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Court of Appeals  
Division III  
State of Washington

No. 33668-9-III

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

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Anna Juarez,

Petitioner/Appellant,

v.

Abdon Chavez Juarez II,

Defendant/Respondent.

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BRIEF OF AMICI CURIAE THE DOMESTIC VIOLENCE LEGAL  
EMPOWERMENT AND APPEALS PROJECT, NATIONAL  
ASSOCIATION OF WOMEN LAWYERS, WOMEN'S LAW PROJECT,  
BATTERED WOMEN'S JUSTICE PROJECT, PROFESSOR  
MARGARET DREW AND PROFESSOR JANE STOEVER

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## INTRODUCTION

The Washington legislature recognized in 1979 that domestic violence “accounts for a ‘significant percentage’ of violent crimes in the nation and is disruptive of ‘personal and community life.’” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208-09 (2008) (quoting RCW 70.123.010). Thirty-five years later, 20 people in the U.S. experience intimate partner violence every minute.<sup>1</sup> There are 10,000,000 acts of domestic violence annually,<sup>2</sup> with a national death toll of some 1,300.<sup>3</sup>

One of the ways in which states have addressed the epidemic of intimate partner violence is through the domestic violence protection order (“DVPO”), a survivor-initiated and empowering civil remedy. A DVPO cannot be effective, however, unless it extends for an adequate period of time. *Amici* agree with Ms. Juarez that the Washington legislature

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<sup>1</sup> See *Injury Prevention & Control*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/nisvs/> (last visited February 10, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Injury Prevention & Control—Intimate Partner Violence: Consequences*, Centers for Disease Control and Prevention, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (last visited February 10, 2016). Both men and women are victims of domestic violence, but the majority (including nearly 80 percent of individuals murdered by their intimate partners) are women. *Id.* In recognition of these facts, and the specific facts of this case, *Amici* use the feminine when context requires a singular pronoun.

intended a typical DVPO to issue for a year. But even if trial courts have discretion to issue a DVPO for less time under some circumstances, they do not have discretion to issue a short-term DVPO and require a survivor to seek protection in family court simply because she is married to or has children in common with her abuser. Such orders not only violate the express language of the Washington Domestic Violence Prevention Act (DVPA); they also are contrary to public policy, raise significant constitutional concerns, and fly in the face of a national trend towards long-term DVPOs.

#### **IDENTITY AND INTEREST OF AMICI**

The Domestic Violence Legal Empowerment and Appeals Project, the National Association of Women Lawyers, the Women’s Law Project, the Battered Women’s Justice Project, Professor Drew, and Professor Stoever are all committed to advancing legal protections for domestic violence survivors through education and advocacy.<sup>4</sup>

#### **STATEMENT OF THE CASE**

*Amici* adopt Ms. Juarez’s Statement of the Case.

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<sup>4</sup> *Amici’s* Motion for Leave to File Brief of *Amicus Curiae* details their expertise and interests and is incorporated herein by reference.

## ARGUMENT

### **I. Denying survivors long-term DVPOs and requiring them to pursue a separate action is dangerous and disempowering.**

#### **A. Short-term DVPOs do not adequately protect survivors.**

Short-term DVPOs, such as the two that the trial court issued in this case, reflect a fundamental misunderstanding of the nature of domestic violence and the danger that survivors face when they seek protection from their abusers. As the record in this case reflects, domestic violence is part of “a pattern of systematic abuse by which the abuser seeks to dominate his partner through the use of power and control tactics including emotional, sexual, and physical violence.”<sup>5</sup> For too many survivors, attempting to leave the relationship leads to further abuse and escalated violence.<sup>6</sup> This is because abuse is not simply a function of proximity, but rather reflects the abuser’s desire to possess, dominate, and control the survivor.

Domestic violence does not end when a survivor leaves the relationship. On the contrary, the very act of separation often causes an intensification of the abuse, as the abuser attempts to reassert control over

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<sup>5</sup> Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 Am. U. L. Rev. 337, 350-51 (2009) (emphasis added).

<sup>6</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 29 n.117 (1991).

the survivor. Studies show that a survivor’s risk of harm increases by seventy-five percent after separation, and this increased risk continues for years.<sup>7</sup> Our courts have witnessed examples, as when Paul Kim stabbed Baerbel Roznowski to death after he was served with her protection order. *See, e.g., Washburn v. Federal Way*, 169 Wn. App. 588 (2012). In light of the increased and ongoing risk of harm to a survivor who leaves an abusive relationship, short-term orders do not offer the level of protection long-term orders provide—and survivors require—to ensure their safety.<sup>8</sup>

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<sup>7</sup> Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 Vand. L. Rev. 1015, 1025 (2014) (citations omitted).

<sup>8</sup> *See, e.g.,* Victoria L. Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 Am. J. Preventive Med. 16, 18-19 (2003) (rates of abuse decreased with longer protection orders); Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. Am. Med. Ass’n 589, 589 (reprinted 2002) (concluding that year-long DVPOS “are associated with a significant decrease in risk of police-reported violence against women by their male intimate partners”); Matthew J. Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. Fam. Violence, 205, 215 (survivors with one-year orders experienced a greater decrease in abuse than those with shorter orders); *see also* Stoeber, *supra* note 7, at 1066 (describing multiple studies finding a correlation between the duration of a protection order and a survivor’s safety, which researchers have described as a “dose-response relationship according to the duration of the [DVPO]”).

1. *Short-term DVPOs force survivors into dangerous physical contact with their abusers.*

As a threshold matter, short-term orders require a survivor to return frequently to court to renew the order’s protections, thereby “increas[ing] contact with the abuser, which may increase the risk of harm” to the survivor. *See Champagne v. Champagne*, 708 N.E.2d 100, 102 n.2 (Mass. 1999). When, as here, the survivor is forced to seek this protection in a separate family court action initiated by the abuser, that contact may be ongoing over the course of numerous—and, often, emotionally charged—proceedings. Every court appearance is a challenge to the abuser’s dominance and control of the survivor, which means that it is *per se* a powerful potential trigger for the abuser’s rage and escalated violence.<sup>9</sup> At their worst, these interactions can be fatal, such as the courthouse murder of Susana Blackwell, her two friends, and her unborn child by her husband when she sought dissolution of their brief, violent marriage.<sup>10</sup> Longer-term orders, in contrast, minimize the

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<sup>9</sup> *See* Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 290 (1995) (studies show increased risk of homicide during extended divorce and child custody proceedings); *see also Pike v. Maguire*, 716 N.E.2d 686, 688 (Mass. App. Ct. 1999) (custody fights are “notoriously volatile”).

<sup>10</sup> Alex Tizon, *Death of a Dreamer*, *The Seattle Times* (Apr. 21, 1996), <http://community.seattletimes.nwsourc.com/archive/?date=19960421&slug=2325181>.

contact between the parties, thereby limiting opportunities for further abuse.

The risks of short-term protection orders extend beyond the adult survivor to her children, due to the unavoidable reality that many domestic violence perpetrators also abuse their children.<sup>11</sup> As with adult survivors, the risks to children increase substantially after separation.<sup>12</sup> Abuse of the child may be a means of perpetrating emotional abuse against a partner, or punishing the survivor for leaving; it may also be a function of the abuser's personality and/or controlling nature.<sup>13</sup> The result is the same: when a court declines to grant a full year of protection,

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<sup>11</sup> See Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 Seattle J. Soc. Just. 1053, 1054 (2011) (“[B]etween 50 and 70 percent of children growing up in violent homes will be physically abused.”).

<sup>12</sup> See, e.g., Einat Peled, *Parenting by Men Who Abuse Women: Issues and Dilemmas*, 30 Brit. J. Soc. Work 25, 28 (2000) (“Separation of their parents seems to increase, rather than decrease, children’s exposure to violence. Certainly, separation significantly increases the danger of abuse and murder for abused women.”) (citations omitted); Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 Juv. & Fam. Ct. J. 1, 33 (1992) (“Abuse of children by batterers may be more likely when the marriage is dissolving. . . .”).

<sup>13</sup> Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 Am. U. J. Gender, Soc. Pol’y & L. 657, 704 (2003) (“At its extreme, this need to punish the mother can lead to the batterer’s decision to kill her children.”); Hart, *supra* note 13 at 33-34 (“When a [survivor] has separated from her batterer . . . he may turn to abuse and subjugation of the children as a tactic . . .”).

both the survivor and her children are put at unnecessary additional risk.<sup>14</sup>

Instead of focusing solely on protecting Ms. Juarez from abuse as the DVPA mandates, the trial court's order directs the parties to seek relief in the divorce proceeding, leaving it to the family court to "solve the overall problem." RP 7:4-13. This was an abdication of the trial's court judicial responsibility to rule consistently with the express purpose and policy of the DVPA. *See generally* Br. of App't. To the extent that the trial court's order reflects a concern that the DVPO would interfere with the dissolution proceeding, that concern is both improper, *see id.* at 9-10, and unwarranted: an abuser can seek modification of the DVPO in the family court at any time. *Gourley v. Gourley*, 158 Wn.2d 460, 477 (2006) (noting that year-long DVPO was subject to modification in family court proceeding). Until that happens, the survivor has the critical DVPO protections. In contrast, when the court grants only a short-term DVPO, the *survivor* bears the risk that it will lapse before she (or the family court) can take further action, leaving her unprotected and at risk. That danger is highlighted in this case: the court denied Ms. Juarez a full-year DVPO because Mr. Juarez had initiated a dissolution proceeding, but because he did not move forward with the dissolution, Ms. Juarez had

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<sup>14</sup> Research shows that survivors with children are more likely to experience violence following the entry of a DVPO than those without children. Stoeber, *supra* note 7, at 1048.

to return to court to seek an extension of her short-term order before it expired. Br. of App't at 7 n. 1. Whereas a long-term DVPO does not infringe on the abuser's rights in any appreciable way, a short-term DVPO absolutely risks a survivor's bodily integrity and right to be free from domestic violence.

2. *Short-term DVPOs expose survivors to additional psychological harm.*

Short-term orders pose harms beyond the increased risk of physical violence. These harms include the unnecessary logistical and financial burdens—such as lost work time, childcare and transportation costs, and legal costs and fees—that are visited on a survivor like Ms. Juarez, who must repeatedly return to court to renew an order. *See id.* Of greater concern, ongoing court contact can have tremendously negative psychological effects.<sup>15</sup> Seeing the abuser, or even the prospect of doing so, is likely to cause a survivor extreme stress, even trauma. In addition, the survivor may be forced to relive the abuse by having to retell her story repeatedly in order to establish that continued protection is

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<sup>15</sup> Stoever, *supra* note 7, at 1026-27 (for abuse survivors, “returning to court every year to seek extensions of the court’s protection is a physically and psychologically dangerous prospect”); Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror*, 72 (1992) (“If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law.”).

warranted.

The nature of family law proceedings—often complicated, protracted, and bitter—can facilitate ongoing psychological and emotional abuse. Once physical violence is made more difficult by a DVPO, abusers may use the legal system to continue to harass the survivor.<sup>16</sup> Indeed, it appears clear that Mr. Juarez used trial litigation tactics for exactly this purpose by serving Ms. Juarez with a dissolution action *at* the hearing on her DVPO request.<sup>17</sup> Mr. Juarez has not followed through with the dissolution proceeding, tending to confirm that Mr. Juarez filed in retaliation for Ms. Juarez’s DVPO petition rather than for any legitimate use of the court system. In these cases, a trial court may unwittingly become complicit in ongoing abuse by forcing a survivor into family court proceedings in order to obtain sustained protection from violence.

DVPOs were designed to be streamlined, expedited processes precisely to minimize obstacles to legal protections for domestic violence

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<sup>16</sup> Mahoney, *supra* note 6, at 44; *cf. Webster v. Webster*, 166 Wn. App. 1037, 2012 WL 628228 \*8 (Feb. 28, 2012) (reviewing DVPO respondent’s attempts to use civil litigation to intimidate and harass survivor; awarding sanctions for frivolous appeal of trial court’s decision to dismiss respondent’s claims).

<sup>17</sup> *See* RP 5:2-23 (counsel for Mr. Juarez, serving Ms. Juarez with notice of the dissolution proceeding and immediately urging court to consolidate DVPO proceeding with the family law case).

survivors. Washington’s protection order process was expressly intended to provide survivors “easy, quick and effective access to the court system.” Laws of 1992, ch. 111, § 1 (restated in Laws of 1993, ch. 350, § 1). Requiring a survivor to repeatedly return to court in order to receive the legal protection to which she is entitled undermines this explicit statutory goal and is likely to exacerbate and extend her trauma.

B. Requiring a survivor to pursue protection in family court deprives her of the autonomy and self-empowerment that are primary goals of the Domestic Violence Prevention Act.

DVPOs give survivors a critical tool to overcome the cycle of powerlessness and control that is at the core of domestic violence. In a study of Boston-area courts, for example, women reported that their DVPOs showed their abuser they “meant business”; “proved something to him and . . . to myself”; countered the abuser’s belief that “he had power over me . . . [as] it got him to back off and realize that he couldn’t treat me like he did”; and made them “feel less powerless, like there’s something to do.”<sup>18</sup> The process enables the survivor to “regain a sense of control, which in turn enables [her] to take further steps toward improving” her life.<sup>19</sup> Indeed, many survivors have said that the process of obtaining a

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<sup>18</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses*, 165-66 (1999).

<sup>19</sup> Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic*

DVPO is “empowering . . . because it allows them to stand up to the abuser.”<sup>20</sup>

The DVPO process empowers survivors by providing “each victim the right to obtain relief tailored to her needs and remains petitioner-driven throughout.”<sup>21</sup> Thus, “[a]n effective [DVPO] system is designed to ensure that each victim can choose how and when to access the system, what relief to request, and when to exit the system. The voluntary nature of this process centralizes the victim’s autonomy.”<sup>22</sup> This is essential:

The first principle of recovery is the empowerment of the survivor. She must be the author and arbiter of her own recovery. . . . Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.<sup>23</sup>

When a survivor and abuser have children in common, family court proceedings may be necessary to address issues such as dissolution

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*Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 *Cardozo L. Rev.* 1487, 1514-15 (2008); see also Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 *J. L. & Pol’y* 617, 658-59 (2006).

<sup>20</sup> Goldfarb, *supra* note 19, at 1515 (citations omitted).

<sup>21</sup> Emilie Meyer & Maureen Sheeran, National Council of Juvenile & Family Court Judges, *Civil Protection Orders: A Guide for Improving Practice*, 5 (2010).

<sup>22</sup> *Id.*

<sup>23</sup> Herman, *supra* note 15, at 133.

and custody. But that does not relieve the DVPO court from its duty to provide the protection that a survivor seeks, once it establishes that she is eligible for that protection. Where a trial court denies a survivor the statutory remedy specifically intended for her benefit—even though she proves abuse—the court inadvertently perpetuates a cycle that the DVPO remedy was expressly intended to disrupt.

**II. Denying survivors long-term DVPOs unless they pursue a family law action raises constitutional concerns.**

In addition to endangering survivors and being contrary to public policy, denying survivors access to a full DVPO outside of a family law action implicates fundamental rights.

A. Survivors have a fundamental right to personal choice in matters of marriage and family.

Conditioning a domestic violence survivor’s statutorily established right to protection on her participation in a family law action impermissibly intrudes on her fundamental freedoms of personal choice. The United States Supreme Court “has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (internal quotation omitted) (striking down ordinance limiting occupancy of dwelling unit to single family). Determining one’s familial status has

long been recognized as a fundamental right. *See Zablocki v. Redhail*, 434 U.S. 374, 385-88 (1978) (striking down state law requiring a person to become current on child-support payments before obtaining a marriage license).

As noted in Appellant's brief, there are a host of reasons a survivor may choose not to pursue a divorce or custody action that have nothing to do with her need for the protection of a DVPO. Br. of App't at 17. Forcing a survivor to obtain protection through a family law action, as the trial court required in this case, takes away her ability to make that choice. The trial court left Ms. Juarez no choice but to move forward with the family law matter in order to obtain the long-term protection she sought and to which she had already established her right.

The Supreme Court has ruled unequivocally that the government may not burden a fundamental right or compel conduct that interferes with a fundamental right without a compelling reason. *E.g., W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (government may not compel speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (government may not infringe freedom of expressive association). Even where such a compelling interest exists, government action that significantly interferes with the exercise of a fundamental right must be supported by sufficiently important state interests and be closely tailored

to effectuate only those interests. *Zablocki*, 434 U.S. at 388. Here, no compelling state interests are served by forcing Ms. Juarez to obtain long-term protection in a concurrent family law proceeding instead of through a DVPO. On the contrary, Washington case law is clear that protection from domestic violence is itself a compelling state interest. *Gourley*, 158 Wn.2d at 468 (“[T]he government has a compelling interest in preventing domestic violence or abuse.”). Therefore, denying a long-term DVPO such that the only ongoing protection a survivor can obtain is through a family law action unconstitutionally impinges on her right to determine her own familial status.

B. Refusing to grant a statutory remedy after the petitioner has met her burden of proof undermines her fundamental right of access to the courts.

The United States Supreme Court has established access to the courts to be a fundamental right of every individual and essential to the protection of individual rights. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977).<sup>24</sup> This right goes beyond an individual’s ability to physically enter the courthouse; it “insures that access to courts will be adequate, effective, and meaningful.” *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th

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<sup>24</sup> Access to justice also holds a prominent place among the individual rights protected by the Washington Constitution. Wash. Const. art I, § 10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”).

Cir. 1997) (internal quotations and citation omitted). Meaningful access to the courts is necessary to serve justice. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). It presumes the availability of judicial relief without abridgement of fundamental rights. *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1428 (8th Cir. 1986).

Although not every forum or process limitation violates the right to access the courts, that right is undermined when a petitioner with standing is denied a statutory remedy for which she has met her burden of proof. Further, when a judge refers survivors to family court instead of granting the full statutory relief requested, the court abdicates its judicial authority to decide the case before it. *Cf. La Buy v. Howe's Leather Co., Inc.*, 352 U.S. 249, 259-60 (1957) (trial court abdicated judicial constitutional responsibilities by referring case to another factfinder rather than deciding issues presented); *Gelfond v. District Court in and for Second Jud. District*, 504 P.2d 673, 675 (Colo. 1972) (same).

*Amici* urge the Court to avoid any ruling in this case that will encourage trial courts to condition long-term protections upon participating in a collateral legal proceeding. In addition to unconstitutionally impairing survivors' rights in the areas of family decision-making, this practice unconstitutionally limits their access to the courts.

### **III. National trends favor longer-term DVPOs, not short-term ones.**

Beginning in the 1970s, legislatures throughout the country adopted anti-domestic violence laws. These laws addressed the criminal justice response, such as mandatory arrest laws,<sup>25</sup> but they also created a new, survivor-initiated and autonomy-enhancing remedy—the DVPO.<sup>26</sup> Washington was a leader in this national legislative movement, enacting two anti-domestic violence statutes in 1979.<sup>27</sup> In 1984, the legislature adopted the current statute, recognizing DVPOs “as ‘a valuable tool to increase safety for victims and to hold batterers accountable.’” *Danny*, 165 Wn.2d at 209 (quoting Laws of 1992, ch. 111, § 1).

While states (including Washington) have amended their DVPO statutes in various ways over the years, one trend in particular is notable: states have moved away from short-term DVPOs towards those of longer duration. At least twenty-two state legislatures have increased the available duration of DVPOs since 2000.<sup>28</sup>

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<sup>25</sup> Stoeber, *supra* note 7, at 1041-42.

<sup>26</sup> *Id.* at 1042.

<sup>27</sup> See RCW 70.123.010 (funding DV shelters); RCW 10.99.010 (law enforcement to treat DV with same seriousness as similar crimes).

<sup>28</sup> A.B. 707, 101st Leg., Reg. Sess. (Wis. 2013); H.B. 5548, 2012 Gen. Assemb., Reg. Sess. (Conn. 2012); H.B. 441, 2012 Legis., Reg. Sess. (La. 2012); S.B. 320, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); H.B. 2396, 53d Legis., 2d Reg. Sess. (Okla. 2011); S.B. 789, 82d Legis., Reg.

At the same time, courts in other jurisdictions increasingly recognize the benefit of longer-term DVPOs and the inappropriateness of considering irrelevant factors such as marital status or parenthood in determining the duration of a DVPO. In recent years, appellate courts across the nation have upheld DVPOs with durations ranging from five to ten years. *See, e.g., Lite v. McClure*, 120 Haw. 386, 2009 WL 1263099, \*1 (Haw. Ct. App. 2009) (approving ten-year DVPO); *Copp v. Liberty*, 952 A.2d 976, 977 (Me. 2008) (six-year DVPO); *Mallette v. LaFontaine*, 192 Vt. 651, 2012 WL 2880574, \*2 (Vt. 2012) (ten-year DVPO) (citing *Benson v. Muscari*, 769 A.2d 1291, 1294 (Vt. 2001) (five-year DVPO)); *see also Rinas v. Engelhardt*, 818 N.W.2d 767, 771-72 (N.D. 2012) (five years). In each case, the court concluded that long-term protection was necessary and reasonable in light of the particular facts. In some cases, the parties had children in common and the long-term DVPO meant that

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Sess. (Tex. 2011); S.B. 490, 2010 Legis., Reg. Sess. (W. Va. 2010); S.B. 134, 2010 Leg., Reg. Sess. (Ala. 2010); H.R. 336, 145th Gen. Assemb., 2d Reg. Sess. (Del. 2010); H.D. 971, 2009 Legis., Reg. Sess. (Md. 2009); H.D. 182, 2008 Legis., Reg. Sess. (Md. 2008); S.F. 3492, 85th Legis., Reg. Sess. (Minn. 2008); H.B. 1149, 83d Legis., Reg. Sess. (S.D. 2008); H.B. 1293, 86th Gen. Assemb., Reg. Sess. (Ark. 2007); S.B. 1356, 59th Legis., 2d Reg. Sess. (Idaho 2006); H.B. 106, 58th Legis., Budget Sess. (Wyo. 2006); A.B. 99, 2005 Legis., Reg. Sess. (Cal. 2005); S.B. 1029, 2005 Gen. Assemb., 1st Sess. (N.C. 2005); H.B. 1717, 189th Gen. Assemb., Reg. Sess. (Pa. 2005); S.B. 170, 23d Leg., Reg. Sess. (Alaska 2004); H.B. 722, 2003 Legis., Reg. Sess. (Ga. 2003); S. 5532, 226th Legis., Reg. Sess. (N.Y. 2003); S. 69, 21st Legis., Reg. Sess. (Haw. 2001); H.B. 1717, 184th Gen. Assemb., Reg. Sess. (Pa. 2000).

the abuser would not have contact with the child until after the child reached the age of majority. *See, e.g., Copp*, 952 A.2d at 979-80.

Additionally, recent appellate decisions from Ohio and Massachusetts vacated short-term DVPOs where the trial court based its decision on factors such as the pendency of a divorce proceeding or the fact that the parties had children in common. As these courts recognized, marital status and children are not legitimate factors in determining a DVPO's duration, because they are irrelevant to how long the survivor needs protection. Ohio law, like Washington's,<sup>29</sup> provides that a protection order is available "in addition to, and not in lieu of, any other available civil or criminal remedies." *Sinclair v. Sinclair*, 914 N.E.2d 1084, 1086 (Ohio Ct. App. 2009) (quoting R.C. 3113.31(G)). In *Sinclair*, when a trial court limited the DVPO to one year due to a pending divorce proceeding, the court of appeals disagreed. *Id.* at 1086 (finding "the trial court abused its discretion by mistakenly concluding that a divorce decree stops the threat of domestic violence"); *see also Parker v. Parker*, No. C-130658, 2014 WL 7177914, at \*2-3 (Ohio Ct. App. Dec. 17, 2014) (same).

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<sup>29</sup> RCW 26.50.025(2) ("Relief under this chapter shall not be denied or delayed on the grounds that the relief is available in another action.").

In the recent Massachusetts case, the petitioning survivor had a child in common with her abuser. *Moreno v. Naranjo*, 987 N.E.2d 550 (Mass. 2013). Although the Massachusetts statute permitted the court to issue a full-year protection order, the trial court granted only a six-month order because of concern about “the impact that the order would have on [the abuser’s] visitation with the child.” *Id.* at 551. The appellate court rejected this consideration as irrelevant to the amount of time reasonably necessary to protect the survivor from further abuse.<sup>30</sup> *Id.* at 552.

Orders such as the one in this case erode Washington’s decades-long commitment to preventing domestic violence and helping survivors obtain safety. Even more troubling, in cases where, as here, the abuser files the dissolution action, an abuser may use the court system to continue exerting control over the survivor by dictating when and where the survivor receives protection. Rather than reducing or preventing domestic violence, this practice inadvertently perpetuates it.

This Court should hold, as the *Moreno* and *Parker/Sinclair* courts recognized, that a trial court errs when it refuses to issue a full-term DVPO based on considerations that are irrelevant to survivor safety. The only relevant factor in determining the proper duration of a DVPO is the

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<sup>30</sup> Despite mootness concerns, *Moreno* addressed the legal issue, recognizing the case raised an “important concern.” 987 N.E.2d at 551.

amount of time necessary to protect the survivor from further abuse. *See Sinclair*, 914 N.E.2d at 1086. A pending dissolution proceeding is irrelevant, because dissolution does not obviate further protection. *Id.* And the existence of children in common is not relevant because (i) temporary custodial rights can be addressed in the protection order, and (ii) the only issue that should govern a decision about the length of a DVPO is the amount of time necessary to protect the survivor. *See Moreno*, 987 N.E.2d at 552.

#### CONCLUSION

*Amici* urge the Court to hold that a trial court violates Chapter 26.50 RCW, and abuses its discretion, when it issues a short-term domestic violence protection order and directs the survivor to seek additional protections in a family law proceeding. Such orders increase the risk of harm and intrude on constitutionally protected rights. Moreover, whether the survivor is married to or has children in common with her abuser is irrelevant to the sole issue before the court—namely, what is required for her protection.

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DATED this 16th day of February, 2016.

Respectfully submitted,

By s/ Robert B. Mitchell

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## CERTIFICATE OF SERVICE

I hereby certify that on this date, I arranged for service of the foregoing Brief of Amici Curiae, with attachments, upon the following parties:

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**COPIES OF  
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OPINIONS**

2014 WL 7177914

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
First District, Hamilton County.

Cherilyn Brandee PARKER, Petitioner–Appellant,

v.

Darrick PARKER, Respondent–Appellee.

No. C–130658.

Decided Dec. 17, 2014.

Appeal from Hamilton County Court of Common Pleas,  
Domestic Relations Division.

#### Attorneys and Law Firms

Kenyatta Mickles, for Petitioner–Appellant.

Darrick Parker, pro se.

#### Opinion

CUNNINGHAM, Presiding Judge.

\*1 { ¶ 1 } Petitioner-appellant Cherilyn Brandee Parker appeals the Hamilton County Court of Common Pleas, Domestic Relations Division’s adoption of a magistrate’s order limiting the duration of the civil protection order issued against her husband, respondent-appellee Darrick Parker. Brandee had requested a five-year protection order, but the court limited the order to a one-year period because Brandee had instituted divorce proceedings. Because the institution of divorce proceedings does not automatically limit the duration of a civil protection order, we reverse.

{ ¶ 2 } Brandee and Darrick married in 1996. The couple had four children. In 2013, Darrick attacked Brandee, striking her in the face and eye. He then hit her with a vacuum cleaner three or four times. Darrick was arrested and charged with criminal domestic violence. The charge was ultimately dismissed at Brandee’s request. Following this attack, the parties separated. Two months later, Darrick entered the marital home at 2:30 a.m. while Brandee was sleeping. He attempted to rape her by grabbing her arms and legs and trying to disrobe her.

Following a struggle, Brandee was able to free herself and summon the police.

{ ¶ 3 } Four days later, Brandee filed this petition for a civil protection order, in the case numbered DV1300326. A magistrate issued an ex parte civil protection order and set the matter for a full hearing. Due to difficulties in obtaining service on Darrick, a full hearing was not held until five months later. During that time, Brandee had filed for divorce, in the case numbered DV1301718.

{ ¶ 4 } At the full hearing on the civil protection petition, Brandee requested an order of five years’ duration. After the hearing, the magistrate found that Brandee was in danger of further violence by Darrick. But the magistrate issued a protection order effective only for one year, concluding that “[a]s the parties are divorcing, [Brandee’s] request for a five year CPO is denied.” The trial court adopted the magistrate’s civil protection order, and Brandee filed a timely notice of appeal from that entry.

{ ¶ 5 } In her assignment of error, Brandee argues that the trial court abused its discretion by limiting the duration of the civil protection order to a one-year period based solely on the fact that she was seeking a divorce. She asserts that the magistrate and trial court erred in concluding that a divorce decree, presumed to be in place one year hence, would stop the threat of domestic violence, and would be an effective substitute for the protections afforded by a civil protection order.

{ ¶ 6 } Civ.R. 65.1 and R.C. 3113.31 provide a special statutory proceeding to expedite the issuance of orders to protect the victims of domestic violence. The trial court’s adoption of a magistrate’s order is a final, appealable order. See Civ.R. 65.1(G); see also *Heimann v. Heekin*, 1st Dist. Hamilton No. C–130613, 2014–Ohio–4276, ¶ 8.

\*2 { ¶ 7 } Because R.C. 3113.31 expressly authorizes a trial court to tailor civil protection orders to the particular circumstances of each case, a trial court is to be afforded discretion in establishing the scope of a protection order. See *Abuhamda–Sliman v. Sliman*, 161 Ohio App.3d 541, 2005–Ohio–2836, 831 N.E.2d 453, ¶ 9 (8th Dist.). Therefore, when, as here, an appellant challenges the scope of a civil protection order, an appellate court reviews the order under an abuse-of-discretion standard. See *Walters v. Walters*, 150 Ohio App.3d 287, 2002–Ohio–6455, 780 N.E.2d 1032, ¶ 1 (4th Dist.); compare *Klecky v. Klecky*, 1st Dist. Hamilton No. C–110116, 2011 Ohio App. LEXIS 3473, \*1 (Aug. 19, 2011) (when the issue on appeal is whether a protection

order should have been issued at all, however, an appellate court must determine whether sufficient, credible evidence supports the trial court's decision). An abuse of discretion is shown when a decision is unreasonable, arbitrary, or unconscionable; that is, when the trial court issues a ruling that is not supported by a "sound reasoning process." *AAAA Ents., Inc. v. River Place Community Urban Rede v. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); see *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{ ¶ 8 } Civil protection orders issued under R.C. 3113.31 are an "appropriate and efficacious method to prevent future domestic violence \* \* \*." *Felton v. Felton*, 79 Ohio St.3d 34, 41, 679 N.E.2d 672 (1997). Therefore, magistrates and trial courts "have an obligation [to issue orders that] carry out the legislative goals to protect the victims of domestic violence." *Id.* at 44-45, 679 N.E.2d 672. Because violence against a former spouse may not stop with a separation, and because that violence often escalates once a battered woman attempts to end the relationship, the Ohio Supreme Court has recognized "strong policy reasons" for courts to issue, when necessary, protection orders extending even after a divorce has become final. *Id.* at 40-41, 679 N.E.2d 672, citing Klein and Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L.Rev. 801, 816 (1993).

{ ¶ 9 } Brandee correctly argues that she should not be denied a civil protection order of sufficient duration simply because she had concurrently sought other legal remedies to remove herself from the danger of domestic violence. R.C. 3113.31(G) expressly provides that "[t]he remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies," including divorce proceedings. See *Felton* at 41, 679 N.E.2d 672.

{ ¶ 10 } In *Sinclair v. Sinclair*, 182 Ohio App.3d 691, 2009-Ohio-3106, 914 N.E.2d 1084 (4th Dist.), the appeals court faced a nearly identical situation. After reporting various acts of domestic violence, the petitioner-wife had sought a five-year civil protection order. The magistrate, however, issued only a six-month protection order. The magistrate posited that since the wife had "vacated the marital residence, and the parties intend to terminate their marriage, there [would] be little future contact and no need to continue a civil protection order beyond the time of the divorce proceedings." *Id.* at ¶ 3, 914 N.E.2d 1084. The appeals court concluded that the trial court's adoption, in part, of the magistrate's decision was error. The trial court's reliance on the pending

divorce did not alleviate the need for a longer-duration protection order to stop the threat of domestic violence by the husband. See *id.* at ¶ 8, 914 N.E.2d 1084.

\*3 { ¶ 11 } We adopt the sound reasoning of the *Sinclair* court and reject the contention that divorce proceedings automatically alleviate the need for a protection order. Here the magistrate and trial court found that Darrick presented a threat of domestic violence to Brandee sufficient to justify issuing a protection order. The record does not demonstrate that any part of the divorce proceeding, in the case numbered DV1301718, was reviewed in this proceeding. We cannot determine if the magistrate or the trial court considered whether the protections, if any, crafted in the divorce proceedings were sufficient to protect Brandee from Darrick.

{ ¶ 12 } Thus the sole basis in the record for the trial court to limit the requested five-year protection period to a single year was Brandee's institution of divorce proceedings. Because the institution of divorce proceedings does not automatically limit the duration of a civil protection order, there is no "sound reasoning process" in this limited record supporting the trial court's decision. We hold that the trial court abused its discretion in adopting the magistrate's order limiting the duration of the requested civil protection order. See *Sinclair* at ¶ 12; see also *AAAA Ents.*, 50 Ohio St.3d at 161, 553 N.E.2d 597. The assignment of error is sustained.

{ ¶ 13 } Accordingly, we reverse the judgment of the trial court and remand the cause to the trial court for it to fashion a protection order consistent with its authority under Civ.R. 65.1 and R.C. 3113.31, and with this opinion.

Judgment reversed and cause remanded.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

HILDEBRANDT and FISCHER, JJ., concur.

#### All Citations

Slip Copy, 2014 WL 7177914, 2014 -Ohio- 5516





182 Ohio App.3d 691  
Court of Appeals of Ohio,  
Fourth District, Athens County.

SINCLAIR, Appellant,  
v.  
SINCLAIR, Appellee.

Nos. 08CA16, 08CA25.

Decided May 18, 2009.

### Synopsis

**Background:** Wife petitioned for civil protection order (CPO) against husband. Magistrate of the Common Pleas Court, Athens County, issued decision recommending six-month CPO. Wife objected to decision. The Court of Common Pleas lengthened duration of CPO to one year. Wife appealed.

**[Holding:]** The Court of Appeals, [McFarland, J.](#), held that issuance of one-year CPO, rather than five-year CPO, improperly limited duration based on policy that divorce proceedings automatically alleviated need for CPO.

Reversed and remanded.

[Harsha, J.](#), concurred in judgment only.

West Headnotes (8)

[1] **Protection of Endangered Persons**  
🔑 Discretion of lower court

When the scope of a civil protection order is the basis for appeal, the reviewing court's standard of review is abuse of discretion.

[3 Cases that cite this headnote](#)

[2] **Courts**

🔑 Abuse of discretion in general

Abuse of discretion is more than an error of judgment; rather, it indicates that a ruling was unreasonable, arbitrary, or unconscionable.

[Cases that cite this headnote](#)

[3] **Appeal and Error**  
🔑 Abuse of discretion

When applying the abuse-of-discretion standard, appellate court may not substitute its judgment for that of the trial court.

[2 Cases that cite this headnote](#)

[4] **Protection of Endangered Persons**  
🔑 Commencement and Duration in General

Issuance to wife of one-year civil protection order (CPO) against husband, rather than five-year CPO, improperly limited duration based on policy that divorce proceedings automatically alleviated need for CPO; CPO remedy was available in addition to other remedies. [R.C. § 3113.31\(G\)](#).

[1 Cases that cite this headnote](#)

[5] **Appeal and Error**  
🔑 Matters not included or shown in general  
**Appeal and Error**  
🔑 Rulings relating to appeal and proceedings in intermediate court

Consideration of evidence outside the record is inappropriate and can constitute reversible error.

[Cases that cite this headnote](#)

[6] **Trial**  
🔑 Power and duty of court in general

It is an abuse of discretion for a court to conduct its own investigation and consider its own observations as evidence in deciding a case.

[Cases that cite this headnote](#)

[7] **Evidence**  
🔑 Records or decisions in same case  
**Evidence**  
🔑 Records and decisions in other actions or proceedings

A court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of prior proceedings in the immediate case.

[Cases that cite this headnote](#)

[8] **Evidence**  
🔑 Records and decisions in other actions or proceedings

Trial court could not take judicial notice of divorce case in wife's action against husband for civil protection order (CPO). [R.C. § 3113.31\(G\)](#).

[1 Cases that cite this headnote](#)

**Attorneys and Law Firms**

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Margaret Drew, Clinic Director, urging reversal for amicus curiae University of Cincinnati College of Law

Domestic Violence and Civil Protection Order Clinic.

**Opinion**

\*\*1085 [McFARLAND](#), Judge.

\*693 { ¶ 1 } Petitioner-appellant, Tracy Sinclair, appeals the decision of the Athens County Common Pleas Court. Appellant contends that it was error for the trial court to issue a one-year civil protection order against respondent-appellee, Charles Sinclair, instead of a five-year protection order, as she requested. Because we find the trial court improperly limited the duration of the civil protection order (“CPO”) because a divorce proceeding automatically alleviates the need for a CPO, we find error. Additionally, we find the trial court impermissibly relied upon evidence outside the record in making its decision, and we reverse the decision and remand the matter for proceedings consistent with this opinion.

**I. Facts**

{ ¶ 2 } In January 2008, appellant and her husband, appellee, had an argument at a convenience store. The argument escalated into a physical altercation, and appellant called 911. As a result of her call, police arrived at the scene and arrested appellee. Five days later, appellant filed a petition for a civil protection order under [R.C. 3113.31](#) and the trial court immediately granted an ex parte CPO.

{ ¶ 3 } Approximately two weeks later, the magistrate of the Athens County Common Pleas Court held a full hearing on the issue. Both parties were represented by counsel at the hearing. During the hearing, appellant testified that appellee had recently committed various acts of domestic violence, including causing her physical injury, intimidating her with a handgun and threats, and having nonconsensual sex with her. Appellee testified only concerning the use and possession of the couple's automobiles. After the hearing, the magistrate issued a decision recommending a six-month CPO. The magistrate's fourth finding of fact states: “As Petitioner has vacated the marital residence, and the parties intend to terminate their marriage, there will be little future contact and no need to continue a civil protection order beyond the time of the divorce proceedings.”

{ ¶ 4 } Partly based upon her belief that the six-month CPO was inadequate, appellant filed an objection to the

magistrate's decision. Appellant asked that the trial court issue a full five-year CPO, as permitted by statute, instead of the six-month CPO recommended by the magistrate. After considering appellant's objections, the trial court declined to issue a five-year CPO, but lengthened the duration of the recommended CPO from six months to one year. The trial court's entry states:

\*694 { ¶ 5} "The Court in general agrees with the Magistrate's finding there is no need to continue a civil protection order beyond a divorce proceeding, because to do so is to assume the failure of the divorce proceeding. But an examination of the divorce file does not reveal that Plaintiff sought a temporary order that would supplant the civil protection order, and, therefore, the Court \* \* \* will issue the civil protection order for one year rather than six months, to allow more time for the divorce proceeding to end and the parties to make appropriate plans."

{ ¶ 6} Subsequent to the trial court's judgment entry and filing of the one-year civil protection order, appellant timely filed the current appeal.

## II. Assignment of Error

I. The trial court erred in issuing a one-year civil protection order instead of a full five year order when the respondent committed serious acts of domestic violence.

## III. Standard of Review

<sup>[1]</sup> <sup>[2]</sup> <sup>[3]</sup> { ¶ 7} When the scope of a civil protection order is the basis for appeal, the \*\*1086 reviewing court's standard of review is abuse of discretion. *Walters v. Walters*, 150 Ohio App.3d 287, 2002-Ohio-6455, 780 N.E.2d 1032, at ¶ 10; *Williamson v. Williamson*, 180 Ohio App.3d 260, 2008-Ohio-6718, 905 N.E.2d 217, ¶ 37. Abuse of discretion is more than an error of judgment. Rather, it indicates that a ruling was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. Furthermore, when applying the abuse-of-discretion standard, we may not substitute our judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

## IV. Legal Analysis

<sup>[4]</sup> { ¶ 8} Appellant argues that under the particular circumstances of her case, it was error for the trial court to issue a one-year instead of a five-year civil protection order. According to appellant, the trial court abused its discretion by mistakenly concluding that a divorce decree stops the threat of domestic violence. Because the trial court decision improperly limited the duration of the CPO based on a policy that divorce proceedings automatically alleviate the need for a CPO, we find error. R.C. 3113.31(G) states that the CPO remedy is "in addition to, and not in lieu of, any other available civil or criminal remedies."

<sup>[5]</sup> <sup>[6]</sup> { ¶ 9} Further, "consideration of evidence outside the record is inappropriate and can constitute reversible error." *In re Estate of Visnich*, 11th Dist. No. 2005-T-0128, 2006 WL 3000427, at ¶ 15, citing *Boling v. Valecko* (Feb. 6, 2002), 9th Dist. No. 20464, 2002 WL 185182. "[I]t is an abuse of discretion for a court to conduct its own investigation and consider its own observations as \*695 evidence in deciding a case." *State v. Stanley*, 11th Dist. No. 2007-P-0104, 2008-Ohio-3258, 2008 WL 2582641, at ¶ 28. "It is axiomatic that the trier of fact must only consider evidence in the record." *In re K.B.*, 12th Dist. No. CA2006-03-077, 2007-Ohio-1647, 2007 WL 1041427, at ¶ 24.

<sup>[7]</sup> { ¶ 10} We do note that Evid.R. 201 permits the taking of judicial notice; however, "a court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of prior proceedings in the immediate case." *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 22, at fn. 3, quoting *Diversified Mtge. Investors, Inc. v. Athens Cty. Bd. of Revision* (1982), 7 Ohio App.3d 157, 159, 7 OBR 201, 454 N.E.2d 1330.

<sup>[8]</sup> { ¶ 11} In the case sub judice, the trial court, in its judgment entry, specifically states that it relied, at least in part, on the parties' divorce case in making its determination: "[A]n examination of the divorce file does not reveal that Plaintiff sought a temporary order that would supplant the civil protection order, and, therefore, the Court \* \* \* will issue the civil protection order for one year rather than six months, to allow more time for the divorce proceeding to end and the parties to make appropriate plans." Further, the trial court could take judicial notice only from the prior proceedings of the CPO case and not the divorce case.

{ ¶ 12} Here, no part of the divorce case was entered into the record in appellant's separate, civil protection case against appellee. Because that evidence was not

presented at the hearing, appellant did not have an opportunity to question, examine, or clarify it. Accordingly, the trial court abused its discretion in limiting the duration of the CPO based on a pending divorce and relying upon such evidence in making its decision. Therefore, we reverse the decision of the trial court and remand the matter for further proceedings consistent with this opinion.

**\*\*1087** Judgment reversed and cause remanded.

[PETER B. ABELE, J.](#), concurs.

[HARSHA, J.](#), concurs in judgment only.

**All Citations**

182 Ohio App.3d 691, 914 N.E.2d 1084, 2009 -Ohio-3106



2012 WL 2880574

Only the Westlaw citation is currently available.

VERMONT SUPREME COURT UNPUBLISHED  
ENTRY ORDER.

Note: Decisions of a three-justice panel are not to be  
considered as precedent before any tribunal.  
Supreme Court of Vermont.

Amanda MALLETTTE  
v.  
George H. LaFONTAINE, III.

No. 2011–385.  
|  
July 11, 2012.

**Synopsis**

**Background:** Mother moved for an emergency relief from abuse order, naming the child’s paternal grandfather as defendant. The Superior Court, Franklin Unit, Family Division, [Linda Levitt, J.](#), issued a final order prohibiting grandfather from abusing or contacting the child, or coming within 500 feet of mother, the child, or her residence, and he appealed.

**[Holding:]** The Supreme Court held that nature of the abuse presented sufficient justification, in and of itself, for ten year protection from abuse order.

Affirmed.

West Headnotes (2)

[1] **Protection of Endangered Persons**  
🔑 Weight and sufficiency

315PProtection of Endangered Persons  
315PIISecurity or Order for Peace or Protection  
315PII(C)Proceedings  
315Pk58Evidence  
315Pk62Weight and sufficiency

Mother’s testimony—corroborated by the

child’s babysitter—describing the child’s sexualized behavior and her identification of paternal grandfather as the source of the behavior was sufficient to meet her burden of demonstrating abuse by a preponderance of the evidence for purposes of mother’s motion seeking protection from abuse order.

1 Cases that cite this headnote

[2] **Protection of Endangered Persons**  
🔑 Hearing and determination  
**Protection of Endangered Persons**  
🔑 “No contact” orders

315PProtection of Endangered Persons  
315PIISecurity or Order for Peace or Protection  
315PII(C)Proceedings  
315Pk51Plenary Proceedings in General  
315Pk57Hearing and determination  
315PProtection of Endangered Persons  
315PIISecurity or Order for Peace or Protection  
315PII(D)Protection Orders in General  
315Pk72Nature, Scope, and Operation of Order  
315Pk77“No contact” orders

While trial court made no explicit findings explaining the lengthy protection from abuse order, prohibiting paternal grandfather from abusing or contacting the child, or coming within 500 feet of mother, the child, or her residence for ten years, the nature of the abuse presented sufficient justification, in and of itself, for the lengthy order; rationale for a ten-year no-contact condition was reasonably inferred from the finding of sexual molestation of child.

Cases that cite this headnote

Appealed from Superior Court, Franklin Unit, Family Division, Docket No. 155–7–11 Frfa, [Linda Levitt](#), Trial Judge.

Present: [REIBER, C.J.](#), [SKOGLUND](#) and [BURGESS, JJ.](#)

**ENTRY ORDER**

\*1 In the above-entitled cause, the Clerk will enter:

Defendant appeals from a final relief from abuse order issued by the superior court, family division, to protect defendant's infant granddaughter. We affirm.

The record evidence may be summarized as follows. Mother and father shared custody of their daughter, who was two and a half years old at the time of the final relief-from-abuse hearing in this matter. In May 2011, mother moved for an emergency relief from abuse order against father. She claimed that, when the child returned from spending time with father, she exhibited inappropriate sexualized behavior and had bruises. The trial court denied the motion, finding that the allegations lacked sufficient "documentation."

In July 2011, mother again moved for an emergency relief from abuse order, naming the child's paternal grandfather as defendant. Mother again alleged that the child had exhibited sexualized behavior; she had referred to people putting fingers in her "peepee hole," placed a toy in her vagina, and removed the clothes from a doll and licked its crotch. She also had an irritation in her vaginal area. Mother's babysitter was defendant's niece and lived for a time in the same household as defendant, where she would often care for the child. The babysitter reported that the child had identified "Papa," the child's name for defendant, as the person who showed her how to do these things.

The trial court issued an emergency relief from abuse order that prohibited defendant from having any contact with mother or the child. Thereafter, after several continuances, the court held a final hearing in September 2011. Mother testified at the hearing, elaborating on the sexualized behaviors and bruising exhibited by the child and confirming the child's report that it was "her Poppa," i.e., defendant, who showed her these behaviors. Mother testified further that the behaviors gradually stopped after issuance of the emergency order in June. The child's babysitter also testified to observing the child engage in a variety of sexualized behaviors with her dolls, and noted redness and bruising in the area of the child's crotch. She also stated that she became concerned about defendant's behavior when he took the child into his bedroom and closed the door. Defendant testified as well, denying the allegations of abuse.

At the conclusion of the hearing, the trial court entered findings on the record. The court expressly found that defendant had sexually abused the child, crediting the testimony of mother and mother's babysitter concerning

the child's sexualized behaviors and her identification of "Poppa," or defendant, as the person who had showed her these behaviors. Accordingly, the court issued a final order prohibiting defendant from abusing or contacting the child, or coming within 500 feet of mother, the child, or her residence. The order provided that it would remain in effect for ten years, until September 29, 2021. This appeal followed.

\*2 Although not clearly developed and argued, several issues are raised by defendant on appeal. First, defendant challenges the sufficiency of the evidence to support the findings, asserting that the court "gave too much weight" to the testimony of mother and her babysitter and too little to the evidence of mother's "acrimonious" relationship with father and her alleged interference with father's visitation the prior May. Defendant also observes that mother did not report the sexual abuse to the police, that several adults lived in the house with defendant, and that there was no medical testimony corroborating the abuse.

The factual findings of a trial court must be viewed in the light most favorable to the judgment, disregarding the effect of modifying evidence, and they will not be disturbed unless clearly erroneous. *Coates v. Coates*, 171 Vt. 519, 520, 769 A.2d 1 (2000) (mem.). Moreover, as we have explained, "[i]n matters of personal relations, such as abuse prevention, the family court is in a unique position to assess the credibility of witnesses and weigh the strength of evidence at hearing." *Raynes v. Rogers*, 183 Vt. 513, 955 A.2d 1135, 2008 VT 52, ¶ 9. Thus, "[w]e will uphold factual findings if supported by credible evidence, and the court's conclusions will stand if the factual findings support them." *Coates*, 171 Vt. at 520, 769 A.2d 1.

<sup>[1]</sup> Viewed under this standard, we find no basis to disturb the judgment. Mother's testimony—corroborated by the child's babysitter—describing the child's sexualized behavior and her identification of defendant as the source of the behavior was sufficient to meet her burden of demonstrating abuse by a preponderance of the evidence. *Id.* As noted, the trial court was uniquely situated to weigh the evidence and the credibility of the witnesses, and we discern no basis for a finding of clear error.

Defendant's additional evidentiary claims require no extended discussion. His assertion that the trial court "gave too much deference to its temporary Order" finds no support in the record. His claim that the evidence failed to support the court's finding that some of defendant's conduct toward the child could be characterized as "grooming" behavior is unsupported by any argument or showing that the finding, even if

erroneous, was unduly prejudicial, given the primary finding of abuse. See *Mills v. Mills*, 167 Vt. 567, 569, 702 A.2d 79 (1997) (mem.) (holding that erroneous finding that was not essential to decision was harmless). Similarly, his claim that the trial court erred in denying a request to serve interrogatories on mother contains no clear claim or showing as to how he was prejudiced by the ruling.

[2] Finally, defendant contends that the ten-year duration of the order was unjustified. We have recognized that the abuse-prevention statute “imposes no limit on the duration of relief-from-abuse orders” and have upheld an order as long as five years in length where the record revealed a clear rationale for the provision. *Benson v. Muscari*, 172 Vt. 1, 9–10, 769 A.2d 1291 (2001) (noting that, on the record evidence, the trial “court could thus conclude that only an order of long duration would ensure a sufficient cooling-off period to minimize the risk of further abuse”); see also *Thibodeau v. Thibodeau*, 178 Vt. 457, 869 A.2d 142, 2005 VT 14, ¶ 4 (mem.) (trial court extended relief-from-abuse order for additional six years,

to terminate when child reached age of majority). While the court here made no explicit findings explaining the lengthy order, the nature of the abuse presents sufficient justification in and of itself. The rationale for a ten-year no-contact condition is reasonably inferred from the finding of sexual molestation of an infant child. Appellant offered no reason as to why the court should have assumed the need for protection would cease at any point short of ten years, or that the court otherwise exceeded its discretion under these circumstances. See *Benson*, 172 Vt. at 9, 769 A.2d 1291 (upholding a five-year restraining order where there “was no basis to conclude that a five-year period is unreasonable as a matter of law”).

**\*3 Affirmed.**

#### All Citations

Not Reported in A.3d, 2012 WL 2880574



120 Hawai'i 386

Unpublished Disposition

Unpublished disposition. See

HI R RAP Rule 35 before citing.

Intermediate Court of Appeals of Hawai'i.

Gary A. LITE, Petitioner-Appellee,

v.

Yukiko McCLURE, Respondent-Appellant.

No. 29107.

|

May 8, 2009.

Appeal from the Family Court of the Second Circuit (FC-DA No. 08-1-0128).

#### Attorneys and Law Firms

Byron Y. Fujieda (Sloper & Fujieda), on the brief, for Respondent-Appellant.

RECKTENWALD, C.J., WATANABE and FUJISE, JJ.

#### SUMMARY DISPOSITION ORDER

\*1 Respondent-Appellant Yukiko McClure (McClure) appeals from an Order for Protection entered by the Family Court of the Second Circuit (family court)<sup>1</sup> on April 3, 2008.

<sup>1</sup> The Honorable Richard T. Bissen, Jr., presided.

On March 24, 2008, in FC-DA No. 08-1-0128, Petitioner-Appellee Gary A. Lite (Lite) filed an ex parte petition for a temporary restraining order pursuant to Hawaii Revised Statutes (HRS) Chapter 586 (Petition) against McClure. The family court issued a temporary restraining order, and subsequently conducted a hearing on the Petition on April 3, 2008. The family court then entered the Order for Protection, which restrained McClure from contacting or threatening Lite, passing within 100 yards of Lite's residence, attending Adult Ballroom classes located at the Kihei Community Center, and entering and/or visiting Lite's workplace. The Order for Protection was effective for a period of ten years.

On appeal, McClure contends that:

(1) The family court's "findings of fact were clearly erroneous when [the family court] granted the order for protection in finding that there was domestic abuse in the past and that a protective order was necessary to prevent future acts of domestic abuse or recurrence of abuse."

(2) The family court "erred in concluding a[t]en year Order [for] Protection was needed to prevent domestic abuse or a recurrence of abuse."

Upon careful review of the record and the brief submitted by McClure<sup>2</sup> and having given due consideration to the arguments advanced and the issues raised, we resolve McClure's points of error as follows:

<sup>2</sup> No answering brief was filed.

(1) The family court's findings of past domestic abuse and that a protective order was necessary to prevent future acts of domestic abuse were supported by substantial evidence, and were not clearly erroneous.

"Domestic abuse" is defined, in part, as "[p]hysical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members[.]"HRS § 586-1 (2006).<sup>3</sup> McClure and Lite both testified that they had been in a dating and intimate relationship. Based on that testimony, the family court properly found that their relationship fell within the definition of household members.

<sup>3</sup> A "family or household member" includes "persons who have or have had a dating relationship."HRS § 586-1 (2006). A "dating relationship" is defined, in part, as "a romantic, courtship, or engagement relationship, often but not necessarily characterized by actions of an intimate or sexual nature[.]"HRS § 586-1.

"Extreme psychological abuse" is defined as "an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress."HRS § 586-1.

Lite testified that McClure engaged in a course of conduct that continually bothered Lite by going to Lite's condominium,

arguing with Lite, and calling the police to have Lite arrested. Lite specifically testified that:

I am terrified that an encounter with her will end in my arrest, because [in] previous encounters she has lied about what has occurred and I have been arrested. I have-the last couple times she has come unannounced to my door, I have had anxiety attacks. I can't-I am not able to tolerate being in her presence.

\*2 Lite's testimony was substantial evidence of "extreme emotional distress" as a result of McClure's intentional course of conduct. The testimony of a single witness is enough to support the determination of the family court. *In re Jane Doe, Born on June 20, 1995*, 95 Hawai'i 183, 196-97, 20 P.3d 616, 629-30 (2001) (citations omitted); *In re "A" Children*, 119 Hawai'i 28, 43, 193 P.3d 1228, 1243 (App.2008) (citation omitted).

Lite also testified that although he had attempted to end the relationship with McClure on several occasions, McClure continued to appear at his residence unannounced. These unannounced visits resulted in Lite being arrested on several occasions.

Accordingly, there was sufficient evidence to support the family court's findings that domestic abuse had occurred and that a protective order was necessary to prevent future acts of domestic abuse.

(2) The family court did not abuse its discretion by setting the term of the Order for Protection at ten years. [HRS § 586-5.5\(a\)](#) provides that a protective order may be issued for a "fixed reasonable period as the court deems appropriate."

At the April 3, 2008 hearing, Lite requested that the family court issue a no-contact protective order that would last "[f]orever, as long as the Court will allow." In accordance with [HRS § 586-5.5\(a\)](#), the family court did not grant Lite's request for an indefinite protective order, and instead set the term of the Order for a fixed period of ten years.

In the absence of any legal impediment to a term of ten years, the setting of the term of the Order for Protection at ten years was not unreasonable and did not disregard the rules and principles of law, and accordingly was not an abuse of discretion. See *In re Guardianship of Carlsmith*, 113 Hawai'i 211, 223, 151 P.3d 692, 704 (2006) (holding that an abuse of discretion occurs when a court disregards the law to the substantial detriment of a party) (citations omitted).

Therefore,

IT IS HEREBY ORDERED that the Order for Protection filed April 3, 2008 in FC-DA No. 08-1-0128 is hereby affirmed.

#### All Citations

120 Hawai'i 386, 206 P.3d 472 (Table), 2009 WL 1263099