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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DEBORAH K. FALK-ROVANG,

Respondent

v.

W. DAVID ROVANG,

Appellant.

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BRIEF OF RESPONDENT / CROSS-APPELLANT

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

SHELLEY L. BRANDT  
WSBA No. 22460  
Attorney for Respondent

CORDES BRANDT, PLLC  
2625 B Parkmont Lane SW  
Olympia, WA 98502  
(360) 357-7793

ORIGINAL

**TABLE OF CONTENTS**

		<i>Page</i>
<b>A.</b>	<b>ASSIGNMENTS OF ERROR . . . . .</b>	1
1.	The trial court committed error when it denied Ms. Rovang's request for attorney's fees when she prevailed in her request for a Domestic Violence Protection action for her daughter. . . . .	1
2.	The trial court committed error when it did not awarded Ms. Rovang attorney fees for defending against Mr. Rovang's Motion for Reconsideration. . . . .	1
3.	Other than the assignment of error indicated in numbers 1 and 2 above, it is the position of the Respondent that the Court did not err. . . . .	1
<b>B.</b>	<b>ISSUES PERTAINING TO ASSIGNMENT OF ERROR . . . . .</b>	1
1.	Where RCW 26.50.060 (1)(g) provides that a party who has obtained a protection order may be awarded fees and costs, did the court error by not awarding Ms. Rovang fees when it denied Ms. Rovang's fees on the basis that it only entered the order as to one of the parties' daughters? . . . .	1
2.	When Ms. Rovang successfully defended against Mr. Rovang's Motion for Reconsideration, did the court error in not awarding Ms. Rovang fees when she had prevailed on the underlying matter and was required to make two appearance as a result of Mr. Rovang's late filing? . . . . .	1
<b>C.</b>	<b>STATEMENT OF THE CASE . . . . .</b>	1 - 9

<b>D.</b>	<b>ARGUMENT</b>	9 - 32
1.	The trial court did not error as it did not enter an order for eleven years, but entered the statutory allowable time of one year ending November 2, 2006.	9 - 10
2.	The trial court did not abuse its discretion in entering the Order of Protection on November 2, 2005 after a contested hearing.	10 - 27
(a)	The standard of review is that the trial court would have had to abuse its discretion for this court to disturb its ruling.	10 - 12
(b)	There was not an abuse of discretion when the court entered the ex parte Temporary Order of Protection.	12 - 14
(c)	The Commissioner did not abuse his discretion in issuing the Order of Protection after the contested hearing on November 2, 2005.	14 - 20
(d)	The trial court properly denied the admission of the polygraph offered by Mr. Rovang as evidence in the contested hearing on November 2, 2005.	20 - 26
	<i>(i) The Court correctly admitted reliable evidence to consider when making its decision about whether to issue an Order of Protection.</i>	21 - 22
	<i>(ii) Polygraph results lack the reliability to be admitted in this Protection Order hearing when opposing counsel does not stipulate to the admissibility and</i>	

	<i>has not had the opportunity to review the entire test administered to the participant.</i>	22 - 24
	<i>(iii)The Commissioner had the authority under RCW 26.50 to order no contact between Mr. Rovang and his daughter, Suni.</i>	24 - 26
(e)	The trial court did not abuse its discretion in denying the motion to reconsider entry of the Order of Protection. . . . .	26 - 27
(f)	Ms. Rovang requests that she be awarded attorney’s fees for responding to this appeal pursuant to RAP 18.1. . . . .	27
3.	The trial court committed error by not awarding Deborah Rovang attorney's fees when she was awarded a protection order for one of the parties' daughters, she was forced to defend against a motion for reconsideration, and CPS had mandated that she take such action or the children would be placed in foster care. . . . .	28
4.	Cases set out that when a party prevails under RCW 26.50, the court may award costs, service fees and reasonable attorney's fees to the petitioner. . . . .	29 - 31
5.	The court abused its discretion when not awarding fees to Deborah Rovang for having to defend a motion for reconsideration and then having to appear when Mr. Rovang provided information in an untimely manner and the second appearance when the motion for reconsideration was denied. . . . .	31 - 32
<b>E.</b>	<b>CONCLUSION . . . . .</b>	<b>32</b>

## TABLE OF AUTHORITIES

	<i>Page</i>
<b>A. WASHINGTON CASES</b>	
1. <u><i>Gourley v. Gourley</i></u> , 124 Wn. App. 52, 98 P.3d 816 (2004)	15 - 16, 19, 27, 30
2. <u><i>Hecker v. Cortinas</i></u> , 110 Wn. App. 865,869, 43 P. 3d 50 (2002)	10 - 11, 29
3. <u><i>In re the Matter of the Disciplinary Proceeding of Kronenberg</i></u> , 155 Wn. 2d 184, 117 P. 3d 1134 (2005)	21 - 23
4. <u><i>In Re Marriage of Barone</i></u> , 100 Wn. App 241, 257, 996 P. 2d 654 (2000)	25 - 26
5. <u><i>In re Marriage of Littlefield</i></u> , 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)	11
6. <u><i>Spence v. Kaminski</i></u> , 103 Wn. App. 325, 331, 12 P. 3d 1030 (2000)	10
7. <u><i>State v. Brown</i></u> , 132 Wn.2d 529, 572, 940 P.2d 546 (1997)	11
8. <u><i>State v. Renfro</i></u> , 96 Wn. 2d 902; 639 P. 2d 737 (1982)	23 - 24
<b>B. STATUTES</b>	
1. RCW 26.50.060 (1)(g)	1, 10, 11, 13, 15, 27 - 29
2. RCW 26.50.010 (1)	11, 12
3. RCW 9A.44.010	12
4. RCW 26.50.030	13

5. RCW 26.50.135 25

**C. RULES**

1. ER Rule 1101(c) 21

2. RAP 18.1 27

**A. ASSIGNMENT OF ERROR**

1. The trial court committed error when it denied Ms. Rovang's request for attorney's fees when she prevailed in her request for a Domestic Violence Protection action for her daughter.
2. The trial court committed error when it did not awarded Ms. Rovang attorney fees for defending against Mr. Rovang's Motion for Reconsideration.
3. Other than the assignment of error indicated in numbers 1 and 2 above, it is the position of the Respondent that the Court did not err.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Where RCW 26.50.060 (1)(g) provides that a party who has obtained a protection order may be awarded fees and costs, did the court error by not awarding Ms. Rovang fees when it denied Ms. Rovang's fees on the basis that it only entered the order as to one of the parties' daughters? (Assignment of Error No. 1)
2. When Ms. Rovang successfully defended against Mr. Rovang's Motion for Reconsideration, did the court error in not awarding Ms. Rovang fees when she had prevailed on the underlying matter and was required to make two appearance as a result of Mr. Rovang's late filing? (Assignment of Error No. 2)

**C. STATEMENT OF THE CASE**

The final documents were entered ending the approximately 18 year marriage between David Rovang and Deborah Falk-Rovang, under Pierce County Superior Court, Cause No. 02-3-00333-7, on April 23, 2004. The parties entered the Parenting Plan by agreement, which

allowed for Season, then 7 years old, to reside with David Rovang and Suni, then 4 years old, to reside with Deborah Falk-Rovang. *See* CP 82-92.

The Parenting Plan was entered by agreement even after a very lengthy guardian ad litem investigation and psychological evaluations. CP 166 - 210; CP 97-127; CP 127-146. The appellant's statements regarding the contents of these documents themselves are accurately set out in his Statement of the Case.

However, in July 2005 after coming home from a visit at David Rovang's home, the parties' youngest child (Suni) told Ms. Rovang that she "put a paintbrush in herself." RP 85-86. Ms. Rovang;

tried to call Jane Kendall, her counselor, left a message. I tried to call Doctor Fry and left a message wanting their advice of what should I do. . . . I thought I should at least have a doctor look to keep her safe.

RP 86.

Ms. Rovang took Suni to the emergency room so that a doctor could examine her. RP 87. Again, Mr. Rovang's recitation of the facts of that document is accurate as well.

A few months later, Ms. Rovang was reading to Suni, which was a nightly event. RP 90. She read "The Right Touch". RP 90. After reading this book to Suni, Suni disclosed to her mother that "her dad had touched

her with his fingers.” RP 90. Ms. Rovang was concerned for two reasons, first she and Suni “don’t have those talks” and second “the terminology [in the book] is only good touch, bad touch. There has never been anything said about fingers.” RP 90. Ms. Rovang felt that “because it was so specific, it was so clear,” she was concerned RP 90.

The next day Ms. Rovang tried to call Jane Kendall, Suni’s therapist. RP 90 – 91. When she did not get any calls back after a week, Ms. Rovang called the Children’s Justice and Advocacy Center in Olympia to get names of child therapists. RP 91. Dr. Maryann Trause was the therapist who responded and had an opening. RP 91. First, Ms. Rovang visited Dr. Trause alone on October 3, 2005 CP 48. Then Suni had several visits with Dr. Trause. CP 48. According to Dr. Trause:

Before I met Suni, I met with her mother, Ms. Rovang, alone for an hour in my office on 10/3/05, to get a history and hear of her concerns about her daughter. It is my usual practice to meet with a parent before meeting a young child.

CP 48.

On the first visit with Dr. Trause, Ms. Rovang disclosed the information contained in the guardian ad litem report, Dr. Traywick’s psychological evaluation and the parenting plan about which she was concerned. RP 91-92. In fact, she provided the actual documents to Dr. Trause at a later visit explaining that she was concerned about being accused of “putting words

in Suni's mouth. RP 92-93. Dr. Trause states in her letter that Ms. Rovang did not disclose anything that Suni had reported. Dr. Trause's recitation of the visit is:

Ms. Rovang states that Suni recently told her, "I'm not supposed to tell anything," then proceeded to tell her mother something that happened to her. Ms. Rovang did not tell me what Suni had reported to her, but said that she had told Suni that she would have to tell someone else. Suni told her mother that she would not be comfortable telling Dr. Fry because he was "a boy." The mother also reported that Suni saw a female therapist in Tacoma once a month for a year, but she did not believe that her daughter had disclosed anything to her.

Ms. Rovang said that she had suspected that Suni was a victim of abuse for a long time, but was very nervous about coming forward because 2 ½ years previously, during her divorce from W. David Rovang, the Guardian ad Litem Susan Dirk and the psychologist Dr. Allen Traywick, had alleged that Ms. Rovang had falsely reported sexual abuse and that she would continue doing so. Ms. Rovang said that she had had other evaluations done which had not indicated that she had such problems, but those evaluations were not considered. She commented tearfully, "I can't say anything about Suni or I'll be accused of false reporting."

CP 48.

Dr. Maryanne Trause met with Suni on October 5, 2005, October 13, 2005, and October 21, 2005. CP 47. On October 5, 2005, Dr. Trause describes the session as follows:

Suni came into my office with her mother. She was very shy at first and buried her head against her mother's arms as they sat together on the couch. I talked to her about school and what she liked to do. She slowly warmed up and was willing to look at me and talk to me. While her mother was there, I told Suni that whenever I meet with kids I ask about touching troubles because it

was my job to be sure kids were safe. I went on to describe three kinds of touching that I thought about: good touching when someone you care about touches you in a way that feels good and comfortable, like a hug or holding hands; bad touching where someone touches you in a way that hurts you, like hitting or kicking or biting; and secret touching where someone older than you touches you in your privates or wants you to touch them in their privates and they will tell you not to tell but to keep it a secret. Then I told her I'd ask later about whether she had any touching troubles.

At that time, Suni was willing to let her mother wait in the waiting room if she could keep her mother's wallet and key with her. Ms. Rovang went into the waiting room and Suni stayed with me in my office. After she left, I asked Suni if she had any worries or anything that was hard for her. She replied, "Daddy touched my peepee 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 I made an appointment to see Suni the following week.

CP 49.

On October 13, 2005, Dr. Trause met with Suni again where Suni made additional disclosures within the following context:

Then 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 that my dad does to me." I asked, "Like what?" She said, "Like one time he put a paintbrush in my pee

pee.” I asked if that really happened and she said, “Yes.” I asked about another time and she said, “A girl named Samantha and she wanted us to kiss bottoms.” I asked where that happened and she said, “In Dad’s bedroom on the bed,” I asked where Dad was and she replied “Downstairs.” She continued, “Season and I didn’t want to do it, but Samantha said, ‘Do it anyway.’ We threw the magic globe and Season caught it and Season, kissed Samantha’s bottom.” I asked what they were wearing and she said, “no clothes.” I asked what happened next and she said, “ We stopped doing it and had lunch.”

\* \* \*

I then asked Suni about the time she said her Dad put a paintbrush in her pee pee. I asked where it happened and she said, “At the big house.” I asked where and she said, “Downstairs somewhere.” I asked who was there and she said, “My dad. Season was upstairs doing her work.” I asked what she was wearing and she said, “Only a shirt.” I asked how come and she said, “Dad wanted me to.” I asked what Dad was wearing and she said “just shirt and pants.” I asked how big the paint brush was and she held her hands apart more than about 6-8 inches. I asked, “What did he do?” She replied, “Put it inside my pee pee.” I asked how much and she put her hands apart a small distance (Probably a couple inches). I asked what happened next and she said “He stopped and said ‘go play with Season.’” I asked if everything she told me was true and she said yes.

CP 49 - 50.

Dr. Trause checked in the middle of this interview to determine if Suni understood the difference between something true and not true and quizzed her about it to be certain. CP 50. Based on Suni’s responses, Dr. Trause believed that Suni clearly knew the difference. CP 50.

Given all of the circumstances, Dr. Maryanne Trause determined that “Suni was a credible reporter and [she] needed to report what she had

disclosed to CPS. CP 51. Dr. Trause left a message for Brandon Harnish at the Shelton CPS office on October 14, 2005. CP 51.

Initially, Kelly Boyle attempted to interview Suni at her school. RP 49. During that interview, Ms. Boyle was also able to determine that Suni was able to differentiate between the truth and a lie and establish whether she was developmentally appropriate to be able to give an interview. RP 49. However, Suni told her that she could not remember what she had told her counselor and that she did not want to talk with Ms. Boyle any further. RP 49.

On October 21, 2005, Dr. Trause meet with Suni and Ms. Boyle from CPS. CP 51. Ms. Boyle tape recorded the session where Suni did disclose what she had previously told Dr. Trause. CP 51.

After Kelly Boyle staffed the case with her co-workers, the decision was made that neither child should have contact with David Rovang. RP 52-53. Kelly Boyle called Ms. Rovang to discuss whether she could be “the protective parent rather than have CPS step in.” RP 53. When questioned about what exactly that meant, Ms. Boyle indicated that “we [CPS] would have called law enforcement and . . . told them the situation and . . . at that time they would have made the determination whether . . . the children would be placed in protective custody or not.” RP 53. CPS expected the mother to use whatever means to keep the children

away from the father, and Ms. Boyle had mentioned a Protection Order as an option. RP 54

On October 21, 2005, Deborah Rovang applied for a domestic violence protection order on behalf of her two children, Season (age, 9) and Suni (age, 6). CP 211 - 217. The Temporary Order was entered on October 21, 2005 setting the hearing for November 2, 2005. RP 125 - 126. The hearing was held on November 2, 2005, before Commissioner Adamson in Mason County. RP 1. At that time, the Court found that it was more probable than not that domestic violence had occurred (See RP 127 and 130) an order was issued for one year, from November 5, 2005 to November 5, 2006. CP 21-24.

Subsequent to the hearing, David Rovang filed a Motion for Reconsideration of the Commissioner's Order. CP 13 - 18. The hearing was scheduled for November 23, 2005. CP 19 - 20. On November 23, 2005, Mr. Rovang, through his attorney, provided a letter from the Department of Social and Health Services, dated November 15, 2005, which he wanted the court to enter into the record for the Motion for Reconsideration. CP 4-5. To allow the court to timely consider the new information, the hearing was continued, the issue of attorney's fees reserved, and ultimately the issue of attorney's fees were argued at presentation of the Order Denying Motion for Reconsideration on January

18, 2006. RP 1. After hearing argument of counsel and reviewing the file, the Commissioner denied Mr. Rovang's Motion for Reconsideration. Deborah Rovang's request for attorney's fees was denied on the basis that "[the Court] denied her request as to one daughter and granted it as to the other. Accordingly, the Court will require that each party bear their respective fees and costs." CP 226.

Deborah Rovang filed a Notice of Appeal on March 15, 2006, seeking review of Commissioner Adamson's January 30, 2006, Memorandum Opinion. CP 225-226. This Memorandum Opinion was subsequently entered into an order dated February 15, 2006. CP 220 - 221.

Since, Mr. Rovang indicated for the first time in his brief that he misread the date on the Protection Order, Ms. Rovang, through her attorney, was forced to file a Motion to Clarify the Protection Order on June 15, 2006. CP 254 - 255. A Stipulated Order was entered clarifying that the Protection Order expires unless renewed on November 2, 2006. CP 251 - 253.

#### **D. ARGUMENT**

- 1. The trial court did not error as it did not enter an order for eleven years, but entered the statutory allowable time of one year ending November 2, 2006.**

Since, Mr. Rovang has filed his appeal indicating that he believes that the Protection Order dated November 2, 2005, was effective through November 2, 2016, Ms. Rovang has been forced to file a Motion to Clarify Order of Protection. CP 254 - 255. The Stipulated Order re: Motion to Clarify Order for Protection of November 2, 2005, was entered on July 28, 2006, making this Assignment of Error moot. CP 251 - 253.

**2. The trial court did not abuse its discretion in entering the Order of Protection on November 2, 2005 after a contested hearing.**

**(a) The standard of review is that the trial court would have had to abuse its discretion for this court to disturb its ruling.**

RCW 26.50.060 authorizes the trial court, after notice and hearing, to issue an Order of Protection. *City of Seattle v. Edwards*, 87 Wn. App. 305, 310, 941P. 2d 697 (1997) cited by *Hecker v. Cortinas*, 110 Wn. App. 865,869, 43 P. 3d 50 (2002). RCW 26.50 authorizes the court to craft an Order of Protection to remedy the given domestic violence situation through (among other things) restraining the respondent from committing domestic violence, from entering the petitioner's (or children named in the order) home, school, daycare or work place, and from contacting the petitioner or children named in the order. RCW 26.50.060 (1); *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P. 3d 1030 (2000). The Court has discretion to enter an order that is permanent if the respondent is "likely to

resume acts of domestic violence against the petitioner . . . when the order expires". RCW 26.50.060(2); *Kaminiski* 103 Wn. App. At 331. The Court of Appeals will not "disturb such an exercise of discretion on appeal absent a clear showing of abuse. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P. 3d 50 (2002) citing *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P. 2d 775 (1971). Abuse of discretion occurs "when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

RCW 26.50.060 and RCW 26.50.070 set forth the criteria which the courts must use in determining to issue Orders of Protections and Ex Parte Temporary Orders of Protection. RCW 26.50.010 defines domestic violence as follows:

- (1) "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW

9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010

Mr. Rovang wants to describe the touching in this case as assault and define it as **unlawful touching** (because of lack of consent) and essentially state that his touching if “[e]ven assuming, *arguendo* that Mr. Rovang did touch Suni’s vaginal area” is a “father’s privileged to touch his child’s body.” Brief of Appellant 20. This case is about Mr. Rovang’s inappropriate sexual touching, which is harmful touching, assault and certainly could inflict fear of assault and bodily injury upon his intended victim. See RCW 26.50.010.

RCW 9A.44.010 defines “sexual contact”

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.10 defines “consent”

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

**(b) There was not an abuse of discretion when the court entered the ex parte Temporary Order of Protection.**

In reviewing whether the Commissioner abused his discretion, we look at RCW 26.50.030 which sets out what is required in a petition for an order of protection.

- (1) 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. Petitioner and respondent shall disclose the existence of any other litigation concerning the custody or residential placement of a child of the parties as set forth in RCW 26.27.281 and the existence of any other restraining, protection, or no-contact orders between the parties.
- (2) A petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties except in cases where the court realigns petitioner and respondent in accordance with RCW 26.50.060(4).

RCW 26.50.030.

Ms. Rovang filed her Petition for Order of Protection on October 21, 2005. CP 211-217. The Petition contains the following supportive paragraph:

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 daughter’s safety. Kelly said that Suni disclosed sexual abuse to her, by her father.

CP 214.

Commissioner Adamson was concerned that he did not have authority under that statute to issue an order based on the information in

the Petition. RP 68. When the Petition was initially filed it only contained the first paragraph cited above and not the second. RP 68. Upon the Commissioner expressing his concern to Ms. Rovang on October 21, 2005, Ms. Rovang telephoned Kelly Boyle. RP 67. The Commissioner reported his concern about the lack of information in the petition to Ms. Boyle and she spoke with Ms. Rovang on the telephone while the Commissioner left his office. RP 68. It was after this telephone call that Ms. Rovang added the second short paragraph. RP 68.

However, Ms. Rovang did disclose to the Commissioner her concerns regarding the divorce in Pierce County, the language in the Parenting Plan and the psychological evaluation by Dr. Traywick. CP 125-126. Further, Ms. Boyle made it clear to the Commissioner that the "Department intended to have both girls removed by law enforcement if the mother did not get a restraining order." CP 126.

The Petition alleged acts of sexual abuse by Mr. Rovang and, well before the contested hearing, Mr. Rovang had all of the specific facts on which the allegations were based. CP 214.

- (c) **The Commissioner did not abuse his discretion in issuing the Order of Protection after the contested hearing on November 2, 2005.**

Pursuant to RCW 26.50.060 the court may, upon notice and after hearing, order relief it deems it is reasonable necessary for the protection of the petitioner and other household members sought to be protected to eliminate the domestic violence occurring or that the Petitioner is fearful will occur. *See* RCW 26.50.060.

In, *Gourley v. Gourley*, 124 Wn. App. 52, 98 P. 3d 815 (2004), Division One affirmed the trial court's issuance of an Order for Protection, when Ms. Gourley sought the Protection Order on behalf of herself and her three children, D (age 14), N (age 14) and K (age 10). *Gourley* 124 Wn. App. at 55. The Petition stated that one child (N) had reported sexual abuse by her father for a period of 1 ½ years. *Id.* at 55. The Petition included a letter from a Snohomish County Sheriff's detective indicating that N had made allegations of sexual abuse that were under investigation and listing a couple specific allegations. *Id.* at 55. Additional supporting documents were filed while the petition was pending.

Mr. Gourley vigorously denied the allegations stating that the timing of N's allegations coincided with a report by K that she was sexually abused by Ms. Gourley's 18 year old son, Michael, from a previous relationship. *Id.* at 55. N reported that Michael sexually abused her as well, but Mr. Gourley support Michael against N's allegations, even though he believed K's allegations. *Id.* at 55. Mr. Gourley believes N's

resentment toward him about his support of Michael triggered her allegations against him of sexually abusing her. *Id at 55*. Also, N had not mentioned the alleged sexual abuse by Mr. Gourley during a CPS investigation nor previous counseling. *Id. at 56*.

As in this case, Mr. Gourley, argued that the finding of domestic violence was not support by the evidence because there were only allegations of sexual touching, not sexual assault. In that case, Division One stated that “[f]irst, . . . the court was entitled to consider hearsay evidence when deciding whether to grant the protection order. Second, Gourley was not denied his right to cross-examination because he never sought to subpoena N, nor did he move the court to issue a subpoena. *Id. at 58-59*.

First, Ms. Rovang presented objective evidence that Suni had disclosed to Dr. Trause inappropriate touching by David Rovang. CP 48 - 51. Commissioner Adamson relied upon Dr. Trause’s letter when he 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 Commissioner had just read the second paragraph on page two of Dr. Trause’s report. RP 128-129, See CP 49. Dr. Trause queried Suni to check for her creditability and found, “[i]n my professional opinion, Suni was a credible reporter and I needed to report what she had disclosed to CPS. CP 50 - 51.

In my professional opinion, 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. I included the entire interview with her in order to present her straight forward way of answering a variety of questions. She knows the difference between what is true and not true. Her answers did not seem to be coached, although I believe that her mother did encourage her to speak up. Her allegations need to be fully investigated by someone who can look at the whole situation without prejudice. It is important that the allegations not be discounted because of possible concerns about the mother's functioning.

CP 51.

David Rovang has never specifically denied touching Suni's vaginal area in an inappropriate way. Cleverly, Mr. Rovang has made a blanket statement of subjective innocence. See CP 76-79. He has never responded to the allegations and specifically denied the allegations.

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.

CP 77.

David Rovang has never denied putting a paintbrush in Suni's vagina. He has never denied any of the specific allegations (*see* CP 76-81.) set forth in Maryanne Trause's report. CP 49 - 50. He did not provide testimony on the day of the contested hearing. RP 1-132.

Mr. Rovang would like the Court to believe that because of the information provided in their divorce action from 2004, that the

allegations against him could not possibly be true. *See* CP 76 – 81. That Ms. Rovang has such a disturbed psychological history nothing that she would report or say could possibly be valid. Carried to its logical conclusion, if Ms. Rovang were to never be able to report sexual abuse she observed in her daughter, or its symptomology, then Mr. Rovang is certainly free to sexually abuse his daughter without fear of reprisal. However, evidence was presented to meet the preponderance standard by which the court must reach to make its finding of domestic violence to issue an Order for Protection.

First, the disclosure was not made by Ms. Rovang; it was made by Suni. CP 49 - 50. Then, a license clinical psychologist with extensive education, training and knowledge in child development and research (see CP 55 - 58.), makes a CPS referral indicating that the child is a credible reporter and there is concern that this matter should be further investigated. CP 51.

Second, Dr. Frye administered the MMPI and the Millon Clinical Multiaxial Inventory-III to Ms. Rovang in October 2003 in an attempt to recreate the findings of Dr. Traywick. RP 13. Dr. Frye's findings were quite different than those of Dr. Traywick's. RP 13. Dr. Frye did not find that Ms. Rovang had a prominent personality disorder. He did not find that Ms. Rovang had "great affectional needs, or exaggerated affectional

needs. And I've worked with a lot of trauma victims, and I – that just was not what I saw, you know, in the test or what she demonstrated in the clinic." RP 13. Dr. Frye has watched Ms. Rovang strengthen emotionally during his therapy with her. RP 15.

Third, Mr. Rovang would have the court believe that this was appropriate "privileged" touching. Appellant's Brief 20 - 21. He is arguing in his brief that this sort of touching can occur while drying her off after a bath or shower or while changing her diaper. There is nothing in the record (RP 1-133), and nothing in the disclosure made to Dr. Trause (CP 45 - 48.) that would indicate that Suni was taking a bath or that her father was drying her off. Suni was 6 years of age at the time of this incidence (CP 211) and was not wearing diapers as a six year old child.

Fourth, everyone wants to ignore the paintbrush issue, which Suni disclosed to Dr. Trause. CP 50. Clearly Suni is talking about two different times when she is speaking of the time with Samantha and then another time when her father put the paintbrush into her vagina. CP 49 - 50.

Suni was 6 years old at the time of this incident. CP 211. She is in the primary care of her mother. CP 84. There are not going to be several people who have witnessed this kind of abuse. In *Gourley*, the children were 14 and 10 years of age. *Gourley*, 124 Wn. App. at 55. The age

difference and developmental level in the children will make a difference in the type, detail and completeness of a disclosure.

Kelly Boyle established Suni's ability to determine whether she could differentiate between the truth and a lie, and also to establish whether she was developmentally appropriate to be able to give an interview. RP 49. Kelly proceeded after finding Suni could do both of those things, because of Suni's age this is a necessary step in the process. RP 49. Commissioner Adamson had sufficient information and did not abuse his discretion, given the age of the child, and the circumstances under which the mother felt restrained when he enter the Order for Protection. See CP 21-24.

**(d) The trial court properly denied the admission of the polygraph offered by Mr. Rovang as evidence in the contested hearing on November 2, 2005.**

Mr. Rovang offered to the court through his counsel, a polygraph examination of Mr. Rovang which contained only part of the questions asked of Mr. Rovang. RP 108.

Further to support that the polygraph should be admitted, Mr. Rovang suggested through counsel that CPS had requested that Mr. Rovang submit to a psychosexual evaluation "which rely almost entirely on polygraph."

RP 109.

Commissioner Adamson stated:

The psycho/sexual evaluation . . . A polygraph is just one small part of a multipart approach. And all counsel and this Court have read a number of those reports so you know that the polygraph is just one part of the piece.

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 give this *Kronenberg* matter . . . This is, I think, more akin to what we're dealing with here today. *Kronenberg* ws 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 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 standard.

RP 111-112.

(i) The Court correctly admitted reliable evidence to consider when making its decision about whether to issue an Order of Protection.

ER Rule 1101(c) states in relevant part:

When Rules Need Not Be Applied. The rules (other than with respect to privileges) need not be applied in the following situations:

\* \* \*

(4) Applications for Domestic Violence Protection. Protection order proceedings under RCW 26.50 and 10.14. . . .

Throughout the proceedings, both parties submitted testimony and declarations containing hearsay that would, under trial circumstances, have been determined inadmissible as a result of hearsay objections. RP 1-133. Commissioner Adamson ruled on the admissibility of evidence throughout the hearing and whether it was sustained or overruled. RP 108 - 109. The issue remains the reliability of evidence and whether it will prejudice the outcome of the trier of fact in making an appropriate decision.

(ii) Polygraph results lack the reliability to be admitted in this Protection Order hearing when opposing counsel does not stipulate to the admissibility and has not had the opportunity to review the entire test administered to the participant.

In In re the Matter of the Disciplinary Proceeding of Kronenberg, 155 Wn. 2d 184, 117 P. 3d 1134 (2005), the Supreme Court held that the polygraph should not have been admitted in a lawyer's disciplinary action, but because of the overwhelming evidence to support the hearing officer's other findings, the Court found the admission was harmless error.

Kronenberg at 195. In attorney discipline cases, misconduct must be proved by a "clear preponderance of evidence." Kronenberg, 152 Wn. 2d at 193, 195, 117 P. 3d 1134 citing In re Disciplinary Proceeding Against Guarnero, 152 Wn. 2d 51, 58, 93 P. 3d 166 (2004). The Supreme Court

directed that “despite this heightened level of proof, ‘[h]earing officers should be guided in their evidentiary and procedural rulings by the principle that disciplinary proceedings are neither civil nor criminal’ and are undertaken to determine if a lawyer’s conduct will impact his or her ability to practice law. ELC 10.14(a); Kronenberg at 193. Also, the ELC 10.14(d)(1) requires that the evidence admitted in attorney disciplinary proceedings must be “evidence, including hearsay evidence, is admissible if in the hearings officer’s judgment it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” ELC 10.14.(d)(1) Kronenberg at 193. However, the Supreme Court held that admission of the polygraph failed to meet the test for admissibility. Kronenberg at 194-195.

The Supreme Court has gone further to say that even when there is a stipulation by the parties there must be further safeguards before polygraph evidence may be admitted. State v. Renfro, 96 Wn. 2d 902; 639 P. 2d 737 (1982).

*(1) That the [prosecuting] attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.*

*(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i. e. if the trial judge is not convinced that the examiner is qualified or that the test*

*was conducted under proper conditions he may refuse to accept such evidence.*

*(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:*

- a. the examiner's qualifications and training;*
- b. the conditions under which the test was administered;*
- c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and*
- d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.*

*Renfro at 906-907.*

The reliability of the evidence is such that the Commissioner correctly did not allow its admission.

Mr. Rovang had not provided all of the information regarding the polygraph, only a portion of the questions asked by the poligrapher were provided. RP108. The person conducting the polygraph was not available to testify and Mr. Rovang was merely trying to admit this report into evidence without the ability of testimony either direct or cross examination by either party. RP 108 - 109.

*(iii)The Commissioner had the authority under RCW 26.50 to order no contact between Mr. Rovang and his daughter, Suni.*

Pursuant to RCW 26.50.135 the Commissioner is directed to consult the judicial information system to determine the pendency of other proceedings involving the children named in Petitions for Order for Protection. See RCW 26.50.135

Residential placement or custody of a child – Prerequisite

- (1) Before granting an order under this chapter directing residential placement of a child or restraining or limiting a party's contact with a child, the court shall consult the judicial information system, if available, to determine the pendency of other proceedings involving the residential placement of any child of the parties for whom residential placement has been requested.

RCW 26.50.135

Mr. Rovang cites in his brief *In Re Marriage of Barone*, 100 Wn. App. 241, 257, 996 P. 2d 654 (2000) for the proposition that protection order may not function as defacto modification of permanent parenting plans. The Barone case is about a divorced spouse who sought equitable relief from past due child support obligations for a period of time during which the child resided with her pursuant to an order of protection (in contravention of the parties' final parenting plan) and she provided for all of the child's financial needs. *Barone*, 100 Wn. App. at 243. The protection order required the child to reside with the obligor parent and prohibited contact between the child and the obligee parent. *Barone*, 100 Wn. App. at 243. The protection order in the *Barone* case as here does not

permanently modify the Parenting Plan nor the Order of Child Support. Division One did not state that the Parenting Plan was improperly modified by the protection order and recognized that “the Legislature intended chapter 26.50 RCW to provide a process by which victims of domestic violence may obtain order of protection more efficiently and easily than court order are generally obtained.” *Barone*, 100 Wn. App. at 247. Therefore, Commissioner Adamson did not abuse his discretion in entering the Order for Protection preventing contact between Mr. Rovang and Suni for one year pursuant to the Order. CP 21-24.

**(e) The trial court did not abuse its discretion in denying the motion to reconsider entry of the Order of Protection.**

At the hearing on Mr. Rovang’s Motion for Reconsideration, Commissioner Adamson affirmed his finding of domestic violence focusing on Dr. Trause’s report. RP 148. Commissioner Adamson believed that the “Court’s original conclusion here was correct.” RP 148.

For the same reason that the trial court did not abuse its discretion in making its original determination, it did not abuse its discretion in denying the Motion for Reconsideration. The trial court took into consideration all of the testimony and evidence presented and based its decision on the circumstances of the case. Mr. Rovang did not deny that

he had the physical contact as alleged and there was sufficient evidence to support the trial court's finding of domestic violence.

**(f) Ms. Rovang requests that she be awarded attorney's fees for responding to this appeal pursuant to RAP 18.1.**

Pursuant to RAP 18.1, "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule . . ." RAP 18.1

Parties who have obtained protection order may be awarded fees under RCW 26.50.60(1)(g).

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

(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;

*RCW 26.50.060(1)(g).*

It is in this Court's discretion to award reasonable attorney fees and costs on appeal under the statute. Gourley, 124 Wn. App at 59.

Since, Ms. Rovang was awarded an Order of Protection, she should be awarded her reasonable fees and cost for having to respond to this appeal.

3. **The trial court committed error by not awarding Deborah Rovang attorney's fees when she was awarded a protection order for one of the parties' daughters, she was forced to defend against a motion for reconsideration, and CPS had mandated that she take such action or the children would be placed in foster care.**

The statute governing the award of attorney's fees in this case is RCW 26.50.060(1)(g), which in pertinent part states:

1. Upon notice after hearing, the court may provide relief as follows:
  - (g) require the respondent to pay administrative court costs and service fees as established by the court or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorney's fees;

Here, Commissioner Adamson denied all of Ms. Rovang's attorney's fees despite the fact that she prevailed and was awarded a protection order as to one of the parties' two daughters stating:

The court's decision herein is guided by the outcome of the litigation. The Petitioner originally asked for a domestic violence protection order as to both of the parties' daughters. The court denied her request as to one daughter and granted it as to the other. Accordingly, the court will require that each party bear their respective fees and costs.

CP 226.

Ms. Rovang knew that she had to seek this protection order or have her children taken into protective custody by either law enforcement or by Kelly Boyle of CPS.

4. **Cases set out that when a party prevails under RCW 26.50, the court may award costs, service fees and reasonable attorney's fees to the petitioner.**

In *Hecker v. Cortinas*, 110 Wn. App. 865, 43 P.3d 50 (2002), this court went so far as to say that RCW 26.50.060 (1)(g):

requires the respondent to pay administrative court costs and service fees and to reimburse the petitioner for costs incurred in bringing a protection order action including reasonable attorney's fees.

In *Hecker*, the ex-husband filed a petition seeking a permanent protection order against his ex-wife. The order was granted and his ex-wife appealed. The judgment of the trial court was confirmed, but the ex-wife sought an award of attorney's fees. The respondent, ex-wife in *Hecker* argued that she should be entitled to fees and costs for defending against such an action. In the absence of a specific statutory authority, this court did not entertain such an award. *Hecker* at 871.

In this case, Commissioner Adamson abused his discretion by essentially offsetting Mr. Rovang's fees against those of Ms. Rovang's. There is no statutory authority to award fees to Mr. Rovang or to consider those fees incurred by Mr. Rovang. Certainly, Ms. Rovang's fees could be reduced by fees incurred for any part of the case that could have involved that of the other child. However, it is clear from the record that a significant portion of this case was involving Suni. The counselor

interviews, information regarding the disclosures made by Suni and the emergency room notes were about Suni. But for CPS's insistence to proceed with the order for both children, it is clear that all of the evidence and disclosures were regarding the parties' youngest child. As a result, Ms. Rovang should be awarded her fees pursuant to statute. See Gourley v. Gourley, 124 Wn. App. 52, 98 P.3d 816 (2004).

On October 21, 2005, Ms. Rovang applied for a protection order on behalf of her two children, stating:

[m]y daughter [Suni] reported something to CPS - Kelly Boyle, she said my daughters [Season and Suni] needed to be in my custody as their protective parent while investigation goes on.

CP 214

Commissioner Adamson did not believe this was sufficient information to grant the initial protection order. RP 67. As a result, Ms. Rovang called Kelly Boyle, the CPS caseworker from the courthouse while in the presence of the Commissioner. RP 67. The Commissioner expressed his concern to Kelly Boyle that the information was not sufficient to grant the 'authority to protection order based upon the information she [Ms. Rovang] had given the Court". Ms. Boyle stated:

That at this time the child has made a disclosure of sex abuse by her father. And that the department believes that the children should not have contact to assure their safety with the father until a further investigation ensues. And

that if the mother felt like she could not pursue this restraining order, then we would need to call law enforcement to see if they could intervene.

RP 68.

5. **The court abused its discretion when not awarding fees to Deborah Rovang for having to defend a motion for reconsideration and then having to appear when Mr. Rovang provided information in an untimely manner and the second appearance when the motion for reconsideration was denied.**

Subsequent to the appearance for the protection order on November 2, 2005, David Rovang filed a Motion for Reconsideration on November 8, 2005. On the date on which the hearing was to be held, all parties appeared only to have Mr. Rovang file new evidence, a letter from Department of Social and Health Services, Child Protective Services, dated November 15, 2005. Because the letter was not timely filed, and the court wanted to consider it as part of its ruling, the hearing had to be continued. The court also reserved its ruling on that date regarding attorney's fees on that issue. Attorney's fees under RCW 26.50 were reserved for further ruling as well. Due to Mr. Rovang's untimely filing, Ms. Rovang's attorney was forced to appear for a hearing that was ultimately continued. CP 19 - 20. Subsequently, the hearing regarding the Motion for Reconsideration and the attorney's fees hearing were combined for hearing on January 18, 2006. CP 3. At the January 18, 2006 hearing, the attorney's fees were denied for the protection order

hearing, the appearance at the continuance on November 23, 2005, and for the appearance on January 18, 2006 for defending against the motion for reconsideration. CP 225 - 226.

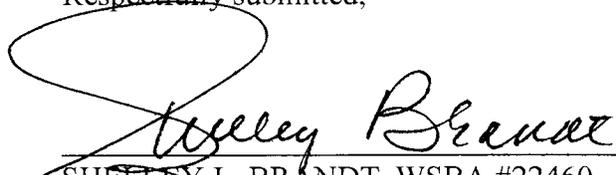
**E. CONCLUSION**

The trial court did not abuse its discretion in entering the Order for Protection for a one-year time period and the order should be affirmed.

The trial court did not abuse its discretion in denying the Motion for Reconsideration; that order should be affirmed.

The trial court should have awarded attorney's fees and costs to Ms. Rovang for prevailing in pursuing a protective order; Ms. Rovang should be awarded fees and costs for responding to this appeal

Respectfully submitted,

  
SHELLEY L. BRANDT, WSBA #22460  
Of Attorneys for Respondent/Cross-Appellant,  
Deborah K. Faulk-Rovang

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No. 34248-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

Chm

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DEBORAH K. FALK-ROVANG,

Respondent

v.

W. DAVID ROVANG,

Appellant.

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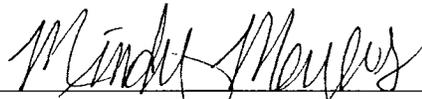
CERTIFICATE OF SERVICE

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

I, MINDY M. MEYERS, Legal Assistant to SHELLEY L. BRANDT of  
CORDES BRANDT, PLLC, of attorneys for Respondent, Deborah K.  
Falk-Rovang, do hereby certify that on the date entered hereunder, caused  
a copy of the **BRIEF OF RESPONDENT/ CROSS-APPELLANT** in the  
above captioned matter to be delivered by U.S. certified mail to the  
Appellant, W. David Rovang at Rovang, Fong & Associates, 569  
Division, Suite A, Port Orchard, WA 98366.

DATED this 25<sup>th</sup> day of July, 2006.



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MINDY MEYERS, Legal Assistant to  
SHELLEY L. BRANDT, WSBA No. 22460  
Attorney for Respondent  
CORDES BRANDT, PLLC  
2625 B Parkmont Lane SW  
Olympia, WA 98502  
(360) 357-7793

ORIGINAL