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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF LISA T.,

Respondent,

-against-

KING E.T.,

(Papers Sealed)

No. 129

Appellant.

20 Eagle Street
Albany, New York
November 16, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 129, the Matter of
3 Lisa T. v. King E.T.

4 MR. HERZFELD: May it please the court, Richard
5 Herzfeld for Appellant King T. I'd like to reserve two
6 minutes, if I may, for rebuttal.

7 CHIEF JUDGE DIFIORE: Of course, sir.

8 MR. HERZFELD: I'd like to focus on the second
9 point in our brief, whether or not the Family Court has
10 jurisdiction to issue an order of protection rather than -
11 - -

12 CHIEF JUDGE DIFIORE: Must the named party in an
13 order of protection have to be found to have committed a
14 family offense?

15 MR. HERZFELD: Absolutely, Your Honor. And - - -
16 and that's why - - -

17 JUDGE STEIN: Where does it say that?

18 CHIEF JUDGE DIFIORE: And was he - - - what is
19 the authority for that?

20 MR. HERZFELD: What is the authority for
21 requiring - - -

22 CHIEF JUDGE DIFIORE: Um-hmm.

23 MR. HERZFELD: - - - the party - - - it's
24 statutory. It - - - it's 812, I believe, says that for the
25 Family Court to have jurisdiction over a family offense



1 proceeding there has to be, A, a family offense, and, B, a
2 requisite relationship between the parties.

3 CHIEF JUDGE DIFIORE: And what was the family
4 offense that Mr. E.T. was found to have committed?

5 MR. HERZFELD: He wasn't found to have - - - to
6 have committed a family offense. It was alleged - - -

7 JUDGE GARCIA: I don't understand that
8 jurisdictional argument. It - - - the way I read 812,
9 correct me, it's jurisdiction to have the case in the
10 court, so there's an allegation of a family offense. They
11 get jurisdiction. They issue a temporary order or
12 protection. Isn't that confusing two things? I mean has
13 anyone read the statute to say that before other than the
14 dissent in this case?

15 MR. HERZFELD: I think courts have frequently
16 read the article to require a family offense before they
17 can issue an order of protection. Those - - -

18 JUDGE STEIN: Well, not before they can issue a
19 temporary order of protection.

20 MR. HERZFELD: I believe it's before they can
21 issue any order - - - the temporary order of protection is
22 - - - is not subject to appeal or at least not - - -

23 JUDGE STEIN: Well, but that - - - so does that
24 mean that when a - - - when a petitioner comes in, files a
25 family offense petition, alleges the proper jurisdictional



1 predicates, and says - - - and gets an ex parte order,
2 which it happens all the time, the court issues the order,
3 that order is of absolutely no effect because the court had
4 no jurisdiction to issue it?

5 MR. HERZFELD: Oh, no. I'm - - - I'm sorry.
6 Either I'm misunderstanding you or you're misunderstanding
7 me. There's no question that the court has authority to
8 issue a temporary order of protection - - -

9 JUDGE STEIN: Okay. So then what - - -

10 MR. HERZFELD: - - - if the petition is facially
11 sufficient.

12 JUDGE STEIN: Okay. So then that happens. And
13 as has happened here the respondent violates that order of
14 protection, okay.

15 MR. HERZFELD: The temporary order of protection,
16 yes.

17 JUDGE STEIN: The temporary order of protection,
18 exactly. And then - - - and isn't - - - doesn't 846 and
19 846(a) say that you can file a violation petition of such a
20 temporary order of protection?

21 MR. HERZFELD: Absolutely.

22 JUDGE STEIN: Okay. So then - - - and it also
23 addresses what happens if you're found to have violated
24 that temporary order of protection.

25 MR. HERZFELD: It does, indeed.



1 JUDGE STEIN: And one of the things it allows the
2 court to do is to enter a permanent order of - - - or
3 another order - - - a new order of protection, correct?

4 MR. HERZFELD: That's what the statute says, yes.

5 JUDGE STEIN: Okay. And Section 847 actually
6 distinguishes between violations that constitute a family
7 offense and violations that don't.

8 MR. HERZFELD: Yes.

9 JUDGE STEIN: Okay. So what does that all mean
10 if what you're saying is correct?

11 MR. HERZFELD: Well, it means several things.
12 First of all, I think you have to - - - well, you start
13 with the fact that the Family Court obviously is a court of
14 limited jurisdiction. So where is its jurisdiction to
15 issue orders of protection? That jurisdiction is found in
16 812 and in 832.

17 JUDGE STEIN: How about Family Court Act Section
18 115 which sets forth the jurisdiction of the Family Court?

19 MR. HERZFELD: That as well.

20 JUDGE STEIN: It includes all the various
21 provisions and also says, "Such other jurisdiction as is
22 set forth in this act." Why doesn't 846 and 846(a) provide
23 that jurisdiction?

24 MR. HERZFELD: Because what you're looking at is
25 issuing an order of protection for facts which don't



1 constitute a family offense. And I don't believe 846(a)
2 provides for that.

3 JUDGE WILSON: So what do you - - - what do you
4 think then is the - - - are the range of remedies, if any,
5 for the violation of the temporary order here?

6 MR. HERZFELD: Well, there are - - - there are a
7 variety of other remedies that are listed. First of all,
8 if the violation is, in fact, a family offense, then you
9 can issue an order of protection.

10 JUDGE WILSON: And here it wasn't?

11 MR. HERZFELD: Right. But there are other
12 remedies, as Justice Gesmer noted. You can find them in
13 contempt if - - - if the proof is beyond a reasonable
14 doubt. You can order attorneys' fees. There are a variety
15 of things that you can do. But where - - - if you look at
16 846(a) - - -

17 JUDGE STEIN: So you could find them in contempt.
18 Could you incarcerate them?

19 MR. HERZFELD: Yeah. If the proof is beyond a
20 reasonable doubt that there was - - -

21 JUDGE STEIN: If there's a family - - -

22 MR. HERZFELD: Yeah.

23 JUDGE STEIN: If it's a family - - -

24 MR. HERZFELD: Yeah.

25 JUDGE STEIN: And it - - - and it says that - - -



1 MR. HERZFELD: Yeah.

2 JUDGE STEIN: - - - in the statute?

3 MR. HERZFELD: Yes, it does. I believe so.

4 JUDGE STEIN: In - - - in 846(a)?

5 MR. HERZFELD: I believe so, yes.

6 JUDGE STEIN: It - - - it distinguishes between
7 when - - - when there's a family - - - an underlying - - -
8 a family offense underlying the violation.

9 MR. HERZFELD: No, it - - - it - - -

10 JUDGE STEIN: Okay. Well, that's what I - - -

11 MR. HERZFELD: Okay. I'm sorry.

12 JUDGE STEIN: - - - because that's what we're
13 talking about here.

14 MR. HERZFELD: Yeah. Right.

15 JUDGE STEIN: So - - -

16 MR. HERZFELD: But what it says if you find a
17 violation of the order - - - temporary order of protection
18 you can issue a quote/unquote "new order of protection."
19 And the way I would argue that should be read is that first
20 you have to have that order of protection, not a temporary
21 order of protection where there's no opportunity to appear,
22 to refute and where in this case it lasted two-and-a-half
23 years, but an actual finding that there should be an order
24 of protection.

25 CHIEF JUDGE DIFIORE: What was the conduct that -



1 - - what was the conduct that your client was found to have
2 committed? What was the gravamen of that finding? Was it
3 a injury to an individual party? Was it an - was it an
4 injury to the court violating the court's order? What was
5 the conduct?

6 MR. HERZFELD: I mean I - - - I suppose it's a
7 combination of the two. It was an email that didn't fall
8 within the parameters of the permitted - - -

9 CHIEF JUDGE DIFIORE: But wasn't the - - -

10 MR. HERZFELD: - - - emails.

11 CHIEF JUDGE DIFIORE: Was that email the sub - -
12 - the subject of the family offense petition that was
13 ultimately dismissed?

14 MR. HERZFELD: No, there were - - - there were a
15 variety of emails. There were emails that were the subject
16 of the family offense petition that the court rejected as a
17 family offense. And then - - - then there were emails that
18 was - - - were alleged to have violated the temporary order
19 of protection which the court agreed violated it but still
20 didn't rise to a family offense.

21 CHIEF JUDGE DIFIORE: So what was the - - - what
22 was the conduct that that court found that your client had
23 committed in order for the court to put the order of
24 protection in place?

25 MR. HERZFELD: Two emails I believe that did not



1 relate directly to visitation and therefore were prohibited
2 by the temporary order of protection.

3 CHIEF JUDGE DIFIORE: Okay. Then I misunderstood
4 your argument because I thought your argument was that the
5 conduct that your client committed violating the temporary
6 order of protection was an act against the authority of the
7 court.

8 MR. HERZFELD: Well, it was in that the email
9 violated the - - - the permitted email - - - it was beyond
10 the scope of the permitted emails, so it did violate the
11 authority of the court.

12 JUDGE WILSON: And did not support - - - would
13 not support or did not support a finding of a family
14 offense.

15 MR. HERZFELD: That's correct. There - - -
16 there's absolutely no possibility that what was found to
17 have took place - - - take place would constitute a family
18 offense here.

19 CHIEF JUDGE DIFIORE: So what was the appropriate
20 - - - what was the appropriate action for that - - - for
21 the judge to have taken?

22 MR. HERZFELD: Well, you know, this - - - this is
23 a case that - - - that sort of falls in a gray area. I'm
24 not sure what the appropriate action would be because - - -

25 CHIEF JUDGE DIFIORE: Should he have referred it



1 for a contempt - - -

2 MR. HERZFELD: Only - - - you know, as Judge
3 Gesmer pointed out, only on a finding beyond a reasonable
4 doubt which was not the finding here. So they - - - they
5 could not do that. I suppose there would be some form of
6 perhaps a civil contempt remedy that they - - - they could
7 exercise. There are attorneys' fees, sanctions but here -
8 - -

9 JUDGE FEINMAN: But isn't what the judge actually
10 did here a far less draconian remedy than all of these
11 alternative remedies?

12 MR. HERZFELD: I don't think it's less draconian
13 to have - - - after - after two-and-a-half years of a - - -
14 of a temporary order of protection for potentially a single
15 email to have - - - have a new order of protection put in
16 place?

17 JUDGE FEINMAN: <Indecipherable>

18 JUDGE RIVERA: Well, it's better than going to
19 jail.

20 MR. HERZFELD: It's less draconian than going to
21 jail. That - - - that's - - -

22 JUDGE RIVERA: And not - - - not overnight.

23 MR. HERZFELD: No.

24 JUDGE RIVERA: As I recall the dissent - - -

25 MR. HERZFELD: Yes.



1 JUDGE RIVERA: - - - had up to six months.

2 MR. HERZFELD: But - - - but I don't think that
3 was an option absent of a finding beyond a reasonable
4 doubt.

5 JUDGE STEIN: Would - - - would a criminal court
6 have had jurisdiction in - - - in your view to issue this
7 permanent order of protection if the violation had been
8 transferred to that - - -

9 MR. HERZFELD: No. Because there - - - there was
10 no family offense so - - -

11 JUDGE STEIN: Yeah, but - - - but a criminal
12 court doesn't need a family offense.

13 MR. HERZFELD: But they need a violation of
14 criminal law, and that's the family offense, the violation
15 of criminal law. And there was no violation of criminal
16 law here.

17 JUDGE RIVERA: So counsel, let's say we agreed
18 with you. How would that further the purposes of a Family
19 Court Act?

20 MR. HERZFELD: I don't know that it would further
21 the purposes but it wouldn't expand the purposes beyond
22 what the legislature granted. It wouldn't expose someone
23 for a single email to an order of protection where that I
24 don't believe is the intention of the statute. You're - -
25 - you're looking - - - under the Family Court Act, under



1 Article 8, you're looking for conduct that is a family
2 offense, and that's what you're trying to protect against.
3 You're trying to - - -

4 JUDGE RIVERA: But you're also looking, as is
5 true for any court, for individuals who appear before the
6 court and are subject to its orders to comply?

7 MR. HERZFELD: Absolutely. Absolutely, Judge.
8 But in this case, where you don't have a family offense, I
9 don't know that the order of protection is the remedy for
10 noncompliance with an order of the court. That's where you
11 have contempt sanctions. You - - - you don't have the - -
12 - I understand it's not as pleasant an alternative but - -
13 -

14 JUDGE STEIN: Well, yeah, and what does the
15 respondent do? Say, well, I don't think she's going to be
16 able to prove her case here so I can violate this - - -
17 this order indiscriminately? But, you know - - -

18 MR. HERZFELD: No, absolutely - - - I mean I - -
19 - I can't speak to - - - to what, you know, a potential
20 respondent would do, but you act at your own risk. And - -
21 - and the fact that - - - the fact that you don't think she
22 can prove her case doesn't negate the temporary order of
23 protection. It - - - it just within the possible
24 consequences is not a new order of protection unless what
25 you do constitutes a family offense.



1 CHIEF JUDGE DIFIORE: So does the fact that the
2 judge did not find the sending of that email to be a family
3 offense and then he puts in place an order of protection
4 directing Mr. E.T. not to speak to this woman, does that
5 concern you that that might be criminalizing his conduct,
6 his conversations?

7 MR. HERZFELD: Yeah, absolutely, Judge, because -
8 - -

9 CHIEF JUDGE DIFIORE: Does that have any First
10 Amendment implications?

11 MR. HERZFELD: No, I don't - - - you know,
12 frankly, I'd like it to, but I don't - - - I don't think it
13 does because you have an order that says you can't
14 communicate with the other party except under certain
15 circumstances, and when you do, I don't think there's any
16 First Amendment protection to that.

17 CHIEF JUDGE DIFIORE: Even though a family
18 offense had not been found?

19 MR. HERZFELD: No, because you've got the
20 temporary order of protection which until there's a
21 decision that it - - - it no longer applies still prohibits
22 him from doing what he did.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel.

25 MR. CARMEL: May it please the court, Randall



1 Carmel for Lisa T. My first time here in the Court of
2 Appeals. I appreciate - - -

3 CHIEF JUDGE DIFIORE: Welcome, sir.

4 MR. CARMEL: Thank you. I will take the lead
5 here and not argue point one, which I don't think is at
6 issue unless any of the bench has questions regarding - - -

7 JUDGE STEIN: I have one question. I'm sorry to
8 take away from your time on this, but in - - - just in
9 terms of notice, actual knowledge, that whole subject area,
10 some of the - - - the case law seems to refer to service or
11 knowledge. And - - - and I'm just wondering if you can
12 tell me that, you know, typically in Family Court is
13 service required to be personal - - - actual personal
14 delivery or is service sometimes by mail or other means?

15 MR. CARMEL: First of all, personal service is
16 preferred but there are substituted service provisions that
17 are allowed once there is a certain showing that efforts
18 have been made and you're not able to personally serve.

19 JUDGE STEIN: Okay. Sort of like the CPLR?

20 MR. CARMEL: Right.

21 JUDGE STEIN: Okay.

22 MR. CARMEL: Similar.

23 JUDGE STEIN: Thank you.

24 MR. CARMEL: And in this case, he was actually
25 personally served with papers on October 3rd of 2013, and



1 then subsequently, he was sent notice. And these notices,
2 I'm sure the court knows, has bold letters, bold language
3 indicating the consequences of violations or not adhering
4 to the court's orders. So if there are any other questions
5 on point - - -

6 CHIEF JUDGE DIFIORE: No, you may proceed to the
7 second issue, sir.

8 MR. CARMEL: Okay. There's no language in
9 Article 8 of the Family Court Act that requires a family
10 offense finding to issue a final order of protection in a -
11 - - in response to a respondent violating an existing valid
12 order, whether it's temporary or final. I - - - I think
13 that's clear - - -

14 JUDGE FEINMAN: So I just - - - and this is a
15 really micro-technical - - -

16 MR. CARMEL: Okay.

17 JUDGE FEINMAN: - - - question which maybe you
18 can help me out not having sat in the Family Court, so the
19 decision of Judge Kelley that's dated May 27th has two
20 docket numbers on it, right, 032396-12 and then 032396-12-
21 15C. The actual order of protection that he then issues
22 pursuant to that decision just has one docket number, and
23 so if we're talking about jurisdiction, I'm trying to
24 understand did he issue that final order of protection on
25 the underlying petition that got dismissed or did he issue



1 it on the one that alleged the violation?

2 MR. CARMEL: It's my understanding, and I'd have
3 to do a little research here right now to go back because I
4 hadn't prepared for that specific question, but you can see
5 this 15C would be in a subsequent filing so I would think
6 that the - - - the docket number listed here is the docket
7 number that relates to the petition that was filed for the
8 violation.

9 JUDGE FEINMAN: The violation.

10 MR. CARMEL: And that's why I think he limited it
11 here rather than including the docket which he dismissed.

12 JUDGE FEINMAN: Correct. So if that is the case
13 then it's not that the court lost jurisdiction because the
14 underlying - - - you know, jurisdiction over him meaning
15 the father here, by having dismissed the underlying family
16 offense petition.

17 MR. CARMEL: I would agree with that.

18 JUDGE FEINMAN: Okay.

19 MR. CARMEL: And I would - - - I would just note
20 the court's attention, because it hasn't been mentioned
21 yet, there's Section 828 of the - - - of the Family Court
22 Act which is the - - - or, you know, the Orders of
23 Protection Act, which provides for temporary orders of
24 protection and procedures in which the court needs to
25 adhere in hearings for violations. And this court, Judge



1 Kelly was very aware of this, and he handled the violation
2 proceedings thoroughly. And so he followed the procedures
3 that are set forth in that article. And then he - - - once
4 he made a finding that there was this willful violation of
5 a temporary order, he then went to the statute which
6 allowed him - - - and I'll refer to Section 841, to allow
7 him to issue that one-year order of protection. And I
8 would submit that it was in furtherance of the purpose of
9 the Family Court Act for him to do - - - for him to do that
10 rather than to do one of the other enumerated dispositional
11 alternatives here. You know, we're - - - I think it's been
12 pointed out in my brief, but in - - - in the Appellate
13 Court's decision the - - - the other alternatives really
14 are not practical here. It - - - we don't want to send him
15 away, punish him into jail when he is visiting with his
16 son. I mean it's a problem that he can't communicate
17 better with - - - with the mother. But incarceration is
18 not going to really serve anybody's purpose and really the
19 child's - - - you know, wouldn't serve the child's best
20 interest. He's - - - he's got assigned counsel although he
21 doesn't have money. You know, so to put a - - - to put it
22 - - - put a contempt order and ask him to pay money, I - -
23 - that doesn't make sense either. To suspend judgment, you
24 know, that doesn't make sense. I mean the only thing
25 really here that makes sense was just to give a little more



1 assurance that the father act within bounds that are
2 appropriate in communicating with the mother, and I think
3 that's all that happens here.

4 JUDGE RIVERA: But isn't that assuming that he
5 had indeed committed an offense to begin with?

6 MR. CARMEL: No, I don't - - - I disagree with
7 you. I - - - I think that violation itself shows that he
8 can - - - that he had a problem confining himself.

9 JUDGE RIVERA: Well, a problem complying with the
10 court's orders, right?

11 MR. CARMEL: Well, the court - - -

12 JUDGE RIVERA: As opposed to whatever his
13 interactions are with her, with the ex-spouse.

14 MR. CARMEL: Well, I have to disagree because I
15 think that the order - - - the order of protection
16 specifically said limit your contact - - - communication
17 with the mother to emergency situations. Okay. So it was
18 about his communication. It wasn't - - - it - - - they're
19 not mutually exclusive. He did violate a court order, but
20 he also did violate communication.

21 JUDGE RIVERA: But is your position that the
22 order of protection here is a sanction for committing an
23 offense, a family offense, Family Court offense?

24 MR. CARMEL: No. I - - - my position here is
25 that the Family Court Act Article 8 provides for temporary



1 orders of protection, procedures are set out for violations
2 of those order of protections, and there's nothing in the
3 statute under Article 8 that would prohibit a court from
4 exercising the dispositional alternatives that are
5 available in an 842 once a violation petition has been
6 found by clear and convincing evidence.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 JUDGE WILSON: Sorry, just have one - - -

9 CHIEF JUDGE DIFIORE: Oh, yes, of course.

10 JUDGE WILSON: So if - - - if on day 364 he sends
11 another email like this the court can then, in your view,
12 issue another order of protection for a year as a sanction
13 for that violation, this can continue indefinitely?

14 MR. CARMEL: Theoretically, yes.

15 JUDGE WILSON: Okay.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 Counsel.

18 MR. HERZFELD: Unless there are any questions, I
19 have nothing further. Thank you.

20 CHIEF JUDGE DIFIORE: Thank you.

21 (Court is adjourned)

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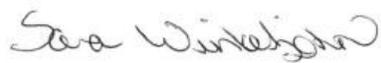
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Lisa T. v. King E.T., No. 129 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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