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I. Assignment of Error

The trial court did not err in denying the Petitioner's Motion to Amend the Decree of Dissolution, and did not err in awarding attorney fees.

II. Issues presented for review

I. DID THE SUPERIOR COURT RULE CORRECTLY THAT THE PERMANENT RESTRAINTS ENTERED IN THE DISSOLUTION ACTION SHOULD REMAIN IN EFFECT?

II. DID THE SUPERIOR COURT FOLLOW THE PLAIN LANGUAGE OF RCW 25.50.130 (6) OR RCW 4.84.185 WHEN IT AWARDED FEES TO THE RESPONDENT/WIFE?

III. IS THE RESPONDENT ENTITLED TO AN ADDITIONAL AWARD OF ATTORNEY FEES ON APPEAL?

III. Statement of the Case

The first Kowalewski dissolution was filed in 1996 under Cause No. 96-3-04114-8 and was dismissed by the Clerk. In 2003, the husband commenced a second dissolution action, which had four motion hearings before an eight-day bench trial was held in February of 2005, and a decree and a permanent order of protection were entered in March of 2005. C.P. at 18. Post-decree, there have been twenty (20) separate hearings in the Superior Court, three appeals, one of which went to the State Supreme Court, and a third dissolution action filed by the Husband in Poland.

In addition to the permanent restraints contained in the decree, there is also a permanent Domestic Violence Protection

Order entered under Pierce County Cause No. 04-2-01291-6. C.P. at 62. There has been extensive litigation and contact between these parties post-decree.

Appellant wants this Court to apply the analysis *In re Marriage of Freeman* 169 Wn. 2d 664, 239 P. 3d 557(2010) wherein the Supreme Court determined that removing a permanent restraining order was appropriate when the Respondent had moved out of State, had absolutely no contact whatsoever with the Petitioner for six years post-dissolution, and had his left arm amputated below the forearm. *Id.* Mr. Freeman's primary complaint with the restraining order was that he was having trouble gaining a new security clearance. *Id.*

In response to the *Freeman* decision, the Legislature on July 22, 2011 *unanimously* added significant language to RCW 26.50.130 enacting "procedures or guidelines for terminating or modifying a protection order after it is entered". RCW 26.50.130 (2) - (10).

Petitioner's reliance on *Freeman* is misplaced in light of the subsequent statutory revision, and also because the Kowalewski matter is factually distinguishable from *Freeman*.

IV. Argument

STANDARD OF REVIEW

"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.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the standard of review is abuse of discretion.

“Whether to grant, modify or terminate a protection order is a matter of judicial discretion” *Freeman* at 671. But whether to significantly re-write a statute is a matter for the Legislature.

RCW 26.50.130 HAS BEEN SIGNIFICANTLY REVISED

The Legislature’s significant revisions of RCW 26.50.130 require the moving party to bear the burden of demonstrating adequate cause (RCW 26.50.130(2)), and carry the burden of proof by a preponderance of the evidence. *Id.* The issue is whether the petitioning party can show whether or not the Respondent/Appellant (Mr. Kowalewski) is likely to commit future acts of domestic violence against the Petitioner/Respondent (Mrs. Kowalewska).

The revised statute provides nine factors the Court may consider in deciding whether to terminate a permanent order of protection. RCW 26.50.130 (3).

First is “whether Respondent has committed or threatened domestic violence, sexual assault, stalking, or other violent acts since the protection order was entered”. Here, there is evidence of domestic violence, stalking and assault since the protection order was entered in 2004. C.P. at 59.

Second is “whether the respondent has violated the terms of the protection order and the time that has passed since the entry of the order.”

Respondent/Appellant was convicted of violating the terms of the restraining order in 2004. The order had been in effect for eight years; Eight years have passed since the order was entered.

Third is whether the respondent has exhibited suicidal ideation. Here there is absolutely no information one way or the other regarding the Respondent/Appellant's suicidal ideation.

Fourth is whether the respondent has been convicted of criminal activity since the order was entered. Here, the Respondent/Appellant has been convicted of criminal activity since the protection order was entered. C.P. at 58-59.

Fifth is whether the respondent has either acknowledged responsibility for the acts of domestic violence that resulted in entry of the protection order or successfully completed domestic violence perpetrator treatment or counseling since the protection order was entered; here, there is no evidence of respondent/Appellant having acknowledged responsibility for his acts of domestic violence, or having completed treatment or counseling.

Sixth is whether the respondent has a continuing involvement with drug or alcohol abuse, if drug or alcohol abuse was a factor in the protection order; Respondent/Appellant apparently has DUI convictions, but whether or not drug or alcohol was a factor in the original protection order is not known.

Seventh is whether the petitioner (here, Mrs. Kowalewska) consents to termination of the protection order. Such consent is not forthcoming here. C.P. 18-23.

Eighth is whether either party has relocated to an area more distant from the other party; here, the parties are both still residing in Lakewood, Pierce County, Washington.

Ninth is “other factors relating to a substantial change in circumstances”. Mr. Kowalewski has not alleged anything other than issues with travel and issues with family gatherings. He has not pled any sort of substantial change of circumstances.

Furthermore, RCW 26.50.130(3)(e) states that “ regardless of whether there is a substantial change in circumstances, the court may decline to terminate a protection order if it finds that the acts of domestic violence that resulted in the issuance of the protection order were of such severity that the order should not be terminated”.

Without the record of the testimony provided during the February 2005 trial, there is no way for this Court to assess the severity of the domestic violence that caused the trial Court to issue a permanent order in 2005.

ISSUE ONE

Did the trial court correctly apply RCW 26.50.130 when it denied Appellant’s fourth request to terminate the permanent restraining order under the dissolution action when the case upon which the Appellant relies has been effectively overruled by the Legislature’s July 22, 2011 amendments to RCW 26.50.130?

“A statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal.” *In re Marriage of Kinnan*, 131 Wn. App. 738, 754, 129 P.3d 807 (2006). It is not clear

from the record provided that either party or the Court had reviewed the July 22, 2011 enactments to RCW 26.50.130 before the arguments held at the trial court. An appellate court can sustain a trial court's judgment on any theory established by the pleadings and proof, even if the trial court did not consider it. *Weiss v. Glempe*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995).

“Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously” *State ex rel. Carroll v. Junker*, Id at 26. Clearly, the Legislature enacted the 2011 revisions to RCW 26.50.130 so that trial courts would have a roadmap based on Washington law to determine whether and under what circumstances trial courts could terminate a permanent order of protection.

Furthermore Appellant does not advise this Court that the DV Assessment upon which he relies was not part of the dissolution action, but was part of an Assault-3 case filed under Pierce County Cause No. 04-1-03054-6 to which the Petitioner/Appellant Mr. Kowalewski took an Alford plea on October 11, 2004. C.P. at 57. The trial Court correctly exercised its discretion when it declined to remove the permanent order of protection, and this Court should not disturb that decision on this appeal.

ISSUE TWO

Did the trial court err when it awarded fees to the Respondent on the Petitioner/Appellant's motion to have the permanent restraints removed?

Courts decline to award attorney fees under a statute unless there is a clear expression of intent from the legislature authorizing such an award. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wash.2d 292, 303, 149 P.3d 666 (2006). We review a grant or denial of attorney fees for abuse of discretion. *Morgan v. City of Federal Way*, 166 Wash.2d 747, 758, 213 P.3d 596 (2009). *Freeman*, at 676.

Judge Nelson's January 13, 2012 Order on Motion to Reconsider specifically found "This motion is frivolous". C.P. at 76:17. When awarding attorney fees for a frivolous action (RCW 4.84.185), a court cannot pick and choose among those aspects of an action that are frivolous and those that are not. The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate. *Biggs v. Vail*, 119 Wn.2d 129, 136, 830 P.2d 350 (1992).

Because Judge Nelson found that the Appellant's request to terminate the permanent protection order was frivolous, she awarded fees. C.P. at 97. Judge Nelson could have alternatively awarded fees to Respondent because the newly added RCW 26.50.130 (6) expressly provides for an award of fees including reasonable attorney fees.

"The Court may require the respondent to pay court costs and service fees . . . and to pay the petitioner for costs incurred in responding to a motion to terminate or modify a protection order, including reasonable attorney's fees". RCW 26.50.130(6). The statute does not require the Respondent to provide financial information in order to be eligible for an award of attorney fees.

The term “may” in a statute generally confers discretion. *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993)).

Thus there was no abuse of discretion in the Court’s decision to require Mr. Kowalewski to pay Mrs. Kowalewska’s reasonable attorney fees incurred responding to his motion to terminate the protection order.

ISSUE THREE

Is the Respondent entitled to an award of attorney fees as the prevailing party at the trial court, and is the Respondent entitled to an additional award of fees for having to respond to this appeal?

Attorney fees may be awarded when authorized by a contract, statute, or recognized ground in equity. *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). Here, the Superior Court awarded fees on the basis that the motion to terminate the permanent protection order was frivolous. Order on Motion to Reconsider, January 13, 2012, C.P. 76.

If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1; *see also Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). Judge Nelson did not abuse her discretion when she awarded Mrs. Kowalewska her reasonable fees in the Superior Court based on RCW 26.50.130 (6), or alternatively, because the Court found the Motion frivolous under RCW 4.84.330.

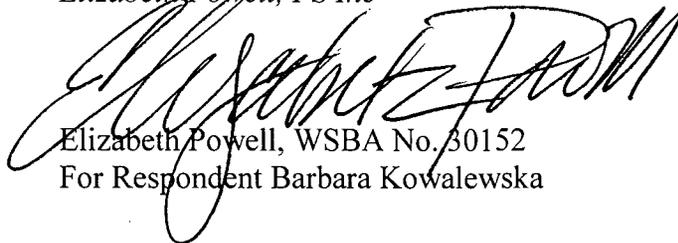
Mrs. Kowalewska should be awarded her reasonable fees at this Court. Counsel has expended not less than 28 billable hours researching, reading, drafting, revising and finalizing this brief, and deserves to be compensated for her work. A declaration in support is attached hereto and incorporated by reference as if fully set forth herein.

V. CONCLUSION

This matter has been before at least one trial court judge and two commissioners, each of whom declined to modify or terminate the orders restraining Mr. Kowalewski from contacting his ex-wife. Having failed to achieve his goal in the trial court, he presents his case to the Court of Appeals, without providing a full and complete record of the proceedings below, and without citing to, or even mentioning the revised statutory authority contained in RCW 26.50.130. This Court should affirm the decision of the trial court.

Respectfully submitted this 15th day of August, 2012.

Elizabeth Powell, PS Inc

A handwritten signature in black ink, appearing to read 'Elizabeth Powell', is written over the typed name and affiliation.

Elizabeth Powell, WSBA No. 30152
For Respondent Barbara Kowalewska

8/16/2012 1:38 PM

Case Number 43067-3-II

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

MARIUSZ K. KOWALEWSKI, Appellant

v.

BARBARA KOWALEWSKA, Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON COUNTY OF PIERCE

The Honorable Kathryn Nelson, Presiding at the Trial
Court

RESPONDENT'S CERTIFICATION OF
SERVICE OF BRIEFS TO MR. MILLS

Attorney for Respondent:

Elizabeth Powell, WSBA No. 30152
Elizabeth Powell, PS Inc.
535 Dock Street, Suite 108
Tacoma, WA 98402

TO: THE CLERK OF THE COURT;

AND TO: J. MILLS, ATTORNEY FOR APPELLANT

Elizabeth Powell, on oath states:

I am the attorney of record for the Respondent herein. On August 15, 2012, at 2:40 p.m., I emailed a .pdf of the Respondent's Brief, and the Declaration of Counsel re Fees to Mr. Mills at jmills@jmills.pro. I then called Mr. Mills to confirm that he had received the documents. Mr. Mills answered my telephone call. Mr. Mills and I have an agreement pursuant to GR33 regarding acceptance of service of pleadings. I declare under penalty of perjury that the foregoing is true and correct. Signed at Tacoma, WA , on this 16th day of August, 2012.

Elizabeth Powell, PS Inc

Elizabeth Powell, WSBA No. 30152

8/16/2012 1:38 PM

Case Number 43067-3-II

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