

**NOT FOR PUBLICATION**

NO. 26726

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

CHRISTINE M. WONG, Plaintiff-Appellee, v.  
DERRICK K.H.WONG, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(FC-D NO. 02-1-2233)

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

MEMORANDUM OPINION

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

Defendant-Appellant Derrick K.H. Wong (Derrick or Defendant) appeals from the July 7, 2004 "Order Denying Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree Filed May 14, 2004"<sup>1/</sup> (July 7, 2004 Order) entered in the Family Court of the First Circuit.<sup>2/</sup>

We affirm in part, vacate in part, and remand for reconsideration of specified issues.

## BACKGROUND

Plaintiff-Appellee Christine M. Wong (Christine or Plaintiff) and Derrick were married on July 25, 1998. Their first son was born on September 3, 1999. Their second son was born on February 23, 2001. Christine filed a Complaint for Divorce on July 8, 2002. On July 25, 2002, Derrick filed an answer.

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<sup>1/</sup> The Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree was actually filed on May 4, 2004.

<sup>2/</sup> Judge Christine Kuriyama presided.

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On February 11, 2003, Alvin Kaohu Nishimura withdrew as counsel for Derrick, and Katherine Puana Kealoha entered her appearance as substitute counsel.

On March 27, 2003, Judge William K. Wallace III granted Christine's oral motion to default Derrick "for his and his counsel's failure to appear at the Notice to Set Hearing[,]" and ordered that "[t]he Decree submitted by [Christine] as her Exhibit 1 to her Motion to Set shall be entered & filed as the decree in this case." On April 3, 2003, the Decree Granting Divorce and Awarding Child Custody (April 3, 2003 Divorce Decree) was filed. In relevant part, it granted the divorce, noted that Christine was relocating to southern California, awarded joint legal custody, awarded Derrick specific visitation rights, ordered Derrick to pay \$960 per month child support for each child, and ordered Christine to maintain medical and dental coverage for the children.

On April 3, 2003, counsel for Derrick filed Defendant's Motion to Set Aside Order for Default Judgment (April 3, 2005 Motion) stating that she had not been informed "that any Motion to Set was to be heard on any given date." The motion did not say what Derrick did not like about the April 3, 2003 Divorce Decree. On April 23, 2003, counsel for Christine filed a response stating, in relevant part:

The Motion to Set was scheduled for hearing on March 27, 2003, at 10:00 a.m., and, for over a month, from after the Withdrawal and

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Substitution was filed, until the default was entered, *new counsel never called or communicated with [Christine's] counsel. . . .*

. . . . .  
[Derrick's] failure to file a position statement or financials or even appear in court is consistent with [Derrick's] failure to defend his case ever since [Christine] was granted custody and child support pursuant to [Christine]'s Motion for Pre Decree Relief, the last hearing on which was held almost 6 months earlier, on August 14, 2002.

(Emphasis in original.)

On April 24, 2003, counsel for Derrick filed a supplemental declaration in support of the April 3, 2003 Motion in which counsel explained that her office had been closed from February 7, 2003 through March 20, 2003 due to an extreme family emergency and that she had not been informed of the hearing on the motion to set.

On May 7, 2003, after a hearing on April 24, 2003, Judge Allene R. Suemori denied Derrick's April 3, 2003 Motion and entered an order (May 7, 2003 Order) stating:

[Derrick] agrees with all the terms of the Decree signed & filed on April 3, 2003 except the provisions relating to visitation with the children as set forth in section 2 b). of the Decree. The parties stipulate to amend those provisions as set forth below. Said Amended Decree shall be submitted by May 2, 2003.

. . . . .  
The provisions relating to visitation shall be amended by adding the following paragraph at the end of section 2.b):

As [Christine] will be moving to California on or about June 1, 2003, [Derrick] shall have visitation with the boys for the weekends April 25, May 2nd, May 16, and May 23rd. Additional visitation, as the parties' work schedule allows, shall be as agreed upon by the parties, with 24 hours notice given to [Christine].

In a letter to Judge Suemori dated May 1, 2003, and filed on May 12, 2003, counsel for Derrick stated in relevant

part:

On April 24, 2003, we came before your Honorable Court on a Motion to Set Aside Default Judgment in the above named case. The Motion was deemed moot, because the terms and conditions of the Decree were fair and equitable, with agreement of the Court. I have reviewed the Decree and the terms with my client, and he had asked for only one change regarding the tax exemptions status. He requested that the tax exemption status be alternated between [Derrick] and [Christine], [Christine] receiving tax exemption for the kids in the odd years (this year) and [Derrick] receiving exemption for the kids in the even years (starting next year 2004). [Christine] would not agree to this modification, and according to [the partner of counsel for Christine] we are to leave it up to the Court.

On May 13, 2003, the Amended Decree Granting Divorce and Awarding Child Custody (May 13, 2003 Amended Decree) was entered. It allowed Christine all of the tax exemptions for the children and stated, in relevant part:

a. General

The parties are awarded joint legal custody of the children. Mother is awarded sole physical care, custody and control of the children subject to Father's rights of visitation as set forth below. Father shall have unlimited telephone contact with the boys during reasonable hours considering the boy's age and usual daily activities. Mother shall keep Father informed of the boy's [sic] school activities and grades, sending him reports in a timely fashion. Both parties shall keep each other informed of any health concerns or doctor's reports. Both parties shall keep each other informed of their current resident addresses, phone numbers and the names of individuals to contact in case of emergency as long as there is a child support obligation.

b) Visitation: Mother is relocating to southern California. Thus, Father shall have visitation every summer for 6 weeks. The boys shall be with Father every other Christmas/New Year's vacation as arranged by the parties. Any additional visitation shall be as arranged by the parties. When Father is passing through the geographical area where Mother and the boys are living, Father shall be entitled to visitation so long as said visitation does not interfere with the boys [sic] usual school activity schedule and Father has given Mother forty-eight hours' notice of his intent to visit.

The boys shall not travel alone, but shall be personally escorted by, on the trip to see Father, by Father, or his substitute, and, on the return trip, by Mother, or her substitute, until the boys are of sufficient age and maturity to travel safely on their own, but in any case not before they turn 13 years of age. The substitute should be a person or persons whom the boys

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know and with whom they feel comfortable. The substitute escort shall be agreed upon in advance, and if there is no agreement the parent who has the boys does not need to send the boys with said person(s), but approval of the escort(s) shall not be withheld without good cause, or else the withholding party shall be liable for any and all costs, including legal fees, associated therewith.

For the boys' summer and Christmas vacation time with Father, the parties shall split evenly the boy's [sic] transportation costs, but pay all of their own, or all of their substitute's transportation expenses. Father shall assume all costs for any other visitation time he and Mother may agree upon. The parties shall cooperate to save on travel expenses and insure that the travel dates are reasonably convenient for all.

As Mother will be moving to California on or about June 1, 2003, Father shall have visitation with the boys for the weekends April 25, May 2<sup>nd</sup>, May 16, and May 23<sup>rd</sup>. Additional visitation, as the parties' work schedule allows, shall be as agreed upon by the parties, with 24 hours notice given to Mother.

On June 30, 2003, Katherine Puana Kealoha withdrew, and Brian Benham Custer entered his appearance, as counsel for Derrick.

On July 3, 2003, Derrick filed a notice of appeal from the March 27, 2003 Order Granting Motion for Default. On January 7, 2004, the Hawai'i Supreme Court entered an Order Dismissing Appeal on the ground that the notice of appeal was not timely filed.

On May 4, 2004, Derrick filed a Motion to Modify Custody and/or Hold Plaintiff in Contempt of Amended Divorce Decree (May 4, 2004 Motion). In this motion, Derrick sought sole custody of the children, modification of visitation orders, sanctions against Christine for violations of custody and visitation orders, appointment of a custody evaluator, and the award of attorney fees. In an April 9, 2004 supporting

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affidavit, he alleged the following:

1. When Christine initially moved to California, she waited for three weeks before she informed Derrick of her telephone number.

2. When Christine changed her address, she waited three weeks before giving Derrick her new phone number.

3. On two occasions, when Derrick called and spoke with his sons, Christine was playing the TV so loud that it interfered with their conversations, and when Derrick asked Christine to turn the volume down, Christine ignored Derrick's request.

4. On more than a dozen occasions when Derrick called and no one answered, Derrick left messages and Christine never returned these calls.

5. Derrick's younger son no longer wishes to talk with Derrick on the phone because his bond with Derrick has been progressively weakened by Christine.

6. Christine failed to keep Derrick informed about his sons' school activities and/or grades.

7. Christine failed to keep Derrick informed about the health concerns of their sons and told Derrick that he did not need to know such information.

8. Christine failed to keep Derrick informed as to her current address and phone number.

9. Christine did not allow Derrick to have his 2003 summer visitation, told Derrick that she did not have to do this because Derrick had visited the children prior to Christine leaving with them for California.

10. Christine refused to send the boys to visit Derrick during Christmas 2003.

11. Derrick asked Christine for a "make-up" Christmas time visit from December 25 to January 26, but Christine refused because she could not afford to pay to fly to Hawai'i to pick up the boys.

At the July 7, 2004 hearing on Derrick's May 4, 2004 Motion, Christine admitted that when she moved into her own apartment she did not inform Derrick until three weeks after she moved. Christine also admitted "that our youngest son did go to the emergency room in July [of 2003] and [she] did not inform [Derrick] just because of we don't get along. We don't get along. We don't communicate, it's a true fact. And that is my fault that I did not tell him." Christine further testified, in relevant part:

Q. Was this issue addressed by your lawyer, Adrienne King, to [sic] a letter on January 13, 2004, which is Defendant's Exhibit K?

A. Yes. [Derrick] was claiming that I don't tell him of any health concerns. And what my previous lawyer Adrienne King was trying to say, that I don't have to tell him about every single doctor visit, just the ones that are a health concern. And that's what he was upset about, that they were going for their shots. When we first moved there, they had to get shots to start school. I did not inform him of those things. Like I said, I am wrong in not telling him about the emergency situation, I should have told him about that.

. . . .

A. . . . [W]hen I first moved there, the boys started preschool June 18. If this were to go farther, the school can verify, Judge, this pamphlet was sent to him plus these forms to sign and return. . . .

So this was the week of June 18, this was mailed to him to sign and return and he never did. So that's why he has not received a single thing. . . . So I was doing good faith in trying to send him information.

When Christine was asked whether she would be in the near proximity to overhear what the children would say when Derrick would call to speak to his sons, Christine testified as follows:

A. Yeah, actually I had to be, like I said, because I felt there wasn't good conversation, I did always stay nearby. I did, and I know I'm not supposed to do this, I did record conversations. [Derrick] does not know I recorded it and I know I'm wrong in doing that. But because of the fact I did not approve of the conversations, and if we ever had to come to court because I knew he was upset about -- he would always threaten that he'd take me to court for this and that.

At the conclusion of the hearing, the court stated, in relevant part:

I believe the problem basically stems from the fact that the two of you do not communicate well with each other. What makes it even more difficult is that you do not reside in the same geographic area. [Derrick] is here, [Christine] and the two boys are in California, that makes communication even more difficult. So in order to avoid problems like this in the future, the two of you have to learn to communicate effectively. All right.

On July 7, 2004, after the hearing, the court entered the following order:

[Derrick's] [r]equests are all denied with the exception of Christmas 2004 in which [Derrick's] visitation with the parties' children shall be from December 14th, 2004 through January 6, 2005. Each party shall bear their own attorneys fees.

On July 27, 2004, Derrick filed a Notice of Appeal from the July 7, 2004 Order.

On September 17, 2004, Judge Kuriyama entered findings of fact and conclusions of law (FsOF and CsOL), stating, in

relevant part:

FINDINGS OF FACT:

. . . . .

8. Plaintiff testified that Judge Suemori had suggested that due to the transition of moving to another state, Defendant should go to visit the children in California so that he could see where they were going to school and where they were going to live. The Court insisted on this because the children were only 2 and 3 years of age at that time and were relocating to the State of California.

. . . . .

10. After Plaintiff had moved to California, Defendant did not request to come to California and pick up the boys. He did not send Plaintiff a ticket for the children to come to Hawaii for the summer. There was no communication about summer visitation for the summer of 2003 between the parties.

11. Defendant called Plaintiff on September 13, 2003 requesting the children for visitation during Christmas vacation. Plaintiff told Defendant that she could not financially afford to send the children to Hawaii for Christmas because of the costs she had incurred in moving to California and that she had to pay for a very expensive divorce. Defendant became very upset. Defendant sent Plaintiff a letter stating that he wanted visitation with the children during Christmas vacation. Plaintiff informed Defendant Christmas vacation was in alternate years and that the children would come and visit with him the following Christmas.

12. When Plaintiff first moved to California, she provided Defendant with her address and phone number where she would be temporarily staying with her Aunt Terry and Uncle Dave. Defendant called and was informed that Plaintiff and the children were at Plaintiff's Aunt Julie's home. Defendant was upset and contacted Plaintiff. Defendant continued to call and was able to speak with his children.

13. When Plaintiff moved to her own apartment, she did not immediately inform Defendant as to her new address and phone number. She did provide that information to Defendant in writing about three (3) weeks later as to her new address and telephone number.

14. Defendant receives medical records regarding the parties' children from the insurance care provider. Plaintiff did not inform Defendant on an occasion in which the parties' son went to the emergency room for treatment. Plaintiff's prior counsel, Adrienne King, addressed this issue to Defendant's counsel in a letter dated January 13, 2004. . . .

15. The parties' children began pre-school on June 18, 2003. Plaintiff testified that the school pamphlet was sent to Defendant. Defendant was to have signed the pamphlet and return it to the school but never did so. Plaintiff explained that this was the reason why the school had not sent Defendant materials regarding the children's schooling.

16. Prior to the parties' divorce, on August 14, 2002 the parties were ordered to participate in parenting counselling with June Ching. Plaintiff contacted June Ching and participated in parenting counselling every month until she relocated. Defendant did not contact June Ching nor did he participate in parenting counselling. Defendant claimed that his prior counsel did not provide him with a copy of the Order requiring him to participate in parenting counselling. However, Defendant signed the Order and was present in Court when the Order was made as well as being told by the Presiding Judge to attend parenting counselling.

17. The parties have had problems in communicating with each other. In the past, Plaintiff felt she was unable to effectively communicate with Defendant because he would put her down or yell at her. Plaintiff believes that parenting counselling would have helped the parties in communicating with each other.

18. Defendant has had telephone contact with the parties' children. Plaintiff has not interfered with Defendant's telephone communications with the children. On occasions she has had to calm the children down because they got very excited when they spoke with Defendant. The youngest child has not wanted to speak with his father on various occasions. Plaintiff believes that this is due to his young age.

. . . . .

20. Plaintiff accompanied the children to Hawaii so that they could have visitation with their Father over the summer (2004) for six weeks. Plaintiff stayed in Hawaii during the summer visit and returned the children to their home in California after the summer visitation.

21. Defendant asked for twelve (12) weeks over the summer on the basis that he did not get visitation over the prior year's (2003) summer.

22. Plaintiff has not interfered with Defendant's visitation rights with the parties' two children.

23. On the issue of custody and visitation, the Court finds that there has been no material change in circumstance.

CONCLUSIONS OF LAW

. . . . .

4. Plaintiff is not in contempt of Court.

5. The divorce decree and the amended divorce decree does [sic] not provide for "make up" visitation and therefore, Defendant's request for making summer visits for twelve (12) weeks is denied.

6. Defendant's requests to require that summer visitation every summer be twelve (12) weeks and that Plaintiff would be

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required to send the children to Hawaii every Christmas as part of the further Amended Decree is denied.

7. Defendant's request for an appointment of custody evaluator is denied.

8. Each party shall bear their own attorney's fees and costs incurred herein.

This appeal was assigned to this court on February 9, 2005.

DISCUSSION

In general, Derrick contends that (1) the court manifested bias against him so as to deny him due process by denying him a fair hearing before an impartial court and (2) Christine, in a July 2, 2004 affidavit, attempted to trade on the maternal preference doctrine by painting a negative personality picture of Derrick. In sum, Derrick contends,

The Court engaged in expectancy confirmation bias. It allowed [Christine] to trade on her personality portrait of [Derrick] as both a bad litigant and a bad parent. [Derrick's] evidence, that Plaintiff violated his visitation and/or contract rights, varied greatly from the Court's stereotypical expectations concerning woman [sic] being better parents than men. Thus, the Court negatively adapted to [Derrick's] evidence. It engaged in a creative interpretation of HRE Rule 611(a) to distort [Derrick's] side of the case. In so doing, it manifested systematic bias against [Derrick].

We interpret Derrick's points of error<sup>3/</sup> to be, and respond to them, as follows:

1. Derrick clearly stated his allegations in and/or with his May 4, 2004 Motion. At the July 7, 2004 hearing, the court first had Christine testify in response to Derrick's

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<sup>3/</sup> In stating the points of error, the opening brief does not comply with the explicit requirements of the Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2005).

allegations and then had Derrick testify in response to Christine's testimony. Derrick asserts two complaints about this procedure. First, he contends that the court disregarded the principle of law that a movant should present his case first because he has the burden of proof. He complains that when he testified he was required to (a) counter Christine's evidence and (b) present his own evidence. Second, he contends that when the court allowed him to present his evidence, it did so under such tremendous time pressure that it effectively hampered his presentation. Upon a review of the record, we conclude that the court's procedure was not an abuse of its discretion.

2. Derrick asserts that the court erroneously admitted Christine's irrelevant and/or unfairly prejudicial evidence. Specifically, he contends as follows:

In this case, there were two factual issues in dispute: (1) whether [Christine] had violated the terms and conditions of the amended divorce decree, (2) whether [Christine]'s violations engendered a material change in circumstances, and/or (3) whether [Christine]'s actions were against the children's best interests. Despite this focus, the Court allowed [Christine] to testify that, prior to the original divorce decree being granted, she had attended parenting counseling while [Derrick] did not, even though they both had been ordered to do so because they did not get along. [Derrick] objected to the admission of this evidence on the grounds that this was beyond the issue of [Christine]'s contemptuous conduct. The court overruled [Derrick] and stated that it was relevant to the issues he had raised.

Upon a review of the record, we conclude that the court did not abuse its discretion. Christine's testimony was relevant to Derrick's request for sole physical custody of the two boys.

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3. Derrick asserts that the court unfairly administered the proceedings so as to systematically admit Christine's hearsay evidence while excluding Derrick's hearsay evidence. He contends that the court, influenced by Christine's negative picture of Derrick, denied Derrick due process in a series of evidentiary rulings. Upon a review of the record, we conclude that the court did not abuse its discretion.

4. Derrick asserts that the court

used an incomplete legal standard. One, it focused on only the issue of whether a material change in circumstances had occurred and completely ignored the issue of what was in the children's best interests. Two, in addressing the material change issue, the Court, operating on the basis of anti-male bias, perceptually filtered out [Derrick]'s evidence and, thus, arrived at a distorted decision. These Court actions caused a substantial detriment to [Derrick] as the Court took minimal steps to repair the damage that [Christine] had done to his relationship with his sons.

Specifically, Derrick contends that "the material change in circumstances that occurred upon [Christine's] move, was her systematic interference with both [Derrick's] visitation and contact rights. As a result of [Christine's] behavior, [Derrick's] psychological relationship with the boys was weakened. This was not in their best interest." Upon a review of the record, we conclude that the court did not abuse its discretion.

5. Derrick asserts that the court abused its discretion when it did not find Christine in civil contempt. Upon a review of the record, we disagree. Proof of a party's past violations of a court order is not proof that the party is

currently "in civil contempt."

6. Derrick contends that the court abused its discretion when it decided not to modify its custody order. Upon a review of the record, we disagree.

We now review the disputed FsOF. FOF no. 8 contains two errors of law. First, a statement of a party's testimony is not a finding of fact. Second, the testimony by Christine that a prior court had "suggested that due to the transition of moving to another state, Defendant should go to visit the children in California so that he could see where they were going to school and where they were going to live" and that "[t]he Court insisted on this because the children were only 2 and 3 years of age at that time and were relocating to the State of California" is hearsay as it is not supported by the record on appeal because there is no transcript. Moreover, if Judge Suemori had "insisted on this" as alleged by Christine, it was incumbent upon Judge Suemori to do so in the May 7, 2003 Order and/or the May 13, 2003 Amended Decree. In the absence of a court order in the record on appeal requiring Derrick to visit his children in California, Derrick cannot be faulted or penalized for not doing so.

In light of the record, FOF no. 10 is not clearly erroneous.

FOF no. 11 states facts that do not establish a violation of the May 13, 2003 Amended Decree because the latter

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did not require Derrick's alternate Christmas visitation to commence in 2003. It permitted it to commence in 2003 or 2004 "as arranged by the parties."

FsOF nos. 13 and 14 state facts proving Christine's violations of orders contained in the May 13, 2003 Amended Decree.

FOF no. 15 misses the point. The May 13, 2003 Amended Decree requires that "Mother shall keep Father informed of the boy's [sic] school activities and grades, sending him reports in a timely fashion." It does not impose any requirement on Derrick. It does not permit Christine, and it does not require Derrick to permit Christine, to assign her obligation to the school(s). Thus, Christine violated this provision of an order contained in the May 13, 2003 Amended Decree.

FOF no. 16 is not clearly erroneous and is relevant to Derrick's request for a change of custody. On the other hand, nothing in the record supports the following statement by counsel for Christine at the July 7, 2004 hearing:

But, your Honor, the key problem in this whole thing is that there's talk about violation or contempt, but it started all with [Derrick], and all of this could have been avoided if he listened to the court order. He was in court on August 14, he was ordered to parenting counseling with June Ching. If he started it at that time -- and he never went, Your Honor, a lot of this could have been avoided.

This statement erroneously assumes that June Ching's parenting counseling would have been more successful with Derrick than it was with Christine.

The court's statements to the parties that "the problem basically stems from the fact that the two of you do not communicate well with each other" and that "in order to avoid problems like this in the future, the two of you have to learn to communicate effectively" and Fsof nos. 16 and 17 state facts reaffirming the ultimate fact that the court's visitation orders are not now, and never have been, appropriate in this situation because they require too much cooperation between non-cooperating parties who have serious problems communicating with each other. The statement that "Plaintiff believes that parenting counselling would have helped the parties in communicating with each other" is irrelevant.

The second sentence in FOF no. 18 stating that "Plaintiff has not interfered with Defendant's telephone communications with the children" appears to be clearly erroneous. Christine admitted recording those conversations while "nearby" to the children. Absent any evidence to the contrary, it is reasonable to assume that the children were aware of these recordings. If the children were aware of these recordings, FOF no. 18 is clearly erroneous.

COL no. 4. that "Plaintiff is not in contempt of Court" is right. But Derrick sought sanctions against Christine for Christine's past violations of the court's orders. The court failed to respond to this request.

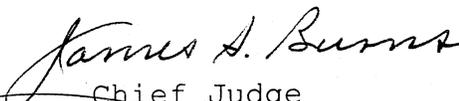
CONCLUSION

Accordingly, we affirm the court's decisions regarding custody and contempt. We vacate FsOF nos. 8 and 15, the last sentence of FOF no. 17, and the second sentence of FOF no. 18. We remand for reconsideration (1) of the issues presented by vacated FOF no. 15, (2) whether FOF no. 18 is clearly erroneous and, if it is, of what should be done about it, (3) of what should be done regarding the violations noted in FsOF nos. 13 and 14, (3) whether the parties have the financial ability to comply with the visitation orders, and (4) of the visitation orders in light of (a) the fact that Christine and Derrick do not communicate well with each other, and (b) the financial abilities of the parties.

DATED: Honolulu, Hawai'i, October 26, 2005.

On the brief:

Brian Custer  
for Defendant-Appellant.

  
Chief Judge

Associate Judge

  
Associate Judge