NO. 23842

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MARSHA R. SORTINO, Petitioner-Appellee, v.
MARK D. SALAS, Respondent-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 00-1242)

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

Respondent-Appellant Mark D. Salas (Salas) appeals the August 9, 2000 order for protection issued against him and in favor of Petitioner-Appellee Marsha R. Sortino (Sortino)[1] by the family court of the first circuit in FC-DA No. 00-01-1242, the Honorable R. Mark Browning, judge presiding. Salas also appeals the family court's September 27, 2000 order denying his motion to dissolve the order for protection. The order for protection was issued pursuant to Hawaii Revised Statutes (HRS) chapter 586 (1993 & Supp. 2000).[2] We affirm.

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[1] Petitioner-Appellee Marsha R. Sortino did not file an answering brief.

[2] Hawaii Revised Statutes (HRS) § 586-3 (1993 & Supp. 2000) provides:

> (a) There shall exist an action known as a petition for an order for protection in cases of domestic abuse.
>
> (b) A petition for relief under this chapter may be made by:
>
> (1) Any family or household member on the member's own behalf or on behalf of a family or household member who is a minor or who is incapacitated as defined in section 560:5-101(2) or who is physically unable to go to the appropriate place

to complete or file the petition; or

(2) Any state agency on behalf of a person who is a minor or who is incapacitated as defined in section 560:5-101(2) or a person who is physically unable to go to the appropriate place to complete or file the petition on behalf of that person.

(c) A petition for relief shall be in writing upon forms provided by the court and shall allege, under penalty of perjury, that: a past act or acts of abuse may have occurred; threats of abuse make it probable that acts of abuse may be imminent; or extreme psychological abuse or malicious property damage is imminent; and be accompanied by an affidavit made under oath or a statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought.

(d) The family court shall designate an employee or appropriate nonjudicial agency to assist the person in completing the petition.

HRS § 586-1 (1993) defines "domestic abuse" as "[p]hysical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members; or [a]ny act which would constitute an offense under section 709-906 [(abuse of family or household members)], or under part V [(sexual offenses)] or VI [(promoting child abuse])] of chapter 707 committed against a minor family or household member by an adult family or household member." HRS § 586-1 (Supp. 2000) defines "family or household member" as "spouses or reciprocal beneficiaries, former spouses or former reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, persons jointly residing or formerly residing in the same dwelling unit, and persons who have or have had a dating relationship." HRS § 586-4(a) (Supp. 2000) provides:

(a) Upon petition to a family court judge, an ex parte temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time the order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

(1) Contacting, threatening, or physically abusing the protected party;

(2) Contacting, threatening, or physically abusing any person residing at the protected party's residence; or

(3) Entering or visiting the protected party's residence.

HRS § 586-5 (Supp. 2000) provides:

(a) A temporary restraining order granted pursuant to this chapter shall remain in effect at the discretion of the court, for a period not to exceed ninety days from the date the order is granted.

(b) On the earliest date that the business of the court will permit, but no later than fifteen days from the date the

I. Background.

A. The Ex Parte Petitions For A Temporary Restraining Order.

On July 27, 2000, Sortino filed an *ex parte* petition for a temporary restraining order for protection (TRO). In her written statement in support of the petition, Sortino alleged (1) that Salas had physically harmed, injured or assaulted her by (a) pushing, grabbing, or shoving her, (b) slapping, punching or hitting her, (c) choking or trying to strangle her, (d) forcing her to have sex with him, and (e) pinning her against a wall to

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> temporary restraining order is granted, the court, after giving due notice to all parties, shall hold a hearing on the application requiring cause to be shown why the order should not continue. In the event that service has not been effected, the court may set a new date for the hearing; provided that the date shall not exceed ninety days from the date the temporary restraining order was granted. All parties shall be present at the hearing and may be represented by counsel.
>
> The protective order may include all orders stated in the temporary restraining order and may provide further relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention.

HRS § 586-5.5(a) (2000) provides:

> (a) If, after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for such further period as the court deems appropriate, not to exceed three years from the date the protective order is granted.
>
> The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. If the court finds that the party meets the requirements under section 334-59(a)(2), the court further may order that the party be taken to the nearest facility for emergency examination and treatment.

warn her not to seek a TRO; (2) that Salas had threatened her with physical harm, injury or assault by (a) threatening to kill her, (b) threatening to physically hurt her, and (c) aiming a machete at her; (3) that Salas had maliciously damaged her property, *viz.*, her purse and makeup; and (4) that Salas subjected her to extreme psychological abuse by (a) threatening and humiliating her at her work place, (b) degrading her, (c) threatening that she would not see their children anymore, (d) threatening her family members, (e) cheating on her twice, and (f) playing with her heart by calling and telling her he still cared about her.

The same day, the family court responded by issuing a TRO against Salas. The notice of hearing accompanying the ex parte petition and TRO and served upon Salas set an August 9, 2000 hearing to determine whether the TRO should continue in effect. The notice of hearing commanded Salas "to appear before the Presiding Judge of this Court at the date, time and place indicated below. At this hearing, you will be permitted to show cause why the [TRO] should or should not continue to be in effect."

Apparently, Salas filed his own *ex parte* petition for a TRO on August 1, 2000, in FC-DA No. 00-1-1269, and presumably was granted a TRO against Sortino. According to Salas's opening brief on appeal, Salas alleged in his *ex parte* petition that he

was the victim of physical and psychological abuse at the hands of Sortino. He also alleged that Sortino threatened him and maliciously damaged his property.

B. The August 9, 2000 Hearing On Both Petitions.

At the August 9, 2000 hearing on the dueling petitions, both parties appeared *pro se*. The family court questioned each party in turn, under oath, beginning with Sortino.

Using leading questions, the family court questioned Sortino about the truth of the allegations in her petition. Sortino affirmed her statements in the petition, stating that everything alleged in her petition was true and correct, and added some testimony about her reasons for bringing the petition and additional allegations against Salas.

The family court next walked Salas through his petition in a similar manner, using leading questions. Salas then testified, in essence, that his version of the events was true, and that Sortino had fabricated her version of the events as revenge for his having broken up with her and taken up with another woman. In particular, Salas alleged that, sometime in July, Sortino hit him with her purse, punched him and spit in his face. That, Salas explained, was how Sortino's purse was damaged. Salas added that he reported the incident to the police and that a police report was generated. Salas also alleged that Sortino had, on more than one occasion, threatened to have her

father kill him. Further, Salas accused Sortino of being a drug abuser whose house was raided twice by the police on account of drugs. Salas revealed that it was Sortino's drug use that was to blame for the couple's breakup. Salas told the family court that the family had been through Child Protective Services (CPS) proceedings, during which Sortino continued her drug abuse even though she knew "the kids was [(sic)] being taken away[.]" Salas also specifically denied each of the bad acts that Sortino had alleged against him.

As a result of the parties' testimony, the family court issued an order for protection in both of the cases. The protective orders were to remain in effect until August 9, 2003. In addition to orders prohibiting threats, abuse and contact between the parties, the protective orders granted Salas legal and physical custody of the parties' two minor sons, with every-other-weekend visitation to Sortino, exchange to be made in front of the Kaneʻohe police station.

C. The Amendment To The Orders For Protection.

On August 14, 2000, the family court entered an order amending the August 9, 2000 orders for protection. The amendment suspended the visitation rights of Sortino.[3] Purportedly, the amendment was based, at least in part, on an August 12, 2000 memo written by Nicola Miller, a care coordinator at the Windward

[3] Salas's opening brief represents that the amendment changed Sortino's visitations from unsupervised to supervised.

Family Guidance Center, and addressed to the family court (the Miller memo). The Miller memo raised concerns about allowing Sortino to have visits with her two children without her first undergoing drug tests, therapy, a parenting evaluation and a home study. Without these, the memo asserted, visitation would result in significant harm to the children's progress in treatment as well as their sense of safety and well-being.

D. Salas's September 22, 2000 Motions.

On September 22, 2000, Salas filed two motions -- a first amended[4] motion to dissolve Sortino's order for protection and a motion to continue the September 27, 2000 hearing set for his first amended motion to dissolve.

In his motion to dissolve, Salas advanced various reasons why Sortino's order for protection should be dissolved. Salas alleged, *inter alia*, (1) that Sortino has a substance abuse problem; (2) that Salas had to end his relationship with Sortino due to her "out of control acting out behavior" resulting from her substance abuse; and (3) that after Sortino learned of Salas's new girlfriend, Sortino filed her petition for protection and misled the family court during the hearing on her petition, all in order to gain control over Salas. In support of his

[4] On August 21, 2000, Salas had filed, apparently *pro se*, a motion to dissolve Sortino's order for protection. In support of this motion, Salas averred that the August 9, 2000 hearing on the orders for protection "was not a fair hearing none of my evidence was reveiwed [(sic)]. [Sortino's] statement was not true therefore [Sortino's)] restraining order should be dissolved." This motion was set for hearing on September 27, 2000.

motion to dissolve, Salas filed an affidavit which restated his August 9, 2000 testimony and outlined the ways in which he had been injured by the protective order. Salas also attached numerous exhibits to his motion to dissolve.

In support of Salas's motion to continue, his attorney declared that he needed to obtain the following discovery before he could be prepared for the hearing on Salas's motion to dissolve: (1) the CPS file on the children, (2) the police report about Sortino's assault on Salas, and (3) the transcript of the August 9, 2000 hearing. According to counsel's declaration, Salas had told his attorney the CPS file would show that the family court had ordered Sortino to undergo a psychological evaluation and drug and alcohol testing and assessments, and to attend AA meetings, family counseling and parenting classes, but that Sortino had not complied with this service plan. Salas had also told his attorney that he had filed a police report against Sortino, alleging that she had verbally (calling him, *inter alia*, "a faggot") and physically (spitting on him and hitting him with her purse) abused him while he was driving her to the military base to buy cigarettes.

E. The September 27, 2000 Hearing On Salas's Motions.

At the September 27, 2000 hearing on Salas's motions, the family court stated that it had read the motions, but that "ultimately the motion that you are asking me to centrally

address is to dissolve [Sortino's] restraining order." The family court informed the parties that, "I'm going to give you brief -- couple minutes to argue, since you basically have put everything your motion. And I don't really need to hear what you've already said." Salas's counsel then argued for the admission of all of Salas's exhibits on the basis that "Addison Bowman's Hawaii Rules of Evidence manual on page two and going through five -- four, notes that under Rule 102 of Hawaii Rules of Evidence, that to secure fairness (indiscernible). . . . and to ascertain truth, you can relax the rules of the evidence in these -- in these bench trials." Salas's counsel then proceeded to address the merits of the motion to dissolve, arguing essentially that Sortino lied out of ulterior motives in seeking the order for protection against Salas. In the course of this argument, Salas's attorney asked the family court "to take judicial notice of the records and files of this case."

Sortino's attorney responded to the motion to dissolve by pointing out that Salas's arguments and exhibits in support "have more to do with custody of the children[,]" and that the truth of Sortino's allegations regarding Salas's abuse of her was not thereby affected.

The family court denied Salas's motion to dissolve. In the course of its ruling, the family court divagated:

> I would say in passing, that this is the only case that I have ever heard that I can recall where I gave mutual restraining orders.

> The Court is well aware of the problematic issues involved with mutual restraining orders and believes in the policy of not issuing mutual restraining orders. But in this particular case, given all the various different circumstances, it seemed appropriate.

The family court added that, "As far as this. . . . [Salas's] exhibits are concerned, they will be made part of the record, but they will not be received."

II. Issues Presented.

On appeal, Salas contends (1) the family court committed reversible error when its notice of hearing ordered Salas to appear to "show cause" why an order for protection should not issue, because "Hawaii case law holds that use of the words 'show cause' in TRO hearings improperly implies a shift in the burden of proof" onto the respondent to disprove the allegations against him or her.

Salas also argues (2) that the family court committed reversible error when it commented that this was the only case in which it had ever granted mutual restraining orders. Salas asserts that this statement is indicative of a misapprehension and misapplication of the proper burden of proof.

Salas further avers that the family court reversibly erred in (3) refusing to take judicial notice of his exhibits A, B and M, (4) refusing to admit the rest of his exhibits based upon an improperly strict application of the hearsay rule, and (5) refusing to take judicial notice of its CPS records and files

regarding the parties' children.

Salas also argues that the family court committed reversible error when it (6) denied his motion to continue despite the fact that his attorney did not have adequate time to prepare, in effect denying him counsel and thus due process; and (7) limited the amount of time his attorney had to present his case, thus denying him due process.

Finally, Salas argues that the family court abused its discretion in (8) granting Sortino's protective order, and (9) denying Salas's motion to dissolve the order.

III. Discussion.

A. The Family Court Did Not Commit Reversible Error When Its Notice of Hearing Commanded Salas To Appear to "Show Cause" Why An Order For Protection Should Not Issue.

Salas argues that the use of the phrase "show cause" in the family court's notice of hearing implied an improper shift in the burden of proof to him to disprove the allegations against him.

We addressed this issue in Kie v. McMahel, 91 Hawai'i 438, 984 P.2d 1264 (App. 1999). In Kie, we held that, while the phrase "show cause" seemingly places on the respondent the burden of disproving allegations in the HRS chapter 586 petition that have yet to be proven, the burden remains on the petitioner to prove the petitioner's underlying allegations by a preponderance of the evidence:

> In our view, the order to a respondent to show cause is a direction from the court to appear at a hearing

> to answer and to respond to the petition's allegations, rather than a mandate which places the burden on the respondent of initially going forward with evidence to prove the negative of the allegations.

Id. at 442, 984 P.2d at 1268. But see Luat v. Cacho, 92 Hawai'i 330, 344, 991 P.2d 840, 854 (App. 1999) ("By using the words "show cause" in the notice, the district court [(in an HRS § 604-10.5 case)] improperly implied that the burden was on [respondent] to disprove the allegations against him, rather than on [petitioner] to prove her allegations by clear and convincing evidence." (Citing Kie, supra.)). As there is no indication in the record that the family court actually imposed upon Salas the burden of proof, there was no error in this respect.

B. The Family Court Did Not Commit Reversible Error When It Stated That "This Is the Only Case That I Have Ever Heard That I Can Recall Where I Gave Mutual Restraining Orders."

At the end of the September 27, 2000 hearing on Salas's motion to dissolve, the family court stated that "this is the only case that I have ever heard that I can recall where I gave mutual restraining orders." The family court went on to note problematic issues involved with mutual restraining orders and the court's belief in the policy of not issuing mutual restraining orders, but nevertheless decided that "in this particular case, given all the various different circumstances, [mutual restraining orders] seemed appropriate."

In support of his point of error, Salas cites Luat, supra, a case in which the trial court stated that "where there is generally a benefit of doubt, as long as the [c]ourt feels

that there is clear and convincing evidence, we're going to resolve things in favor of the issuance of an injunction in the interest of public safety." We decided that this statement reflected the trial court's adoption of an improper preponderance of the evidence standard of proof, the trial court's mention of the required clear and convincing evidence standard notwithstanding. Luat, 92 Hawai'i at 344, 991 P.2d at 854. According Salas, the family court here was stating the same position as the trial court in Luat, "albeit in an abbreviated form[.]" Therefore, Salas concludes, the family court "was not holding Sortino to a proper burden of proof."

First, we do not see how Salas's conclusion follows from the family court's statement. And we cannot discern from the record, without surmise, whose ox was gored.

Second, Luat is readily distinguishable. Luat involved a petition for an injunction against harassment under HRS § 604-10.5. In such cases, the petitioner is held to a clear and convincing evidence standard of proof. In this case, the protective order was issued pursuant to HRS chapter 586, and a preponderance of the evidence standard of proof applied. Coyle v. Compton, 85 Hawai'i 197, 208-9, 940 P.2d. 404, 415-16 (App. 1997). Hence, even if we accept the proposition that the family court in this case was stating the same proposition as the trial court in Luat, we cannot say that the family court was not holding Sortino to a proper burden of proof.

At any rate, there is nothing in the record to support Salas's assertion that the family court failed to apply the proper standard of proof. The issuance of mutual restraining orders may be appropriate in cases where the parties pose a potential risk to one another. There is nothing prohibiting such an action, and in our view, the family court's remark about how infrequently it issues mutual restraining orders merely emphasized that it does not issue protective orders upon a bare request.

C. The Family Court Did Not Commit Reversible Error When It Did Not Admit Salas's Exhibits Into Evidence.

1. The Court Did Not Err In Not Admitting Salas's Exhibits A, B and M Into Evidence.

At the September 27, 2000 hearing on Salas's motion to dissolve, Salas proffered exhibits A, B and M. Exhibits A and B were family court orders in other cases awarding sole custody of the parties' children to Salas. Exhibit M was the Miller memo. The family court refused the proffer. Salas argues on appeal that the family court erred in refusing his request that judicial notice be taken of exhibits A, B and M, pursuant to Hawaii Rules of Evidence (HRE) Rule 201 (1993).[5]

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[5] Hawaii Rules of Evidence (HRE) Rule 201 (1993) provides:

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice,

First, we observe that Salas misinterprets the record. Salas's attorney asked the family court "to take judicial notice of the records and files of this case[,]" not of specific family court orders in other cases or of a specific memo to the court. Salas asserts on appeal, however, that "the offer of exhibits A, B, and M into evidence constituted a request by Salas for the court to take Judicial Notice." We disagree. Simply offering exhibits into evidence does not constitute a request for judicial notice.

Second, if we assume, *arguendo*, that Salas did request judicial notice pursuant to HRE Rule 201, he was thereby requesting that adjudicative facts in exhibits A, B and M be deemed conclusively true. See HRE Rule 201(a) ("This rule governs only judicial notice of adjudicative facts."); Rule 201 Commentary ("The process of judicial notice enables a court to declare as true a relevant fact without receiving evidence of proof."). In this light, exhibit M was not appropriate for

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whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

judicial notice. A judicially noticed fact "must be one not subject to reasonable dispute[.]" HRE Rule 201(b). Exhibit M was merely an opinion containing assertions and conclusions that were subject to reasonable dispute.

Finally, with respect to exhibits A and B, these were orders in other family court cases giving custody of the couple's children to Salas. As such, they did not address the central dispute involved in Salas's motion to dissolve -- whether Salas was a threat to Sortino. If the failure to admit them into evidence was improper, the impropriety was harmless. The orders for protection retained, in any event, provisions giving sole legal and physical custody of the couple's children to Salas.

2. The Family Court Did Not Err In Not Admitting The CPS Records and Files Regarding The Couple's Children Into Evidence.

Salas argues that the family court reversibly erred in not taking judicial notice of "the CPS records and files" pursuant to HRE Rule 201.

Here again, it does not appear that Salas ever requested judicial notice of the CPS records and files. His assertion, that his general request for judicial notice of the records and files in this case covered the CPS records and files, is unconvincing. And his reference to his testimony at the August 9, 2000 hearing -- "that Sortino had been through CPS, that the kids was [(sic)] being taken away, but that Sortino still used drugs and came up dirty three times" -- as a request

for judicial notice of the CPS records and files is similarly unavailing.

In any event, it is not clear from Salas's opening brief what the CPS records and files were intended to show. Salas did not make them a part of the record on appeal. Even if, as the opening brief intimates, the CPS records and files accused Sortino of being an unregenerate drug abuser, the CPS records and files were not amenable to judicial notice, as they presumably contained numerous accusations subject to reasonable dispute. HRE Rule 201(b). Nor does it appear from the record that Salas supplied the family court with information necessary for judicial notice, HRE Rule 201(d) ("When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information."), or that Salas supplied this court with an adequate record on appeal in this respect. We reject this point on appeal.

3. The Family Court Did Not Err In Not Admitting, As Hearsay, Salas's Exhibits Into Evidence.

At the August 9, 2000 hearing, Salas sought to introduce exhibits K and L (two eyewitness statements that contradicted Sortino's version of the events) and exhibits F, H and J (eyewitness statements from Sortino's co-workers stating that they suspected drug abuse by Sortino) into evidence. The family court did not accept the exhibits.

At the September 27, 2000 hearing, Salas renewed his

request to admit the exhibits into evidence and asked the court to admit additional exhibits, twenty exhibits in all. The additional exhibits were letters written on Salas's behalf pointing out his virtues and detailing Sortino's bad acts and character defects. Included were letters from Salas's mother, his co-workers, his supervisor and his neighbors. The family court received the twenty exhibits as exhibits but did not admit them into evidence.

Salas contends on appeal that the family court reversibly erred in refusing to admit his exhibits into evidence on the ground that they were hearsay. Salas does not contest the fact that the exhibits were unexceptional hearsay. Salas instead argues that "all of these exhibits should be admitted since the rules of evidence were to be relaxed in bench trials according to Bowman's Hawaii Rules of Evidence Manual."[6]

While it is true Hawai'i courts have recognized that the rules of evidence may be relaxed in certain pre- and post-trial proceedings, see e.g., Bates v. Ogata, 52 Haw. 573, 575-76, 482 P.2d 153, 155-56 (1971) (hearsay may be admissible in bail hearings); State v. Davis, 60 Haw. 100, 102, 588 P.2d 409, 411 (1978) (hearsay pre-sentence report is admissible in sentencing hearings), we have not yet sanctioned the wholesale admission of hearsay evidence in fact-finding proceedings, cf. Thompson v.

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[6] See A. Bowman, Hawaii Rules of Evidence Manual, 6-8 (2d ed. 1998).

Yuen, 63 Haw. 186, 190, 623 P.2d 881, 883 (1981) ("We note the distinction between the adversary proceedings to determine guilt or innocence and the disposition phase of the proceeding which allows for different application of the rules of evidence." (Citation omitted.)), and Salas does not point out any precedent for such a notion. At any rate, we observe that the family court allowed Salas to testify quite extensively about the content of his exhibits. We see no error in this respect.

D. The Family Court Did Not Commit Reversible Error When It Denied Salas's Motion To Continue.

Salas filed a motion to continue the hearing set for his motion to dissolve on the basis that his attorney had not had sufficient time to prepare to effectively represent him. Counsel declared in support of the motion that he had not yet obtained the transcript of the August 9, 2000 hearing on the orders for protection, the CPS records regarding the parties' children and the police report of Sortino's alleged physical abuse of Salas. On appeal, Salas asserts that the family court denied his motion to continue "indirectly[,]" and thus effectively denied him counsel and due process.

We first observe that the family court did not deny Salas's motion to continue, either directly or indirectly. Indeed, the family court did not consider or decide Salas's motion to continue because Salas's attorney did not clearly assert it at the September 27, 2000 hearing set for Salas's

motion to continue and his motion to dissolve. The hearing commenced and proceeded, as follows:

> THE COURT: Now, with respect to your motions. You have several different motions, [counsel for Salas]. Ult -- ultimately the motion that you are asking me to centrally address is to dissolve the restraining order.
>
> [COUNSEL FOR SALAS]: Correct.
>
> THE COURT: That's right. Okay.
>
> Now, the basis or one of the basis [(sic)] at least initially when your client filed, was -- is that he did not have an evidentiary hearing. That's incorrect.
>
> [COUNSEL FOR SALAS]: Okay.
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> THE COURT: In fact, I had in front of -- the parties appeared in front of me twice. And there was a -- a trial. And he was allowed to testify about whatever he wanted to testify.
>
> Two. He wanted to provide me with hearsay documents which I could not receive, since the rules of evidence prevent me from considering such. Okay?
>
> Now, I'm going to give you brief -- couple minutes to argue, since you basically have put everything in your motion. And I don't really need to hear what you've already said. All right.
>
> [COUNSEL FOR SALAS]: Correct.
>
> THE COURT: So, whatever thing -- anything else that you want to add, [attorney for Salas].
>
> [COUNSEL FOR SALAS]: Okay.
>
> Just to --
>
> THE COURT: You may proceed.
>
> [COUNSEL FOR SALAS]: Just to address a couple of your ques --
>
> THE COURT: Okay.
>
> [COUNSEL FOR SALAS]: -- issues.
>
> Number one, your Honor, we would note that Addison Bowman's Hawaii Rules of Evidence manual on page two and going through five -- four, notes that under HRE Rule 102, that to secure fairness (indiscernible). . . . and to ascertain truth, you can relax the rules of the evidence in these -- in these bench trials.
>
> And specifically we're going to ask you -- oh, and for the record, your Honor, if you will, I'm going to give you on the record the exhibit list for all the exhibits I attached to the motion.
>
> THE COURT: All right.
>
> [COUNSEL FOR SALAS]: There's some additional exhibits there. And I apologize, I just got these.
>
> THE COURT: Okay.
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> [COUNSEL FOR SALAS]: So, we're asking -- we're just asking on the record to submit everything and have everything offered into evidence based on that, plus my arguments on the -- the rules of evidence relaxation as contained in Bowman.

There's a bunch of cases he cites, but in the interests of expediting, I'll just leave the reference to Bowman and I --

THE COURT: Thank you.

[COUNSEL FOR SALAS]: -- can cite that if necessary.

Let's see. The critical issue, your Honor, in this case is -- aside from everything else I've said -- is that this is a court of equity. And when [Sortino] -- for her to bring her initial petition, she had to have clean hands. And she did not have clean hands.

As you take into consideration my client's affidavit, all the exhibits I've given you, my own declaration in support of my motion to continue, which talks about -- I -- I believe she has three C -- separate CPS cases, which I was asking to continue, 'cause I haven't had a chance to look at those, I just got this case ten days ago.

Plus the HPD report, which I was going to subpoena, but I haven't had a chance to, that's why I was asking for a continuance. And I forget -- the other issue there was the transcript from the prior hearing -- but I take your representations.

She didn't have clean hands. She -- she's -- she's a drug user, and she's had three sets of children literally taken away by CPS.

One of the -- there's two things that drug users do that I've learned. One is, they don't have relationships, they take hostages. And -- and CPS records will show you that [Salas has] been enabler, he's been a hostage for her the whole time.

And the second thing they do, is they lie, cheat and steal in support of their habit.

And this whole -- and I also ask you to take judicial notice of the records and files of this case.

'Cause what I believe is there was a letter written to this Court afterwards -- ex-parte -- from the Windward Family Service Center, Nicola Miller, who basically got -- I think it was Judge Bryant -- it's in the records and files -- went ahead and modified the original protective order disallowing her any visitation with those children because of the emotional upset she's created in these children.

If she would get clean and sober, your Honor, and follow the recommendations of the Windward Family Center, you know, much of this mess we wouldn't be here on. That's why we're here today.

Frankly, your Honor, unclean hands, she's -- on the basis of equity, she should never have been allowed to bring this restraining order period.

And all the other arguments, I'm submitting in -- in addition, you know, to -- that particular one.

THE COURT: All right.

[Counsel for Sortino], you want to respond?

The family court commenced the hearing by stating that

the primary issue to be addressed at the hearing was whether to dissolve the order for protection. By then proceeding to fully argue his motion to dissolve without apparent objection to and in apparent agreement with the family court's proposed agenda for the hearing, Salas waived his request for a continuance. If Salas indeed desired a continuance or a ruling on his motion to continue at that point, he should made a clear and definitive request at the outset. In effect, the family court could not err with respect to Salas's motion to continue because Salas did not allow the family court the opportunity to err in that respect.

At any rate, we note that the police report, the CPS records and the August 9, 2000 hearing transcript each memorialized an event in which Salas had first-hand involvement. Presumably, he supplied his counsel with most of the information contained therein that he claimed he needed for the September 27, 2000 hearing. And at the August 9, 2000 hearing before the same judge, Salas testified about the altercation giving rise to the police report and about the family's involvement with CPS. All in all, we conclude that the family court did not err with respect to Salas's motion to continue.

E. The Family Court Did Not Commit Reversible Error When It Limited The Time For Presentation Of Salas's Case.

At the start of the September 27, 2000 hearing, the family court stated:

> Now, I'm going to give you brief -- couple minutes to argue, since you basically have put

> everything in your motion. And I don't really need to hear what you've already said. All right.
> [COUNSEL FOR SALAS]: Correct.

Salas complains on appeal that "[t]he Judge gave Salas' [(sic)] attorney less than five minutes to argument [(sic)] Salas's position and did not allow Salas time to cross examine Sortino. In so doing, the Judge effectively denied Salas his Due Process rights to have an attorney present to represent him. Thus, the Judge committed reversible error."

On this complaint, we first note that nothing in the record shows how many minutes it took to present Salas's case. Moreover, the transcript of the September 27, 2000 hearing, excerpted more fully in subsection III.E. above, contains no indication that the family court set a definitive limit on the time available to each party. And if Salas's attorney indeed needed more time to present his case, there is nothing to indicate that a request for more time would have been denied by the family court. We question, in the first instance, whether Salas's attorney felt a need for more time. He apparently concluded his presentation when he chose to do so. He was not cut off by the family court. And he did not at any juncture complain of the time allowed. The family court had the responsibility to conduct the hearing in a reasonable and efficient manner. See HRE Rule 611(a) (1993).[7] We believe that

[7] HRE Rule 611(a) (1993) provides, in substantive part, that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the

it did.

F. The Family Court Did Not Commit Reversible Error When It Granted The Order For Protection To Sortino And Denied Salas's Motion To Dissolve The Order For Protection.

On appeal, Salas contends the family court reversibly erred in issuing the order for protection to Sortino on August 9, 2000. Salas claims that "it was clear that Sortino was a substance abuser who had chased Salas from their relationship and was attempting to use the Family Court TRO proceedings to gain power and control over Salas." Salas also claims on appeal that the family court reversibly erred in denying his motion to dissolve the order for protection. On this latter point, Salas avers that the numerous exhibits he proffered (but which family court did not receive into evidence) and his affidavit in support of his motion to dissolve were ample justification for the family court to grant the motion: "Despite all of this new evidence, the Judge chose to stick with his original decision and deny Salas' [(sic)] motion to dissolve the protective order granted to Sortino[.]"

In all and in essence, Salas's arguments on these two points of his appeal decry the family court's determinations as to the credibility of the two witnesses and the weight of the evidence. This simply will not do. "It is well-settled that an

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interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect the witness from harassment or undue embarrassment."

appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (citations, brackets and internal quotation marks and block quote format omitted). See also Lemay v. Leander, 92 Hawai'i 614, 626, 994 P.2d 546, 558 (2000) ("This court has long observed that it is within the province of the trier of fact to weigh the evidence and to assess the credibility of the witnesses, and this court will refrain from interfering in those determinations." (Citation omitted.)). Salas's last two points on appeal lack merit.

IV. Disposition.

Accordingly, we affirm the family court's August 9, 2000 order for protection issued against Salas and in favor of Sortino, and the family court's September 27, 2000 order denying Salas's motion to dissolve the order for protection.

DATED: Honolulu, Hawaii, May 9, 2002.

On the brief:

Brian Custer,
for respondent-appellant.

Acting Chief Judge

Associate Judge

Associate Judge