S.C. No. 27580

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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| LILY E. HAMILTON on behalf of AMBER J. LETHEM, a Minor,<br><br>Respondent/Plaintiff-Appellee,<br><br>vs.<br><br>CHRISTY L. LETHEM,<br><br>Petitioner/Defendant-Appellant. | CIVIL NO. 05-1-1977<br><br>**APPEAL FROM THE TEMPORARY RESTRAINING ORDER (EX PARTE) FILED SEPTEMBER 23, 2005 AND ORDER REGARDING TEMPORARY RESTRAINING ORDER FILED OCTOBER 5, 2005**<br><br>**Family Court of the First Circuit**<br><br>**Judge Darryl Choy** |

**PETITIONER/DEFENDANT-APPELLANT CHRISTY L. LETHEM'S APPLICATION FOR WRIT OF CERTIORARI**

**APPENDICES "1" – "8"**

**CERTIFICATE OF SERVICE**

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**PETITIONER/DEFENDANT-APPELLANT CHRISTY L. LETHEM'S APPLICATION FOR WRIT OF CERTIORARI**

Petitioner/Defendant-Appellant Christy L. Lethem (Father) respectfully asks this Court to issue a writ of certiorari to review the opinion and judgment (September 21, 2011) of the Intermediate Court of Appeals (ICA) in *Hamilton v. Lethem*, No. 27580, 2011 WL 2611284 (Haw. Ct. App. June 30, 2011). (Appendix (App.) 1).

In *State v. Matavale*, this Court recognized that "an isolated instance of moderate or reasonable physical force ... that results in nothing more than transient pain or temporary marks or bruises is protected under the parental discipline defense," and that an "angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere." *State v. Matavale*, 115 Haw. 149, 166, 166 P.3d 322, 339 (2007) (internal citation, block quote format and italics omitted). This Court concluded that a mother's striking of her daughter after she lied about school, with a backpack, a plastic hanger, a "small car brush," and with "'the plastic handle' of an unspecified tool" was protected parental discipline under Haw. Rev. Stat. (HRS) § 703-309 (1993).

Although that statute is not applicable in non-criminal cases when Family Courts are evaluating an application for a temporary restraining order (TRO), the same principles govern. In the case at bar—an appeal from the issuance of a TRO obtained on behalf of Father's daughter by her mother (who was locked in a bitter divorce with Father)—both the Family Court and the

ICA failed to articulate under what standard they determined that Father's reaction to his teenaged daughter's revelation that she had obtained the "morning after" birth control pill "for a friend" was not "moderate or reasonable discipline," but constituted abuse. The lack of any governing standard in the TRO statute, HRS ch. 586, by which to distinguish permissible discipline from abuse allowed the courts below to simply conclude "I know (abuse) when I see it," and the ICA applied no discernible standard.

Rather than evaluate factors such as the age and size of the minor, the severity of any injury, the type of instrument used if any, the mental or emotional state of the parent, whether the force used was reasonably related to the purpose of safeguarding the child's welfare or was punishment for the child's misconduct, the ICA held that Father's actions were not protected discipline *simply because they were abusive*, without articulating any factual or legal reason why that was so. That tautology is no substitute for clear standards to guide Hawaii's parents, and is of little help to Family Courts when they attempt to balance the need to protect children from truly abusive acts, against a parent's constitutional right to insure their children are disciplined.

If the Constitutional right of parents to impose "moderate or reasonable discipline" is to have any meaning in the "real world of parenting," courts must not essentially presume abuse, but must be guided by clear and articulable standards to distinguish between protected corporal punishment and prohibited child abuse. Yet, nothing in the TRO statute or in the ICA's opinion provides that necessary guidance. Neither informs parents where the line is, or guides the Family Courts in their evaluation of parental actions. For a parent's right to discipline his or her children to have any meaning, the line between protected discipline and actions that will be deemed abusive must be drawn clearly, particularly where the parent is subject to civil penalties or criminal conviction if she wrongly predicts. Only this Court can draw that line.

Father respectfully requests the Court grant this application, issue the writ, and allow further briefing and hear oral argument,[1] in order to provide these desperately needed guidelines.

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[1] Until recently, Father has appeared *pro se*, and the courts have not benefitted from briefing or argument by counsel. *See Hamilton v. Lethem*, No. 27580, 2011 WL 2611284, *4 n.2 (Haw. Ct. App. June 30, 2011) (App. 1) ("Father's opening brief largely fails to conform to Hawaii Rules of Appellate Procedure (HRAP) Rule 28(b). . . . Accordingly, we will consider Father's arguments to the extent we can discern them."). Should this Court grant this application, Father suggests that the Court would benefit from supplemental merits briefing to clarify the issues and arguments. Rule 40.1(i) of the Hawaii Rules of Appellate Procedure (HRAP) provides that "[w]ithin 10 days after the acceptance of the application for a writ of certiorari, a party may

## QUESTIONS PRESENTED

1. When determining whether to issue a TRO, does the parental right to discipline children require the application of clear and articulable guidelines to distinguish truly abusive behavior from actions that are "moderate or reasonable discipline [that] is often part and parcel of the real world of parenting?"

2. When considering whether to issue a TRO, must the Family Court recognize that a non-custodial parent maintains a "residual parental right" to discipline his child during a period of unsupervised visitation, including the right to discipline the child for morals?

## STATEMENT OF PRIOR PROCEEDINGS

Father was engaged in a horrific divorce with Respondent/Plaintiff-Appellee Lily E. Hamilton (Mother). App. 5. Father and Mother were both seeking exclusive custody of their teenage daughter, Amber (Amber), who was then fifteen years old. Record on Appeal (RA) 43; App. 5. On September 23, 2005, Mother petitioned the Family Court of the First Circuit (Family Court) *ex parte* for a temporary restraining order (TRO) on Amber's behalf against Father, pursuant to HRS § 586-3 (1993 & Supp. 2004). RA 1-5. The same day, the Family Court issued a TRO that prevented Father from threatening or physically abusing Amber, having any contact with her, and required Father to stay at least 100 yards from her. RA 6-8; App. 2.

On October 5, 2005, the Family Court held a hearing on the TRO. RA 9, 15; Transcript (Tr.) 10/5/2005. At the conclusion of the hearing, the Family Court issued an order extending the TRO until December 22, 2005. RA 6, 15; App. 3. The TRO expired by its own terms on December 22, 2005. *Id.* On March 3, 2006, the Family Court issued Findings of Fact and Conclusions of Law. RA 42-44; App. 4.

Father appealed *pro se*, arguing, in part, that HRS Chapter 586 was unconstitutional and that the Family Court erred in failing to consider discipline as a defense. On May 16, 2008, the ICA issued an unreported Summary Disposition Order (SDO). *Hamilton v. Lethem*, No. 27580 (Haw. Ct. App. May 16, 2008); App. 7. The ICA failed to address Father's claims that the

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move in the supreme court for permission to file a supplemental brief," and Father is prepared to supply such a brief. For the court's convenience, a copy of Father's proposed Motion for Supplemental Briefing is attached to this writ as App. 6. Additionally, Father suggests that oral argument would benefit this Court's consideration of this case and help focus the arguments.

Family Court did not consider his constitutional and statutory claims, and instead dismissed Father's appeal as moot because the Family Court TRO had already expired by its own terms. *Id.* The ICA vacated the Family Court's orders in the underlying action. *Id.*

On September 23, 2008, this Court accepted Father's *pro se* application for a writ of certiorari. *Hamilton v. Lethem*, 119 Haw. 1, 2, 193 P.3d 839, 840 (2008) (*Hamilton I*); App. 8. On October 14, 2008, this Court unanimously reversed the SDO, and held that Father's appeal was not moot, but remained a live controversy under the collateral consequences exception to the mootness doctrine. *Hamilton I*, 119 Haw. at 12, 193 P.3d at 850. This Court remanded the appeal to the ICA with instructions to consider the merits of Father's arguments. *Id.* On June 30, 2011, without further briefing or argument, in a published opinion, the ICA affirmed the Family Court TRO. *Hamilton v. Lethem*, No. 27580, 2011 WL 2611284 (Haw. App. June 30, 2011); App. 1. The ICA issued its judgment on appeal on September 21, 2011. This timely application for writ of certiorari follows.

## STATEMENT OF THE CASE

As noted above, Mother and Father were in the middle of a contentious divorce and each sought custody of Amber. Mother obtained the TRO *ex parte*, and twelve days after issuance, the Family Court held a hearing. RA 44; Tr. 10/5/2005, *passim*. Amber testified that she had helped a friend obtain the morning-after pill, and a few days later, she and Father spoke about it. Tr. 10/5/2005, p. 15-16. Father testified: "And I was lecturing my daughter. I was telling her I'm her father. That's my role. I'm not her buddy. I'm not her friend. I'd like to be. It's an easier role. But I am – I am her father, and you know, I'm here to – I have to do my job." Tr. 10/5/2005, p. 37. Father testified that "Amber was – was trying to get up. She was screaming at [her sister], and she was – she was just ranting and raving" and he slapped her. *Id.* Father attempted to raise his right to discipline his child as a defense to the Family Court, but at the conclusion of the hearing, although recognizing that the incident occurred as part of a disciplinary related issue, the court failed to recognize his right to discipline, and concluded that Mother possessed the sole right to discipline Amber:

> . . . My understanding that is she will have visitation at Mr. Lethem's house, she's caught doing drugs, I think Mr. Lethem has the right to use physical force, if necessary.
>
> In this case, though, we're talking about an ongoing philosophy of how we should run their lives and how children

> should be raised. That unfortunately falls with the mother's (inaudible), not father's. She is the sole custodian.

Tr. 10/5/2005, pp. 58-59. In its findings of fact and conclusions of law issued nearly a year later, the Family Court set forth its reasons for refusing to consider Father's claim that he was disciplining Amber and was within his rights to do so:

> The defendant has raised parental discipline under section 703-309(a) HRS. However, that section applies to criminal not civil actions. Moreover, while it would appear that Amber was disciplined by the defendant for assisting her friend with obtaining a birth control product, discipline over issues of morals lies with the petitioner, who has sole legal and physical custody. Assuming additionally that the defendant struck Amber because of her refusal to discuss this issue late during a school night, the court concludes that such an action is not proper discipline.

RA at 44. In affirming the TRO, the ICA agreed with the Family Court's justifications and likewise refused to give effect to either Father's constitutionally-protected fundamental liberty interest in disciplining his child or Father's statutory "residual parental right" to discipline.[2] *See* Slip Op. at 14-15.

## ARGUMENT

### I. THE ICA GRAVELY ERRED BY FAILING TO ARTICULATE ANY STANDARD BY WHICH IT CONCLUDED THAT FATHER'S ACTIONS WERE NOT DISCIPLINE

A parent has a fundamental constitutional right to discipline his or her children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *In re RGB*, 123 Haw. 1, 56, 229 P.3d 1066, 1121 (2010). A parent's right to discipline includes the right to use reasonable corporal punishment. *Doe v. Lang*, 327 F.3d 492, 523 (7th Cir. 2003); *Lang v. Starke County Office of Family and Children*, 861 N.E.2d 366, 378 (Ind. Ct. App. 2007). This right is a constitutional right, and is not dependent upon legislative recognition in a statute. *E.g. City of Boerne v. Flores*, 521 U.S. 507, 545 (1997). The ICA gravely erred by failing to apply a discernible standard to differentiate between discipline and abuse, which allowed it to in essence presume that Father's discipline

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[2] The ICA's three essential conclusions were: (1) "HRS Chapter 586 does not violate procedural or substantive due process," (2) "The process for obtaining an ex parte TRO is not unconstitutionally gender bias," and (3) "the Family Court did not abuse its discretion in issuing the ex parte TRO." Slip Op. at 8-32.

was instead conduct that required the Family Court to issue a TRO. *See* Slip Op. at 9-12. Rather than apply this amorphous standard, courts must "distinguish between those acts of parental control for which the state cannot interfere based on the recognized liberty interest parents have in raising their children and those instances where the state's interest in protected a child's welfare justifies intervention." *P.W. v. D.O.*, 591 S.E.2d 260 (W. Va. 2003) (citing *Troxel*, 530 U.S. at 65-66 and *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

The only way for parents to distinguish between protected discipline and unprotected abuse is to have clearly established standards informing what factors will be considered by Family Courts if their actions are called into question. Recently, the Texas Court of Appeals explained: "[F]or corporal punishment to constitute family violence, there must be some evidence – such as severity of injury, type of instrument used, or mental or emotional state of the perpetrator – that would transcend a reasonable level of parental discretion regarding discipline." *In re Wean*, No. 03-10-00383, 2010 WL 3431708, *5 (Tex. Ct. App. Aug. 31, 2010).

Similarly, HRS § 703-309 (1993), which provides a parental justification defense for the use of force in criminal cases, provides, in pertinent part:

> The use of force upon or toward the person of another is justifiable under the following circumstances . . . [t]he actor is the parent . . . responsible for the general care and supervision of a minor . . . and: (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and (b) The force used is not designated to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

There are no "bright line rules that dictate" whether corporal punishment is considered reasonable under the statute, and "the *permissible degree of force* will vary according to the child's physique and age, the misconduct of the child, the nature of the discipline, and all surrounding circumstances." *Matavale*, 115 Haw. at 165, 166 P.3d at 338. Thus, this Court's interpretation of the criminal statute is in accord with the constitutionally-protected fundamental liberty interest of a parent to inflict reasonable discipline on one's child. The domestic violence protective order statute, HRS Chapter 586, must be afforded like interpretation.

The ICA failed to subscribe meaning to the constitutionally-protected fundamental liberty interest in discipline that is embodied in the HRS § 703-309 parental discipline defense. Instead,

the ICA dismissed Father's argument that similar limitations must be placed on a court's interpretation of what constitutes abuse under HRS Chapter 586 under the justifications that (1) the criminal statutory defense does not expressly apply in a civil setting, and (2) the definition of "domestic abuse" encompasses conduct that might otherwise satisfy the parental discipline defense. Slip Op. at 14-15.

For a parent's constitutionally-protected fundamental liberty interest in discipline – including the use of corporal punishment – to have any meaning in "real world of parenting," *Matavale*, 115 Haw. at 166, 166 P.3d at 339, similar standards must guide the Family Court's determination of whether to issue a TRO under Chapter 586. If a parent asserts her actions were protected parental discipline, courts must understand how to evaluate the evidence and how to draw the line between discipline and abuse. Without standards, parents will not be able to understand how a court concluded their actions were enough to merit the issuance of a TRO. Without guidelines, courts are left to apply their own ad hoc sense of what the standard is and where the line is drawn – apparently what happened in the present case. The failure to apply clear standards is contrary to the requirements of due process and will result in a "chilling" effect on parents' fundamental right to discipline. *Cf. Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2743 (2011) ("**Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited**. The lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech." (emphasis added)) (internal citation and quotation marks omitted).

Here, the Family Court applied no discernible standard to judge whether Father's disciplining of Amber crossed the line to abuse. The ICA's opinion simply assumed that Father's actions were "abuse" by engaging in circular reasoning that couched Father's act of discipline as causing "severe bodily harm" and, in doing so, failed to adequately acknowledge that there are degrees of discipline a parent has a right to inflict without state interference and thereby improperly presumed that Father's act of discipline was abuse. Slip Op. at 9-12. The ICA's presumption prevented the court from meaningfully recognizing Father's constitutionally-protected fundamental liberty interest in disciplining his child.[3]

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[3] Limitations on a parent's right to discipline their children are subject to strict judicial scrutiny. *E.g. Troxel*, 530 U.S. at 65; *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005); *In re Parentage of C.A.M.A.*, 109 P.3d 405, 408 (Wash. 2005). The ICA, however,

## II. THE ICA GRAVELY ERRED BY DISREGARDING FATHER'S "RESIDUAL PARENTAL RIGHT" TO DISCIPLINE

The ICA concluded that Father did not have a right to discipline Amber and that the family court did not abuse its discretion in issuing the TRO. Slip Op. at 8-15, 29-32. The ICA erred in failing to take judicial notice of custody case documents which would have established that Father maintained a right to discipline his daughter.[4] In addition to ignoring Father's constitutionally-protected fundamental liberty interest to discipline, the ICA's decision was contrary to well-established authority recognizing a non-custodial parent's "residual parental right" to discipline.

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applied the "rational basis" standard. Slip. Op. at 12-13. This was grave error because the fact that the constitutional right to care and control of one's child may be limited does not take the right out of the purview of a fundamental liberty interest or mean that a lesser standard than strict scrutiny applies. *See McCullough v. Godwin*, 214 S.W.3d 793, 807 (Tex. App.—Tyler 2007, no pet.) ("While not absolute, a parent's rights to care, custody, and management of his child are constitutional in nature and considered a precious fundamental liberty interest" (citing *Santosky*, 455 U.S. at 753-59)).

[4] Although the ICA recognized that Father requested judicial notice of the custody case, the court declined to take such notice because Father "has not supplied the relevant records." Slip Op. at 29, n.20. Father requested judicial notice. *See* Open. Br. at pp. 3 (request for judicial notice), 5-8, 18, 22 (citation to custody case record); Reply Br. at p. 1-2, 3 (reiteration of judicial notice and attachment of custody case documents as appendix), 5-6 (citation to custody case record). In fact, Father attached the custody case documents as appendices to his reply brief. Reply Br. 1-3, Appendices 5-6, 8-16. By disregarding Father's repeated requests for judicial notice in his briefing – even if not made with the formalities of an experienced appellate attorney – the ICA contravened this Court's long standing "policy of affording litigants the opportunity to have their cases heard on the merits, where possible[.]" *Hous. Fin. and Dev. Corp. v. Ferguson*, 91 Haw. 81, 85-86, 979 P.2d 1107, 1111-112 (1999) (internal citation and quotation marks omitted). Had the ICA taken judicial notice of the custody case documents, it would have been apparent that Father retained the "residual parental right" of discipline.

In an abundance of caution, Father has filed, concurrently with this writ, a Motion for Judicial Notice or in the alternative Motion to Supplement the Record on Appeal. For the Court's convenience, the motion is also attached to this writ as App. 5. As evinced by Exhibits "A" and "B" to the Motion for Judicial Notice, although Mother was given sole legal custody of the couples' children, nothing in the family court's August 27, 2003 Order abrogates Father's statutory "residual parental rights" protected by HRS § 571-2 (2006) because the August 27, 2003 Order did not modify the visitation schedule established by the Court under its prior September 20, 1999 Stipulated Order for Post-Decree Relief. Specifically, Exhibit "A" states: "The current visitation schedule shall be followed."

In *State v. Stocker*, 90 Haw. 85, 976 P.2d 399 (1999), this Court concluded that a non-custodial parent retains the right to discipline even if he or she does not have "legal" custody:

> The issue is whether a non-custodial parent, acting within his court-prescribed unsupervised visitation time, retains as a 'residual parental right,' within the meaning of HRS § 571-2, the authority to discipline a child with respect to that child's conduct during the visitation period. We hold that he must.

*Id.* at 94, 976 P.2d at 408.[5] This Court noted, "the non-custodial parent *must* retain the authority to care for [the] child's safety and well-being during the period of visitation."[6] *Id.* "A contrary holding would lead to the absurdity that a non-custodial parent, alone with his child during an authorized visitation period, would be powerless to employ the use of force were reasonably necessary to 'promote' the child's 'welfare.'" *Id.*[7] Here, it is not disputed that Father is a non-custodial parent, and his actions took place during his authorized visitation period. App. 5 (Exhibits "A" & "B").

In concluding that Father's "use of force was not reasonably related to safeguarding or promoting Minor's welfare" (Slip Op. at 14, n.6, 15), the ICA perpetuated the Family Court's erroneous assumption that Father did not have the right to discipline Amber over "moral" issues, when it is plain that he did. *See Stocker*, 90 Haw. at 94, 976 P.2d at 408; App. 5. Moreover, the ICA's decision similarly perpetuated the Family Court's internally conflicting and erroneous assumption that Father's actions were improper because the act occurred "late during a school night," as if that were germane.[8] Slip Op. at 15, n.9. The child custody orders in this case did not

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[5] HRS § 571-2 (2006), in pertinent part, defines "residual parental rights" as "those rights . . . remaining with the parents after the transfer of legal custody . . . including, but not limited to, the right to reasonable visitation, [and] consent to adoption or marriage[.]"

[6] *Accord Ascuitto v. Farricielli*, 711 A.2d 708, 714 (Conn. 1998); *Taylor v. Taylor*, 508 A.2d 964, 967 n.4 (Md. 1986); *Stevens v. Scott*, 706 S.W.2d 278, 279 (Mo. Ct. App. 1986); *Coleman v. Coleman*, 278 S.E.2d 114, 114 (Ga. Ct. App. 1981).

[7] App. 5 (Exhibits "A" & "B"); Tr. 10/5/2005, p. 10.

[8] There is sufficient factual support in the record to support the propriety of Father's act of disciplining Amber as part of his right to the "care and control" of her upbringing "by imposing reasonable physical discipline to prevent and punish the child's misconduct." *See State v. Thompson*, No. 04CA30, 2006 WL 307715, *4 (Ohio Ct. App. Feb. 10, 2006) (*citing Santosky v. Kramer*, 455 U.S. 745 (1982)); Tr. 10/5/2005, pp. 13-18, 23-24 (Amber's testimony), 35-42

place a time-of-day limitation on Father's "residual parental right" to discipline Amber. *See* App. 5. Reading any such limitation into the orders, or the relevant statutory authority, would lead to the absurd result of placing an arbitrary limit on an otherwise statutorily and constitutionally protected right based on the hour at which the discipline occurred; for example, a parent's fundamental liberty interest would be protected before 11:00 p.m. but not after. The error in the ICA's reasoning is that HRS Chapter 586 must be read to embrace a parent's fundamental liberty interest in discipline ***and*** a parent's statutory "residual parental right" to discipline. Any other interpretation would render HRS Chapter 586 unconstitutional.

The ICA's errors perpetuated continuing collateral consequences. In its prior decision in this case, this Court adopted the collateral consequences exception to the mootness doctrine. *Hamilton I*, 119 Haw. at 10, 193 P.3d at 848. Just as collateral consequences affect whether or not an appeal from a TRO is moot, the same issues apply generally to the impact of a TRO on an individual against whom the TRO is issued. According to this Court:

> the TRO issued by the family court was based upon its express ruling that Father did physically harm, injure or assault Minor. Such ruling **implies that Father is a child abuser** and is, therefore, 'potentially dangerous, thereby **undermining his reputation and standing in the community**.' Additionally . . . the TRO, once issued, became part of the **public record**. As such, there is a reasonably possibility that 'potential employers and landlords might be reluctant to employ or rent to Father once they learn of his status as a child abuser.' . . . Thus, the issuance of the TRO could also adversely affect Father's 'personal and professional life, employability, associations with neighbors, and choice of housing.'

*Id.* at 11, 193 P.3d at 849 (quoting *State v. Bani*, 97 Haw. 285, 294-96, 36 P.3d 1255, 1264-66 (2001) (brackets and some internal citations and quotation marks omitted) (emphasis added).[9]

As this Court noted in *Hamilton I*, "the importance of reputational damage" has been previously recognized outside the context of a mootness analysis. *Hamilton I*, 119 Haw. at 10 n.12, 193 P.3d at 848 n.12. For example, in *Gonsalves v. Nissan Motor Corp.*, 100 Haw. 149, 171, 58 P.3d 1196, 1218 (2002), this Court recognized that because a key element of a defamation claim is publication to a third party, "[t]he interest which is here protected is that of

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(Father's testimony).

[9] *Accord Wilder v. Perna*, 883 N.E.2d 1095, 1099 (Ohio Ct. App. 2007).

reputation[.]" Here, too, because the TRO issued against Father remains a matter of public record, collateral consequences of the abuse finding continue because of the ICA's erroneous decision in this case. *See, e.g., Putman v. Kennedy*, 900 A.2d 1256, 1263 (Conn. 2006) (explaining that collateral consequences continue to have a prejudicial effect even after the expiration of the domestic violence restraining order); *Wilder v. Perna*, 883 N.E.2d 1095, 1099 (Ohio Ct. App. 2007) (same).

Additionally, during the pendency of the TRO, Father's former wife was given sole legal and physical custody of Amber (and the couple's other then-minor daughter) – custody which Father was unable to modify because of the effect of the TRO. App. 5. As a direct result, Father was likewise unable to modify the court ordered child support – support which he continues to pay to this day (because both his daughters are still enrolled in college). App. 5 (Exhibit "A" ordering child support to "continue uninterrupted if each said child continues her education post high school on a full-time basis at an accredited college or university . . . until each said child's graduation or attainment of the age of 23 years[.]"). The impact of the collateral consequences which naturally spring from the issuance of a TRO underscores the importance that HRS Chapter 586 be read to protect a parent's constitutional and statutory rights to discipline one's child.

## CONCLUSION

In order to properly protect a parent's constitutional right to discipline a child, including the use of corporal punishment, the Family Court's decision whether to issue a protective order under HRS § 586-5.5 (2006) (or, as here, extend the effective time period of a TRO), must be based upon a discernible standard that differentiates between discipline and abuse. The Family Court must also recognize that a non-custodial parent has a "residual parental right" to discipline a child during unsupervised visitation.

In the absence of such standards, parents will not understand how to conform their behavior so that they do not run the risk that actions which they believed to be discipline will later be determined to warrant a TRO. Because the ICA applied no such standards, it gravely erred when it affirmed the Family Court's judgment.

Pursuant to HRAP 40.1 and HRS § 602-5 (Supp. 2010), Father respectfully requests this Court issue a writ of certiorari to review the ICA's grave error and vacate the ICA's June 30, 2011 opinion and September 21, 2011 judgment on appeal. Father further requests this Court vacate and dismiss the Family Court's findings of fact, conclusions of law, and TRO.

DATED: Honolulu, Hawai`i, October 14, 2011.

Respectfully submitted,

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