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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 43067-3-II

BY _____
DEPUTY

THE COURT OF APPEALS, DIVISION II

State of Washington

MARIUSZ K. KOWALEWSKI,

PETITIONER

Vs.

BARBARA B. KOWALEWSKA,

RESPONDENT

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred by refusing to lift “permanent” restraints more than six years after entry of a Decree of Dissolution, with no intervening violence incidents, and after the appellant was evaluated and determined to have no domestic violence issues.

The Superior Court erred in awarding attorney fees in this case.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

A “permanent” restraint is issued in connection with a March 25, 2005 Decree of Dissolution prohibiting husband from being within 500 feet of wife. In November of 2011, there being no post-trial incidents of violence, and after a post decree DV assessment indicating that treatment is “not indicated” by Bill Notarfrancisco, husband asks to lift the permanent restraints. In the absence of some new evidence showing risk, does the court abuse discretion in refusing to lift the restraints?

Is there any demonstrated basis for an award of attorney fees in connection with a request to lift the restraints by husband?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court's decision not to modify or lift a "permanent" restraining order issued after a trial. The case closely mirrors *Marriage of Robin M. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010).

Whether to grant, modify, or terminate a protection order is a matter of judicial discretion. RCW 26.50.060(2). *Marriage of Robin M. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

IMPORTANT FACTS

A Decree of Dissolution was entered in this case on March 27, 2005, containing a provision barring husband from being within 500 feet of wife. CP 1-7 (particularly CP 4-5.)

On March 31, 2005, a DV evaluation was performed by Bill Notarfrancisco, a well-known professional licensed by the state who indicated only:

RECOMMENDATIONS: One (1) follow up session with me.

ADDITIONAL COMMENTS: Based on my findings, the need for a one (1) year DV Group program is **not** indicated at this time.

CP 84-87.

Over six years later, on October 13, 2011, there being no incidents of any kind, Mr. Kowalewski sought an order lifting the restraints asserting that the restraints were interfering in his attendance at family functions, including specifically the baptism of his youngests grandson and that the restraints were creating problems when he traveled to Canada and Poland. CP 8-11.

Forty-nine pages of response material were filed (exclusive of a 10-page memorandum). The material cited to:

1. A December 4, 2004 incident. CP 19. (But the referenced exhibit is a 2003 police report.) CP 25-33.
2. A June 2004 police report and a July 2004 letter from Ms. Kowalewski to a Victim Advocate. CP 35-41.
3. An April 13, 2005 Memorandum filed by Mr. Kowalewski's divorce lawyer in the divorce case. CP 42-46.
4. A series of undated photos, including photos of rifles owned by Mr. Kowalewski. CP 48-49.
5. A photo of a cap on concrete blocks allegedly outside the wife's home. CP 50.
6. An August 27, 2004 Cronology of Events, detailing for the prosecutor allegations by the wife of incidents of abuse. CP 52-56.
7. Print-outs of Mr. Kowalewski's history of litigation. CP 57-61.
8. A copy of a January 25, 2005 order reissuing a DV protection order. CP 62.
9. An August 1, 2005 order continuing in effect a DV protection order. CP 63.
10. A letter signed by John-Robinson Ph.D dated May 15, 2004 describing facts relayed by Ms.

Kowalewska about conflict and describing her response. CP 14-15.

11. An August 19, 2005 letter from Deborah Smith, MD indicating that Ms. Kowalewska is suffering from PTSD and Generalized Anxiety Disorder and depression “due in part to the lack of support and ongoing harassment by her now ex-husband.” CP 16. This appears to be a recital of information given by Ms. Kowalewska and is somewhat incomprehensible. For example, there is no explanation for what Dr. Smith means by “lack of support” from an ex-husband. Customarily, ex-spouses aren’t much supportive post dissolution.

A fair reading of the entire response shows two events of note post-dating the Decree and its restraints.

First, there is the August 1, 2005 Superior Court order reissued a DV restraining order. That’s not surprising or even significant in light of the “Permanent” restraints contained in the March 25, 2005 Decree. The DV order simply re-states the existing restraints in the Decree.

Second, there is an allegation that after the entry of the dissolution, “Petitioner called the police when she found [husband’s] beret sitting in a bush outside her living room window.” CP 19 at its 5th full paragraph. Oddly, the photo

attached shows a beret sitting on concrete blocks, not “in a bush.” CP 50.

Based on that response, the court rejected Mr. Kowalewski’s request to lift the restraints, and awarded attorney fees of \$1,550. CP 76.

The precise basis for an award of fees was explained later when the court denied a timely reconsideration, indicating that the motion was frivolous in light of “No rebuttal of factual harassment post-order,” and based on the court’s concluding wife was “on state assistance.” CP 97.

Oddly, no fees were awarded in connection with the reconsideration that was denied. CP 97.

This timely appeal followed. CP 98-99.

APPLICABLE LAW AND ARGUMENT

The award of attorney fees is unjustified on any legal basis.

The court’s award of attorney fees is puzzling. Fees were awarded when the motion was initially denied. No fees were awarded when Mr. Kowalewski’s reconsideration was rejected.

In part, the court found that fees were awarded because wife “is on state assistance.” CP 97. But, there is

zero financial data in the record to substantiate that determination.

The forty-nine page response signed by Barbara Kowalewska is some sort of amalgam of a memorandum and statement. It's not a statement under penalty of perjury and contains nothing sworn to, although it's signed. See CP 66-75.

Even setting aside that flaw, nowhere in the statement does she assert she's on public assistance.

There was no response to Mr. Kowalewski's Motion to Reconsider, so clearly that can't be the basis for any finding that the wife is on public assistance.

A trial court abuses its discretion when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). It's submitted that the court's finding the wife is on public assistance, when there is no competent evidence in the record to show that's so, is a decision based on untenable grounds.

In all events, receiving public assistance is not a basis for an award of fees. RCW 26.09.140 allows the court to make an award based on need and ability to pay, but again

there is zero in the record showing either of the parties' respective financial circumstances. An award on this record under RCW 26.09.140 is untenable and therefore an abuse of discretion.

A trial court can award fees for the filing of a frivolous claim. A lawsuit is frivolous if, when considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Curhan v. Chelan County*, 156 Wn.App. 30, 37, 230 P.3d 1083 (2010). Brought to the trial court's attention is this court's decision in *Freeman v. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010), and the facts in this case are sufficiently similar so that it is submitted the case is not frivolous; there is at least some rational argument based on *Freeman* and over six years of no incidents and no contact between the parties.

Chapter 26.50 RCW (the domestic violence law) allows for an award of fees incurred by a protected party in seeking an order or renewal of an order. But, this case concerns neither the seeking nor the renewal of an order, nor did the court award fees under the domestic violence law. See *Freeman v. Freeman*, 169 Wn.2d 664, 667, 239 P.3d 557 (2010) (rejecting a similar claim for fees.)

The court's refusal to lift the restraints is an abuse of discretion.

A trial court abuses its discretion when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Without re-litigating all that lead up to the issuance of the original order, "permanent" protection orders can be modified or terminated upon application with notice to affected parties and after a hearing. RCW 26.50.130(1).

The modification statute fails to spell out grounds, factors, or standards authorizing modification of a permanent protection order. *Id.* It also fails to mention which party bears the burden of modifying or maintaining the permanent protection order. *Id.*

Still, the *Freeman* case (169 Wn.2d 664) identifies 10 specific factors to consider, and then "other factors deemed relevant by the court."

As to the ten specific factors, we agree that the victim has not consented, but it will be the rare case on appeal where a victim has consented to lifting restraints.

The next significant factor is the “victim’s fear” of the restrained party. Here, after over six years of no contact, it’s unclear what exactly could create a reasonable fear. There is an assertion (unsworn) statement that Ms. Kowalewska found a beret outside her home. Still, even considering that in its most damning light, it would indicate he showed up and then left without incident. Why exactly anyone would do that is a mystery, but given all the uncertainties, it seems that any fear is unreasonable.

The next significant factor is whether there have been any contempt citations. Here there are none.

The next factor is the restrained party’s alcohol and drug involvement. Here there is none.

The next factor is other violent acts on the part of the restrained party. Here there are none.

The next factor is whether the restrained party has engaged in DV counseling. In this case, the answer is “yes,” to the extent he can get counseling. Since Mr. Notarfrancisco found no need for intensive treatment, obviously he’s not going to get a competent provider to supply uncalled for “treatment.” The evaluation at least shows no substantial problem.

The next factor is whether the restrained party is acting in good faith. That's somewhat hard to gauge, but the court should consider this court's companion case No. 43067-3-II and the fact that the true conflict here is over real property and the perception by Ms. Kowalewska that she was cheated out of money.

The next factor is whether other jurisdictions have entered protection orders against the restrained party. Again, that's not the case here.

Setting aside all the pre-trial data – things leading to the issuance of the protection order in the first place – and looking at what's happened since, the question is whether any substantial evidence supports Ms. Kowalewska's alleged "fear" of her ex-husband. It is submitted that there is no substantial evidence, and that it is more likely that her objection is retaliation for perceived property division issues.

And, really the vast bulk of all factors to be considered weigh in favor of granting Mr. Kowalewski's request.

Divorce cases are often contentious and it is often difficult to set aside the personal differences and act reasonably and responsibly given the very person emotional issues involved. But, refusing to allow Mr. Kowalewski to

participate in the baptism of his grandson, and excluding him from all family functions merely because that would entail getting within 500 feet of his ex-wife is not justified on this record.

Causing him difficulty at the border serves no legitimate purpose except to exact some retribution for perceived unfairness in the divorce outcome. None of that justifies continuing the restraints.

As in *Freeman*: “Here, to permit the permanent protection order to continue forever would hold [Mr. Kowalewski] hostage to his decade-old imprudence. There is scant evidence that [he] would subject his former wife and her children to future domestic violence. Through his testimony, deeds, relocation, career ambitions, and now [6]-year compliance with the permanent protection order, [Mr. Kowalewski] has met his burden to prove that he will more likely than not refrain from future acts of domestic violence against Robin or her children.” *Freeman*, 169 Wn.2d at 666.

CONCLUSION

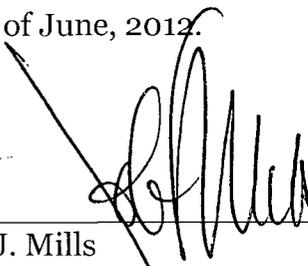
Under Washington law, a trial court may only grant attorney fees if the request is based on a statute,

a contract, or a recognized ground in equity. *Cnty. Ass'n Underwriters of America, Inc. v. Kalles*, 164 Wn.App. 30, 38,259 P.3d 1154 (2011). There is no basis shown for any award of fees, and accordingly the trial court's award of fees was an abuse of discretion and should be reversed.

Based on the factors announced in *Freeman*, Mr. Kowalewski has met his burden of showing that he will more likely than not refrain from future acts of domestic violence. He has good and substantial reasons to request the old restraints be lifted. The trial court has inadequately explained why it refused the request and accordingly the decision is manifestly unreasonable and should also be reversed.

The trial court should be reversed and the case remanded for entry of an order lifting the restraints and vacating the judgement for fees.

DATED this 29th day of June, 2012.



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WASHINGTON STATE COURT OF APPEALS
Division Two

In re the Marriage of:

BARBARA B. KOWALEWSKA
Petitioner,

vs.

MARIUSZ K. KOWALEWSKI
Respondent,

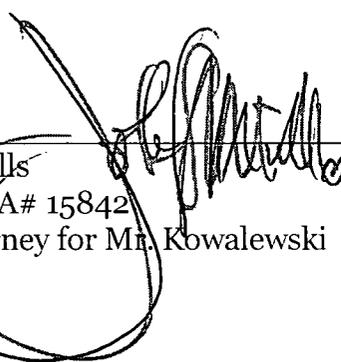
NO. **43057-3-II**

DECLARATION OF re-SERVICE

DECLARATION OF SERVICE

The undersigned certifies that on today's date a Second, and signed, copy of Appellant Opening Brief was served on Barbara Kowalewska by delivery to the U.S. Mail, postage prepaid, and addressed to Barbara Kowalewska at 18 W. Shore Avenue, Tacoma, WA 98498-5830, that being her last known address.

DATED this 6th day of July, 2012.



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