

No. 63602-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

SHANNON HOLSMAN,

RESPONDENT,

v.

RICHARD POPE,

APPELLANT.

APPEAL FROM THE SUPERIOR
COURT OF KING COUNTY

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. Trial court erred by failing to enter any findings of fact or conclusions of law after the non-jury trial of the anti-harassment action.
2. Informal trial court reasoning does not support issuance of an anti-harassment order under the statutory factors to be considered.
3. Even if findings of fact and conclusions of law had been entered, substantial evidence does not support issuance of an anti-harassment order under the statutory factors to be considered.
4. The trial court denied due process of law, in that the trial court reviewed exhibits presented by Respondent without entering them into evidence or otherwise making them part of the record of the case, and did not even review or place into the record exhibits offered by Appellant.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did trial court err by failing to enter any findings of fact or conclusions of law after the non-jury trial of the anti-harassment action?
2. Does any informal trial court reasoning support issuance of an anti-harassment order under the statutory factors to be considered?
3. Does substantial evidence support issuance of an anti-harassment order against Appellant, when all allegedly unwanted contact between Appellant and Respondent was initiated by Respondent?
4. Did the trial court deny due process of law, when the trial court reviewed exhibits presented by Respondent without entering them into evidence or otherwise making them part of the record of the case, and did not even review or place into the record exhibits offered by Appellant?

C. STATEMENT OF THE CASE

Appellant Richard Pope is the custodial father of a six year old daughter, Kathleen Pope (Katie), who is developmentally disabled with severe autism and unable to speak. (CP 11) The DSHS Division of Developmental Disabilities allocates Katie 57 hours per month of personal care hours, which allows an outside caregiver to come to Mr. Pope's home and provide care for Katie and free some burdens from Mr. Pope. (CP 15)

Respondent Shannon Holsman provided this personal care for Katie from July 30, 2008 to September 24, 2008. (CP 16, 19) Ms. Holsman and Mr. Pope first met socially in early 2007, through Ted Branstetter, a close personal friend of Mr. Pope. (CP 13) Ms. Holsman is a close personal friend of Ted's son Matt Branstetter, and sometimes has a dating relationship with Matt. (CP 13) In mid-July 2008, both Branstetters and Ms. Holsman were again at Mr. Pope's home, and Mr. Pope ended up selecting Ms. Holsman to be a caregiver for Katie. (CP 14-15)

Problems soon developed with Ms. Holsman's caregiving of Katie. On August 7, 2008, Katie's arm was broken and Ms. Holsman was not able to explain how this happened. (CP 16) Katie started acting upset and afraid when Ms. Holsman came to care for her, something she did not do with other female caregivers. (CP 16-17) At the end of August 2008, Ms. Holsman became obsessed with the false idea that Mr. Pope wanted to marry her. (CP 17) Ms. Holsman then suggested that Mr. Pope should provide a female caregiver for Katie with free room and board. (CP 17)

On September 3, 2008, Ms. Holsman allowed a new boyfriend of hers, Tristian Yost, to come to Mr. Pope's home while she was caring for Katie, without Mr. Pope's knowledge or consent. (CP 18) Ms. Holsman brought Matt Branstetter to Mr. Pope's home on September 4, 2008, while she was watching Katie. (CP 18) Ms. Holsman knew that a court found Matt had committed a sexual assault, but did not disclose this fact to Mr. Pope. (CP 13, 18) Had Mr. Pope been aware of this at the time, he would not have allowed Matt in his home while Katie was there. (CP 18)

Ms. Holsman had some serious fallings out with both Mr. Yost and Matt Branstetter in the September 17-24, 2008 time, that she managed to get Mr. Pope involved with. (CP 18-20) On September 17, 2008, Ms. Holsman told Mr. Pope she wanted Matt out of her apartment, because he was seeing another woman. (CP 18) Ms. Holsman then told Mr. Pope on September 23, 2008 that Matt had raped three woman, including her best friend and her other roommate. (CP 19) Ms. Holsman said that some of her father's "biker" friends were prepared to forcibly make Matt move out, but was able to convince Mr. Pope to ask for Ted Branstetter's assistance in convincing Matt to move out of her place voluntarily. (CP 18)

Matt Branstetter served a week in jail for one of his many traffic offenses, and was released on September 24, 2008. (CP 19) Mr. Yost had sent Matt a threatening text message while he was in jail, talking about a gun. (CP 20) Ted Branstetter called Mr. Pope, and said Matt had decided not to move out of Ms. Holsman's apartment because of this. (CP 20)

Mr. Pope called Ms. Holsman on the evening of September 24, 2008 to relate this information. Ms. Holsman got extremely mad at Mr. Pope, told him she was quitting her work with Katie, and hung up. (CP 20)

Mr. Pope tried to call Ms. Holsman, to get her either to change her mind or to return his house key and Katie's car seat. Ms. Holsman would not answer the phone, or promise to return these items, so Mr. Pope had to get a friend help him change the locks to his home. (CP 20) Ms. Holsman did not return these items to Mr. Pope until September 27, 2008, after Ted Branstetter finally convinced her that she needed to do so. (CP 21)

Ms. Holsman left her sunglasses at Mr. Pope's home on September 27, 2008. Mr. Pope sent several messages to Ms. Holsman about this, but she showed no interest in getting her sunglasses back. (CP 21)

On the evening of September 28, 2008, Mr. Pope e-mailed Ms. Holsman and told her that her time sheet for September 2008 needed to be signed. (CP 21) Ms. Holsman e-mailed Mr. Pope back, accusing him of lying about the need to sign the time sheet, telling Mr. Pope never to contact her again, and threatening to file for a "restraining order". (CP 22)

In spite of telling Mr. Pope never to contact her again, Ms. Holsman proceeded to initiate unsolicited communications with Mr. Pope on at least 10 different occasions and engage in other bizarre conduct.

First, Ms. Holsman e-mailed Mr. Pope on October 1, 2008, and told him that the September 2008 time sheets really did need to be signed after all, resulting in several e-mails being exchanged. (CP 22)

Second, Ms. Holsman added Mr. Pope as a "friend" on FaceBook, a social networking website, on October 2, 2008, resulting in several more e-mails being exchanged. (CP 22)

Third, Ms. Holsman added Mr. Pope as a "friend" on Flixster the evening of November 17, 2008, resulting in several more e-mails being exchanged. (CP 22-23) The e-mails sent by Ms. Holsman were rather nasty, and again threatened Mr. Pope with a "restraining order". (CP 23)

Fourth, just hours after threatening Mr. Pope with a "restraining order" and promising never to communicate with him again, Ms. Holsman sent Mr. Pope another message on Flixster on the morning of November

18, 2008. Mr. Pope e-mailed Ms. Holsman back, telling her very clearly to stop all further unsolicited communications with him. (CP 23)

Fifth, on December 20, 2008, Ms. Holsman e-mailed Mr. Pope, complaining that Mr. Pope was playing games on MySpace and FaceBook with people that Ms. Holsman considered her “friends”. Ms. Holsman threatened to “go to the cops” if Mr. Pope did not stop playing with her friends. Mr. Pope responded, stating that he was obeying the game rules (“terms of service”), that any “friends” of Ms. Holsman could always stop playing with him if they chose to do so, and that he had no way of knowing who her “friends”, since her “profile” was private. (CP 24)

On January 17 and 18, 2009, Ms. Holsman and her friend Keith Nelson posted a series of messages on MySpace with various harassment and threats, which include implicit death threats, directed at Mr. Pope. Some of these threatening and harassing messages included: "**Richard should f*** off and die**", "**Richard REALLY needs to f*** off and die**" and "**someone should make Richard f*** off and die**". (CP 24)

On March 19, 2009 and March 29, 2009, Ms. Holsman sent “friend requests” to Mr. Pope on YouTube, a video website. (RP 15:15-16)

On the morning of April 16, 2009, Mr. Pope and Ms. Holsman coincidentally ran into each other at the Redmond courthouse. Mr. Pope was there to get court documents and an audio CD that a friend of his needed to prepare for a superior court trial. Ms. Holsman was with Matt Branstetter, who had a traffic offense hearing that morning. This surprised Mr. Pope, since Matt had finally moved from Ms. Holsman’s apartment

several months earlier. Mr. Pope and Matt spoke to each other. Ms. Holsman smiled Mr. Pope, who did not smile back or talk to her. (CP 25)

Mr. Pope told Ted Branstetter what had happened that morning. Mr. Pope also told Ted that he would be testifying at a trial in the Seattle courthouse on the afternoon of April 20, 2009. Ted told Mr. Pope that Matt was also going to be at the Seattle courthouse that same afternoon for a child support contempt hearing. Ted said that he would inform Matt and Ms. Holsman that Mr. Pope would also be at the courthouse, so that they would not be alarmed in the event they happened to see him there. (CP 25)

While both Mr. Pope and Matt Branstetter had court hearings they were required to attend, there was no requirement for Ms. Holsman to be at the Seattle courthouse on the afternoon of April 20, 2009. Ms. Holsman chose to go to the Seattle courthouse anyway, even though she knew Mr. Pope would be there. There is no indication from either Ms. Holsman or Mr. Pope that they saw each other in the Seattle courthouse. (CP 26)

Ms. Holsman filed an anti-harassment protection order petition against Mr. Pope on April 20, 2009. (CP 1-4) A temporary protection order was entered, setting a hearing date for May 4, 2009. (CP 5-6) Ms. Holsman's filing fees were waived under RCW 10.14.055. (CP 7-8)

On the morning of April 21, 2009, Ms. Holsman "bought" Mr. Pope's profile in a game application on FaceBook called "Top Friends". Mr. Pope considered this behavior by Ms. Holsman to be very bizarre, obsessive and threatening, since it happened AFTER Ms. Holsman had obtained a temporary anti-harassment order against Mr. Pope. (CP 26)

Mr. Pope filed an anti-harassment protection order petition against Ms. Holsman on April 24, 2009. (CP 9-27) A temporary protection order was entered, setting a hearing date for May 4, 2009. (CP 30-31) Mr. Pope's filing fees were waived under RCW 10.14.055. (CP 28-29)

The hearing on both parties' anti-harassment petitions against each other was held on May 4, 2009. (CP 35-36)

Towards the beginning, the trial court asked each party if they would both agree to the entry of the anti-harassment order requested by the other party. (RP 4:16-19) Ms. Holsman said she would agree to entry of an order against herself (RP 4:20-21), while Mr. Pope said he did not agree to entry of an order against himself. (RP 4:24 to 5:15)

During the hearing, Ms. Holsman provided the trial court with a "whole huge stack" of e-mails. (RP 9:2-25) They were first given to Mr. Pope to review, and then presented to the trial court. The trial court looked through Ms. Holsman's documents, but stated that it would not have time to read all of them. (RP 10:19-23) The trial court reviewed Ms. Holsman's documents, but did not formally admit any of them into evidence, nor were any of them otherwise preserved in the court record.

Mr. Pope informed the trial court that he had documents of his own to offer. (RP 11:25 to 12:1) The trial court observed that Mr. Pope had "quite a few". (RP 12:2-4) When Mr. Pope offered his own documents to the trial court, the trial court refused to even look at them. (RP 15:1-10) There was no process provided during the hearing for preserving the documents offered by Mr. Pope into the court record either.

At the conclusion of the hearing, the trial court entered anti-harassment orders against Mr. Pope in favor of Ms. Holsman (CP 37-38), and against Ms. Holsman in favor of Mr. Pope. (CP 39-40)

Mr. Pope filed an appeal of the anti-harassment order entered against himself in favor of Ms. Holsman on June 3, 2009. (CP 41-50)

D. ARGUMENT

1. Findings of Fact and Conclusions of Law:

CR 52(a)(1) requires the court to enter findings of fact and conclusions of law in all actions tried upon the facts without a jury:

In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law.

In addition, CR 52(a)(2) requires findings and conclusions when temporary injunctions are granted or refused, and in all final domestic relations decisions, including uncontested dispositions.

Findings and conclusions are definitely required when an order for protection under RCW 10.14.080 is entered after a contested hearing. An order for protection is similar to a permanent injunction entered after trial. CR 52(a)(2)(A) requires findings and conclusions even in cases involving a temporary injunction. Moreover, all these antiharassment protection order cases are tried on the facts without a jury.

Thomas v. Thomas, 477 A.2d 728 (D.C. 1984), interpreted the District of Columbia domestic violence act. That jurisdiction uses federal-patterned civil rules similar to Washington rules.

The trial court entered a protection order simply based upon stating there was "good cause to believe" commission of domestic violence, without entering findings of fact. The respondent appealed, claiming that the trial court's ruling was a "farce".

The appellate court agreed with respondent, reversing and remanding to the trial court:

[T]he finder of fact must provide this court with findings sufficient to facilitate appellate review.... We have no such findings before us. This absence is particularly critical since appellant's sole contention is that the allegations offered by appellee are untrue. We hereby remand the record of this proceeding to the trial court with instructions to prepare a written statement of its findings, based upon the hearing already completed.

Thomas, 477 A.2d at 729.

In the various reported decisions involving anti-harassment appeals under Chapter 10.14 RCW, the trial courts have generally entered extensive findings of fact and conclusions of law. *See McIntosh v. Nafizger*, 69 Wn. App. 906, 909-10, 851 P.2d 713 (1993); Burchell v. Thibault, 74 Wn. App. 517, 522, 874 P.2d 196 (1994).

A long line of Washington cases have uniformly required findings of fact and conclusions of law in all non-jury cases (both civil and criminal). Bard v. Kleebe, 1 Wash. 370, 25 P. 467, 27 P. 273 (1890); Colvin v. Clark, 83 Wash. 376, 145 P. 419 (1915); Western Dry Goods Co. v. Hamilton, 86 Wash. 478, 150 P. 1171 (1915); State ex rel. Dunn v. Plese, 134 Wash. 443, 235 P. 961 (1925); State v. Medcraft, 167 Wash. 274, 9 P.2d 84 (1932); Seattle v. Silverman, 35 Wn.2d 574, 214 P.2d 180

(1950); State v. Helsel, 61 Wn.2d 81, 377 P.2d 408 (1962); State v. Wood, 68 Wn.2d 303, 412 P.2d 779 (1966); State v. Russell, 68 Wn.2d 748, 415 P.2d 503 (1966); State v. Wilks, 70 Wn.2d 626, 424 P.2d 663 (1967); State v. Edwards, 3 Wn. App. 638, 477 P.2d 28 (1970); Turner v. Walla Walla, 10 Wn. App. 401, 517 P.2d 985 (1974).

On appeal, a judgment entered without findings of fact and conclusions of law must be vacated and remanded to the trial court for their entry, before the judgment may be reinstated.

Every reported decision has vacated judgments entered without findings and conclusions, with instructions for the trial court to make findings and conclusions before reentering judgment. Bard, 1 Wash. at 376; Colvin, 83 Wash. at 381-82; Western Dry Goods, 86 Wash. at 482; Plese, 134 Wash. at 450; Silverman, 35 Wn.2d at 578; Helsel, 61 Wn.2d at 83; Wood, 68 Wn.2d at 304; Wilks, 70 Wn.2d at 629; Edwards, 3 Wn. App. at 639; Turner, 10 Wn. App. at 406.

When a judgment has been vacated for entry of required findings and conclusions, the trial court has the discretion to take additional evidence prior to reentry of judgment. Wilks, 70 Wn.2d at 629; Turner, 10 Wn. App. at 405.

Findings of fact and conclusions of law would be especially crucial in an anti-harassment case, as Chapter 10.14 RCW sets forth numerous specified statutory criteria which must be considered by the trial court.

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A court may issue an anti-harassment protection order only when it "finds by a preponderance of the evidence that unlawful harassment exists." RCW 10.14.080(3). "Unlawful harassment" is defined as:

"(1) a knowing and wilful (2) course of conduct (3) directed at a specific person (4) which seriously alarms, annoys or harasses such person, and (5) which serves no lawful or legitimate purpose".

Burchell v. Thibault, 74 Wn. App. 517, 521, 874 P.2d 196 (1994) (quoting RCW 10.14.020(1)).

Such course of conduct must satisfy both an objective standard (what a reasonable person would feel) and a subjective standard (how did the petitioner actually feel) in relation to causing substantial emotional distress. RCW 10.14.020(1).

"Course of conduct" is defined as a "pattern of conduct composed of a series of acts", which are "evidencing a continuity of purpose". RCW 10.14.020(2). There are six specific factors that a court must consider in determining whether a "course of conduct serves any legitimate or lawful purpose", which are set forth in RCW 10.14.030.

Finally, the Rules of Appellate Procedure require Appellants to set forth in their opening briefs (in the body or the appendix) the text of any challenged findings of fact or conclusions of law. RAP 10.4(c); Oblizalo v. Oblizalo, 54 Wn. App. 800, 776 P.2d 166 (1989). This cannot be done where no findings or conclusions were entered.

The anti-harassment order of the trial court in this matter should be vacated, with this matter remanded for entry of findings and conclusions.

2. **Evidence and Informal Reasons Do Not Support Order**

Neither the evidence presented, nor the informal reasoning made by the trial court, support the issuance of an anti-harassment order against Mr. Pope under the criteria set forth in RCW 10.14.010 and 10.14.030.

The trial court gave informal reasoning twice during the hearing:

[I]t seems like we have a mutuality of interest here. Neither side wants to have contact with the other. There's been communication back and forth. Both sides have expressed the fact they don't want to receive that kind of correspondence. (RP 16:15-19)

So I think it really would be best for both of you to stop communicating with each other. I'm ordering that, but I also think it is the right thing to do. It's caused nothing but problems and it's now time to just sever that relationship. And I think just both of you move on with your lives. It sounds like that's what you want, so let's just go ahead and do that. (RP 17:21 to 18:3)

The purpose of an anti-harassment order under RCW 10.14.010 is to provide "protection orders **preventing all further unwanted contact** between the victim and the perpetrator". (emphasis added)

RCW 10.14.030 provides six criteria for the trial court to consider when determining whether the conduct of a respondent is legitimate or lawful, or whether an anti-harassment order is necessary to be issued:

In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether:

(1) **Any current contact between the parties was initiated by the respondent only or was initiated by both parties;**

(2) **The respondent has been given clear notice that all further contact with the petitioner is unwanted;**

(3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;

(4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:

(a) Protect property or liberty interests;

(b) Enforce the law; or

(c) Meet specific statutory duties or requirements;

(5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;

(6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

First, it is important to consider current contact between the parties. The working relationship between Ms. Holsman, Mr. Pope and Katie up through September 28, 2008 provides important context, but what is really important is the conduct of the parties after September 28, 2008, when Ms. Holsman told Mr. Pope that she wanted no further contact with him, and then continued repeatedly to initiate contact with Mr. Pope.

Ms. Holsman e-mailed Mr. Pope on October 1, 2008 (CP 22), added Mr. Pope as a "friend" on FaceBook on October 2, 2008 (CP 22), added Mr. Pope as a "friend" on Flixster on November 17, 2008 (CP 22), sent Mr. Pope a message on Flixster on November 18, 2008 (CP 23), e-mailed Mr. Pope on December 20, 2008 (CP 24), posted threatening messages about Mr. Pope on MySpace on January 17 and 18, 2009 (CP 24), and made YouTube "friend" requests in March 2009. (RP 15:15-16)

Mr. Pope responded to most of Ms. Holsman's communications listed above. The only communications that Mr. Pope had with Ms. Holsman after September 28, 2008 were in response to Ms. Holsman's communications to Mr. Pope. At first, Mr. Pope responded to Ms. Holsman's continued communications in a positive manner, since he genuinely wanted to resume his prior friendship with Ms. Holsman. (CP 22) Ms. Holsman's renewed communications became nasty and threatening on November 17, 2008. (CP 22) Mr. Pope then told Ms. Holsman he was very upset with her communications, and that he wanted no further unsolicited communications from Ms. Holsman. (CP 23)

Ms. Holsman continued to initiate communications with Mr. Pope after this, including the November 18, 2008 Flixster message (CP 23), the December 20, 2008 e-mail (CP 24), the January 17 and 18, 2009 threatening MySpace messages (CP 24), and the March 19 and 29, 2009 YouTube "friend" requests. (RP 15:15-16) Ms. Holsman even "bought" Mr. Pope's profile in a FaceBook game on April 21, 2009 (CP 26), the day after she had filed for anti-harassment against Mr. Pope! (CP 1-8)

An anti-harassment order against Mr. Pope is not warranted under RCW 10.14.010, since the purpose is to "prevent[] all further unwanted contact". In this case, Ms. Holsman repeatedly initiated communications with Mr. Pope on at least 10 different dates after professing that she wanted no further contact with Mr. Pope. All of the communications from Mr. Pope after September 28, 2008 were in response to communications from Ms. Holsman, and he finally told her never to contact him again.

Under RCW 10.14.030(1), the trial court must consider whether **“[a]ny current contact between the parties was initiated by the respondent only or was initiated by both parties”**.

If the current contact between the parties is initiated only by the respondent, then RCW 10.14.030(1) would support the issuance of an antiharassment order against the respondent.

On the other hand, if the current contact has been initiated by both parties, then RCW 10.14.030(1) would oppose the issuance of an antiharassment order, especially given the purpose under RCW 10.14.010 is to “prevent[] all further unwanted contact”. If both the petitioner and the respondent were initiating contact, then the contact between the parties could not be found to be unwanted by the petitioner.

In the present case, all communications after September 28, 2008 were initiated by Ms. Holsman, and any communications by Mr. Pope were in response to communications by Ms. Holsman.

RCW 10.14.030(1) clearly does not allow for an antiharassment order against a **respondent** (Mr. Pope) when all “current contact between the parties was initiated by the” **petitioner only** (Ms. Holsman)!

Under RCW 10.14.030(2), the trial court must consider whether **“the respondent has been given clear notice that all further contact with the petitioner is unwanted”**.

Ms. Holsman claimed on September 28, 2008 that she wanted no further contact from Mr. Pope, but proceeded to initiate unsolicited communications with Mr. Pope on 10 different times after that date.

This is certainly not a situation under RCW 10.14.030(2) where Ms. Holsman would have given Mr. Pope **clear notice** that all further contact was unwanted. Ms. Holsman's conduct in repeatedly continuing to make unsolicited communications to Mr. Pope contradicts her claimed desire to have no further contact with Mr. Pope. Moreover, Mr. Pope's only communications with Ms. Holsman after September 28, 2008 were in response to unsolicited communications initiated by Ms. Holsman.

Neither the evidence presented, nor the informal reasoning of the trial court, support entry of an antiharassment order against Mr. Pope. Although the lack of proper findings of fact and conclusions of law would normally require remand for these to be entered, an outright reversal of the antiharassment order against Mr. Pope is appropriate, given the evidence.

3. Denial of Due Process of Law with Documents/Exhibits

Procedural due process is required in any judicial proceeding which may affect life, liberty or property. U.S. Const. amend. XIV, sec. 1; Wash. Const. art. I, sec. 3. A full evidentiary hearing is required at some stage of a judicial proceeding. Case law uniformly holds the element of procedural due process to include presentation of witnesses and evidence, cross-examination of adverse witnesses, record of proceedings, compulsory process, representation by counsel, impartial decision maker, and a written decision based upon the evidence introduced at the hearing.

The trial court had entered a permanent protection order in In Re Penny R., 509 A.2d 338 (Pa. Super. 1986) based upon a letter in the case

file, without allowing any testimony to be presented. The appellate court ruled that due process rights of the parties had been violated:

The hearing of July 11, 1984 ... does not fulfill the requirement as no evidence was taken nor testimony elicited, beyond reference to the letter from the Mental Health Center, which was inadmissible. Such a record does not provide an adequate basis for appellate review....

Penny R., 509 A.2d at 340.

The appellate court reversed and remanded for a proper hearing, using due process principles:

Such a hearing, of course, must contain all the elements of due process, which, above all, requires sufficient evidence, which, by its preponderance, will support restriction of a member of the family to his or her rights under the law.... [A]n appropriate evidentiary proceeding with competent witnesses, called if necessary by the court, is required.

Penny R., 509 A.2d at 340.

The trial court in Ehrhart v. Ehrhart, 776 S.W.2d 450 (Mo. App. 1989) held a protection order proceeding. "No witnesses were sworn nor was any documentary evidence offered." 776 S.W.2d at 451.

The appellate court reversed and remanded for a due process evidentiary hearing, holding:

Nothing in the record indicates that the witnesses were sworn, no other evidence was offered at the hearing and counsel was not afforded the opportunity to cross-examine witnesses. In short, no adversarial proceeding of any kind occurred in a case which contained a contested issue. We thus hold that there is insufficient evidence to uphold the award.

Ehrhart, 776 S.W.2d at 451.

Schraer v. Berkeley Property Owners, 207 Cal. App. 3d 719, 255 Cal.Rptr. 453, 461-62 (1989) held that due process required defendants in an anti-harassment action be allowed to present witnesses and evidence and cross-examine opposing witnesses, even though it was a "highly expedited lawsuit".

El Nashaar v. El Nashaar, 529 N.W.2d 13, 14 (Minn. App. 1995) held that a "full hearing" in a domestic violence action included the right to present and cross-examine witnesses, to produce documents, and have a decision made on the merits.

Brand v. Elliot, 610 So.2d 37, 38 (Fla. App. 1992) held that a "full hearing" in a domestic violence action required presentation of evidence, and was not satisfied by mere argument of counsel.

Deacon v. Landers, 68 Ohio App. 3d 26, 587 N.E.2d 395, 398-99 (1990) held that "full hearing" in domestic violence actions included presenting evidence, both direct and rebuttal, as well as the opportunity to cross-examine opposing witnesses.

RCW 10.14.080(2) requires a "full hearing" on an anti-harassment petition to be conducted, with a protection order to issue only when the court "finds by a preponderance of the evidence that unlawful harassment exists." RCW 10.14.080(3). This implies a full due process hearing.

In this case, both Ms. Holsman and Mr. Pope brought considerable amounts of documentary evidence with them to the hearing, both intending to present this evidence to the trial court in support of their own petitions and/or in opposition to the petitions of the opposing party.

Ms. Holsman's documents were presented for Mr. Pope to review and then handed to the trial court. (RP 9:2-25) The trial court looked at some of them and indicated it did not have time to read all of them. (RP 10:19-23) Mr. Pope said he had documents of his own to offer and the trial court observed there were "quite a few". (RP 11:25 to 12:4) The trial court then refused to review any of Mr. Pope's documents. (RP 15:1-10)

The hearing procedure was highly irregular in dealing with both parties proffered exhibits. Normally, the trial court would allow each party to present exhibits to the clerk, have them marked for identification, and then decide whether to admit each exhibit. Regardless of how the trial court ruled, each proffered exhibit would normally be kept by the clerk as part of the official record (unless the exhibit was withdrawn without being formally offered for admission). This record of exhibits would then be available for an appellate court to review, including consideration of the admitted exhibits as part of the record, and consideration of whether the trial court erred in admitting or denying exhibits challenged on appeal.

In the present case, not only did the trial court deny due process of law by either partially reviewing exhibits (Ms. Holsman) or not reviewing exhibits at all (Mr. Pope), but the hearing procedure used by the trial court did not even provide for either party's proffered exhibits (which both parties considered very important) to be preserved in the official record.

The appropriate remedy for these errors would be to require a new hearing, require the court to consider and rule on both parties' exhibits, and require all proffered exhibits to be preserved as part of the record.

E. CONCLUSION

The anti-harassment order issued by the trial court in favor of Ms. Holsman and against Mr. Pope on May 4, 2009 should be reversed. If the anti-harassment order is not reversed outright on appeal, this matter should be remanded, with instructions to hold a new hearing, allow both parties to offer exhibits, to consider and rule on all exhibits, to preserve all proffered exhibits in the official record, and to enter appropriate findings of fact and conclusions of law after conducting the new hearing.

RESPECTFULLY SUBMITTED on March 11, 2010.

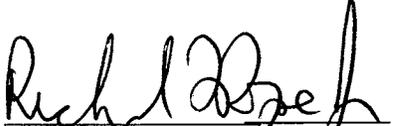

RICHARD L. POPE, JR.
Appellant Pro Se

DECLARATION OF MAILING

I declare under penalty of perjury under the laws of the State of Washington that I mailed a copy of the above and foregoing, postage prepaid, on March 11, 2010 to:

(1) Shannon Holsman, 1231 Eagle Lane S., # 2, Renton,
Washington 98055

Signed at Bellevue, Washington on March 11, 2010.


RICHARD L. POPE, JR.
Appellant Pro Se