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

DEBORAH K. FALK-ROVANG,

Respondent

v.

W. DAVID ROVANG,

Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Mason County,
Cause No. 05-2-01012-0
Hon. Richard C. Adamson, Court Commissioner

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PM 4/24/04

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A. ASSIGNMENTS OF ERROR

1. The trial court committed an error of law by entering an Order of Protection prohibiting Mr. Rovang from having “any contact whatsoever” with his daughter for eleven years.
2. The trial court abused its discretion in entering the Order of Protection.
3. The trial court abused its discretion in denying the motion to reconsider entry of the Order of Protection.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Where RCW 26.50.060(2) provides, “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,” did the trial court commit an error of law by entering an Order of Protection restraining Mr. Rovang from contacting his daughter for eleven years? (Assignment of Error No. 1)
2. Did the trial court abuse its discretion in entering the Order of Protection where there is not substantial evidence in the record to support a finding that Mr. Rovang committed “domestic violence” against his daughter and where the trial court refused to consider relevant polygraph evidence? (Assignment of Error No. 2)
3. Did the trial court abuse its discretion in denying the motion to reconsider entry of the Order of Protection where it merely ruled that it did not believe it had erred in entering the Order originally? (Assignment of Error No. 3)

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C. STATEMENT OF THE CASE

The marriage between the parties was dissolved in Pierce County Superior Court under Cause No. 02-3-00333-7 on April 23, 2004. *See* CP 82-92.

The Parenting Plan Final Order designated Ms. Falk-Rovang as the primary custodian of then 4-year old Sunia, and Mr. Rovang as the primary custodian of then 7-year old Season. *Id.* Under “Other Provisions” of the Parenting Plan is found the following language:

The Parenting Investigator, Suzanne Dircks, shall monitor the residential placement of the children through March 31, 2005, at which time she shall be discharged from her obligations, as Parenting Investigator. During the period of time of her ongoing appointment, the Parenting Investigator shall be entitled to intervene should allegations of sexual abuse or any other form of child abuse arise.

CP 90.

In her Declaration, Ms. Dircks explained the unusual provision:

As part of my role as parenting Investigator I reviewed the psychological evaluations of Dr. Allen Traywick of both Mr. and Mrs. Rovang. The Court made me aware at that time that Ms. Rovang had made sexual abuse allegations against Mr. Rovang alleging that he had sexually abused his daughter. This allegation was fully investigated by the authorities as well as myself and Dr. Traywick and there was no reason to believe that Mr. Rovang had sexually abused his child. It is both Dr. Traywick’s as well as my belief that Mr. Rovang was at risk for further allegations of sexual abuse by his wife based upon her psychological profile.

As a result the Parenting Plan provided:

6.1. The Parenting Investigator, Suzanne Dircks, shall monitor the residential placement of the children through March 31, 2005, at which time she shall be discharged from her obligations, as Parenting Investigator. During the period of time from her ongoing appointment, the Parenting Investigator shall be entitled to intervene should allegations of sexual abuse or any other form of abuse arise.

This was a very unusual provision in the Parenting Plan in my experience and was based upon the fear of false allegations by Ms. Rovang.

Dr. Traywick was concerned enough to recommend that Ms. Rovang have her visitation with the children suspended and that visitation occur only under structured conditions such as supervision if false allegations of abuse were lodged by Ms. Rovang against her husband.

It is very upsetting to me that Ms. Rovang has now made these allegations unfortunately I am not surprised. While I know nothing about the actual content of the allegations I would strongly recommend to the Court that the Court evaluate the allegation with a great deal of suspicion based upon Ms. Rovang's psychological history and her personal history as well.

CP 162.

Ms. Dircks attached her 42-page Report of Parenting Investigator to her Declaration. CP 166-210. The Report of Parenting Investigator includes Ms. Dirck's assessment that "Debbie projects her own fears and suspicions onto her children. She is preoccupied with suspicions about

sexual abuse and satanic cult activity.” CP 196. Ms. Dircks’ Report also included the following statements:

Dr. Traywick finds that Debbie Rovang has long standing psychological problems that interfere with her ability to effectively parent. I concur with that finding. It was interesting to note that in talking with Debbie, she continually sexualized the girls’ behavior with their father, especially that of Season. . . . It is most disturbing that there were what appear to be false allegations of sexual abuse in this case. When Suni came back from her father’s house with a diaper rash Debbie immediately jumped to the conclusion that Suni was being sexually abused and questioned both of her daughters in that regard. . . .

These children are showing no symptoms of being sexually abused and there is nothing in David Rovang’s psychological profile to suggest that he would sexually abuse the children. . . .

There is concern that there will be further allegations against the father of inappropriate behavior.

CP 207-208.

In July of 2005, just four months after Ms. Dircks was discharged from her duties as parenting investigator, Ms. Rovang testified that Suni told her, “my pee pee hurts.” RP 86. Ms. Rovang “said can you tell me why. And she said that she put a paintbrush in herself.” *Id.* Ms. Rovang then testified that she unsuccessfully tried to call Suni’s counselor and she unsuccessfully tried to call Dr. Fry, her own psychotherapist, then took Suni to the emergency room because “I thought I should at least have a

doctor look to keep her safe.” *Id.* The report from the emergency room stated:

The patient otherwise known as “Sunny” is a 6-year old Asian female here with mom. The patient has just come home from a weekend at dad’s. The mother noticed when the patient came home that she went to the bathroom, locked the door, and kept on grabbing towards her vaginal area. The mother states that when she questioned her daughter regarding why she was grabbing that area, she eventually divulged that the patient had put a paintbrush into her own vagina. . . . The patient states that it was her idea to perform this act, that she had not been asked or coached to perform this act by any adult or the other children present. The patient states that her father and no other adult was in the vicinity of this room when she stuck the paintbrush into her vagina.

* * *

The patient finally gave much more detailed history regarding her events and with repeated questioning had validated several times that the patient’s father reportedly was not in the room or involved in any of these acts.

CP 50-51.

A physical examination of Suni revealed

The perineum has no evidence of blood or bruising. The introitus is normal. There is no scarring appreciated. There is no edema or exudate seen. Perianal area is also without any fissuring, ecchymosis or abrasions.

CP 51.

Ms. Falk-Rovang testified that two months after the emergency room visit, she read a book titled "The Right Touch" to Suni. RP 90. When Ms. Falk-Rovang was done reading the book, Suni told her "that her dad had touched her with his fingers." RP 90. Ms. Falk-Rovang did not state whether Suni told her when the alleged touch took place or what the circumstances surrounding the touch had been. Ms. Rovang tried to call Suni's counselor (Jane Kendall) "over and over for at least four days, if not every day of the week, leaving messages," but was unable to make contact. RP 90-91. Ms. Falk-Rovang

then called the Children's Justice and Advocacy Center in Olympia and asked if they could give me the names of any child therapists. I wrote down all the names they gave me. I called all of those. And then even some of them gave me names of more therapists in Shelton. I called those. The ones that did call me back said they were so full they would not take on any more clients. And Maryanne Trause was the only one who called back and said yes, she had an opening.

RP 91.

On October 5, 2005, Ms. Falk-Rovang took Suni to see Dr. Trause, who reported that she asked Suni "if she had any touching troubles." RP

48. Dr. Trause's report continues:

She replied, "Daddy touched my pee pee with his finger (and she held out her pointer finger). I asked how and she demonstrated pushing her finger into her vaginal area. I

asked if it happened one time or more than one time, and she replied “one time.” I asked where it happened and she said “at his house.” I asked where at his house and she said “the living room.” I asked what she was wearing and she said “nothing.” I asked who else was there and she said “Season was in her bedroom doing homework.” We finished at that time and made an appointment to see Suni the next week.

RP 48.

On October 13, 2005, Ms. Falk-Rovang took Suni to Dr. Trause for a second visit. RP 48. Dr. Trause reported on this second visit:

. . . I asked her to turn the paper over and draw a picture of a person and I would ask her some questions about the person. She complied and when I asked her to give the person a name, she said “Mama.” I proceeded to ask a series of questions I typically ask in a semi-structured interview about the child’s drawing. I asked, “What makes Mama happy?” She answered, “I don’t know.” So I asked, “What might make Mama happy sometimes?” She replied, “When I tell her things my dad does to me.” I asked, “Like what?” She said, “Like one time he put a paintbrush in my pee pee.”

* * *

Then I returned to my semi-structured interview and asked what makes Mama sad and she replied, “If I don’t tell a person things my dad does.”

RP 48-49.

On October 17th, 2005, CPS Investigator Kelly Boyle received a referral from Dr. Trause stating that Suni “had made an allegation of sexual abuse.” RP 47. On that same day, without telling Ms. Falk-

Rovang in advance (RP 70; RP 73), Ms. Boyle made a visit to Suni's school and took a taped statement from Suni. RP 70. During the 45-minute interview, Suni told Ms. Boyle "that she didn't remember what she had told her counselor and she didn't want to talk with me any further."

RP 49.

On October 21, 2005, Ms. Falk-Rovang took Suni to Dr. Trause for a third session, which was also attended by Ms. Boyle. CP 50; RP 50; RP 73. During this session, Dr. Trause "asked Suni . . . to talk about the trouble with touching that she had talked about at their session before."

RP 74. At that time, "Suni disclosed that her father had put a paintbrush in her pee pee." RP 75.

On October 21, 2005, Ms. Falk-Rovang filed a Petition for Order for Protection in Mason County Superior Court under Cause No. 05-2-01012-0, initiating the proceedings below. CP 211-217. Commissioner Adamson described his interview of Ms. Falk-Rovang on the record:

. . . I have to say that what ensued was perhaps one of the most unusual interviews I've ever had with a petitioner on a domestic violence petition. And I see probably anywhere from one to four per week. And I say unusual because I could not get any information out of Mrs. Rovang. Both counsel have the petition. She told me about the divorce in Pierce County. She did not have any of that paperwork with her. And as she was describing the parenting plan and her concerns out of the parenting plan, I was frankly incredulous. I said I have never heard of a parenting plan like that.

She described it in such a way that if she were to disclose information to the Court in the form of a complaint against Mr. Rovang, she would lose custody of Suni. And I said that's not what the law says. And I have difficulty understanding how any court would enter that type of parenting plan. She went on to tell me about Doctor Traywick. I expressed no small amount of frustration with Doctor Traywick. And I finally told her, I cannot enter this order based on what you have written in this petition.

She then produced her cell phone and she contacted Ms. Boyle. And then you heard my questioning to Ms. Boyle today. She gave the telephone to myself. I spoke to Ms. Boyle. And then I handed the telephone back to her. While she was speaking with Ms. Boyle, I stepped out just to check on Suni in the outer office. Then I came back. I believe at that point Ms. Rovang had gotten off the telephone. And I said did Ms. Boyle give you any more information. And she said yes, and then she wrote down the last line on the first paragraph of page two of the petition.

And in my conversation with Ms. Boyle, she had made it clear to me that the Department intended to have both girls removed by law enforcement if the mother did not get a restraining order. By now it was well after 5:00 p.m. And again, I was on the phone with Ms. Boyle trying to get some additional information. And the phone had been handed back to Ms. Rovang. And based upon the additional writing that Ms. Rovang did in the petition, this Court granted the Order.

RP 125-126.

The "additional writing that Ms. Rovang did in the petition" is this:

"Kelly said that Sunia disclosed sexual abuse to her, by her father." CP

214.

On November 2, 2005, the hearing on Ms. Falk-Rovang's Petition for Order of Protection was held. RP 1. Commissioner Adamson identified the written materials he had received and would consider in reaching his decision whether to enter an order of protection (RP 2-3), then heard testimony of Dr. Daniel Fry, Ms. Falk-Rovang's psychotherapist (RP 7; RP 28); Kelly Boyle, the social worker with CPS who investigated the allegation of "sexual abuse" (RP 46-47); and Ms. Falk-Rovang. RP 83.

Mr. Rovang offered results of his polygraph examination to be considered, but the Commissioner refused to admit the evidence, stating:

. . . [T]he reason I'm not going to admit it is that while it may be used in probation issues, it may be used in sexual offender treatment, it may be used in cases involving affidavits of search warrants, those are preliminary matters.

And here I've been given this *Kronenberg* matter by Ms. Brandt. This is, I think, more akin to what we're dealing with here today. *Kronenberg* was a full hearing involving whether or not this attorney should keep his license to practice law based upon a variety of allegations of misconduct on his part.

And here we're trying to determine, to the best of our ability, whether or not one or both of these little girls should have any contact with their dad. Although neither counsel has argued it, we all know that the Fry [sic] standard is applicable in this State in terms of admission of evidence. And I am not aware of any case which has shown that polygraph results meet the Fry [sic] standard.

And given the nature of this case, given the extremely restrictive basis for use of polygraphs in this State, I'm going to deny the request of the Respondent to consider the polygraph.

RP 111-112.

The Court discounted the "paintbrush" incident (*see* RP 128) as did CPS (*see* CP 4-5), and stated, "[w]hat I'm focusing on is Doctor Trause's report, and particularly the paragraph that I just read on page two." RP

129. The "middle paragraph on page two" of Dr. Trause's report states:

I asked if she had any touching troubles, and she said, "Daddy touched my pee pee with his finger (and she held out her pointer finger). I asked how and she demonstrated pushing her finger into her vaginal area. I asked if it happened one time or more than one time, and she replied "one time." I asked where it happened and she said "at his house." I asked where at his house and she said "the living room." I asked what she was wearing and she said "nothing." I asked who else was there and she said "Season was in her bedroom doing homework." We finished at that time and made an appointment to see Suni the next week.

RP 48.

Commissioner Adamson entered an Order of Protection prohibiting Mr. Rovang from having "any contact whatsoever" with Suni and from coming from within 500 feet of Suni's day care or school, and from having any visitation with Suni until November 2, 2016. CP 21-24.

The Commissioner also ruled, "As to Season, I do not find that there is sufficient evidence to issue a protection order. And I direct that

she be returned to her father as the majority residential parent of Season.”

RP 127.

On November 9, 2005, Mr. Rovang filed a Motion for Reconsideration. CP 13-18.

On November 15, 2005, CPS concluded its investigation into Dr. Trause’s October 14, 2005 report, by issuing a letter to Mr. Rovang stating that “the resulting findings from the investigation are as follows: 1. Referral ID: 1660901 The allegation of Sexual Abuse is Inconclusive.” CP 4-5. The letter explains that “Inconclusive means that, based on the information available to CPS, it cannot be determined whether child abuse or neglect occurred.” CP 5.

The hearing on Mr. Rovang’s motion for reconsideration was held on December 14, 2005. RP 135. Commissioner Adamson denied the motion for reconsideration (RP 149), stating:

Frequently with children, as we know from our training, a child is not automatically a competent witness if they cannot appreciate the nature of the oath. Here, Doctor Trause finds that she does know the difference between what is true and not true. She goes on to say her answers did not seem to be coached, although I believe that her mother did encourage her to speak up. But the mother was not present during either of these interviews with Doctor Trause, to the best of my knowledge. And I am making my decision again, based upon the evidence which was presented at the hearing, not what might be concluded by any CPS or law enforcement investigation.

CP 148.

Mr. Rovang filed a Notice of Appeal on December 30, 2005, seeking review of the November 2, 2005 Order of Protection and denial of his motion for reconsideration on December 14, 2005. CP 222. After this Court issued a letter on January 17, 2006 stating that the Notice of Appeal was premature absent the order on reconsideration, Mr. Rovang obtained a written Order Denying Consideration on February 15, 2006. CP 220-221.

D. ARGUMENT

- 1. The trial court committed an error of law by entering an Order of Protection prohibiting Mr. Rovang from having “any contact whatsoever” with his daughter for eleven years.**

RCW 26.50.060(2) provides, in pertinent part, “[i]f 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.**” (Emphasis added.) Here, the court entered the Order of Protection on November 2, 2005. CP 21-24. The Order states, “The terms of this order shall be effective until 11/2/16.” CP 21. The court had no authority to enter an Order of Protection prohibiting Mr. Rovang from contacting his daughter for eleven years.

The Order entered by the trial court improperly modified the terms of the permanent parenting plan, which granted Mr. Rovang residential

time with Sunia “[f]rom Friday at 6:00 p.m. to Sunday at 6:00 p.m., every other week” (CP 84) and granted him extended periods of residential time during Christmas vacation and in even-numbered years during spring vacation, “two weeks of uninterrupted residential time with both children” during the summer, and alternating time with both children on holidays and special occasions. CP 84-85.

Under the Order of Protection, Mr. Rovang is “restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly” with Sunia, and is excluded from Sunia’s day care or school, and is to be allowed no visitation whatsoever. CP 22-23.

These drastic changes to the residence and visitation provisions of the permanent parenting plan were accomplished without following the procedures of RCW 26.09.260 and without applying the “strong presumption in favor of custodial continuity and against modification.” *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

Although the trial court had jurisdiction to enter an Order of Protection, it exceeded its statutory authority to enter an order restraining Mr. Rovang from contact with his daughter for more than one year. This was an error of law. *See State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996) (an order “outside the relevant statutory mandate” is a “mistake[]

as to statutory construction, i.e., [an] error[] of law [.]”). The provision of the Order that it is effective until November 2, 2016 must be vacated.

2. The trial court abused its discretion in entering the Order of Protection.

The decision to grant or deny a protection order is reviewed for abuse of discretion. RCW 26.50.060(1); *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). “A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable.” *In re Detention of Broten*, 130 Wn. App. 326, 336, 122 P.3d 942, *review denied*, 150 Wn.2d 1010, 79 P.3d 445 (2003), citing *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021, 827 P.2d 1392 (1992).

In the absence of written findings, this Court may look to the oral opinion to determine the basis for the trial court’s resolution of the issue. *In re Marriage of Booth*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990).

The issue before this Court is whether the trial court abused its discretion in entering an Order of Protection where it made no specific findings regarding whether domestic violence had been perpetrated by Mr. Rovang against Suni, and the only “evidence” that domestic violence had been committed was a six-year old child’s statement that “daddy touched my pee pee with his finger.”

- (a) There is insufficient evidence in the record to support a finding that domestic violence was committed by Mr. Rovang against his daughter.

A trial court's findings will be upheld on appeal if they are supported by substantial evidence in the record. *In the Matter of the Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW 26.50.030(1) sets out what is required in a petition for an order of protection, stating in pertinent part: “[a] petition for relief shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.” Pertaining to this case, “domestic violence” means “sexual assault of one family or household member by another.” RCW 26.50.010(1). There is no statutory definition of “sexual assault” included in RCW 26.50.010, nor has that term as used in Chapter 26.50 RCW been construed in any published case.

“Assault is, among other things, an unlawful touching.” *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999), *review denied*, 140 Wn.2d 1020, 5 P.3d 10 (2000). “[A] touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either

harmful or offensive.” *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978).

- (i) *The Petition did not include “specific facts and circumstances from which relief is sought.”*

Commissioner Adamson stated on the record that at the time he interviewed Ms. Rovang about her Petition for Order of Protection, “I finally told her, I cannot enter this order based on what you have written on this petition.” RP 126. This was a correct decision, for Ms. Rovang’s Petition as she originally submitted it to Commissioner Adamson did not state any “specific facts and circumstances from which relief is sought.” RCW 26.50.030(1). Instead, it included the following language to “describe the most recent incident or threat of violence and date”:

My daughter reported something to CPS – Kelly Boyle. She said my daughters needed to be in my custody as their protective parent while investigation goes on. I am worried and concerned about my daughters’ safety.

CP 214.

In answer to the instruction on the form Petition to “describe any violence or threats towards children,” Ms. Rovang stated, “My daughter, Sunia, has disclosed incidents to CPS – Kelly Boyle & her counselor as well.” CP 214. As originally submitted to the trial court, Ms. Rovang’s

Petition included no “specific facts and circumstances” whatsoever that would justify entry of a temporary order.

After talking with Ms. Rovang, Commissioner Adamson then spoke with Kelly Boyle, a CPS investigator, and told Ms. Boyle that in his opinion, the Petition included “insufficient information upon which to issue an order.” RP 68. The Commissioner then handed the phone back to Ms. Rovang, who also spoke with Ms. Boyle while in the Commissioner’s office. *Id.*

After hanging up, Ms. Rovang added a sentence to the Petition: “Kelly[Boyle] said that Sunia disclosed sexual abuse to her, by her father.” CP 214. Commissioner Adamson stated on the record, “[B]ased upon the additional writing that Ms. Rovang did in the petition, this Court granted the order.” RP 126.

In *Spence v. Kaminski*, 103 Wn. App. 325, 12 P.3d 1030 (2000) this Court ruled that a petition “met the threshold requirements of RCW 26.50.030 and justified the court’s decision to set a hearing for the protection order” where

Ms. Spence’s standard form petition for relief indicates that Mr. Kaminski had stalked, trespassed, and harassed her since 1993. She also states that she recently became fearful after the closure of her mother’s estate and her ex-husband’s subsequent custodial interference – “often threatened but never this aggressive.” . . . The petition was accompanied by numerous declarations from witnesses and

the record from the dissolution proceedings and custody disputes from Skagit County.

Spence, 103 Wn. App. at 330-331, 12 P.3d 1030.

In contrast, Ms. Falk-Rovang's Petition, which contained no specific factual information, was accompanied by no declarations and no documents from the 2003 dissolution proceedings. Even with the added information after her phone conversation with Ms. Boyle, the Petition for Protection is insufficient to justify issuance of an Order of Protection.

(ii) *The evidence relied upon by the trial court to reach its decision does not support a finding of domestic violence.*

Prior to making his ruling at the hearing, Commissioner Adamson stated:

. . . in a proceeding of this nature, the petitioner bears the burden of proof by what is called the preponderance of the evidence. A preponderance of the evidence is defined as it more [sic] probable than not that what the proposing party says occurred did in fact occur. Stated another way, it's essentially a 51 versus 49 percent balance, as opposed to other burdens of proof we have in other types of cases.

RP 126-127.

RCW 26.50.060 authorizes a court to provide the types of relief listed in the statute. However, before granting any of the types of relief listed in RCW 26.50.060, a court must of necessity make a finding that domestic violence has been committed by the respondent. *See* RCW

26.50.020(1) (a person seeking relief under Chapter 26.50 RCW must allege that “domestic violence has been committed by the respondent”).

The trial court stated that it was “focusing on” one paragraph in Dr. Trause’s report (RP 129) as the basis for its ruling on Ms. Rovang’s Petition for Order of Protection.

Six-year old Suni’s statement under questioning by Dr. Trause that “Daddy touched my pee pee with his finger” is not “substantial evidence” to support a finding that Mr. Rovang committed domestic violence. Suni also told Dr. Trause that, at the time of the “touch,” she had no clothes on and was in the living room of her father’s house. Suni demonstrated the “touch” by “pushing her pointer finger into her vaginal area.” RP 129.

Even assuming, *arguendo*, that Mr. Rovang did touch Suni’s vaginal area, that fact alone would not be sufficient to support a finding of domestic violence, i.e., “sexual assault of one family or household member by another.” RCW 26.50.010(1). Assault is an **unlawful** touching. *Thomas*, 98 Wn. App. at 424, 989 P.2d 612. Touching may be unlawful because it was not consented to or was not “otherwise privileged,” and was either harmful or offensive. *Garcia*, 20 Wn. App. at 403, 579 P.2d 1034.

A father is privileged to touch his child’s body, and may do so without the touch being harmful or offensive. For example, a father may

touch his daughter's vaginal area while drying her off after a bath or shower or while changing her diaper. Such a touch is not a "sexual assault."

The preponderance of the evidence supports the conclusion that, even if Mr. Rovang did touch Suni's vaginal area, any such touch was privileged and not unlawful. This is so because the court also had before it Mr. Rovang's Declaration, in which he stated:

I have not sexually abused my children or any child, ever. I have not physically abused my children. There are no grounds for taking the action that has been taken, and these proceedings are detrimental to my children's well being.

* * *

I submitted to a psychological examination with Dr. Alan Traywick of Tacoma, during our divorce proceedings, as so did my wife Debbie, because of false allegations of sexual abuse at that time. I was given a clean bill of health by Traywick, and by the Guardian ad Litem, who both recommended that I should have custody of both of our children. Both the guardian ad Litem and Dr. Traywick predicted a high probability of future false allegations of sex abuse generated by Debbie and recommended supervised visitation between Debbie and the children, should further false allegations of sexual abuse be made.

CP 77; CP 81.

The trial court also had before it the Permanent Parenting Plan, Ms. Dirck's Report of Parenting Investigator, and the psychological

evaluations of both Ms. Falk-Rovang and Mr. Rovang, all of which support Mr. Rovang's statements in his Declaration.

There is "substantial evidence" in the record to support a finding that no domestic violence had been inflicted on Suni by Mr. Rovang. There is substantial evidence in the record to support a finding that Ms. Falk-Rovang's previously identified preoccupation with suspicions about sexual abuse was continuing unabated and that it was Ms. Falk-Rovang's conduct that "generated" Suni's "disclosure." However, there is **not** substantial evidence in the record to support the court's finding that Mr. Rovang had committed domestic violence, i.e., had sexually assaulted his daughter.

Dr. Trause also stated in her report,

this is a very complicated case. It is difficult to know what is true. It is possible that the mother has some mental health issues, but it is possible that she does not. Regardless, Suni's disclosures seem credible. . . . Her answers did not seem to be coached, although I believe that her mother did encourage her to speak up.

CP 50.

Even if Dr. Trause believed that Suni's "disclosures seem credible" (CP 50) and even if her father did touch Suni's vaginal area with his finger, there is not substantial evidence in the record to support a finding

that David Rovang sexually assaulted his daughter. A father may touch his daughter's vaginal area without sexual assault taking place.

In *In re Gourley*, 124 Wn. App. 52, 98 P.3d 816 (2004), *review denied*, 154 Wn.2d 1012, 113 P.3d 1039 (2005), the petition for a protective order filed by Kimberly Gourley included her own statement that her 14-year old daughter had reported sexual abuse by her father for a period of 1-1/2 years. Kimberly Gourley also attached to the Petition a letter from a Snohomish County Sheriff's detective indicating that the 14-year old had made allegations of sexual abuse that were under investigation and describing a specific allegation that Mr. Gourley "had applied body oil to his daughter while she was naked and had touched her breasts. She also alleged that he placed his hands down the inside of her pants and touched her vaginal area." *Gourley*, 124 Wn.App. at 55, 98 P.3d at 817.

Additional supporting documents were filed by Ms. Gourley while her petition was pending. *Id.* The 14-year old daughter submitted a signed declaration to the trial court stating that her father had confessed that he had "done wrong things to [her] (sexually)" and she was afraid he might "touch [her] sexually again." The 14-year old's counselor also submitted a letter stating that the girl "in her own words told me that her

dad molested her over a period of about 2 years and that the molestations happened many times a week.” *Id.*

Not surprisingly, the *Gourley* Court affirmed the Order of Protection entered in that case. *Gourley*, 124 Wn. App. at 55, 98 P.3d at 817. Here, however, Ms. Falk-Rovang’s Petition, even after the addition of the last sentence, did not contain specific factual allegations to support a finding that domestic violence had occurred.

Further, the supporting Declarations subsequently submitted by Ms. Rovang do not address the subject “disclosure” of “sexual abuse,” and do not even suggest that Mr. Rovang would sexually abuse his daughter. The materials submitted to the trial court support a finding that no domestic violence occurred, and do so by a preponderance of the evidence.

Suni’s statement to Dr. Trause, relied upon by the trial court to enter an Order of Protection, is insufficient to support entry of an order of protection, especially given the history of the parties and the circumstances in which the “disclosure” was made, coming as it did after Suni had just been read a book titled “The Right Touch.”

This Court should vacate the Order of Protection because the record does not contain substantial evidence to support a finding that Mr.

Rovang committed domestic violence or that Suni was a victim of domestic violence.

- (b) The trial court abused its discretion in refusing to consider the polygraph of Mr. Rovang.

Mr. Rovang's counsel offered results of a polygraph examination of Mr. Rovang to the court for admission into evidence. RP 107. This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Moran*, 119 Wn. App. at 218, 81 P.3d 122.

Before argument on admitting the evidence began, Commissioner Adamson stated:

The -- the difficulty and -- and the Court well knows the law in the State of Washington. In the average case -- the issue that we have before is that polygraphs are not admissible. And the reason is -- absent a stipulation of counsel.

RP 108.

After hearing argument, the court ruled:

In terms of admissibility of Mr. Rovang's polygraph examination in this case, I'm not going to admit it. And the reason I'm not going to admit it is that while it may be used in probation issues, it may be used in sexual offender

treatment, it may be used in cases involving affidavits of search warrants, **those are preliminary matters.**

And here I've been given this *Kronenberg* matter by Ms. Brandt. **This is, I think, more akin to what we're dealing with here today. *Kronenberg* was a full hearing** involving whether or not this attorney should keep his license to practice law based upon a variety of allegations of misconduct on his part.

And here we're trying to determine, to the best of our ability, **whether or not one or both of these little girls should have any contact with their dad . . .**

And given the nature of this case, given the extremely restrictive basis for use of polygraphs in this State, I'm going to deny the request of the Respondent to consider the polygraph.

RP 111-12 (emphasis added).

(i) The court misconstrued the pending issue.

As an initial matter, it must be pointed out that the issue before the trial court at the hearing on Ms. Rovang's Petition was **not** "whether or not one or both of these little girls should have any contact with their dad." That issue had already been settled by the Permanent Parenting Plan. CP 82-92.

In *In re Marriage of Barone*, 100 Wn. App. 241, 247, 996 P.2d 654 (2000), the Court stated, "it would be contrary to public policy for this court to rule that protection orders may function as de facto modifications of permanent parenting plans."

The *Barone* Court noted that “it is relatively difficult to obtain orders that modify final parenting plans,” and quoted the Supreme Court for the proposition that “[c]ustodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.” *Barone*, 100 Wn. App. at 247, 996 P.2d 654, quoting *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). The *Barone* Court then stated:

These are legitimate barriers to altering permanent parenting plans . . . , and it would be contrary to the Legislature’s intent for this court to create a mechanism by which individuals may evade these barriers.

Barone, 100 Wn. App. at 247-248, 996 P.2d 654.

The issue before the court below was simply whether an Order for Protection should be entered. Entry of such an order required a finding that Mr. Rovang had sexually assaulted a member of his family. *See* RCW 26.50.020(1).

(ii) *Evidence rules don’t apply to protection order proceedings.*

In this case, the trial court’s ruling on the admissibility of the polygraph evidence was an abuse of discretion for several reasons.

First, ER 1101(c) (4) specifically provides that the rules of evidence do not apply to “protection order proceedings under RCW 26.50.” The trial court was aware of this, at one point stating, “[b]ut as we

again know that the Rules of Evidence do not apply in 26.50 hearings.”

RP 43.

(iii) *The Kronenberg case was inapplicable.*

Contrary to the trial court’s assertion (RP 112), the hearing on Ms. Rovang’s motion for a protective order was not a “full hearing” of the same type as the attorney disciplinary proceedings in *Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005). The “full hearing” language of RCW 26.50.020(5) was discussed in *Gourley*, where the Court wrote:

RCW 26.50.020(5) does contain the “full hearing” language *Gourley* refers to, but that statute is a jurisdictional one directing the district or municipal court issuing a temporary protection order to “set the full hearing provided for in RCW 26.50.050 in superior court[.]” RCW 26.50.050(5). The “full hearing” provided for in RCW 26.50.050 must take place within 14 days after the court receives a petition for a protection order. But RCW 26.50.050 does not define the evidentiary procedures for that hearing, stating simply that “[u]pon receipt of the petition, the court shall order a hearing which shall be held not later than fourteen days from the date of the order.”

Gourley, 124 Wn. App. at 58, 98 P.3d at 818.

Further, in *Kronenberg*, polygraph evidence was found to be inadmissible for two reasons, neither of which applies to RCW 26.50 proceedings. First, there is a “heightened burden of proof in disciplinary hearings,” i.e., “a clear preponderance of evidence,” which requires

“greater certainty than ‘simple preponderance.’” *Kronenberg*, 152 Wn.2d at 193, 195, 117 P.3d 1134.

Second, ELC 10.14(d)(1) requires that evidence admitted in attorney disciplinary proceedings must be “the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” The Rules for Enforcement of Lawyer Conduct do not apply to RCW 26.50 proceedings. *Kronenberg* did not apply to the proceedings below, and it was an abuse of discretion to base a decision to exclude Mr. Rovang’s polygraph evidence based on language from that case.

(iv) *The proceeding below was not a “bench trial.”*

The hearing on the motion for the order of protection was not a “bench trial,” as asserted by the court. RP 107. The rules of evidence apply in a bench trial (*See, e.g., State v. Read*, 147 Wn.2d 238, 253-254, 53 P.3d 26 (2002): they do not apply to “protection order proceedings under RCW 26.50.” ER 1101(c)(4).

(v) *The polygraph evidence was admissible and relevant.*

In *State v. Cherry*, 61 Wn. App. 301, 305, 810 P.2d 940, review denied, 117 Wn.2d 1018, 818 P.2d 1099 (1991), the Court acknowledged that “[w]hile admissibility of polygraph results **at trial** is strictly limited, it

is recognized that they have probative value.” (Emphasis added.) RCW 26.50 proceedings are not trials.

There was no reason to exclude the polygraph evidence because the proceeding was a “full hearing.” There was no basis to exclude the polygraph evidence based on the language of *Kronenberg*.

The court failed even to consider whether the polygraph evidence was relevant at the hearing on Ms. Falk-Rovang’s petition, which it certainly was. The results of Mr. Rovang’s polygraph examination were relevant because (1) they had a tendency to prove a fact (that Mr. Rovang did not sexually assault Suni) and (2) that fact was “of consequence” to the determination of the action (whether an order for protection should be entered). ER 401; Karl B. Tegland, 5D WASHINGTON PRACTICE, *Courtroom Handbook on Washington Evidence* (2006), page 189.

Under ER 402, the polygraph evidence was admissible because it was relevant and there is no limitation on its admissibility in RCW 26.50 proceedings in any Washington case, court rule, or evidence rule. The trial court abused its discretion in excluding the polygraph evidence.

3. The trial court abused its discretion in denying the motion to reconsider entry of the Order of Protection.

This Court reviews a trial court’s decision to grant or deny a motion for reconsideration under an abuse of discretion standard. *Rivers*

v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

At the hearing on the motion for reconsideration, the trial court affirmed its finding of domestic violence on the same evidence that it had “focused on” in the November 2, 2005 hearing: “the bottom of page three and top of page four” of Dr. Trause’s report,” stating “I do not believe that the Court’s original conclusion here was incorrect.” RP 148.

For the same reasons that the trial court abused its discretion in entering its original ruling finding domestic violence, the trial court’s denial of the motion to reconsider was an abuse of discretion. A six-year old child’s statement that her father touched her “pee pee with his finger” is not sufficient evidence to support a finding of domestic violence and the entry of an order of protection.

E. CONCLUSION

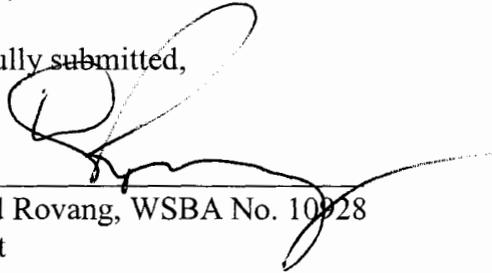
The trial court committed an error of law in entering the Order for Protection for a period of eleven years. The Court must vacate the provision that the Order for Protection is in effect until November 2, 2016.

The trial court abused its discretion in entering the Order of Protection, and the Court should therefore vacate the Order in its entirety.

The trial court also abused its discretion in denying the motion for reconsideration: that order should also be vacated.

DATED this 24 day of April, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. David Rovang', is written over a horizontal line. The signature is stylized and extends to the right.

W. David Rovang, WSBA No. 10928
Appellant

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DEBORAH K. FALK-ROVANG,)
)
) Petitioner,)
)
) v.)
)
) W. DAVID ROVANG,)
)
) Defendant.)

Appeal No. 32428-1-II
Superior Court No. 05-2-01012-0

AFFIDAVIT OF MAILING

The undersigned, being first duly sworn, under oath, states: That on the 24th day of April, 2006,
affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Ms. Shelly Brandt
Attorney at Law
Cordes Brandt, PLLC
2625 B. Parkmont Lane SW
Olympia, WA 98502

a true copy of the Brief of Appellant.

Ann Blankenship
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 24th day of April 2006.

Meredith Nora Orpilla
MEREDITH NOBA ORPILLA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard
My commission expires 9-11-06

AFFIDAVIT OF MAILING - 1

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