NOS. 24044 AND 24045

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

In the Interest of JOHN DOE, Born on June 27, 1996
(FC-S NO. 99-06046)

and

In the Interest of Doe Children:
Jane Doe, Born on July 4, 1993, and
Jane Doe, Born on June 22, 1994
(FC-S NO. 99-06076)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Foley, JJ.)

The adjudicated father (Father) of John Doe born on June 27, 1996, Jane Doe (Jane Doe 1) born on July 4, 1993, and Jane Doe (Jane Doe 2) born on June 22, 1994 (the Children), appeals from the (1) November 16, 2000 Orders Concerning Child Protective Act and (2) December 26, 2000 Orders Concerning Child Protective Act, entered by per diem District Family Judge Marilyn Carlsmith. We affirm.

The November 16, 2000 Orders Concerning Child Protective Act granted the Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan filed by the Department of Human Services (DHS) and (a) found Father to be in default, (b) divested the parental and custodial duties and rights of

Father and the Children's legal and natural mother (Mother), (c) awarded permanent custody to DHS, and (d) ordered the August 17, 2000 Permanent Plan. The December 26, 2000 Orders Concerning Child Protective Act denied Father's Motion for Reconsideration.

DHS' involvement began in April of 1999. In September of 2000, DHS filed a Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan. On November 16, 2000, the trial on the motion commenced. At 8:35 a.m., three calls were made for Father with no response. Father's counsel was present.

Mother testified that Father "beat [her] up all the way 'til this morning" so Mother and the Children's paternal grandmother (Paternal Grandmother) left the house while Father was in the shower, and Paternal Grandmother drove Mother to the bus stop. Father did not appear in court until 10:00 a.m., and there is no evidence that Father made any attempt to contact the family court to say that he was going to be late or to provide any explanation why he did not contact the family court.

Father argues that he "should have been allowed to present witnesses on his behalf. He should have been allowed to cross-examine the state's witnesses." However, Father's counsel could have cross-examined Mother but did not do so. Similarly,

Father's counsel could have asked for a continuance but did not do so.

Father contends that his default should have been set aside and he should have been given his day in court. However, Father's motion for reconsideration did not ask the court to set aside the default entered against him. It merely sought reconsideration of the termination of his parental rights

> because the evidence failed to show reasonable efforts to reunite Father with the children; failed to prove by clear and convincing evidence that Father is unable to provide a safe home for the children with the assistance of a service plan; and fail[ed] to show that the permanent plans are in the best interests of the children.

Relevant precedent states that

> [i]n general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act.

BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 77, 549 P.2d 1147, 1150 (1976) (citations omitted). Assuming Father can establish requirements (1) and (3), the question is whether he can satisfy (2).

The only argument Father stated to the family court during the Motion for Reconsideration was that "the alleged incident that [Mother] related to the court regarding the night before the hearing that [Mother] was abused by [Father] is totally false and that she's given four different versions regarding that particular incident." Even excluding Mother's

testimony on that subject, however, the record contains clear and convincing evidence that Father would not now nor in the reasonable foreseeable future be able to provide the Children with a safe family home, even with the assistance of a service plan. In other words, in light of the record, we conclude that Father has no "meritorious defense" and that the outcome of Father's case would be no different if the default was set aside. The record shows that (a) Father had not addressed his history of substance abuse and safety issues with Mother and the Children, (b) Father had a history of incarceration and an extensive record of arrests (for abuse of a family/household member, assault, robbery, and promoting a detrimental drug), (c) Father had limited contact with the Children because of his previous incarceration, and (d) during the period he was not incarcerated, Father did not maintain contact with DHS and did not participate in any services.

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 the parties,

IT IS HEREBY ORDERED that the November 16, 2000 Orders Concerning Child Protective Act and December 26, 2000 Orders

Concerning Child Protective Act from which this appeal is taken are affirmed.

DATED: Honolulu, Hawai‘i, May 6, 2002.

On the briefs:

Jeffry R. Buchli
for Father-Appellant.

Chief Judge

Patrick A. Pascual and
Mary Anne Magnier,
Deputy Attorneys General,
for Department of Human
Services-Appellee.

Associate Judge

Associate Judge