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State of Washington
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No. 51247-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES A. L. FOWLER,

Appellant

v.

MARTA FOWLER,

Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant James "Jay" Fowler ("Jay") seeks removal of a protection order against him relating to his ex-wife, Marta Fowler ("Marta")¹ from whom he has been separated for 21 years. The protection order in question is an agreed-to order from 2003, which was to run until all their children were adults—which occurred 6 years ago.

II. ASSIGNMENTS OF ERROR

The trial court erred in denying termination under RCW 26.50.130 based upon facts that do not relate to whether Jay is likely to commit domestic violence, including (a) the court's view of the importance of Jay's reason for seeking termination, and (b) the court's finding of Marta's subjective fear.

¹ To avoid confusion, Marta Fowler will be identified by her first name. To be clear, Marta Fowler may elsewhere be identified in the record as Marta Tolman, her name from her second marriage. After divorce from her second husband, Marta changed her name back to Fowler.

III. STATEMENT OF THE CASE

A. Appellate Facts and Procedural History

1. 1996 Domestic Violence

Twenty-one years ago, in December 1996, Jay admits he committed domestic violence by yelling at his then-wife, Marta; grabbing and squeezing her arm; and frightening her. CP 72. Marta called the police and Jay was arrested. Jay and Marta had been married for 8 years. Their two children were then 6 and 3 years old.

A few days later, on December 30, 1996, Marta obtained a Temporary Order of Protection. *Fowler v. Fowler*, No. 96-2-04545-1, Dkt. No. 3 (Thurston Co. Sup. Ct. December 30, 1996). At the scheduled hearing on January 8, 1997, the parties presented an agreed one year Order of Protection which required Jay to participate in domestic violence treatment with Norm Nickle (with whom the parties were already counseling). See Attachment A.

(Transcript of 1/8/97 Trial Hrg)². Marta also filed for a legal separation. See *id.*, Dkt. No. 5.

Shortly after, Jay began medical treatment for his bi-polar disorder and entered into domestic violence treatment. CP 71-72. He timely completed his domestic violence treatment and remained in counseling for several years. CP 73-74. He continues in active medication treatment for his mental health disorder. CP 71, 77. Due to the passage of time and the death of a counselor he had seen, records from his domestic violence treatment are no longer available. CP 74. The 1997 Order of Protection expired without incident a year later, on January 8, 1998. The parties later agreed to mutual restraints in their final decree of dissolution.

2. 1999 Divorce and Jay's Remarriage

On May 14, 1999, Marta and Jay were divorced by

² Appellant seeks to supplement the record here. See RAP 9.6.

final order. *Fowler & Fowler*, No. 97-3-00037-9, Dkt. No. 155 (Thurston Co. Sup. Ct. May 14, 1999). Their Decree of Dissolution contained a provision that restrained both Marta and Jay from going to each other's homes or work place. See *id.* Despite their divorce being final, the parties continued to litigate various property and financial issues for several years. Between 2001 and 2006 the parties litigated parenting plan issues. A modified final parenting plan was entered on December 1, 2006. *Id.*, Dkt. No. 380. The dissolution action then came to an end when the child support issues were resolved by a revision order entered on October 13, 2009. See *id.*, Dkt. No. 489.

Jay began dating Sharesse, his current wife, in January 1998. CP 82. They have now been together for twenty years. There have been no domestic violence incidents between them. CP 83. In her declaration to the court, Sharesse described how Jay took complete responsibility for the 1996

incident with Marta then and now, CP 82-83; how Jay has used what he learned in counseling to work through any relationship issues with her, CP 82-84; and, how he remains compliant with his mental health medication treatment. CP 83.

3. 2002 Incident

On November 15, 2002, there was an incident at Jay's home in which Jay had become angry at their son, then age 12, for misbehaving during a friend's sleepover. CP 15-17. He spoke sternly to both his son and his son's friend about his disappointment in them bullying someone who, because of medical issues, could not defend himself. CP 16. He later took his son upstairs to speak with him privately. CP 16. The following day, Jay was impatient with the chaos in the room where the boys had built a "fort." CP 16. He required that the boys clean it up and helped in a way that he described as "not delicate with the pieces of the 'fort'." CP 16. He later admitted that he had been inappropriate, but

denied physical aggression at the boys, yelling, or throwing things. CP 16, 34. A declaration by the parent of one of the boys who was present supports Jay's account that he did not strike or physically assault anyone. CP 65-66.

Marta was not present but filed a domestic violence petition on both her and the children's behalf. CP 4-11. Her petition asked for restraints keeping Jay from coming within 500 feet of her and the children that would remain in place "permanently until the children are over 18." CP 5-6.

In her petition, Marta explained what she believed occurred, which contradicted the accounts of Jay and the parent of a boy who was present. CP 15-17, 65-66. The court did not hold a hearing or make any finding of child abuse or domestic violence. CP 19-21. Instead, the parties agreed to an informal order which focused on a short term visitation plan for the children, which they

entered ex-parte. Id.

4. 2003 Permanent Protection Order

In mid-2003, Jay purchased waterfront property in the same neighborhood where he and Marta had lived together, and where she and the children still lived. CP 55. Marta then filed for a formal protection order based upon the 2002 incident and claims that, before their divorce in 1999, Jay harassed her by walking onto her driveway instead of dropping things off at the end of it, and taking pictures of her from a boat. CP 21-26. Jay did not oppose Marta seeking an additional restraining order, as there was already a mutual restraining order between them in their dissolution decree. CP 34. The court did not hold a hearing. CP 36.

On August 20, 2003, the court entered a standard order for protection (drafted by Marta's attorney), that permanently restrained Jay from all contact with Marta and allowing only such contact with the children as permitted under the parenting plan. CP

37-41. The order prohibited Jay from being within 1,500 feet of Marta's residence, workplace, and/or school. CP 39.

5. 2006 and 2007 Modifications of Protection Order

Since the entry of the order, it has been modified several times. The first modification occurred in 2006, after Jay violated the provision that restrained him from going to their son's school and was arrested when Marta reported him. CP 42. Jay had picked up their ill son from school after receiving a call from his son and asking to be picked up because Marta was out of town. CP 47. Jay was quickly released from custody and the charges were dropped because it was understandable that he would respond to a request from his ill child when the mother was not available. See CP 58-60; *City of Olympia v. Fowler*, No. CR0200002 (Olympia Municipal Ct. February 2, 2006). The order was then modified to allow Jay to be at the school as appropriate. CP 42-43

In 2007, Jay was detained at the Canadian border while with the children. CP 47. The order was then modified again to remove all of the restraints related to the children since a modified unrestricted final parenting plan had been entered. CP 49-50.

6. 2008 to the Present

In October 2011, their youngest child turned 18. The children are now 24 and 27. In the past 14 years, Jay has not engaged in any threatening behavior towards Marta. The parties were able to successfully co-parent their children while living in close proximity. Marta moved freely about the neighborhood, including being in and about the home of Jay's next door neighbors. CP 84. Jay kept his distance, despite the burden of not being able to attend social functions with close friends and neighbors. CP 56, 70. And, although Marta has been in Jay's home at least once, he did not seek relief under the mutual restraints in the decree of

dissolution. CP 70. Marta also did not invoke the restraining order when their son graduated from college. CP 84.

In June, 2017, in an abundance of caution, Jay requested a court order allowing him to attend his daughter's graduation. The parties agreed to a stipulated order, which was entered, allowing him to attend. CP 51-53. At the same time Jay filed a motion to terminate the order in its entirety. CP 54-57.

Marta contested the motion, asserting she was still afraid of Jay. She also asserted Jay was likely responsible for a letter written by a neighbor asking that Jay be permitted to attend her husband's 60th birthday party. CP 67. That neighbor stated Jay did not request her to send the letter; she sent it on her own volition for the sake of her husband. CP 78-81. Neither the court commissioner nor the Superior Court found that to be a violation of the order. CP 134- 135; 177, para. 2.5. However,

the court commissioner denied Jay's motion to terminate the protection order.

Jay filed a motion to revise. At the revision hearing, Superior Court Judge Schaller refused to terminate the order but found a basis *sua sponte* for modifying it. CP 170-175.

Jay appeals that ruling here.

IV. STANDARD OF REVIEW

On appeal, this Court determines whether the trial court abused its discretion in denying termination of a 2003 protection order. A trial court abuses its discretion when that "discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *In re Marriage of Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010) (superseded in part by statute on other grounds) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A trial court's findings must be supported by "substantial evidence in the record"—that is, a

quantity of evidence sufficient to persuade a fair-minded, rational person of the finding's truth. See *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006); *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). Where a question of witness credibility or conflicting testimony arises, this Court defers to the trial court's determination. *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009).

V. ARGUMENT

RCW 26.50.130 (3)(c) sets forth specific factors for a court to determine whether it should terminate a protection order. See, Attachment B. These factors exist to answer the dispositive question: whether "there has been a substantial change in circumstances such that the respondent is not likely to resume acts of domestic violence against the petitioner or those persons protected by the protection order if the order is terminated." *Id.*

Here, those factors, taken together, warrant termination of the 14-year-old protection order. The trial court abused its discretion by considering its own factors that have no bearing on whether the respondent is likely to commit domestic violence against his ex-wife of over 18 years. See RCW 26.50.130 (3)(b) (where the legislature limits the trial court to "considering only factors" addressing the likelihood of domestic violence recidivism against the petitioner.) (Emphasis added.)

B. The statutorily-proscribed factors warrant termination of the protection order here.

Based **only** upon factors that address whether Jay is likely to be a present danger to Marta, there was no tenable reason to deny termination of the protection order. The trial judge's own factual findings, when limited to those relevant to the risk of recidivism against Marta, do not support continuing to restrict Jay's rights and liberties—

including restricting his ability to attend family and friend memorials and celebrations, and restricting his travel—under a protection order.

The statutory-proscribed factors are quoted as headings, below, then applied:

1. "(i) Whether the respondent has committed or threatened domestic violence, sexual assault, stalking, or other violent acts since the protection order was entered"

The trial court found Jay did not engage in any subsequent violent acts or threats. CP 156:16-20; 177, para. 2.5.

2. "(ii) Whether the respondent has violated the terms of the protection order, and the time that has passed since the entry of the order"

The trial court found Jay committed a technical violation of the protection order in 2006, when Marta was out of town, to assist their minor son, who was ill at the time. Because of the circumstances, the charge was dismissed and the order modified to allow the exact behavior he engaged in going forward. CP 42-43 (Modification

Order); 156:21-157:7; 177,para. 2.6.

3. "(iii) Whether the respondent has exhibited suicidal ideation or attempts since the protection order was entered"

The trial court found Jay did not exhibit suicidal ideations. CP 157:8-10; 177, para. 2.7.

4. "(iv) Whether the respondent has been convicted of criminal activity since the protection order was entered"

The trial court found Jay was not convicted of any criminal activity. CP 157:11-13; 177, para. 2.8.

5. "(v) Whether the respondent has either acknowledged responsibility for the acts of domestic violence that resulted in entry of the protection order or successfully completed domestic violence perpetrator treatment or counseling since the protection order was entered"

This requirement involves two findings: whether Jay acknowledged responsibility and whether he underwent domestic violence treatment.

First, the trial court noted, in his initial filing, Jay appeared he may be denying the

seriousness of past events by suggesting Marta no longer had a valid reason to refuse consent in removing the protection order. CP 160:8-17; 177, para. 2.10.

However, the court recognized that, in later filings, Jay genuinely took responsibility for his previous actions. CP 160:17-19; 177, para. 2.10.

Second, the trial court recognized there was insufficient evidence that Jay had undergone domestic violence treatment. Jay underwent treatment in the mid-to-late nineties from counselors who passed away, no longer are in practice, or no longer have such records. Although the records have not survived, the court found Jay underwent treatment, over the years, with four different skilled therapists and professionals. See CP 159:11-22:7; 177, para. 2.15. The court further found Jay has maintained his mental health since that time. CP 158:19-24.

6. "(vi) Whether the respondent has a continuing involvement with drug or alcohol abuse, if such abuse was a factor in the protection order"

The trial court found Jay has no drug or alcohol problem and it was not a factor in 2003, when the protection order was entered. CP 157:14-19; 177, para. 2.11.

7. "(vii) Whether the petitioner consents to terminating the protection order, provided that consent is given voluntarily and knowingly"

Marta does not consent to removal of the 2003 protection order. CP 157:20-22; 177, para. 2.12. This factor is relevant in considering termination of a protection order **only** to the extent it speaks to whether "respondent is likely to commit future acts of domestic violence against the petitioner or those persons protected by the protection order." See RCW 26.50.130 (b).

Here, no facts connect Marta's lack of consent to Jay being a current threat. The law imposes no obligation for Marta to ever forgive Jay; however,

her withholding consent here is not indicative of a likelihood of recidivism. Over 20 years have passed since the domestic violence incident with Marta in 1996, during which time: (a) Jay received treatment and mediation for his bipolar condition, (b) Jay entered into and has sustained a healthy relationship with his current wife of 19 years; (c) the youngest child of Marta and Jay turned 18 over 6 years ago; and (d) Jay and Marta have lived in the same neighborhood without incident for the last 14 years. See Section III(A), *supra*. The lack of consent here is not an indication of a likelihood of recidivism.

8. "(viii) Whether the respondent or petitioner has relocated to an area more distant from the other party, giving due consideration to the fact that acts of domestic violence may be committed from any distance"

In 2003, Jay and Sharesse, his girlfriend at the time and now his wife, purchased a waterfront home in the same neighborhood as Marta. CP 157:23-158:7. Jay and Marta have continued for the last 14 years

to both live in that neighborhood without incident.

Proximity can increase the risk that domestic violence will occur, increasing the opportunity for friction between the parties where distance might avoid the contact all together. Here, however, despite the physical proximity, and despite the need for continued contact due to having minor children together, as well as sharing friends and neighbors, there have been no instances of violence or threats by Jay moving to the same neighborhood 14 years ago. This history weighs against the likelihood of recidivism, not in favor of it.

9. "(ix) Other factors relating to a substantial change in circumstances"

a. Additional Factors Supporting Termination and Recognized by the Trial Court

The trial court found two substantial changes, indicative of an unlikelihood of recidivism, that Jay has undergone since the protection order was issued in 2003:

First, Jay has maintained his mental health and

stayed on medication. CP 77; 158:19-24; 177, para. 2.16.

Second, Jay has maintained a healthy relationship with his current wife for the last nearly 20 years. *See id.* CP 158:24-21:2; 178, para. 2.17.

b. Additional Factors Supporting Termination and Ignored by the Trial Court

The trial court failed to recognize three additional factors that speak to a lack of a likelihood of recidivism here:

First, Jay and Marta have jointly raised their two children together for over 14 years without threats or violence, despite repeated and consistent interaction.

Second, the children of Jay and Marta are adults now, the youngest now 24 years old. The potential contact between Jay and Marta will be limited to social gatherings and celebrations. This lessened interaction, and involving situations that are not

fraught with potential disagreement (as parenting can be), weighs towards a lessened likelihood of recidivism.

Third, the likelihood of recidivism is lessened because Marta continues to be protected by the mutual restraints set forth in their May 14, 1999 Decree of Dissolution, which permanently precludes either party from going to or entering the home or workplace of the other. *Fowler & Fowler*, No. 97-3-00037-9, Dkt. No. 155 (Thurston Co. Sup. Ct. May 14, 1999).

10. Summary: The factors relating to the likelihood of recidivism here require termination of the protection order.

Jay engaged in domestic violence in 1996. Jay has acknowledged his fault; addressed his bipolar disorder through therapy and medication; completed DV treatment; sustained a healthy, nearly 20-year relationship with his current wife; and worked with Marta to raise their children, the youngest of whom turned 18 years old 6 years ago, while living in

the same neighborhood as Marta for the past 14 years, without incident. See Section III(A), *supra*.

RCW 26.50.130 provides individuals the ability to rehabilitate to escape the restrictions and stigma of a previous wrong, while protecting the interests of the victim. Here, Marta's most recent allegations of Jay's bad conduct against her are during or prior to 1999 – over 18 years ago. The record is devoid of evidence showing a present risk to Marta's safety. Even so, the parties are still precluded from entering each others' homes and places of work through a permanent restraining order in their 1999 Decree of Dissolution.

The trial court here abused its discretion by refusing to terminate the protection order, despite lacking grounds to find a present likelihood of Jay committing domestic violence against Marta. Without substantial evidence demonstrating such a likelihood, the court's denial, based upon a preponderance of the evidence, was untenable and an

abuse of discretion. See *Freeman*, 169 Wn.2d at 671; *Stewart*, 133 Wn. App. at 550.

C. The trial court erred by adding additional factors that are not relevant to whether Jay poses a likelihood of committing domestic violence against Marta.

1. The trial court erred by requiring Jay to prove he has sufficient need to terminate the protection order.

The trial court held that Jay's desire to visit friends living closer than 1,500 feet from Marta and the travel restrictions Jay is subjected to due to the protection order are not a "sufficient reason" to terminate the order and do not provide him a "real interest" to terminate. CP 161:19-22; 162:1-7; 178, paras. 2.21-2.22.

The legislature expressly limits a trial court's consideration to "only factors which address whether the respondent is likely to commit future acts of domestic violence against the petitioner or those persons protected by the protection order." RCW 26.50.130 (b). A respondent does not need to

prove that regaining his freedom to travel unimpeded is important enough to require a trial court to apply the statutory factors for termination of a protection order. See RCW 26.50.130.

2. The trial court erred to the extent it considered subjective fear, divorced from any relationship to a likelihood of recidivism.

The trial court found: Marta "has a current, real and genuine fear of imminent physical harm" from Jay. CP 178, para. 2.20. The trial court based this on the 1996 domestic violence event, which it found was still a difficult emotional issue for Marta. See CP 178, para. 2.18. The trial court did not identify any recent basis for the fear, nor does any exist in the record. The trial court refused to rule whether this fear was objectively reasonable, concluding that was not part of the legal standard. RP pg. 8 (Transcript of 8/30/17 Trial Hrg. 8:13-23).

The trial court erred by shifting the analysis

back to a petitioner's fear. The trial court correctly noted that Marta had "no burden of proving that he or she has a current reasonable fear of imminent harm by the respondent." RCW 26.50.130 (3)(a). The statute has shifted the inquiry **away** from fear, instead focusing on the actual state interest: whether the respondent poses a likelihood of committing domestic violence against the petitioner. However, the trial court then appears to have used subjective fear – without more – as a primary basis to deny terminating the protection order. See CP 178, paras. 2:18-2:20.

If a trial court can deny a termination of a protection order based upon the subjective fear of a petitioner, this will force respondents to attempt to prove the fear is unreasonable – that is, not tied to actual factual evidence. Regardless of the statutory language, this will have the practical effect of cornering the petitioner into proving **reasonable** fear – i.e. that the fear is

based upon a current threat. But the legislature expressly precluded this; instead, it shifted the focus from the reasonableness of the fear to the likelihood of recidivism. See RCW 26.50.130 (3)(a).

But even if this Court were to allow trial courts to slide back into *Freeman's* focus on fear, Marta's subjective fear here is not indicative of Jay's likelihood of recidivism, the statutorily-proscribed focus. See RCW 26.50.130 (3)(a); H.B. 1565, Sec. 1 (2011) (enacted) ("The legislature finds that some of the factors articulated in the Washington supreme court's decision in *In re Marriage of Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010) for terminating or modifying domestic violence protection orders do not demonstrate that ***a restrained person is unlikely to resume acts of domestic violence when the order expires***, and place an improper burden on the person protected by the order.") (Emphasis added).

VI. CONCLUSION: RELIEF SOUGHT

Over 14 years have passed since this protection order was entered by agreement, and 20 years since the domestic violence event with Marta. It is true that time alone does not warrant terminating a protection order. RCW 26.50.130 (3)(d)(i). However, under a statute that allows for Jay to rehabilitate and change his life, he has done just that.

Acknowledging he had a mental health issue, he sought and continued with treatment; continues to take medication; began and has continued a healthy, 20-year relationship with his current wife; worked with Marta to raise their minor children (who are now all adults); and has lived in the same neighborhood with Marta for 14 years without incident. He continues to abide by the ongoing mutual restraints from their dissolution decree, and does not enter Marta's home or place of work.

These facts demonstrate a substantial life change, indicative of no longer posing a risk of

committing domestic violence against his ex-wife of 18 years. Under RCW 26.50.130, the 2003 Protection Order should be terminated. Jay asks this Court to reverse the trial court's denial of his motion to terminate the protection order.

DATED this 03 day of January, 2018

Respectfully submitted,



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ATTACHMENT A:

TRANSCRIPT OF 01/08/97 TRIAL HEARING

FILED
SUPERIOR COURT
THURSTON COUNTY WASH.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
97 JAN 23 P4:12
IN AND FOR THE COUNTY OF THURSTON

In Re the Marriage of:)

JAMES FOWLER,)

Petitioner,)

and)

JAMES FOWLER,)

Respondent.)

BEITTS & SULLIVAN, P.L.L.C.

BY _____
DEPUTY

NO. 96-2-04545-1

ORIGINAL

TRANSCRIPTION FROM TAPED PROCEEDINGS

BE IT REMEMBERED that on the 8th day of January, 1997,
the above-entitled and numbered cause came on for hearing
before the Honorable Jean Meyn, Pro Tem Commissioner,
Thurston County Superior Court, Olympia, Washington.

A P P E A R A N C E S

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January 8, 1997

Olympia, Washington

MORNING SESSION

Pro Tem Commissioner Jean Meyn, Presiding

(Appearances as heretofore noted.)

(Taped Proceedings)

--oOo--

THE COURT: And, Ms. Brandt, do you have an agreed order to present in the meantime?

MR. BATTAN: I would like to be on the record, your Honor. No. 9.

THE COURT: Certainly. The court would call Item No. 9, Marta Fowler versus James Fowler. All right. Apparently by how you're standing, I can tell who is representing who. So you would be Marta Fowler? All right. And are you James Fowler? All right.

MS. BRANDT: Your Honor, I have an agreed order that we have drafted this morning (inaudible).

THE COURT: So if I'm to understand this, the only contact between the respondent and the minors is during supervised visitation, as presented?

MR. BATTAN: If I can address that, your Honor, I will. There was an incident at the Fowler residence, for which Mr. Fowler was arrested. And the facts of that are sufficient to justifying Ms. Fowler obtaining a

1 restraining order if she would like to do so. We are
2 stipulating, for the purposes of this order, that the
3 children can be included in this restraining order, so
4 we don't think the facts necessarily apply to that.

5 The Fowlers are separated and Ms. Fowler is going to
6 be filing a petition for separation. Neither of them
7 knows what's going to happen with their relationship,
8 and Mr. Fowler would like to work through counseling
9 toward reconciliation and repair of the relationship.
10 Ms. Fowler doesn't know.

11 So we've come to court today in a position where
12 some things are happening that we're not comfortable
13 with and I'm sure Ms. Fowler is the same way.

14 Having supervised visitation with the children is
15 not what we prefer and we don't think it's necessary.
16 But Ms. Fowler does. So we're trying to indicate to her
17 that we'll agree to it for these three visits because it
18 will make her more comfortable and reassure her. I
19 think that's important at this time of transition.

20 The order provides that after those three supervised
21 visits, which, by the way, are being supervised with a
22 neighborhood family friend who is very close to both of
23 the parties, so that's the kind of supervision, then
24 there will be unsupervised visits. And we don't know
25 what that schedule is going to be like.

1 I assume that a petition for separation is going to
2 be filed shortly. Hopefully, we'll be able to talk and
3 we'll be able to work out a schedule for our clients to
4 parent their children if they're not going to be
5 together. And we hope in the future, through
6 counseling, they will be together. But that's the
7 context in which this order is entered.

8 They have participated in the past with counseling
9 with Norm Nichols, and I'm pleased that Ms. Fowler has
10 agreed to cooperate with Mr. Nichols and follow up on
11 any recommendations he might make. And he has a number
12 of ideas for Mr. Fowler specifically and for this couple
13 to work on the issues that have brought them to -- to
14 court today, really.

15 So that is the context for this order, your Honor.
16 You can see it's a fairly short-term order. The
17 restrainer isn't short-term; it's a year. But the order
18 with regard to the children is about of ten days'
19 duration. So we're hoping within ten days to have
20 worked out something that's much better than that for
21 the children, by agreement or in the domestic action.

22 And if we do proceed in the domestic action, then I
23 assume we'll be vacating this order and relying on any
24 orders in that action.

25 THE COURT: All right. Let me see if I --

1 there's a section here where you end the supervised
2 visits and end the no -- that's different from the
3 no-contact?

4 MS. BRANDT: The no-contact is not in. What we
5 specify in there is that Mr. Fowler shall not have any
6 contact with the children other than during the
7 supervised visits. It's clear that there is going to
8 have to be a subsequent order with respect to how these
9 parties deal with their children.

10 There will be a domestic case filed, a petition for
11 legal separation. I would imagine it would be
12 ultimately joined with the domestic violence action and
13 subsequent arrangements made with respect to these
14 children.

15 But otherwise, the no-contact exists until amended
16 by the parties in that action or in this action
17 specifically, as well. And I think both the attorneys
18 will be representing these parties. I -- Ms. Meserve is
19 actually Ms. Fowler's attorney and could not be present
20 this morning. But both attorneys will make sure that
21 the domestic violence order's also consistent with the
22 order in the domestic case as well.

23 THE COURT: So, Mr. Battan, in referencing that
24 it's short-term, the terms of the arrangements for the
25 visits, is because of the specified date. Is that what

1 you were indicating?

2 MR. BATTAN: Yes, after next --

3 THE COURT: So that actually, in terms of the
4 way this order is drafted, unless it's changed prior to
5 January 16th, then there's to be no contact. Is that
6 the parties' understanding unless this is -- you have
7 listed -- you have specified supervised visits through
8 specific dates and then they end. So if it's not
9 modified, then there would be no contact at all with the
10 children?

11 MR. BATTAN: Well --

12 MS. BRANDT: Pursuant to that order, that would
13 be correct.

14 MR. BATTAN: But that is not the intention of
15 the parties --

16 MS. BRANDT: Right.

17 MR. BATTAN: -- and that's part of the reason
18 that I wanted to present this on the record, so that we
19 could have this discussion and make sure this order is
20 clear.

21 This order should not imply there is to be no
22 contact after the period of the next week or week and a
23 half. It should imply that there will be contact; there
24 will be a schedule once it's worked out.

25 MS. BRANDT: And I think that's clear if you

1 look at -- is it Page 3, where it talks about visitation
2 with the children? It talks about there will be a
3 subsequent --

4 THE COURT: Oh, I see it.

5 MS. BRANDT: -- parenting plan and residential
6 schedule arranged.

7 THE COURT: "Or as agreed by the parties."

8 My only concern is that -- and I understand it's
9 certainly in the court's best interest, as well as the
10 parties, to have the order be consistent, which is
11 counsels' intention; but this order in itself should be
12 complete until it's modified also, and I just have some
13 concern that it's left open. But it says, "This
14 agreement by the parties." So have both counsel
15 explained this to their clients so they understand?

16 MR. BATTAN: I think we have. And that
17 agreement of the parties would have to be reduced by an
18 order in this action --

19 MS. BRANDT: That is Correct.

20 MR. BATTAN: -- to clarify this order.

21 MS. BRANDT: This order with respect to the
22 residential arrangements for the children will have to
23 be clarified for anything past January 16th.

24 THE COURT: All right. So is it acceptable to
25 the parties for the court to add, that or you may add it

1 at the end of this paragraph, where it says "Orders
2 agreed by the parties pursuant to subsequent order in
3 this action"?

4 MS. BRANDT: Well, I think we have talked about
5 that.

6 THE COURT: Am I missing that in another
7 sentence?

8 MS. BRANDT: We've talked about entering a
9 parenting plan.

10 THE COURT: But that doesn't -- as you know --

11 MR. BATTAN: Uh-huh.

12 THE COURT: -- this can go concurrently --

13 MS. BRANDT: Certainly.

14 THE COURT: -- to the parenting plan, and they
15 don't have to even reference one another --

16 MR. BATTAN: Right.

17 THE COURT: -- and of course we do get into
18 problems.

19 MR. BATTAN: Right.

20 THE COURT: It's the Court's concern that this
21 order needs to stand on its own. And so if I, it
22 sounded like, say, "As agreed by the parties by
23 subsequent order in this action" --

24 MR. BATTAN: That's fine.

25 THE COURT: -- I would assume that you're going

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to file a modification that mirrors whatever the parenting plan is going to be.

MR. BATTAN: I think that's --

MS. BRANDT: That would --

THE COURT: And this would even be dismissed. I don't know.

MS. BRANDT: That would be appropriate, your Honor.

MR. BATTAN: I think that would be a very good idea.

SPEAKER: It's congenial for now.

THE COURT: And I'll just let you review that to make sure that you understand since you all signed it prior to that. Thank you, Counsel.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

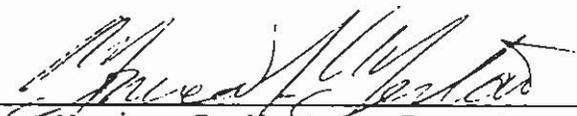
Pro Tem Commissioner Jean Meyn

In Re the Marriage of:)
JAMES FOWLER,)
Petitioner,)
and) TRANSCRIBER'S CERTIFICATE
JAMES FOWLER,) NO. 96-2-04545-1
Respondent.)

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss

I, Monica J. Mestas, official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do certify:

That the foregoing pages, 1 through 9 inclusive, comprise a true and correct transcription of the taped proceedings held in the above-entitled matter, as designated by Counsel Paul Battan to be included in the transcript, taped on the 8th day of January, 1997.


Monica J. Mestas, Reporter
C.S.R. No. MESTAMJ451M6

ATTACHMENT B:

RCW 26.50.130

Order for protection—Modification or termination—Service—Transmittal.

(1) Upon a motion with notice to all parties and after a hearing, the court may modify the terms of an existing order for protection or may terminate an existing order for protection.

(2) A respondent's motion to modify or terminate an order for protection that is permanent or issued for a fixed period exceeding two years must include a declaration setting forth facts supporting the requested order for termination or modification. The motion and declaration must be served according to subsection (7) of this section. The nonmoving parties to the proceeding may file opposing declarations. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the declarations. If the court finds that the respondent established adequate cause, the court shall set a date for hearing the respondent's motion.

(3)(a) The court may not terminate an order for protection that is permanent or issued for a fixed period exceeding two years upon a motion of the respondent unless the respondent proves by a preponderance of the evidence that there has been a substantial change in circumstances such that the respondent is not likely to resume acts of domestic violence against the petitioner or those persons protected by the protection order if the order is terminated. In a motion by the respondent for termination of an order for protection that is permanent or issued for a fixed period exceeding two years, the petitioner bears no burden of proving that he or she has a current reasonable fear of imminent harm by the respondent.

(b) For the purposes of this subsection, a court shall determine whether there has been a "substantial change in circumstances" by considering only factors which address whether the respondent is likely to commit future acts of domestic violence against the petitioner or those persons protected by the protection order.

(c) In determining whether there has been a substantial change in circumstances the court may consider the following unweighted factors, and no inference is to be drawn from the order in which the factors are listed:

(i) Whether the respondent has committed or threatened domestic violence, sexual assault, stalking, or other violent acts since the protection order was entered;

(ii) Whether the respondent has violated the terms of the protection order, and the time that has passed since the entry of the order;

(iii) Whether the respondent has exhibited suicidal ideation or attempts since the protection order was entered;

(iv) Whether the respondent has been convicted of criminal activity since the protection order was entered;

(v) Whether the respondent has either acknowledged responsibility for the acts of domestic violence that resulted in entry of the protection order or successfully completed domestic violence perpetrator treatment or counseling since the protection order was entered;

(vi) Whether the respondent has a continuing involvement with drug or alcohol abuse, if such abuse was a factor in the protection order;

(vii) Whether the petitioner consents to terminating the protection order, provided that consent is given voluntarily and knowingly;

(viii) Whether the respondent or petitioner has relocated to an area more distant from the other party, giving due consideration to the fact that acts of domestic violence may be committed from any distance;

(ix) Other factors relating to a substantial change in circumstances.

(d) In determining whether there has been a substantial change in circumstances, the court may not base its determination solely on: (i) The fact that time has passed without a violation of the order; or (ii) the fact that the respondent or petitioner has relocated to an area more distant from the other party.

(e) Regardless of whether there is a substantial change in circumstances, the court may decline to terminate a protection order if it finds that the acts of domestic violence that resulted in the issuance of the protection order were of such severity that the order should not be terminated.

(4) The court may not modify an order for protection that is permanent or issued for a fixed period exceeding two years upon a motion of the respondent unless the respondent proves by a preponderance of the evidence that the requested modification is warranted. If the requested modification would reduce the duration of the protection order or would eliminate provisions in the protection order restraining the respondent from harassing, stalking, threatening, or committing other acts of domestic violence against the petitioner or the petitioner's children or family or household members or other persons protected by the order, the court shall consider the factors in subsection (3)(c) of this section in determining whether the protection order should be modified. Upon a motion by the respondent for modification of an order for protection that is permanent or issued for a fixed period exceeding two years, the petitioner bears no burden of proving that he or she has a current reasonable fear of imminent harm by the respondent.

(5) Upon a motion by a petitioner, the court may modify or terminate an existing order for protection. The court shall hear the motion without an adequate cause hearing.

(6) A court may require the respondent to pay court costs and service fees, as established by the county or municipality incurring the expense and to pay the petitioner for costs incurred in responding to a motion to terminate or modify a protection order, including reasonable attorneys' fees.

(7) Except as provided in RCW **26.50.085** and **26.50.123**, a motion to modify or terminate an order for protection must be personally served on the nonmoving party not less than five court days prior to the hearing.

(a) If a moving party seeks to modify or terminate an order for protection that is permanent or issued for a fixed period exceeding two years, the sheriff of the county or the peace officers of the municipality in which the nonmoving party resides or a licensed process server shall serve the nonmoving party personally except when a petitioner is the moving party and elects to have the nonmoving party served by a private party.

(b) If the sheriff, municipal peace officer, or licensed process server cannot complete service upon the nonmoving party within ten days, the sheriff, municipal peace officer, or licensed process server shall notify the moving party. The moving party shall provide information sufficient to permit notification by the sheriff, municipal peace officer, or licensed process server.

(c) If timely personal service cannot be made, the court shall set a new hearing date and shall either require an additional attempt at obtaining personal service or permit service by publication as provided in RCW **26.50.085** or service by mail as provided in RCW **26.50.123**.

(d) The court shall not require more than two attempts at obtaining personal service and shall permit service by publication or by mail unless the moving party requests additional time to attempt personal service.

(e) If the court permits service by publication or by mail, the court shall set the hearing date not later than twenty-four days from the date of the order permitting service by publication or by mail.

(8) Municipal police departments serving documents as required under this chapter may recover from a respondent ordered to pay fees under subsection (6) of this section the same fees for service and mileage authorized by RCW **36.18.040** to be collected by sheriffs.

(10) [(9)] In any situation where an order is terminated or modified before its expiration date, the clerk of the court shall forward on or before the next judicial day a true copy of the modified order or the termination order to the appropriate law enforcement agency specified in the modified or termination order. Upon receipt of the order, the law enforcement agency shall promptly enter it in the law enforcement information system.

[**2011 c 137 § 2; 2008 c 287 § 3; 1984 c 263 § 14.**]

NOTES:

Findings—2011 c 137: "The legislature finds that civil domestic violence protection orders are an essential tool for interrupting an abuser's ability to perpetrate domestic violence. The legislature has authorized courts to enter permanent or fixed term domestic violence protection orders if the court finds

that the respondent is likely to resume acts of domestic violence when the order expires. However, the legislature has not established procedures or guidelines for terminating or modifying a protection order after it is entered.

The legislature finds that some of the factors articulated in the Washington supreme court's decision in *In re Marriage of Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010), for terminating or modifying domestic violence protection orders do not demonstrate that a restrained person is unlikely to resume acts of domestic violence when the order expires, and place an improper burden on the person protected by the order. By this act, the legislature establishes procedures and guidelines for determining whether a domestic violence protection order should be terminated or modified." [[2011 c 137 § 1.](#)]

Short title—2008 c 287: See note following RCW [26.50.050](#).

DECLARATION OF SERVICE

On said day below, I e-filed a true and accurate copy of the Brief of Appellant in Court of Appeals, Division II, Case No. 51247-5-II, to the following parties:

Patricia Novotny
Zaragoza Novotny PLLC
3418 NE 65th St
Ste A
Seattle, WA 98115
Email: Patricia@novotnyappeals.com

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 03, 2018, at Olympia,
Washington



Amber Macki, Legal Assistant
Brost Law, PC

BROST LAW, PC

January 03, 2018 - 6:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51247-5
Appellate Court Case Title: Marta M.K. Fowler, Respondent v. James A.L. Fowler, Appellant
Superior Court Case Number: 02-2-30809-8

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