

FILED

SEP 11 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COA No. 306461

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STEPHINE BARE, Respondent,

v.

JEREMY SHERVEY, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The court erred by denying Jeremy Shervey's CR 60 motion to vacate the November 14, 2011 default order for protection.

B. The court erred by entering the order for protection.

Issues Pertaining to Assignments of Error

1. Did Stephine Bare's petition for order for protection allege sufficient facts to issue a domestic violence protection order? (Assignments of Error A and B).

2. Did the court err by denying Mr. Shervey's CR 60 motion to vacate the default order for protection? (Assignment of Error A).

3. Did the court err by denying Mr. Shervey a continuance of the November 14, 2011 hearing on the order for protection order when he had to appear in Tukwila Municipal Court that same day? (Assignments of Error A and B).

II. STATEMENT OF THE CASE

In Kittitas County, Ms. Bare filed a petition for order for protection on October 11, 2011. (CP 1-49). She alleged she was a victim of domestic violence and asked the court to grant her the care, custody, and control of the minors named in the petition, *i.e.*, 12-year old Serena and 8-year-old Shantele Shervey. (CP 1, 2, 4).

In the Statement section, Ms. Bare described the most recent incident or threat of violence and date:

On 9/25/11 Jeremy took my girls and put a protection order on me. On 10/10/11 the no-contact order was denied and the girls were returned to me. I am afraid Jeremy will come to Ellensburg and take off[f] with my girls. (CP 4).

She further alleged past incidents of domestic violence toward her and the children. (CP 5). A temporary order for protection and notice of hearing was filed on October 18, 2011. (CP 50-53). The next hearing date was October 31, 2011. (*Id.*).

At the October 31 hearing, the court reissued the temporary protection order, authorized Ms. Bare to serve Mr. Shervey by mail, and set another hearing for November 14, 2011. (10/31/11 RP 1; CP 56).

On November 14, 2011, Mr. Shervey faxed a continuance request to the court as he had "prior obligations at another court at the same time and date." (11/14/11 RP 2). Finding no good cause for a continuance, the court denied the request and entered by default an order for protection. (CP 60-64). The order restrained Mr. Shervey from committing acts of abuse on Ms. Bare or the children and restrained him "from coming near and from having any contact whatsoever, in person or through others, by

phone, mail, or any means, directly or indirectly, . . . with . . . [Serina and Shantelle Shervey].” (CP 61). The order further granted Ms. Bare temporary care, custody, and control of the children and restrained Mr. Shervey from interfering with her physical or legal custody of them. (CP 62).

Meanwhile, Mr. Shervey filed a petition in King County, where he lives, requesting the modification/adjustment of custody decree/parenting plan/residential schedule. (CP 99, 138). On December 22, 2011, the King County court entered an order re adequate cause finding it had jurisdiction over the proceeding and the parties; Ms. Bare had been served with the petition and had responded; and adequate cause for hearing the petition had been established. (CP 95-97). Ms. Bare signed the order. (CP 97).

Also on December 22, 2011, the King County court entered a temporary parenting plan for Shantelle Shervey limiting or restraining completely Ms. Bare’s residential time with her; providing she was scheduled to reside the majority of the time with Mr. Shervey; and finding Ms. Bare’s involvement or conduct may have an adverse effect on Shantelle’s best interests because of neglect or substantial nonperformance of parenting functions, Ms. Bare’s long-term impairment resulting from drug, alcohol, or other

substance abuse that interferes with the performance of parenting functions, her abusive use of conflict which creates the danger of serious damage to the child's psychological development, and she had withheld from Mr. Shervey access to Shantelle for a protracted period without good cause. (CP 99-113). A similar temporary parenting plan was entered for Serina Shervey. (CP 115-129).

On December 30, 2011, Mr. Shervey filed in Kittitas County a motion for CR 60 order vacating the November 14, 2011 default order for protection. (CP 82-129). The motion was heard on January 27, 2012. (1/27/12 RP 16). Mr. Shervey's counsel argued Ms. Bare's petition for protection order was defective as she failed to provide enough evidence to obtain a domestic violence protection order:

There is not enough evidence in the petition attached to the affidavit . . . by affidavit form or declaration to the petition to create a domestic violence protection order. Ms. Bare clearly what she intended to do was to get custody of her children and to prohibit Mr. Shervey from interfering with that custody. Their petition that she's filed states very clearly that that is what she was attempting to do. (1/27/12 RP 17-18).

His counsel also noted the effect of the King County temporary parenting plan:

The King County court orders take into effect – would take – the King County is in effect now.

[Ms. Bare] had a hearing. She was in front of the judge. She managed – [s]he had her say in front of the judge and the King County court made an order. And they said that Mr. Shervey ran to the King County court and got affidavits and is forum shopping. In reality that case at least for the oldest child has been ongoing since 1999. Ms. Bare most recently she talked about going back to court and modify as recently as September. (1/27/12 RP 25).

The court denied Mr. Shervey's motion:

Yeah, well, I think that the petition which Ms. Bare submitted in the Kittitas County domestic violence protection order is sufficient. I don't find grounds to set it aside so I am going to deny the respondent's request to dismiss this case. And order holding a hearing on whether there needs to be an order. I appreciate the predicament that causes. Now we still have these conflicts that's going to have to be resolved in King County. (1/27/12 RP 29).

The court also clarified that it was denying the motion based on sufficiency of the petition and, in doing so, considered just the petition. (1/27/12 RP 29). Finding the petition was sufficient, the court filed its order denying Mr. Shervey's CR 60 motion to vacate the default domestic violence order for protection on January 27, 2012. (CP 257). This appeal follows. (CP 258-265).

III. ARGUMENT

A. The court erred by denying Mr. Shervey's CR 60 motion to vacate the default domestic violence protection order.

Mr. Shervey could not appear at the November 14, 2011 hearing in Kittitas County on the domestic violence protection order as he was scheduled to be in Tukwila Municipal Court the same day and time. (CP 93). He asked for a continuance. (11/14/11 RP 2). Finding no good cause for continuing the hearing, the Kittitas County court denied his request and entered the protection order by default “since he is not here.” (*Id.* at 3).

Mr. Shervey filed a CR 60 motion to set aside the default domestic violence protection order. (CP 82). CR 55(c)(1) provides that “[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” That was the procedure used here.

CR 60(b)(1) provides that a court may relieve a party from a final order if there were “[m]istakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order.” On review of a trial court’s decision on vacation of a judgment under that rule, the standard is abuse of discretion. *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040, *review denied*, 129 Wn.2d 1028 (1996). Discretion is abused when it is exercised on

untenable grounds or for untenable reasons. *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

In exercising discretion to vacate a default order under CR 60(b), the court must first determine whether substantial evidence exists to support a defense to the claim. *Suburban Janitorial Svcs. v. Clarke Am.*, 72 Wn. App. 302, 305, 803 P.2d 1337 (1993), *review denied*, 124 Wn.2d 1006 (1994). A default order is not an order on the merits and different considerations must be applied. *Brown & Haley*, 81 Wn. App. at 105. Since the law looks to resolve cases on their merits, default judgments are disfavored. *Id.*

Here, Mr. Shervey did not willfully disregard or ignore the November 14, 2011 hearing. He asked for a continuance because of his Tukwila Municipal Court hearing the same day and time. (CP 93). The court articulated no tenable reasons for finding Mr. Shervey's request lacked good cause. Rather, it stated the request for continuance did not say what court or when "or anything like that." (11/14/11 RP 2). To the contrary, the court had already acknowledged the request stated Mr. Shervey "had prior obligations at another court at the same time and date." *Id.* Yet, the court decided that was not good cause.

The court's decision on a continuance is also reviewed for an abuse of discretion. Mr. Shervey had to be in Tukwila Municipal Court at the same date and time. If he could not make it, all the Kittitas County court had to do was maintain the temporary protection order and set a hearing for consideration on the merits. In the circumstances here, the decision to enter a default protection order was based on untenable grounds or reasons as none were provided. Indeed, the court refused to exercise its discretion. Discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). The court erred by denying Mr. Shervey's request for continuance.

Moreover, there was substantial evidence to support a defense to the claim. Ms. Bare's petition for domestic violence protection order failed to state any acts of domestic violence as they are defined by statute. She stated Mr. Shervey had committed these acts:

On 9/25/11 Jeremy took my girls and put a protection order on me. On 10/10/11 the no-contact order was denied and the girls were returned to me. I am afraid Jeremy will come to Ellensburg and take off[f] with my girls. (CP 4).

This statement was relied on by the court, which clarified its decision by stating it considered just the petition. (1/27/12 RP 29).

But this statement does not allege an act of domestic violence under RCW 26.50.010(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.

Although Ms. Bare further stated in her petition there was a history of domestic violence and Mr. Shervey was currently going to court for violating a no-contact order, his criminal history reflects the most recent charge in 2006 was subsequently dismissed. (CP 213-220; 252-254). The only outstanding case was the 2005 Tukwila proceeding that was set for probation review on November 14, 2011, the same date and time as the Kittitas County hearing on the protection order. (CP 93).

Ms. Bare’s petition does not allege any act of domestic violence as defined in RCW 26.50.010(1). She alleges no present acts of domestic violence or fear of imminent physical harm. What she does show, however, is that Mr. Shervey acted in accordance with a King County temporary protection order granting him temporary custody of the children. (CP 138).

Freeman v. Freeman, 169 Wn.2d 664, 239 P.3d 557 (2010), is instructive as to what quality and quantum of fear is necessary for the issuance of a fixed period or permanent domestic violence protection order. The decision to grant, modify, or terminate a protection order is a discretionary one. *Id.* at 671. The court noted the Domestic Violence Protection Act fails to mention which party bears the burden of modifying or maintaining the fixed period or permanent protection order. *Id.* at 679.

RCW 26.50.060(3) authorizing renewal of a temporary protection order provides that “[t]he court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner’s children or family or household members when the order expires.” Mr. Shervey never got that opportunity to present evidence on his behalf.

As particularly relevant here, the *Freeman* court stated:

The facts supporting a protection order must reasonably relate to physical harm, bodily injury, assault, or the fear of *imminent* harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be in the present. *Id.* at 674.

Although Ms. Bare alleged facts that may have justified the protection order in the past, they cannot alone support a present order. She had to also show a reasonable likelihood of imminent harm in the present. Ms. Bare failed to present facts satisfying that likelihood. Her petition alleged no present incidents of domestic violence and does not satisfy its definition in RCW 26.50.010(1). Nor did she allege any fear of imminent harm. Her petition simply did not support a domestic violence protection order. *Freeman*, 169 Wn.2d at 674.

The fixed period protection order wrongfully denies Mr. Shervey contact with Shantelle and Serina. The King County Superior Court entered a temporary parenting plan giving him custody of the children. Ms. Bare participated in the proceedings and signed off on the plan. The Kittitas County court did not consider the jurisdiction issue and it is not before this Court. (1/27/12 RP 29). But a domestic violence protection order is not, and should not be, a substitute for a parenting plan.

A decision based on misapplication of the law is an abuse of discretion. The court failed to appreciate the significance of *Freeman* and its clarification of the requirements to support a protection order. Without analysis, the court simply declared the

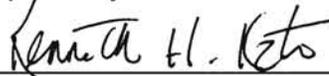
petition sufficient. It was not. *Freeman*, 169 Wn.2d at 674. The court erred by denying the CR 60 motion to vacate the default domestic violence protection order.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Shervey respectfully urges this Court to reverse the denial of his CR 60 motion to vacate the protection order and to dismiss that order.

DATED this 11th day of September, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 11, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Cathy A. Busha, Attorney at Law, 409 N. Water St. – Ste 101, Ellensburg, WA 98926-3074.

