NO. 998701
Court of Appeals NO. 80949-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KARYNN PAULEY,

Respondent,

v.

SCOTT HODGES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Washington State Cases

TABLE OF AUTHORITIES (CON'T)

Page

United States Supreme Court Cases

United States Constitution

TABLE OF AUTHORITIES (CON'T)

Page

Statutes, Rules, and Administrative Code

A. IDENTITY OF PETITIONER AND DECISION BELOW

Scott Hodges, petitioner here and appellant below, asks this Court to accept review of the unpublished Court of Appeals decision, filed May 24, 2021, terminating review. This decision affirmed the imposition of the protection order in this case and the authority of the trial court to grant certain relief and is included in the Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Review should be granted because the trial court's order requiring Mr. Hodges to participate in a domestic violator perpetrator's program requires, among other things, signed releases and public disclosure of prescriptions and learning disabilities, disclosure and re-education of a participant's spiritual and cultural beliefs; and the order threatens jail time should the participant not engage in the process. This statute is facially unconstitutional to the First and Fifth Amendments, as well as the right to privacy; is unconstitutional as-applied, and review should be granted under RAP 13.4(b)(1), (3).
2. Review should also be granted because the trial court ordered the surrender of firearms when firearms were explicitly not involved in the underlying incident. The provision authorizing

surrender in this situation is unconstitutional as applied and review should be granted pursuant to RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

1. Facts and procedural history

Mr. Hodges and Ms. Pauly were in a dating relationship for 14 months starting in 2017. CP 7. After the relationship ended, Ms. Pauly witnessed behavior she found concerning from Mr. Hodges. *See* CP 5-7.

Eventually Mr. Hodges' behavior alarmed Ms. Pauley enough that Ms. Pauley sought a domestic violence (DV) protection order under the Domestic Violence Protection Act (DVPA), RCW 26.50.020. CP 1. In her petition Ms. Pauley acknowledged Mr. Hodges did not own firearms and did not use any weapons to threaten or harm Ms. Pauley. CP 8. Mr. Hodges was never criminally charged regarding any of the acts attributed to him, and he has never been a defendant in a DV criminal setting.

Mr. Hodges and Ms. Pauley engaged in a contested hearing. Mr. Hodges argued he did not intentionally inflect domestic violence and his acts were attributable to medical issues he was addressing in treatment. CP 101-02[1]. The trial court found Ms. Pauley had established that Mr. Hodges had inflicted domestic violence. CP 117.

[1] Mr. Hodges was working with medical professionals to address his panic attacks, PTSD, and anxiety. CP 101-03.

The trial court ordered standard no-contact order conditions. Those included restraining Mr. Hodges from contacting or coming within 500 feet of Ms. Pauley. CP 118. However, the trial court also ordered Mr. Hodges to participate in a DV perpetrator treatment program and prohibited him from possessing firearms/weapons. CP 120.

Mr. Hodges moved for revision on the findings of the trial court and the final order. CP 133. On revision, the reviewing court upheld the rulings of the commissioner. CP 269. Mr. Hodges timely appealed to the Court of Appeals and, with former counsel, raised 11 assignments of error.

In the unpublished opinion included in the Appendix, the Court of Appeals rejected the assignments of error and upheld the orders of the trial court. Regarding the issues presented here, the opinion held that the forced compliance with a DV perpetrator program implicated the First Amendment, but the provision survived under strict scrutiny. *Hodges v. Pauley*, No. 80949-1-I, filed 5/24/2021, Slip Op. at 15-16. (Unpublished). The opinion also held the trial court was mandated under RCW 9.41.800(3)(c)(i) to order the surrender of firearms. *Id.* at 8.

Mr. Hodges retained current counsel and this Court granted an extension to file this Petition for Review. For the reasons below, review should be granted.

2. Structure of the Domestic Violence Protection Act

The Domestic Violence Protection Act (DVPA) is a civil proceeding that permits those who allege they are the victim of domestic violence to petition a court for relief. RCW 26.50.020(1)(a).

If the petitioner makes their requisite showing, the trial court can enter an order of protection that lasts a fixed period, e.g., one year; or is permanent. RCW 26.50.060(2). The standard relief[2] will order respondents to restrain from contacting the petitioner, from being within a fixed distance, and from harassing, stalking, etc. *See* RCW 26.50.060(1). The court can also order other relief, including paying costs and fees, making residential provisions with shared children, ordering dispossession of shared personal effects, etc. *Id.*

If the order lasts for a fixed period, the petitioner can move for renewal of the order. At that time the burden shifts to the respondent to establish the respondent will not engage in future domestic violence. RCW 26.50.060(3). If the respondent cannot meet that burden, the order can be renewed for another fixed period, or become permanent. *Id.*

If the subject of an order violates the no-contact provisions, that person is guilty of a crime under RCW 26.50.110. If the subject is ordered

[2] These are "standard" conditions because they mirror the restraint conditions of ex parte temporary protection orders. RCW 26.50.070. *See also* CP 75-76.

to surrender weapons and the subject is found in violation of that order, that person is guilty of a crime under RCW 9.41.040(2). For all other orders generated by the DVPA process, the trial court enforces the orders through its civil contempt power. RCW 7.21.030(2)[3].

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The DVPA framework has been upheld as protective of the due process rights of both petitioners and respondents. *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006). Cases that have examined this framework have generally concerned themselves with a party's right to cross-examination. *Id.; see also Aiken v. Aiken***,** 187 Wn 2d 491, 387 P.3d 680 (2017) (Trial courts are not required to permit cross-examination in DVPA proceedings). Other cases reviewing the DVPA have generally considered the availability for petitioner's relief when there are co-occurring proceedings. *See Juarez v. Juarez,* 195 Wn. App. 880, 382 P.3d 13 (2016) (Petitioner may obtain relief even when there is a parallel dissolution action); *see also Smith v. Smith,* 1 Wn. App.2d 122, 404 P.3d 101 (2017) (Petitioner is entitled to relief even if respondent faces pending criminal charges). However, Washington courts have not addressed the constitutionality of the remedies discussed in this Petition for Review.

[3] This petition is ripe because Mr. Hodges cannot challenge the constitutionality of the order if he is alleged to have violated it. *Walker v. City of Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

In this case, the trial court's order to the respondent to participate in a DV perpetrator treatment program under RCW 26.50.060(1)(e) is both facially unconstitutional and unconstitutional as-applied. To comply with this court order, the respondent must disclose to the treatment provider:

> Current and past violence history; a lethality risk assessment; history of treatment from past domestic violence perpetrator treatment programs; a complete diagnostic evaluation; a substance abuse assessment; assessment of cultural issues, learning disabilities, literacy, and special language needs. RCW 26.50.150(1)

The program also requires the participant to sign releases so this information can be provided to the "victim and victim's community and legal advocates," among others RCW 26.50.150(2). The program requires a focus on "holding the perpetrator accountable" and "changing behavior." RCW 26.50.150(4). This treatment program only ends when the participant meets "specific criteria." RCW 26.50.150(5).

This criteria is laid out in WAC 388-60B. For example, counselors require participants to discuss "individual and cultural belief systems, acknowledge they are "solely responsible...for their behavior," and identify "personal motivations, ethics, and values..." WAC 388-60B-0415.

In this context these requirements are facially unconstitutional. Freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n Mun. Emps., Council 31*,

138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018). Compelling individuals to voice support for specific ideas violates the "cardinal constitutional command" of the First Amendment. *Id.* at 2463.

These provisions also run afoul of the Fifth Amendment by requiring that a participant acknowledge current and former acts of abuse. *See Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007). (Requirements of a full and frank disclosure to avoid incarceration implicates the Fifth Amendment). Under the DVPA, a respondent who does not follow this order can be held in civil contempt, which includes possible imprisonment. *In re Detention of Young*, 163 Wn.2d 684, 185 P.3d 1180 (2008) (trial courts can enforce orders to submit to evaluations through threat of jail).

This provision also violates the constitutional right to privacy and autonomous decision-making. The program requires participants to sign releases of information so the treatment providers can share information with the victim, their advocates, prosecutors, the participant's current and past intimate partners, and others. The program also restricts participants from engaging in *co-occurring treatment*, either outright banning such participation or requiring other treatment programs change their treatment to adhere to the DV treatment goals.

In addition, the statutory provision that permits a trial court to order surrender of firearms is unconstitutional as applied in this case. Mr. Hodges has a Second Amendment right to self-defense. *State v. Sieyes*, 168 Wn.2d 276, 287, 225 P.3d 995 (2010). Those rights can only be infringed upon "reasonable regulation." *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1945).

In this case the surrender order is not reasonable because there is no nexus between the acts of Mr. Hodges and firearms specifically. Despite constitutional implications, orders on contact and physical distance are reasonable because they reflect conduct that led to the final order. Undisputedly though, firearms were not involved here. Requiring a surrender when no firearms were involved is unconstitutional as applied.

1. Ordering respondents in the DVPA to participate in perpetrator treatment is unconstitutional.

a. Compelled Domestic Violence Batterers Treatment in the DVPA is facially unconstitutional under the First Amendment.

The DVPA permits a trial court to order a respondent to "participate" in a domestic violence perpetrator program." RCW 26.50.060(e). Because of the nature of this participation, the authorizing statute is facially unconstitutional under the First Amendment.

This Court interprets statutes and constitutional challenges de novo. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162

(2009); *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009). First Amendment free speech challenges are also reviewed de novo. *Catlett v. Teel*, 15 Wn. App. 2d 689, 699, 477 P.3d 50 (2020) (citing *Resident Action Council v. Seattle Hous. Auth*., 162 Wn.2d 773, 778, 174 P.3d 84 (2008)). Generally, the State bears the burden of justifying restrictions on free speech[4]. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

Participants in DV treatment are required to comply with an initial assessment before treatment begins. WAC 388-60B-0400(1). This initial assessment requires participants to disclose (among other things): their current relationship status and plans for that relationship, their culture, including their gender identity; sexual orientation, religious or spiritual beliefs; groups which the participant identifies with, past experiences as a sexual assault victim; and their "comments or views" about past abusive behaviors. WAC 388-60B-0400. This assessment must be completed before a participant is allowed to begin the ordered treatment. *Id.*

Once treatment begins, the participant must make "required cognitive and behavioral changes." WAC 388-60B-0415. To enact these changes, participants are required to discuss: their individual and cultural

[4] Pursuant to RCW 7.24.110, the Attorney General's office has been served a copy of this Petition for Review so the State can be heard regarding the constitutional challenges here.

belief system and acknowledge those beliefs have supported violence against an intimate partner, acknowledge how the participant is solely responsible for their abusive and controlling behavior, require the participant to commit to giving up power and control, identify the participant's personal motivations, ethics, and values; and more. *Id.*

Free speech rights include "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Janus,* 138 S. Ct. at 2463.

By its administrative framework, this treatment involves compelled expressive speech. Expressive speech implicating the First Amendment is analyzed under a two-part test: 1) whether there is an intent to convey a message, and 2) whether the message would be understood by those who would receive it." *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *State v. Arlene's Flowers, Inc*., 193, Wn.2d 469, 441 P.3d 1203 (2019). This test is clearly met here: the framework requires speech, and that speech is woven into changing thoughts and behavior.

The Court of Appeals opined it is "speculative" that Mr. Hodges will be "compelled" to admit he committed domestic violence. Slip. Op. p. 14. But accountability is discussed 26 times in the WACs and is a primary

purpose of the treatment: "[T]he program's treatment focus is...ending the participant's violence and holding the participant accountable for their abusive behaviors." WAC 388-60B-0310.

This type of treatment is explicitly content-based. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional..." *Id.* These laws are analyzed under strict scrutiny. *Id*. at 164.

Under strict scrutiny, a statutes can only be upheld "if it serves a compelling state interest and is "narrowly drawn...to serve th[at] interest[ ] without unnecessarily interfering with First Amendment freedoms." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective...in this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (internal citations and quotations omitted). *See also State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.,* 135 Wn.2d 618, 628, 957 P.2d 691 (1998) ("The State "bears the

well-nigh insurmountable burden to prove a compelling interest that is both narrowly tailored and necessary to achieve the State's asserted interest.") (internal quotations omitted).

Here the State cannot overcome the presumptive unconstitutionality of the ordered treatment. It is neither narrowly tailored nor necessary to accomplish the goal of protecting Ms. Pauley.

The treatment program is vastly expansive and requires Mr. Hodges to disclose his cultural beliefs, past victimizations, current relationship goals, and much more. It requires compelled speech that Mr. Hodges may disagree with about this incident, past relationships, his spiritual beliefs, and his familial upbringing.

The treatment order stands in stark contrast to the no-contact order issued by the trial court. While raising some constitutional issues, these orders have been upheld because they are "narrowly tailored by focus on the victim and a no contact zone around the victim." *State v. Noah*, 103 Wn. App. 29, 41-42, 9 P.3d 858 (2000). These orders are constitutional because they leave open expressive or alternative communication so long as no contact is made with a victim. *Id.* at 42.

Here the trial court's order to engage in compelled speech cannot be upheld against strict scrutiny. Review should be granted.

b. Compelled treatment in a civil setting also violates the Fifth Amendment.

The order to comply with DV treatment implicates the Fifth Amendment. As part of the assessment and treatment, a participant is required to disclose and take accountability for current and past incidents. WAC 388-60B-0400(j), WAC 388-60B-0415(v).

The DVPA is a civil proceeding. Mr. Hodges was never criminally charged for any incident with Ms. Pauley and has never been a criminal defendant in any DV action. Mr. Hodges has a Fifth Amendment right to not disclose information that may cause him to be criminally charged.

Because Mr. Hodges is not a convicted defendant, this matter is analogous to the defendant in pre-trial status in *Butler*. *Butler v. Kato*, 137 Wn. App. 515, 154 P.3d 259 (2007). In *Butler*, pre-trial defendants were ordered as conditions of release to participate in alcohol treatment. *Id.* at 519. The alcohol treatment required participants disclose current and past interactions with alcohol abuse. *Id.* at 525. The defendant asserted his Fifth Amendment right to not discuss incriminating events with treatment staff, and was threatened with jail by the arraigning court. *Id.* at 526.

The *Butler* court noted the distinction between those that had been convicted of a crime and those who had not. *Id.* at 525. The court also held the threat of jail hinging on whether a participant engages in full and frank

disclosures violated the Fifth Amendment: "The risk of incarceration is sufficient compulsion to implicate the Fifth Amendment. The requirement of full and frank disclosure necessary in...evaluation...implicates an accused's constitutional right not to incriminate himself." *Id.* at 526.

Here Mr. Hodges is subject to a similar risk of incarceration if he does not make full and frank disclosures to a treatment agency. While Mr. Hodges' incarceration will arise out of civil contempt rather than revoked conditions of release, the end result is the same. Only those who have been convicted of crimes have "reduced expectations of privacy." *State v. Olsen*, 189 Wn.2d 118, 124, 399 P.3d 1141 (2017). For others, pre-trial defendants or respondents in civil proceedings, there are no reduced expectations and they retain a Fifth Amendment right not to incriminate themselves. In this case the trial court's order is unconstitutional to the Fifth Amendment and review should be granted.

c. Compelled treatment in this context also violates the respondent's constitutional right to privacy.

The United State Supreme Court has identified two types of interests protected by the right to privacy: the right to autonomous decision-making and the right to confidentiality of intimate personal information. *O'Hartigan v. Department of Personnel*, 118 Wn.2d 111, 117, 821 P.2d 44 (1991) (*Citing Whalen v. Roe*, 429 U.S. 589, 599-600, 97

S.Ct. 869, 51 L.Ed.2d 64 (1977). The specific treatment structure at issue here violates both provisions.

The right to autonomous decision-making includes those related to treatment. A person has an autonomous right to determine their treatment. *See In re Welfare of Colyer,* 99 Wn.2d 114, 119-20, 660 P.2d 738 (1983).

This autonomy is violated on forced entry to the DV treatment program because of mandatory restrictions on other treatment. For example, a participant in DV treatment is forbidden from engaging in marital or couple's counseling, even if that *partner is not the specified DV victim,* unless the participant has been engaged in DV treatment for six months. WAC 388-60B-0350(4)(a).

In addition, any other treatment a participant wants to engage in is usurped by the DV treatment by requiring that other treatment facilitate "change in the participant's abusive behavior without blaming the victim..." WAC 388-60B-0350(2). Restricting whether and how a participant engages in non-DV treatment is a per se violation of autonomous decision-making and cannot survive strict scrutiny[5].

[5] This is not a speculative concern. The trial court specifically ordered Mr. Hodges to complete DV batters' treatment because the court felt Mr. Hodges' current treatment providers were not working fast enough or successfully enough. CP 138. This order upends the progress Mr. Hodges was making with his own providers.

Privacy rights include nondisclosure of intimate information. This right is analyzed under rational basis. Rational basis is only met if the disclosure of intimate information is carefully tailored and the disclosure is no greater than reasonably necessary. *O'Hartigan*, 118 Wn.2d at 117.

The DV treatment program requires substantial waivers of intimate information that are not carefully tailored nor limited. Significantly, the participant *must* sign a release to allow the program to communicate with the victim to share information gleaned during the assessment and treatment, and all progress and setbacks with treatment. WAC 388-60B-0365(1). The participant must also sign a release to: significant others and current partners, children who have ever lived with the participant, the victim's community and legal advocates, police, prosecutors, courts, and concurrent or former treatment agencies. WAC 388-60B-0365(3).

Of course, releases to courts and prosecutors implicate the Fifth Amendment as discussed above. But these mandatory disclosures to disparate groups, regarding a participant's cultural beliefs, a participant's co-occurring treatment, etc., is not necessary to enact the goal of reducing DV behavior. Under no circumstance are these voluminous releases narrowly tailored. For a respondent in a civil proceeding, this framework violates the constitutional right to privacy and review should be accepted.

d. The issues above are also unconstitutional as-applied.

For the reasons above, the DV treatment provisions are facially unconstitutional. But review should be granted on as-applied challenge too, given the record.

An as-applied challenge maintains the constitutionality of the law except under similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Here, the circumstances are that Mr. Hodges was not criminally charged for this DV incident and has never been a defendant in a DV action. Mr. Hodges has never been a respondent in any other DV action. There is nothing in the record indicating that Mr. Hodges would not follow the no-contact order issued by the court or court orders generally. The complaints about Mr. Hodges' current treatment providers likewise do not justify the constitutional infringements here. Future respondents would feel chilled to share current treatment plans, for fear a trial court will determine they are insufficient and compel a significant medical change instead. This court should also accept review of this as-applied challenge.

2. A trial court's order to surrender firearms, when no firearms were used or threatened in an instance of domestic violence, is unconstitutional as applied.

In the DVPA, a trial court should be vested with the discretion to order surrender of firearms in appropriate circumstances. But those

appropriate circumstances are when a case actually involves firearms or weapons. As the record demonstrates, no firearms or weapons were used or threatened in the matter between Mr. Hodges and Ms. Pauley. CP 8.

The Second Amendment encompasses a citizen's right to self-defense. *See State v. Jorgenson*, 179 Wn.2d 145, 312 P.3d 960 (2013). *See also Sieyes*, 168 Wn.2d at 287 (The Second Amendment grants the fundamental right of self-defense). The right is most acute in the home where the need for defense of self, family, and property is greatest. *D.C. v. Heller*, 554 U.S. 570, 628, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The surrender order bans Mr. Hodges from possessing firearms in his home.

In *Jorgenson*, this Court examined the constitutionality of a statute that required surrender of firearms when a defendant was charged specific enumerated "serious offenses[6]."

In *Jorgenson* the defendant was specifically charged with a firearm offense and found in violation of the arraigning court's conditions of release order. *Id.* at 149. In upholding the statute to the as-applied challenge, the court looked to the facts of the case, as well as the "temporary" nature of the (pre-trial) restriction. *Id.* at 163. *Jorgenson* also noted the defendant was found in possession of the firearms in a car, and

[6] Those serious offenses are described in RCW 9.41.010(28) and are limited to felonies that are also, e.g. crimes of violence, Incest, Rape, Drive-by Shooting, etc.

not "in the home, where the need for defense of self, family, and property is most acute." *Id.* at 158 (internal citations omitted). Those components all cut against the constitutionality of the surrender order at bar.

Most significantly, Mr. Hodges was never accused of using or threatening firearms in any capacity through the petition or testimony of Ms. Pauley. Unlike *Jorgenson*, Mr. Hodges's conduct before or after the petition does not correlate with use or misuse of firearms.

In addition, it is not clear that the surrender order is temporary in the same manner as *Jorgenson*. The *Jorgenson* order reflected pre-trial status that would eventually expire with a dismissal, plea, or verdict.

By contrast the DVPA framework permits renewal of the order at bar. RCW 26.50.060(3). That order can be extended for another year, or ten years, or forever. *Id.* And it is Mr. Hodges, not Ms. Pauley, who bears the burden to *disprove* future acts of domestic violence. *Id.* If Mr. Hodges cannot meet his burden, the order continues to renew in perpetuity. *Id.* Under this statutory framework there is potentially no end in sight for the surrender order.

While not a perfect analogy, courts in the sentencing arena are constrained to craft its sentencing orders that "directly relates to the circumstances of the crime." RCW 9.94A.030(10). Here, the trial court's orders to stay away from Ms. Pauley, to have no contact, etc., directly

relate to Mr. Hodges' committing an act of domestic violence against Ms. Pauley. But the firearm surrender order, redundant to the no-contact orders and obviating Mr. Hodges' Second Amendment rights to protect himself, his family, and his home, does not survive scrutiny[7]. This Court should accept review and find the order unconstitutional as applied.

E. CONCLUSION

This Court should grant review because the decision of the Court of Appeals conflicts with established precedent of both this Court and the United States Supreme Court and involves a significant question of Mr. Hodges' constitutional First, Second, and Fifth Amendment rights; and right to privacy. RAP 13.4(b)(1), (3).

Respectfully submitted this 23 day of August 2021.

Noah Weil, WSBA #42902
Attorney for Petitioner Scott Hodges

[7] "The level of scrutiny (if any) applicable to firearm restrictions challenged under the Second Amendment is not settled." *Jorgenson*, 179 Wn.2d at 159. The *Jorgenson* court applied intermediate scrutiny to the RCW temporarily banning firearm possession of those charged with serious crimes. *Id.* at 161.

DECLARATION OF FILING AND DELIVERY

I certify under penalty of perjury under the laws of the State of Washington that I served this Petition for Review to the Supreme Court to which this declaration is attached and filed in the Washington Supreme Court and delivered to the following attorneys and/or parties:

TO: Lindsey Goheen — Lindseyg@nwjustice.org
Northwest Justice Project

TO: Jeffrey Even — Jeffrey.Even@atg.wa.gov
Office of the Attorney General

TO: Scott Hodges
Petitioner

Dated at Seattle, Washington, this 23rd day of August, 2021

Noah Weil, WSBA# 42902
Law Office of Noah Weil PLLC
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APPENDIX A

May 24, 2021, Opinion

FILED
5/24/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT HODGES, Appellant, v. KARYNN PAULY, Respondent.	No. 80949-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

The appellant, Scott Hodges, has filed a motion for reconsideration of the opinion filed on April 19, 2021. The court has determined that the motion should be denied, but the opinion should be withdrawn, and a substitute opinion filed; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on April 19, 2021 is withdrawn; and it is further

ORDERED that a substitute unpublished opinion shall be filed.

Andrus, A.C.J.

Coburn, J.

Chun, J.

FILED
5/24/2021
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SCOTT HODGES, Appellant, v. KARYNN PAULY, Respondent.	)	No. 80949-1-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Scott Hodges appeals a domestic violence protection order (DVPO) protecting his former girlfriend, Karynn Pauly, an order to surrender weapons, and court-ordered domestic violence treatment. Hodges argues he did not commit domestic violence because his actions were the result of an illness, not an intent to inflict fear on Pauly. He also maintains he should not be required to surrender weapons because he presented no credible threat to Pauly. Finally, Hodges contends the DVPO process violated his right to procedural due process and the court-ordered DV treatment violates his free speech rights. We reject his arguments and affirm.

FACTS

Karynn Pauly met Scott Hodges in February 2017 and the two dated until April 2018, when Pauly ended the relationship after witnessing several violent outbursts by Hodges.

In February 2018, when Pauly and Hodges were together in a parking garage, Hodges became enraged and kicked out the taillights of three cars, later blaming her for triggering his conduct. In another instance, Hodges threw a backpack across Pauly's bedroom with such force that he dented a closet door and knocked it off its hinges.

This pattern culminated in April 2018, when Hodges subjected Pauly to seven hours of destructive behavior. During the incident, he yelled at Pauly, refused to allow her to go to sleep, broke her dishes and glasses, and threw a beer bottle across her bedroom, drenching her, the bed, and walls in liquid. The next morning, after becoming locked out of Pauly's apartment, Hodges hit the door so forcefully while trying to get back in that he cracked the door frame, jammed the bolt and trapped Pauly inside. She was so frightened she did not go to work for several days. Pauly then informed the couple's therapist that she wanted to end the relationship and no longer intended to participate in joint therapy with Hodges.

A week later, Pauly came home from work around midnight to find Hodges waiting for her in front of her building. Pauly told him that their relationship was not healthy and she did not want to see him anymore. Over the next several months, Hodges wrote Pauly several, often lengthy, letters that he left on her doorstep, sometimes with packages and flowers. In these letters, Hodges acknowledged his

behavior was threatening, erratic and out of control. He also admitted knowing "my behavior scared you and it damaged your feeling of safety." Pauly did not respond to Hodges's gestures, hoping he would eventually cease contact.

On the evenings of February 26 and April 11, 2019, Hodges again came to Pauly's apartment uninvited and knocked on her door. Both times, Pauly told him to stop coming to her apartment. Pauly became frightened when Hodges ignored her entreaties to leave. During the April 11 incident, Pauly again explained that it was inappropriate for him to continue contacting her given that the relationship had ended a long time ago. Hodges responded that he did not think they had concluded the subject. Pauly's body flooded with adrenaline and she started shaking. She told him if he did not leave, she would call the police. Pauly's new partner, at Pauly's home at the time, refused to accept items Hodges wanted to give to Pauly and succeeded in locking the door. After this incident, Pauly filed a police report.

Pauly filed a petition for a DVPO on April 15, 2019. In her petition, Pauly described the fear she experienced and the anxiety with which she had struggled, and the treatment she had sought for panic attacks. The court granted Pauly a temporary restraining order on the same date. Once Pauly served Hodges with the temporary order, he retained counsel, and sought a continuance of the hearing on Pauly's petition to allow him to obtain copies of any police reports and to submit a written response. The court granted this continuance over Pauly's objection.

Hodges appeared with counsel for a hearing before a superior court commissioner on July 18. The commissioner took testimony from Pauly in which

she described Hodges's escalating violence toward her during the relationship, his refusal to accept her request that he have no contact with her, and the anxiety and fear she felt not knowing when he might show up on her doorstep. Hodges submitted a written declaration in which he corroborated Pauly's account of some of his behavior, but claimed it was attributable to his severe sleep apnea, panic attacks, and the stress of being in a relationship with a woman who, he stated, had an "inability to communicate effectively." Hodges, through counsel, acknowledged that "[h]e may have had aggressive outbursts," but he argued these were not directed at Pauly and her allegations of stalking were simply "an issue of miscommunication." He maintained he did not intend to harm or threaten Pauly and he did not realize Pauly wanted to cease contact with him because she did not communicate that fact clearly until the April 2019 incident. Hodges contended he was "unaware of what [Pauly] wanted. This is a breakdown in communication." Hodges testified that, "had Ms. Pauly been able or willing to communicate to me clearly after May of 2018 what she did or didn't want by way of contact from me, I would have appreciated it, would have known what wishes she wanted me to follow, and we would not be here." He insisted he meant Pauly no harm and did not intend to cause her to have fear of any kind.

Pauly disputed Hodges's version of events after their separation. She testified she had an in-person conversation with Hodges on May 8, 2018, in which she put him on notice of her desire to terminate contact with him. She also testified she informed him a second time on February 26, 2019, when he showed up on her doorstep and "told him in no uncertain terms at that point that . . . no relationship

was desired and that any further contact was inappropriate, and he still showed up a month later." She also pointed out that despite Hodges sending her seven letters spaced out over a calendar year, she did not attempt in any way to communicate with him because the letters reflected his knowledge and recognition that his behavior had scared her.

The commissioner found that Hodges's violent conduct and repeated uninvited appearances at Pauly's apartment placed her in reasonable fear of imminent harm and therefore constituted domestic violence. The commissioner further found that Hodges represented a credible threat to Pauly and entered a one year DVPO. The commissioner ordered Hodges to participate in a state-certified domestic violence perpetrator treatment program out of concern that his current therapist was not addressing his domestic violence issues. Based on the credible threat finding, the commissioner entered an order requiring Hodges to surrender any weapons he had in his possession.

Hodges moved to revise the commissioner's decision. The trial court, reviewing the record before the commissioner de novo, affirmed the findings and denied the motion. Hodges appeals.

ANALYSIS

A. Definition of Domestic Violence

Hodges argues the trial court erred in granting the DVPO because he never assaulted Pauly and she presented no evidence he intended to inflict fear of any physical harm. We disagree with Hodges's interpretation of RCW 26.50.010(3) as well as his characterization of the evidence before the trial court.

First, RCW 26.50.010(3) defines domestic violence as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner." The trial court found that Pauly proved "by a preponderance of the evidence that she has a present fear of harm based on Mr. Hodges past violent behavior." Hodges does not challenge this finding. He instead argues, in the absence of any actual physical injury or assault, a DVPO cannot be issued unless a petitioner proves a respondent acted with the specific intent to inflict fear of physical harm.

Although we generally review a superior court's decision to grant a protection order for abuse of discretion, In re Marriage of Stewart, 133 Wn. App. 545, 550, 137 P.3d 25 (2006), Hodges raises a question of statutory interpretation which we review de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To determine legislative intent, we first look to the plain language of the statute. Id. If a statute is unambiguous, Washington courts apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent. Id. at 762.

Hodges argues the phrase "infliction of fear" must be interpreted to require proof of intent to cause fear. But the dictionary definitions of "inflict" or "infliction" do not support such an interpretation. To "inflict" is to "cause (something damaging

or painful) to be endured." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1160 (2002). One can certainly cause another to endure something damaging or painful without intending to do so.

Our Supreme Court has rejected a similarly limiting interpretation of the definition of domestic violence in Rodriguez v. Zavala, 188 Wn.2d 586, 398 P.3d 1071 (2017). In that case, the Supreme Court reversed this court's interpretation that fear of imminent harm referred only to "the fear possessed by the one seeking protection, not fear that another family member has of harm to the one for whom protection is sought." Id. at 592. The Supreme Court concluded that this interpretation was "unnecessarily narrow" and went against the plain and unambiguous language of the statute indicating that domestic violence includes the infliction of fear of harm between family members generally. Id.

As in Rodriguez, Hodges seeks to append a restricting element that is not supported by the plain language of the statute. The meaning of RCW 26.50.010 is unambiguous. One commits domestic violence when one inflicts fear of physical harm on one's intimate partner. This court has repeatedly held that a petitioner's fear of harm is sufficient basis for a DVPO. See Maldonado v. Maldonado, 197 Wn. App. 779, 791, 391 P.3d 546 (2017) ("[e]ven when there is no evidence of a direct assault on a child, fear of violence is a form of domestic violence that will support an order for protection"); Stewart at 551 (children's fear of future assault on their mother constituted domestic violence); Spence v. Kaminski, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000) (trial court's finding that respondent had

threatened petitioner in the past and that the petitioner continues to be afraid of petitioner was adequate grounds for permanent protection order).

And despite Hodges's characterization of his conduct as mere "illness-induced destructive acts," Pauly offered circumstantial evidence that Hodges intended to cause her to fear violence at his hand. A trier of fact "may infer . . . intent from . . . conduct where it is plainly indicated as a matter of logical probability. This includes inferring or permissibly presuming that a defendant intends the natural and probable consequences of his or her acts." State v. Bea, 162 Wn. App. 570, 579, 254 P.3d 948 (2011). Pauly presented evidence that Hodges yelled and screamed at her for a seven-hour period, refused to let her sleep, and then after she went to bed, woke her up by throwing a beer bottle across her bedroom showering her, the bed, and her walls in liquid. A reasonable trier of fact could infer intent to inflict fear of bodily harm from the nature and duration of Hodges's aggressive actions.

The trial court therefore did not err in granting the DVPO.

B. Credible Threat Finding

Hodges next argues that the trial court erred in finding that he presents a credible threat to Pauly and ordering him to surrender weapons. A court must enter an order to surrender weapons in connection with a DVPO if that court finds the respondent "represents a credible threat to the physical safety" of the individual protected by the DVPO. RCW 9.41.800(3)(c)(i).

Hodges first maintains that our standard of review should be de novo because the credible threat finding is a conclusion of law. We disagree. "If a

determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact, but if a determination is made by a process of legal reasoning from, or interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law." Goodeill v. Madison Real Estate, 191 Wn. App. 88, 99, 362 P.3d 202 (2015) (citing Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 197 n. 5, 584 P.2d 968 (1978)).

In contexts other than the Domestic Violence Protection Act (DVPA),[1] we have held that whether a person's past statements were threats and perceived as threats are questions of fact. Lawter v. Emp't Sec. Dep't, 73 Wn. App. 327, 333, 869 P.2d 102 (1994). We have also held that whether a person presents a danger in the future based on past threatening conduct is also a question of fact. State v. Wood, 57 Wn. App. 792, 799, fn. 4, 790 P.2d 220 (1990). The DVPA presents a trial court with an analogous inquiry. Whether Hodges presents a credible threat of physical harm under the DVPA requires the trier of fact to determine whether his prior conduct and statements evidence a risk of future dangerousness. Although the finding does have legal significance in that it requires the court to enter a surrender weapons order, the court does not interpret the legal significance of this finding; it only decides whether the threat in fact exists. It is therefore a finding of fact that we review for substantial evidence. In re Dependency of Schermer, 161 Wn.2d 927, 940, 169 P.3d 452 (2007).

[1] Ch. 26.50 RCW.

Hodges next maintains that substantial evidence does not support the trial court's finding that he represents a credible threat to Pauly. In its oral ruling, the trial court stated that

> I do conclude that Ms. Pauly did witness Mr. Hodges engage in violent acts in the past, and that having witnessed those acts, combined with Mr. Hodges showing up at Ms. Pauly's front door late at night in April 2019, that was enough, that is enough for me to conclude that. . . . Mr. Hodges presents a credible threat to physical safety of Ms. Pauly.

Hodges does not dispute that Pauly witnessed him engage in violent acts or that he repeatedly showed up at her apartment uninvited late at night. Instead, Hodges argues that he never intended to harm Pauly and that his actions were caused by his ongoing medical issues.

But this argument does little to counter the weight of evidence supporting the trial court's determination. Regardless of the cause and intent behind Hodges's actions, Pauly's undisputed testimony that she was repeatedly subjected to his threatening and abusive behavior, that she repeatedly told him to have no further contact with her, that he persistently showed up on her doorstep late at night, and that he left her several letters suggesting his intent to continue a relationship she did not want, supports the conclusion that Hodges represents a credible threat to her. After making this finding, the trial court was obligated to enter the surrender weapons order and therefore did not err in doing so.

C. Domestic Violence Treatment Program

Hodges next argues that the trial court abused its discretion when it ordered he participate in a domestic violence perpetrators treatment program. We disagree.

Hodges contends that the court's order was based on untenable grounds because his "episodes of violence were illness-based, not part of a pattern of behavioral domestic violence" and he "was already receiving appropriate medical and mental health treatments to prevent future episodes of violence." Hodges supports his argument by citing to the Washington Domestic Violence Manual for Judges (DV Manual), which states that "specialized domestic violence counseling is contraindicated for illness-based violence. In such cases, the violence can be more effectively managed by appropriate external constraints and by appropriate medical or mental health intervention." WASH. STATE SUPREME COURT GENDER & JUSTICE COMM'N, ADMIN. OFFICE OF COURTS, DOMESTIC VIOLENCE BENCH GUIDE FOR JUDICIAL OFFICERS 2-27 (June 2016), http://www.courts.wa.gov/content/manuals/domViol/Complete%20Manual%202015.pdf#search=domestic%20violence%20manual%20for%20judges. He maintains that domestic violence treatment is inappropriate for him. This argument is unconvincing.

First, state regulations now require that a participant in a domestic violence treatment program "must complete an individual interview and behavioral assessment with a certified program prior to starting any level of treatment." WAC 388-60B-0400(1). The purpose of this assessment is to determine the level of risk, needs, and responsivity for the participant as well as the level of treatment required and the creation of an individualized treatment plan. WAC 388-60B-0400(2). As part of this process, assessors screen for mental health indicators and are authorized to recommend no domestic violence intervention treatment where

appropriate. WAC 388-60B-0400(10) and (19)(f). This procedure minimizes the risk that Hodges will receive domestic violence treatment that is unnecessary or unhelpful.

Second, Hodges has offered no evidence, other than his own assertions that his aggressive, threatening behavior is "illness-based domestic violence" as defined in the DV Manual. The DV Manual cautions that this type of domestic violence is uncommon, but recognizes that "[a] very small percentage of violence against intimates is mislabeled as domestic violence when actually it is caused by organic or psychotic impairments." DOMESTIC VIOLENCE BENCH GUIDE, supra, at 2-26. The manual provides an illustrative list of impairments causing illness-based domestic violence including Alzheimer's disease, Huntington's chorea, and psychosis. Id. The manual makes no mention of sleep apnea or PTSD. Moreover, the manual states that perpetrators of domestic violence often externalize responsibility to factors supposedly outside of their control, including PTSD. Id. at 2-37. Ultimately, the trial court is in the best position to determine whether a respondent's actions are the result of an illness not amenable to domestic violence treatment.

The record indicates that the commissioner carefully considered the evidence of Hodges's medical issues and the type of treatment he was receiving from his long-term therapist. After weighing this evidence, the commissioner exercised her discretion to order Hodges to participate in a treatment program to specifically address domestic violence that did not appear to be a part of his

existing therapist's plan of treatment. The trial court did not err in ordering such treatment.

D. Court-Ordered DV Treatment as Compelled Speech

Hodges next argues that court-ordered participation in a domestic violence treatment program constitutes "compelled speech" in violation of his First Amendment rights. He argues that this requirement in the DVPO will force him "to express opinions with which [he] might not agree." We assume, although Hodges does not explicitly say so, that one of the ideas he disagrees with is the trial court's finding that he committed domestic violence.

We will review Hodges's constitutional challenge de novo. Shoop v. Kittitas County, 149 Wn.2d 29, 33, 65 P.3d 1194 (2003); Aiken v. Aiken, 187 Wn.2d 491, 501, 387 P.3d 680 (2017).

The freedom of speech contained in the First Amendment to the United States Constitution "includes both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." Janus v. Am. Fed'n Mun. Emps., Council 31, 138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018). It is this line of cases on which Hodges relies for his challenge here.

Hodges cites no authority for the proposition that court-mandated treatment constitutes unlawful compelled speech when the treatment arose out of a judicial determination that Hodges perpetrated domestic violence. We are not required to

search for authorities and assume that counsel, after diligent efforts, has found none. City of Seattle v. Muldrew, 69 Wn.2d 877, 420 P.2d 702 (1966).

It is somewhat speculative that Hodges will be "compelled" to admit he committed domestic violence or else be forced to engage in protected expressive conduct or speech as a part of his treatment program. However, we assume without holding, that court-ordered domestic violence treatment involves some "expression" protected by the First Amendment. See State v. Arlene's Flowers, Inc., 193 Wn.2d 469, 511, 441 P.3d 1203 (2019) (a party alleging a violation of the First Amendment based on compelled speech "must first demonstrate that the conduct at issue . . . amounts to 'expression' protected by the First Amendment"). WAC 388-60B-0370(3)(d) does require a participant in a domestic violence treatment program to "actively participate in treatment, including sharing personal experiences, values, and attitudes."

The next inquiry is whether the mandated treatment is a "content-based" or "content-neutral" regulation of speech. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018). Content-based regulations "target speech based on its communicative content." Reed v. Town of Gilbert, 576 U.S. 155, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015). A speech regulation targeted at a "specific subject matter" will be deemed content-based even if it does not discriminate among viewpoints within that subject matter. Reed, 135 S. Ct. at 2230. Laws regulating the content of speech are presumptively unconstitutional unless they are narrowly tailored to serve compelling government interests. Becerra, 138 S. Ct. at 2371. Although neither party offers any argument

on whether court-mandated domestic violence treatment programs are content-based or content-neutral, we assume here that because treatment is targeted at a specific subject matter, it falls into the category of regulating content-based speech and will apply strict scrutiny.

Under this test, we conclude court-mandated domestic violence treatment is narrowly tailored to advance a compelling government interest. First, Washington's legislature and state Supreme Court have both recognized that the government has a compelling interest in preventing domestic violence and abuse. Gourley v. Gourley, 158 Wn.2d 460, 468, 145 P.3d 1185 (2006); LAWS OF 1993, ch. 350, § 1 (recognizing that "domestic violence is a problem of immense proportions affecting individuals as well as communities. . . . Domestic violence costs include the loss of lives as well as millions of dollars each year in the state of Washington for health care, absence from work, and services to children. The crisis is growing.")

The court-ordered treatment is narrowly tailored to advance this compelling interest. First, RCW 26.50.060(1)(e) gives courts the discretion to "[o]rder the respondent to participate in a domestic violence perpetrator treatment program approved under RCW 26.50.150." RCW 26.50.150, in turn, requires domestic violence treatment programs to be certified by the Department of Social and Health Services and meet minimum standards, the primary focus of which is "ending the violence, holding the perpetrator accountable for his or her violence, and changing his or her behavior." RCW 26.50.150(4). This focus ties back directly to the compelling interest in preventing domestic violence.

Second, the court ordered Hodges to attend this treatment only after conducting a contested evidentiary hearing during which he was represented by counsel and only after finding that he had in fact committed domestic violence.

Third, Hodges had the opportunity to argue to the commissioner and subsequently on revision before the trial court that domestic violence treatment was not appropriate for him. Moreover, the governing WAC provisions provide for an intake process that tailors an individualized treatment plan and minimizes the likelihood that Hodges will receive treatment that is outside the legislature's stated objective of preventing domestic violence and abuse. WAC 388-60B-0400.

We conclude under these circumstances, the court order requiring Hodges to participate in domestic violence treatment survives strict scrutiny.

E. Procedural Due Process

Hodges next argues that the trial court's orders violated his procedural due process rights. We reject this contention as well.

"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, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The level of procedural protection required varies based on circumstance. Id. at 334.

Our Supreme Court has upheld the DVPA against procedural due process challenges. See Aiken, 187 Wn.2d at 504-05 (due process does not require trial court to allow parent to cross examine child regarding alleged domestic violence); Gourley, 158 Wn.2d at 467 (same). Hodges seeks to distinguish Gouley and Aiken by arguing that, unlike in the parenting context where the petitioner and respondent

have competing equal rights to the control and care of their children, Pauly has "no offsetting rights over [Hodges's] liberty or right to bear arms." He argues that "[h]ere, where firearm restrictions or DV treatment requirements are at stake, due process should require more." But our due process analysis does not pit Hodges's rights to bear arms against Pauly's right to be free from domestic violence. We look at Hodges's interests and those of the government in protecting victims:

> In evaluating the process due in a particular situation, [Washington courts] consider (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail.

Aiken, 187 Wn.2d at 501-02 (quoting Mathews, 424 U.S. at 335). In both Aiken and Gourley, despite recognizing the respondents' fundamental right to make decisions concerning the care, custody, and control of their children, the Supreme Court concluded that "[t]he government has an equally compelling interest in protecting children and preventing domestic violence or abuse." Aiken, 187 Wn.2d at 502-03 (citing Gourley, 158 Wn.2d at 468). This interest is anchored in the legislature's explicit findings in enacting provisions of the DVPA. See LAWS OF 1993, ch. 350, § 1. The court concluded in both cases that the parent's rights over their children does not outweigh the government's compelling interest in preventing domestic violence. Aiken, 187 Wn.2d at 502-03; Gourley, 158 Wn.2d at 468.

We therefore conclude, as the Supreme Court did in Aiken and Gourley, that the first and third factors must be balanced by a consideration of the

procedures employed by the government and the risk that Hodges's interests were erroneously deprived. Gourley, 158 Wn.2d at 468.

The DVPA provides several procedural protections for respondents. Aiken, 187 Wn.2d at 502; Gourley, 158 Wn.2d at 468-69. The provisions of the DVPA

> satisfy the two fundamental requirements of due process—notice and a meaningful opportunity to be heard by a neutral decision maker. The procedural safeguards include: (1) a petition to the court setting forth facts under oath; (2) notice to the respondent; (3) a hearing before a judicial officer where the petitioner and respondent may testify; (4) the opportunity to file a motion to modify a protection order; (5) a requirement that a judicial officer issue any order; and (6) the right to appeal.

State v. Karas, 108 Wn. App. 692, 699, 32 P.3d 1016 (2001) (citing Spence v. Kaminski, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000). Each of these procedural safeguards was provided in the present case to protect Hodge's due process rights.

Hodges was represented by counsel at every stage of this proceeding. He was afforded adequate notice and the court granted him a five-week continuance to respond to Pauly's petition. Hodges presented his argument via a declaration and exhibits, and volunteered testimony at the hearing. He did not request the opportunity to cross examine Pauly. After the commissioner's ruling, Hodges filed a motion for revision and again had the opportunity to be heard in front of a trial court.

Moreover, the risk of the erroneous deprivation of Hodges's constitutional interests is mitigated by the DVPO's limited one-year term. See Mathews, 424 U.S. at 341 (holding that the possible length of wrongful deprivation of a property

interest is an important factor in assessing the impact of official action on the private interests).

Hodges has failed to show how these numerous safeguards were so deficient as to deprive him of due process. Our Supreme Court has repeatedly upheld these procedural protections in the DVPO context and we adhere to those holdings here.

F. Appearance of Fairness

Hodges lastly argues that the DVPO process violates the appearance of fairness doctrine. We disagree.

"Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The doctrine requires that the judge not only be impartial, but also appear to be impartial. Id. (citing State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). A successful claim under the doctrine requires evidence of actual or potential bias on the part of the judge. State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).

Hodges cites a number of provisions of the DVPA, arguing that they create a process which favors petitioners over respondents. The fundamental problem with Hodges's argument is that he does not provide evidence of bias on the part of any judicial officer, but instead asserts bias of the legislature in drafting the DVPA. The appearance of fairness doctrine does not apply to legislative actions. See Barry v. Johns, 82 Wn. App. 865, 920 P.2d 222 (1996).

Hodges also argues the commissioner who granted Pauly's ex parte DVPO, violated the appearance of fairness doctrine by asking Pauly several leading questions during the hearing. But the commissioner's efforts to elicit information from a pro se petitioner does not constitute evidence of bias. Judges are permitted "to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard" without violating the rule of partiality and fairness. CJC 2.2, comment 4. These actions do not violate the appearance of fairness.

G. Attorney Fees

Pauly requests attorney fees for this appeal. An appellate court may award attorney fees where allowed by statute, rule or contract. Aiken, 187 Wn.2d at 506. Under RCW 26.50.060(1)(g), the court has the discretion to require a respondent in a DVPA proceeding to pay reasonable attorney fees. Id. Because Pauly is the prevailing party, we exercise our discretion and grant her request for reasonable attorney fees and costs on appeal subject to her compliance with RAP 18.1.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Coburn, J.

Chun, J.

APPENDIX B

RCW 26.50.060
RCW 26.50.150

RCW 26.50.060

Relief—Duration—Realignment of designation of parties—Award of costs, service fees, attorneys' fees, and limited license legal technician fees. *(Effective until January 1, 2021.)*

*** CHANGE IN 2021 *** (SEE 1320-S2.SL) ***

(1) Upon notice and after hearing, the court may provide relief as follows:

(a) Restrain the respondent from committing acts of domestic violence;

(b) Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child;

(c) Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(d) On the same basis as is provided in chapter 26.09 RCW, the court shall make residential provision with regard to minor children of the parties. However, parenting plans as specified in chapter 26.09 RCW shall not be required under this chapter;

(e) Order the respondent to participate in a domestic violence perpetrator treatment program approved under RCW 26.50.150;

(f) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer, as allowed under this chapter;

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees or limited license legal technician fees when such fees are incurred by a person licensed and practicing in accordance with the state supreme court's admission to practice rule 28, the limited practice rule for limited license legal technicians;

(h) Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household;

(i) Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260;

(j) Require the respondent to submit to electronic monitoring. The order shall specify who shall provide the electronic monitoring services and the terms under which the monitoring must be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the respondent to pay for electronic monitoring;

(k) Consider the provisions of RCW 9.41.800;

(l) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept, or held by the petitioner, respondent, or minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The court may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of specified locations where the pet is regularly found; and

(m) Order use of a vehicle.

(2) If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year. This limitation is not applicable to orders

for protection issued under chapter **26.09**, *26.10, 26.26A, or **26.26B** RCW. With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

If the petitioner has petitioned for relief on behalf of the respondent's minor children, the court shall advise the petitioner that if the petitioner wants to continue protection for a period beyond one year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may seek relief pursuant to the provisions of chapter **26.09**, 26.26A, or **26.26B** RCW.

(3) If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at any time within the three months before the order expires. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. Upon receipt of the petition for renewal the court shall order a hearing which shall be not later than fourteen days from the date of the order. Except as provided in RCW **26.50.085**, personal service shall be made on the respondent not less than five days before the hearing. If timely service cannot be made the court shall set a new hearing date and shall either require additional attempts at obtaining personal service or permit service by publication as provided in RCW **26.50.085** or by mail as provided in RCW **26.50.123**. If the court permits service by publication or mail, the court shall set the new hearing date not later than twenty-four days from the date of the order. If the order expires because timely service cannot be made the court shall grant an ex parte order of protection as provided in RCW **26.50.070**. The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. The court may renew the protection order for another fixed time period or may enter a permanent order as provided in this section. The court may award court costs, service fees, and reasonable attorneys' fees as provided in subsection (1)(g) of this section.

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW **26.50.070** on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW **26.50.030**.

(5) Except as provided in subsection (4) of this section, no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW **26.50.050**.

(6) The court order shall specify the date the order expires if any. The court order shall also state whether the court issued the protection order following personal service, service by publication, or service by mail and whether the court has approved service by publication or mail of an order issued under this section.

(7) If the court declines to issue an order for protection or declines to renew an order for protection, the court shall state in writing on the order the particular reasons for the court's denial.

[**2019 c 46 § 5038**; **2018 c 84 § 1**; **2010 c 274 § 304**; **2009 c 439 § 2**; **2000 c 119 § 15**; **1999 c 147 § 2**; **1996 c 248 § 13**; **1995 c 246 § 7**; **1994 sp.s. c 7 § 457**. Prior: **1992 c 143 § 2**; **1992 c 111 § 4**; **1992 c 86 § 4**; **1989 c 411 § 1**; **1987 c 460 § 55**; **1985 c 303 § 5**; **1984 c 263 § 7**.]

NOTES:

***Reviser's note:** Chapter **26.10** RCW, with the exception of RCW **26.10.115**, was repealed by 2020 c 312 § 905, effective January 1, 2021.

RCW 26.50.150

Domestic violence perpetrator programs.

*** CHANGE IN 2021 *** (SEE 1320-S2.SL) ***

Any program that provides domestic violence treatment to perpetrators of domestic violence must be certified by the department of social and health services and meet minimum standards for domestic violence treatment purposes. The department of social and health services shall adopt rules for standards of approval of domestic violence perpetrator programs. The treatment must meet the following minimum qualifications:

(1) All treatment must be based upon a full, complete clinical intake including but not limited to: Current and past violence history; a lethality risk assessment; history of treatment from past domestic violence perpetrator treatment programs; a complete diagnostic evaluation; a substance abuse assessment; criminal history; assessment of cultural issues, learning disabilities, literacy, and special language needs; and a treatment plan that adequately and appropriately addresses the treatment needs of the individual.

(2) To facilitate communication necessary for periodic safety checks and case monitoring, the program must require the perpetrator to sign the following releases:

(a) A release for the program to inform the victim and victim's community and legal advocates that the perpetrator is in treatment with the program, and to provide information, for safety purposes, to the victim and victim's community and legal advocates;

(b) A release to prior and current treatment agencies to provide information on the perpetrator to the program; and

(c) A release for the program to provide information on the perpetrator to relevant legal entities including: Lawyers, courts, parole, probation, child protective services, and child welfare services.

(3) Treatment must be for a minimum treatment period defined by the secretary of the department of social and health services by rule. The weekly treatment sessions must be in a group unless there is a documented, clinical reason for another modality. Any other therapies, such as individual, marital, or family therapy, substance abuse evaluations or therapy, medication reviews, or psychiatric interviews, may be concomitant with the weekly group treatment sessions described in this section but not a substitute for it.

(4) The treatment must focus primarily on ending the violence, holding the perpetrator accountable for his or her violence, and changing his or her behavior. The treatment must be based on nonvictim-blaming strategies and philosophies and shall include education about the individual, family, and cultural dynamics of domestic violence. If the perpetrator or the victim has a minor child, treatment must specifically include education regarding the effects of domestic violence on children, such as the emotional impacts of domestic violence on children and the long-term consequences that exposure to incidents of domestic violence may have on children.

(5) Satisfactory completion of treatment must be contingent upon the perpetrator meeting specific criteria, defined by rule by the secretary of the department of social and health services, and not just upon the end of a certain period of time or a certain number of sessions.

(6) The program must have policies and procedures for dealing with reoffenses and noncompliance.

(7) All evaluation and treatment services must be provided by, or under the supervision of, qualified personnel.

(8) The secretary of the department of social and health services may adopt rules and establish fees as necessary to implement this section.

(9) The department of social and health services may conduct on-site monitoring visits as part of its plan for certifying domestic violence perpetrator programs and monitoring implementation of the rules adopted by the secretary of the department of social and health services to determine compliance with

the minimum qualifications for domestic violence perpetrator programs. The applicant or certified domestic violence perpetrator program shall cooperate fully with the department of social and health services in the monitoring visit and provide all program and management records requested by the department of social and health services to determine the program's compliance with the minimum certification qualifications and rules adopted by the department of social and health services.

[**2019 c 470 § 5**; **2017 3rd sp.s. c 6 § 334**; **2010 c 274 § 501**; **1999 c 147 § 1**; **1991 c 301 § 7**.]

NOTES:

Effective date—2017 3rd sp.s. c 6 §§ 102, 104-115, 201-227, 301-337, 401-419, 501-513, 801-803, and 805-822: See note following RCW **43.216.025**.

Conflict with federal requirements—2017 3rd sp.s. c 6: See RCW **43.216.908**.

Intent—2010 c 274: See note following RCW **10.31.100**.

Finding—1991 c 301: See note following RCW **10.99.020**.

LAW OFFICE OF NOAH WEIL

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