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NO. 73129-7

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

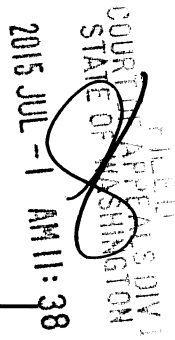
DAVID W. AIKEN,

Appellant,

vs.

CYNTHIA L. AIKEN

Respondent.



BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court (Commissioner Pro Tem David Patterson) erred in entering the ex parte order of protection on November 24, 2014 (CP 325-328) without requiring any notice to David Aiken, his attorney, or the GAL prior to suspending the parenting plan in case number 13-3-02944-0. There was insufficient evidence to support any position that irreparable injury would result absent a full hearing and the petition failed to identify what actual harm would result if an order was not issued immediately. (CP 249)

2. The trial court (Commissioner Pro Tem Geoff Gibbs) erred in entering an order denying David Aiken's motion for a full testimonial hearing (CP 191-194) and prohibiting Mr. Aiken's attorney from deposing or subpoenaing R.A. on December 22, 2104. (CP 16 and 141)

3. The trial court (Commissioner Jacalyn Brudvik) erred in finding domestic violence had been committed and entering the one-year domestic violence protection order on February 3, 2015 (CP 62-66) and declining to dismiss the action.

4. The trial court (Commissioner Jacalyn Brudvik) erred in entering the modified domestic violence protection order on reconsideration on February 26, 2015. (CP 17-21)

B. ISSUES PERTAINING TO ASSIGNEMENTS OF ERROR

1. Is it error for a Superior Court Judge or Commissioner to enter an immediate order suspending an existing parenting plan without notice to the other party or the children's GAL or an opportunity to be heard, when there is no irreparable harm clearly identified or alleged in the Petition and based only upon the contested allegations of one party?

2. Does due process require a testimonial hearing and cross examination in domestic violence protection order hearings involving a parent and a child?

3. Is it unconstitutional to allow the suspension of a parent's right to contact with their child based upon a preponderance of the evidence standard and not the clear, cogent, and convincing evidence standard?

4. Did the court err in entering the one-year protection order in this case and refusing to allow Mr. Aiken the opportunity to cross-examine his accuser?

5. Is it error for a Superior Court Judge or Commissioner to enter a modified protection order on reconsideration, which modifies the order beyond that requested in the motion?

C. STATEMENT OF THE CASE

Cynthia Aiken filed an action to dissolve the parties' marriage in the fall of 2013 under cause number 13-3-02944-0. Despite the parties' many disagreements, ultimately the parties entered into a full settlement agreement on October 31, 2014 after a full day of mediation. (CP 70-71)

For nearly a year prior to the settlement, the parties had been actively participating in the dissolution matter and a guardian ad litem (GAL), Jeanette Heard, had been appointed for the parties' three minor children. (CP 138-139) Under the parenting plan the parties had agreed to pursuant to CR2A, Mr. Aiken was scheduled to have his first Thanksgiving with his children since the parties separated in 2013. The

GAL had investigated the parties' allegations and had recommended the children have residential time with Mr. Aiken on alternating weekends, holidays, summer and Christmas vacation as well as a mid-week visit every week. (CP 211; 221) Ms. Aiken's attorney had prepared final pleadings and circulated those subsequent to the mediation.

On November 19, 2014, Ms. Aiken's sister in law, Shelby Morrill, notified Mr. Aiken that R.A. would not be available for his scheduled time as she had been taken to the hospital because she was not feeling well at school. (CP 212) He was later advised that R.A. had a stomachache. (CP 116-119) Mr. Aiken did have his residential time with the younger children that afternoon and evening, however. (CP 212)

On November 21, 2014, Mr. Aiken was scheduled to pick up all three children for his weekend residential time. Ms. Aiken advised that R.A. had made a disclosure to her counselor at school and that a CPS report had been made. Mr. Aiken's attorney advised Ms. Aiken's attorney that he would agree not to take R.A. for his scheduled time but that the other two children should, again, participate as they had earlier that week. The GAL, Jeanette Heard, agreed and advised Ms. Aiken's attorney that the younger children would benefit from having time with their father. (CP 75; 213) However, Ms. Aiken communicated through her attorney

that since she had already advised all three girls that they would not be going with their father that she would not be changing her mind. (CP 228)

The next Monday, both Mr. Aiken's attorney and the GAL attempted to contact Ms. Aiken's attorney in order to make certain that Ms. Aiken would not be withholding the children during Mr. Aiken's Thanksgiving vacation. (CP 228) Neither Mr. Aiken's attorney nor the GAL received any response suggesting that the residential time would be an issue.

On Tuesday, November 25, 2015, Mr. Aiken's attorney contacted Ms. Aiken's attorney again seeking to address the upcoming Thanksgiving holiday and the GAL advised that the issue need to be immediately addressed. (CP 225) At that time, Ms. Aiken's attorney advised that her client had gone into court on her own and filed a new Petition for Order for Protection under a new cause number, 14-2-01504-4. (CP 225) Accordingly, Mr. Aiken was unable to have his Thanksgiving vacation or any other residential time with any of the children until a further court hearing.

Ms. Aiken's November 24, 2015 Petition alleged that a "member of my family or household is the victim of domestic violence committed by the respondent." (CP 246 paragraph 1) Ms. Aiken did not allege in

paragraph one of her Petition that she was a victim of domestic violence. (CP 246 paragraph 1) In her Petition, Ms. Aiken identified that another case was pending, Snohomish County Cause Number 13-3-02944-0 that involved her, the minors and Mr. Aiken. (CP 247 paragraph 6) At the time she filed this action, the parties' had circulated and negotiated final documents in the dissolution action, including a final parenting plan. Ms. Aiken's basis for the protection order was related to information from R.A. and what Ms. Aiken felt were new "findings" after the October 31, 2014 settlement agreement. (CP 72-76)

The order obtained by Ms. Aiken without notice, restrained Mr. Aiken from having contact with any of the children and prohibited him from spending his Thanksgiving Holiday with the children.

On December 8, 2014, at the first return hearing, the court modified the protection order eliminating the younger two children from the order and requiring the CR2A parenting plan to be followed. (CP 233-234) Mr. Aiken's attorney orally requested the court set the matter for a full testimonial hearing with cross-examination pursuant to *Gourley v. Gourley* and the sitting commissioner, Lee Tinney, suggested that such a request be made in writing. (CP 322) Accordingly, Mr. Aiken's counsel filed a motion for both an extended hearing and a full testimonial hearing

with cross-examination. (CP 191-194) Ms. Aiken's attorney objected to the request for a full hearing suggesting that such a request was, itself, further evidence of abuse. (CP 144) Pro tem commissioner, Geoff Gibbs, granted the request for an extended hearing to be considered with the motions filed separately in 13-3-02944-0. However, the commissioner denied the request for a full testimonial hearing and further prohibited Mr. Aiken's attorney from deposing or subpoenaing R.A. for the hearing. (CP 16; 141)[1]

At the hearing on Ms. Aiken's Petition, the trial court found that she had established a fear of harm as to R.A. and the court entered a one-year order protecting the three children from physical harm or harassment. (CP 63 paragraphs 1 and 2) The court did not find that Ms. Aiken had met any burden related to her allegations about herself and did not enter any restraints as to Ms. Aiken. (CP 282; 62-66)[2]

Ten days later, Ms. Aiken motioned the court to reconsider it's decision and to modify the protection order as to sections (3) and (6) "as it

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[1] Mr. Aiken's attorney had scheduled Ms. Aiken's deposition for December 4, 2014. Ms. Aiken and her attorney failed to appear for that scheduled date (CP 121) and Ms. Aiken's attorney objected to her client being deposed and sought to limit the scope of the deposition only to matters after the signing of the CR2A. (CP 145)

[2] The order that entered has two check boxes on page one that are inconsistent with the minute entry as well as the balance of the order in paragraphs 1 and 2. It is not unusual for these check boxes to be filled in by a petitioner or court facilitator prior to the hearing.

relates to the minor child" R.A. (CP 272; 271) Ms. Aiken relied upon the decision of *Hecker v. Cortinas*, 110 Wn. App. 865 (2002), as the authority for her motion as well as new allegations subsequent to entry of the February 3, 2015 order. (CP 273; 275) Mr. Aiken filed a detailed response requesting the court deny the motion to reconsider and modify. (CP 29; 34-35) The court, without any contested hearing or argument, entered a modified order substantially changing the prior order and granting relief beyond that requested. (CP 266) The modified order was not limited to the three children, included restraints related to Ms. Aiken and also included restraints as to R.A. in section (4), none of which were requested in the motion before the court. (CP 4-6) The court based this decision not on any conduct of Mr. Aiken, but upon the reported acts of R.A. after she learned the court had not granted her mother's request for a no contact order.

D. ARGUMENT

The Petition for an Order of Protection is a significant action, which carries with it the ability to curtail substantial rights. *See* RCW 26.50 *et. seq.*, Such relief may often be necessary and reasonable. These sorts of actions, however, also carry with them the ready ability for abuse of the court system and often lead to stigmatize people.[3] At least one Washington court has recognized the stigma restraining orders can have. Hough v. Stockbridge, 113 Wn. App. 532, 536-37, 54 P.3d 192 (2002), *overruled on other grounds by* Hough v. Stockbridge, 150 Wn.2d 234, 76 P.3d 216 (2003). The present case is an example of how such a Petition and the resulting orders can be abused and have unintended and inappropriate consequences. Moreover when, as here, the court uses preprinted forms with multiple checkboxes, often times such orders lack clarity because the findings do not accurately reflect what the trial court intended nor do they identify case specific facts or findings.

[3] Pierce County has even instituted DVPO "kiosks" to streamline the process. https://www.co.pierce.wa.us/DocumentCenter/Home/View/23821 The procedure for obtaining these orders has become so easy, and the issues of such orders so common place, that it is almost assumed the orders will be entered regardless of the evidence.

1. If No Irreparable Harm Shown There is No basis to enter immediate order without notice to other side.

Because of the nature of these types of proceedings, the court must provide a full and fair hearing for the parties involved. RCW 26. 50.070 allows the court to enter an immediate order without notice ***IF*** a petition establishes that irreparable harm will result if a temporary order is not issued immediately. In the present case, the Petition did not identify any irreparable harm. Because the parties had been actively participating in a separate parenting plan matter and a GAL had been appointed and recommended that the two younger children continue to have residential time with Mr. Aiken ***PRIOR*** to Ms. Aiken's appearance on an ex parte basis, it was error for the pro tem commissioner to enter an immediate order without notice to either Mr. Aiken or the GAL.

Ms. Aiken repeatedly asserted that no notice was required under RCW 26.50. However, a careful review of the statutes and the Petition itself suggests otherwise. This court should carefully review this issue so that other parents and individuals in our state are not subjected to immediate orders when no emergency exists and when a party fails to allege or establish any irreparable harm that will ensue. This is especially

necessary when, as here, there is an existing parenting plan and a GAL that is actively involved on behalf of the children.

2. Need for a full testimonial hearing and cross-examination.

Due process requires a full testimonial hearing on the merits. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545,552 (1965)).

Cross-examination is the key safeguard to defend oneself when the only evidence to be considered is hearsay or testimonial records or statements of witnesses. "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105 (1974). Our supreme court has identified that "live testimony and cross-examination" may be appropriate when addressing RCW 26.50 cases involving allegations by a minor against a parent. Gourley v. Gourley 158 Wn.2d 460, 464 and 470 (2006). Our supreme court has also found that "where an outcome determinative credibility issue is before the court in a contempt proceeding, it may often be preferable for the superior court

judge or commissioner to hear live testimony of the parties or other witnesses, particularly where the presentation of live testimony is requested. " Marriage of Rideout, 150 Wn.2d 337, 352 (2003). "[I]ssues of credibility are ordinarily better resolved in the 'crucible of the courtroom, where a party or witness' fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors.'" Id. at 352.

This is precisely the type of case that required a full testimonial hearing as contemplated by the authorities above. In the present case Mr. Aiken specifically raised this issue first at the original return hearing and then by written motion. Despite this, the pro tem commissioner entered an order denying the request and further prohibiting Mr. Aiken from seeking to examine the witnesses against him at the hearing. Under the facts of this case, the court's refusal to conduct a full testimonial hearing violated Mr. Aiken's due process rights. Accordingly, the court should dismiss the action against Mr. Aiken or remand the case for a full testimonial hearing.

3. Standard of Proof when a parent child relationship is involved.

These orders impact substantial liberty interests including (a) the right to care for ones child; (b) freedom of movement (travel); and (c) freedom against social stigma.

(a). When a request is made to modify the parent child relationship and to restrain one parent from access to their child, the court must satisfy constitutional notions of due process as well as impose the appropriate burden upon a petitioner. It has long been established that parents have a fundamental liberty interest in the care of their children. U.S. Const. amends V, XIV; Wash. Const. art. 1, section 3; Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); In re Custody of Smith, 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998); *aff'd sub nom.* Troxel v. Granville, 530 U.S. 57, 120 S.Ct 2054, 147 L.Ed.2d 49 (2000). In termination proceedings clear, cogent and convincing evidence that a parent is unfit to care for their children must be established before the state may interfere in the parent child relationship. In re Welfare of A.B., 168 Wn.2d 908, 232 P.3d 1104 (2010); RCW 13.34.180.

Even in a dissolution action, in order to modify a parenting plan, a parent is required to schedule an adequate cause hearing to present

evidence of a substantial change in circumstances prior to the court even allowing such a request to proceed for further consideration. RCW 26.09.260 - 270. Most often, such disruptions are not in a child's best interests.

(b) Issuance of a protection order can infringe upon Mr. Aiken's constitutional rights to freedom of movement/travel. *See* State v. Lee, 135 Wn.2d 369, 389-92, 957 P.2d 741 (1998). Mr. Aiken's ability to go to the other children's activities, R.A.'s school to have a parent teacher conference, or travel within a certain distance while transporting the children to and from his residential time is all an issue when the court orders a distance restriction or prohibition upon being some place. Moreover, Mr. Aiken is at risk that Ms. Aiken or R.A. will abuse the orders by deliberately going to the other children's activities and events and thereby force him to either not attend or risk being arrested for an alleged violation.

(c) As noted above, there is a social stigma related with being restrained by a court order as well as the likely impact on a person's employment and housing opportunities. *See* Hough v. Stockbridge, *infra.* Washington applies a stigma-plus test to determine if a stigma on one's reputation rises to the level of a liberty interest. In re Meyer, 142 Wn.2d

608, 620, 16 P.3d 563 (2002). Under the stigma-plus test a person must show a stigmatizing statement made by the government, the accuracy of which is contested, and that the stigma is negatively impacting some other recognized interest of the person. *See* Ulrich v. City and County of San Francisco, 308 F.3d 968, 982 (9th Cir. 2002). Washington courts have recognized that when a stigma to one's reputation affects one's employment opportunity, that impacts a person's liberty interests. Meyer v. University of Washington, 105 Wn.2d 847, 854, 719 P.2d 98 (1986) *citing* Paul v. Davis, 424 U.S. 693, 47 L. Ed 2d 405, 96 S. Ct. 1155 (1976).

Because DV Protection Orders carry with them a stigma and can show up in employment and housing background checks, issuance of such orders can infringe upon one's employment liberties and interest in one's reputation. Moreover, issuance of these orders remains in one's history and cannot be characterized as a temporary injury; the record of the issuance of this order will last forever.

Given the nature of the proceeding and the relief sought, a preponderance of the evidence standard is inappropriate to authorize the infringement of a parent's fundamental liberty interests. While it has been argued and asserted that these types of proceedings are not permanent, the

record of entry of such an order is a permanent record. Additionally, the court must recognize that, under the statute, once an order is entered, the burden shifts to the respondent when the other parent seeks to renew the order for another year. RCW 26.50.060 (3).[4] A one-year order prohibiting a parent from any contact with their child should be based upon clear, cogent and convincing evidence.

4. Failure to Allow Mr. Aiken a Full Testimonial Hearing with the Opportunity to Cross Examine Witnesses Resulted in the Erroneous Findings and the Issuance of a One Year Order.

The court erred in finding the allegations of domestic violence upon R.A. had been properly established. The petition and hearsay allegations relied upon by Ms. Aiken and the court are insufficient and inappropriate. Failure to conduct a full hearing with an opportunity to confront one's accuser and to determine the genesis of the underlying allegations prohibited Mr. Aiken from having a fair hearing.

Ms. Aiken was unaware of any details related to the allegations surrounding R.A.'s disclosure to Sherri Adams that her father pretended to suffocate her at some time in the past. (CP 73-74) Mr. Aiken denied any

[4] "The court shall grant the petition for renewal unless the respondent proves by a

such actions or intentions and was only able to surmise that such claims may have been a misrepresentation of playful wrestling occurring well before the parties' agreements in October of 2014. Because of the lack of clarity related to the main allegations in support of the Petition, Mr. Aiken could not defend himself without the opportunity to cross-examine the witnesses in this case. Additionally, there was insufficient evidence to establish an incident of domestic violence toward R.A. based upon the assertions he "pretended" to do something.

5. On Reconsideration, the Commissioner Issued a Modified Order Beyond that Requested in the Motion Without a Contested Hearing.

The original order entered on February 3, 2015 did not provide any restraints related to Ms. Aiken. (CP 63) Ms. Aiken filed a motion for reconsideration requesting the court modify the protection order as to sections (3) and (6) "as it relates to the minor child" R.A. (CP 272; 271) The court, without any contested hearing or argument, entered a modified order substantially changing the prior order and granting relief beyond that requested. (CP 266.) The modified order was not limited to the three

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preponderance of the evidence that the respondent will not resume acts of domestic . . . when the order expires."

children, included restraints related to Ms. Aiken and also included restraints as to R.A. in section (4), none of which were requested in the motion before the court. (CP 4-6)

The court's decision to enter a modified order beyond the motion and request without a full hearing was an abuse of discretion. Additionally, given the fact that the only new information related to the alleged acts of R.A. and not Mr. Aiken, such evidence was insufficient to warrant the modification of the order entered on February 3, 2015.

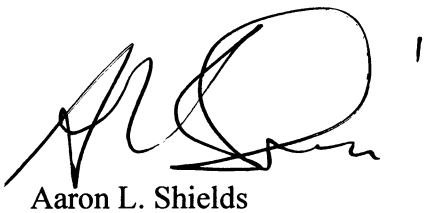
E. CONCLUSION

Based upon the records and files herein, Mr. Aiken requests this court dismiss the Petition for Order for Protection and remand the case to the lower court for entry of an order of dismissal. Alternatively, Mr. Aiken requests this court remand the case to the lower court for a full testimonial hearing with cross examination in order to allow him the opportunity to properly confront the witnesses and allegations against him.

Mr. Aiken further requests the court address the issue of whether Protection Orders that restrain a parent from their child should be based upon a preponderance of the evidence standard or a clear, cogent, and convincing standard given the fundamental liberty interests at stake.

June 30, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 30th day of June, 2015, I filed the foregoing document with the Court of Appeal as follows:

BY US MAIL TO:

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I also caused a true and correct copy of the foregoing document to be delivered to the following:

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I also caused a true and correct copy of the foregoing document to be mailed to the following address as her attorney filed a notice of intent to withdraw effective May 1, 2014:

BY US MAIL TO:

Respondent
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Dated this 30th day of June, 2015 at Everett, Washington.

Aaron L. Shields, WSBA 26285