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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

REPLY BRIEF OF APPELLANT

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Counsel, on behalf of Appellant James ("Jay") Fowler, files this Reply to the Amended Brief of Respondent Marta Fowler ("Marta"), filed April 4, 2108 ("Resp. Br."). Appellant addresses the following issues raised by Respondent:

- 1. The sole issue here is whether Jay is likely to commit acts of domestic violence against Marta based upon the current facts.**

Marta's brief focuses on justifying the basis for an *agreed-to*, August 20, 2003 protection order—based upon Jay's conduct 15-20 years ago. See Resp. Br. 2-5. Whether that *agreed-to* order was justified in 2003 isn't at issue here. The relevant inquiry here is whether the *current* facts demonstrate that Jay "is unlikely to resume acts of domestic violence" if the order is terminated. See RCW 26.50.130(3)(a); H.B. 1565, Sec. 1 (2011).

The parties' history is summarized as follows:

Fifteen to twenty years ago, Jay: engaged in domestic violence against Marta (December 1996); by Marta's account—assumed true here—he also was

present near Marta's home (including while using and returning their mutually-owned boat), and at events of their children that either violated or came close to violating court orders during undefined dates before the parties' divorce was final (May 1999); and, in late 2002, engaged in an inappropriate display of anger (including grabbing his son by the arm and throwing objects) during visitation with his now - 27 year old son, Evan (for which Marta was not present but pursued a protection order based upon conflicting accounts of what happened).

In May 1999, the parties entered into an agreed dissolution which restrained both parties from entering the home of the other, and agreed to a final parenting plan which contained no RCW 26.09.191 restrictions. *Fowler & Fowler*, No. 97-3-00037-9, Dkt. Nos. 153-155 (Thurston County Family and Juvenile Ct 1997). Then, in 2006, the parties resolved the modification of parenting plan

filed by Marta in 2003, with an agreed parenting plan, that again contained no RCW 26.09.191 limitations and further provided that Marta deliver the children to Jay's home for visitations. *Fowler*, No. 97-3-00037-9, Dkt. No. 380.

Since then, Jay has: been consistently medication compliant for his bi-polar disorder and engaged in mental health therapy to address his other issues, see CP 74; 177, para. 2.15; maintained 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 Jay has lived in the same neighborhood as Marta for the past 15 years. See Op. Br. 14-22. During this time, while cooperatively raising their children, Marta entered Jay's home at least once, by her own choice, without incident. CP 56; 70. Moreover, Marta voluntarily agreed to deliver the children to Jay's home for visitation in the final parenting plan she signed

in 2006. *Fowler*, No. 97-3-00037-9, Dkt. No. 380.

The question on appeal here, and the inquiry required under the statute, is whether the *current* circumstances surrounding Jay, his health, and his disposition make him likely to commit future domestic violence against Marta. See RCW 26.50.130(3)(a).

The facts here do *not* show a likelihood of recidivism now. Marta, accepting here her description of Jay's behavior exhibited 15-20 years ago, ignores the subsequent change in Jay's circumstances through: his *ongoing* medical treatment, consistent compliance with medication, and personal growth from (and necessary to) the development and maintenance of a healthy, intimate relationship. Marta does not identify a factual basis to connect Jay as he is now, and has been for 15 years, with a risk of recidivism.

When considering "substantial change in circumstances," the court has discretion in

balancing the relevant factors *but* must consider “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(3)(b). Here, the lower court’s order fails to articulate a factual nexus between any factor and a risk of recidivism – as the statute requires. The lower court’s refusal to terminate the protection order was an arbitrary exercise of discretion, unsupported by the record.

2. In February 2006, Jay picking up his ill son when Marta was out of town does not indicate a risk of recidivism.

Jay’s only violation of the 2003 protection order (which Jay seeks to terminate here) – a February 2006 incident – does not demonstrate a risk of recidivism. See Resp. Br. 5-6. There, Jay picked up his *ill* son from school, outside visitation times set forth in the parenting plan, *because Marta was out of town*. See Op. Br. 5. He was

charged with a criminal offense for violating the protection order because the temporary parenting plan in effect at the time (and referenced in the protection order) prohibited him from going to the school – a charge which was immediately dropped, CP 59, and an order entered to allow him to go to the school, because Jay did the right thing, see CP 42-43. Marta was unavailable and Jay acted the part of a responsible parent. This provides no evidence of Jay being likely to engage in further domestic violence against Marta. See RCW 26.50.130(3)(a).

Moreover, a few months later, in December of 2006, the parties entered into a final parenting plan, which again contained no RCW 26.09.191 limitations and specifically provided that Marta deliver the children to Jay's home for visits. *Fowler*, No. 97-3-00037-9, Dkt. No. 380. This agreed-to proximity to Jay did not lead to any domestic violence then, and there is no reason to believe that the absence of a protection order now,

would lead to domestic violence going forward.

3. Jay was not precluded from purchasing, and had good reason to purchase, a home in Marta's and his old neighborhood in June 2003.

Marta villainizes the decision of Jay to purchase a home on the same road as the former family home (where Marta still lived) in June 2003, labelling it as "bizarre[]." See Resp. Br. 1, 5. But the context here does not support an inference of nefarious intent, or a risk of recidivism 15 years later.

Jay and Marta had lived in that waterfront community for many years before the dissolution; they had many friends in the neighborhood; and, Jay wanted a low bank waterfront home where he would be closer to his children. Furthermore, no court instruction or order prevented Jay from moving there – an undisputed fact here. CP 24; CP 70.

Marta claims this shows a risk of recidivism, asserting a court in December 2002 intended to issue a restrictive order against Jay but did not,

due to an "apparent clerical error." See Resp. Br. 4-5. But, there was no "clerical error" by the court; under Marta's own alleged facts, the parties' legal counsel at the time failed to confer, and present for entry, a proposed order, which the court may or may not have decided to issue. See CP 24 (Statement of Marta Fowler).

Furthermore, such an order – restricting Jay from coming within 500 feet of Marta's home – would not have precluded him from buying a home that is a half mile away.

Jay moving in 2003 does not demonstrate a likelihood of committing domestic violence against Marta then or now. His move in 2003 did not violate any court order. Regardless, Marta was worried in 2003 about *potential* harassment or violations of the parenting plan as a result of Jay's move and sought a permanent protection order (providing a 1,500 feet restriction). CP 25-26. Jay did not object to the restraints Marta sought for herself.

See CP 33.

Agreeing to those restraints is not the behavior of a person likely to recommit. See RCW 26.50.130(3)(a). It is the behavior of a person who demonstrated empathy, acknowledged his wrongdoings of years past, and was attempting to move on with his new life. CP 33-35.

4. Marta's timeline is not supported by the record.

Marta asserts: "Altogether, far from proving it unlikely that Jay will resume acts of domestic violence, his actions since 2003 prove the continuing need for a permanent order..." Resp. Br. 13. Despite the wording, Marta bases this statement on conduct and events that occurred *before* 2003 or which do not provide any connection between Jay and a current risk of recidivism.

a. The conduct Marta relies on to demonstrate a present risk of recidivism happened well before 2003.

In her briefing, Marta asserts Jay looked into her windows or drove a boat by her home to

demonstrate Jay hasn't changed since 2003. See Resp. Br. 13. But this alleged conduct occurred prior to May 1999; Marta accused Jay of this conduct during their divorce proceeding. See CP 195 (Marta's Declaration). Any insinuation in Marta's current briefing that these occurred *after* 2003 is inaccurate and unsupported in the record. See Resp. Br. 13.

b. Jay underwent and completed therapy to address his domestic violence and associated issues.

Marta emphasizes that Jay did not undergo domestic violence treatment after the 2003 protection order. See Resp. Br. 10, 12. Out of context, that assertion is misleading:

(1) The August 2003 protection order did not require *DV-specific* treatment. Instead, it required compliance with orders in the dissolution case, which involved counseling with Norm Nickel in which Jay was already engaged. CP 17; 39.

(2) Jay completed the DV treatment he was

required to complete in 1996 and counseled with "skilled therapists" thereafter. CP 177, para. 2.15 (Findings of Fact, Conclusions of Law & Order of Revision); see also, CP 160:14-25; 161: 1-7. Although the DV treatment records were not available from the mid-to-late 1990s, see CP 74, the revising judge recognized that Jay had engaged in various therapy with four different professionals, at least one of whom was a DV expert, CP 177, para. 2.15.

The court also found that Jay had begun and consistently maintained compliance with medical treatment for his bi-polar disorder. CP 177, para. 2.16.

In sum, the August 2003 protection order did not require DV treatment; regardless, Jay did undergo DV treatment previously and engaged in ongoing therapy as well as medical treatment for his bi-polar condition.

c. Jay's rehabilitation began before and continued beyond the agreed-to 2003 protection order.

Marta claims any efforts Jay made towards recovery before the 2003 protection order – including therapy, medication, and his long-term healthy relationship with his current wife – are irrelevant to whether he has changed since 2003 (the year of the protection order sought to be terminated here). See Resp. Br. 12-13. Again, this is misleading out of context:

(1) The 2003 order was *agreed to* by both parties, an initial indicator of Jay's attitudinal and behavioral change since the late 1990s as he did not seek to drag Marta through a legal battle over it. See CP 33, 37.

(2) Jay's therapy, medication, and his healthy relationship with his current wife did not begin and then *stop* before 2003. The impact continued – as did the rehabilitation and personal growth they set in motion. Jay complied with medication,

engaged in therapy, and maintained a healthy, long-term intimate relationship with his current wife – *beginning* in 1997, and *continuing* beyond. To assert the change these activities caused within Jay and in his life somehow do not “count” past 2003, simply because Jay began the activities in 1997, misapprehends the nature of rehabilitation and ignores that it is a long, and often difficult, journey. But it is one that ultimately transformed Jay’s life, as the record here of 15 years and counting, demonstrates.

(3) It would set a disastrous precedence if individuals, who agree to protection orders and seek therapy prior to such an order being issued, were punished by courts later because those courts ignored any progress and cooperation evident prior to the order being issued.

The court here was charged with looking at changes in circumstances, with the ultimate view at whether Jay is a *present risk of committing*

domestic violence against Marta. See RCW 26.50.130(3)(a). The *present and continuing* effects of Jay's previous therapy, medication, and a relationship that began before 2003 inform the *present* risk, and here the lack thereof, of Jay committing domestic violence against Marta now.

Furthermore, the record lacks a factual basis to contradict that Jay's personal growth and rehabilitation is anything other than sincere and indicative of a lack of likelihood that Jay will resume 20-year-old acts of domestic violence against Marta.

- d. Jay is not responsible for a neighbor sending a letter to Marta about permitting Jay to attend the neighbor's husband's 60th birthday party.**

In her briefing on appeal, Marta accuses Jay of engaging in "manipulation of neighbors" to pressure her to remove the protection order. Resp. Br. 6, 13. This accusation is unfounded: (a) the neighbor herself clarified Jay did not request she send the letter or contact Marta, CP 79; (b) the court

commissioner at the first hearing did not find that Jay asked the neighbor to write the letter, CP 124; and, (c) the revising judge made no finding whatsoever that Jay was involved, CP 134-137.

e. Conclusion: The evidence in the record shows Jay is not a current recidivism risk.

As the record shows, Jay's unacceptable and highly-regrettable conduct inhabited a period 15-20 years ago. He did not defend that conduct then nor since. He does not defend that conduct here. Neither the record nor the court's factual findings support Marta's claim that Jay has continued risk-causing conduct after 2003 or is a current risk now. See Resp. Br. 13-14.

5. The lower court erred by arbitrarily retaining the 2003 protection order after finding substantial changes sufficient to remove the bulk of its restrictions.

The lower court modified the protection order, finding Jay was not a current threat sufficient to warrant requiring him to leave an event if Marta was also in attendance. See CP 178, para. 3.3. But

the lower court then created a new consideration, one absent from the statute, that Jay's "concerns" and "desire" – to travel without being stopped at security each time due to the restraining order, and to attend events of friends within 1,500 feet of Marta's home – were not "important" and "significant" enough for the court to remove the protection order. *Id.*, paras. 2.21-.23.

RCW 26.50.130 charges the court with determining whether Jay is a present, domestic violence threat to Marta. The statute does not charge the court with first determining whether Jay's reasons for wanting to remove the permanent protection order are "important" enough to warrant the court to rule based on the recidivism factors. Since Jay's reasons for wanting the order removed do not relate to his risk of recidivism here, the lower court erred by modifying, but arbitrarily not terminating, the protection order based upon non-recidivism considerations. See RCW

26.50.130(3)(a).

**6. The law provides for a path to redemption;
Jay has taken that path.**

Domestic violence is appalling and it is easy to eternally label perpetrators as "evil". Furthermore, when we read written accounts of such wrongs, the fact that they occurred 15-20 years does not lessen our visceral reaction.

But despite that very human reaction, the legislature understood that protecting victims of domestic violence was less about punishment and more about effecting a change in social attitude, and requiring accountability in the perpetrators. As such, the legislature provided a path and strong incentive for perpetrators to rehabilitate.

That is why the law limits consideration to the facts as they pertain to the person before the court, *the person that exists now*. See RCW 26.50.130(b) ("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.”) The legislature could have, and *specifically did not*, make a permanent protection order a life sentence.

Of course, where past facts relate to present risk, they are properly before the court. Jay has presented his case in full detail, showing over and over in established facts in the record that the circumstances related to the likelihood that he would resume acts of domestic violence against Marta have changed, that he is not the person that was a domestic violence risk in the late 1990s, or the person who struggled with a parenting issue in the early 2000s. He met his statutory burden. See RCW 26.50.130(3)(a).

With his burden met, Marta has had full opportunity to point to what specific facts indicate a *current* risk of recidivism. But Marta has failed to make any argument why behavior over 15 years ago – predating Jay’s substantial, demonstrated progress through therapy, medication,

maturation, and his ability to maintain a healthy, almost-20-year intimate relationship with another woman – make Jay a risk for committing domestic violence against Marta now.

It is not apparent what more Jay could do now, or could have done over the past 15 years, to satisfy the statutory factors demonstrating a lack of recidivism risk. See RCW 26.50.130(3)(a). Marta's briefing is a condemnation against Jay as he was in the late 1990s – a condemnation Jay shares. That briefing is not a legal argument concerning present risk under the requirements of RCW 26.50.130.

Jay does not seek to avoid responsibility for his wrongs here; but under the statute, those facts are only relevant to the extent they demonstrate a present risk. As shown by his treatment, his current life, and the life he has led for over a decade, those wrongs do not define who he is now.

7. An award of attorney fees is not appropriate here.

Marta demands attorney fees because Jay has exercised his legal rights in good faith. See Resp. Br. 17. The issue is whether Jay is the same man he was in the late 1990s, or whether he has changed in the last 15-20 years by addressing his mental health issues with therapy, medication, and healthy living. The record demonstrates that he has changed.

Marta condemns him for attempting to show that. But he has done what the legislature, and society, has asked of him: he has made "a substantial change in circumstances such that the [he] is not likely to resume acts of domestic violence against [Marta]." RCW 26.50.130(3)(a). It contradicts the purpose of the statute, and the will of the legislature, to punish and condemn him for attempting to show that to the court here.

8. Conclusion: There is a missing link here between past conduct and present likelihood of recidivism.

Marta mischaracterizes Jay's appeal as a dispute over how the statutorily-required considerations were weighed against each other. See Resp. Br. 11-12. The reviewing court must determine whether the lower court viewed each factor as the law requires – based upon its connection to Jay's present likelihood of recidivism. See RCW 26.50.130(3)(a). Where a statutory factor does *not* relate to the likelihood of recidivism, it is not relevant under the statute. See RCW 26.50.130(3)(b). This conforms to the purpose of a *protection* order: whether the protection order should continue is a question of whether Marta is in danger without it.

Essentially, Marta's argument boils down to: once a perpetrator of domestic violence, *always* a perpetrator of domestic violence. See Resp. Br. 13. The focus here isn't that 15-20 years have passed; it's that Jay took that time to work diligently to

make *substantial* changes in himself, in his life, and in how he addresses interpersonal challenges in his relationships. The factors *as they relate to recidivism* demonstrate and prove that change beyond a preponderance of the evidence. See RCW 26.50.130(3)(a). The lower court's decision failed to consider those factors solely as they relate to recidivism, and thus failed to follow the court's statutory mandate.

DATED this 4th day of May, 2018

Respectfully submitted,



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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:

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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: May 04, 2018, at Olympia, Washington



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