73129-7

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NO. 73129-7

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

vs.

CYNTHIA L. AIKEN

Respondent.

REPLY BRIEF OF APPELLANT

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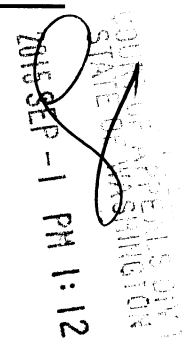

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A. ASSIGNMENTS OF ERROR

1. The issues related to entry of an ex parte order of protection (CP 325-328) without requiring notice to a Respondent should be addressed by the court as the issue presents a substantial and continuing interest for the public and the courts. Blackmon v. Blackmon, 155 Wash. App. 715 (2010, Div II). These types of ex parte orders are requested and entered everyday throughout the State of Washington. There is a need for direction to our lower courts that, absent clear and persuasive evidence of an immediate threat of harm, the court abuses its discretion if it dispenses with due process and the requirements of notice and an opportunity to be heard.

2. The court abused its discretion when it denied David Aiken's motion for a full testimonial hearing with cross-examination and entered an order denying the opportunity to depose or subpoena R.A. The Supreme Court has recognized that due process often requires the opportunity for live testimony and cross examination except in fact specific circumstances. Under the facts of this case, a testimonial hearing with the opportunity for cross-examination was necessary in order to fulfill the requirements of due process. *See* Gourley v. Gourley, 158

Wn.2d 460, 470-471 (2006)(noting that the need for cross examinations was obviated based upon respondent's own admissions).

3. The trial court's entry of the one-year domestic violence protection order on February 3, 2015 (CP 62-66) was an abuse of discretion under the facts of this case. When a parent child relationship is involved, the standard for issuing such a restraining order should require clear, cogent and convincing evidence.

4. The trial court abused its discretion in summarily entering a modified domestic violence protection order that substantially exceeded Petitioner's requested modifications in her motion.

B. REPLY TO RESPONDENT'S ARGUMENTS

1. The standard of review is abuse of discretion, however there are also constitutional questions of due process and the requirement of a full hearing as identified and addressed in Gourley v. Gourley. ***Id.*** Given the facts in this case, Mr. Aiken's specific requests, and the motions presented to the trial court in this matter, it was an abuse of discretion to prohibit Mr. Aiken from deposing R.A. and/or subpoenaing R.A. for the "full hearing" on the petition in this matter. (CP

140-141). In this matter, the court did not allow actual testimony at the full hearing. As Justice Sanders noted in dissent, "[a]lthough the right to confront one's accuser may not apply in some civil proceedings, *Chmela v. Dep't of Motor Vehicles*, 88 Wn.2d 385, 392 (1977), 'due process may guarantee the right to cross-examine witnesses even if the confrontation clause does not apply directly.' *In re Det. Of Brock*, 126 Wn. App. 957, 963 (2005)." Justice Sanders, Dissenting in Gourley v. Gourley, Id. at 480.

Respondent relies on Blackmon v. Blackmon suggesting that case supports the court's denial of Mr. Aiken's request for a full testimonial hearing. Curiously, in Blackmon the trial court actually allowed a full hearing with opening statements, direct and cross examination of the witnesses and the presentation of other evidence and included "a full day of testimony." Id. at 715-716. The only question actually addressed in Blackmon was whether a failure to grant the request for a jury trial was an abuse of discretion. Id. at 723-724. The Blackmon court held that a jury trial was not required under our constitution for civil domestic violence cases and that the remaining issues raised by Petitioner were moot. Id. There is dicta in Blackmon suggesting that the Gourley court held there is no right to subpoena or cross-examine witnesses under the domestic

violence protection act.[1] Such dictum is not controlling authority in the present case. Moreover, due process and a full hearing on the merits require the ability to subpoena and cross-examine witnesses. An order prohibiting such opportunities is an abuse of discretion.

2. Entry of an ex parte order without notice to the other side is an abuse of discretion when no emergency exists and no irreparable harm has been alleged or identified in the underlying petition. RCW 26.50.070(1) only permits this relief if there are allegations of irreparable injury that could result from domestic violence. In this case, Ms. Aiken checked a box titled "An emergency exists as described below" but failed to include any explanation of the emergency and failed to allege or assert any harm that would result if an order was not issued immediately without prior notice to the respondent. (See CP 249) This issue should be addressed given the questions of substantial and continuing interest. Blackmon v. Blackmon, 155 Wash. App. 715 (2010). These kinds of ex parte orders are requested and issued everyday

[1] I will leave it to this court to determine the import of the Gourley opinions submitted by the Justices of our Supreme Court. It may be of interest, however, that the author of Blackmon also authored a concurring opinion in Gourley asserting a similar position that is contained in dicta in the Blackmon opinion. (No other Justices joined in this concurring opinion.) The language in Blackmon is not controlling in the present case and is not supported by the holdings in Gourley and In re the Marriage of Rideout nor is it consistent with constitutional notions of due process.

in Washington. Accordingly, this court should make it clear that due process requires, at a minimum, the petitioning party clearly identify what irreparable injury s/he is asserting would result if an order was not granted on an ex parte basis.

In the present case, there was no reference to any attachments at CP 249 and the actual attachment to the petition primarily focused on allegations of R.A.'s stated reasons for self harm; no evidence as to the other two children was presented. A GAL and multiple counselors were actively involved in the parties' dissolution case at the time of the ex parte hearing, yet no notice was provided to anyone prior to entry of the temporary order. (CP 254) Moreover, even the attachment to the petition fails to specify any actual injury that would result. This is significant given Mr. Aiken had actually agreed through counsel and the GAL to forego his court ordered weekend visit with R.A. due to the recent incidents and before Ms, Aiken went to court to obtain the ex parte order in question. (CP 75; 213).

3. Due process requires the opportunity to subpoena and examine witnesses. In the present case Mr. Aiken specifically requested the court provide him a full testimonial hearing and to subpoena R.A. but the pro tem commissioner denied these requests. (CP 140-141). Mr. Aiken was

ultimately able to depose Ms. Aiken, but Ms. Aiken's answers prove she had little or no knowledge about the details of the allegations she asserted in her Petition. (CP 71-75; deposition excerpts of Ms. Aiken attached hereto as appendix). Accordingly, Ms. Aiken's deposition provided nothing in terms of addressing R.A.'s actual statements or in having an opportunity to cross-examine one's accuser. R.A.'s actions and statements made to other third parties were the primary matters at issue in this case. Mr. Aiken specifically denied ever engaging in any behavior alleged by Ms. Aiken and R.A. and was forced to simply guess at what kind of situation may have been the genesis of the allegation. In Gourley, the Respondent had admitted to conduct sufficient to support the allegations and the court held under those specific facts that refusal to allow cross-examination was not an abuse of discretion. *Id.* at 470. Here, failure to allow Mr. Aiken an opportunity to even question R.A. about her statements was an abuse of discretion.

Right to freedom of travel

Spence v. Kaminski, 103 Wash. App. 325, 336 (2000), cited by Ms. Aiken, involved the issuance of a permanent protection order restraining a respondent from "committing acts of domestic violence against [petitioner], from contacting her except when arranging visitation

for their child, and from entering her residence " Id. at 332. Under those facts, the court declined to find the protection order provisions unduly curtailed Mr. Kaminski's constitutional right to freedom of travel. Id. at 336.

Here, under the parties' court ordered parenting plan, Mr. Aiken continues to have regularly scheduled residential weekends, holidays and midweek visits with his two younger children (R.A.'s sisters). However, on his scheduled residential time, Ms. Aiken and R.A. have historically come to the children's sporting events and school activities. It is not mere speculation that, despite his regularly scheduled time with his younger children, Ms. Aiken and R.A. are authorized by the court's protection order to limit his ability to freely travel and to actively participate with his younger children's activities even during his court ordered residential time. This protection order impairs Mr. Aiken's freedom of movement as well as his constitutional, fundamental liberty interests to care for his children and to participate in in their lives.

Reputation and employment issues

Entry of these orders impact a person's reputation and employability. Mr. Aiken submits that this situation satisfies the stigma-plus test. As the information age continues to provide immediate access to large storages of information, these orders and their effects continue to crop up in the practice of law. Many employers will not hire a person who has a protection order issued against them. Rarely do employers or the general public investigate the nature of the order or the facts giving rise to these petitions. The court's order, alone, impacts whether a job is offered or even available. Often times a person cannot volunteer at their child's school with these sorts of orders in their background. These issues will only continue to present themselves more and more often.

Clear cogent and convincing evidence standard

Mr. Aiken is not seeking clear, cogent and convincing evidence as the standard in every restraining order action. However, when the action involves and impacts the relationship between a parent and child, it is of utmost importance that a proper standard of proof be established; one that satisfies constitutional considerations and provides due process. In our state, the nature of due process and the standards considered in these

hearings are controlled, in large part, by the venue in which a petitioner chooses to file the action. In some counties a full hearing with testimony and cross-examination is allowed. *See* Blackmon, 155 Wash. App. at 715-716. In Pierce County you can obtain temporary orders through a kiosk without even appearing in person for the hearing. *See* footnote 3 of opening brief. In Snohomish County the court simply reviewed written statements of the parties and denied the request for an opportunity question R.A..

Mr. Aiken submits that the standard for depriving a parent of the ability to see or parent a child must be greater than that of a small claims court matter in order to satisfy due process. The statutes and cases cited in the opening brief suggest that the state cannot enter orders limiting or prohibiting contact between a parent and child absent clear, cogent and convincing evidence. It is unconscionable that a parent's ability to maintain contact with a child may be considered on the same, or less, evidence than a relatively minor dispute between two neighbors. Such a standard does not satisfy due process. Moreover, protection order cases give the court the ability to substantially impair and sever a parent child relationship. The nature of the court's action in these circumstances should not be trivialized or over looked. A standard that may be supported

by mere allegations without cross-examination or an ability to actually confront one's accuser is unconstitutional. A standard not much greater than a coin toss when determining whether to restrain a parent from a child is unconstitutional and violates the standards of due process. The entry of a protection order substantially impacts a parent child relationship. As noted in the opening brief, if a request is made to reissue the order the statute shifts the burden to a respondent to prove domestic violence will not occur in the future. Ultimately, the framework of this process and its impacts to families cannot be ignored or overlooked. A clear, cogent and convincing standard should be required when a court enters a civil restraining order between a parent and a child.

4. A trial court abuses its discretion when, on a motion for reconsideration without a hearing on the merits, reviews a motion and new material and enters an order granting relief substantially the relief requested. The civil rules do anticipate a reconsideration motion will be considered without oral argument. Still, it strains credulity to suggest that it is appropriate to grant relief beyond that requested in the motion. Without being on notice of the relief being considered, a litigant has no ability or notice that he or she must also address the court on issues

outside of the pleading being considered. Given the only requests before the court were based upon new evidence of R.A.'s response to the court's earlier order, and only sought additional restraints as to R.A., the court's order granting additional restraints as to Ms. Aiken was an abuse of discretion; there was no new evidence presented as to Ms. Aiken nor was there any request for that relief in the motion before the court.

5. Ms. Aiken's request for attorney fees should be denied. Once the court issues a decision in this matter, any issues of attorney fees and costs for either party should be considered pursuant to RAP 14.1 through 14.6. Mr. Aiken objects to the cost bill submitted by Ms. Aiken. Ms. Aiken should not be awarded any fees or costs in this matter.

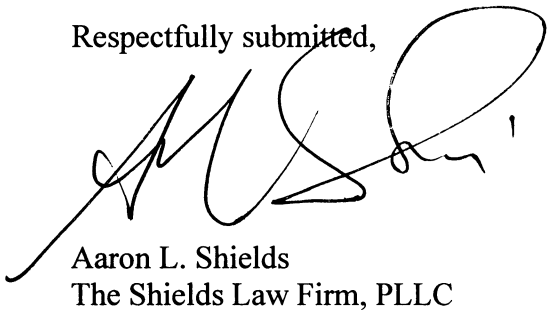
C. CONCLUSION

Based upon the records and files herein, Mr. Aiken requests this court dismiss the Petition for Order for Protection and remand the case to the lower court for entry of an order of dismissal. Alternatively, Mr. Aiken requests this court remand the case to the lower court for a full testimonial hearing with cross examination in order to allow him the opportunity to properly confront the witnesses and allegations against him.

Mr. Aiken further requests the court address the issues of 1. whether Protection Orders that restrain a parent from their child should be based upon a preponderance of the evidence standard or a clear, cogent, and convincing standard; 2. whether a court abuses its discretion when it enters an ex parte hearing without notice and opportunity to be heard unless an allegation of immediate harm is clearly raised and identified; and 3 whether it is an abuse of discretion to enter restraints beyond those requested in a reconsideration motion.

August 31ST, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 31st day of August 2015, I filed the foregoing document with the Court of Appeal as follows:

BY MAIL TO:

Richard D. Johnson
Court Administrator
The Court of Appeals of the State of Washington
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One Union Square
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Seattle, Washington 98101-4170

I also caused a true and correct copy of the foregoing document to be delivered to the following:

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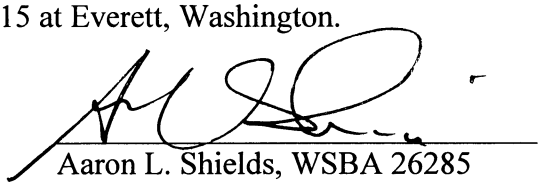
Dated this 31st day of August, 2015 at Everett, Washington.



Aaron L. Shields, WSBA 26285

APPENDIX

Excerpts from Deposition of Cynthia Aiken

SUPERIOR COURT WASHINGTON

COUNTY OF SNOHOMISH

In re:	)	
	)	
CYNTHIA AIKEN,	)	
	)	
Petitioner,	)	
	)	NO. 14-2-01504-0
vs.	)	
	)	
DAVID AIKEN,	)	
	)	
Respondent.	)	
	)	

DEPOSITION UPON ORAL EXAMINATION
OF
CYNTHIA AIKEN

2:16 p.m.
January 9, 2015
3206 Wetmore Avenue, Suite 12
Everett, Washington

Reported by Julie A. Espinoza
Certified Court Reporter
WA CCR #3094

A P P E A R A N C E S

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I N D E X

Whereupon,

CYNTHIA AIKEN

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHIELDS:

Q Cindy -- do you mind if I call you Cindy? I can call you Ms. Aiken. I'll call you whatever you're most comfortable --

A Cindy is fine.

Q On October 31st, we met and entered into a CR2A Agreement. Do you remember that?

A Yes.

(Exhibit No. 1 marked.)

Q (By Mr. Shields) And I've handed you what's been marked as Exhibit 1. Do you see that?

A Mm-hm.

Q Have you reviewed that since October 31st?

A Perhaps. I don't remember if I have or haven't.

Q Well, I guess I'm not asking if you've reviewed every individual page since October 31st. Have you reviewed what's in the agreement since October 31st? Any of it?

A I don't know if I've actually like sat there and read it. I remember what I agreed to.

Q As we sit here today, is there any part of the CR2A Agreement

that you don't agree to?
A That -- as of now, yes.
Q Can you identify for me everything that you believe you no longer agree to in that CR2A Agreement?
A Because of the recent new findings --
Q I'm not asking why. I'm only asking which -- specifically what it is that you no longer agree to?
A The parenting plan.
Q Everything other than the parenting plan, you agree to?
A Yeah.
Q So then let's talk about the parenting plan. What are you now going to be asking the Court for a parenting plan?
A Now because of the new findings, I feel that the girls -- we all need to have some form of protection and the visits should be supervised. Dave should have to undergo his ordered treatment --
Q I'll let you get to that. You're going to have plenty of opportunity to tell me those sorts of things or Gail can ask you about those. What I need to know today is, if we go to trial or when we go to trial, what is it you're going to ask the Court for as far as a schedule? And what I'm hearing is that all three girls need protection; is that correct?
A Yes.
Q And I'm hearing that any visitation in your mind needs to be supervised?

A Currently, yes.
Q So what are you proposing in terms of time?
A I haven't actually sat down and written out, this is exactly what I want, so I'm not sure if I can give you that answer.
Q Well, you want a protection order that prohibits him from having any time, isn't that true?
A I would like a protection order that allows them supervised visits.
Q Is that what you asked for in your protection order? Did you ask for supervised visits?
A I suggested it. I suggested it to the judge.

(Exhibit No. 2 marked.)

Q (By Mr. Shields) I'm going to hand you this Exhibit. It's marked as Exhibit 2. It's my understanding that you prepared this petition?
A Yes.
Q So if you can take a look at it and confirm that's the petition that you've filed?
A Yes.
Q Now, do you remember what led up to you filing that petition?
A Why did I file this petition? -- because --
Q Well, you can answer that way.
A Because of the new findings from Riley.
Q The new findings from Riley --
A From Riley. November 19th being one of them.

Q Now, you're using the term "findings." Does that mean something to you?
A My daughter tried to overdose because of stating she did not want to see her dad. She also went to her school counselor. The school counselor called me and told me that she's calling CPS because of what Riley has told her of recent abuse. So, yes, that is why I filed the protection order.
Q What is the recent abuse? I need to know. We're talking about after October 31st, correct?
A What the counselor told me -- the school counselor told me is that Riley told her that there has been times when her dad holds her down and pretends to suffocate her until she feels very uncomfortable and almost starts to cry.
Q And when did these times happen?
A I don't know exactly.
Q Has the counselor gleaned that information --
A Has not told me -- those were the words that were told to me.
Q Has Riley told you?
A Has Riley told me? -- she said: Yeah, it happens all of the time, Mom.
Q And so she says -- I mean, I'm trying to quantify --
A I don't know how many times. I don't know that information.
Q Do you know dates?
A No.
Q But she told you that too?

A Who told me what?
Q Riley told you that he does this all of the time?
A After the counselor called me, yes, Riley told me about it. Before that, I did not know.
Q When you say Riley told you about it, how did that come about? How did that conversation -- how did you have that conversation with Riley?
A Riley -- the counselor called me.
Q The school counselor?
A The school counselor called me and told me about it. She said Riley is very, very upset; you know, you need to talk to her. And so when she came home, she told me about it. She just flat out said, This is what happened, Mom. And that was it.
Q And what day was that?
A What day did that happen?
Q Yeah.
A It was like the -- I don't know the exact day. It was a Friday.
Q Was it before you had obtained the protection order that she talked to you about this?
A Yes.
Q So does it -- I mean, that sounds like it was November 21st that Riley had this conversation with you?
A Yeah. It was a Friday. She told me about this. And with the overdose attempt on Wednesday and the claim from Riley that

this is continuing to happen by her dad, I went as soon as the Court was available to me, which is Monday, and filed for a protection order.

Q On Friday, you were aware that the guardian ad litem had been urging you not to withhold the other two children from Dave for his weekend visit, weren't you? You were aware that that --

A I was aware. And I was adamant about not sending the other girls either. I don't know -- with the new findings, no -- no determination of what really went on had been found. So with me not knowing what's really happening and me being very concerned about the welfare of my children, of course. They should all be protected.

Q Well, so I assume you've had a chance to talk to McKenzie and Quinn since November 21st, right?

A Talked to McKenzie and Quinn?

Q Yeah.

A I talk to them every day.

Q Did they tell you that he tries to suffocate them?

A Did -- McKenzie told me that, yes.

Q When did that happen? When was that conversation had?

A Probably that night. Friday night. I don't know the exact day. I'm sorry.

Q Well, it's important.

A I don't know.

Q Well --