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NO. 26549

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

A.P., Petitioner-Appellant, v.
J.S., Respondent-Appellee

(FC-DA NO. 04-1-0190)

AND

J.S., Petitioner, v. A.P., Respondent

(FC-P NO. 03-1-0319)

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT

MEMORANDUM OPINION

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

This appeal from a domestic abuse case involves Petitioner A.P., the mother (Mother), and Respondent J.S., the father (Father), of a male child (Son) born on December 26, 2001. On March 12, 2003, a paternity case, was commenced by Father. On January 28, 2004, the domestic abuse case was commenced by Mother. Although this appeal involves court actions in the domestic abuse case, it is being treated as a confidential appeal because the paternity and the domestic abuse cases were consolidated before the court actions being appealed from occurred.¹

¹ Hawaii Revised Statutes (HRS) § 584-20 (1993) states as follows:

Hearings and records; confidentiality. (a) Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this chapter shall be held in closed court without admittance of any person other than those persons necessary to the action or proceeding. All papers and records pertaining to the action or proceeding, whether part of the permanent record of the

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In the domestic abuse case, FC-DA No. 04-1-0190 (the FC-DA case), Mother appeals from the April 5, 2004 Order Dissolving Temporary Restraining Order (April 5, 2004 FC-DA Order) entered in the Family Court of the First Circuit.² We vacate and remand with instructions.

BACKGROUND

On March 12, 2003, in FC-P. No. 03-1-0319 (the FC-P case), Father filed a petition for judicial recognition of his paternity of Son. A Consent Judgment filed on April 23, 2003 awarded joint legal and physical custody of Son, such that Son was with Mother on weekdays and with Father on weekends; ordered Father to pay \$400 per month child support; and stated the obligations of the parties regarding Son's health care. In a December 4, 2003 motion, Father moved for specific drop-off and pick-up times and for alternate holidays, vacations, and special

court or of a file in the department of health or elsewhere, shall be subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

(b) Upon paternity being established, the confidentiality requirement shall not extend to the judgment and all subsequently filed documents that are used in good faith for support and medical expenses, insurance, or enforcement purposes, except that the confidentiality requirement shall continue to apply to any references to a non-adjudicated alleged or presumed father.

There is no similar confidentiality requirement for domestic abuse cases authorized and governed by HRS Chapter 586 (Supp. 2004). It may be that the family court intended to consolidate only the hearings of the two cases. That, however, is not what it did.

In light of these facts, we recommend that the family court not consolidate paternity cases with domestic abuse cases. In appropriate situations, the hearings may be consolidated. At all times, however, the orders should be written as if the hearings had not been consolidated and separate case files should be maintained.

² Judge Allene R. Suemori presided.

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days, and for a modification of his child support obligation. This motion was scheduled to be heard on January 15, 2004. On January 15, 2004, it was rescheduled to be heard on February 12, 2004.

Meanwhile, on January 28, 2004, Mother commenced the FC-DA case by petitioning for a temporary restraining order (TRO) and a domestic abuse protective order (DAPO) against Father pursuant to Hawaii Revised Statutes (HRS) Chapter 586 (Supp. 2004). Her TRO/DAPO petition alleged that: she and Father previously cohabited; in June 2002, Father (1) hurt her with an object, (2) slapped, punched, and/or hit her, and (3) kicked and/or bit her; prior to December 2003, Father punched a hole in the wall of her apartment, took her makeup bag and threw it out of the car, and threw her property out of the car; in December 2003, Father punched a hole in the door of her apartment; on January 22, 2004, Father pushed, grabbed, and/or shoved her; and on January 25, 2004, Father pulled her by the arm, threatened her, and hurt her mentally.

On January 28, 2004, in the FC-DA case, the court entered a TRO that expired on April 27, 2004. The TRO was served on Father on January 31, 2004.

On February 10, 2004, in the FC-DA case, the Order Continuing Hearing and Amending Temporary Restraining Order continued the hearing of the TRO Petition until February 25,

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2004; consolidated the FC-DA case with the FC-P case³; ordered the supervised exchanges of Son to take place at the PACT-Family Visitation Center; ordered Mother to drop off Son on Fridays at 3:30 p.m. and Father to pick up Son at 3:45 p.m.; ordered Father to drop off Son on Sundays at 4:00 p.m.; and Mother to pick up Son at 4:15 p.m.

On February 10, 2004, in the FC-P case, the Order Continuing Motion and Affidavit for Relief After Order or Decree consolidated the FC-DA case with the FC-P case⁴, moved the hearing on the December 4, 2003 motion to February 25, 2004, and stated, in relevant part, as follows:

Exhibits and witness lists shall be presented to Court by [Mother] on February 18, 2004, Transfer of [Son] shall be via 'supervised exchange' at PACT - Family Visitation Center. Parties to register with PACT within 48 hours of today's hearing. Dropoff [sic] by [Mother] Fridays 3³⁰ [p.m.] Pickup by [Father] 3⁴⁵ [p.m.] Fridays.

Dropoff [sic] by [Father] 4⁰⁰ [p.m.] Sundays. Pickup by [Mother] 4¹⁵ [p.m.] Sundays. Any costs associated with 'supervised exchanges' at PACT, parties shall pay own or share 50/50.

All other orders that are not inconsistent with this order shall remain in full force and effect.

[Mother] shall provide by February 18, 2004, 8:30 a.m., the witness list along with offers of proof regarding the alleged incidences of 6/02 and 12/03, as well as offers of proof as to the 1/22/04 and 1/25/04 alleged incidences.

[Father] shall provide by February 18, 2004, 8:30 a.m., the witness list along with offers of proof regarding the alleged incidences of 1/22/04 and 1/25/04. Pursuant to further order of the court, [Father] will be given more time to respond to [Mother's] offers of proof as to the 6/02 and 12/03 allegations.

³ The order states as follows: "IT IS HEREBY ORDERED that the hearing on the Temporary Restraining Order filed on January 28, 2004 in the above-mentioned case shall be continued until February 25, 2004 at [8:30] [a.m.] and consolidate with FC-P 03-1-0319[.]"

⁴ The order states: "FC-DA 04-1-0190 is consolidated with this action. This motion shall be continued from February 12, 2004 to February 25, 2004, 8³⁰ am." See n. 3 above.

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Notwithstanding the consolidation of the two cases, the family court continued to maintain two separate files.⁵

Only in the FC-DA case, On February 18, 2004 order rescheduled the February 25, 2004 hearing to March 10, 2004, at 8:30 a.m., and changed the place to pick up and drop off Son to the main police station in Honolulu.

On March 10, 2004, in the FC-DA case, the Order Regarding Temporary Restraining Order (March 10, 2004 FC-DA Order) rescheduled the March 10, 2004 hearing to April 5, 2004 at 1:30 p.m. and continued the TRO in effect. This order did nothing else.

On March 29, 2004, in the FC-P case, Mother moved for a court order awarding her the primary physical and sole legal custody of Son subject to Father's right of visitation on alternating weekends (March 29, 2004 FC-P Motion). Alternatively, she asked "that the shared physical custody arrangement be modified to [Father] having Friday morning through Sunday." She also asked for an equal division of holidays, vacations, and special days. Mother stated the basis for her motion as follows:

[Father] has continued to physically and psychologically abuse [Mother], and has continued to threaten [Mother] since the entry of the Consent Judgment (hereinafter "Judgment"), filed April 23, 2003. Since the entry of the Judgment, the abuse has "escalated" in the sense that [Son] has witnessed [Father] physically abusing [Mother] & has heard the derogatory & demeaning names [Father] has called [Mother]. Since visiting with [Father] two night/three days per week, [Son] has developed behavioral problems, including starting to curse, calling [Mother] demeaning names, and acting out violently towards [Mother].

⁵ See nns. 1, 3, and 4 above.

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This motion was scheduled to be heard on April 5, 2004.

On March 31, 2004, in the FC-DA case, Mother filed a Motion to Supplement and Amend the Ex Parte Petition for a Temporary Restraining Order for Protection and Statement, Filed January 28, 2004 (March 31, 2004 FC-DA Motion), requesting "an Order Supplementing and Amending the Ex Parte Petition for a Temporary Restraining Order and Protection and Statement, filed January 28, 2004, and to grant the Supplemental and Amended Ex Parte Petition for a Temporary Restraining Order and Statement, which is concurrently submitted." In an accompanying affidavit, Mother alleged that: Father's physical and psychological abuse of Mother began in September 1999; Son was born on December 26, 2001; Mother and Father "finally separated" in September 2002; some of the dates stated in her January 28, 2004 petition are incorrect, not all of the dates are listed, and the petition does not give the full picture of the abuse or show the pattern of the abuse; the last time Father hurt Mother with an object was on August 31, 2002, but he did so many times previously; the last time Father pushed, grabbed, or shoved Mother was on January 23, 2004, but he did so many times previously; the last time Father slapped, punched, hit, kicked or bit Mother was in August 2002, but he did so many times prior to August 2002; the last time Father threatened to physically abuse Mother was on January 25, 2004, but he did so many times in 2000, 2001, and 2002; the last time Father damaged Mother's property was in December 2002, but he did so previously in 2001 and 2002;

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and the last time Father subjected Mother to extreme psychological abuse was on January 25, 2004, but he did so many times previously, all the way back to November 1999.

On April 2, 2004, in the FC-P case, Father filed a motion to continue the hearing on the March 29, 2004 FC-P Motion. In an accompanying declaration, counsel for Father stated, in relevant part, as follows:

2. This FC-P case has a related FC-DA case in which [Father] is the Respondent. That case number is FC-DA No. 04-1-1090. In addition, [Mother] has also filed harassment charges against [Father]. That District Court criminal trial is currently scheduled for April 27, 2004.

3. Previously on March 10, 2004, this . . . Court had granted [Father's] request that the restraining order trial be limited to a single incident - due to [Mother's] admission that the majority of dates on her Ex Parte Application were incorrect.

. . . .

5. . . . [Mother] has filed on March 29, 2004, her Motion For Relief After Judgment Or Order and Declaration. Furthermore, she filed on March 31, 2004, a motion to amend her ex parte restraining order application in the FC-DA case. . . .

6. It is respectfully requested that both of [Mother's] motions be continued to allow for adequate discovery and preparation. [Father] denies any and all allegations of abuse, believes [Mother] is unstable and that she is filing all of these actions to gain leverage in the custody and child support issues.

. . . .

10. It is also respectfully requested that this Honorable Court issue a written order setting [Father's] child support at \$110.00 per month, beginning December 1, 2003. The Court had issued this order at the March 10, 2004 hearing, but it was, I believe, not placed on the record and was not reflected in writing.

At the hearing on April 5, 2004⁶, after a lengthy discussion and prior to any evidence being presented, the following was stated:

⁶ The sole transcript in the record on appeal initially reported that it was of the April 5, 2004 hearing. Subsequently, Court Transcriber Anna M. Awana changed the date to indicate that most of it was of the March 10, 2004 hearing. After reading the transcript, we conclude that all of it is of the April 5, 2004 hearing.

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[COUNSEL FOR MOTHER]: Well, he's perceiving the petition stating that she feels she [sic] in imminent harm --

THE COURT: Right.

[COUNSEL FOR MOTHER]: -- with what -- she's filled out the petition correctly, putting last dates of abuse.

THE COURT: Right.

But my understanding was at the last hearing you said there was only one that was accurate.

[COUNSEL FOR MOTHER]: We gave him notice --

THE COURT: Well, I mean, this is what you guys said that it was only one that was accurate and that was the January whatever it was date. Okay.

So, what I want to know is now you're saying you can add more without giving him a basis of all the factual basis for this. The one is enough and thereafter if anything -- and I need to know this on the record.

[COUNSEL FOR MOTHER]: Uh-huh.

THE COURT: If anything else he doesn't need to know about it.

[COUNSEL FOR MOTHER]: We feel the only thing he needs to know is she's filing a TRO because she feels she's in imminent harm with him.

THE COURT: Okay.

[COUNSEL FOR MOTHER]: And he actually received written notice of our amendment over a month ago by letter in addition to the most recent amendments that we filed by the Motion.

[COUNSEL FOR FATHER]: Judge, at the last hearing you ordered that [Mother] can only testify as to the incident of January 25, 2004 because all of the other dates were wrong even though she signed that under penalty of perjury.

THE COURT: Right.

. . . .

[COUNSEL FOR FATHER]: Okay.

Now, despite the Court granting that oral Motion she's got -- brought in other witnesses who were prepared apparently to testify about events other than January 25.

Judge, due process talks about notice ability to defend, all right? You just can't come up -- and in their amendment -- I don't know if -- I tried to count the new allegations.

There are anywhere between a hundred and twenty-one and a hundred and sixty-nine new allegations of abuse.

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For instance: "In 2003 he hit me with an object two to three times a month."

"In 2002 he hit me with an object one to two times a month."

I'm not reading that. That's the general gist of this whole amendment. How can he defend that?

She can't come in here, [Mother], and say, "I don't have to disclose where these happened. I don't have to disclose when these happened."

He can't defend that. The dream team couldn't defend -- nobody can defend this new -- this requested supplement.

And I'll tell you what, Judge. We're gonna put on credible sworn testimony that the January 25th date is wrong. So, she got 'em all wrong on the original ex parte application.

You gave her an avenue in which to amend this. This is not the avenue that they have chosen to take.

You told them to go down to ASB [Adult Services Branch, Family Court] and file an amended ex parte petition.

There is no way between March 31 and today we could have prepared for this supplemental [sic] for trial and we're not ready to proceed. I'll put that on the record.

And there is no way, Judge, we will ever be able to proceed on this amended supplemental request. You can't do it. Nobody can do it.

THE COURT: Response?

[COUNSEL FOR MOTHER]: First of all at our last hearing, it was a pre-trial conference. It was off the record. You made no official orders at that time.

What you said is that you -- if we did go forward with the trial you would only consider that last date because she incorrectly listed other dates.

You told us to solve the problems to go and file an amendment.

I believe you may have suggested going to ASC [sic] but it's not common process for us to have to file amendments like that so we did it the way we felt was best.

You also --

THE COURT: Don't you usually want to do what's best would be for the Court since the Court's making the decision?

[COUNSEL FOR MOTHER]: Which is what [sic] we amended the days as you asked and we added --

THE COURT: Okay.

[COUNSEL FOR MOTHER]: -- dates --

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THE COURT: Go ahead.

[COUNSEL FOR MOTHER]: -- because you also said that you would only listen to last dates because that's all she put in the petition.

We believe all incidents of abuse need to be addressed, the whole pattern of abuse involving the relationship. Not only the last dates of the abuse.

The Hawaii Supreme Court case Anoi (phonetic spelling) says that: "Recent harm isn't imminent harm."

And we believe the whole entire relationship between the parties -- the whole pattern of abuse needs to be addressed and that's -- that's our position.

THE COURT: Okay.

This is your Motion to Supplement And Amend The Ex Parte Petition.

. . . [T]ell me what your position is. You want to supplement and amend the ex parte petition, add these allegations and go on with the trial right now.

[COUNSEL FOR MOTHER]: Yes, your Honor.

THE COURT: Okay.

That being the case and the Court having no other choice, the Court's going to find that fundamental fairness requires . . . that [Father] . . . have some notice and the Court's going to deny the Motion to Supplement.

We will proceed on the trial since you also don't want to have a continuance on the one incident.

[COUNSEL FOR MOTHER]: Your Honor, if that's your decision --

. . . .

[COUNSEL FOR MOTHER]: -- we would prefer to continue the trial so that we have time to give [Father] notice.

THE COURT: No.

. . . .

That's why I asked you to make your decision

. . . .

THE COURT: Okay.

I'm going to go on the January 25th. . . . [R]ead your January 25th allegations. You've got something if these are correct. Present your case.

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Only Mother testified. Her testimony established that the threat that allegedly occurred on Sunday, January 25, 2004, actually occurred on Monday, January 26, 2004. According to Mother:

I just allowed him to have [Son] one extra day because that Friday before I came to his house to drop off [Son] late. So, I told him . . . if I drop off [Son] late to you you can keep him 'til the day time on Monday.

But I had told him I needed [Son] back by -- between 2:00 and 4:00 because I have to go to work.

. . . And I had called him at 6:00 and told him to return [Son].

But his girl friend had answered the phone and she hung up the phone on me, would not put him on the phone. I called back and she called me psycho. Was calling me names, hung up the phone on me.

So, I called him back and he finally answered the phone and I told him to bring [Son] back. He told me that if I continued to be mean to his girl friend that he was going to beat my ass.

With the tone that he had in his voice I knew that that's the kind of person -- that's the kind of voice he used to have when he used to hurt me when we were together in our relationship.

Mother also testified, in relevant part, as follows:

[COUNSEL FOR MOTHER]: . . .

Q. And you're asking the Court for a three year extension of the temporary restraining order.

A. Yes.

Q. And do you feel this is necessary for your safety?

A. Yes, I do.

Q. Why . . . ?

A. I'm really scared of [Father]. You know, . . . I have experienced a lot of physical harm

. . . .

A. I just feel that when we were in our relationship there was so much physical abuse and I'm afraid of -- from the statement that he made on the 25th, I'm afraid of what he's gonna do to me or [Son].

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At the conclusion of the hearing, the court decided that

the Court's going to deny the restraining order for lack of sufficiency of the petition and the failure to allow notice and to respond by the defense.

That being the case, you know, the [FC-DA case] is going but the [FC-P case] is still here.

. . . .

Now, pending before the Court . . . is a Motion to change visitation. . . .

But my inclination at this point . . . is to separate the two of you so that you don't hardly ever see each [other] and you have parallel parenting, okay.

In the FC-DA case, after orally denying "the restraining order for lack of sufficiency of the petition and the failure to allow notice and to respond by the defense," the court entered the April 5, 2004 FC-DA Order which dissolved and vacated the TRO because of "insufficient evidence."

In the FC-P case, an April 15, 2004 Order Granting in Part Motion for Relief After Judgment or Order & Declaration Filed 3/29/04 ordered that Son shall be with Father from Friday at 3:00 p.m. through Monday at 9:00 a.m. and that

[b]oth parties shall abide by the Protection Against Parental Disputes, which is attached Exhibit "1". The parties may discuss the welfare of [Son] only via a notebook. Both Mother, Father and [Son] shall be in counseling immediately. [Son] shall be immediately placed into therapy with Anita Trubitt. Dr. Robinson shall be the parenting counselor - both parties shall separately contact Dr. Robinson. Both Mother and Father shall sign off on any and all forms necessary to allow the four therapists to talk.

2. Mother and Father shall immediately enroll in the next Active Parenting w/Kapiolani.

3. Father shall within 60 days of today amend his taxes to remove [Son] as his dependent exemption. Mother shall be allowed to claim [Son] as her dependent exemption for tax year 2003.

4. [Father's child support shall be \$110.00 per month commencing December 2003.

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Exhibit 1, Protection From Parental Disputes, attached to the aforementioned order, states as follows:

a) Neither parent shall engage in, nor permit/encourage any step-parent, fiancée, significant other, grandparent[,] other relative or other associate, to criticize, disparage, demand, insult, or otherwise "bad-mouth" the other parent, step-parent, significant other, or grandparent to the minor children or in the presence or hearing of the minor children. This prohibition shall apply even to information that is truthful and accurate.

b) Neither parent shall fight (verbally or physically) -- in person or by telephone -- in the presence or hearing of the minor children.

c) Neither parent shall align or attempt to align the minor children against the other parent (or other relative), nor allow or encourage anyone else (including relatives and friends) to do so. Neither parent shall directly or indirectly ask the minor children to choose between parents, to choose to reside with one parent instead of the other, or to choose one household over the other household.

d) Neither parent shall ask the minor child to pass orders or instructions or uncomplimentary messages to the other parent (orally or in writing). Complimentary messages are allowed, and encouraged.

e) Neither parent shall ask the minor children to "keep secrets from" the other parent, or ask or encourage the minor children to lie to the other parent about events or persons the children experienced during a visit with the other parent, grandparent or relative.

f) Neither parent shall ask the minor children to "spy on" the other parent or the other parent's lifestyle or household nor ask any detailed, "probing" questions about the other parent or lifestyle or household of the other parent.

g) Both parents shall encourage a positive parent-child relationship between the minor children and both parents, and not say or do anything (including "grimace" or put on a "long face") to adversely affect the minor children's love for the other parent.

h) Neither parent shall interfere with the parent-child relationship with the other parent, and neither parent shall conceal the minor children from the other parent during the other parent's period of responsibility.

On May 3, 2004, Mother filed a notice of appeal from the April 5, 2004 FC-DA Order. This appeal was assigned to this court on February 1, 2005.

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On June 17, 2004, the court entered its Findings of Fact and Conclusions of Law (June 17, 2004 FsOF and CsOL). The June 17, 2004 FsOF and CsOL is unique in that it has the following three parts:

"I. RELEVANT BACKGROUND."

"II. FINDINGS OF FACT."

"III. CONCLUSIONS OF LAW."

Section I, Relevant Background, states, in relevant part, as follows:

March 10, 2004 Hearing.

On March 10, 2004, a hearing on [Mother's] January 28, 2004 Ex Parte Petition was held before Judge SUEMORI.

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During the March 10, 2004 hearing, [Mother] admitted that all but one (1) incident described on her January 28, 2004 Petition were wrong as the [sic] date the incident allegedly occurred. She also admitted that she could not pinpoint the date each incident allegedly occurred except one (1) incident.

Accordingly [sic] then to [Mother] herself,, [sic] only one (1) of her allegations contained in her January 28, 2004 Ex Parte Petition had an accurate date (the January 25, 2004 incident).

Since [Mother] admitted that all but one (1) incident were inaccurate as to the date they occurred and she was unable to provide any accurate dates for the incidents, it would have been impossible for [Father] to respond to and defend [Mother's] undated and vague allegations.

At the conclusion of the March 10, 2004 hearing, the Court dismissed all [Mother's] allegations except the alleged January 25, 2004 incident.

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April 5, 2004 Hearing.

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[Mother's] [March 31, 2004 FC-DA Motion] was denied by the Court. It was improper for [Mother] to require [Father] to be prepared to respond to and defend against between 121 - 169 new allegations of domestic abuse between the years 200 [sic] - 2003.

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Section II, Findings of Fact, states, in relevant part,
as follows:

15. On March 10, 2004, a hearing on [Mother's] January 28, 2004 Petition was held before ALLENE R. SUEMORI, Judge of the above-entitled Court.

16. During the March 10, 2004 hearing, [Mother] failed to produce any witnesses or any reports or photographs or other documents from the police department, health care facilities, friends, family, or any other persons which supported her allegations as they were presented in her January 28, 2004 Petition.

17. During the March 10, 2004 hearing, [Mother] admitted that all but one (1) incident described on her January 28, 2004 Petition were wrong as the [sic] date the incident allegedly occurred.

18. During the March 10, 2004 hearing, [Mother] admitted that she could not pinpoint the date each incident allegedly occurred except one (1) incident.

19. Purportedly, only one (1) of [Mother's] alleged incident [sic] in her January 28, 2004 had [sic] an accurate date (which was the January 25, 2004 alleged incident).

20. Since [Mother] admitted that all but one (1) incident were inaccurate as to the date they occurred and she was unable to provide any accurate dates for the incidents, it would have been impossible for [Father] to respond to and defend against [Mother's] undated and vague allegations.

21. At the March 10, 2004 hearing, all [Mother's] allegations were dismissed except the alleged January 25, 2004 incident.

22. The only remaining allegation from [Mother's] January 28, 2004 Ex Parte Petition was the January 25, 2004 incident.

23. The January 25, 2004 alleged incident was scheduled to come on for a full evidentiary hearing on April 5, 2004.

. . . .

26. [Mother's] [March 31, 2004 FC-DA Motion] was denied. [Mother's] attempt to include at such a late date anywhere between 121 - 169 new allegations of domestic violence and her position that [Father] should be ready to respond to and defend such previously unknown allegations would violate [Father's] notice and due process rights. To allow [Mother] to proceed on the numerous allegations contained in her [March 31, 2004 FC-DA Motion] would have violated [Father's] right to have a fair trial.

27. . . . [T]he Court found that the January 25, 2004 allegation contained in [Mother's] January 28, 2004 Ex Parte Petition was not supported by any credible evidence.

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28. [Mother] failed to produce any witnesses or any reports or photographs or other documents from the police department, health care facilities, friends, family, or any other persons which supported her claim that [Father] "hurt" her on January 25, 2004 as [Mother] had claimed.

29. [Mother] did not present any credible evidence to show that she had been a victim of a recent past act (or acts) or abuse by [Father].

30. [Mother] did not present any credible evidence that she had been the victim of any threats or abuse by [Father] such that further acts of abuse may be imminent.

31. [Mother] did not present any credible evidence that she was a victim of extreme psychological abuse or malicious property damage by [Father] in the past.

32. [Mother] did not present any credible evidence that it was imminent that she would be a victim of extreme psychological abuse or malicious property damage by [Father].

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34. [Mother] was not credible during her testimony and admitted that her allegation of domestic abuse did not occur on January 25, 2004 as she had stated in her January 28, 2004 Ex Parte Petition. Therefore, all of the allegations contained in her January 28, 2004 Ex Parte Petition were incorrectly dated - some by as much as a year and some less. [Mother] in her testimony was not credible in all respects.

RELEVANT STATUTES

The basis for a TRO is stated in HRS § 586-4 (c) (Supp. 2004) as follows:

The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purposes of: preventing acts of abuse or preventing a recurrence of actual domestic abuse; and ensuring a period of separation of the parties involved.

The basis for a DAPO is stated in HRS § 586-5.5 (Supp. 2004) as follows:

(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.

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(b) A protective order may be extended for such further fixed reasonable period as the court deems appropriate. Upon application by a person or agency capable of petitioning under section 586-3 [for a DAPO], the court shall hold a hearing to determine whether the protective order should be extended. In making a determination, the court shall consider evidence of abuse and threats of abuse that occurred prior to the initial restraining order and whether good cause exists to extend the protective order.

The relevant definitions are as follows:

§ 586-1 Definitions. As used in this chapter:

. . . .

"Domestic abuse" means:

- (1) Physical 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
- (2) Any act which would constitute an offense under section 709-906 [abuse of family and household members], or under part V [sexual offenses] or VI [child abuse] of chapter 707 committed against a minor family or household member by an adult family or household member.

"Extreme psychological abuse" means an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress.

"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.

"Malicious property damage" means an intentional or knowing damage to the property of another, without his consent, with an intent to thereby cause emotional distress.

RELEVANT PRECEDENT

We hold that in an action under Hawai'i Revised Statutes (HRS) chapter 586 (1993 and Supp.1997) relating to domestic abuse protective orders, a temporary restraining order (TRO) may only issue upon probable cause, and any TRO conditions which are incorporated into a protective order and the allegations underlying a request for a protective order must be proven by the petitioner by a preponderance of the evidence. While a respondent to such an action is required "to show cause" why the TRO conditions should not continue and a protective order issue, the burden on the respondent is to appear and respond to the allegations at a hearing therefor, not to carry the initial burden of proving the negative of the allegations.

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Kie v. McMahel, 91 Hawai'i 438, 439, 984 P.2d 1264, 1265 (App. 1999).

We hold in this appeal by Defendant-Appellant Todd P. Compton (Defendant), from the first circuit family court (court) February 16, 1995 Hawai'i Revised Statutes (HRS) Chapter 586 protective order barring Defendant's contact with Plaintiff-Appellee Rita A. Coyle (Plaintiff), that (1) the court did not err when it applied the preponderance of the evidence as the standard of proof under HRS § 586-5.5 (1993); (2) the court did not violate Defendant's equal protection or due process rights when it applied a preponderance of the evidence standard of proof[.]

Coyle v. Compton, 85 Hawai'i 197, 199, 940 P.2d 404, 406 (App. 1997).

Based upon the plain language of HRS § 586-3 (Supp.1997) and the legislative history explaining its recent amendment, the family court improperly required [the petitioner] to show recent acts of abuse at the hearing. Although the family court has discretion to examine recent acts, the family court's order and transcript of the OSC hearing reveal that the court did not consider the other evidence that [the petitioner] presented, including "past act or acts of abuse that 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 upon the evidence presented, the family court should have determined whether there was "adequate evidence to support the need for a protective order" without requiring a showing of "recent" acts. A showing of "recent" acts may be an indicator of imminent abuse or damage, but the family court must take into consideration all facts presented by the petitioner and the respondent to determine whether "a protective order is necessary to prevent domestic abuse or a recurrence of abuse."

Hill v. Inouye, 90 Hawai'i 76, 84-85, 976 P.2d 390, 398-99 (1998) (brackets omitted).

DISCUSSION

In the opening brief, Mother contends, in essence, that the family court erred when, at the April 5, 2004 hearing, "it excluded evidence on the allegations of past acts of abuse, malicious property damage, and extreme psychological abuse contained in [Mother's] TRO and allowed [Mother] to proceed on

only the January 25, 2004 allegation." We agree.

It appears that on March 10, 2004, the court conducted an off-the-record pre-trial conference. No court reporter was present. The proceeding was not tape-recorded. The March 10, 2004 FC-DA Order did nothing more than reschedule the March 10, 2004 hearing to April 5, 2004 at 1:30 p.m. and continue the TRO in effect. Notwithstanding the above, the June 17, 2004 FsOF state, in relevant part, as follows:

21. At the March 10, 2004 hearing, all [Mother's] allegations were dismissed except the alleged January 25, 2004 incident.

22. The only remaining allegation from [Mother's] January 28, 2004 Ex Parte Petition was the January 25, 2004 incident.

(Emphasis in original.)

The first problem with the June 17, 2004 FsOF and CsOL is that what it says happened at the March 10, 2004 proceeding is not sufficiently supported by the record on appeal. The recorded discussion between the court and counsel at the April 5, 2004 hearing is not sufficient to validate the court's action prohibiting Mother from presenting evidence of instances other than the alleged January 25, 2004 incident. The attempt to utilize a "Relevant Background" preliminary to the findings of fact to create a record on appeal supporting the findings that followed is unauthorized and improper.

The second problem with the June 17, 2004 FsOF and CsOL is that, in light of the relevant statutes and precedent noted above, it appears that the family court imposed an excessive specificity burden on Mother. A petition for a DAPO is not a

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criminal complaint. The burden of proof is the more probable than not burden. It is reasonable to require Mother to be fairly specific about the dates and times of alleged recent relevant events. It is not reasonable to require the same or similar specificity about the dates and times of alleged non-recent events. The alleged January 25, 2004 incident is a good example. Father knew that the accurate date was January 26, 2004. He was not in any way misled regarding the date. At the April 5, 2004 hearing, counsel for Father told the court, "We're gonna put on credible sworn testimony that the January 25th date is wrong."

The third problem with the June 17, 2004 FsOF and CsOL is FOF no. 16, which indicates that the family court erroneously imposed a pre-trial corroborative evidence burden on Mother. FOF no. 16 states as follows:

During the March 10, 2004 hearing, [Mother] failed to produce any witnesses or any reports or photographs or other documents from the police department, health care facilities, friends, family, or any other persons which supported her allegations as they were presented in her January 28, 2004 Petition.

CONCLUSION

Accordingly, we vacate the April 5, 2004 Order Dissolving Temporary Restraining Order and the June 17, 2004 Findings of Fact and Conclusions of Law. We note that the January 28, 2004 temporary restraining order expired ninety days after it was granted. Nevertheless, the application for a domestic abuse protective order remains to be decided. We remand for further proceedings consistent with this opinion.

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Further, we order the family court to cause the record in FC-DA No. 04-1-0190 to be kept as confidential as the law requires the record in FC-P No. 03-1-0319 to be kept confidential. In addition, the clerk of the appellate court is directed to designate the appellate record in this case as confidential.

DATED: Honolulu, Hawai'i, September 29, 2005.

On the briefs:

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James A. Burns

Chief Judge

Corinne K.A. Watanabe

Associate Judge

Ausa D.W. Fujino

Associate Judge