration under Hawai‘i Family Court Rules (HFCR) Rule 59(g) had passed, Mother filed an HFCR Rule 60(b) motion to set aside the entry of default and default judgment against her. Mother contested the court's order to pay Father's attorneys' fees and costs, arguing that neither she nor her counsel received notice of the hearing and that Father failed to comply with HFCR Rules 4 and 5. The family court denied Mother's motion in a written order filed on August 16, 1999. Mother's September 14, 1999 notice of appeal was timely as to the court's August 16, 1999 denial of her HFCR Rule 60(b) motion.

II. STANDARDS OF REVIEW

A. Family Court Decisions

"Generally, the family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion." In re Doe, 95 Hawai‘i 183, 189, 20 P.3d 616, 622 (2001) (citations and internal quotation marks omitted).

B. Findings of Fact by the Family Court

The family court's findings of fact are reviewed under the "clearly erroneous" standard. In re Doe, 95 Hawai‘i at 190, 20 P.3d at 623 (citations omitted).

C. Conclusions of Law by the Family Court

Conclusions of law by the family court are reviewed de novo, under the right/wrong standard. Id. (citations omitted).

D. Denial of a Motion for Reconsideration

The denial of a motion for reconsideration will not be reversed on appeal absent an abuse of discretion. Bettencourt v. Bettencourt, 80 Hawai'i 225, 231, 909 P.2d 553, 559 (1995) (citations omitted).

III. DISCUSSION

A. The Family Court's July 28, 1998 Order

With respect to the family court's July 28, 1998 order, Mother contends that the court erred in: (1) finding that Father was a fit and proper parent and had not sexually abused Child; (2) granting Father unsupervised visitation; and (3) in denying Mother's motion for reconsideration.[4]

1. The Family Court's Findings of Fact

Mother contends that the family court erred when it found that Father was a fit and proper parent and that Father had not sexually abused Child. In support of her contentions, Mother quotes extensively from the transcript of proceedings of June 22, 1998, noting that Father alone testified on his behalf while

[4] Mother also lists in her statement of points on appeal that the family court erred in denying her request for a social study. However, no corresponding argument appears, and, consequently, Mother has waived this point of error. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (1999).

Vogelman-Sine, McKillop, and McCullough testified on Mother's behalf.

A finding of fact is "clearly erroneous" when (1) the record lacks credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support the finding, or (2) despite substantial evidence supporting the finding, the appellate court is nevertheless left with a definite and firm conviction that a mistake has been made. Doe, 95 Hawai'i at 190, 20 P.3d at 623 (citations omitted). Additionally, determinations regarding the credibility of witnesses and the weight of evidence is the province of the trier of fact. State v. Aplaca, 96 Hawai'i 17, 23, 25 P.3d 792, 798 (2001) (citations omitted).

In the present case, Smith was appointed by the family court specifically to investigate Mother's allegations of sexual abuse, and she concluded that there was no evidence of such abuse. Additionally, Child's physician reported no physical evidence of sexual or physical abuse and that, although "it [was] not unreasonable to suspect child abuse[,] . . . given the lack of cooperation between [M]other and [F]ather, it is equally likely that [Mother's] suspicions of abuse . . . are unfounded." With respect to the finding that Father was a fit and proper parent, Smith specifically testified that granting Father's request for full custody would not be contrary to Child's best interests, although she could not determine whether granting

either Mother's or Father's requests for custody would be in Child's best interests. Therefore, given the evidence presented and the court's role in determining credibility and the weight of evidence, the family court's findings that there was no sexual abuse of Child and that Father was a fit and proper parent are not clearly erroneous.

2. Granting Father Unsupervised Visitation

In support of her contention that the family court abused its discretion in granting Father unsupervised visitation, Mother cites various testimony from the June 22, 1998 hearing. HRS § 571-46(7) (Supp. 1998) states:

> Reasonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child[.]

As noted supra, the family court's determinations that Child was not sexually abused and that Father was a fit and proper parent were not clearly erroneous. Moreover, there was no showing that Father's visitation would be detrimental to Child's best interests. Accordingly, the family court did not abuse its discretion in granting father unsupervised visitation.

3. Denial of Mother's Motion for Reconsideration

With respect to the family court's denial of Mother's motion for reconsideration, Mother argues that the court "ignored or discounted the testimonies and reports of the child's court appointed therapists, an expert in substance abuse, and

[Mother's] exhibits to the detriment of the parties' child, as opposed to [Father's] minimal and inadequate response to the issues presented at trial."

HFCR Rule 59(b)(1) (1982) provides that "reconsideration of a written or oral decision may be granted for good cause to any party on all or part of the issues." "As a general rule, 'good cause' means a substantial reason; one that affords a legal excuse." State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1042 (1981) (citation omitted). In her motion for reconsideration, Mother simply argued that the family court erred in weighing the evidence. Given the role of the fact-finder in determining the weight and credibility of evidence, Mother's argument did not amount to a substantial reason or one that affords a legal excuse. Accordingly, Mother has failed to demonstrate good cause, and the family court did not err in denying Mother's motion for reconsideration.

B. Mother's Motion for Relief from the December 17, 1998 Order

Mother argues that the family court abused its discretion in denying her motion to set aside the December 17, 1998 order because she was never served with notice of the hearing pursuant to HFCR Rules 4 and 5. She asserts that she did not become aware of Father's December 7, 1998 motion until after the hearing had concluded. In his memorandum in opposition to Mother's motion for relief from default, Father admits that

service was not made upon Mother prior to the December 17, 1998 hearing.

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Fujimoto v. Au, 95 Hawai'i 116, 164, 19 P.3d 699, 747 (2001) (quoting Bank of Hawai'i v. Kunimoto, 91 Hawai'i 372, 388, 984 P.2d 1198, 1214 (1999) (internal citations omitted)). This court has noted that, "'[i]t is elementary law that a judgment binding on the person of the defendant may not be rendered in an action classified as in personam without some form of personal service sufficient to satisfy the requirements of due process of law.'" Lynch v. Blake, 59 Haw. 189, 204, 579 P.2d 99, 108 (1979) (quoting United States Rubber Company v. Poage, 297 F.2d 670, 673 (5th Cir. 1962)). We, therefore, hold that the family court abused its discretion in denying Mother's motion for relief from default.

IV. CONCLUSION

Based on the foregoing, we: (1) affirm the family court's July 28, 1998 order; (2) affirm the August 16, 1999 order denying Mother's motion for reconsideration of the July 28, 1998 order; and (3) vacate the family court's denial of Mother's January 19, 1999 motion to set aside entry of default and default judgment and remand for a hearing, if necessary, on Father's

December 7, 1998 motion for order to show cause, after proper notice of the hearing to Mother.

DATED: Honolulu, Hawai‘i, February 28, 2003.

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(no answering brief
filed)