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NO. 27104

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

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STATE OF HAWAII

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FILED

DEPARTMENT OF HUMAN SERVICES, et al., Petitioners-Appellees,
v.
HAROLD L.S. HONG, Respondent-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-DA NO. 05-1-0096)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Harold L. S. Hong (Mr. Hong)
appeals from the family court's^{1/} Order for Protection entered on
January 26, 2005.

On December 2, 2002, the family court entered an order
(1) terminating the parental rights and duties of Mr. Hong and
his wife Carol K. Hong (Mrs. Hong) regarding three children (the
Children)^{2/} they had previously adopted, (2) awarding permanent
custody of the Children to the State of Hawai'i, Department of
Human Services (the DHS), and (3) ordering Mr. and Mrs. Hong to
have "no contact" with the Children without defining the meaning
of "no contact".^{3/}

On January 14, 2005, the DHS petitioned for a temporary
restraining order (TRO) that would essentially repeat the "no

^{1/} Judge Lillian Ramirez-Uy presided.

^{2/} The children were born in 1990, 1991, and 1995, respectively.

^{3/} What does a "no contact" order prohibit? Should all "no contact"
orders contain both a geographical and a communication prohibition?

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contact" order contained in the December 2, 2002 order.^{4/} The petition was based on an allegation that, on December 9, 2004, "Mr. and Mrs. Hong showed up at the [C]hildrens' schools, scaring the [C]hildren with their presence." An order entered by Judge Christine E. Kuriyama on January 14, 2005, granted the TRO and set the matter for a hearing "to show cause why this temporary restraining order should not continue."

At the January 26, 2005 hearing, Thomas Haia, who had previously been the guardian ad litem (GAL) for the Children, testified that at "Christmas time" in 2003, the child born in 1995 "had said that she was afraid that her dad -- that Mr. Hong was going to steal her."^{5/}

On direct examination by the prosecutor, the DHS social worker testified in relevant part:

Just, from what I understand, at the time the permanent custody was awarded, . . . an order was put in there that said that the Hong's shall have no further contact with the children. . . . I think it was on four occasions -- in April, twice in May, and once in June of 2004 -- one of which Mr. Hong admitted to, the May Day program.^{6/} We came to court after those incidents, asking for a TRO at that time. Judge [Kenneth E.] Enright at that time just clarified . . . the no-contact order that was already in effect and declined at that time to issue a TRO, stating that if it happens again, then DHS needs to take steps.

On cross-examination by Mr. Hong, the DHS social worker testified in relevant part:

^{4/} Hawaii Revised Statutes § 586-4(e) (Supp. 2005) states that a knowing or intentional violation of a temporary restraining order is a misdemeanor.

^{5/} Finding of Fact no. 9, which says that this statement was made at Christmas 2004, is clearly erroneous.

^{6/} Defendant-Appellant Harold L. S. Hong admits that on May 14, 2004, he and his wife went to a school's basketball gym to watch one of the children at a May Day program but were unaware that doing so was a violation of the court's order.

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Q. Okay. And it says here on this statement here that the last time we went down there, really, to approach the [C]hildren was -- where we scared them and intimidated them was on December the 9th.

A. That's correct.

. . . .

Q. . . . I have proof here that I wasn't even on the island on December the 9th.

. . . .

Q. Okay. So how can she say that I was down there, intimidating the [C]hildren, when I was not even on the island?

A. This is . . . the day that was reported to me by Foster Mom. That is what I reported in the TRO.

Q. So it was reported to you by the foster parent?

A. Correct.

. . . .

A. I took the word from Foster Mom, after she spoke with Principal, that they saw you at the school. I don't -- I cannot speak on whether they made a mistake on the day or not.

Q. So on this incident on this particular day, the principal reported it to the foster parent?

A. Correct.

(Footnote added.)

At the conclusion of the trial on January 26, 2005, the court orally found that

as to the charge of contact on December 9, 2004, that was not proved even by a preponderance. Court will, however, make the finding that there was an intention to make contact. And the Court will also consider the testimony of Mr. Haia as to any possible threat of kidnapping [sic] as to [one of the children] during the pendency of the no contact order.

On March 7, 2005, the court entered its Findings of Fact and Conclusions of Law. The Findings of Fact state, in relevant part:

15. Orders Concerning Child Protective Act, filed June 2, 2004 state specifically on page 2, that if the Hong's [sic] continue to make contact with the [C]hildren the DHS shall be notified and take appropriate steps to address the matter.

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16. Since that order was issued, the crossing guard at [one of the Children's] school reported seeing Harold Hong at the school on or about December 9, 2004.

17. The Court finds as to the allegation of contact on December 9, 2004, that was not proven by a preponderance of the evidence.

18. The Court makes the findings [sic] that there was an intention to make contact.

19. The Court did consider the testimony of Mr. Haia as to any possible threat of kidnaping as to [the child born in 1995] during the pendency of the no-contact order.

On February 7, 2005, the Hongs filed a notice of appeal. This case was assigned to this court on January 20, 2006.

Hawaii Revised Statutes (HRS) § 586-1 (Supp. 2005) states, in relevant part:

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, or under part V or VI 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.

HRS §§ 586-3 (Supp. 2005) states, in relevant part:

Order for protection. (a) There shall exist an action known as a petition for an order for protection in cases of domestic abuse.

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(b) A petition for relief under this chapter may be made by:

- (1) Any family or household member on the member's own behalf or on behalf of a family or household member who is a minor or who is an incapacitated person as defined in section 560:5-102 or who is physically unable to go to the appropriate place to complete or file the petition; or
- (2) Any state agency on behalf of a person who is a minor or who is an incapacitated person as defined in section 560:5-102 or a person who is physically unable to go to the appropriate place to complete or file the petition on behalf of that person.

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

HRS §§ 586-5 (Supp. 2005) states, in relevant part:

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

(b) On the earliest date that the business of the court will permit, but no later than fifteen days from the date the temporary restraining order is granted, the court, after giving due notice to all parties, shall hold a hearing on the application requiring cause to be shown why the order should not continue. In the event that service has not been effected, the court may set a new date for the hearing; provided that the date shall not exceed ninety days from the date the temporary restraining order was granted. All parties shall be present at the hearing and may be represented by counsel.

The protective order may include all orders stated in the temporary restraining order and may provide further relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention.

The Order for Protection was based on the finding "that there was an intention to make contact." What facts support this finding? First are the events considered by Judge Enright when he made his decision on June 2, 2004. Second is the testimony of the DHS social worker that the school principal reported to the

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foster parent that on December 9, 2004 Mr. Hong had been seen at the school attended by at least one of the Children.

The court found that the December 9, 2004 event did not occur. Thus, the only facts supporting this finding are the incidents considered by Judge Enright when he made his decision on June 2, 2004.

The Hawai'i Supreme Court has stated:

This court has consistently recognized that:

The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

Pele Defense Fund v. Paty, 73 Haw. 578, 599, 837 P.2d 1247, 1261 (1992) (citations omitted).

Based on the above precedent, it must be concluded that all of the incidents that had been considered by Judge Enright when he entered his June 2, 2004 order are insufficient to support the January 26, 2005 Order for Protection. There were no incidents post-Judge Enright's order. Therefore, there are no facts to support the family court's January 26, 2005 Order for Protection.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

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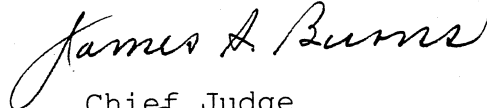
IT IS HEREBY ORDERED that the order granting the
January 26, 2005 Order for Protection is reversed.


DATED: Honolulu, Hawai'i, June 16, 2006.

On the briefs:

Harold L.S. Hong
Pro Se Respondent-Appellant.

Audrey L. Whitehurst,
Deputy Attorney General
for Department of Human
Services on behalf of
Petitioners-Appellees.


Chief Judge


Associate Judge


Associate Judge