

NO. 24028

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DARA M. HOLBROOK, Plaintiff-Appellee, v.  
LAWRENCE J. HOLBROOK, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 00-1-2177)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Lawrence J. Holbrook (Lawrence or Defendant) appeals from the family court's January 3, 2001 Order for Protection (Protective Order) that expires on January 3, 2004. We affirm.

It appears that Lawrence and Plaintiff-Appellee Dara M. Holbrook (Dara or Plaintiff) and their two minor children were living in Virginia until Dara moved with the two minor children, initially to California, and then to Hawaii. In his opening brief, Lawrence alleges the following:

On December 17, 2000, [Lawrence] was told by [Dara] that they were in agreement on a negotiation issue. The issue was that [Lawrence] would rescind [his] Virginia Petition for custody of the children and, in exchange, [Dara] would get a more detailed psychological evaluation. [Dara] appeared to willingly participate in the negotiation process which was mediated by her Aunt Mabel.

On December 19, 2000, pursuant to Hawaii Revised Statutes (HRS) Chapter 586, Dara filed an "Ex Parte Petition for a Temporary Restraining Order for Protection and Statement"

(1) alleging that Lawrence (a) physically assaulted her, (b) maliciously damaged her property, and (c) subjected her to extreme psychological abuse; and (2) asserting that she truly believed that she was in immediate danger that Lawrence

will very soon do the following to me:

1. [X] physically harm, injure or assault me.
2. [X] subject me to extreme psychological abuse.
3. [X] maliciously damage my property.
4. [X] try to take the kids away from me.

On December 19, 2000, Judge Diana L. Warrington entered a Temporary Restraining Order (TRO) that was valid until March 19, 2001. This TRO ordered Lawrence not to have contact with Dara, their daughter (then age 6), and their son (then age 3).

On January 3, 2001, Judge R. Mark Browning entered the Protective Order stating, in relevant part, as follows:

Pursuant to HRS, Chapter 586, a hearing on Plaintiff's petition for an Order for Protection (Protective Order) was heard on the date indicated above.

The Court has jurisdiction over the parties and this matter and Defendant was provided with notice and given an opportunity to be heard.

[X] After full consideration of the facts and evidence, the Court finds that the Plaintiff has proven the material allegations of the petition and that the Defendant has failed to show cause why the order should not issue and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse.<sup>1</sup>

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<sup>1</sup> While at that hearing the respondent must "show cause why" the protective order is not necessary, HRS § 586-5.5(a), the burden remains on the petitioner to prove the petitioner's underlying allegations by a preponderance of the evidence. Coyle [v. Compton], 85 Hawai'i [197,] at 206, 940 P.2d [404,] at 413 [(App. 1997)]. . . . In our view, the order to a respondent to show cause is a direction from the court to appear at a hearing to  
(continued...)

. . . .

[X] Plaintiff and Defendant are spouses, former spouses, parents of a common child, cohabitants or former cohabitants. Therefore, they are "intimate partners" as defined by 18 USC Section 921(a)(32).<sup>2</sup>

The parties cannot together agree to change any part of this order without a prior court order. The Plaintiff cannot alone change or decide not to enforce this Order without a prior court order. The Plaintiff is prohibited by HRS, section 702-222, from intentionally soliciting or aiding the Defendant in violating this Order by failing to report a violation, by initiating contact, by allowing contact or by coming withing [sic] the prohibited distances of the Defendant (unless otherwise provided for by this Order). Any participation by the Plaintiff to solicit or aid the Defendant's violation of this Order is not a defense to any criminal prosecution against any party for a violation of this Order.

Good cause appearing therefore,

**IT IS HEREBY ORDERED** that this Family Court Order for Protection is issued pursuant to HRS, Section 586-5.5, and remains in effect until [January 3, 2004].

**IT IS FURTHER ORDERED** that:

A. THREATS AND ABUSE

1 Defendant is prohibited from threatening or physically abusing the Plaintiff or anyone living with the Plaintiff and shall not maliciously damage any property of the Plaintiff or property of the Plaintiff's household. This includes, but is not limited to, prohibition of the use, attempted and/or threatened use of physical force against Plaintiff or any child of the Plaintiff or Defendant who resides with Plaintiff that would reasonably be expected to cause bodily injury. [See 18 USC Section 922(g)(8)]

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<sup>1</sup>(...continued)

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.

Kie v. McMahel, 91 Hawai'i 438, 442, 984 P.2d 1264, 1268 (App. 1999).

<sup>2</sup> 18 USC § 921(a)(32) states as follows: "The term 'intimate partner' means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person."

B. CONTACT BETWEEN PARTIES

2 Defendant is prohibited from contacting the Plaintiff.

3 Defendant is prohibited from telephoning, writing or otherwise electronically communicating (by recorded message, pager, etc.), including through third parties, with the Plaintiff and any children residing with the Plaintiff.

4 Defendant is prohibited from coming or passing within 100 yards of any place of employment or where the Plaintiff lives and within 100 feet of each other at neutral locations. In the event the parties happen upon each other at a neutral location, the subsequent arriving party shall leave immediately or stay at least 100 feet from the other. When the parties happen upon each other at the same time at a neutral location, the Defendant shall leave immediately or stay at least 100 feet from the Plaintiff.

**Do not violate this order even if the Plaintiff invites you to be at the place of employment or where the other lives.**

5 Notwithstanding the foregoing Order, . . . Defendant may have LIMITED contact with the Plaintiff . . . in person for the purpose of . . . attending court proceedings, and by telephone for emergency purposes only.

6 Defendant is prohibited from contacting the following:  
[Daughter] and [Son], except as allowed for visitation.

7 Neither the Plaintiff nor the children shall leave the jurisdiction of the State of Hawaii until further order of the domestic division of the courts of the State of Hawaii or the State of Virginia.

8 The Plaintiff shall promptly report any violation of this Order to the . . . Police Department (phone 911). . . .

C. TEMPORARY CUSTODY AND VISITATION

9 . . . Plaintiff . . . shall have temporary legal and physical custody of the parties' minor children:

Name	Sex:	Age:
[Daughter]	F	6
[Son]	M	3

until the expiration date of this Order or amendment of this Order.

10 . . . Defendant shall have visitation with the minor children as follows: . . . supervised visitation; . . . at the PACT Family Visitation Center until further order of the domestic division of the court in either the State of Hawaii or the State of Virginia. Defendant is allowed to see the

children prior to leaving the State of Hawaii on January 4, 2001, under the supervision of Mabel Williams.<sup>3</sup>

. . . .

F. NO FIREARMS [HRS § 134-7(f); 18 USC § 922(g)(8)]

11 Defendant is prohibited from possessing or controlling any firearm, ammunition, firearm permit or license for the duration of this Order or extension thereof. All Permits/Licenses are hereby revoked. Defendant shall immediately turn over all firearms, ammunition, permits and/or licenses to the Honolulu Police Department (Firearms Unit, Main Station, 801 S. Beretania Street, 1st Floor) for the duration of this Order or extension thereof.

. . . .

Information on person to surrender firearms/permits, etc.:

Name: Lawrence J. Holbrook  
Address: 212 Aquia Bay Avenue, Stafford, VA 22554  
Date of Birth: July 10, 1958 Telephone No. (540) 720-2616  
Social Security Number: . . .

WARNING: Possession, transportation or receipt of firearms while this order is in effect may be a felony under federal law punishable by up to 10 years in prison and/or \$250,000 fine. 18 USC Section 922(g)(8).

12 The terms and conditions of this Order were explained by the Court to the parties in open court. The parties acknowledged that they understood the terms and conditions of the order and the possible criminal sanctions for violating it. The Parties have notice of this Order.

. . . .

A copy of this Order shall be released to the appropriate law enforcement and school authorities as well as other persons who have a need to review or possess a copy of the Order in order to enforce the terms and conditions of this Order.

THIS PROTECTIVE ORDER IS ENFORCEABLE IN ALL 50 STATES, DISTRICT OF COLUMBIA, U.S. TERRITORIES, AND TRIBAL LANDS. [18 USC SECTION 2265]. INTERSTATE VIOLATION OF THIS ORDER IS SUBJECT TO FEDERAL CRIMINAL PROSECUTION. [18 USC SECTIONS 2261(g), 2261A AND 2262].

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<sup>3</sup> It is stated in the opening brief that Defendant-Appellant Lawrence J. Holbrook (Lawrence) has e-mail communication with his children and that "PACT [Parents and Children Together] has been able to arrange supervised telephone visitation on almost a once per week basis."

ANY VIOLATION OF THIS FAMILY COURT PROTECTIVE ORDER IS A MISDEMEANOR, WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF UP TO ONE(1) YEAR AND/OR A FINE OF UP TO \$1,000. [HAWAII REVISED STATUTES SECTION 586-11.]

**POLICE SHALL ENFORCE THIS ORDER.**

(Footnotes added, emphases in original.)

On January 17, 2001, Lawrence filed a notice of appeal. On January 22, 2001, the family court entered an "Order to Submit Proposed Findings of Fact and Conclusions of Law" ordering the attorney for Dara to prepare and submit findings and conclusions no later than February 23, 2001. The findings and conclusions entered by the court on March 5, 2001, state, in relevant part, as follows:

A. Dara M. Holbrook and Lawrence J. Holbrook are household or family members within the scope of Hawaii Revised Statutes, Chapter 586-1, as they are married.

B. There were two children . . . born during the marriage, [Daughter] (age 6) and [Son] (age 3).

. . . .

G. Lawrence J. Holbrook had the burden to show cause why the TRO should not continue to be in effect.<sup>4</sup>

H. When the Court requested that appearances be made, Lawrence J. Holbrook refused to state his name for the record.

I. Lawrence J. Holbrook disputed subject matter jurisdiction of the Court but did not present any credible evidence that he and Dara M. Holbrook were not married.

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<sup>4</sup> As noted in footnote 1 above, this burden to show cause why "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." McMahel, 91 Hawai'i at 442, 984 P.2d at 1268.

J. Dara M. Holbrook presented credible evidence that in early 1997 Lawrence J. Holbrook physically abused her by punching her in the eye.<sup>5</sup>

K. Dara M. Holbrook presented credible evidence that Lawrence J. Holbrook subjected her to extreme psychological abuse by ordering the family cat to be put to sleep in February 1998.

L. Dara M. Holbrook presented credible evidence that Lawrence J. Holbrook subjected her to extreme psychological abuse by criticizing her parenting and housekeeping skills throughout the marriage and as recently as December 17, 2000.

M. Additionally, Dara M. Holbrook presented credible evidence that Lawrence J. Holbrook subjected her to extreme psychological abuse by accusing her of being mentally unstable on December 17, 2000.

N. Dara M. Holbrook presented credible evidence that she was in imminent danger of Lawrence J. Holbrook as a result of his escalating anger during in person conversations on December 17, 2000 and December 18, 2000.

O. In response to Dara M. Holbrook's allegation of physical abuse, Lawrence J. Holbrook admitted he hit Dara M. Holbrook and presented no credible evidence that he hit Dara M. Holbrook in self-defense.

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<sup>5</sup> In his opening brief, Lawrence states, in relevant part, as follows:

- (1) ***Physical Harm February 1997.*** Plaintiff[-Appellee Dara M. Holbrook (Dara)] stated that I have physically harmed her, specifically, one time in early 1997. I deny that I ever hit my wife with the intention of inflicting physical harm. In fear of my life and of my daughter's safety, I acted in self-defense and hit [Dara] with an open hand to stop her from inflicting further harm upon [Lawrence] and to prevent her from causing harm to our daughter.

[Dara] immediately called me a perpetrator of domestic violence and from that moment I assumed responsibility for my actions. I have had deep remorse and regret for my action. I got counseling for the harm I caused her defending myself and my daughter. However, [Dara] has taken no responsibility for her anger that created such great fear in me.

Further, this was only one in a series of incidents caused by [Dara] in which I feared for my life. This information was clearly stated to the Honorable Judge R. Mark Browning presiding at the family court hearing on January 3, 2001. I would like to provide additional detail surrounding the extraordinary circumstances of this unfortunate event.

P. Lawrence J. Holbrook did not dispute that he ordered the family cat to be put to sleep.<sup>6</sup>

Q. Lawrence J. Holbrook presented no credible evidence that he did not subject Dara M. Holbrook to extreme psychological abuse.

R. Furthermore, Lawrence J. Holbrook did not present any credible evidence to refute Dara M. Holbrook's statement that she believed she was in imminent danger.

S. Lawrence J. Holbrook repeatedly alleged that Dara M. Holbrook was mentally unstable and that she had been a danger to the minor children since the parties' physical separation in June 2000.

T. Dara M. Holbrook presented credible evidence that she provided Lawrence J. Holbrook with the children's current residential and contact information throughout the course of the separation from June 2000 to December 2000.

U. Lawrence J. Holbrook admitted that he was consistently aware of the children's whereabouts throughout the course of the separation, but did not attempt to regain custody of the children because he was "advised to stay away".

V. The Court repeatedly warned Lawrence J. Holbrook that he was out of time in presenting his testimony. However, he repeatedly ignored the Court's warning and continued to provide testimony.

W. Throughout the hearing, Lawrence J. Holbrook's demeanor was belligerent as he refused to abide by the Court's direction and counseling regarding the administration of the hearing.

NOW THEREFORE, THIS COURT MAKE[S] THE FOLLOWING CONCLUSIONS OF LAW:

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<sup>6</sup> In his opening brief, Lawrence states, in relevant part, as follows:

(7) **The Cat.** [Dara] alleges that I have caused her extreme psychological abuse by killing her cat in February 1998. . . . My action saved the life of our son. . . . Several months before tax season, I began to discuss with [Dara] the deteriorating cleanliness of our home due to her cat. The pervasive smell of urine, the hairballs, the feces and the fleas all over the house were not only damaging the emotional but also the physical health of everyone in the house. . . . [Dara] ignored my pleas to do something about the cat. In January 1998, our son went into the hospital. He was a baby's breath away from death. I took it upon myself to do something. . . . I took the cat to the vet. I asked the veterinarian [sic] to euthanize the cat. It was painless for the animal. I then cleaned the house from top to bottom. My kids were healthy now that our house was clean.



X. The Court had subject matter and in personam jurisdiction to hear the Order to Show Cause.

Y. Lawrence J. Holbrook's allegations concerning Dara M. Holbrook's mental stability and posing a danger to the children were not credible.

Z. Dara M. Holbrook proved the material allegations of her Ex Parte Petition for a TRO, filed on December 19, 2000.

AA. Lawrence J. Holbrook failed to show cause why Dara Holbrook's TRO should not be continued.<sup>7</sup>

BB. A three year Order for Protection was necessary to prevent domestic abuse or a recurrence of domestic abuse.

(Footnotes added.)

I.

A request for a transcript of the January 3, 2001 hearing was filed on February 2, 2001, but is not a part of the record on appeal. The affidavit of the Clerk of the Court Reporting Services reflect that the tape recording of that hearing was inadvertently erased and that there is no backup tape. In such situations, the proper procedure to follow is stated in Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(c) (2002), in relevant part, as follows:

*Statement of the evidence of proceedings when no report made or when transcript unavailable.* If the reporter refuses, becomes unable, or fails to transcribe all or any portion of the evidence or oral proceedings after proper request, the party may . . . (ii) prepare a statement of the evidence or proceedings from the best available means, including the party's recollection or uncertified transcripts or reporter's notes. The statement shall be served on the opposing party(ies), who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the court or agency appealed from for settlement and approval and as settled and approved shall be included by the clerk of the court appealed from in the record on appeal.

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<sup>7</sup> In light of footnotes 1 and 4 above and the findings above, this statement is not true.

In his opening and reply briefs, Lawrence responded to the family court's March 5, 2001 findings and conclusions with his written recollection of the relevant events. It appears that the testimony of Lawrence at the hearing on January 3, 2001, included his oral recollection of most, if not all, of these relevant events. In this appeal, Lawrence wants this court to use his written recollection in substitution of the missing transcript. Technically, we are not authorized to do so because Lawrence failed to comply with the requirements clearly stated in HRAP Rule 10(c) quoted above. Even if we did so, however, our decision would not change. In the family court, the dispositive issue was the credibility of the parties. The family court decided that issue in favor of Dara. In this appeal, Lawrence contends that the family court erred when it believed Dara rather than him. It appears that he is unaware that "it is well settled that an 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." In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (citation omitted).

## II.

Lawrence contends that his procedural due process rights were violated by the family court. More specifically, Lawrence states, in his reply brief, that "I did as best as I

could in the ten minutes that I was told to abide by." He also states as follows:

- ix) . . . The court summarily rejected Defendant's transcript of the statements that I would have made if I had been given the chance to speak on each issue in the Family Court. The court rejected written testimony prior to the court date on several occasions and during the hearing in spite of a good faith effort to have them submitted. . . .  
    . . . .
- xii) . . . I did offer to the judge the testimony that I felt relevant to the case. I had copies for the judge, the Plaintiff and extras. At no point from the time the TRO was served on December 19, 2000 was I afforded the opportunity to submit my testimony in spite of repeated attempts to submit my testimony. Defendant requests that the court recognize the good faith effort of the Defendant to present the appropriate documentation at the appropriate time.
- xiii) In addition, the court directed Defendant to keep testimony to 10 minutes where I needed at least a half-hour to show the false statements in all of the Plaintiff's allegations both in the Ex-Parte Petition and in the court.

In the absence of a valid transcript or statement of the evidence or proceedings at the hearing on January 3, 2001, we cannot determine exactly what happened there. As noted above, however, it appears that the testimony of Lawrence at the hearing on January 3, 2001, included his oral recollection of most, if not all, of the relevant events. As indicated in footnote 5 above, it appears that Lawrence is complaining because, when the court would not allow him (a) to submit written testimony or (b) additional time to present additional evidence, the court denied him the opportunity "to provide additional detail." Upon a review of the record, we conclude that Lawrence has failed his burden of establishing that the family court abused its discretion in such matters.

### III.

Prior to its amendment in 1997, HRS § 586-3(c) stated, in relevant part, as follows:

A petition for relief shall be in writing and upon forms provided by the court and shall allege that a recent past act or acts of abuse may have occurred, or that the threats of abuse make it probable that acts of abuse may be imminent, or that extreme psychological abuse or malicious property damage is imminent[.]

Based on the above statute, Lawrence contends that the family court erred when it extended the TRO because "none of these events indicates a pattern of abuse" and there were no "recent" acts of abuse. These contentions by Lawrence have no basis in law. First, the law does not require a "pattern of abuse." Second, as a result of amendments in 1997 and 2000 to HRS § 586-3(c) (2001), the word "recent" is not in the subsection and it now states, in relevant part, as follows:

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;<sup>8</sup> threats of abuse make it probable that acts of abuse may be imminent; or extreme psychological abuse or malicious property damage is imminent[.]

(Footnote added.)

### IV.

In its Protective Order, the family court awarded Dara temporary custody of the children. Lawrence contends that the court erred because (a) the family court did not have

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<sup>8</sup> Curiously, although HRS § 586-4(a) (2001) states that "[u]pon petition to a family court judge, an ex parte temporary restraining order may be granted without notice" and HRS § 586-4(c) (2001) states that the temporary restraining order "shall state that there is probable cause to believe that a past act or acts of abuse have occurred," HRS § 586-3(c) (2001) pertaining to "Order for protection" states that "[a] petition . . . shall allege . . . that: a past act or acts of abuse may have occurred[.]"

jurisdiction under the Hawai'i Uniform Child Custody Jurisdiction Act (HUCCJA) and (b) it was not in the best interests of the children.

Preliminarily, Dara responds that Lawrence is not permitted to contend for the first time on appeal that the family court lacked subject matter jurisdiction. We disagree.

"[S]ubject matter jurisdiction may not be waived and can be challenged at any time." Pub. Access Shoreline v. City Planning Comn., 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (citation omitted).

In HRS § 583-3 (1993), the HUCCJA states, in relevant part, as follows:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

. . . .

(3) The child is physically present in this State and . . . (B) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent[.]

In this appeal, the parties debate whether, in this case, the jurisdiction of HRS § 583-3(a) (3) has been invoked or established. We do not reach these issues. This case was brought under HRS Chapter 586, Domestic Abuse Protective Orders. HRS § 586-5.5(a) (2001) states as follows:

**Protective order; additional orders.** (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 a further fixed reasonable period as the court deems appropriate.

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[.]

Clearly, the family court had subject matter jurisdiction to enter the Protective Order and to order temporary child custody and visitation in the Protective Order.

As noted above, the dispositive issue in the case was the credibility of the parties. The family court conclusively decided that issue in favor of Dara. Thus, there is no support in the record on appeal for Lawrence's position that awarding Dara temporary custody of the children was not in the best interests of the children.

Accordingly, we affirm the family court's January 3, 2001 Order for Protection.

DATED: Honolulu, Hawai'i, February 27, 2003.

On the briefs:

Lawrence J. Holbrook,  
Defendant-Appellant, *pro se.*

Chief Judge

Cheryl Y. Yamaki and  
Jennifer A. Rose  
for Plaintiff-Appellee.

Associate Judge

Associate Judge