IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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JK, Respondent/Plaintiff-Appellee,

v.

DK, Petitioner/Defendant-Appellant.

SCWC-18-0000844

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-18-0000844; CASE NO. 2DV161000408)

AUGUST 3, 2023

RECKTENWALD, C.J., McKENNA, AND EDDINS, JJ.,
CIRCUIT JUDGE DeWEESE IN PLACE OF NAKAYAMA, J., RECUSED, AND
CIRCUIT JUDGE WATANABE IN PLACE OF WILSON, J., RECUSED

OPINION OF THE COURT BY EDDINS, J.

I.

In this divorce case, the Family Court of the Second Circuit ordered a default judgment in favor of Joel D. Katz (Husband) as a Hawai'i Family Court Rules (HFCR) Rule 37(b)(2) discovery sanction against Dania N. Katz (Wife). Later, the

court refused to set aside the default, and then denied Wife's motion to reconsider.

In a memorandum opinion with a dissent, the Intermediate Court of Appeals affirmed the family court.

We conclude that the family court erred when it declined to set aside the default judgment under HFCR Rule 60(b)(1) for excusable neglect. The court also erred by entering default as a discovery sanction.

We vacate the family court's orders and remand to the second circuit.

II.

Husband and Wife married in 1995. Husband filed for divorce in October 2016. Husband works as a musician, teaches at the University of Hawaiʻi Maui College, and earns income through his home studio recording business. Wife owns and runs a Maui food and drink publication. They have two children. One child, their daughter, was a minor (sixteen years old) when Husband filed for divorce.

Initially, Wife had an attorney, who helped her answer Husband's divorce complaint. On January 24, 2017, Husband served a production of documents request on Wife's attorney. Husband demanded that Wife produce varied records within a month. His document request spanned seven pages, containing several subparts. Husband wanted copies of each check and wire

payment Wife received and made after their 1995 marriage. He also sought other financial records, like Wife's credit card statements from the past three years, all her personal financial statements and complete business records covering the past five years, all cash and non-cash gifts from the last five years exceeding $1,000, and any document showing Wife had sole or joint ownership of any asset during their marriage.

The discovery deadline lapsed with no response from Wife. After the deadline passed, Husband's attorney called Wife's attorney. Wife's attorney said she would move to withdraw as counsel. On March 1, 2017, she did. And on March 17, 2017, the court granted the motion. Before withdrawing, Wife's lawyer did not request a discovery extension.

The family court did not schedule a status hearing regarding new counsel, or *any* court date. The record omits a transcript. No one suggests that the family court advised Wife about her court-related responsibilities

On April 5, Husband sent his attorney an email. He decides to "switch" to Wife's tax accountant because Wife told him she had filed a separate tax return. Husband mentions that he had asked Wife's accountant for her 2016 tax information. The accountant, Husband tells his attorney, "did not have any numbers from her to complete a return and he was unable to

advise [Husband] on whether it would be to [Husband's and Wife's] benefit to file jointly."

On April 6 at 5:08 a.m., Husband's attorney emailed Wife. The attorney asks her to confirm what Husband claimed: Wife had filed her 2016 tax returns and listed their daughter as a dependent. Counsel comments that if Wife has already filed her tax returns, she could easily produce the discovery materials. But if she *hasn't* filed, the attorney wants to "speak with [Wife] about the efficacy of filing a joint return."

One minute later, Husband's lawyer sent a second email. The lawyer warns Wife that Husband would move to compel discovery and seek attorney's fees and costs if Wife doesn't produce the records by April 11.

Wife replied on April 12. Husband gave her more time to respond, she says. (Husband denies this.) In her email, Wife informs Husband's counsel that she was still unrepresented. Finding a new attorney posed challenges, she explains; many Maui attorneys had declined to represent her due to "conflict of interest." Later in her motion to set aside the default judgment, Wife elaborates: (1) Husband communicated with several Maui family law attorneys before she did; and (2) other lawyers declined to represent her because they had pending cases before a per diem family court judge who Husband was dating. Wife's financial situation also made hiring a lawyer difficult.

Aside from lack of counsel, Wife offers another reason why she struggled to produce the records. She needed a new accountant. Once the accountant realized he had shared her confidential information with Husband, she says, the accountant sent each a letter, refusing to work with either spouse. Wife maintains Husband's "interference" made her unable to "furnish [Husband] with accurate financial records from [her] [accountant]."

Husband counters that the accountant told him he had "no conflict working with [Husband] or [Wife]" and discussed their filing of joint returns. But soon after, the accountant sent Husband and Wife letters, advising that he did in fact have "conflicts of interest." Husband blames Wife for the accountant's decision. He speculates she had "some intense contact" with the accountant making him "change his mind about working with us."

On May 4, Husband moves to compel discovery. Husband asks for attorney's fees and costs and lists all available discovery sanctions under HFCR Rule 37(b)(2), including entering default judgment. A "Notice of Motion" dated May 2, 2017 and signed by Counsel, says that the family court would hear the discovery motion on May 31, 2017. A certificate of service, also dated May 2, 2017, represents that Counsel had served Wife by mail at her P.O. Box.

Meanwhile, Wife and her daughter planned to move out of the longtime family home at the end of May. On May 31, 2017, Wife is a no-show at the motion to compel discovery hearing. Since she neither appeared nor provided discovery, Husband orally moves to default Wife. The court defaults her. It grants Husband's motion to compel, imposes attorney's fees and costs, and gives Wife until June 13 to produce discovery. The court also schedules a further hearing on the discovery matter for June 27, 2017.

The day before that hearing, Husband moves ex parte to extend the discovery deadline and reset the status hearing. Turns out, Counsel never served Wife with the notice of hearing date. Wife has "not been served with the Order relating to the Motion to Compel Discovery filed May 5, 2017 [sic] and heard on May 31, 2017[,]" Counsel writes.

The court grants Husband's "ex parte motion to extend deadlines and to continue status hearing." It signs a proposed order submitted with, and attached to, the motion. Wife is given about two weeks, until July 10, to produce discovery. The "Ex Parte Order" also moves the next day's hearing to July 20, 2017. At the end, it cautions Wife that if she fails to appear at the discovery status hearing or submit discovery, "the court may granted [sic] the proposed Divorce Decree submitted by [Husband]." As before, Husband's counsel does not *email* Wife

the legal documents, *personally* serve her, or communicate with Wife about the court date.

Husband's counsel files another certificate of service. Counsel mails (to Wife's P.O. Box) the court's May 31 discovery order, along with other legal documents: the ex parte motion and order (together six pages); two copies of an odd-fonted, one page, unsigned and uncaptioned "order" purporting to grant Husband attorney's fees and costs; and Husband's proposed divorce decree, titled "Judgment Granting Divorce and Awarding Child Custody."

Counsel created the court's ex parte order (and every family court order filed in the case). Counsel's name and office information, like a motion, appear in the top left corner. At the end of each order, above a line above "Judge of the above-entitled court," the family court judge signs off.

The ex parte order – the one that reset the status hearing and set a discovery deadline - does not stand alone. The two-page order follows Husband's four-page "ex parte motion to extend deadlines and to continue status hearing." The order's final part reads: "If [Wife] fails to appear at that status hearing mentioned above or fails to respond to the discovery requests by the deadline stated herein, the court may granted [sic] the proposed Divorce Decree submitted and filed by [Husband]."

On July 20, 2017, Wife does not show at the status hearing. Husband reports that Wife had ignored the discovery deadline. The family court asks: "[H]as there been any communication from the defendant?" Husband's attorney replies that Husband and Wife had discussed matters other than discovery or the case. Then, because Wife missed the status hearing and neglected her discovery obligations, the family court defaults her.

Next, the court veers toward finality. It gives Husband a choice. Does he want to testify under oath or submit an affidavit regarding jurisdiction? Husband chooses to testify. The court poses some jurisdictional questions about the marriage, then says it has "one last question" for Husband, reminding him that he was "still under oath." The court asks husband about his proposed division of property: "The division of assets, including real property, does it follow the Hawaiʻi Marriage Partnership Principles? Meaning that it's a reasonably fair distribution of the assets of the marriage?" See Hawaiʻi Revised Statutes (HRS) § 580-47(a) (property division should be "just and equitable"). Husband's attorney jumps in, "my client asked me that question too. Can I respond to that?" Husband's interest in the equity of their home equals the value of Wife's business, Counsel says. Thus, the divorce decree awards Husband the home (he had sole title before marriage and kept it solely in his name during marriage) and its equity over the twenty plus

years of the marriage. And it lets Wife keep her business. Husband "indicated," the lawyer says, that Wife's business "has substantial cash flow. Um, probably [$]100,000 a year in cash flow."

Then the court asks Husband if the property division is equitable. Husband answers:

> **[Husband:]** I - I do. I mean I understand that [DK] is entitled to half the increase in equity of the house. And we had an informal agreement when we were married that she had no interest in the property. Although I offered her, you know, sharing the title. And I paid for everything with the house for the en - our entire marriage. All taxes, all mortgage, all repairs and maintenance.
>
> **[Family Court:]** Is - is the value of her business, in your opinion, reasonably close to the value of the increase in equity, if divided by two, during the marriage?
>
> **[Husband:]** I think it's close. But I –
>
> **[Family Court:]** All right. I'm satisfied.

That's it. Case closed. The court enters a default judgment against Wife. Husband receives all equity in the family's Wailuku home. Wife keeps her magazine business and receives zero spousal support. The two share joint physical and legal custody of their daughter.

Husband did not submit an asset and debt statement or any record to support his (or Wife's) financial circumstances. The family court divides the marital property based on Husband's and his counsel's "testimony." Other than making Counsel cross-out "by agreement" language in the decree and add "pursuant to

[Wife's] default," the family court makes no meaningful changes to Husband's hoped-for divorce decree.

Wife hired an attorney. By then, the Hawaiʻi Rules of Appellate Procedure Rule 4(a)(3) deadline had passed. So Wife moved to set aside the default judgment under HFCR Rule 60(b).

A different family court judge denies Wife's motion to set aside the default judgment. The court's pithy order reads: "[T]he sanction of default was within the sound discretion of the Court[.]" Wife moves to reconsider. The family court denies that motion, too.

Wife appeals in October 2018.

In a November 2022 memorandum opinion, the ICA affirms the family court's orders granting the default judgment, refusing to set it aside, and denying the recon. The ICA holds that Wife's failure to appear in court and comply with discovery did not constitute excusable neglect under HFCR Rule 60(b)(1). Rule 60(b) "is at bottom an equitable one," the court understands. But equity principles do not support setting aside the default judgment. The opinion ends: "Taking account of all the relevant circumstances surrounding [Wife's] failure to meet deadlines, appear at hearings, and provide reliable information regarding the income from and value of her business, we cannot say that her conduct constituted excusable neglect."

Judge Nakasone dissents. She finds Wife's neglect excusable under a "broad, equitable inquiry taking into account all relevant circumstances." These circumstances include Wife's "self-represented status, the multiple ambiguities surrounding the adequacy of the notification that Self-Represented [Wife] received, her personal situation regarding the housing transition and working two jobs, and the financial and logistical challenges she encountered in finding conflict-free replacement counsel on Maui."

Wife applied for cert, and we accepted.

III.

Hawaiʻi Family Court Rule 60(b) and its look-alikes, Hawaiʻi Rules of Civil Procedure (HRCP) Rule 60(b) and Hawaiʻi District Court Rules (HDCR) Rule 60(b), offer a defaulted party a way to attack a final judgment. These rules allow relief "from a final judgment, order, or proceeding."

Rule 60 is no substitute for appeal. Once the notice of appeal deadline expires, the rule allows a last chance at a merits-based outcome. Courts treat this challenge as a continuation of the original action. PennyMac Corp. v. Godinez, 148 Hawaiʻi 323, 329, 474 P.3d 264, 270 (2020).

Equity principles guide Rule 60(b) motions. See, HFCR Rule 60(b) ("On motion and upon such terms as are *just* . . . ") (emphasis added); Eckard Brandes, Inc. v. Dep't of Labor and

Indus. Relations, 146 Hawaiʻi 354, 364, 463 P.3d 1101, 1021 (2020) (the rule endorses a "broad, equitable, inquiry"); In re Haw. Elec. Co. Inc., 149 Hawaiʻi 343, 362, 489 P.3d 1255, 1274 (2021) (explaining how rule 60(b)(5) refers to "some change in conditions that makes continued enforcement inequitable.").

Equity and finality often clash. Rule 60(b) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2851 (3d ed. 2023). Because Rule 60(b) is remedial in nature, Hawaiʻi courts apply it liberally, favoring a merits-oriented outcome that bends the rule's finality interest to accomplish justice. See e.g., Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawaiʻi 149, 158, 73 P.3d 687, 696 (2003) ("HRCP Rules 60(b) and 60(b)(3) reflect the preference for judgments on the merits over the finality of judgments."); see also Magoon v. Magoon, 70 Haw. 605, 616 n.4, 780 P.2d 80, 86 n.4 (1989) (recognizing, in a division of marital property case, HFCR Rule 60(b)'s "clash" between finality and justice, and noting "the desire for truth is deemed to outweigh the value of finality" with rule 60(b)(3) fraud claims); Rearden Family Tr. v. Wisenbaker, 101 Hawaiʻi 237, 254, 65 P.3d 1029, 1046 (2003) (default judgments are "harsh" so any doubts are resolved in favor of a merits-based outcome).

A.

Wife argues her neglect was excusable. She says the ICA erred when it affirmed the family court's denial of her timely (within one year) HFCR Rule 60(b)(1) motion. The rule reads:

> (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:
>
> (1) mistake, inadvertence, surprise, or excusable neglect[.]

A trial court does not narrowly focus on the defaulting party's neglect. Rather, it considers "all relevant circumstances" to see if the neglect is excusable. Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993).

This court has identified three factors to assess Rule 60(b) motions to set aside: (1) prejudice to the non-defaulting party; (2) whether the defaulting party offers a "meritorious defense"; and (3) whether the default resulted from "inexcusable neglect or a wilful act." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976); cf. Chen v. Mah, 146 Hawaiʻi 157, 160, 457 P.3d 796, 799 (2020) (ruling that a good cause standard controls HRCP Rule 55 motions, but leaving untouched BDM's factors for HRCP Rule 60(b) motions). Equity principles inspire each factor and guide a Rule 60(b) motion's resolution.

This court has not meaningfully tended Rule 60(b)(1) since sketching BDM's three factors some time ago. Since courts consider all relevant circumstances, we identify three more factors that may aid Rule 60(b)(1)'s equitable inquiry: (1) the defaulting party's good or bad faith. See Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223–24 (9th Cir. 2000) (quoting Pioneer, 507 U.S. at 395, identifying the three BDM factors and a fourth - "whether the movant acted in good faith."); (2) court warnings regarding default judgment as a consequence. See, e.g., Guggenheim Cap., LLC v. Birnbaum, 722 F.3d 444, 452 (2d Cir. 2013) (holding, in a case with six separate verbal warnings, that "a court abuses its discretion if it dismisses a case without first warning a pro se party of the consequences of failing to comply with the court's discovery orders"); and (3) the effectiveness of alternative measures. See Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987) (using "the effectiveness of alternative sanctions" as a factor to "determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default.").

We understand the first two factors may shoehorn into BDM's wide-ranging third factor (inexcusable neglect or willful act). But we believe considering good or bad faith and court warnings covering consequences aid a relevant circumstances inquiry. As to "alternative measures," since a defaulting party can usually

suggest a credible lesser measure than a case's end, this factor is mostly unhelpful. Its value, though, rises when a Rule 60(b) motion follows a Rule 37-derived default judgment. See, e.g., Malautea v. Suzuki Motor Co., Ltd., 987 F.2d 1536, 1542 (11th Cir. 1993) (calling default judgment as a Rule 37 discovery sanction "severe" and "appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders.")

B.

First, we examine prejudice. Did the defaulting party's neglect prejudice the other side?

We conclude Husband will suffer no prejudice if the case reopens. Husband identifies none. He doesn't explain how setting aside the default causes prejudicial harm to his case. Nor does he point to common signs of prejudice, like lost evidence or unavailable witnesses. See, e.g., KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 15 (1st Cir. 2003) (describing the loss of evidence due to delay as an example of unfair prejudice).

Husband says that Wife's failure to provide financial records prejudiced him. A trial date, though, had not yet been set when the court defaulted Wife. And even if one loomed, that was then, prejudice under Rule 60(b) is now. Husband does not claim *prospective* prejudice. That is, if the court grants the

motion to set aside and the case reopens, will prejudice result? There is no prejudice to Husband if the family court decides property division and child custody based on evidence presented at trial. Having his case decided on the merits versus a forfeit win disadvantages Husband, but it does not prejudice him. BDM, 57 Haw. at 76, 549 P.2d at 1150 (reasoning the "mere fact" a party has to litigate doesn't spell prejudice).

We turn to the meritorious defense factor.

A meritorious defense does not mean a triumphant defense; it's closer to a valiant defense. A favorable outcome is not something the defaulting party needs to show. Rather, the Rule 60(b) movant only needs to present some factual support - bare allegations will not do - that paves the way to a different outcome. "All that is necessary to satisfy the meritorious defense requirement is to allege sufficient facts that, if true, would constitute a defense" to the underlying matter. United States v. Aguilar, 782 F.3d 1101, 1107 (9th Cir. 2015) (cleaned up).

Wife claims that Husband inaccurately represented their financial situation. She says he controlled the finances during their marriage, and they were not the financial equals he paints through his in-court testimony and his divorce decree (later adopted nearly word-for-word by the family court). Wife maintains she lacked legal representation and awareness of her

legal plight, causing an inequitable outcome: "It awards all family assets solely to [Husband]."

After Wife retained new counsel, she filed her motion to set aside. In it, Wife offers evidence that establishes sufficient facts to support a worthwhile defense contesting the division of the marital property. For instance, Wife presents evidence that (1) per her 2017 tax return, the magazine business made a gross profit of less than $25,000; (2) Husband, in his words, believed the magazine was "not a viable source of income for [Wife]" and that "[a]ny financial hardship [Wife] alleges is due to her own irresponsibility and poor choices"; (3) values the family home at $679,000 in July 2017 (this appraisal, though, does not show the property's equity increase over the twenty-year marriage); (4) puts her in the hole $450 per month (per her income and expense statement, HFCR Form 2F-E-035 – a document Husband never filed), unable to cover her and her daughter's living expenses, even after taking a second job; and (5) post-mother-and-daughter move-out, Husband receives substantial rental income.

We conclude that Wife presents sufficient factual support to contest the property division proposed in Husband's divorce decree.

Now, we look at Wife's neglect.

Inexcusable neglect may sink a Rule 60(b) motion. But neglect or carelessness may not. "[N]egligence or carelessness does not prevent a court in equity from discretion to relieve a litigant from an adverse judgment." In re Marriage of Gharst, 525 P.3d 250, 254 (Wash. Ct. App. 2023); see Bateman, 231 F.3d at 1225 (finding excusable neglect since the "errors resulted from negligence and carelessness, not from deviousness or willfulness."); Pioneer, 507 U.S. at 395 (considering "whether the movant acted in good faith.").

Wife offers several reasons for her neglect: she (1) lacked legal representation and scrambled to find an affordable lawyer who wasn't conflicted by Husband's actions or his personal relationship with a per diem judge; (2) moved out of the longtime family home with her teenage daughter right before a court hearing; (3) struggled to make ends meet; (4) received confusing court documents and was not adequately warned about default judgment as a discovery sanction; and (5) realized too late that the court adopted Husband's divorce decree based on his in-court testimony during a status hearing that morphed into a trial.

The ICA majority deflates Wife's excuses, finding her conduct inexcusable: Wife "was afforded adequate notice to appraise her of the pending action." She "repeatedly failed to

provide her financial information," and missed court hearings, the ICA said.

Wife's unrepresented status frames her neglect. Wife answered Husband's complaint and engaged from the case's start. Then, near the first discovery deadline, her attorney withdrew. Wife struggled to hire new counsel. Both her financial situation and the putative conflicts faced by Maui family law attorneys hurt her efforts. Wife had no one to advance her interests, aid her discovery responses, and ensure she fully understood her legal obligations. See, e.g., Falk v. Allen, 739 F.2d 461, 464 (9th Cir. 1984) (identifying party's difficulty finding counsel as one reason to find excusable neglect). An unrepresented party's non-compliance with discovery demands is problematic. Still, it's unexceptional, especially like here where detailed discovery requests are made.

Wife's personal plight provides context to her neglect. She and her daughter moved out of their longtime home; she worked two jobs, lived at a monthly financial deficit, and experienced emotional issues associated with the dissolution of her marriage and her new situation. Her circumstances show that she did not willfully try to manipulate the judicial system. See e.g. Gharst, 525 P.3d at 254 ("Absent evidence of a deliberate attempt to manipulate the legal system, a party unfamiliar with the legal system who fails to respond during a

time of 'extreme personal difficulty' should not be considered culpable for purposes of the excusable neglect standard.").

Next, we turn to Wife's claim that confusing legal documents also contributed to her neglect.

Wife maintains she did not fully understand the meaning of one sentence buried in several documents sent to her P.O. Box. Wife didn't get that she had to attend a status hearing regarding discovery and hand over discovery by then – *or else*. Without the assistance of counsel, she struggled to make sense of "confusing and conflicting notices."

The ICA majority describes the legal documents mailed to Wife as "not a model of clarity." Nevertheless, it believes Wife received "adequate notice" that she better show up in court and turn over records; otherwise Husband's proposed divorce decree controls their post-marital life. The ICA points to the six of nineteen pages of legal papers Wife received. There the family court's "ex parte order" has a final sentence: if Wife fails to appear at the status hearing or produce discovery, "the court may granted [sic] the proposed Divorce Decree submitted and filed by [Husband]." That "proposed Divorce Decree" (provided to Wife for the first time) appears to be a document titled "Judgment Granting Divorce and Awarding Child Custody."

We disagree with the ICA majority's view that Wife's neglect was inexcusable because she had adequate notice.

To recap, because Counsel forgot to serve Wife with notice of a status hearing (and a discovery order), Husband moves ex parte to reset the hearing. Though the hearing is the next day, Counsel chooses not to alert Wife by email or phone about the ex parte motion and the order granting it. Later, Counsel mails scattered documents to Wife's P.O. Box. There are motions and orders and a proposed divorce decree: the ex parte motion and ex parte order that set a new status hearing date (together), two copies of an odd-fonted, one-page, unsigned and uncaptioned "order" purporting to grant Husband attorney's fees and costs, and Husband's divorce decree somewhat misleadingly called "Judgment Granting Divorce and Awarding Child Custody." Counsel authors all the family court orders. Aside from the unadorned attorney's fees "order," Counsel's name and office information (like a motion) appear at the top left of each family court order. The "notice" in the "ex parte order" makes no reference to HFCR Rule 37(b)(2) or default judgment.

We conclude the family court inadequately warned Wife about the risk and consequences of neglect. An in-court warning goes a long way. See Williams v. Chicago Bd. of Educ., 155 F.3d 853, 858-59 (7th Cir. 1998) (expressing the importance of a court's direct verbal warning about Rule 37 "consequences" and encouraging judges "to make even clearer to litigants the ramifications of their actions" including "that dismissal

loom[s] as a real possibility.") Here, there was no face-to-face court warning about the pitfalls – such as an aggressive litigation-ending sanction – to neglecting a discovery deadline or missing a status hearing about that discovery. See e.g., Malautea, 987 F.2d at 1543-44 (court's in-court, "explicit" warnings of a default judgment sanction for repeated discovery violations supported default judgment).

We turn to notice of the court's status hearing. Hearing date notices must be clear and conspicuous, especially when an unrepresented or self-represented party has to appear in court. See Lai v. Montes, 121 N.Y.S.3d 431 (N.Y. App. Div. 2020) (default judgment set aside in part because notice of required appearance was a single sentence in middle of second page of three-page order and was not "conspicuous"). The consequences of missing that court date must also be clear and conspicuous. See Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995) (stressing "the significance of warning a defendant about the possibility of default before entering such a harsh sanction.").

Here, not only is the hearing date inconspicuous, but the ex parte order does not plainly explain that the reset status hearing could result in a *default judgment* against Wife if she neglected discovery or didn't appear in court. The order makes no reference to HFCR Rule 37(b)(2)(C). And it fails to clearly

convey that the court could enter default judgment if Wife missed the status hearing or did not hand over discovery before then. We view the inartful language in the "ex parte order" as inadequate, particularly without an in-court advisement. (Understandably, in a classic default judgment case, one involving a never-in-court defaulting party, an in-court warning will not happen.)

Wife makes a cogent point: she could not have foreseen that her failure to answer discovery would lead to the family court accepting Husband's unsupported avouchment that his proposed property division was fair. Since Wife has presented sufficient evidence that she did not know the real consequences of neglect – marital property divvied up so that she kept her fledgling magazine business with no financial support, while Husband banked twenty years of equity in the family home - her neglect was excusable. See Briones v. Riviera Hotel & Casino, 116 F.3d 379, 380, 382 (9th Cir. 1997) (ignorance of the law by itself cannot constitute excusable neglect but can be considered where litigant was pro se and other reasons existed for finding excusable neglect).

We conclude Wife lacked sufficient notice that neglecting discovery and missing a status hearing about discovery would lead to the court endorsing nearly word-for-word Husband's proposed division of property and child custody. Only after the

court entered default judgment and she retained counsel, Wife says, did she understand that the court relied on Husband's untested testimony and his lawyer's remarks to establish that the property division urged by Husband was "just and equitable." See HRS § 580-47(a). Wife could not have anticipated, we believe, that the family court would approve Husband's property division and spousal support wish-list without any supporting documents. Nor could Wife know that the court would remake a status hearing about discovery into a trial about the division of marital property. We do not believe unrepresented Wife could have fairly anticipated these developments from the ex parte order's notice.

Based on the relevant circumstances, Wife did not engage in deliberate, willful conduct. And we see no evidence of bad faith or stubbornly disobedient (contumacious) behavior. Rather, we view the record as showing excusable neglect.

So considering all relevant circumstances, we hold that Wife's neglect was excusable under HFCR Rule 60(b)(1). Therefore, the family court abused its discretion by refusing to set aside the default judgment. See PennyMac, 148 Hawaiʻi at 327, 474 P.3d at 268 (HRCP Rule 60(b) motions reviewed for abuse of discretion).

C.

Lastly, we turn to the family court's decision to default Wife as a discovery sanction. Since the ICA endorses the family court's Rule 37 sanction, we weigh in.

The ICA majority ruled that the family court correctly imposed default as a discovery sanction. It said Wife's "failure to meet deadlines, appear at hearings, and provide reliable information regarding the income from and value of her business," gave the family court sufficient reason to terminate the case per Rule 37. We disagree.

Hawai'i's justice system disfavors default. See, e.g., Wisenbaker, 101 Hawai'i at 254, 65 P.3d at 1046 ("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") (cleaned up).

No Hawai'i Supreme Court case has upheld default as an HFCR, HRCP or HRDC Rule 37 discovery sanction. And, only one published Hawai'i appellate case expressly approves default as a discovery sanction. The ICA majority cites it, Aloha Unlimited, Inc. v. Coughlin, 79 Hawai'i 527, 904 P.2d 541 (App. 1995).

The present case bears little resemblance to Aloha Unlimited. There, the trial court dismissed a company's *counterclaim*. Aloha Unlimited – *represented by counsel* –

violated numerous and varied court orders. The company (and counsel) failed to attend a deposition, something that "was not an isolated act but was indicative of its behavior during the discovery process." The company demonstrated a "contentious attitude towards discovery" that "repeatedly forc[ed]" the other side to obtain orders compelling it to comply with discovery requests. Id. at 535, 904 P.2d at 549. The ICA dubbed Aloha's "pattern" of conduct as an "obstinate refusal" to comply with court orders and a "willful violation of the discovery rules." Id.

In contrast, Wife's behavior was tame. We do not view Wife's conduct as evincing a pattern of willful or contemptuous behavior. See Weinberg v. Dickson-Weinberg, 123 Hawaiʻi 68, 77, 229 P.3d 1133, 1142 (2010) (to warrant a litigation-ending sanction, the court must find "evidence of willful or contemptuous or otherwise opprobrious behavior.")

Aloha Unlimited also differs because Wife lacked counsel. Between her first lawyer's withdrawal and her second lawyer's Rule 60(b) motion, Wife neither appeared in court on her own behalf, nor filed a single court document. Wife struggled to find unconflicted, affordable legal counsel. She did not self-represent; she was unrepresented. Only after the appeal deadline passed did she retain counsel and pursue her only path to relief.

The ICA majority overlooks criteria this court has used to decide whether a trial court abuses its discretion by defaulting a party as a discovery sanction: (1) the public's interest in resolving cases quickly; (2) the court's need to manage its docket; (3) whether the party moving for sanctions would be prejudiced; (4) the public policy favoring cases being resolved on their merits; and (5) whether less drastic sanctions are available. Weinberg, 123 Hawaiʻi at 71, 229 P.3d at 1136 (court denied a spouse's motion to extend the pretrial motions deadline, preventing her from presenting evidence at trial; thus making the court's action "tantamount to entering a default against her" as a discovery sanction. Id. at 76, 229 P.3d at 1141).

The first two factors, speedy endings and judicial management, are comparatively less important than the other factors. There's a generalized interest in resolving cases quickly. And there's an evident need for a court to "manage its docket." Here, the case was at an early pretrial stage; a trial date had not yet been set. The record shows no *specific* reason to close Wife's case for docket management or speedy resolution purposes.

Unlike the first two factors, the third factor touches the defaulting party's conduct and whether it causes prejudice. We find no prejudice to Husband. See supra section III.B.

Regarding the fourth factor, public policy favors giving everyone – especially spouses with children and property division issues - their day in court. See Eckard Brandes, 146 Hawaiʻi at 364, 463 P.3d at 1021.

Lastly, the family court fails to consider milder sanctions short of default. Aside from attorney's fees and costs, HFCR Rule 37(b)(2)(C) lists alternative measures shy of default, such as "striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed." Husband suggested these sanctions in his motion to compel. Before invoking 37(b)(2)(C)'s case-ending consequence, the family court should have considered other measures, "lesser sanctions." See Dela Cruz v. Quemado, 141 Hawaiʻi 338, 345-46, 409 P.3d 742, 749-50 (2018) (rejecting the "severe" sanction of default for unintentionally missing a settlement conference, and holding that to "better serve the interest of justice" courts have an obligation to consider lesser sanctions than default).

The family court erred by defaulting Wife as a discovery sanction.

IV.

We vacate the ICA's Judgment on Appeal that affirmed the orders denying Wife's motion to set aside default judgment and

motion for reconsideration. We remand to the Family Court of the Second Circuit.

Anthony L. Ranken
for petitioner

Christina D. Lizzi
for respondent

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Todd W. Eddins

/s/ Kathleen N.A. Watanabe

/s/ Wendy M. DeWeese