

68904-5

68904-5

NO. 68904-5
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

BRIEF OF APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY

JILL SHARON on behalf of

ALEC SHARON,

Respondent,

and

TOD SHARON,

Appellant

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STATE OF WASHINGTON
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DAVID G. KONTOS, WSBA#12710
Attorney for Appellant
1103 West Meeker, Ste 102
Kent, WA 98032

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I. ISSUES AND ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting a domestic violence protection order against Mr. Sharon on behalf of his son because there is insufficient evidence to support a finding of domestic violence by Mr. Sharon against his son.

2. The trial court erred in reaching its conclusion of law that there was domestic violence as defined by RCW 26.50.010 by Mr. Sharon against his son.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the court abuse its discretion by entering an order of protection against Mr. Sharon on behalf of his minor son where there is no evidence of domestic violence by Mr. Sharon against his son? (assignment of error no. 1).

2. Did the trial court err in applying the findings of fact to the law when it granted the order of protection to Alec based upon fear felt by his mother and not Alec? (assignment of error no. 2).

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jill Sharon (the Respondent) and Tod Sharon (the Appellant) married on July 17, 1999. (RP P. 211) They have one child, Alec, age nine. The couple separated when Alec was approximately six months old. (CP P.193) A Petition for Legal Separation was filed by Jill Sharon on October 6, 2003. Joan Ward, a private evaluator, prepared an evaluation in the case and a Final Parenting Plan was entered on March 31, 2005. (CP P1; P.193). The parenting plan provided a “phased in residential schedule for the child.” (CP P. 2-6; P. 194)

On June 10, 2008, the father filed a petition for modification. (CP P.194) On August 28, 2008, an order determining educational placement of the child was entered. (CP P.194) On December 29th, 2008, the father’s petition for modification was dismissed without prejudice. (CP P.194) On May 22, 2009, Jill Sharon filed a petition to modify child support, and on September 3, 2009, an order of support was entered. (CP P.194) On April 25, 2011, Ms. Sharon filed a contempt motion against the father for failing to pay child support and follow the parenting plan. An order denying her motion was entered on May 26, 2011. (CP P.194)

In December of 2011, the father filed for a protection order against Ms. Sharon. (CP P.194) He was unable to have her served with the order so the first hearing was continued. Prior to the second hearing date, Mr. Sharon decided not to pursue the order. He did not appear at the return hearing in January, believing that by not appearing, the case would be dismissed. (RP P. 221). At the hearing, however, the Pierce County Superior Court realigned the parties and issued a full order of protection against the father. (CP P. 194)

On February 15, 2012, the mother filed a Petition for Order of Protection in King County under cause no. 03-3-01882-5 KNT. (CP P. 18) A Temporary Order of Protection was issued the same day and a hearing was set for February 29, 2012. (CP P. 33) On February 28, 2012, the mother filed a petition for modification of the parenting plan. (CP P.194) The temporary order for protection was reissued February 29, 2012 and the case was forwarded to Family Court Services for completion of a domestic violence assessment. (CP P. 182; P. 185) A hearing was set for May 9, 2012, before Commissioner Bonney Thurston-Canada. After a hearing with only Jill Sharon and Tod Sharon as witnesses, the court issued the

Order of Protection on behalf of Alec against his father. (CP P. 187). A timely Notice of Appeal was filed on June 7, 2012.

B. STATEMENT OF FACTS

Jill and Tod Sharon were married for approximately four years before legally separating in 2003. The couple entered an agreed Final Parenting Plan for their son Alec, who was approximately two years old. (CP P. 1; P. 193) After a phasing in period while Alex was very young, the plan eventually provided nearly equal residential time with Alec between the two parents. (CP P. 1-7); (RP P. 212)

As with many parenting plans, the one entered by the Jill and Tod Sharon has not been without conflict. In her interview with Family Court Services, Ms. Sharon admitted that the final parenting plan agreed to in 2005 "was sometimes difficult to follow as some of the language was not as clear as it should have been if someone pushes the limits and there was 'lots of conflict in interpretation of the final parenting plan.'" (CP P. 194) Nevertheless, this has been the plan followed by the parties for the last six years until the mother was granted and order of protection against the father in Pierce County. That order was eventually revoked by the court. (RP P. 216)

On February 15, 2012, Jill Sharon filed a Petition for an Order of Protection on behalf of Alec Sharon in King County Superior Court. (CP P. 18) In her declaration in support of the order, Ms. Sharon stated as follows: "I am seeking an Order of Protection for my minor son Alec Sharon. I have filed for a modification of our current parenting plan, but need this order until that is resolved." (CP P.39) In the Petition, Ms. Sharon asked for an order restraining Mr. Sharon from having contact with Alec Sharon, that he be excluded from the residence, day care and school of Alec Sharon and that he be prohibited from coming within 500 feet of her residence, Alec, and Alec's school or day care. (CP P. 20) She also asked the court to suspend the Parenting Plan and grant her sole custody of Alec. (CP P. 20) A Temporary Order of Protection was granted, and a hearing on the order was set for February 29, 2012. (CP P. 33)

In her declaration in support of the motion for a protection order on behalf of Alec, Respondent alleged the following "recent incident or threat of violence and date:"

"2/13/12—I was contacted by the Tacoma Police department to inform me that there was a serious threat of violence for my son and myself from Tod Sharon. They based this from the information they had from the assaults and escalating violent behavior

of Tod Sharon. They informed me that I was not allowed to return to my home and my son was not allowed to attend school until they said it was safe. We are still not sure when we can return. 2/14/12. The Paternal grandmother went to take the child from school. The Tacoma police have written another report based on this and believe she and the father are trying to flee with my son. 9/11 Tod Sharon stalked my son by going to my mother's house to look for him.

(CP P. 24).

In response to the directive in the petition to “[d]escribe the past incidents where you experienced violence, where you were afraid of injury or where the respondent threatened to harm or kill you.” Respondent simply stated “See attached reports from Tacoma Police Department.” (CP P. 24) She offers no facts in the petition to support her claims.

In response to the petition directive to “Describe any violence or threats toward children,” Ms. Sharon stated that “There is an existing threat of violence to my son based on the information I have received from the Tacoma Police.” (CP P. 24)

In response to the petition's directive to describe any “stalking behavior by respondent,” Ms Sharon stated as follows:

9/11. Tod Sharon stalked my son by following me to my work demanding to take my son. He later went to my mother's home where we were hiding, again demanding my son. He had never been to my

mother's house before. He was issued a Trespassing Abomination [sic] by the Renton Police based on his behavior at my work.

Halloween 2010. Tod Sharon appeared unexpectedly in my neighborhood wearing a full mask. It was not his residential day. He waited on the sidewalk not saying anything to me. When my son came back to the sidewalk he removed the mask to talk to my son. He had no reason to be there. We were all very afraid.

(CP P. 25)

Finally, in the section of the petition that asks for a description of "medical treatment you have received and for what:" Ms. Sharon states that "My son has been evaluated for anxiety based on the information and situations his father is exposing him too ." (CP P. 26) "My son is very nervous that on a daily basis his dad will show up and take him from school. This is not emotionally or educationally healthy for my son. My son has anxiety based on his father's actions and has trouble sleeping at times." (CP P. 39)

After an initial hearing on the order on February 29, 2012, the court ordered an evaluation by Family Court Services on both parents and continued the hearing until May 9, 2012 so that Family Court Services could prepare a report. (CP P. 185) The court also ordered supervised visitations for Mr. Sharon and Alec pending the May 9th, 2012 hearing. (CP P.186)

There is no evidence provided by Alec Sharon in support of this order of protection. There also are no interviews or other documented statements from Alec that provide any evidence in support of the protection order sought on his behalf by Jill Sharon.

In her declaration in support of the protection order, Ms. Sharon provides one of her justifications for an order of protection on behalf of Alec: the father's allegedly declining mental state. Ms. Sharon states as follows: (CP P. 37)

The Tacoma Police department stated in several reports that they are concerned about Tod Sharon's declining mental state. This concern is part of the reason I am seeking this order for the minor child. Please refer to Tacoma Police reports 120060503.1, 120450557.1, 120470675.1 and 120480522.1. There is compelling evidence about his mental stability being in question. It was reported from the Federal Way police report that Tod Sharon has been showing up at other crime scenes, following patrol officers from the Tacoma Police and of course assaulting Tacoma Police officers. Tod Sharon is also a hoarder. It was [sic] become increasingly worse over the years.

She also describes the basis for her concern for her son's safety.

There are several reports and many concerns related to my son's safety due to Tod Sharon. Please refer to Tacoma Police reports 120060503.1, 120060503.2. These reports reflect the growing concern for my son's safety. Tod Sharon assaulted 2 police officers and was arrested for one. He has increased violent outbursts towards police and others. There has been

extra security placed at school to keep my son safe. Please also refer to Tacoma Police reports 120440554.1, 120450557.1. During the last two week I had been advised that my safety and the safety of my son was such a concern that we were asked by the Tacoma Police to leave our home. My son was not allowed at school. This was a very hard time for my son and I. Given the severity of the issues we ended up staying away from our home for 10 days. (CP P. 37-38)

Also in Mr. Vellahermosa's declaration in sections 3, 5, 6 and 8, it confirms the safety of my son at school. Tod Sharon has taken my son on several occasions from school that are not his residential days causing custodial interference. Tod Sharon has been notified by the district of his restrictions by a letter to confirm he is not allowed on school properties on my residential time or the school will go into lock down and he could be arrested. (CP P. 38)

In her interview with Family Court Services (FCS) on April 5, 2012, the mother alleged that in the Fall of 2009, she and the father got into an argument and that Mr. Sharon was "calling her the C word in front of my child" and that he also called her the "B word" in front of him as well. (CP P. 195) She also told the evaluator that she believed the father had "back issues and may be taking pain medications." (CP P. 195)

According to the FCS report, Ms. Sharon admitted that the supervised visits between Alec and his father were "going fine at this point," but Alec was very nervous. Ms. Sharon attributed the

alleged nervousness to Alec being “afraid he was going to be taken by his dad” and that his uncle would not be able to prevent it. (CP P. 195) Ms. Sharon also told the evaluator that Alec is in counseling and has shown a “decrease in anxiety and is sleeping and eating better and is handling his anger better.” (CP P.195)

Ms. Sharon further told the evaluator that she was working with the principal of the elementary school “to prevent the removal of Alec from school by the father.” (CP P. 195) She then elaborated on the alleged stalking incidents by the father. The FCS report states as follows:

[T]he mother reports other incidents such as in September 2011 when the father went to her work and ended up being trespassed by the police after he refused to leave. On this occasion as the mother was going to work the father was going to have Alec but according to the parenting plan if he doesn't appear by a specified time then the residential time is cancelled. On this day the mother reports he didn't appear on time which made her late for work and she took Alec with her to the dental office where she works. Later on the father appeared and demanded to take Alec which the mother refused. The father called the police who spoke with the mother but indicated they would not intervene. (CP P. 195)

Ms. Sharon goes on to tell the evaluator that the father knocked at the back of the building and at one point backed up his car and spun his wheels flinging gravel at her car. She states that

the police came and issued Mr. Sharon a notice of trespass. Ms. Sharon told the evaluator that she then left work for the remainder of the day with Alec and, according to the evaluator's report, "went to the maternal grandmother's home. " (CP P. 196) Ms. Sharon also reported that although Mr. Sharon had never been to this home "he appeared there later looking for Alec and the next day went to the maternal grandmother's work looking for her." (CP P. 196)

Several other items in the evaluator's report are noteworthy. First, the evaluator references the Parenting Evaluation report from April 21, 2004 by private evaluator Joan Ward, MSW, LICSW. "Ms. Ward determined that there was no serious allegation (RCW 26.09.191) and that the plan should progress to close to equal residential time for each parent and joint decision making." (CP P. 199).

Second, the evaluator references a report citing two anonymous referrals against the father for "Negligent Treatment or Maltreatment" alleging that the father is a hoarder and his living situation is dangerous. (CP P. 199) The evaluator reports that "[t]he first referral was received on 5/3/11 and the second, an anonymous letter was received by CPS on 8/22/11. The 5/3/11

referral screened in and was closed with a finding of N/A. The August 2011 referral did not screen in.” (CP P. 199-200)

Third, the evaluator references her collateral contacts and includes Scott Nighbor, Alec’s counselor from Valley Cities. According to her report, Mr. Nighbor stated that “he has had 5 or 6 sessions with Alec. Treatment is focused on reducing Alec’s anxiety, he has also had nightmares and appears to have concerns about who is around him **and concerns around supervised visits.**” (CP P. 200) (Emphasis added) Mr. Nighbor stated that, “Alec doesn’t talk all that much in counseling and it does seem that he is avoiding talking about his dad.” Finally, Mr. Nighbor admits that most of the information that he is receiving is from the mother rather than from Alec but he believes “mom’s assessment seems to be accurate. Alec is having a lot of concerns around dad’s intentions and trustworthiness.” (CP P. 200)

The evaluator also interviewed Randy Back, the maternal uncle. (CP P.201) Mr. Black has supervised the father’s visits with Alec. According to the evaluator’s report, Mr. Back “indicated that he didn’t know the father very well but he (the father) has been appropriate to him.” (CP P.201) Mr. Back also observed that “Alec is a quiet kid and that he does get anxious about knowing where his

mom is and seems to have a strong attachment to her.” (CP P. 201) Finally, Mr. Back mentioned that he was contacted on a Saturday to schedule a visit, ‘however the father’s visitation person did not contact the mother who had a conflict with having the visit at a later time than what was specified in the order.” (CP P. 201)

The evaluator concludes as follows:

. . . FCS must err on the side of caution and recommend that the father’s residential time with Alec be suspended until he engages in a full psychic evaluation to assess and address the presenting concerns. Additionally, although this case **doesn’t follow a typical pattern of domestic violence, the father did exhibit stalking behavior toward the mother and maternal family members on a number of occasions** and that, in conjunction with is continual violations of the parenting plan, **would create a reasonable fear in the mother** that would support a full order of protection.

(CP P.204) (Emphasis added)

The only evidence we have from Alec himself is the statement he made to his paternal grandmother, which she had him repeat to a school administrator, regarding his fear about not seeing his father on Valentine’s Day. The meeting is described by Officer Mathew Dovich. (CP P. 29) In his incident report, Officer Dovich describes a meeting with Police Sergeant Todd Kitselman, School Administrator Miguel Villhermosa and Tacoma School

District Director of Human Resources, Gayle Elija. (CP P. 29)
Officer Dovich reports that at that meeting, Gayle Elija provided him with a statement regarding a TPS student that, in the officer's characterization, "felt threatened." (CP P. 29) His report continues as follows:

During the meeting O/ELIJA provided a statement concerning a TPS student who felt threatened. O/ELIJA stated that a student from NE Elementary School, O/A SHARON [Alec] , came to her office with his grandmother, O/E SHARON [Elise] on 2/13/2012 at 0900 hrs. O/E ELIJA stated that O/E Sharon stated to O/E ELIJA, I want you to hear this from my grandson, O/A SHARON, because you will want to hear it from him. O/A SHARON then stated **"I'm afraid something bad is going to happen at school and that I'm not going to get to see my dad on Valentines Day."** O/ELIJA stated that O/E SHARON came to O/ELIJA because they had been long time co-workers and friends. (Empasis added)

O/ELIJA stated that O/E SHARON attempted to explain what O/A SHARON was trying to say. O/ELIJA stated that O/E SHARON basically blamed police for causing O/A SHARON to be uncomfortable because the district had sent School Patrol to watch NE Elementary School yesterday due to O/A SHARON father, O/T SHARON [Tod], possibly coming to the school and creating a scene. O/ELIJA stated that she did not ask very many questions and was just trying to listen to what O/E SHARON had to say. (CP P. 29)

Officer Dovich's report continues:

Also, O/T SHARON has become a serious hoarder and has a large amount of junk accumulated at his

listed address. In addition, O/T SHARON has had two recent run ins with Tacoma PD where he assaulted a Police Officer both times (see related case numbers for details). There is a concern that O/T SHARON may do something violent at NE Elementary School tomorrow, 2/14/2012 due to his mental state and due to O/A SHARON'S above statement.

(CP P. 29)

At the hearing on May 9th, 2012, before Commissioner Bonney Canada-Thurston, the Ms. Sharon provided the following testimony in support of the motion on behalf of Alec.

My knowledge is that he was arrested for assaulting a police officer on January 23rd of this year. (RP P. 213)

:

There has been contact with the police of other suspected trouble or – but he wasn't arrested for any other actions. (RP P. 213)

There's been lots of conflict at my son's school. And based on those conflicts, there is a constant security person at school when we come and go from school at all times; that the school has also called the police when Mr. Sharon has taken our son from school on his nonresidential days. (RP P. 214)

I am concerned about his mental health. I believe he has issues surrounding a potential hoarding problem at his house. I don't believe its safe for my son there. There are issues with – his violence has been increasing over the years, and especially since the fall of this year. He's had another instance with another person where they've tried to take out an anti-harassment order against him, and I believe that all of

those issues attest to his mental stability, or instability.
(RP P. 214-215)

Q. Do you believe Mr. Sharon has an adequate
for this child home?

"No I do not." (RP P. 215)

Q. Okay. Can you explain to the Court what
the police officer found at the home?

A. What the police officer found at the home
was that there were stacks and piles of furniture
and debris all over the house, and that they weren't
clear where the doorways were. And my son was
behind some -- some parts of the -- whatever the
stuff was inside the house. And it didn't -- there
was no clear pathway. They couldn't see directly
into the house. The outside was cluttered as well.

Q. Would you say that he has a hoarding issue?

A. Yes, I do.

MR. MARLOW: The police have indicated, in
their reports, that they've advised her to take some
preventive measures.

THE COURT: **I'm going to allow it. It's
relevant only to show that she's afraid.** And then
we can move on because the rest of the people in
the courtroom also are entitled to a hearing today.
(emphasis added).

MR. MARLOW: I'm almost done.

Q. Could you answer the question?

A. Yes. The Federal Way Police Department,
which is the city that I live in, have placed a VARDA
alarm in our house, which I understand –

THE COURT: **Why don't we just ask the**

question, and I'll do it.

Ma'am, do you continue to be afraid of this gentleman?

JILL SHARON: **Yes, Your Honor.**

THE COURT: Thank you. Move on.

MR. MARLOW: Thank you, Your Honor.

(RP P. 219-220) (Emphasis added)

In granting the the order of protection for Alec Sharon, the court commissioner made the following statements in support of her decision. First, the commissioner declined to consider any events from Pierce County court in making her decision. (RP P. 234) (“I take no judicial notice of anything that has taken place in Pierce County because I have no certified orders from Pierce County.”) After acknowledging that “both parents love the child,” the Commissioner continued by stating her reasons for granting the protection order. First, the commissioner cited decreasing mental health of Mr. Sharon. The commissioner stated as follows:

However, in recent months, he [Tod Sharon] has started to display other characteristic behavior as found in -- looked at through Family Court Services. His mental health, to my humble opinion, is deteriorating, and I don't know if it's from the medication that he was on. I have not been provided with the conditions of which he is on medical leave. But Family Court Services did an investigation.

(RP P. 234)

Second, the commissioner cites the alleged condition of Mr. Sharon's home.

A person who has known the father for 25 years and is a teacher, I believe what she said to Family Court Services, that she has known him, that she does believe him to be a very good professional for the school district, as well as an individual who loves his son; that she recognized the deteriorating condition of his home. And she did say to him, not in a negative way, but just in a way that, "You need to clean this place -- start to clean this up or, in the future, this could become a parenting issue." That goes towards corroborating what the police officer and the mother has said with regards to the conditions of the home.

(RP P. 235)

Third, the commissioner cites the belief that the father may be affected by medicine.

The father has a back injury that he's being treated for. I do not know whether the treatment that he -- the medicine has affected him in a way that has caused him to act in a manner that caused his behavior with the school, not adhering to the parenting plan, causing the school to restrict his access at the school and causing him -- with the police officer, who's there for the safety check of a child, children that he takes care of on a daily basis -- not to allow an officer to make sure the child was safe. (RP P. 235)

Finally, the commissioner concludes that the father's behavior is erratic and the mother "feels" she's being stalked.

But that, in conjunction with the fact that Family Court

Services has concerns with regards to his diminishing behavior and putting a child in a serious situation between adults that became highly conflicted; notwithstanding what the prosecutor and two attorneys may mitigate down to, the father was **arrested for assaulting a police officer, which in and of itself is a dangerous situation; his erratic behaviors, the mother feels she's being stalked; her testimony to – with regards to what she alleges to be threats**, notwithstanding the father feeling his behavior is not threatening, causes this Court to believe **that there is a reasonable fear that he, at this state, could be a likelihood of harm to his child and the petitioner.** (emphasis added)

That's not saying that this can't be corrected. The recommendation is that the father complete a full psychiatric eval. But I'm going to be honest with you, and I'm going to ask you Mr. Kontos. I don't order these in a DV. Do you want me to order this in this D -- I'm granting the full order for protection.

(RP P. 236)

III. LEGAL ANALYSIS

A. THE TRIAL COURT ERRED ENTERING A DOMESTIC VIOLENCE PROTECTION ORDER AGAINST MR. SHARON BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING OF DOMESTIC VIOLENCE BY MR. SHARON AGAINST HIS MINOR SON.

The appellate court is in the same position as the revision court. RCW 2.24.050; State v. Lown, 116 Wn. App. 402, 407, 66 P.3d 660, review denied, 150 Wn.2d 1024, 81 P.3d 121 (2003). Accordingly, if a party challenges the commissioner's findings of facts and conclusions of law, the revision court reviews the findings for substantial evidence and the conclusions of law de novo. Id. at 407, 66 P.3d 660. Substantial evidence is that sufficient to persuade a fair-minded person for the truth of the asserted premise. Pilcher v. Dep't of Revenue, 112 Wn. App. 428, 435, 49 P.3d 947 (2002), review denied, 149 Wn.2d 1004 (2003) .

1. Although the rules of evidence do not need to be applied in a protection order proceeding, RCW 26.50.030 nevertheless requires "competent evidence" of "specific facts and circumstances" showing "domestic violence."

It is true that the rules of evidence need not be applied in protection order proceedings. Gourley v. Gourley, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) (citing ER 1101(c)(4); Hecker v.

Cortinas, 110 Wn. App. 865, 870, 43 P.3d 50 (2002) ("the rules of evidence, including the hearsay rule, need not be applied in protection order proceedings under chapter 26.50 RCW"). Despite the laws leniency for what can be admissible evidence in a Domestic Violence hearing, the statute still requires "competent evidence sufficient to support the trial court's decision to grant or deny a petition for a domestic violence protection order" even if the evidence contains hearsay or is entirely documentary. See Gourley, 158 Wn.2d at 467; Hecker, 110 Wn. App. at 870. "Competent evidence" has been traditionally defined as "That which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry." **Black's Law Dictionary**, P. 4th Ed.)

In this case, the evidence of domestic violence as defined in RCW 26.50.010(1) by Mr. Sharon against his son Alec is astonishingly slim--certainly not substantial. The necessary elements, such as Alec feeling fear of imminent bodily harm as a result of Mr. Sharon's actions, are not even alleged. Much of the witness statements are second or third hand information and contain numerous opinions speculating on the father's mental state as well as legal analysis of the Sharon's parenting plan all without

the benefit of medical or legal training or education. Such evidence, if it is to be called evidence at all, is not “substantial,” and it is not “competent evidence” of “domestic violence” as required for a protection order under RCW 26.50.030 and Gourley. Gourley, 58 Wn.2d at 467, 145 P.3d at 192.

2. Because Ms. Sharon brought this petition on behalf of the couple’s minor son Alec and not on behalf of herself, the showing of “domestic violence” must be between Mr. Sharon and his son Alec.

Under RCW 26.50.020(1)(a) “any person may seek relief under this chapter by filing a petition with a court alleging the person has been the victim of domestic violence committed by the respondent.” The statute further provides that a person may “petition for relief on behalf of himself or herself and on behalf of minor family or household members. Id. Persons under sixteen must seek relief through a parent or guardian. A petition alleging domestic violence must “be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.” RCW 26.50.030(1).

Ms. Sharon did not petition for a protection order for herself. (CP P. 18; P. 39) She only petitioned on Alec’s behalf. Alec is nine years old, he had not yet reached the age where he could file for relief on his own behalf. See RCW 4.08.050 (1) (When the

infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.); RCW 26.50.020(2)(b). Therefore, Ms. Sharon was required to present “specific facts and circumstances” showing “domestic violence” between Mr. Sharon and his son Alec. See RCW 26.50.020(1) (a); Neilson ex rel. Crump v. Blanchette, 149 Wn. App. 111, 114, 201 P. 3d 1089, 1092 (2009) (“[T]he fact that Ms. Neilson filed the petition does not eliminate the requirement of “domestic violence” between Mr. Blanchette and Ms. Crump.”)

In Crump, the mother brought a petition for an order of protection under RCW 26.05.030 on behalf of her 13 year-old daughter against her daughter’s former boyfriend. Since the mother petitioned the court for an order of protection on behalf of her daughter, the court confirmed the statutory requirement that the evidence necessary to support the order of protection must show domestic violence against the minor petitioner and not the parent pursuing the petition on her behalf. Crump at 114, P.3d at 1092 (Domestic violence showing must be against the minor daughter and not the mother since the daughter was the actual petitioner.)

Similarly in this case, because the mother petitioned the court on behalf of the minor child and not on behalf of herself, the child is the actual petitioner and the evidence of domestic violence must be against him. See RCW 26.50.020(1); Id.

3. The commissioner abused her discretion granting a protection order because substantial evidence in the record does not support the court's finding of domestic violence by Mr. Sharon against his son Alec.

The record does not contain substantial evidence supporting the commissioner's findings of domestic violence against Alec. Granting the order without proper evidence is reversible error. See Scott v. Trans-Sys. Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

The term "Domestic violence" is defined by RCW 26.50.010:

As used in this chapter, the following terms shall have the meanings given them:

(1) "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.□□

There is no allegation of sexual assault in this case. Therefore, the evidence of domestic violence must fall under definition (a) regarding physical harm or the infliction of fear of physical harm or (c) stalking as defined in RCW 9A.46.110. Since

there is also no allegation of actual physical harm inflicted by Mr. Sharon against his son Alec, the only possible justification for domestic violence under (a) is proof of the “infliction of fear of imminent physical harm, bodily injury, or assault” between family members. RCW 26.50.010(1)(a).

4. There is no evidence that Mr. Sharon inflicted fear of imminent physical harm, bodily injury or assault on anyone, and certainly not Alec as the statute requires.

Under RCW 26.50.020(2), a party seeking an order of protection must allege that they have been the victim of domestic violence. Alec is the petitioner, and he must be the victim of domestic violence for a protection order to be granted on his behalf. See Crump, 149 Wn. App. at 114, 201 P. 3d at 1092. The evidence presented to the commissioner did not meet the legal requirements for a domestic violence order of protection to be granted on behalf of Alec.

There is no testimony in the record from Alec stating that he was afraid of his father, and certainly nothing to support a conclusion that he had been inflicted with the fear of “imminent” harm. That level of misconduct is not even alleged. Rather, the core “evidence” presented can be summed up as follows: (1) the father has a declining mental state because he is a “hoarder”; (2)

he may be on medication; (3) he has violated the parenting plan; and (4) he is possibly violent because of his conflicts with police.

The evidence supporting each of these allegations, as indicated by the record, is rife with speculation and conclusions. But even if taken as true, it does not comprise substantial and competent evidence of each of the elements necessary for the court to issue a protection order under RCW 26.50.030. The evidence must show the “the infliction of fear of imminent physical harm, bodily injury or assault” by the father against Alec to justify such an order. It simply is not there. In fact, the only evidence from Alec is his statement that he was afraid he would not see his father on Valentine’s day. (CP P. 29). Alec clearly wanted to see his father. He does not fear him.

5. Substantial evidence in the record does not support a finding of domestic violence by stalking as defined by RCW 9A.46.110 by Tod Sharon against his son Alec

There is no evidence of stalking by Mr. Sharon against Alec. Under RCW 26.50.030, a domestic violence protection order can be granted for stalking behavior. But simply feeling “stalked” is not sufficient. The stalking required for an order of protection is defined by RCW 9A.46.110:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

...

(6) (b) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. **A finding that the alleged stalker repeatedly and deliberately appears** at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another. (emphasis added)

...

(c) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

...

(e) "Repeatedly" means on two or more separate occasions.

“Unlawful harassment” is defined by RCW 10.14.020 (2) as follows:

“Unlawful harrassment” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

A course of conduct is defined as “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. . . . Constitutionally protected activity is not included within the meaning of “course of conduct.” RCW 10.14.020 (1).

Therefore, in order to prove stalking as defined by RCW 9A.46.110 the following factors must be met: the alleged stalker must (1) intentionally and (2) repeatedly, (3) harass or follow another, and (4) the person must be placed in fear that the stalker intends to injure the person or another person (5) the feeling of fear is one that a reasonable person in the same situation would feel and (6) the stalker either intended to frighten, intimidate, or harass

the person, or knows or reasonably should know that the person is afraid, intimidated or harassed. RCW 9A.46.110.

Furthermore, if the finding of domestic violence by stalking is to be based upon "harrassment" then the petitioner must show (1) a "knowing and willful course of conduct" (2) "directed at a specific person"; (3) which seriously alarms, annoys, [or] harrasses . . . and (4) which serves no legitimate or lawful purpose. The course of conduct shall be such as (5) would cause a reasonable person to suffer substantial emotional distress, and (6) shall actually cause substantial emotional distress to the petitioner. RCW 10.14.020 (2). The course of conduct must be a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." RCW 10.14.020 (1).

The evidence fo stalking presented by the mother does not meet the requirements of the statute. The mother's allegations of stalking can be summed up as follows: (1)Tod Sharon showed up at her work to get Alec on his visitation day when they failed to meet before she went to work; (2) that same day Mr. Sharon then went to the home of Ms. Sharon's mother (where Ms. Sharon states she went after leaving work early) to ask if Alec and his mother were there; (3) The next day, Mr. Sharon went to the work place of

Ms. Sharon's mother to ask if she was at work; (4) In 2010, Mr. Sharon showed up on the sidewalk in front of Ms. Sharon's on Halloween to speak with his son Alec. (CP P. 25); and (5) on "several" occasions, Mr. Sharon showed up at the mother's house where she claims he would "walk my property line and take pictures over my fence and bang on the door." (RP P. 217-218)

Given the facts used to support the allegation of stalking, it is clear that the statutory requirements are not satisfied. There is no evidence that Mr. Sharon intended to harass or intimidate anyone, and certainly not his son Alec. There is no evidence that Mr. Sharon knew or should know that Alec or anyone else was feeling frightened, intimidated, or harassed. Two of the alleged stalking events occurred on the same day; a day that was supposed to be Mr. Sharon's residential day with Alec. (CP P. 195). There is no evidence whatsoever that Alec felt fear or intimidation by his father trying to pick him up on a scheduled residential day. Moreover, picking up Alec on his visitation day is a "lawful purpose." See RCW 10.14.030

Of the other allegations, one involves Jill Sharon's mother and not Ms. Sharon or Alec, and the other involves the father showing up at Ms. Sharon's home (on the sidewalk) to see Alec on

Halloween in 2010. There is no evidence that Mr. Sharon was harrassing or following anyone. Simply put, there is not substantial evidence of stalking as defined by RCW 9A.46.110, therefore, there is no stalking under RCW 26.50.010 that would support an order of protection against Mr. Sharon on behalf of Alec.

B. THE TRIAL COURT ERRED IN ITS CONCLUSIONS OF LAW AND IN GRANTING AN ORDER OF PROTECTION FOR ALEC BECAUSE THE COURT DID NOT APPLY THE STATUTORY FACTORS OR APPLY THE STATUTE CORRECTLY

The appellate court reviews the conclusions of law de novo. State v. Lown, 116 Wn. App. 402, 407, 66 P.3d 660, review denied, 150 Wn.2d 1024, 81 P.3d 121 (2003).

In granting this order, the court did not make specific written findings of fact and conclusions of law. The court also did not question Alec Sharon or have any written or other testimony from Alec. But the court did ask Alec's mother whether she was afraid of Mr. Sharon. (RP P. 220) Ms. Sharon answered that she was afraid, and the court granted the order of protection for Alec. However, whether Ms. Sharon was afraid of Mr. Sharon is not the question. The mother did not seek an order of protection, so her alleged fear of Mr. Sharon is not a legal justification for this

protection order. See RCW 26.50.020 (1); Crump 149 Wn. App. at 114, 201 P. 3d at 1092.

The statute requires a finding of “domestic violence” against the petitioner. See RCW 26.50.020(2). That imposes a requirement that Alec, the petitioner, feel “the infliction of fear of imminent physical harm, bodily injury or assault,” as a result of the actions of his father, the appellant. RCW 26.50.010 (1)(a) There is no evidence to support a finding that the father inflicted fear of “imminent physical harm, bodily injury or assault’ on anyone, and certainly not Alec as the statute requires. See RCW 26.60.020(2) (a party seeking an order of protection must allege that they have been the victim of domestic violence); Crump at 114, 201 P. 3d at 1092. The evidence of stalking is equally lacking. The commissioner both mis-applied the factors and failed to apply the factors of RCW 26.50. when she granted a domestic violence order of protection on behalf of Alec based upon the mother’s alleged fears. The commissioner’s order must be reversed. In re Marriage of Wicklund, 84 Wn. App. 763, 770 n.1, 932 P.2d 652 (1996).

C. THE FATHER SHOULD BE AWARDED HIS REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN THIS APPEAL.

Under RAP 14.2, the prevailing party on appeal is entitled to an award of their attorney fees and costs. Appellant requests that should the court rule in his favor, the court award his attorney fees and costs pursuant to RAP 14.2.

IV. CONCLUSION

Ms. Sharon petitioned the court for a Domestic Violence Order of Protection on behalf of Alec only, not on behalf of herself and Alec. Therefore, the statute requires that evidence of domestic violence must be between Alec and his father. That evidence is practically non-existent and certainly not substantial. A fair review of the record reveals that there is not substantial competent evidence of domestic violence as defined in the statute between Mr. Sharon and his son Alec. Rather, the only direct evidence of Alec's feelings, albeit hearsay, is the statement by Alec that he "was afraid" something bad would happen and he would not "get to see his father on Valentine's Day." (CP P. 29) Even Ms. Sharon's brother, Mr. Back, who supervised visitations with Alec, stated that Mr. Sharon had always acted appropriately around him. (CP P. 201)

Mr. Sharon may not be well liked by the mother or the administrators at Alec's school. He may not be liked by the Tacoma Police, but this is not a popularity contest and their personal feelings are irrelevant. Even considering all the conclusory and self-serving statements by the mother and her witnesses, there is not substantial evidence to support this order.

The fact that the mother did not seek a protection order for herself speaks volumes about the true reason for this order. If Mr. Sharon was such a threat, Ms. Sharon would certainly have asked for a protection order for herself. She specifically did not and the logical reason is because there was not evidence to support a protection order for herself. The evidence does not support one for Alec either.

Unfortunately, the domestic violence protection order has unjustly prevented Mr. Sharon and Alec from sharing time together except under supervised and artificial conditions. This forced separation and the stigma of having to endure supervised visitation has taken its toll on both Mr. Sharon and his son. Clearly, Alec Sharon is uncomfortable with the situation and his anxiety is easily traced to this uncomfortable arrangement that his mother has forced on him and his father.

Other avenues were available to the mother as well as the court other than a domestic violence protection order. The mother could have pursued an anti-harrasment order or a no contact order on her own behalf, she might have been able to pursue a protection order on her own behalf, but she instead chose to claim domestic violence of Alec by his father under RCW 26.50.010. Therefore, the court was compelled to apply the law as written and not make exceptions where the facts and law do not support a domestic violence protection order under RCW 26.50.060. The commissioner did not even consider most of the necessary factors of the statute in her decision.

The father also requests that he be awarded his attorney's fees and costs in pursuing this appeal.

Dated this 23rd day of January, 2013

A handwritten signature in black ink, reading "David G. Kontos". The signature is written in a cursive style with a horizontal line underneath the name.

David G. Kontos, WSBA #12710
Attorney for Appellant

NO. 68904-5-1

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

In re of:

TOD SHARON,

Appellant,

And

JILL SHARON,

Petitioner.

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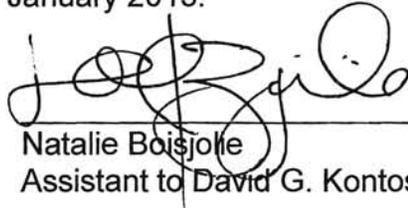
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Natalie Boisjolie
Assistant to David G. Kontos

The Law Office of David G. Kontos
1103 West Meeker Street, Suite 102
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(253)859-3966

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