NO. 28394

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

IN THE INTEREST OF I.S.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S 05-10428)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

In this termination of parental rights case, Father-Appellant (Father) appeals from the December 15, 2006 Amended Order Awarding Permanent Custody (Amended Custody Order) and the January 2, 2007 Orders Concerning Child Protective Act entered by the Honorable Bode A. Uale, presiding judge in the Family Court of the First Circuit (family court). After a careful review of the record, the points raised and the arguments and authorities presented, we conclude that the family court did not abuse its discretion, and affirm.

I.

Father is the natural and legal father of the child I.S. (Child), who was born on January 27, 2005. On January 28, 2005, the Department of Human Services, State of Hawaii (DHS) received a report of the possible abuse of Child by her natural and legal mother (Mother),[1] based on (1) allegations of substance abuse, generally and specifically, use of methamphetamines during her pregnancy with Child and (2) her failure to participate in appropriate prenatal care. Mother voluntarily placed Child in

[1] Mother was ordered to appear at a March 16, 2006 review hearing. When she failed to appear, the Family Court of the First Circuit (family court) entered a default against her and dispensed with notice of future hearings to her. Mother did not move to set aside this default and is not a party to the instant appeal.

the foster custody of DHS on February 1, 2005, and DHS placed Child in the home of a maternal cousin.

At an Ohana Conference held on February 16, 2005, both Mother and Father agreed to participate in substance abuse treatment, random urinalysis for drugs, psychological evaluation and parenting education. However, Father and Mother tested positive for methamphetamines on February 28, 2005, and both thereafter failed to fully participate in services.

The instant Petition for Foster Custody (Petition), based on the foregoing events, was filed on June 24, 2005. Father and Mother were personally served with the Petition, Summons and proposed service plan on June 28, 2005. The Summons contained the following statement, as required by Hawaii Revised Statutes (HRS) § 587-32(d):

> YOUR PARENTAL AND CUSTODIAL DUTIES AND RIGHTS CONCERNING THE CHILD OR CHILDREN WHO ARE THE SUBJECT OF THE ATTACHED PETITION MAY BE TERMINATED BY AWARD OF PERMANENT CUSTODY IF YOU FAIL TO APPEAR ON THE DATE SET FORTH IN THIS SUMMONS. IF YOUR PARENTAL RIGHTS ARE TERMINATED, YOU WILL LOSE RIGHTS TO THE CARE AND CUSTODY OF YOUR CHILD; YOUR CHILD MAY BE PLACED FOR ADOPTION. IF YOU FAIL TO APPEAR AT THIS HEARING, FURTHER ACTION WILL BE TAKEN WITHOUT FURTHER NOTICE TO YOU.

The Summons further stated that the hearing was set for 9:30 a.m. on July 5, 2005.

At the July 5, 2005 hearing, Mother and Father stipulated to the adjudication of the Petition, the award of foster custody of the Child to DHS, and to the June 22, 2005 service plan as modified. Based on the stipulation of Father and Mother, the record, and the reports submitted, the Family Court found an adequate basis to support the Petition because the Child's physical or psychological health or welfare had been harmed or was subject to threatened harm by the acts or omissions of the Child's family. The family court invoked its jurisdiction over Mother, Father, and Child, awarded foster custody of the child to DHS, and ordered the June 22, 2005 service plan as modified.

At the May 3, 2006 review hearing, the family court ordered continued foster custody, another review hearing on

June 6, 2006 at 8:30 a.m. and a trial date of June 20, 2006 at 8:30 a.m. At the June 6, 2006 hearing, it was reported by DHS social worker Susan Yoo (Yoo) that Father's unsupervised Sunday visits with Child had been discontinued on May 11, 2006 due to a presumptive positive test for methamphetamines on May 9, 2006. Although Father appeared at the June 6 review hearing and spoke at length contesting the May 9, 2006 test results, the family court told the parties to present their evidence at the June 20, 2006 trial. The family court emphasized that the only issue it was concerned about was drug use by Father.

Father did not appear at the June 20, 2006 trial on his requests for unsupervised visits, the return of Child to his care, and the validity of his positive urinalysis for methamphetamines. As a result, the family court proceeded with the June 20, 2006 trial without Father's presence and entered a default against Father and discontinued notice of future hearings to him. The family court entered orders continuing the prior award of foster custody of Child to DHS and ordering visits for Mother and Father to be supervised at the discretion of DHS and the guardian ad litem.

Based on Father's "Motion for Immediate Review" the family court set aside its June 20, 2006 entry of default and reset trial for August 30, 2006. However, on August 9, 2006, DHS filed its "Motion for Order Awarding Permanent Custody and Establishing a Permanent Plan," which was set for hearing on August 15, 2006. Father was served with DHS's motion by United States Mail on August 9, 2006. The "Notice of Motion" attached to the motion stated the following:

> You are hereby advised that if you fail to appear on the date set forth in this notice or to file an answer with the clerk of the Family Court of the First Circuit, whose mailing address is P.O. Box 3498, Honolulu, Hawaii 96811, before the date of the hearing, further action shall be taken without further notice to you and your parental and custodial duties and rights concerning the child(ren) who is/are the subject of the petition may be terminated by the award of permanent custody and that such child(ren) may be then placed for adoption.

Father was present at the August 15, 2006 hearing on DHS's motion. His request to reinstate his unsupervised Sunday visits was opposed by social worker Yoo because, due to missing a testing appointment, Father had been terminated from the Hina Mauka monitoring program and he had not engaged in substance abuse treatment. The family court continued the hearing to August 30, 2006 and consolidated the hearing with the trial on Father's requests.

At the August 30, 2006 proceeding, Father presented his evidence, including his own testimony and that of parent educator Stephanie Camilleri, DHS moved for a directed verdict and the family court granted DHS's motion.[2] The family court considered DHS's motion for permanent custody, but upon Father's opposition, the family court set the matter for trial and ordered all parties to return for a pretrial hearing on November 16, 2006 at 8:30 a.m. and the trial scheduled for December 12, 2006 at 8:30 a.m.

As Father did not appear at the pretrial hearing on November 16, 2006 or at the December 12, 2006 trial, the family court entered default against Father on the latter date.[3] Given the default of Father and Mother, the family court proceeded to

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[2] The family court summarized its ruling as follows:

> Based on all of the evidence, especially [Father's] own testimony on cross examination, after May 9th there was a positive, on June 7th. There was also a positive on July 19th. There was a no-show.
>
> There's no way I can give him family supervision. I need a track record that shows me that he's not using. As far as I'm concerned right now, he needs to get treatment or else I'll never give his kid back.
>
> And you -- you gotta show me a track record. If you don't show me a track record, I can't do my job.
>
> [Father]: Okay, Your Honor.

[3] Upon colloquy with Father-Appellant's (Father) counsel, it was ascertained that Father knew of the hearing and that at the time of the hearing, he was living somewhere in Waikiki, although he could not provide his counsel with an address. The family court noted that it waited fifteen minutes before calling the case.

trial on DHS's motion and considered the evidence presented by DHS and the record in the instant case. The family court issued oral findings, ordered termination of Mother and Father's parental rights, awarded permanent custody of Child to DHS, and approved the July 17, 2006 proposed Permanent Plan.

The unchallenged findings of fact as reflected in the family court's Findings of Fact and Conclusions of Law filed on February 22, 2007 included the following: (1) Father was born on May 26, 1959; (2) Father represented that he had last used methamphetamines in 1999, yet tested positive for this drug on February 28, 2005, March 14, 2005, November 7, 2005, May 9, 2006,[4] June 7, 2006,[5] July 19, 2006 and failed to appear for his "random" urinalysis tests on February 26, 2005, March 31, 2005, May 13, 2005, June 9, 2005, June 18, 2005, July 13, 2005, October 3, 2005, October 1, 2005, November 21, 2005, December 5, 2005, July 10, 2006, August 4, 2006, August 22, 2006, September 5, 2006, September 14, 2006, September 21, 2006, October 31, 2006, November 16, 2006 and November 24, 2006, all of which were deemed presumptive for drugs; (3) Father admitted that he started using marijuana and alcohol while in his teens and had also used cocaine, crack cocaine and Valium; (4) Father was not a credible reporter of his substance abuse; (5) Father's substance abuse assessments conducted in 2005 and 2006 both diagnosed Father as suffering from methamphetamine dependence, recommended substance abuse treatment programs until discharged and, in 2006, assessed Father as having a poor prognosis for conquering his substance abuse problem; (6) Father's May 26, 2005 psychological

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[4] Father claimed that this positive test result was a "false positive" because he had been taking "Vitamin B Complex." However, Father's urine sample was tested twice, using two different kits, with positive results each time. Father took the sample and disposed of it before it could be transported for a confirmation test. Father also tried to steal the urinalysis reporting form.

[5] Father also claimed that this test was a false positive for methamphetamines because he was taking vitamin B-12, penicillin and "hyrdocod." However, the confirmation test was also positive for methamphetamines.

evaluation questioned Father's overall psychological and emotional functioning and parenting skills due to overall defensiveness and expressed concerns that, without external controls, Father may revert to his previous antisocial behaviors; (7) Father was offered free substance abuse treatment as late as September 2006 but failed to fully participate in and complete this treatment; (8) Father lacked insight into his substance abuse problem and would not be able to adequately address this problem until he acknowledges that he has a problem; and (9) until Father addresses his substance abuse problem, he will not be able to provide a safe family home for Child. The family court also noted that Child was placed in foster care on February 1, 2005, when she was five days old, and as of the date of the termination hearing had remained in foster care for one year, ten months and eleven days.

Father filed his "Motion to Set Aside Default" on December 18, 2006, asking the family court to set aside the December 12, 2006 entry of default against him, the December 12, 2006 order terminating his parental rights, and to reset the trial on DHS's motion for Permanent Custody. Father alleged that he thought the December 12, 2006 trial was set for 9:30 a.m. rather than 8:30 a.m. and that he arrived at the family court at 9:10 a.m.

After the January 2, 2007 hearing, the family court denied Father's motion to set aside default, finding that Father failed to satisfy the three requirements for such relief as established in BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 579 P.2d 1147 (1976), and entered "Orders Concerning Child Protective Act" to that effect on January 2, 2007. On January 29, 2007, Father filed a notice of appeal, challenging the December 15, 2006 Amended Custody Order and the January 2, 2007 order denying him relief from default.

II.

On appeal, Father contends that the family court clearly erred when it (1) denied his motion to set aside default entered against him on December 18, 2006 and (2) found Father was not able to provide a safe home for Child.

As to the former, the standard of review for setting aside a default is abuse of discretion. Hawai'i Hous. Auth. v. Uyehara, 77 Hawai'i 144, 147, 883 P.2d 65, 68 (1994). "[T]o constitute an abuse of discretion a court must have clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). In BDM, the Hawai'i Supreme Court stated that "defaults and default judgments are not favored and . . . any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." Id. at 76, 549 P.2d at 1150. The court held 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. The mere fact that the nondefaulting party will be required to prove his [or her] case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening.

Id. at 77, 549 P.2d at 1150 (citations omitted; emphasis added); see Rearden Family Trust v. Wisenbaker, 101 Hawai'i 237, 254, 65 P.3d 1029, 1046 (2003).

On appeal, as Father does not claim that the family court abused its discretion when it entered default against him, we consider whether the family court's decision not to set the entry of default aside was an abuse of discretion. See Long v. Long, 101 Hawai'i 400, 407, 69 P.3d 528, 535 (2003).

Following the analysis set forth in BDM, the family court found that Father failed to establish any of the required

factors. Father does not present any argument on appeal that the family court was incorrect in so finding.

Rather, Father contends that the "good cause" standard of Hawai'i Family Court Rules (HFCR) Rule 55(c)[6] applies in this case and was satisfied solely due to the "'fundamental liberty interests' of parental rights." Even if Father is correct that the "good cause" standard of HFCR Rule 55(c) applies, Father provides no authority for the proposition that the adjudication of his parental rights and his mistake regarding the time of the trial, without more, constituted "good cause" and justified the setting aside of the entry of default.

Moreover, the record supports the findings of the family court. First, Child and her foster parents were prejudiced by the delay in determining a permanent placement for her. Given her tender age of twenty-two months, even short delays represent a significant proportion of her life.[7]

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[6] Hawai'i Family Court Rule 55(c) provides:

> (c) **Setting aside default.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

[7] That younger children should be treated more expeditiously is a notion that has been codified in the provisions governing the protection of children. For example, Hawaii Revised Statutes (HRS) § 587-25(a)(1)(A) (2006) (Jack-in-the-Box) mandates that the court consider the age and vulnerability of the child in "determining whether the child's family is willing and able to provide the child with a safe family home[.]" In addition, when considering a proposed permanent plan, HRS § 587-73(a)(3) (2006) creates a presumption that

> (A) It is in the best interests of a child to be promptly and permanently placed with responsible and competent substitute parents and families in safe and secure homes; and
>
> (B) The presumption increases in importance proportionate to the youth of the child upon the date that the child was first placed under foster custody by the court[.]

Second, as admitted by Father himself in the family court proceeding,[8] he had no good reason for missing the scheduled trial. He was told, when he appeared at the October 30, 2006 hearing that trial would commence on December 12, 2006 at 8:30 a.m. As the family court explained to Father at the January 2, 2007 hearing on his motion to set aside default, his case was not called until 8:45 a.m. to give Father more time to appear for trial.

Finally, Father presented no valid defense to the termination of his parental rights. Termination must be ordered upon a showing, by clear and convincing evidence, that the parent cannot presently nor is it forseeable, that a parent could provide a safe home for the child, even with the assistance of a service plan, within a reasonable time. HRS § 587-73(a) (2006).[9] A "reasonable time" is defined by statute as no longer

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[8] Father spoke directly to the family court at the hearing on his motion to set aside default:

> First of all, I'd like to apologize for being late on that day. 'Cause, you know, there was no excuse to be late, but I got the times all mixed up. I thought it was like at 9:30 and -- or 9:00 o'clock, something like that, and I -- and I came late.
>
> But I have a busy schedule at work and, you know, things been little bit -- little bit, um -- stuffed up and I'm just tryna do my best.
>
> But as far as my daughter, you know, I don't wanna lose my daughter to the State. Not -- not leaving her with my ex-girlfriend's family in Waiʻanae. Knowing that I -- you know, I can take [c]are my daughter and give her -- give her one good life. Not -- not letting 'em stay out there with the people that's taking care her now. I not going give up on my baby.
>
> THE COURT: That's why you think you're gonna win your case?
>
> [FATHER]: No. I going win my case be -- I -- I can win the case because I guess the State like me go do treatment at Hina Mauka. And I kinda like resent that and the fact that -- but if I gotta do it, you know, I'll do it.

[9] HRS § 587-73(a) provides, in pertinent part,

> (a) At the permanent plan hearing, the court shall consider fully all relevant prior and current information pertaining

(continued...)

than two years. HRS § 587-73(a)(2). The court however, is not required to wait for those two years to pass before terminating parental rights. See In re Doe, 89 Hawai'i 477, 491-92, 974 P.2d 1067, 1081-82 (App. 1999) (under prior version of HRS § 587-73(a)(2)). "If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of the law is valid." Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983). The family court's determination that Father was not able, nor would he become able, within a reasonable period of time, to provide a safe family home for Child is reviewed under the clearly erroneous standard on appeal. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001).

At the hearing on his motion to set aside default, Father acknowledged to the family court that he would need to continue substance abuse treatment, thereby tacitly admitting he had a substance abuse problem. Beyond this tacit admission, as reflected in the uncontested findings of the family court, Father tested positive for methamphetamine use on multiple occasions, the last of which on July 19, 2006. Moreover, he failed to submit, as ordered, to testing on nineteen occasions, the last on November 24, 2006, only eighteen days before the hearing on the

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[9](...continued)
to the safe family home guidelines, as set forth in section 587-25, including but not limited to the report or reports submitted pursuant to section 587-40, and determine whether there exists clear and convincing evidence that:

(1) The child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 are not presently willing and able to provide the child with a safe family home, even with the assistance of a service plan;

(2) It is not reasonably foreseeable that the child's legal mother, legal father, adjudicated, presumed, or concerned natural father as defined under chapter 578 will become willing and able to provide the child with a safe family home, even with the assistance of a service plan, within a reasonable period of time which shall not exceed two years from the date upon which the child was first placed under foster custody by the court[.]

termination of his parental rights. Finally, as also found by the family court, Father failed to fully participate in and complete substance abuse treatment offered to him free of charge as late as September 2006. Father has failed to show that he has any meritorious defense to the family court's determination that he could not provide a safe family home within two years of the start of Child's foster care.

We therefore conclude that Father has failed to show that the family court abused its discretion in denying his motion to set aside default. Moreover, given the substantial evidence of Father's longstanding and ongoing substance abuse problem, we also sustain the family court's determination that Father could not, within a reasonable time, provide a safe home for Child.

Therefore,

The Family Court of the First Circuit's December 15, 2006 Amended Order Awarding Permanent Custody and the January 2, 2006 Orders Concerning Child Protective Act are affirmed.

DATED: Honolulu, Hawai'i, December 14, 2007.

On the briefs:

Tae Chin Kim,
for Father-Appellant.

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for Petitioner-Appellee.

Presiding Judge

Associate Judge

Associate Judge