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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

ESMERALDA CHAVEZ OCHOA,

Respondent,

V.

VICTOR OCHOA,

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

18-2-01911-39

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the respondent's request to exclude witness testimony.

2. The trial court erred when it denied the respondent's request to keep the petitioner's testimony within the borders of the petition.

3. The trial court erred when it declined to follow the clear language of the statute because the petitioner was not represented at the start of legal proceedings.

B. ISSUES PRESENTEED

1. Does Due Process require adequate witness disclosure and time to prepare in hearings governed by ER 1101 and RCW 26.50?

2. Does Due Process and RCW 25.50 require that a petitioner' testimony be kept within the boundaries of the petition?

C. LAW

The body of law on which this argument is made is derived from the 14th Amendment to the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Constitution, 14th Amendment.

Hearings under RCW 26.50 are conducted under ER 1101(3).

When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations . . . . Protection order proceedings under Chapters 7.90, 7.92, 7.94, 10.14, 26.50, and 74.34 RCW.

ER 1101(c)(4).

Issues of law are reviewed de novo. Interlake Sporting Ass'n v. State Boundary Review Bd., 158 Wn.2d 545, 551 (2006). This includes Constitutional issues. Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 703 (2011).

D. FACTUAL HISTORY

It should be noted for the Court of Appeals that the brief filed in Superior Court on August 23, 2018 contained errors with respect to dates and opposing counsel did not have time to write a response given time constraints. CP 15-25. What follows is a correct recital of the facts to the best of counsel's knowledge.

On July 5, 2018, the respondent and the petitioner were present for a hearing on the petition. Temporary orders were in effect. On this date, Counsel for the Petitioner, Mr. Tait, informed Mr. Newhouse that the petitioner would have 4-5 witnesses. This was the first time the respondent had any notice that witnesses would be called. A continuance was requested due to the witness issue and because a contested hearing of this nature typically must be specially set to ensure that equate time is available. When Mr. Newhouse arrived back at his office on this same day, he sent an email to Mr. Tait asking for witness information. No response was ever received to this email. A few days later Mr. Newhouse called Mr. Tait's office. Mr. Newhouse learned that Mr. Tait was recovering from a

recent surgery. Mr. Newhouse did express concern about the lack of witness information.

On July 17, 2018, Mr. Newhouse still had not received any witness information from the petitioner. He emailed Mr. Tait's office expressing concern about the lack of witness information while acknowledging that Mr. Tait would likely need a continuance if his health was an issue. His office did request a continuance and there was agreement to have the matter set for August 23, 2018. The continuance was authorized on July 19, 2018. RP 2-3. CP 12.

On August 9, 2018, Mr. Tait called Mr. Newhouse. It was a pleasant conversation about the case at hand. Mr. Newhouse again requested the witness information and was told that "some would refuse to speak to [him]" and at least one would only be "appearing by affidavit." The names provided were: Yolanda Cortez, Nancy Chavez, Marissa Morales, and Margarita Licea. No phone numbers or addresses were provided. No email addresses were provided.

On August 13, 2018, Mr. Newhouse again emailed Mr. Tait's office. He made the following request: ". . . I also need some contact info and the subject of each witnesses' testimony. Could you please provide some phone numbers and address at a minimum so that I can properly prepare if my client choses to go forward? I understand that

some may not wish to speak with me, but I will deal with that as I run into it." No response was delivered. The respondent was in utter and complete darkness as to what evidence the petitioner was planning on presenting through testimony or otherwise. The respondent could see the weight of the evidence growing but could not see the evidence. This is not justice as we have come to know it.

On August 23, 2018 all parties were present for a hearing for permanent orders. Also in the courtroom were numerous witness for the petitioner. RP 4-8. The petitioner did not challenge the facts recited on the record by Mr. Newhouse other than concluding that the respondent should have all the information on witness location already and that the law never intended to keep testimony within the boundaries of the petition RP 6-7. The respondent did not know what these witnesses would testify to, what evidence they were going to present, what they witnessed, etc. Seeing the writing on the wall, the respondent had no choice but to go forward on a stipulated trial and request review. RP 11.

E. ARGUMENT

1. DUE PROCESS REQUIRES ADEQUATE WITNESS DISCLOSURE AND TIME TO PREPARE IN HEARINGS GOVERNED BY ER 1101 and RCW 26.50.

The respondent made one single request of the petitioner and it was not unreasonable. The respondent needed to know who the petitioner's witnesses were, how to contact them, and what they were expected to testify about. This is a matter of due process, even though these proceedings are governed by ER 1101(4). This information is required so the respondent can prepare his defense, which any parent must do when the following is threatened through the legal process: 1) contact with children; 2) job security; 3) firearm rights; and 4) the freedom to travel and associate. The negative repercussions from these hearings are absolutely real and some protections must be in placed despite the underlying desire to quickly address domestic violence issues. These protections are necessary as it is easy to claim domestic violence for improper means, as much as society likes to think otherwise. In our case here, nothing but a few names were provided, and they were provided late in the game.

> The United States Constitution guarantees that federal and state governments will not deprive an individual of "life, liberty, or property, without due process of law." U.S. Const. amends. V & XIV. The due process clause of the Fourteenth Amendment confers both procedural and substantive protections. When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. The opportunity to be heard must be "'at a meaningful time and in a meaningful manner,'" appropriate to the case.

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 217 (2006).

> Where an individual's physical liberty is not at stake, courts evaluate three elements in deciding what due process requires: (1) the private interests at stake, (2) the government's interests, and (3) the risk that the procedures used will lead to erroneous decisions.

In re Dependency of S.K.-P., 200 Wn. App. 86, 112 (2017)

The respondent, without a doubt, has a private interest in his children and to associate with who he sees fit.

> Parents have a fundamental right to raise their children without State interference. But parental rights are not absolute and may be subject to reasonable regulation. Limitations on fundamental rights must be "reasonably necessary to accomplish the essential needs of the state and the public order." Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children.

State v. Corbett, 158 Wn. App. 576, 598 (2010). Raising children is a *fundamental right.* Id.

> Nowhere in the constitution does it mention the individual's right to associate with others in whatever form, political party, group or otherwise, to advance or oppose beliefs or ideas. Nonetheless that right is firmly established as an essential method of implementation and exercise of First Amendment guarantees.

Good v. Associated Students of Univ. of Wash., 86 Wn.2d 94, 100 (1975).

The government, also without a doubt, has an interest in quickly resolving domestic violence related issues, but not so quickly that the risk of error becomes too great.

> The legislative, judicial, and executive branches of government have repeatedly declared that it is the public policy of this state to prevent domestic violence by encouraging domestic violence victims to escape violent situations, protect children from abuse, report domestic violence to law enforcement, and assist efforts to hold their abusers accountable. The public policy in this case overwhelmingly requires an affirmative answer to the certified question.

Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200 (2008).

Yakima County Superior Court has made it clear to counsel on a number of other cases that these types of proceedings are supposed

to be streamlined and quick. This case is no different. The court noted:

> Well, first off, I don't know that this is – these proceedings are, I don't know what the right word is, probably that they are streamlined in many ways in order to quickly address issues of domestic violence.

RP 8. The respondent must be abundantly clear here. The Trial Court's desire to quickly resolve these types of cases due to safety concerns is honorable, appreciated, and necessary. However, allowing a case to go forward after a clear demonstration on how one party has precluded the other party from any meaningful defense without limiting or suppressing testimony to rectify the deficiency, violates due process. The respondent is not asking for a full blown complex civil case with all the rules of evidence applied. The respondent is simply requesting that he be allowed to know who the witnesses are, have an opportunity to reach out to them to determine what they are planning on testifying to, and be given time to seek out rebuttal witnesses. If this is too much, the respondent would then simply ask that opposing counsel be required to provide this information at its earliest convenience once asked. These are easy fixes to keep these cases streamlined enough to address the

state's interest in quick resolutions without burying the court in more litigation.

By analogy, when the trial court considers excluding a witness or witnesses after a violation of a *court order*, "[T]he record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." Jones v. City of Seattle, 179 Wn.2d 322, 338 (2013). These are known as the "Burnet Factors." Furthermore, "late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the non-violating party, and the insufficiency of sanctions less drastic than exclusion." Id. at 343. "A trial court's decision on whether to exclude a witness or not will "not be disturbed absent a clear abuse of discretion." Id. at 338. In this case, the respondent respectfully points out that no testimony or evidence was given on the willfulness of the behavior or the prejudice it caused. RP 1-18. No lesser sanction was considered. RP 1-18. Instead, the trial court relied on the representations of opposing counsel that the respondent should have known who the petitioner's witnesses were and did not address the issue concerning contact or the subject of their testimony. RP 9.

Respectfully, denying any remedy under the facts of this case with respect to witness testimony was an abuse of discretion that deprived the respondent of the ability to defend himself against serious accusations that are having a real and negative impact on his life.

2. DUE PROCESS AND RCW 26.50 REQUIRES THAT THE PETITIONER'S TESTIMONY BE KEPT WITHIN THE BOUNDARIES OF THE PETITION.

First and foremost, the respondent incorporates by reference herein the foregoing arguments concerning due process and witness testimony and argues that they also require the Petitioner to plead with enough specificity so that the respondent is afforded an opportunity to defend himself. In these cases governed by RCW 26.50, a mountain of evidence is not required.

> Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010 (3).

Further on in RCW 26.50 we are told that only ONE (1) incident need to be proven. *Just one,* which in reality -without commenting on appropriateness –seriously weighs the scales heavily against respondents. Petitioners need only plead one instance and prove it by a preponderance of the evidence. It ***is not difficult to plead specifics*** in these cases.

> Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

RCW 26.50.020(1)(a).

> There shall exist an action known as a petition for an order for protection in cases of domestic violence. (1) A petition for relief shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought. Petitioner and respondent shall disclose the existence of any other litigation concerning the custody or residential placement of a child of the parties as set forth in RCW 26.27.281 and the existence of any other restraining, protection, or no-contact orders between the parties. (2) A petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties except in cases where the court realigns petitioner and respondent in accordance with RCW 26.50.060(4).

RCW 26.50.030 (1)-(2).

Given the statutory framework here, giving petitioners the absolute freedom to bring in witnesses and information not contained in the petition and adequate without notice to the respondent deprives respondents of a meaningful defense. For purposes of our case, the respondent and his counsel arrived for court on August 23, 2018 to see several witnesses in the gallery and it is not difficult to see how the hearing was going to go and what the outcome would be if the witnesses and the petitioner were allowed to testify without limitation.

The trial court denied the Respondent's request to keep testimony within the boundaries of the petition. RP 8. It reasoned:

> The petitioner when she filed her petition was pro se. She wasn't assisted by an attorney or anybody else it wouldn't appear and drafting the petition. Her petition is in the big scheme of things is actually quite detailed. Many petitions that we see are not detailed at all. They are conclusory, they are perfunctory and I don't know that any – myself or any other judicial officer has ever said, well, because you, you know, your petition although it made out a case for domestic violence because you are, you know, semi-literate or whatever, we're just going to hold you to the four corners of the instrument. I don't think that is the intent of the statute and certainly was not the intent of the legislature in designing the statute in the process as it has evolved.

RP 8. There was no testimony or evidence concerning the petitioner's literacy or assistance in filling out the petition. RP 1-8.

Our Supreme Court has held:

> We give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we may not look beyond the language nor consider the legislative historyWe construe an act as a whole, giving effect to all the language used. Related statutory provisions are interpreted in relation to each other and all provisions harmonized.

C.J.C. v. Corporation of the Catholic Bishop, 138 Wn.2d 699 (1999)

There is nothing in RCW 26.50 that provides exceptions such as what the trial court cited to for pro se litigants (it should be noted that the petitioner was without counsel for a very short time in this case). In fact, what the statute clearly states is this:

> A petition for relief shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

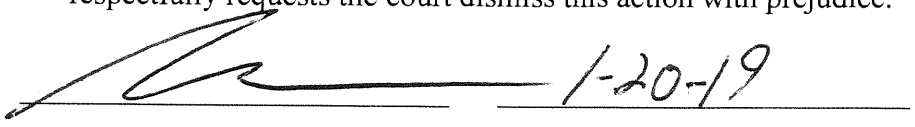
RCW 26.50.030 (1). By statute, petitioners must plead specifics and need only prove by a preponderance of the evidence one incidence of qualifying domestic violence. Considering the clear language of the statute and the serious repercussion that flow from the granting of a protection order of any nature, petitioner's testimony should be held within the boundaries of the petition with exceptions decided

on a case by case basis at the trial court level. This would easily prevent and safeguard against ambush through testimony.

The legislature recognized the difficultly in the court process for some victims, specifically citing language barriers. RCW 26.50.030 (1992 c 111). It also expressed quick and efficient access to the courts had to be made available to victims. Id. Despite these findings, the legislature still required petitioners to plead "specific facts and circumstances." Id. The denial of the respondent's request to limit the petitioner's testimony to the boundaries of the petition was in error as it was contrary to statute, and it deprived the respondent of due process of law.

F. CONCLUSION

The respondent, for all the foregoing reasons, maintains that he was not afforded the process due to him. He was denied a meaningful opportunity to defendant himself. For these reasons, the respondent respectfully requests the court dismiss this action with prejudice.



Alex Newhouse, wsba#40052 Date: 1-20-19

D. DEFENDANT'S ACKNOWLEDGMENT

I, VICTOR OCHOA, acknowledge that I have been personally served with an exact copy of the Appellant's Brief hereto attached. I received a hardcopy on January 23rd, 2019 from my attorney, Alex Newhouse.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct to the best of my knowledge. I have no further arguments to present at this time.

1/23/19 Sunnyside, Washington
Date and Place of Signature

VICTOR OCHOA

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ESMERALDA CHAVEZ OCHOA Respondent, v. VICTOR OCHOA, Appellant.	Trial Court: 18-2-01911-39 Appellate No: 363414 **CERTIFICATE OF SERVICE**

CERTIFICATE

I certify that I mailed a copy of the Appellant's Brief to the following addresses, postage prepaid on January 23, 2019:

Christopher Tait, 403 West Chestnut Ave., Yakima, WA 98902-3438

Tracking number: 7018 0680 0001 2794 7224, USPS certified

~~Alex Newhouse, Attorney for Defendant~~.

Respectfully submitted this 23rd day of January, 2019

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