

**FILED**

JUL 15 2019

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.**

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**APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY**

**18-2-01911-39**

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**BRIEF OF RESPONDENT**

CHRIS TAIT  
ATTORNEY FOR  
RESPONDENT

[1]

*Tait Law Office, Inc., P.S.  
403 W. Chestnut Avenue  
Yakima, Washington 98902  
Phone: (509) 248-1346  
Fax: (509) 248-1034*

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*Tait Law Office, Inc., P.S.*  
403 W. Chestnut Avenue  
Yakima, Washington 98902  
Phone: (509) 248-1346  
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**COURT OF APPEALS, DIVISION III,  
STATE OF WASHINGTON**

**ESMERALDA  
CHAVEZ OCHOA  
Respondent,**

**And**

**VICTOR OCHOA  
Appellant.**

**No. 18-2-01911-39**

**Appeal No. 36341-4 III**

**BRIEF OF RESPONDENT**

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**TO: CLERK OF THE COURT  
TO: ESMERALDA OCHOA, Respondent.  
TO: NEWHOUSE LAW PLLC, Attorney for Appellant  
TO: VICTOR OCHOA, Appellant.**

**STATEMENT OF THE CASE**

The PETITION FOR ORDER FOR PROTECTION was filed in Yakima County Superior Court on 05/31/2018. The Respondent was properly served on 06/01/2018. Adequacy and/or timeliness of service was never contested. The first hearing was scheduled for 06/14/2018. A RE-SSUANCE OF TEMPORARY ORDER FOR PROTECTION AND NOTICE OF HEARING was issued on 06/14/2018 and the matter was continued to 07/05/2018. On 07/05/2018 another RE-

SSUANCE OF TEMPORARY ORDER FOR PROTECTION AND NOTICE OF HEARING was entered, setting a trial date on 07/19/2018. On 07/19/2018 another RE-SSUANCE OF TEMPORARY ORDER FOR PROTECTION AND NOTICE OF HEARING was entered, setting a trial date on 08/23/2018. On 08/23/2018 an ORDER FOR PROTECTION was entered after a bench trial.

No formal discovery procedures were requested and/or accomplished. No DEPOSITIONS were taken. None were requested. No INTERROGATORIES were propounded. No REQUEST FOR PRODUCTION OF DOCUMENTS was made or served.

No witness interviews were requested and no interviews were conducted. On August 9, 2018, approximately two weeks before trial, attorney Newhouse was supplied with the names of Nancy Chavez, Margarita Licea, Melissa Morales, and Yolanda Cortes as witnesses who might testify on behalf of the Petitioner, the Respondent here.

This record is devoid of any effort by the Appellant, and/or his counsel, to contact any of those witnesses in any way at any time before trial. The record shows that all those witnesses were persons well known to the Respondent. Most if not all those witnesses had been friends and/or acquaintances with one or both parties for years.

The Appellant did not disagree with or object to or challenge any of those assertions. No CR 26 (i) conference was held. None was requested. No MOTION TO COMPEL ANSWERS or the like was filed or discussed.

On August 23, 2018, both parties appeared for trial. Both parties were represented by counsel. Approximately three (3) witnesses for the Petitioner were present in court, ready to testify from their own personal knowledge and observations about numerous acts of domestic violence committed by the Appellant over a long period of time. Those incidents included, but were not limited to, threats with firearms, threats to kill, and

very dangerous driving. Yakima County Superior Court Local Rule 10, requires the giving of five (5) days notice before argument on any motion being filed.

No MOTION FOR ORDER SHORTENING TIME was filed and/or served, and no ORDER SHORTENING TIME was entered. On August 23, 2018, 83 days after the Appellant was served with the PETITION FOR ORDER FOR PROTECTION and 13 days after his counsel was provided with the names of witnesses for the Respondent here, Counsel for Appellant served a MOTION TO EXCLUDE WITNESSES FROM TESTIFYING AND TO LIMIT TESTIMONY TO ACCUSATIONS LISTED IN PETITION on counsel for the Respondent in the courtroom only minutes before the trial began. The Respondent here had no opportunity to prepare for that motion, and/or to respond to it, and/or to brief the legal issues. The trial court denied that oral motion. No motion for continuance was made, orally or in writing.

On stipulated facts, the trial was held. Waiving his right to confront and cross-examine witnesses, the Respondent and his counsel sat mute while the trial court entered its findings, based upon the uncontested assertions/content of the PETITION FOR ORDER FOR PROTECTION. Even though the Appellant's untimely oral motion was denied, he gained the remedy sought in his motion because no witnesses testified and the court ruled, without objection, on the contents of the PETITION FOR ORDER FOR PROTECTION. Waiving his right to testify on his own behalf, the Appellant did not testify. Waiving his right to call witnesses on his own behalf, the Appellant called no witnesses. The trial court made findings of fact and entered a DOMESTIC VIOLENC PROTECTION ORDER.

### **ISSUES PRESENTED**

- 1) Does RCW 26.50 provide litigants with adequate notice before a trial or hearing is held?

- 2) Does RCW 26.50 prohibit or prevent parties from participating in discovery procedures, including but not limited to :
- a. INTERROGATORIES;
  - b. REQUEST FOR PRODUCTION OF DOCUMENTS;
  - c. DEPOSITION(S);
  - d. ANY OTHER DISCOVERY TOOL FOUND IN CR 26-37;
- 3) Did the trial court err in denying Appellant's MOTION TO EXCLUDE WITNESSS FROM TESTIFYING AND LIMIT TESTIMONY TO ACCUSATIONS LISTED IN PETITION?
- 4) Did the trial court abuse its discretion in entering the DOMESTIC VIOLENCE PROTECTION ORDER?

## **ARGUMENT**

Statutes carry a presumption of constitutionality. The Appellant here must establish the Act's unconstitutionality beyond reasonable doubt. See Wash. Fed'n of State Employees v. State, 127 Wash. 2nd 544, 558, 901 P. 2nd 1028 (1995).

The constitutionality of RCW 26.50 was challenged in State v. Karas, 127 Wn. 2nd. 544, 901 P. 2nd. 1028 (1995). In Karas, the court found that the burden was not met, and held the statute constitutional.

RCW 26.50 provides that the Superior Courts of this state have jurisdiction over PROTECTION ORDER cases.

While RCW 26.50 does not contain specific provisions for discovery procedures, nothing therein prevents discovery from occurring in a Superior Court proceeding.

Karas is instructive. The court ruled:

“Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the Due Process Clause. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process is a flexible concept; the particular situation determines its exact contours. Mathews, 424 U.S. at 334, 96 S.Ct. 893. But “[t]” the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ Mathews, 424 U.S. at 333, 96 S. Ct. 893 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

Determining what process is due in a given situation generally requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the government interest involved.

Mathews, 424 U.S. at 335, 96 S.Ct. 893; Spence v. Kaminski, 103 Wash. App. 325, 335, 12 P.3d 1030 (2000). A protection order may implicate several private interests including exclusion from a dwelling and the interest in one’s children. See also Baker v. Baker, 494 N.W.2d 282, 287 (Minn.1992); State ex rel. Williams v. Marsh, 626 S.W.2d 223, 230 n. 8 (Mo.1982).

Here, the Act’s provisions satisfy the two fundamental requirements of due process-notice and a meaningful opportunity to be heard by a neutral decision maker. The Procedural safeguards include: (1) a petition to the court setting forth facts under oath; (2) notice to the respondent; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) the opportunity to file a motion to modify a protection order; (5) a requirement that a judicial officer issue any order; and (6) the right to appeal. See, e.g., Spence, 103 Wash.App. at 334, 12 P.3d 1030 (nothing in dicta that the ‘process for issuing a permanent protection order provides adequate notice and ability to be heard’). Karas was afforded each of these safeguards although he failed to exercise his right to appeal the protection order.

A protection order issued under chapter 26.50 RCW ‘does not protect merely the ‘private right’ of the person named as

petitioner in the order.” State v. Dejarlais, 136 Wash.2d 939, 944, 969 P.2d 90 (1998). Rather, the Act reflects the legislative determination that the public has an interest in preventing domestic violence:

“Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic Violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.”

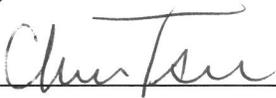
State v. Dejarlais, 136 Wash.2d at 944, 969 P.2d 90 (quoting Laws of 1992, ch. 111, 1). See also Spence, 103 Wash.App. at 335, 12 P.3d 1030. “when the purpose of legislation is to promote the health, safety and welfare of the public and bears a reasonable and substantial relationship to that purpose, every presumption must be indulged in favor of constitutionality.” State v. Lee, 135 Wash.2D 369, 390, 957 P.2d 741 (1998).

Considering the minor curtailment of Karas’s liberty imposed by the protection order and the significant public and governmental interest in reducing the potential for irreparable injury, the Act’s provision of notice and a hearing before a neutral magistrate satisfies the inherently flexible demands of procedural due process. See Spence v. Kaminski, 103 Wash.App 325, 332, 12 P.3d 1030 (2000); State v. Lee, 82 Wash.App. 298, 313, 917 P.2d 159 (1996) (stalking statute does not violate procedural due process because there is strong State interest in curtailing stalking behavior; no substantial privacy interest is at stake; and there is only a minimal risk of erroneous deprivation of liberty because enforcement requires a showing that intentional stalking behavior provoked reasonable fear in victim), *aff’d*, 135 Wash.2d 369,957 P.2d 741 (1998). Thus, Karas has not carried the heavy burden of establishing that the Act is unconstitutional beyond a reasonable doubt.”

## **CONCLUSION**

RCW 26.50 is not unconstitutional. Due process was afforded to the Appellant. The trial court did not abuse its discretion. The ruling of the trial court should be affirmed.

DATED this 12<sup>th</sup> day of July, 2019



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**Chris Tait WSBA 6104**  
Attorney for Respondent  
**Esmerelda Ochoa**

THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON  
DIVISION III

**No. 18-2-01911-39**

**Appeal No. 36341-4 III**

**AFFIDAVIT OF SERVICE**

The undersigned, being first duly sworn on oath, deposes and says; that he is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above action and competent to be a witness therein.

I, **YaYa Cuevas**, state the following under oath:  
I sent, via postal mail, on JULY 12, 2019 a copy of the "BRIEF OF RESPONDENT" to Alex Newhouse at 308 Yakima Valley Hwy Sunnyside Washington 98944 and **via email @ Alex Newhouse <alex@newouselawpllc.com>**

Affiant further states, based on the information available, the signature below is my true signature.

Dated this 12 day of July, 2019.

  
\_\_\_\_\_  
YAYA CUEVAS  
Legal Secretary to Chris Tait,  
Attorney for Respondent