

NO. 24520

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

FAITH A. MIHO, on behalf of JOHN DOE, a Minor,  
Petitioner-Appellee, v. JANE DOE, A Minor Child,  
and PAT L. MULVEY, her Legal Guardian,  
Respondent-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-DOMESTIC ABUSE NO. 01-1-1275)

MEMORANDUM OPINION

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

Respondent-Appellant Pat L. Mulvey (Pat), as legal guardian of her daughter, Jane Doe, a minor (Female Minor), appeals from the July 31, 2001 Amended Order for Protection entered against Female Minor. We reverse.

BACKGROUND

On July 2, 2001, in Mulvey v. Miho, FC-DA No. 01-1-1167, in the Family Court of the First Circuit, Pat, on behalf of Female Minor, petitioned ex parte for a temporary restraining order (TRO) against John Doe, a minor (Male Minor), son of Petitioner-Appellee Faith A. Miho (Faith). The TRO was

entered. This is all the information that the record reveals about FC-DA No. 01-1-1167.

On July 16, 2001, in the case on appeal (FC-DA No. 01-1-1275), Faith, on behalf of Male Minor, petitioned ex parte for a TRO against Female Minor. District Family Judge Karen M. Radius entered a TRO on that same day.

For both orders, the Hawaii Revised Statutes (HRS) § 586-5.5 (Supp. 2001) hearing "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" was held on July 30, 2001. At the hearing, it was stipulated that Male Minor, age fifteen, and Female Minor, age fifteen, had engaged in consensual sexual intercourse. Based solely on this fact, District Family Judge James R. Aiona, Jr., orally stated to Male Minor and Female Minor, in relevant part, as follows:

[Y]ou have engaged in sexual intercourse. And let me tell you if that's not a threat of imminent harm, psychologically and physically, then I don't know what is when I put all of those facts together. Because I am not talking about people who are adults. . . . Whether you like it or not, you are not adults. And so we have a threat of imminent harm both ways. . . .

And so I need to make a finding that you stay away from each other. And I think I have enough in the record to grant both petitions. . . . There is enough for me to make a finding that you stay away from him and you stay away from her. No contact whatsoever, physically, verbally, E-mail, photograph, whatever it may be.

. . . .

. . . These are two people that need to stay away from one another. And I hope the parents stay away from one another also, but I'm not here to decide that. It's just the minors that need to stay away from one another. . . .

So we all have to take responsibility for what's happening in this room here. Every single one of us. Me as a judge, if I'm a bad judge, I take responsibility for not laying the law down right and not having 15-year-olds engaged in sexual intercourse. I take responsibility for that. If you're a parent and your kids are engaging in sexual intercourse at 15, maybe you should take some responsibility for that also.

In the case on appeal, the Amended Order for Protection was entered on July 31, 2001. It prohibited Female Minor from "threatening or physically abusing [Male Minor]," contacting Male Minor, communicating with Male Minor, passing within 100 yards of Male Minor except at the school they both attended, and "possessing or controlling any firearm, ammunition, firearm permit or license[.]" Notwithstanding the specification in HRS § 586-5.5(a) that "the court may order that a protective order be issued for a further fixed reasonable period as the court deems appropriate[,]" the express life of the order was "until further order of the court."

#### POINTS ON APPEAL

First, Pat argues that Faith did not satisfy her burden of proving, as required by HRS § 586-3(c) (Supp. 2001), 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[.]"

Second, Pat argues that she and Female Minor did not have the opportunity during the hearing, pursuant to HRS §§ 586-5(b) and -5.5(a) (Supp. 2001), to "show cause why" the protective order was not necessary.

Third, Pat argues that the no-firearms order entered pursuant HRS § 134-7(f) (Supp. 2001) denies Female Minor her right to bear arms under the second amendment to the United States Constitution and her right to freedom of choice.

#### DISCUSSION

We conclude that Faith did not satisfy her burden of proof and the evidence was insufficient to support the July 31, 2001 Amended Order for Protection entered against Female Minor.

HRS § 586-3 (1993 and Supp. 2001) authorizes "an action known as a petition for an order for protection in cases of domestic abuse." It specifies that the petition must be by or on behalf of a "family or household member." HRS § 586-4(a) (Supp. 2001) states that a temporary restraining "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." HRS § 586-1 (Supp. 2001) states, in relevant part, as follows: "'Family or household member' means 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 § 586-5.5 (Supp. 2001) requires proof "that a protective order is necessary to prevent domestic abuse or recurrence of abuse[.]" HRS § 586-1(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[.]"

As noted above, the court entered the July 31, 2001 Amended Order for Protection solely on the basis of the fact that Male Minor, age fifteen, and Female Minor, age fifteen, had engaged in consensual sexual intercourse. It failed to note that consensual sex between fifteen-year-olds is not a crime. HRS § 707-730(1)(b) (1993) specifies that a crime occurs where "[t]he person knowingly subjects to sexual penetration another person who is less than fourteen years old[.]"<sup>1</sup> Assuming Male Minor

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<sup>1</sup> Effective July 10, 2001, Hawaii Revised Statutes § 707-730 was amended, in relevant part, as follows:

(1) A person commits the offense of sexual assault in the first degree if:

(continued...)

and Female Minor "had a dating relationship" and thereby qualified as family or household members, there is no evidence that Female Minor's consensual sex with Male Minor constituted "domestic abuse" as the term is defined in HRS § 586-5.5.

We note that HRS § 571-11(2) (B) (1993) specifies, in relevant part, as follows:

Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings: . . .  
[c]oncerning any child living or found within the circuit:  
. . .[w]ho is beyond the control of the child's parent or other custodian or whose behavior is injurious to the child's own or others' welfare[.]

It appears that Female Minor was beyond the control of Pat and Male Minor was beyond the control of Faith. Nevertheless, neither Pat nor Faith requested such action and the family court did not utilize the procedures specified in HRS § 571-21 (Supp. 2001) for asserting its jurisdiction over Female Minor and Male Minor pursuant to HRS § 571-11(2) (B).

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

. . . .

- (b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old; or
- (c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:
  - (i) The person is not less than five years older than the minor; and
  - (ii) The person is not legally married to the minor.

CONCLUSION

Accordingly, we reverse the July 31, 2001 Amended Order for Protection.

DATED: Honolulu, Hawai'i, September 18, 2002.

On the briefs:

Pat A. Mulvey, Respondent-Appellant, <i>pro se.</i>	Chief Judge
Norman K. K. Lau for Petitioner-Appellee.	Associate Judge
	Associate Judge