NO. 23446

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

In the Interest of DOE CHILDREN:
JOHN DOE 1, Born on October 9, 1991, and
JOHN DOE 2, Born on November 14, 1992

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 96-04282)

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

Appellant (Mother) appeals from the family court's April 14, 2000 order, entered by District Family Judge Bode Uale, denying "[Mother's Hawaiʻi Family Court Rules (HFCR)] Rule 60(b) Motion for Relief From Decision Awarding Permanent Custody to the Department of Human Services Filed December 21, 1999," entered on April 4, 2000. We affirm.

BACKGROUND

On February 26, 1996, Appellee Department of Human Services (DHS) petitioned the family court for family supervision over the family of Mother and Father. At that time, Mother had five children. She had a son, age 18 (Adult Child 1), a daughter, age 15 (Child 2),[1] a son born on October 9, 1991 (Child 3); a son born on November 14, 1992 (Child 4); and a son

[1] The February 26, 1996 Petition for Family Supervision states, in relevant part, that "Mother is willing to allow [Child 2] to live with Maternal Grandmother permanently after the end of this school year."

born on March 31, 1995 (Child 5). Father is the alleged biological father of Child 3 and the presumed biological father of Child 4 and Child 5.

When the petition was filed, Child 3, Child 4, and Child 5 lived with Mother and Father.

The Petition for Family Supervision filed on February 26, 1996, alleged a reasonable, foreseeable, and substantial risk of harm to Child 3, Child 4, and Child 5 based *inter alia* on the history of domestic violence and drug use by Mother and Father.

On February 28, 1996, the family court appointed Ryan H. Tomasa as counsel for Mother (Mother's Counsel) "until the final disposition of the case unless sooner discharged by the court."

The parties stipulated at a March 4, 1996 hearing that an adequate basis existed to sustain the petition because the physical or psychological health or welfare of the children either "had been harmed or was subject to threatened harm by the acts or omissions of the children's family." Following the hearing, the court asserted jurisdiction, pursuant to Hawaii Revised Statutes (HRS) §§ 571-11(9) and 587-11 (1993), and entered its first Orders Concerning Child Protective Act, which ordered DHS family supervision over the children and that Mother

and Father participate in home-based services, domestic violence counseling, and anger management until clinically discharged.

The orders for DHS family supervision were continued through Orders Concerning Child Protective Act entered on April 18, 1996, and April 25, 1996. On October 18, 1996, finding that "[c]ontinuation in the home is contrary to the immediate welfare of the children[,]" the court entered an order revoking family supervision, awarding custody of the children to DHS, and ordering implementation of the service plan dated October 9, 1996. Pursuant to the October 9, 1996 service plan, Mother was to continue to provide care for her three youngest children; re-engage in substance abuse treatment until clinically discharged; attend and participate in parenting education and support; participate, when recommended, in domestic violence counseling until clinically discharged; and cooperate with the DHS social worker.

Following a hearing on April 3, 1997, the court entered orders continuing foster custody, ordering the service plan dated March 18, 1997, and ordering that "[i]f parents do not actively participate in services within the next six months, [p]ermanent custody will be filed[.]" The March 18, 1997 service plan required Mother to engage in substance abuse treatment until clinically discharged; submit to random urine drug screens; attend and participate in parenting education and support

programs until clinically discharged; participate in domestic violence counseling when recommended until clinically discharged; and obtain and maintain stable housing, finances, and medical insurance through employment or government assistance.

In its August 27, 1997 Orders Concerning Child Protective Act, the court ordered continued custody to DHS and implemented the service plan dated August 13, 1997, which essentially continued the services ordered in the prior service plan and additionally required Mother to attend a minimum of three Alcoholics Anonymous/Narcotics Anonymous meetings a week.

In its February 19, 1998 Orders Concerning Child Protective Act, the court continued foster custody and ordered the service plan dated February 13, 1998, which increased Mother's minimum required attendances at Alcoholics Anonymous meetings to five meetings per week and ordered her to participate in individual psychiatric treatment counseling. The service plan also continued services as required by previous service plans.

On March 18, 1998, DHS filed its "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan" (Motion for Permanent Custody) pertaining to the three youngest children. This motion was based, in part, upon a safe family home report dated February 13, 1998, which alleged, in part, as follows:

> [Mother] is considered the perpetrator of threatened and physical harm to [her children] due to her **chronic use of drugs, on-going domestic violence with [Father], inability to maintain her mental health through maintaining psychiatric/counseling appointments or taking her medications as prescribed, and inability to make appropriate decisions in regards to the welfare of her children.** [Mother] has continued to display a negative and unstable lifestyle. This lifestyle has resulted in all four of her children being involved with the Child Protective Services since 1995. To date, the . . . children have been in foster care since 10/18/96.
>
> [Mother] has not demonstrated a true apology in regards to the welfare of her children. [Mother] has not made any attempts towards making positive changes in her lifestyle, she continues to center all of her decisions around her relationship with [Father] as well as her illegal use of substances, has not maintained consistent visitation with her children, and had made herself unavailable to services providers as well as the DHS. Once again, the Department is attempting to service this family that remains unmotivated and non-commited [sic] to the welfare of their children.

(Emphasis in original.)

Following a hearing on April 23, 1998, the court entered its "Order Awarding Permanent Custody and Establishing a Permanent Plan as to [Child 5] and Continuing Foster Custody of [Child 3 and Child 4]." As to Child 5, the court revoked the existing service plan, divested Mother's and Father's parental and custodial duties and rights, and awarded permanent custody to DHS. As to Child 3 and Child 4, the court continued the February 13, 1998 service plan and foster custody and scheduled a review hearing on October 29, 1998.

On September 9, 1998, DHS filed a "Motion for Immediate Review to Order Permanent Custody as to [Child 3] and [Child 4]." On September 29, 1998, the court entered its September 29, 1998 "Orders Concerning Child Protective Act as to [Child 3] and [Child 4]," in which the court set December 7, 1998, for a

permanent custody trial. After several continuances, a trial on the motion for permanent custody regarding Child 3 and Child 4 was held on December 9, 1999. The court entered its Decision on December 21, 1999 (December 21, 1999 Decision), finding

> clear and convincing evidence that:
>
> a) [Mother] and [Father] are not presently willing and able to provide the children with a safe home, even with the assistance of a service plan;
>
> b) it is not reasonably foreseeable that [Mother] and [Father] will become willing and able to provide the children with a safe family home, even with the assistance of a service plan, within a reasonable period of time, and
>
> c) the proposed permanent plan is in the best interest of the children and will assist in achieving an appropriate goal of permanency for these children.

The December 21, 1999 Decision "ordered that parental rights of both [Mother] and [Father] are hereby divested and that their respective counsel be discharged" and that "[t]he DHS and GAL [are] to submit proposed Findings of Fact and Conclusions of Law within two (2) weeks of the filing of this Order." On February 1, 2000, the court entered its "Findings of Fact and Conclusions of Law Re: [Child 3] and [Child 4]."

On January 4, 2000, the court entered its "Order Awarding Permanent Custody Re: [Child 3] and [Child 4]" (January 4, 2000 Order). This January 4, 2000 Order was silent as to the discharge of counsel for Mother and Father.

Mother's Counsel alleges that, on December 24, 1999, notwithstanding his discharge by the court, he sent Mother a

letter in which he referred to the December 21, 1999 Decision and stated as follows:

> According to this Order I am no longer your attorney. I have sent a copy of this letter to Judge Uale and all parties for clarification as to whether or not I am still your attorney. Until then, I do not believe it productive to speak with you after the messages you left with my office. You know the effort I made on your behalf.

Mother's Counsel further alleges that he sent copies of the letter to Judge Uale and other counsel in the case. The record does not reveal how Mother's Counsel sent a copy of the letter to the court or whether the court received it.

On January 13, 2000, notwithstanding the fact that he had previously been discharged as court-appointed counsel for Father, Dean T. Nagamine (Father's Counsel), filed Father's Motion for Reconsideration of the court's December 21, 1999 Decision (Father's M/R).[2]

On January 24, 2000, Mother's Counsel filed Mother's notice of appeal (No. 23110) of the January 4, 2000 Order. That same day, January 24, 2000, Mother's Counsel allegedly sent Mother a copy of the notice of appeal and a transmittal letter stating, in relevant part, as follows:

> Last week on Thursday, January 20th I was notified that A Motion to Reconsider was filed by [Father's Counsel] to be heard on February 18th at 10:30 a.m. I will attend. I sill [sic] have not

[2] Discharge as court-appointed counsel for the party does not prevent the discharged attorney from continuing to represent the party with the consent of the party. The right to privately retained counsel of choice is a constitutional right. State v. Maddagan, 95 Hawai‘i 177, 179, 19 P.3d 1289, 1291 (2001).

> been informed by the Court whether or not I still represent you. Therefore I am filing a Notice of Appeal on your behalf. See Enclosed.

Father's M/R was heard and denied on February 18, 2000. On March 17, 2000, Father's Counsel filed a notice of appeal.

On April 4, 2000, Mother's Counsel filed "[Mother's HFCR] Rule 60(b) Motion for Relief from Decision Awarding Permanent Custody to [DHS] Filed December 21, 1999" (HFCR Rule 60(b) Motion). In his "Memorandum in Support of Motion," Mother's Counsel cites the following facts: the court did not respond to his question whether he still represented Mother in the matter; pleadings were being left in his court jacket instead of via U.S. Mail; he was informed on January 20, 2000, by the court bailiff that Father's M/R would be heard on February 18, 2000; even though he did not know if he still represented Mother, he thought it prudent to file a notice of appeal because Father had filed a Father's M/R, and the time for Mother to file a motion for reconsideration "was apparently past";[3] he anticipated that he would be able to raise all of these issues at the February 18, 2000 hearing; although he waited from 9:30 a.m., on February 18, 2000, for the hearing and notified Father that he would be absent for only a few minutes, he missed it because it

[3] Hawaii Revised Statutes (HRS) § 571-54 (1993), allows "twenty days from the date of the entry of any such order or decree[.]" The statute has priority over any contrary rule. In re Doe Children, 94 Hawai‘i 485, 486, n.2, 17 P.3d 217, 218, n.2 (2001); In re Doe, 77 Hawai‘i 109, 112, 883 P.2d 30, 33 (1994).

occurred during those few minutes while he was at Court Management Services obtaining documents for another case.

On April 14, 2000, after a hearing, the court entered its order denying Mother's HFCR Rule 60(b) Motion.

On May 8, 2000, Mother's appeal, No. 23110, was dismissed for lack of appellate jurisdiction resulting from Mother's failure to file the pre-appeal motion for reconsideration required by HRS § 571-54 (1993).[4]

DISCUSSION

HFCR Rule 60(b) (2000) provides, in relevant part:

> 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

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[4] Appeals from the family court in HRS § 571-11(1), (2), (6), or (9) cases are governed by HRS § 571-54 (1993). This is a HRS § 571-11(9) case. HRS § 571-54 states, in relevant part:

> 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 upon the same terms and conditions as in other cases in the circuit court and review shall be governed by chapter 602 [Courts of Appeal], except as hereinafter provided. . . .
>
> . . . .
>
> An order or decree entered in a proceeding based upon section 571-11(1), (2), (6), or (9) [Child Protective Act] 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 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[.]

> provisions of a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Mother urges this court to apply the clearly erroneous standard to the family court's denial of her HFCR Rule 60(b) motion and to find clear error on the ground that "[t]here was a factual basis to grant Mother['s] Rule 60(b) motion for relief." However, the standard of review of a determination of a HFCR Rule 60(b) motion is the abuse of discretion standard. De Mello v. De Mello, 3 Haw. App. 165, 169, 646 P.2d 409, 412 (1982).

> Under [the abuse of discretion] standard of review, the appellate court is not authorized to disturb the family court's decision unless (1) the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant; (2) the family court failed to exercise its equitable discretion; or (3) the family court's decision clearly exceeds the bounds of reason.

Wong v. Wong, 87 Hawai'i 475, 486, 960 P.2d 145, 156 (App. 1998) (brackets in original) (quoting Bennett v. Bennett, 8 Haw. App. 415, 426, 807 P.2d 597, 603 (1991)).

A consequence of HRS § 571-54 is that the January 4, 2000 Order is not the final and appealable judgment. HRS § 571-4 allowed Mother twenty days to file a motion for reconsideration of the January 4, 2000 Order and allowed Mother to appeal the court's order denying a timely-filed motion for reconsideration of the January 4, 2000 Order. Mother failed to file a motion for

reconsideration on or before January 24, 2000. Instead, on January 24, 2000, Mother's Counsel filed a notice of appeal. Therefore, it cannot be said that the reason for Mother's inaction was the fact that her court-appointed attorney had been discharged and Mother was without the services of an attorney. This is not a case where Mother's Counsel ignored the case after being discharged as court-appointed counsel. Mother's Counsel continued to represent Mother after he was discharged as her court-appointed counsel. After Mother's Counsel's attempt to appeal failed because Mother's Counsel failed to comply with the applicable statute, Mother, via Mother's Counsel, sought relief pursuant to HFCR Rule 60(b) from the family court's December 21, 1999 Decision, which was the basis for the January 4, 2000 Order.

In Mother's memorandum in support of her HFCR Rule 60(b) motion, Mother's Counsel asserts: "On December 24, 1999 [the family court] was asked to clarify its [December 21, 1999 Decision], specifically whether Counsel still represented Mother in this matter. See Exhibit '2.'" Although Mother's Counsel notes that "the Family Court did not respond" to his alleged request for clarification, the question is whether such request was actually delivered to the family court. The "Exhibit '2'" to which Mother's Counsel refers is not a request to the court, but rather a transmittal letter from Mother's Counsel to Mother stating that Mother's counsel "sent a copy of

this letter to Judge Uale and all parties for clarification as to whether or not I am still your attorney." Mother's Counsel does not point to, nor have we located, any other evidence of such a letter to the judge in the record.

Mother's Counsel notes that after the December 21, 1999 Decision was "delivered to Counsel via Court jacket without any additional notice[,]" the family court continued to place communications, including the January 4, 2000 Order in Mother's Counsel's court jacket, without Mother's Counsel's knowledge, and that Mother's Counsel remained "unaware of these documents for at least one week." Assuming Mother's Counsel was unaware of the documents for "at least one week," Mother's twenty-day deadline to move for reconsideration of the January 4, 2000 Order had not expired when Mother's Counsel became aware of the order "at least one week" later.

In Mother's amended opening brief, Mother's Counsel states, in relevant part, as follows:

> On January 20, 2000 Counsel was notified via telephone by Family Court Bailiff . . . that Father's Motion for Reconsideration would be heard on February 18th at 10:30 a.m. and Mother of same by letter dated January 24, 2000. This Motion was received by Counsel via Court jacket or U.S. Mail. As a Motion for Reconsideration had already been filed [by Father] and time to file said Motion was apparently past, Counsel thought it prudent to file Notice of Appeal even if he did not know if he still represented Mother. Counsel anticipated that he would be able to raise all of these issues at the February 18th hearing.

Mother's Counsel's argument regarding the prudence of filing Mother's January 24, 2000 Notice of Appeal of the January 4, 2000 Order is not persuasive. Had Mother's Counsel,

on January 24, 2000, filed a motion for reconsideration rather than Mother's January 24, 2000 Notice of Appeal, the motion for reconsideration would have been timely. Therefore, we disagree with the contention of Mother's Counsel that his failure constituted the "mistake, inadvertence, surprise, or excusable neglect" contemplated by HFCR Rule 60(b)(1).

The grant of relief under HFCR 60(b) is counter to the general preference for finality of judgments. Hayashi v. Hayashi, 4 Haw. App. 286, 291, 666 P.2d 171, 175 (1983). In granting such relief,

> the court must carefully weigh all of the conflicting considerations inherent in such applications. Once the court has made a determination to grant or deny relief, the exercise of its discretion will not be set aside unless the appellate court is persuaded that, under the circumstances of the case, the court abused its discretion.

Id. (citations omitted). A party moving for HFCR Rule 60(b)(1) relief "must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough." Joaquin v. Joaquin, 5 Haw. App. 435, 443, 698 P.2d 298, 304 (App. 1985) (citation omitted).

> The cases calling for great liberality in granting Rule 60(b) motions, for the most part, have involved default judgments. There is much more reason for liberality in reopening a judgment when the merits of the case have never been considered than there is when the judgment comes after a full trial on the merits. Based on the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited. As long as the movant seeking timely relief has a meritorious defense, doubt should be resolved in favor of a motion to set aside the judgment.

11 C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2857 (1995) (footnotes omitted). Conversely, when the

movant seeking relief does not have a meritorious defense, doubt should be resolved against the motion to set aside the judgment.

We conclude that the family court acted within its discretion when it denied Mother's HFCR Rule 60(b) Motion.

CONCLUSION

Accordingly, we affirm the April 14, 2000 order of the family court denying "[Mother's HFCR] Rule 60(b) Motion for Relief From Decision Awarding Permanent Custody to the Department of Human Services Filed December 21, 1999."

DATED: Honolulu, Hawai‘i, August 29, 2002.

On the briefs:

Ryan H. Tomasa
for Mother-Appellant.

Chief Judge

Jay K. Goss and
Mary Anne Magnier,
Deputy Attorneys General,
for Department of Human Services-Appellee.

Associate Judge

Associate Judge