NO. 23416

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF DOE CHILDREN:
JOHN DOE, Born on May 6, 1992,
JOHN DOE, Born on April 7, 1993,
JOHN DOE, Born on March 30, 1996,
Minors

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 97-04960)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Mother-Appellant (Mother) appeals from the Orders Concerning Child Protective Act entered by the Family Court of the First Circuit[1] (the family court) on April 11, 2000, denying in part and granting in part Mother's Motion for Reconsideration of Order Awarding Permanent Custody and Withdrawal of Counsel[2] (Rule 60(b) Motion) filed on April 7, 2000, pursuant to Hawaiʻi Family Court Rules (HFCR) Rule 60(b).[3]

[1/] The Honorable R. Mark Browning presided.

[2/] Mother's motion for reconsideration of the order awarding permanent custody was denied and the motion for withdrawal of her counsel was granted.

[3/] HFCR Rule 60(b) states in relevant part:

> **Rule 60. RELIEF FROM JUDGMENT OR ORDER.**
> . . . .
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from any or all of the provisions of a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

(continued...)

In her appeal, Mother contends the family court: (a) erred when it found there was insufficient evidence to support findings that the children were being abused in the foster home, and (b) abused its discretion when it failed to reconsider its decision to terminate Mother's parental rights based on newly discovered evidence.

We disagree with Mother and affirm the Orders Concerning Child Protective Act filed on April 11, 2000.

I. BACKGROUND

Mother is the natural mother of the following children named in this appeal:

John Doe, born May 6, 1992 (John Doe 1);

John Doe, born April 7, 1993 (John Doe 2); and

John Doe, born March 30, 1996 (John Doe 3).

Mother is also the natural mother of John Doe, born October 21, 1989 (John Doe 4), who was the subject of a separate family court case in which custody was granted to his natural father on April 6, 1999; and Jane Doe, born May 6, 1997 (Jane Doe), now deceased.

Father is the natural father of John Does 1, 2, and 3, and was the natural father of Jane Doe.

[3/](...continued)
under Rule 59(b) . . . . The motion shall be made within a reasonable time, and for reason[] . . . (2) not more than one year after the judgment, order, or proceedings was entered or taken.

On July 7, 1997, Mother and Father (Parents) took Jane Doe to the Waianae Coast Comprehensive Health Center (WCCHC) with a 103º fever and bowel blockage. The staff at WCCHC instructed Parents to take Jane Doe immediately to the Kapiolani Medical Center (KMC) for further treatment. The family's physician agreed to meet Parents and Jane Doe at the KMC Emergency Room. When no one showed up at KMC, the physician became concerned. The physician finally reached Mother by telephone that evening, and Mother told the physician that Jane Doe was better and did not need medical help. The physician convinced Mother to bring Jane Doe in for an office visit the next day; Mother failed to keep the appointment.

Jane Doe died on July 18, 1997, and the coroner's office subsequently determined the cause of death to be from Sudden Infant Death Syndrome (however, suffocation or smothering could not be ruled out). When a representative from the Department of Human Services (DHS) confronted Mother on August 4, 1997 about not taking Jane Doe to KMC, Mother stated that she "did not want [Jane Doe] to be tortured anymore" (when Jane Doe was less than a month old, she had a benign tumor on her arm that required x-rays and blood work).

On August 26, 1997, the Child Protective Services (CPS) Team consultants and a DHS representative evaluated the risk factors present in the family home. DHS's report to the family

court, dated September 25, 1997, stated that there had been prior DHS reports filed concerning abuse of the children; Parents had untreated alcohol and substance abuse problems, a history of domestic violence, and impaired parenting abilities and judgment; and all of the children had been exposed to a childhood of instability and the chronic threat of harm resulting from Parents' domestic violence, substance abuse, and poor parenting.

On September 26, 1997, pursuant to Hawai‘i Revised Statutes (HRS) Chapter 587, DHS filed a Petition for Family Supervision (Petition). The bases of the Petition were medical neglect and threatened harm to John Does 1-3. At an October 29, 1997 hearing, the family court found an adequate basis to sustain the Petition, awarded family supervision over John Does 1-3 to DHS, and ordered Parents to participate in the treatment programs set forth in the September 25, 1997 service plan and to comply with the provisions of the plan.

On November 19, 1997, John Does 1-4 were placed into temporary foster care (Foster Home A) following confirmed reports of the (1) physical abuse of John Doe 2 (during a parent-teacher conference for John Doe 1 on November 18, 1997, Mother held John Doe 2 up by his ears, pounded his hand, and came close to slapping him in the face); and (2) medical neglect of John Doe 3 (Mother failed to take John Doe 3 to the family physician for a follow-up visit for a fever).

On December 2, 1997, DHS filed a Motion for an Immediate Review Hearing. At the December 3, 1997 hearing on the motion, the family court ordered, in part, that the prior award of family supervision be revoked, DHS be awarded temporary foster custody of John Does 1-3, and Parents' visitation with children be at the discretion of DHS and the Guardian Ad Litem (GAL).

At the December 3, 1997 hearing, Mother reported to the family court that Mother's sister had seen John Does 2 and 3 being slapped and yanked by two women in the parking lot at K-Mart while under foster care. On December 4, 1997, John Does 2 and 3 were moved to another foster home (Foster Home B). John Doe 1 remained at Foster Home A until February 11, 1999, when he too was moved to Foster Home B.

On February 5, 1998, the family court filed its Orders Concerning Child Protective Act, which adopted a service plan dated November 26, 1997 allowing for treatment of Parents and supervised visitation. On July 2, 1998, the family court filed its Orders Concerning Child Protective Act, which adopted Service Plan #3 dated June 16, 1998.

Parents filed a Motion for Immediate Review for [sic] Order for Family Supervision on August 18, 1998. The family court denied the motion by order dated September 21, 1998.

On December 16, 1998, the family court ordered that Service Plan #3 remain in effect.

On April 1, 1999, DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan.

After a hearing on April 6, 1999, the family court ordered that Service Plan #3 remain in effect and set a trial date of August 11, 1999. At the April 6 hearing, Parents renewed their request for a new social worker to be assigned to the case because Parents had complained about the children being abused in the foster home and their complaints had been disregarded. The parties were ordered to brief the issue for a hearing to be held on June 1, 1999.

In their Motion for Immediate Review for Change of Social Worker, filed May 26, 1999, Parents complained of the following: the social worker told the parents that the children were "making up stories" when the Parents warned the social worker of physical abuse in the foster home; abuse in the foster home was confirmed and the children were finally moved months after the parents' warnings; and approximately one year ago visitation with the children had been suspended after the children expressed fear of the Parents and had never been reinstated, and now lack of visitation was to be used as an argument against reunification.

At the June 1, 1999 hearing on the motion to change the social worker, the social worker represented to the court that Parents' allegations referred to the abuse of the children in the

previous year and the allegations were not confirmed. The Volunteer Guardian Ad Litem (VGAL) represented to the family court that when abuse of John Doe 1[4] was discovered by his therapist, the therapist reported the abuse to the social worker who immediately moved John Doe 1 to Foster Home B, where John Doe 1 was reunited with his brothers, John Does 2 and 3. Parents' attorney stated that Mother's requests were ignored and resulted in lost visitation rights. Mother stated that the social worker believed the foster parents when they said that the children "fell or got hurt." The attorney for DHS stated that the allegations of abuse in the foster home were raised by Parents along with allegations that the social workers were conspiring to intimidate the children to turn the children against their parents. Parents' motion was denied by the family court (order filed June 2, 1999).

After a one-day trial on September 9, 1999, the family court found the testimony of Mother's therapist, the psychologist, the social worker, and the VGAL to be credible. The family court specifically found that Mother's testimony was not credible. The family court terminated Mother's and Father's parental and custodial duties and rights and appointed the

---

[4/] In the third report to the family court filed March 30, 1999, the VGAL stated that John Doe 1 said he was hit with a belt and a fly swatter, had his ears pulled, and was grabbed by the shirt and thrown up against the wall by the foster parents in Foster Home A. At trial, the social worker testified that John Doe 1 said his ear had been pulled and he had been yelled at in Foster Home A.

Director of DHS as permanent custodian of the children. The family court's Order Awarding Permanent Custody was filed on September 10, 1999.

On April 7, 2000, Mother filed her Rule 60(b) Motion. Based upon allegations that the children were abused while in foster care and that the children's statements to the therapists were affected by the physical abuse the children had received in the foster home, Mother asked the family court to reconsider the September 9, 1999 decision terminating parental rights. In her memorandum in support of her motion (Exhibit 2), Mother argued that:

(1) the foster parents in Foster Home A had been convicted of abusing their adoptive children as evidenced by a recent newspaper article;

(2) her children had been taken to the hospital with extensive injuries while they were living in Foster Home A as evidenced by recently discovered medical bills;

(3) her mother-in-law had spoken to the older children after they were placed in Foster Home A and one of the boys stated that he was being beaten by foster parents and did not want to go back; and

(4) the children's statements to the therapists had been affected by the physical abuse the children received by the foster family.

At the Rule 60(b) Motion hearing, Mother argued that a Honolulu Police Detective (the Detective) had informed her that John Does 1 and 4 had been living in Foster Home A at the time the couple who ran the foster home were accused of child abuse and, in the course of his investigation, the Detective discovered that John Does 1 and 4 had been abused. Mother argued further that the therapist never knew the children were being abused in the foster home and the therapist's recommendations were based on the Parents and not about any abuse the children might have gone through in Foster Home A.

DHS argued that the motion was a HFCR Rule 59(b) motion and should have been filed within twenty days of the family court's entering the Order Awarding Permanent Custody. DHS also argued that:

(1) the HMSA statements were for authorized pre-placement medical examinations and the children were not in Foster Home A on the dates the statements show the children received medical treatment;

2. although Mother did complain about the children's being abused in foster care, there were complaints

about the children being abused prior to CPS's involvement; however, DHS had never received any independent reports about abuse of the children while in foster care;

3. Mother still had problems;

4. the crux of the matter was whether permanent custody was appropriate;

5. there was not enough information to the contrary to have the family court overturn its September decision that permanent custody was appropriate.

After hearing argument and considering the evidence before it, the family court denied Mother's Rule 60(b) Motion. On April 11, 2000, the family court issued its Orders Concerning Child Protective Act, denying the Rule 60(b) Motion as to the order awarding permanent custody and granting it as to the withdrawal of Mother's counsel.

On May 3, 2000, Mother filed her notice of appeal. On June 28, 2000, the family court entered its Findings of Fact and Conclusions of Law.

On September 8, 2000, Mother filed her opening brief, in which she alleged errors pertaining to the September 10, 1999 Order Awarding Permanent Custody and to the family court's abuse of discretion when it failed to reconsider its decision that Mother's parental rights should be terminated.

On October 6, 2000, DHS filed a Motion to Dismiss for Lack of Appellate Jurisdiction based on Mother's failure to file a timely motion for reconsideration of the Order Awarding Permanent Custody and failure to file a motion for reconsideration of the April 11, 2000 order denying Mother's Rule 60(b) motion. In the alternative, DHS asked the court to strike the portion of Mother's opening brief that did not address the issue of whether the family court erred in denying Mother's request for relief under HFCR Rule 60(b).

On October 25, 2000, the Hawai‘i Supreme Court denied DHS's motion to dismiss, but ordered Mother to file an amended opening brief asserting points of error and argument only on the issue of relief under HFCR Rule 60(b)(2) on the grounds of newly discovered evidence. In its Order Denying Motion to Dismiss Appeal and Granting Alternative Motion to Strike Opening Brief, the supreme court stated that

> (1) the requirement of reconsideration as a prerequisite to appeal set forth in HRS § 571-54[5] does not apply to the

---

[5/] HRS § 571-54 (1993) states in relevant part:

> **§571-54 Appeal.** An interested party aggrieved by any order or decree of the court may appeal to the supreme court for review of questions of law and fact . . . .
>
> . . . .
>
> An order or decree entered in a proceeding based upon section 571-11 . . . (9) shall be subject to appeal to the supreme court only as follows:
>
> Within twenty days from the date of the entry of any such order or decree, any party directly affected thereby may file a motion for a reconsideration of the facts involved. The motion and any supporting affidavit shall set forth the grounds on which a reconsideration is

(continued...)

> appeal of the April 11, 2000 order denying the motion for relief under HFCR 60(b), but applies to the appeal of the September 10, 1999 order terminating parental rights and awarding permanent custody; (2) the time for filing the motion for reconsideration required by HRS § 571-54 is governed by the provisions of HRS § 571-54 (the motion must be filed "within twenty days from the date of the entry of the order or decree"), not by any provision of the family court rules, inasmuch as reconsideration as a prerequisite to appeal is a statutory rule, not a court rule; (3) the April 7, 2000 "motion for reconsideration of the September 10, 1999 order" was not filed within twenty days after entry of the September 10, 1999 order and the jurisdictional requirements for appealing the September 10, 1999 order have not been met; and (4) review of the April 11, 2000 order denying relief under HFCR 60(b) does not permit review of the underlying September 10, 1999 order.

(Citations and brackets omitted; footnote added.)

In her Amended Opening Brief, Mother argues there was sufficient evidence to support findings that the children were being abused in the foster home and that the family court abused its discretion when it failed to reconsider its decision to

---

[5/](...continued)
requested and shall be sworn to by the movant or the movant's representative. The judge shall hold a hearing on the motion, affording to all parties concerned the full right of representation by counsel and presentation of relevant evidence. The findings of the judge upon the hearing of the motion and the judge's determination and disposition of the case thereafter, and any decision, judgment, order, or decree affecting the child and entered as a result of the hearing on the motion shall be set forth in writing and signed by the judge. Any party deeming oneself aggrieved by any such findings, judgment, order, or decree shall have the right to appeal therefrom to the supreme court upon the same terms and conditions as in other cases in the circuit court and review shall be governed by chapter 602; provided that no such motion for reconsideration shall operate as a stay of any such findings, judgment, order, or decree unless the judge of the family court so orders; provided further that no informality or technical irregularity in the proceedings prior to the hearing on the motion for reconsideration shall constitute grounds for the reversal of any such findings, judgment, order, or decree by the appellate court.

HRS § 571-11 (1993) states in relevant part:

§571-11 Jurisdiction; children. Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

. . . .

(9) For the protection of any child under chapter 587.

terminate Mother's parental rights based on newly discovered evidence.

II. STANDARDS OF REVIEW

A. Motion for Reconsideration

A trial court's denial of a motion under HFCR Rule 60(b) is reviewed under the abuse of discretion standard. De Mello v. De Mello, 3 Haw. App. 165, 169, 646 P.2d 409, 412 (1982).

> 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. Thus, we will not disturb the family court's decisions on appeal unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason.

In re Jane Doe, 95 Hawai‘i 183, 189-90, 20 P.3d 616, 622-23 (2001) (internal quotation marks, citations, brackets, and ellipsis omitted).

B. Findings of Fact/Conclusions of Law

Findings of fact of the family court are reviewed under the clearly erroneous standard. Id. at 190, 20 P.3d at 623. "If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983).

C. 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. Thus,

> we will not disturb the family court's decisions on appeal unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason.

In re Jane Doe, 95 Hawai‘i at 189-90, 20 P.3d at 622-23 (internal quotation marks, citations, brackets, and ellipsis omitted).

III. DISCUSSION

A. Mother's Rule 60(b) Motion and the Exhibits Presented at the Hearing Raise No New Substantiated Evidence.

Mother contends the family court erred when it found there was insufficient evidence to support findings that the children were abused in their foster home. In support of her Rule 60(b) motion, Mother filed six exhibits with the family court.

Exhibit 2 was a memorandum in support of the motion that summarized the remainder of the exhibits. Mother stated in her memorandum that "the therapists in this case were not told that the children were abused by their foster families and that the therapists did not take into consideration this key factor when making their recommendations to the courts." However, only John Does 1 and 4 reported any abuse prior to the trial (John Doe 4 is not a party to this action). As to the abuse of John Doe 1, this was raised at the June 1, 1999 hearing on Parents' motion to replace the social worker, where the VGAL testified before the family court:

> [VGAL]: Our position is that the social worker upon hearing from the therapist that there was abuse in the foster home moved [John Doe 1] and reunified him with his two brothers in another foster home and it was a really a positive thing, I think for the -- for the children to all be reunified. The foster home that they're in now is good.
>
> When [John Doe 1] said that he was hit in the foster home I think [the social worker] did the right thing and she moved -- she moved [him] immediately.

As to any possible abuse to John Does 2 and 3, Mother does not provide any information in her Rule 60(b) Motion that was not previously considered by the family court.

The information contained in Exhibits 3 (motion for change of social worker) and 7 (page 5 of the June 16, 1998 Supplemental Safe Family Home Report) had been previously before the family court and was thus not newly discovered evidence.

Exhibit 4, an affidavit of the children's paternal grandmother (Grandmother), stated that she saw bruises on John Doe 4. Grandmother did not state any abuse to John Does 1, 2, or 3 in her affidavit.

Exhibit 5 was three pages of a medical insurance statement dated February 7, 1998 for hospital charges incurred for John Does 1-4. The date of treatment for John Does 1, 2, and 3 was December 4, 1997. In her memorandum in support of her Rule 60(b) Motion, Mother claimed she had just recently discovered the statement because it had been sent to her sister's home. Mother alleged that the statement confirmed the abuse of the children. However, no medical records for the children were attached to the Rule 60(b) Motion or subpoenaed for the hearing on the motion to

substantiate Mother's allegations. At a Rule 60(b) Motion hearing, the attorney for DHS stated regarding the medical bills:

> And with regards to the medical bill -- I mean, the medical bills that mother cites in her memorandum, Judge, I just need to again reiterate for mother and her attorney and for the Court that those were not due to any kind of abuse. They were pre-placement physical exam bills and DHS is required to do a medical exam with every kid prior to placing them in a foster home.

Mother never presented any proof to the family court of the exact date on which she discovered these statements. Furthermore, Mother provided no evidence to the family court that the children's visits to the hospital were not for pre-placement physical examinations nor any evidence that the medical bills were for treatment of any abuse of the children.

Exhibit 6 was a March 4, 2000 Honolulu Star-Bulletin article regarding a woman who had been convicted of abusing her adopted children and her two-and-one-half year old foster son. Mother alleged in her memorandum that the Detective, who had investigated the Star-Bulletin abuse case and Jane Doe's death, informed Mother after the September 9, 1999 custody hearing that this foster mother had been taking care of Mother's children and that her children were subject to abuse. Mother offered this hearsay evidence, but presented no affidavit from the Detective substantiating these allegations and did not call the Detective to testify as a witness at the hearing on the Rule 60(b) Motion.

The record in this case established that Foster Home B (where John Does 2 and 3 were placed on December 4, 1997) was not

the foster home mentioned in the newspaper article. This court can locate no reference in the record before it that the foster home referred to in the newspaper article was Foster Home A (where John Doe 1 was placed). Even if the newspaper article referred to Foster Home A and if John Doe 1 had been one of the children abused in that home, John Doe 1 had been removed from Foster Home A on February 11, 1999 -- a year before this article appeared.

Mother's evidence is either not newly discovered or is unsubstantiated. Based on the above, the family court did not abuse its discretion in denying Mother's Rule 60(b) Motion for neither did it disregard rules or principles of law or practice to the substantial detriment of a party litigant, nor did its decision clearly exceed the bounds of reason. In re Jane Doe, 95 Hawai‘i at 189-90, 20 P.3d at 622-23.

B. Mother's Appeal of Findings of Fact and Conclusions of Law Is Untimely.

Mother contends the family court abused its discretion when it failed to reconsider its decision to terminate Mother's parental rights based on newly discovered evidence. Mother argues that the therapist, in evaluating the children, would have attributed signs of abuse to the Parents rather than the foster parents because the therapist was unaware of the abuse allegedly occurring in the foster home. Mother argues that because the family court based its decision to terminate Mother's parental

rights on the therapist's testimony, this court should now review the family court's order awarding permanent custody to DHS.

As stated supra, in section III.A, there is no new substantiated evidence of abuse in Foster Home A. There is "credible evidence of sufficient quality and probative value" to support the family court's determination that Mother is not presently, nor will become in the foreseeable future, willing and able to provide the children with a safe family home. In re Jane Doe, 95 Hawai‘i at 196, 20 P.3d at 629 (internal quotation marks omitted).

IV. CONCLUSION

We affirm the Orders Concerning Child Protective Act entered on April 11, 2000 by the family court.

DATED: Honolulu, Hawai‘i, April 30, 2002.

On the briefs:

Marrionnette L.S. Andrews
for Mother-Appellant

Acting Chief Judge

Julio C. Herrera,
Mary Anne Magnier,
Deputy Attorneys General,
for Department of Human
Services-Appellee

Associate Judge

Associate Judge