

DISSENTING OPINION BY REIFURTH, J.

I respectfully disagree with the majority's conclusion that the Family Court of the First Circuit ("Family Court") abused its discretion in denying Plaintiff-Appellant DJ's ("Father") mid-hearing request for a continuance to seek the assistance of counsel.¹ Therefore, I dissent.

Because I disagree with the majority's abuse of discretion analysis, I would reach Father's second point of error on appeal, whether the Family Court abused its discretion by relying upon a report prepared by the Family Court's Custody Investigation Unit ("CIU") that was allegedly incomplete and performed without his consent. I would conclude that the Family Court did not err in accepting the report and, accordingly, would affirm the Order Granting Defendant's Motion for Post-Decree Relief, Filed February 1, 2016, filed on November 23, 2016 ("Custody Order"), and the Order Denying Motion for Reconsideration or Amendment of Judgments and Order Filed 12/2/16, filed on January 4, 2017 ("Order Denying Motion for Reconsideration").

I. The Family Court did not abuse its discretion in denying Father's request for a continuance to obtain legal counsel.

The majority concludes that the Family Court abused its discretion in denying Father's mid-hearing request for a continuance to seek the assistance of counsel in light of his demonstrated lack of examination skills, the nature of the proceeding, and his "substantive parental rights." Respectfully, however, this decision ignores the fact that Father knew of his right to counsel, knew that the evidentiary hearing on the February 1, 2016 Motion and Declaration for Post-Decree Relief ("Motion") filed by Defendant-Appellee CJ ("Mother") would include the presentation and examination of witnesses, and had a

^{1/} This is not the first time in this case that Father chose to represent himself at a hearing, found that things were not going well, and belatedly sought a continuance in order that he might obtain an attorney. On June 19, 2013, the family court held a hearing on Father's March 14, 2013 post-decree motion to change the location of the twice-weekly exchange of the parties' children. At the close of the hearing, the court announced that it would deny the motion and Father requested to continue the proceedings to allow him to retain counsel. That request, like the one in the instant appeal, was denied.

history of seeking to invoke his right only when he perceived the winds to shift against him. Most concerning, it turns control of courtroom proceedings over to parties who will decide when it becomes necessary for them to hire counsel, and ignores the third and fourth factors recognized by the Hawai'i Supreme Court's directive that the Hawai'i Family Court Rules "shall be construed and applied in such manner as will advance the fair, equitable, speedy and inexpensive determination of every action." Haw. Fam. Ct. R. 1.

Father's first point of error relies primarily upon his arguments that he had legitimate reasons for the request for delay—that he is not a native English speaker and had difficulty communicating as he cross-examined witnesses—and that it was not his fault that the procedure of cross examining witnesses was unfamiliar to him. Father asserts that the denial of his request for a continuance thereby prejudiced him.²

We review a trial court's denial of a motion to continue for abuse of discretion. *Onaka v. Onaka*, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006) (citing *State v. Lee*, 9 Haw. App. 600, 603, 856 P.2d 1279, 1281 (1993) ("A motion for continuance is addressed to the sound discretion of the trial court, and the court's ruling will not be disturbed on appeal absent a showing of abuse of that discretion.")). "Generally, to constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *State v. Crisostomo*, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000) (quoting *State v. Gaylord*, 78 Hawaii 127, 144, 890 P.2d 1167, 1184 (1995)) (internal quotation marks and

^{2/} The Custody Order addressed Father's request for a continuance as follows:

Father requested a continuance of the trial to retain legal counsel after Mother had concluded her presentation of evidence in her case in chief. Despite the passage of 7 months and numerous court hearings since the filing of Mother's Motion, Father had failed to seek or retain legal counsel. Father presented no excuse for his failure to retain legal counsel in a timely fashion, and the Court denied Father's request for a continuance literally in the middle of trial as untimely.

brackets omitted).

Not only was Father well-aware that he was entitled to have an attorney represent him, but he had previously invoked that same right in prior proceedings. In addition, although Father was aware of the procedures that would apply at the September 30, 2016 evidentiary hearing, he declined to exercise that right in the seven months prior to that proceeding. On June 8, 2016, the presiding judge explained to Father:

THE COURT: . . . So I will go ahead and--and set--you guys have to come back here on June 20th to see Ms. Shintani and then come back here for trial on July 8th at 8:30.

All witnessess and exhibit lists need to be filed and exchanged with the parties by July 1st, 2016.

And then we'll--I'll give you half-day trial, from 8:30 to 12 o'clock, to present whatever witnesses you have and evidence you have to either support your request to relocate or to challenge the request to relocate. Okay?

* * * *

Because I--I want you guys to have more time than you guys are going to have just in a--a short hearing today, 'cause this is a very important request. So I'm going to set it for trial and give you half a day, just you guys, to present your case so that I can have more time to go and consider everything. Okay?

Okay. Any question, sir?

[FATHER]: No, your Honor.

THE COURT: And then interpreter will be ordered for that day.

In light of the fact that Father did not question the process, that he knew that he had a right to retain his own counsel, and that he had previously exercised that same right, the timing of this most recent request for counsel is critical in determining whether the Family Court abused its discretion. Even in the criminal context where counsel is a matter of constitutional right and the liberty interests are at least the equal of those presented here, "courts generally 'view with disfavor requests for a continuance made on the day set for trial or very shortly before.'" *Lee*, 9 Haw. App. at 603, 856 P.2d at 1281 (quoting 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL

§ 832 at 263 (2d ed. 1982)).

Father's contention that the Family Court abused its discretion is premised upon his right to hire a lawyer and his claimed surprise at the process involved—that is, the general procedures of presenting witnesses and evidence—in the hearing on the Motion. Although Father had seven months in which to hire counsel and had declined to do so, what he did not have was a subsequent mid-hearing right to change his mind.

The majority's reliance on *Sapp v. Wong*, 62 Haw. 34, 41 609 P.2d 137, 142 (1980) is, I believe, misplaced. In *Sapp*, the supreme court concluded that the trial court abused its discretion in failing to grant a pre-trial request for a continuance on the basis that the appellees, who were indispensable to the case, were not available to testify. *Sapp*, 62 Haw. at 41, 609 P.2d at 142. The supreme court stressed that granting the continuance would not prejudice or inconvenience the appellees, but would prejudice the appellants from having a reasonable opportunity to try the case on the merits. *Id.*

Here, even if we assume that an attorney was necessary to allow Father a reasonable opportunity to try the case on the merits, it was Father who, well-aware of his right and the process, with ample time at his disposal, failed to take the necessary steps. A movant must generally show that due diligence has been exercised. *Lee*, 9 Haw. App. at 604, 856 P.2d at 1282 (citing *United States v. Walker*, 621 F.2d 163, 168 (5th Cir. 1980) (in order to obtain a continuance to secure the attendance of a witness)). Furthermore, all pre-trial deadlines had passed, and Mother's witnesses had been presented, cross-examined, and excused. There is no discovery to be had. The only thing that an attorney might be retained to do would be to cross-examine the judiciary author of the CIU report.

Father's mid-hearing request for a continuance was premised upon the very general and unprovable contention that he "did not realize that he would have to be doing cross examination," and that "[n]one of his prior experience had involved witnesses and cross-examination." To the extent that Father was indeed in the dark as to the nature of the evidentiary

hearing that the court was affording him, he nevertheless does not contend that he sought out any of the free (the Judiciary's Access to Justice Room at the family court) or almost-free (Voluntary Legal Services of Hawaii) resources that would have, at a minimum, informed him of the process. Furthermore, Father now contends that his "unexpressed, but obvious explanation for his delay is simple. The CIU report had only been completed one week prior," and therefore he "should not have been penalized for delay in seeking counsel, since he actually had less than one week to decide whether he needed counsel and then to obtain counsel." The record, however, demonstrates that Father was made aware almost six months earlier that he would have approximately one week between report distribution and the hearing.

Father also asserts that any inconvenience to the Family Court was minimal because "about one and a half hours of Court time [] had been scheduled for this case[,] and "it is not as if the Court has nothing else to do with this time[,] like "working on decrees and orders for other cases." Father's argument oversimplifies the judicial process and does not establish that the inconvenience to the Family Court was minimal.³

While parents have a substantive liberty interest in the care, custody, and control of their children, and these rights "would mean little if parents were deprived of the custody of their children without a fair hearing," *In re Doe*, 99 Hawai'i 522, 533, 57 P.3d 447, 458 (2002), this is not that case. Father, in fact, had long-ago been provided with an interpreter, and the hearing on the Motion had already been delayed for almost seven months. He was familiar with his right to counsel and the process, yet he chose not to hire an attorney. In sum, he did not exercise any due diligence. Father's substantive parental rights, in this context, were therefore not infringed upon, and the court did not abuse its discretion in denying Father's mid-hearing request for a further continuance. Therefore, I would

^{3/} Father's argument does not address the fact that Mother filed her motion on February 1, 2016, hoping to register the children for school in North Carolina in the fall, or how any such continuance would affect her, or bear on the ultimate question, the best interests of the children.

reach Father's second point of error on appeal.

II. The Family Court did not abuse its discretion in relying upon a CIU report that was allegedly incomplete and performed without Father's consent.

Father's second point of error is that the Family Court abused its discretion in relying upon a CIU report that was incomplete and performed without his consent.

The supreme court has stated:

Generally, the family court possesses wide discretion in making its decisions and those decision 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.

Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) (quoting *In re Doe*, 95 Hawai'i 183, 189-90, 20 P.3d 616, 622-23 (2001)). Additionally, "the family court is given much leeway in its examination of the reports concerning a child's care, custody, and welfare, and its conclusions in this regard, if supported by the record and not clearly erroneous, must stand on appeal." *Id.* (citing *In re Doe*, 95 Hawai'i at 190, 20 P.3d at 623).

Here, Father did not establish that the CIU report was incomplete in any material sense,⁴ that his consent to the CIU report was a precondition to the court accepting it into evidence, or even that the court made any particular use of the report in reaching its decision. Mindful of Father's failure to support his arguments and the Family Court's broad discretion in

^{4/} Hawaii Revised Statutes ("HRS") section 571-46(4) provides the guidelines for investigating and preparing a CIU report in child custody cases and gives the court ample discretion in ordering and considering a CIU report:

Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare, and custody of any minor child of the parties. When so directed by the court, . . . the reports may be received in evidence if no objection is made and, if objection is made, may be received in evidence; provided the person or persons responsible for the report are available for cross-examination as to any matter that has been investigated[.]

Haw. Rev. Stat. § 571-46(4); see *Fisher*, 111 Hawai'i at 50, 137 P.3d at 364 (noting the Family Court's broad discretion in weighing the various factors, pursuant to HRS section 571-46, in a child custody/relocation case).

examining reports concerning a child's custody, I would conclude that the Family Court did not abuse its discretion in relying on the CIU report to help in determining the children's best interests.

Based on the foregoing, I would affirm the Family Court's November 23, 2016 Custody Order and the January 4, 2017 Order Denying Motion for Reconsideration.