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Supreme Court No. 82283-2
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
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STATE OF WASHINGTON

In the Matter of:

ROBIN M. FREEMAN
N/K/A ROBIN ABDULLAH,

Respondent,

and

ROB R. FREEMAN,

Appellant.

RESPONSE BRIEF OF APPELLANT

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A. INTRODUCTION

The Court of Appeals correctly found that Robin's claim of a current fear of harm was not reasonable and that the superior court abused its discretion when it denied Rob's request to terminate a permanent order of protection upon changed circumstances.

B. RESTATEMENT OF THE CASE

Rob filed a petition for dissolution of his three year marriage to Robin on January 20, 1998. Three days later, Robin appeared pro se to request a temporary domestic violence protection order against him.[1] CP 76. At the time, Robin had four children from previous relationships aged 18, 16, 12, and 10. Id. In her emergency request to the court, she alleged Rob had committed acts of domestic violence. Id. Her claim that she had been sexually assaulted while unconscious after taking pills in a suicide attempt was not persuasive to the court during the full hearing on February 4, 1998. CP 78; CP 84. The only two incidents that supported a finding of domestic violence was what Robin claimed was an assault[2] to her then-16-year-old

[1] The dissolution and protection order actions were not consolidated.

[2] Robin claimed Rob had "dragged my sixteen year old daughter down the hall

(continued...)

daughter, Yasmeen Addullah, and a perceived threat of the use of firearms. CP 84.

According to Robin, when she accused Rob of taking her jewelry from the home, he pulled his rifles out to show her that he did not have the jewelry among his possessions, all the while assuring her that he would not hurt her. CP 25. At that time, Robin told Rob that she was scared and he said, "fine, fine you're scared." CP 26.

During the February 4, 1998, contested hearing on the petition, the commissioner scolded Rob for not being sensitive to Robin's fear of weapons and told Rob that he should conduct himself more carefully if he wanted to protect his career and reputation. CP 32. The commissioner warned Rob: "[F]or someone in your situation who has been trained to use force and to use weapons of force you need to be very careful to conduct yourself[,] and your actions in regard to Ms. Freeman have been careless in terms of protecting your own reputation if you felt that that was in danger. I think that's probably

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[2](...continued)
by her throat applying pressure points causing her to black out." CP 78. Rob admitted that he physically forced Yasmeen into her room after she refused to go. According to him, he pushed her from the hallway into her room and left her there. CP 13. According to Robin, "Neither one of them told me about it for a week and we've already brought that up in front of the military with the JAG Officers. They looked into doing a criminal investigation but it didn't have a threshold high enough to bring charges for the military." CP 7.

all I should say." According to Commissioner Wickham, Rob was in a "special position" because he had been trained to use force and to use weapons of force: "That means you probably have to conduct yourself a little differently [than] other people who are in a similar situation and that's without making any judgment as to what did or did not happen in that time in question." CP 32. The court then entered a permanent order of protection,[3] restraining Rob from causing harm to Robin and her children, from having any contact with them, and from entering or being within 1,000 feet of the family's home, Robin's place of employment, and the children's schools.[4] CP 85 -86.

At the time of the hearing, Rob had already been reassigned to duty in Kentucky, and he was scheduled to depart. CP 16; CP 35. He has not returned to Washington since he left in 1998. CP 36.

In 2001, Rob was seriously injured. CP 4; CP 36. Many of the jobs he is now qualified to do require a security clearance that he cannot obtain

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[3] The court checked the box on the order form indicating that the order for protection is permanent. The order form also includes the following preprinted language: "If the duration of this order exceeds one year, the court finds that an order of less than one year will be insufficient to prevent further acts of domestic violence." CP 87.

[4] The Clerk of the Court was required to forward a copy of the order to the Thurston County Sheriff's Office, where it was to be entered in "a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants." CP 87.

because of the permanent restraining order. CP 4-5. The existing restraints have a serious negative effect on Rob's ability to earn a living. CP 36. Rob filed a motion to modify/terminate the protection order on May 31, 2006, stating:

> The effect of the restraining order seems very severe, given that I have had no contact with my ex-wife since the order was entered, live in another state, have had no law violations of any kind and simply do not pose any kind of danger to anyone at this time.

CP 5.

Robin opposed his motion, alleging in a declaration that she has continued to be "harassed from afar":

> Over the years following Rob's transfer, out of state, strange things would continue to happen at my house. . . . Flower vases that had disappeared during the divorce reappeared on my dresser, a hole was kicked in my bedroom wall, tools or other items were missing. Usually, the reappearance of items were left on my dresser. These occurrences finally ended when, in January 2003, I had new windows and glass doors installed throughout the house. Prior to that time, the single-pane aluminum windows were fairly [easy to] open.[5]

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[5] Rob responded to this allegation as follows:

> My time as a drill sergeant [in Kentucky] consisted of 15-17 hour days, at least 6 and often 7 days per week. How can anyone seriously believe that I would take what little time & money I had to risk my career by traveling 2,400+ miles to play the kind of games being described by Robin. I deny her allegations . . . .

> I am terrified of this man. For my safety and the safety of my children, I wish to keep this protection order in place.

CP 89 -90.

The motion was argued to Thurston County Superior Court Commissioner Anne Hirsch on August 9, 2006. CP 93. Neither Rob nor Robin, who were each represented by counsel, attended the hearing. Id. Instead, Robin's daughter, Yasmeen Abdullah, attended and testified. Id.

At the time of the hearing, Yasmeen was 25 years old and a recent law school graduate. CP 44-45. She testified that she saw Rob twice in 1998 after the restraining order was entered. CP 45. She alleged that he appeared briefly when she was in high school – watching her once from across the street and a second time from the student parking lot. Id. Yasmeen testified she remains in fear of Rob. CP 46.

The court denied Rob's motion to terminate the order and entered findings of fact and conclusions of law. CP 37-38; CP 53-56.

Rob moved to revise the commissioner's ruling, arguing the motion to Thurston County Superior Court Judge Christine A. Pomeroy on September 29, 2006. CP 59. The court declined to revise the court commissioner and denied the motion to revise. CP 60-61.

Rob's appeal to Division II followed. CP 62. On May 21, 2007,

subsequent to the filing of both Rob and Robin's brief, this case was administratively transferred to Division I.[6] Robin now appeals the decision of that Court.

C. ARGUMENT

1. RAP 13.4(b)(4) DOES NOT APPLY.

Washington case law, with respect to issues of substantial public interest, generally focuses on moot issues that the appellate court will nevertheless consider. In those cases the courts follow the rule articulated in *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). The three factors considered essential are: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. *Hart v. Social and Health Servs.*, 111 Wn.2d 445, 759 P.2d 1206 (1998).

This is a very pedestrian abuse of discretion case in which the Court of Appeals simply applied existing law to its review of a superior court's finding that, based on a change in circumstances, a domestic violence victim's claim of a present fear was no longer reasonable. In this case, like

[6] The basis for the transfer was Yasmeen's employment in Division II, of the Court of Appeals. A fact which had not been disclosed to Rob's counsel.

Hart, the decision of the Court of Appeals is limited to its facts. Thus, it is of a private, not public nature. This Court should decline review under RAP 13.4(b)(4).

2. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH OTHER DECISIONS AND DOES NOT CHANGE EXISTING LAW WHEN IT REQUIRES THAT A VICTIM'S CURRENT FEAR BE RELATED TO A THREAT OF IMMINENT HARM, INJURY, OR ASSAULT.

The appeals court did not change who had the burden of proof. Slip op., at ¶11. Rob was required to prove (and did prove) that there were changed circumstances and that he would "more likely than not refrain from resuming acts of domestic violence, i.e., acts of actual physical harm, injury or assault or acts to inflict fear of imminent harm, injury or assault." Slip op., at ¶11; See also, *Spence v. Kaminski*, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000). The court did not require that Robin overcome a presumption, and thus, neither conflicts with other decisions, nor changes existing law. This court should decline review under RAP 13.4(b)2).

3. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT DENIED A REQUEST TO TERMINATE A PERMANENT PROTECTION ORDER AFTER CHANGED CIRCUMSTANCES NO LONGER SUPPORTED THE VICTIM'S CLAIM OF CURRENT FEAR THAT PHYSICALLY HARMFUL ACTS OR THREATS OF IMMINENT HARM WOULD OCCUR UPON LIFTING THE ORDER.

Under the Domestic Violence Prevention Act, Chapter 26.50 RCW, the infliction of fear of physical harm is sufficient to support a restraining order. However, although a past act can reasonably inflict a current fear, that fear must nevertheless relate to a threat of imminent harm, injury, or assault. *Barber v. Barber*, 136 Wn. App. 512, 515-16, 150 P.3d 124 (2007); *Spence v. Kaminski*, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000); *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002).

In this case, the Court of Appeals correctly determined that the denial of the motion to terminate or modify the order was based on untenable reasons and grounds. Slip op., at ¶21. The only basis for the 1998 protection order against Rob was Robin's fear, which the court found to be reasonable at that time. Slip op., at ¶4; CP 7. However, in the intervening 8 years, things changed. Slip op., at ¶17.

Rob had been reassigned to duty in Kentucky in 1998. CP 16. In

2001, Rob was severely injured, which both impacted his ability to cause injury, and worse, significantly impacted his employment opportunities. Slip op., at ¶5; CP 4; CP 36. However, even before he was injured, he had clearly moved on with his life and had not done anything to support Robin's continued fear of harm from him. Slip op., at ¶17; CP 16, 35, 36.

The court first pointed out that there was no evidence that Rob had hurt his wife or his children at any time. Slip op., at ¶20; CP 16, 35. Rob had no contact with Robin or her children since his deployment to Kentucky, shortly after the order was entered. He had not returned to the state of Washington. Id. Yasmeen's claim that she thought she saw him across the street from her school and in the student parking lot was not supported by a police report or any attempt to prosecute him for the alleged violations.[7] Slip op., at ¶17. In addition, none of the "suspicious goings on" reported by Robin after he left the state of Washington could credibly be attributed to him. Slip op., at ¶17; CP 35.

As the Court of Appeals correctly pointed out, "due to time and distance, there is no evidence to support a current fear that physically harmful

[7] Even if Rob had been across the street or in the parking lot at her school, the distance restriction of 1,000 feet might not have been violated. Slip op., at ¶18. Further, Yasmeen did not allege that he did anything to threaten her or attempt to contact her. Slip op., at ¶5; CP 45.

acts or threats of imminent harm would occur upon lifting the order." Slip op., at ¶16. Unlike what Robin suggests, this is not a case where the Court of Appeals considered only the "passage of time." Slip op., at ¶20. Instead, the court recognized that Rob had not hurt his wife or children; his compelling need, based on the impact of his significant injuries on his employment opportunities; and both his lack of contact for 8 years and lack of opportunity for future contact. Slip op., at ¶19 - 20. It correctly found that based on the changed circumstances, Robin's claim of a "current fear" was not reasonable. Slip op., at ¶21.

4. A PROTECTION ORDER THAT INCLUDED MINOR CHILDREN LIVING IN THE HOUSEHOLD WHEN IT WAS ENTERED DOES NOT CONTINUE TO PROTECT THOSE CHILDREN ONCE THEY REACH ADULTHOOD AND NO LONGER RESIDE IN THAT HOME.

RCW 26.50 does not provide for continued protection of a child who is no longer a minor. Nothing in the legislative scheme indicates that a domestic violence protection order should be extended to protect an adult child who is no longer a household member.[8] While it is reasonable to protect minor children who live in the same household with a protected

[8] Since the protections of RCW 26.50 extends to household members, it would protect an adult child that continues to reside in a victim's home. *Hecker v. Cortinas*, 110 Wn. App. 865, 43 P.3d 50 (2002).

person, it is not feasible to continue to apply the terms of a protection order to a legal adult who may no longer reside in that home. Nothing prevents such an adult child from seeking their own protection order, if they continue to have a reasonable fear of imminent harm from a perpetrator.

5. ATTORNEY FEES CANNOT BE AWARDED UNDER RCW 26.50.130 or RAP 18.1.

A trial court may award fees and costs to the prevailing party when authorized to do so by contract, statute, or a recognized ground in equity. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont*, Inc., 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828 , 839, 100 P.3d 791 (2004).

In this case, although RCW 26.50.060(1)(g) provides that attorney fees may be awarded upon the issuance of a protection order and RCW 26.50.060(3) provides that fees may be awarded upon hearing for renewal, RCW 26.50.130, the statute concerning modification or termination of an order, contains no such provision. Without a statutory basis for awarding fees, the court was without power to do so. *Labriola.*, at 839.

D. CONCLUSION

For all of the foregoing reasons, Rob Freeman asks this Court to

deny review and/or affirm the decision of the Court of Appeals.

Respectfully submitted,

11-10-08
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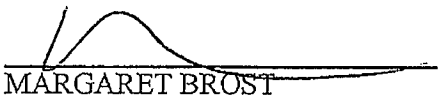

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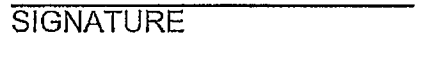
Olympia, WA PLACE	 SIGNATURE

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