

No. 73207-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE PARENTAGE OF T.W.J & I.B.J,

ANDREA ANTHONY, Respondent

v.

AWAN JOHNSON, Appellant

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

TABLE OF CONTENTS

I. Statement of the Case.....4

II. Argument.....4

III. Conclusion.....7

TABLE OF AUTHORITIES

Table of Cases

Freeman v. Freeman,
169 Wa 2d 664 at 672, 239 P.3d 557 (2010).....6

Xieng v. Peoples Nat'l Bank,
120 Wash.2d 512, 526, 844 P.2d 389 (1993).....6

Statutes

RCW 26.09.191.....4

RCW 26.26.....7

RCW 26.26.130(9).....7

RCW 26.50.....7

Regulations and Rules

RPC 1.6.....5

I. Statement of the Case

The trial court did not find a history of acts of domestic violence. The trial court found that Mr. Johnson committed an act of domestic violence. That act was the threat to kill her, made to his attorney if he “got screwed in court”. (CP 199, 650, and RP 41).

II. Argument

Whether or not there was evidence of domestic violence in the past, prior to entry of the final parenting plan order in October 2014, did not factor in to the court’s decision as to whether the statement to the attorney, without more, justified Ms. Anthony’s fear of imminent bodily harm. While the prior acts involved some physical contact there was no evidence that they were of such a nature as to hurt or harm her. (CP 740). Nor were they relied upon by the trial court in rendering its determination. (RP 41).

The implication of the argument in the response brief filed on behalf of Ms. Anthony is that the prior acts rendered Ms. Anthony’s fear of imminent bodily harm reasonable. The prior acts predated entry of the final order that contained no findings of domestic violence and no RCW 26.09.191 restrictions. (CP 502).

Nor was the threat made in circumstances that were themselves threatening since the statement, if made at all, was not made to or in the presence of Ms. Anthony. It was reported in an email by his attorney to her attorney.

The response brief references RPC 1.6. RPC 1.6 only allows an attorney to violate the duty to preserve confidentiality, "...to the extent the lawyer reasonably believes necessary (1) ...to prevent **reasonably certain** (emphasis supplied) death or substantial bodily harm." In the explanatory note, the comment states: "Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." (pages 90-91). Thus the lawyer needs more than a threat made in anger to breach the duty of confidentiality. The lawyer appears to need clear and convincing evidence to conclude acting upon the threat will occur.

Our Supreme Court has also imposed a standard of "reasonableness" of the fear of such harm in the totality of the circumstances in which the statement occurs, whether one seeks extension of a permanent domestic violence order of protection or the renewal of a temporary one. "The facts supporting a protection order must reasonably

relate to ...the fear of imminent harm;...” *Freeman v. Freeman*, 169 Wa 2d 664 at 672, 239 P.3d 557 (2010). There the Supreme Court upheld the reversal by the court of appeals of an order that extended a protection order because “...the facts do not suggest Robin’s fear of Rob is based on a reasonable threat of imminent harm.” *Freeman, supra* at 676 (2010).

It is the petitioner who has the burden of proof based upon a preponderance of the evidence. It was her burden to prove that her fear that he would try to kill her if she screwed him in court was reasonable. The absence of a finding as to an element that is her burden justifies the conclusion that she failed to meet her burden. *Xieng v. Peoples Nat'l Bank*, 120 Wash.2d 512, 526, 844 P.2d 389 (1993).

The brief argues that the fact that a similar threat was made in years past by the mother, Ayanna Rosenberg, of his older daughter, in a custody dispute, is evidence that justifies Ms. Anthony’s fear.

Actually that is evidence that her fear was unjustified. He did nothing to carry out the threat. That fact supports the notion that that he merely blows off steam when angry and nothing more, and that Ms. Anthony had every reason to believe nothing would come of it.

Additional evidence that he would do nothing if he got screwed in court is that he got screwed in court before the hearing and he did nothing

and threatened nothing after that the ex parte order was before the hearing as to whether it would be extended.

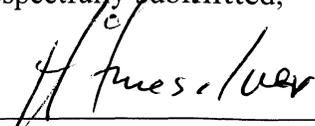
III. Conclusion

Domestic violence protection orders create special consequences not incident to other restraints. They include the obligation to not possess firearms; problems in taking a child for travel outside the continental United States. They prevent even certain types of employment opportunities. Had this proceeding been brought under RCW 26.50 obtaining an order to protect Ms. Anthony from threats would have been a zero sum game; an all or none proposition determined by whether an act of domestic violence occurred. No domestic violence, no order. But it was not. This proceeding was brought under RCW 26.26.

If the court concluded that no contact between the parties was warranted it could enter such an order under the authority of RCW 26.26.130(9) without having to find that any acts of domestic violence. Thus the protections afforded Ms. Anthony through a domestic violence protection order were available under RCW 26.26 without going to the draconian extent of an order that would brand Mr. Johnson as a violent and dangerous man.

DATED this 22 day of September, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Michael Finesilver". The signature is written in a cursive style with a large initial "H" and a stylized "F".

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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Parentage of T.W.J & I.B.J,)	
)	
A WAN JOHNSON,)	
)	
Appellant,)	DECLARATION OF
)	SERVICE
v.)	
)	
ANDREA ANTHONY,)	
)	
Respondent,)	
_____)	

I, Lester Feistel, state and declare as follows:

I am a Paralegal in the Law Offices of Anderson, Fields, Dermody & Pressnall, Inc., P.S. On the 25th day of September, 2015, I emailed true and correct copies of the Reply Brief of Appellant to the Court of Appeals for delivery on September 25, 2015 to:

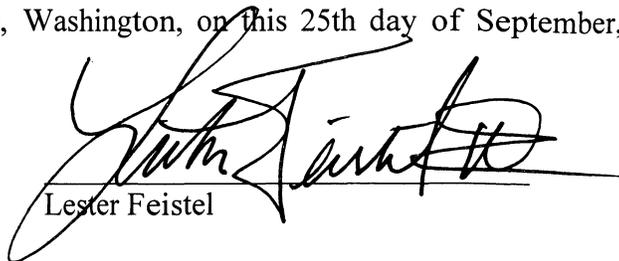
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I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

DATED at Seattle, Washington, on this 25th day of September,
2015.



Lester Feistel

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