

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 AUG 20 10 27

NO. 82283-2

BY RONALD R. CARPENTER

CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBIN M. FREEMAN N/K/A ROBIN ABDULLAH, Petitioner

v.

ROB R. FREEMAN, Respondent

RESPONDENT'S RESPONSE TO SUPPLEMENTAL BRIEF

MARGARET BROST
Attorney for Respondent
1800 Cooper Point Road SW #18
Olympia, Washington 98502
(360) 357-0285
WSBA No. 20188

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ARGUMENT 1

C. CONCLUSION 5

APPENDIX 6

TABLE OF AUTHORITIES

Washington Cases

Bradford v. Stubblefield, Wn.2d 664, 220 P.2d 305 (1950) 2

In re Freeman, 146 Wn. App. 250, 192 P.3d 369 (2008) passim

State v. Dejarlais, 88 Wn. App. 297, 298, 944 P.2d 1110 (1997) 2

Other Jurisdiction Cases

Carfagno v. Carfagno, 288 N.J. Super. 424, 672 A.2d 751
(Ch. Div. 1995) passim

United States v. Swift & Co., 286 U.S. 106, 76 L. Ed. 999,
52 S. Ct. 460 2

Statutes, Rules & Other Authorities

CR 60 passim

RCW 26.50.130 2, 5

A. INTRODUCTION

The court is being asked to establish a standard for modification and terminating domestic violence protection orders. Because even “permanent” restraining orders are not forever, and because such orders are fundamentally different than any other judgment or decree, the use of CR 60 as a standard for modification and/or termination is inappropriate.

B. ARGUMENT

1. Whether this court should adopt CR60(b)(6) as the only standard for modification or terminating a permanent domestic violence protection order on equitable grounds.

This is a case of first impression. Until Division Three heard this case, there had not been a single Washington decision that considered the grounds upon which modification or terminating a permanent domestic violence protection order should be granted, nor assigned the burden to one party or the other.

CR 60(b) enumerates a number of reasons a court may use to provide relief from a final judgment, order, or proceeding. However, the only provision that would apply to situations like the one being considered here, is CR 60(b)(6).

It provides, in pertinent part, for relief when:

... it is no longer equitable that the judgment should have prospective application.

While on the surface such a standard might appear to be appropriate for the modification or termination of protection orders, adopting it in this case would ignore: 1) RCW 26.50.130, which expressly provides for the modification of protection orders; 2) Legislative reassurance that “parties may protect their rights by petitioning the court to remove the order if there has been a change in circumstances.” *State v. Dejarlais*, 88 Wn. App. 297, 298, 944 P.2d 1110 (1997); and 3) The court’s inherent power “to modify its own injunctions.” *Bradford v. Stubblefield*, 36 Wn.2d 664, 220 P. 2d 305 (1950) (citing, *United States v. Swift & Co.*, 286 U. S. 106, 76 L. Ed. 999, 52 S. Ct. 460)

In *Bradford*, the court recognized that a preventative injunction is fundamentally different from any other judgment or decree and that a court had the power to modify it, even at a time when “the power to modify a judgment at law would have ceased to exist.” *Id.* at 675

Furthermore, even if the court were to adopt CR 60 as the standard, it would be of little help in determining whether to grant the relief being sought, since (like RCW 26.50.130) it does not provide any guidance as to what the court should consider before a modification or termination should be granted.

Other jurisdictions have grappled with this issue and one in particular has established a framework from which to evaluate a request to modify or vacate a domestic violence protection order. *Carfagno v. Carfagno*, 288 N.J.

Super. 424, 672 A.2d 751 (Ch. Div. 1995). In New Jersey, where protection orders are **final and permanent**, the court articulated 11 factors for consideration for dismissal: 1) Consent of victim to lift the order; 2) The victim's fear of the defendant; 3) Nature of the relationship between the parties today; 4) Contempt convictions; 5) Alcohol and drug involvement; 6) Other violent acts; 7) Whether defendant has engaged in domestic violence counseling; 8) Age/health of defendant; 9) Good faith of victim; 10) Orders entered by other jurisdictions; 11) Other factors deemed relevant by the court. *Id.*

Here, the court should focus on the following factors:

The victim's fear: Both Division Three and the New Jersey Court, recognized that the appropriate inquiry is not on the subjective fear that is produced by and within the mind of the victim. *Carfagno*, 672 A.2d at 758; *In re Freeman*, 146 Wn. App. 250, 256, 192 P.3d 369 (2008). Instead, the inquiry is on the objective fear which a "reasonable victim similarly situated would have under the circumstances." 672 A.2d at 758. Here, as found by Division Three, the fear expressed was not objectively reasonable. *Freeman*, 146 Wn. App. at 258. (fear must relate to a threat of *imminent* harm, injury, or assault).

Nature of the relationship: The New Jersey court also required an inquiry to determine "whether the relationship today is one that would allow the defendant to exercise control over the victim." *Carfagno*, 672 A.2d at 758.

In this case, the court appropriately found that there was a lack of opportunity for contact because Rob lived in Missouri and had not returned to Washington since being reassigned to Kentucky shortly after the order was entered as another reason that Robin's fear was unreasonable. *Freeman*, 146 Wn. App. at 258.

Age/health: Since the focus of the inquiry is on protection of the victim and not punishment of the offender, "in some cases of age or infirmity, it might be appropriate to dissolve the final restraining order." *Carfagno*, 672 A.2d at 759. Here, Rob has suffered substantial injury that the court found relevant to his compelling need to lift the order. *Freeman*, 146 Wn. App. at 258.

Good faith of victim: The New Jersey court also requires looking at the "good faith of the victim" in opposing the defendant's request to dissolve the final restraining order, pointing out that it was "mindful that sometimes one party to a divorce action abuses the Domestic Violence Act to gain an advantage in the underlying matrimonial action." 672 A.2d at 759.

Here, there has been no inquiry into the good faith of Robin. Nevertheless, this court should be mindful of both the fact that the order was entered at the first (and only) hearing after the ex-parte order was issued, during which Rob was not represented by counsel, as well as the incongruous assertions made to oppose Rob's request to lift it eight years after having had no contact

with Robin. CP 89-90

C. CONCLUSION

While it is clear that some standard should apply to the modification or termination of protection orders, CR 60 is not the solution, because 1) it violates the statutory scheme which includes RCW 26.50.130, and 2) it provides no guidance to the court which must evaluate the changed circumstances and whether a victim continues to require protection. Finally, this court should provide guidance to avoid the danger of the onerous and distressing impact of protection orders that punish forever.

Respectfully submitted,

8-20-09
DATED



MARGARET BROST
Attorney for Respondent
WSBA No. 20188

APPENDIX

288 N.J. Super. 424, *; 672 A.2d 751, **;
1995 N.J. Super. LEXIS 607, ***

TARA CARFAGNO, PLAINTIFF, v. KEVIN J. CARFAGNO,
DEFENDANT.

DOCKET NUMBER FV-18-746-92

SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION,
FAMILY PART, SOMERSET COUNTY

288 N.J. Super. 424; 672 A.2d 751; 1995 N.J. Super. LEXIS 607
November 8, 1995, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication March 6,
1996.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former husband sought review of an order by a New Jersey trial court that dismissed appellant's request to have a restraining order had been granted to appellee former wife dissolved.

OVERVIEW: Appellant former husband had harassed, followed, and telephoned appellee former wife. A restraining order was put into effect against appellant. Appellant sought to have the restraining order dissolved. The court determined that appellee had not consented to the dissolution, that she had a reasonable fear of appellant, and that appellant had violated the restraining order several times. The court affirmed the denial of appellant's motion for dissolution, having determined that he had failed to show good cause.

OUTCOME: The court affirmed the denial of appellant former husband's motion to dissolve appellee former wife's restraining order against him, having determined that appellant had failed to show good cause for the dissolution.

CORE TERMS: restraining order, dissolve, domestic violence, subjective,

contempt, alcohol, good cause, dissolving, good cause, consented, violent acts, counseling, harassing, cycle, best interests, dissolution, objectively, convicted, violating, times, twice, good faith, victim fears, similarly situated, reconciliation, restraining, injunction, injunctive, opposing, custody

LEXISNEXIS HEADNOTES

HN1: Under N.J. Stat. Ann. § 2C:25-29(d) the court may dissolve or modify a final restraining order upon good cause shown. Generally, a court may dissolve an injunction where there is a change of circumstances whereby the continued enforcement of the injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law.

HN2: The following framework may be followed as to an application to dissolve a final restraining order under N.J. Stat. Ann. § 2C:25-29(d) when the request has been made by a defendant: (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.

HN3: Where the victim has consented to lifting the restraining order and the court finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis

HN4: Final restraining orders may be dissolved upon good cause shown. N.J. Stat. Ann. § 2C:25-29(d). Permission of the victim is not required before the court can dissolve a final restraining order.

Essentially, if the court were to consider only subjective fear, it would

be merely determining whether the victim consented to dissolving the final restraining order without considering other relevant information. This interpretation would render the good cause shown language inoperative. Thus, the courts must consider objective fear -- not subjective fear.

HN5: The court must look to determine whether the relationship today is one that would allow the defendant to exercise control over the victim. Where the parties do not have children in common and have little other reason to contact each other, it would be more appropriate to dissolve a final restraining order. Where the parties have reason to contact each other, such as where the parties have children in common, it may be less appropriate to dissolve a final restraining order.

COUNSEL: *Jeney & Kingsland*, Attorneys for Plaintiff (*Robert J. Jeney, Jr.*, Esq. appearing)

Ferrara, Siberine, Woodford & Rizzo, Attorneys for Defendant (*Mary Ann Bauer*, Esq. appearing).

JUDGES: DILTS, J.S.C

OPINION BY: THOMAS H. DILTS

OPINION

[*430] [**754] DILTS, J.S.C

The question presented is whether the defendant has shown good cause to dissolve a final restraining order issued pursuant to the *Prevention of Domestic Violence Act of 1990* ("the Act").

[*431] *PROCEDURAL HISTORY*

On May 13, 1992, Ms. Carfagno filed a domestic violence complaint against Mr. Carfagno for allegedly harassing her. The harassment consisted of Mr. Carfagno telephoning Ms. Carfagno four times per day, Mr. Carfagno waiting at Ms. Carfagno's home, and Mr. Carfagno taking Ms. Carfagno's automobile without permission. On May 21, 1992, the court found that Mr. Carfagno committed the above alleged acts of domestic violence and entered a final restraining order against Mr. Carfagno. The order restrains Mr. Carfagno from

contacting Ms. Carfagno, except to discuss the welfare of the parties' child in Ms. Carfagno's custody.

[**755] On September 3, 1992, Mr. [***2] Carfagno pled guilty to contempt of the final restraining order for following Ms. Carfagno, while she was driving, and directing harassing communication toward her. Mr. Carfagno received a noncustodial sentence for this conviction.

Mr. Carfagno requested an order against Ms. Carfagno and on September 16, 1992, the court entered a final restraining order against Ms. Carfagno, restraining her from contacting Mr. Carfagno except to discuss matters involving the welfare of the child.

On March 3, 1994, the court found Mr. Carfagno guilty of contempt for the second time for telephoning Ms. Carfagno, on her car telephone, stating that he was following her. For this conviction, the court sentenced Mr. Carfagno to a 30-day custodial term plus one year of probation. Mr. Carfagno appealed this conviction, and the Appellate Division affirmed the judgment of this court.

Presently, Mr. Carfagno has applied to dissolve the final restraining order pursuant to N.J.S.A. 2C:25-29(d) Counsel for both parties submitted briefs and certifications to support their positions. The court heard argument of counsel and testimony from both parties on November 8, 1995.

Mr. Carfagno argues that the court [***3] should dissolve the final restraining order because (1) there have been no incidents between the parties since he was found guilty of contempt for the [*432] second time; (2) it is in the best interests of the child that the court dissolve the final restraining order; (3) both parties have "inadvertently violated the orders"; (4) Ms. Carfagno does not presently need the order for protection; and (5) Ms. Carfagno is opposing Mr. Carfagno's request in bad faith to prevent him from obtaining full-time employment with the Beach Haven, N.J., Police Department.

Ms. Carfagno argues that the court should deny Mr. Carfagno's request because (1) there have been incidents between the parties since 1993; (2) she continues to fear Mr. Carfagno; (3) there have not been mutual violations of the final restraining orders; and (4) Mr. Carfagno is motivated to dissolve the final restraining order only to obtain full-time employment with the Beach Haven, N.J., Police Department.

At oral argument, counsel for Mr. Carfagno argued that Ms. Carfagno's assertion of fear lacked credibility. Noting that the court cannot decide

credibility on the papers alone, the court scheduled a short plenary hearing where both parties [***4] offered testimony. See *Harrington v. Harrington*, 281 N.J.Super. 39, 47, 656 A.2d. 456 (App. Div.1995) (where the parties' certifications present a genuine issue of material fact, the court must hold a plenary hearing).

At the plenary hearing, Mr. Carfagno testified in part that, during telephone conversations with Ms. Carfagno regarding the child, Ms. Carfagno was verbally aggressive to Mr. Carfagno, resulting in arguments. Ms. Carfagno testified in part that the parties argued most of the time during the telephone conversations. Ms. Carfagno admitted that she did call Mr. Carfagno "a jerk" but that she did so because Mr. Carfagno forgot to pick the child up for visitation after school and the child waited at school for over two hours as a result. Ms. Carfagno asserted that she continues to be afraid of Mr. Carfagno because Mr. Carfagno constantly harassed her for a seven month period before the entry of the 1992 final restraining order, because Mr. Carfagno violated the final restraining order twice, because she believes that Mr. [*433] Carfagno is still watching and following her, and because Mr. Carfagno has continued to threaten her.

FINDINGS OF FACT

The court finds that [***5] Mr. Carfagno has continued to attempt to assert control and power over Ms. Carfagno. Mr. Carfagno has twice recently provoked Ms. Carfagno to argue in regard to the child. The court notes that Mr. Carfagno has been convicted twice for contempt for violating the final restraining order.

The court also finds that Ms. Carfagno continues to be afraid of Mr. Carfagno, both objectively and subjectively. Ms. Carfagno testified that she feared Mr. Carfagno. The court finds Ms. Carfagno's testimony to be credible despite Mr. Carfagno's assertions that she really does not fear him. Moreover, [**756] the court finds that Ms. Carfagno's fear of Mr. Carfagno is objectively reasonable because the final restraining order arose from circumstances where Mr. Carfagno was harassing and following Ms. Carfagno and because Mr. Carfagno has violated this order at least two times by harassing and following Ms. Carfagno. The court's finding that Mr. Carfagno continues to attempt to assert power and control over Ms. Carfagno bolsters the court's finding that Ms.

Carfagno objectively fears Mr. Carfagno.

The court also finds that Ms. Carfagno has not consented to dissolving the final restraining order. The court further [***6] finds that Ms. Carfagno did not provoke Mr. Carfagno to start arguing with her in regard to the child. The court further finds that Ms. Carfagno is not motivated to prevent Mr. Carfagno from obtaining full time employment and has opposed Mr. Carfagno's application in good faith.

CONCLUSIONS OF LAW

^{8N1} Under N.J.S.A. 2C:25-29(d) the court may dissolve or modify a final restraining order "upon good cause shown." Generally, a court may dissolve an injunction where there is a "a change of circumstances [whereby] the continued enforcement of the [*434] injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law." *Johnson & Johnson v. Weissbard*, 11 N.J. 552, 555, 95 A.2d 403 (1953). For the reasons stated below, the court finds that Mr. Carfagno has failed to show good cause to dissolve the order.

In N.J.S.A. 2C:25-18, the Legislature provided the legislative findings and declarations as related to the Act.

" . . . It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide . . . Further, it is the responsibility of the courts to protect the victims [***7] of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public..."

The Legislature intended to protect the victims – not to punish the person who committed the act of domestic violence. See generally *Trans American Trucking Service, Inc. v. Ruane*, 273 N.J.Super. 130, 133, 641 A.2d 274 (App.Div.1994) (purpose of an injunction is to protect injured party and not to punish the offending party).

There are no published decisions regarding the application of N.J.S.A. 2C:25-29(d). Although two published decisions state that reconciliation of the

parties acts as a de facto vacation of the restraining order, *Mohamed v. Mohamed*, 232 N.J. Super. 474, 477, 557 A.2d 696 (AppDiv.1989); *Hayes v. Hayes*, 251 N.J. Super 160, 167, 597 A.2d 567 (Ch.Div.1991), a more recent case has suggested that the court must first make an independent finding that continued protection is unnecessary before vacating a restraining order due to reconciliation. *Torres v. Lancellotti*, [***8] 257 N.J. Super. 126, 128, 607 A.2d 1375 (Ch.Div1992). These three cases do not address the factual inquiry that a court must perform when the defendant requests dissolution of a final restraining order in the absence of reconciliation. Therefore, this court concludes that ^{HN2} the following offers a framework of legal analysis that may be followed when faced with an application to dissolve a final restraining order under N.J.S.A. 2C:25-29(d).

To accomplish the goal of protecting the victim, courts should consider a number of factors when determining whether [*435] good cause has been shown that the final restraining order should be dissolved upon request of the defendant: (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the [***9] defendant; (9) whether the victim is acting in good faith when opposing the defendants request; (10) whether [**757] another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.

*FACTORS TO BE CONSIDERED IN DETERMINING WHETHER
DEFENDANT HAS ESTABLISHED GOOD CAUSE*

1. Consent of Victim to Lift the Order

The first factor is whether the victim consents to dissolve the final restraining order. ^{HN3} Where the victim has consented to lifting the restraining order and the court finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis.

The Legislature intended that the courts should follow the victim's request to

dissolve a domestic violence order or dismiss a domestic violence complaint without further legal analysis. When construing a statute, the court must follow the legislative intent, considering the policy underlying the statute. *Lesniak v. Budzash*, 133 N.J. 1, 8, 626 A.2d 1073 (1993). "A statute is not to be given an arbitrary construction . . . but rather one that will advance the sense and meaning fairly deductible from [***10] the context." *Id.* at 14. 626 A.2d 1073.

[*436] The policy of the Act is to provide broad protection for the victim. N.J.S.A. 2C:25-18. The court notes that the Legislature provided that a restraining order would be a civil remedy, N.J.S.A. 2C:25-18 (legislative declarations) and that the victim – not the state – files the complaint to obtain the restraining order, N.J.S.A. 2C:25-23 (victims to be notified of their rights to file a civil complaint for a restraining order); N.J.S.A. 2C:25-28(a) (procedures for the victim to file a civil complaint). Thus, when looking at the entire Act, the court concludes that the Legislature intended to provide broad protection to the victim.

If judges disregard the victim's wishes in determining whether to dismiss a complaint or dissolve a restraining order on the victim's request, this has the effect of discouraging victims from filing complaints when necessary. If the victim perceives that the courts would not be responsive to their request to dismiss the action, that victim or other victims may refrain from filing a domestic violence complaint in the future. Certainly, this is not what the Legislature intended. Thus, if the victim voluntarily requests [***11] the court to dismiss a domestic violence action or dissolve a restraining order, the court should grant the request without conducting any further legal analysis.

Here, Ms. Carfagno has not consented to dissolving the final restraining order. Thus, this factor points to continuing the restraining order.

2. *The Victim's Fear of the Defendant*

The Act protects victims from physical harm. Yet, physical safety is not all that the Legislature intended to protect. Recognizing that domestic violence occurs in a relationship where one party asserts power and control over the other, the victim is also protected from mental or emotional harm.

Fear of the defendant is the center of the cycle of power and control in domestic violence situations. Restraining orders have the effect of empowering the victim to stand up to the defendant. Thus, fear is important to consider.

[*437] Fear of the defendant is especially important when the parties share children. In domestic violence cases involving children, the victim usually has custody of the children. See N.J.S.A 2C:25-29(b)(1) (presumption that victim shall have custody of the children). It is also presumed that the custodial parent [***12] will act in the best interests of the children. *Gubernat v. Deremer*, 140 N.J. 120, 142, 657 A.2d 856 (1995). However, where the victim has continual fear of the defendant, the defendant's perceived control over the victim may attenuate the victim's ability to act in the best interest of the children. Moreover, fear might attenuate the ability of the victim to act in his or her own best interests. Accordingly, it is important to consider the victim's fear of the defendant.

A question remains whether the court should focus on subjective fear or objective fear. Subjective fear is the fear produced [**758] by and within the mind of the victim as the victim understands and communicates it. Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances. The court holds that courts should focus on objective fear. The Legislature intended the courts to consider objective – not subjective - fear. Courts should not construe a statute in a manner that would leave a portion of the statute inoperative. *State v. Reynolds*, 124 N.J. 559, 564, 592 A.2d 194 (1991). The Legislature provided that ^{HN4}final restraining orders may be dissolved upon good [***13] cause shown. N.J.S.A. 2C:25-29(d). The Legislature did not state that permission of the victim is required before the court can dissolve a final restraining order. Essentially, if the court were to consider only subjective fear, it would be merely determining whether the victim consented to dissolving the final restraining order without considering other relevant information. This is not what the Legislature intended because this interpretation would render the "good cause shown" language inoperative. Thus, the courts must consider objective fear – not subjective fear.

[*438] Moreover, considering merely subjective fear would result in overly broad restraining orders. "The duration of an injunctive order should be no longer than is *reasonably required* to protect the interest of the injured party." *Trans American Trucking Service, Inc. v. Ruane*, 273 N.J. Super. at 133, 641 A.2d 274 (emphasis added). The court must balance the parties' individual rights when determining the breadth of the injunctive order. *Id.* If the courts were to merely focus on subjective fear alone, the scope of the injunction might be broader than is reasonably required to protect the victim and might unduly [***14] infringe the rights of the defendant. Thus when determining whether good cause exists to dissolve a restraining order, the courts must determine

whether the victim continues to fear the defendant, and to apply an objective standard for evaluation; would a reasonable victim similarly situated have fear of the defendant under the circumstances.

Here, the court has found that Ms. Carfagno continues to fear Mr. Carfagno and that a reasonable victim similarly situated would fear Mr. Carfagno. The court notes that, with the order in place, Ms. Carfagno was able to criticize Mr. Carfagno when he failed to pick up the child from school for visitation. Mr. Carfagno's failure to pick up the child was inimical to the child's best interest because the child waited at school for two hours before she was picked up. The court finds that, because Ms. Carfagno still objectively fears Mr. Carfagno, absent a final restraining order, she would have a diminished capacity to act in her or the child's best interest. Thus, this fact points to continuing the final restraining order.

3. Nature of the Relationship Between the Parties Today

The third factor is the nature of the relationship between [***15] the parties today. Here, ^{HNS}the court must look to determine whether the relationship today is one that would allow the defendant to exercise control over the victim. Where the parties do not have children in common and have little other reason to [*439] contact each other, it would be more appropriate to dissolve a final restraining order. Where the parties have reason to contact each other, such as where the parties have children in common, it may be less appropriate to dissolve a final restraining order. Other factors for the court's consideration is the relationship of the parties at the time the order was entered. If, for example, there was a dating relationship when the order was entered and two years later when the application is filed, both parties are married to other persons, dissolution may be more appropriate. Certainly, the physical proximity of the parties to each other is another factor bearing upon the relationship. If the parties live in different areas, depending upon other factors present, dissolution may be appropriate.

In all cases, however, when considering the relationship of the parties, the court must determine whether there are indicia of control and domination exercised [***16] by the defendant over the victim in the limited amount of contact between the parties permitted under the final restraining order.

[**759] Here, the parties have a child in common. Moreover, the court has found that the parties have engaged in arguments in regard to the welfare of the child, which is within the scope of the limited contact permitted under the final

restraining order, This leads the court to believe that the final restraining order should be continued.

4. *Contempt Convictions*

The fourth factor is the number of times that the defendant has been convicted of contempt for violating the final restraining order. The number of violations of the final restraining order gives an indication that the final restraining order is not totally effective in breaking the cycle of power and control exercised by the defendant. Here, Mr. Carfagno was convicted twice for violating the final restraining order. Both convictions involved [*440] Mr. Carfagno contacting and harassing Ms. Carfagno, Certainly, these convictions do not show that the cycle of power and control [***17] has been broken. Thus, this factor points to continuing the final restraining order.

5. *Alcohol and Drug Involvement*

The fifth factor is whether the defendant has a continuing involvement with drugs or alcohol. In 1994, 39% of all domestic violence incidents involved drugs or alcohol. *Crime in New Jersey: Uniform Crime Report*, 1994 at 189, 198. Alcohol alone was involved in 34% of all reported domestic violence cases. *Id.* Accordingly, drug or alcohol use is highly relevant in determining whether the victim still needs protection. Here, there is no evidence that Mr. Carfagno is involved with drugs or alcohol. Thus, this factor points to dissolving the final restraining order.

6. *Other Violent Acts*

The sixth factor is whether the defendant has perpetrated violent acts upon the victim or other persons. The defendant's violent nature as evidenced by other violent acts is relevant to whether the victim needs continued protection. See Richard J. Gelles, Ph.D., Regina Lackner, Glenn D. Wolfner, *Men Who Batter*, Violence Update August 1994 at 10. ("Perhaps the most important risk marker...is prior violent or abusive behavior. In the absence of clear or convincing [***18] change, past behavior is probably the single most reliable indicator of future behavior, and battering is no exception.") Here, there is no evidence before the court that Mr. Carfagno has engaged in other violent acts. Thus, this factor leads to dissolving the order.

7. *Whether Defendant Has Engaged in Domestic Violence Counseling*

The seventh factor is whether the defendant has engaged in domestic violence

counseling. Counseling may be effective in breaking the cycle of power and control. " Without intervention or [*441] some form of change agent, the batterer is likely to continue battering." Id. Here the defendant has not shown that he has successfully completed domestic violence counseling, this, this fact points to continuing the final restraining order.

8. Age/Health of Defendant

The eighth factor is the age and health of the defendant, In some cases of age or infirmity, it might be appropriate to dissolve the final restraining order. Here, the defendant is a physically fit male who is 33 years old. Thus, this factor points to continuing the final restraining order.

9. Good Faith of Victim

The next factor is the good faith of the victim in opposing the defendant's [***19] request to dissolve the final restraining order. The court is mindful that sometimes one party to a divorce action abuses the Act to gain advantage in the underlying matrimonial action. See, *State v. L. C.*, 283 N.J. Super. 441, 449, 662 A.2d 577 (App. Div.1995); *Murray v. Murray*, 267 N.J. Super. 406, 631 A.2d 984 (App. Div.1993). Here, the court has found that Ms. Carfagno opposed Mr. Carfagno's request in good faith. Thus, this factor leads to the conclusion that the final restraining order should be continued.

[**760] *10. Orders Entered by Other Jurisdictions*

The final factor is whether the victim is protected from the aggressor by a "a verifiable order of protection from another jurisdiction." Under 18 U.S.C. § 2265(a), a restraining order entered in one state is entitled to full faith and credit by courts of another state. Thus, the fact that a foreign state has entered a restraining order protecting the victim from the aggressor must be known and considered by the court.

Here, the parties have not alleged that a foreign jurisdiction has entered a restraining order to protect Ms. Carfagno from Mr, [*442] Carfagno. Thus, this factor points to dissolving the final restraining [***20] order.

11. Other Factors Deemed Relevant by the Court

The court also needs to consider any other factors raised by the parties which, based upon the evidence presented, may show that good cause exists to dissolve the restraining order. In this case, the court concludes that there are no other

factors which affect the court's judgment.

CONCLUSION

The legislative standard for dissolution is whether the defendant has shown that good cause appears to dissolve or modify the order. The above factors need to be weighed qualitatively, and not quantitatively, to determine whether defendant has met the required burden. In this case, the court concludes that Mr. Carfagno has not shown good cause to dissolve the order, and his motion is denied.