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NO. _____
COA NO. 26148-4-III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**ROBIN M. FREEMAN
N/K/A ROBIN ABDULLAH
Respondent**

and

**ROB R. FREEMAN
Appellant**

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robin Abdullah, f/k/a Robin Freeman, asks this Court to accept review of the Court of Appeals decision terminating review. See Part B.

B. COURT OF APPEALS DECISION

Petitioner Robin Abdullah, f/k/a Robin Freeman, seeks review of the Court of Appeals' decision, ordered published on September 11, 2008, reversing the trial court order denying Rob Freeman's motion to modify a permanent domestic violence protection order. A copy of this decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. What must an individual restrained by a permanent domestic violence protection order prove to justify a court terminating that order?

2. In particular, is termination justified where an individual demonstrates only that he has complied with the order, that he has relocated out of state, and that he allegedly is disadvantaged in the workplace by the existence of the order?

3. Must a victim protected by a permanent domestic violence protection order, who has already established domestic violence and the likelihood that violence would resume without an order, bear the burden to

prove why the order should remain in effect when such an order is challenged?

4. Does relocation out of state, from one military facility to another, establish the lack of opportunity to perpetrate domestic violence?

5. What weight should a court considering whether to terminate a permanent protection order give to the perpetrator's claim of being disadvantaged by the order?

6. Is the Court of Appeals' interpretation of the statute at odds with Washington's clear public policy of protecting domestic violence victims?

7. Does an individual protected by a permanent protection order automatically lose that protection when she reaches the age of majority?

8. Should a person having to defend against a challenge to a permanent protection order receive attorney fees at trial and on appeal?

D. STATEMENT OF THE CASE

Rob Freeman committed acts of domestic violence during his marriage to Robin Abdullah, which were proved at a trial in 1998. According to the Court of Appeals, these acts "at worst" involved "an assault to the then-16-year-old daughter and a perceived threat of the use of firearms." Slip op., at ¶ 13. The daughter was rendered unconscious

when Freeman dragged her down the hall and applied pressure to points on her neck and head, which Freeman described as “escorting” her to her room. CP 7-11, 13, 20, 78. On another occasion, during an argument with Abdullah, Freeman “inventoried” his rifles. CP 7. He displayed the guns to Abdullah while telling her he was not going to hurt her. She told him she was frightened and he stormed out of the house, became violent in the front yard, screaming and yelling at Abdullah and almost putting his fist through the car window. CP 7, 10, 25-26. Abdullah explained that Freeman is a Green Beret with sniper and anti-terrorism training. CP 26. She testified further that Freeman had threatened her from the beginning of the marriage with car bombings and house fires if she were ever to leave him. CP 7. Abdullah and her children (by a prior marriage) were terrified. CP 25-26.

After hearing both parties testify, the court found the assault upon the daughter and the display of weapons, particularly in light of Freeman’s training, reasonably caused Abdullah to remain fearful of him. CP 84. The court entered a permanent protection order. CP 85-87. Freeman did not appeal.

In 2006, Freeman moved to terminate the order because eight years had elapsed, during which he had no contact with Abdullah; he now lives in another state; and he cannot get a job requiring security clearance so

long as the order exists. CP 4-5. At a hearing, the court considered Abdullah's certified statement that she had lived in fear of Freeman since their divorce, a fear fueled by the prior acts of domestic violence and ongoing disturbances at her home of unknown cause. CP 88-89. She averred that she is "terrified of this man." CP 90.

Abdullah's daughter, the victim of Freeman's assault, testified, confirming the domestic violence inflicted upon her. CP 43. She testified that she saw Freeman outside her high school several times after entry of the protection order, which frightened her and put her "constantly on the lookout ..." CP 44. She confirmed that she remained fearful of Freeman and described how she did not put return addresses on mail to her mother and had never listed her telephone number. CP 44.

The trial court ruled that Freeman had failed to carry his burden to prove Abdullah was no longer entitled to the protection order. CP 48. The mere passage of time was insufficient to this purpose. CP 55. Specifically, the court held, Freeman was required to prove that he "will not resume acts of domestic violence against the petitioner or the petitioner's family members." CP 54. The court found Freeman bore the burden because "the Legislature determined that it isn't fair or appropriate to make the victim have to prove year after year after year that they are still a victim." CP 48, 53-54. The court found that Abdullah and her

daughter were both “currently in fear” of Freeman and their fears were reasonable. CP 54, 55-56. The passage of time was not enough to assuage a victim’s fear of the perpetrator. CP 55. Finally, the court observed that the Legislature had determined “that people who commit acts of domestic violence should not have access to weapons.” CP 55.

Freeman appealed. Division Three of the Court of Appeals held the trial court abused its discretion when it denied Freeman’s motion to terminate the order. The court both understated the trial record evidence of domestic violence and applied a different legal standard to who bore the burden to prove what. The court declared that Abdullah’s current fear “must still relate to a threat of *imminent* harm, injury, or assault.” Slip op., at ¶ 17. Here, because Freeman had moved to another state, the court concluded he had no opportunity for contact with Abdullah. *Id.*, at ¶ 22. Thus, the court concluded, Abdullah’s fear was unreasonable. *Id.*, at ¶ 23. “Here, due to time and distance, there is no evidence to support a current fear that physically harmful acts or threats of imminent harm would occur upon lifting the order.” *Id.*, at ¶ 17. Finally, the court considered Freeman’s “compelling need” to have the order lifted as a justification. *Id.*, at ¶ 22.

Abdullah seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Washington has a clear public policy of protecting domestic violence victims, the Domestic Violence Prevention Act being but one example. *Danny v. Laidlaw Transit Services*, --- P.3d ----, 2008 WL 4456457 (Wash., 2008) (Slip op., ¶¶ 11-19). That act allows domestic violence victims to obtain permanent protection orders. This case presents a question of how permanent such an order is. The Court of Appeals' decision, with its requirement that such an order may be terminated unless the victim can establish that her fear relates to a threat of imminent harm, injury or assaults, effectively negates the permanent nature of the protection order. Under the court's ruling, a perpetrator may have a permanent order terminated if he proves he has complied with the order over a period of time, no longer lives in the vicinity, and claims a need for the order to be terminated. This cannot be right.

Necessarily, the Legislature must have contemplated that perpetrators would comply with the court's orders; indeed, compliance is the purpose of the orders. Likewise, the Legislature would have expected perpetrators to comply permanently, not just for some years. And, finally, nowhere does the Legislature suggest that, in our mobile society, distance itself offers a victim protection. Nevertheless, the Court of Appeals

interprets the statute so that permanent orders are now contingent on these common events: compliance and temporal and geographical distance.

In so doing, the court's opinion conflicts with other decisions of the Court of Appeals. RAP 13.4(b)(2). In those decisions, the court has determined that a protection order may be renewed and even made permanent on a showing of past abuse and present fear. *See Barber v. Barber*, 136 Wn. App. 512, 150 P.3d 124 (2007); *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000). These cases declare that in a renewal context the victim does not need to prove domestic violence again. Here, by contrast, where a permanent order is challenged, Division Three shifts the burden of proof to the protected party, requiring her to overcome a presumption that her present fear is unreasonable if not assuaged by the passage of time and distance. In short, Division Three entirely rewrites the statute, interposing a new obstacle to domestic violence victims who seek the law's protection.

Because of this effect, and because this effect flatly contradicts the Legislature's purpose in enacting the Domestic Violence Protection Act, this case also presents an issue of substantial public interest. RAP 13.4(b)(4). *See Danny v. Laidlaw Transit Services, supra* (Washington has a clear public policy of preventing domestic violence); *State v. Karas*,

108 Wn. App. 692, 32 P.3d 1016 (2001) (Legislature determined that the public has an interest in preventing domestic violence).

1. A PROTECTION ORDER ISSUES UPON PROOF OF DOMESTIC VIOLENCE.

The Domestic Violence Protection Act defines domestic violence in pertinent part as “(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; ...” RCW 26.50.010(1). Each of these forms of domestic violence focuses on the perpetrator’s actions: harming, injuring, assaulting, or inflicting. A petitioner who establishes domestic violence by any of these means may be granted a broad range of relief, including a protection order. RCW 26.50.060.

The duration of protection orders may be for either a fixed term or permanent, within the discretion of the court. RCW 26.50.060(2).¹ To issue a permanent order in the first instance, the court must find the perpetrator “likely to resume acts of domestic violence against the petitioner or the petitioner’s family or household members or minor children...” RCW 26.50.060(2).

Orders that are time-limited may be renewed upon certain conditions. RCW 26.50.060(2) and (3). That is, once the petitioner, in a

¹With respect to duration, the court is constrained only when the protection order would restrain a respondent from contacting his or her own children, in which case the court must fix a period of one year or less for the order. RCW 26.50.060(2).

timely fashion, states reasons for seeking renewal, the statute 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.” RCW 26.50.060(3) (emphasis added). If the respondent fails this burden of proof, the court may issue another fixed duration order or a permanent order. *Id.*

Whether issuing an original protection order or renewing one, the duration is left entirely to the court’s discretion, as follows:

With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

RCW 26.50.060(2). It is not necessary for a petitioner to prove a recent act of domestic violence in order, when seeking renewal, to obtain a permanent protection order. *Spence v. Kaminski, supra*. Nor is it necessary for a petitioner to prove a new act of domestic violence in order to obtain renewal of a protection order of fixed duration. *Barber*, 136 Wn. App. at 514-516. Rather, present fear based on past domestic violence is

sufficient to obtain renewal of a protection order, including making the renewed order permanent. *Id.* The burden remains on the respondent to prove he or she will not resume acts of domestic violence. RCW 26.50.060(3).

These cases stand for the proposition that it is reasonable for a person to continue to fear someone based on past violent and threatening conduct. This proposition finds ample empirical support in studies of domestic violence, which indicate that “[b]attered women who leave their abusive partners are sometimes followed and harassed for months and even years. Some batterers continue to harass and beat their partners twenty-five years after the victims have left them.” Klein and Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 *Hofstra L. Rev.* 801 (1993) (internal citations omitted). The Legislature understood this when, in the renewal process, it placed on the respondent (perpetrator) the burden to prove that he or she would no longer commit acts of domestic violence. The Legislature did not require victims to prove their case all over again.

2. TO TERMINATE A PERMANENT ORDER, A PERPETRATOR MUST, AT MINIMUM, PROVE HE WILL NOT OR CANNOT COMMIT DOMESTIC VIOLENCE. THE PROTECTED PARTY HAS NO BURDEN OF PROOF.

Permanent orders, as the term would suggest, do not require renewal. Rather, a party restrained by such an order may seek modification of it under a general provision that allows the trial court to “modify the terms of an existing order for protection.” RCW 26.50.130.² The statute does not offer any standards for implementation, beyond the general authorization that the trial court exercise its discretion. *See Id.* The statute does not require a protected party to “state reasons” for maintaining the order, as is required when a protected party seeks to renew an order. Necessarily, the burden falls on the party seeking modification, as the trial court correctly held. CP 54 (§ 2.14). *See, e.g., Teller v. APM Terminals Pacific, Ltd.*, 134 Wn. App. 696, 142 P.3d 179 (2006) (burden on party seeking to have pleading amendment relate back and to justify failure to timely amend); *Parrott Mechanical, Inc. v. Rude, et al*, 118 Wn. App. 859, 864, 78 P.3d 1026 (2004) (moving party bears burden of proof on summary judgment).

However, the statute does not identify what a party must prove to justify modification of a protection order, so the nature of the proof must

² In express terms, the modification provision applies to an order with “an expiration date,” which would exclude permanent orders.

be inferred from the Domestic Violence Prevention Act as a whole. As described above, in order to get an order in the first place, permanent or otherwise, a petitioner must prove domestic violence and prove that the respondent will resume domestic violence. RCW 26.50.060(2) and (3). If renewal of a fixed duration order is sought, the burden shifts to the respondent to prove that he or she will not resume domestic violence. *Id.* This standard harmonizes with the statute's purpose of prevention.

Logically, a similar, or higher, standard must apply to a perpetrator seeking modification of a permanent order. In other words, at a minimum, the perpetrator must prove that he or she will not resume domestic violence. Also logically, and by omission of any requirement in the statute, the protected party carries no burden whatsoever to justify the permanent protection order.

The Court of Appeals ignores this structure and analyzes the case as if Abdullah, not Freeman, had the burden of proof, requiring her to prove her present fear of him is reasonable. As observed above, this is wrong because it shifts the burden of proof to the victim, as if she is required to justify again the permanent nature of the protection order. This is precisely what Freeman erroneously argued to the court. See, e.g., Br. Appellant, at 14-15 (“[t]he facts here are insufficient to persuade a

fair-minded person that Rob represents a threat of imminent harm to Robin or her adult children.”).

In short, there is really no difference between requiring Abdullah to prove her fear to be reasonable under the circumstances of this case and requiring her to prove another act of domestic violence. In the first place, fear itself is an injury; the infliction of it is a form of domestic violence. RCW 26.50.010(1). In 1998, Abdullah obtained her permanent protection order partly on this basis. Certainly, most victims of domestic violence cannot be required to stop being afraid simply because their perpetrators have relocated to another state and have complied with the protection order. Time and distance alone do not prevent recurrence of domestic violence. Freeman did not prove in court his remorse for his past conduct, a resolve to behave differently, or an inability to commit domestic violence. All he claimed was that for eight years he had complied with the protection order, that he now lived out of state, and that a job he wanted in national security work was off-limits to him because of his past violence. That a protection order has worked for eight years seems a poor argument for terminating it, as does the fact that it inconveniently disqualifies a perpetrator from work involving security and firemans. In any case, the proper inquiry for whether to terminate an order must be whether the victim remains fearful, and the burden to prove the order should be lifted

must rest with the restrained party. Further, to comport with the statute, the presumption must be that the victim who remains fearful, need not have to prove domestic violence again or disprove that time and distance do not protect her.

When the Legislature enacted the domestic violence statute it determined that “domestic violence must be addressed more widely and more effectively in our state.” RCW 26.50.030 (legislative findings). Protection orders are meant “to reduce and prevent domestic violence by intervening before the violence becomes severe.” *Id.* It is “the legislature’s intent to intervene *before* injury occurs.” *Kaminski*, 103 Wn. App. at 334, *citing State v. Dejarlais*, 136 Wn. 2d 939, 944, 969 P.2d 90 (1998) (Chapter 26.50 RCW reflects the Legislature’s belief that the public has an interest in preventing domestic violence). The appellate court’s decision in this case, rewriting the statute to require victims to justify maintaining the permanence of a permanent protection order undermines that important public interest.

3. SHOULD A PERMANENT PROTECTION ORDER
AUTOMATICALLY EXPIRE WHEN THE PROTECTED
PARTY REACHES MAJORITY?

The Court of Appeals declared that the permanent protection order, which encompassed Abdullah’s minor children, no longer applies if the children have reached the age of majority. Slip op., at ¶ 14. Accordingly,

the child whom Freeman assaulted automatically lost the order's protection when she turned eighteen. The statute cited by the court does not dictate that result³ and the Domestic Violence Prevention Act is silent as to the effect of orders as they relate to minors who reach adulthood. The statute does provide that minors aged sixteen and older may seek protection orders on their own behalf. RCW 26.50.020(2) (see note 2, below). Under the Court of Appeals' broad ruling, these orders would appear to terminate when that minor turns eighteen. This outcome again does not fulfill the purpose of preventing domestic violence or comport with the statute's goal of making protection orders accessible to victims by eliminating costly and inefficient steps, as discussed below.

**4. THE COURT SHOULD HAVE AWARDED
ABDULLAH HER FEES AND SHOULD AWARD
THEM ON APPEAL.**

Robin Abdullah requests the court award her attorneys fees on appeal and award her the fees she requested at the trial court. The Domestic Violence Prevention Act authorizes an award of reasonable

³ RCW 26.50.020 provides:

(1) Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

(2) A person under eighteen years of age who is sixteen years of age or older may seek relief under this chapter and is not required to seek relief by a guardian or next friend.

attorney's fees incurred by a protected party in seeking an order or renewal of an order. RCW 26.50.060(1)(g); RCW 26.50.060(3); RAP 18.1(a). *See In re Gourley*, 124 Wn. App. 52, 98 P.3d 816, *aff'd* 158 Wn.2d 460, 470, 145 P.3d 1185 (2004) (wife entitled by statute to attorney fees on husband's unsuccessful appeal from domestic violence protection order, despite that request made under incorrect statute). This rule should apply here because it is no different to defend a permanent protection order than to seek an order in the first place or renewal of an order.

As indicated above, the Domestic Violence Prevention Act authorizes attorney fees. Abdullah did not ask for fees at the initial hearing on the motion. CP 93. She did ask for fees on revision, as she does here. Her attorney fees request must be viewed in the context of the purposes of the Domestic Violence Prevention Act. For one thing, the legislation is expressly designed to make it simple and economical for victims of domestic violence to obtain court protection. *See, e.g.*, RCW 26.50.030(4) (forms provided free of charge); RCW 26.50.040 (filing and service fees not permitted; copies provided petitioners at no charge). By these and other means, the Legislature made clear that it did not want costs to be an impediment to the prevention of domestic violence. *See* RCW 26.50.040 Legislative Findings (1992) ("Refinements are needed so that victims have the easy, quick, and effective access to the court system

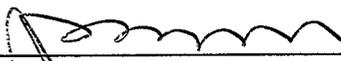
envisioned at the time the protection order process was first created.”).
Certainly, the Legislature did not intend that victims who have received permanent protection orders be subjected to the ongoing cost of defending these “permanent” orders.

F. CONCLUSION

For the foregoing reasons, Robin Abdullah asks this Court to take review and to reverse the Court of Appeals decision, to award her fees on appeal and those she requested below, and to reinstate the protection order.

Dated this 10th day of October 2008.

RESPECTFULLY SUBMITTED,



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FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re:)	No. 26148-4-III
)	
ROBIN M. FREEMAN,)	
)	
Respondent and)	Division Three
Cross-Appellant,)	
)	
and)	
)	
ROB R. FREEMAN,)	
)	
Appellant.)	UNPUBLISHED OPINION

SCHULTHEIS, C.J. — During dissolution proceedings, Robin Freeman obtained an ex parte order of protection against Rob Freeman that was made permanent upon full hearing in 1998. Rob¹ was in the military and did not return to Washington or contact Robin after their dissolution. In 2006, after Rob was injured in Iraq, he attempted to modify the permanent order, which prevented him from obtaining a security clearance to continue his military career in a less physically demanding role. A court commissioner denied his motion. Revision was also denied. On appeal, Rob contends that the motion to

¹ We use the parties' first names in this opinion for clarity.

modify the order should have been granted. We conclude that Rob has made the requisite showing and reverse.

Robin cross-appeals the denial of attorney fees on revision and seeks fees on appeal. Finding no error, we affirm the decision below and deny her request for fees on appeal.

FACTS

As a part of proceedings to dissolve her three-year marriage to Rob, Robin obtained an ex parte temporary order of protection on January 23, 1998, effective until a hearing on February 4, 1998.

On February 4, after hearing testimony and examining the evidence, a court commissioner made the order permanent. The court found that Robin was in reasonable fear due to two incidents. In the first incident Rob admitted that he physically forced Robin's 16-year-old daughter into her room after she refused to go. She crouched down and he pushed her from the hallway into her room. In the second incident he inventoried or displayed his guns to Robin. Rob's training as a Green Beret and with weapons caused Robin to remain fearful.² The order prevented Rob's contact with Robin as well as her four children then aged 18, 16, 12, and 10 years old.

² The commissioner expressly declined to resolve Robin's claim that Rob sexually assaulted her when she was unconscious after taking pills in a suicide attempt, which was her main claim to support the permanent order.

On May 31, 2006, Rob moved to modify or terminate the order of protection. Rob asserted that he was severely injured on a mission in Iraq where he suffered the loss of a hand, among other injuries. The injuries required retraining and reassessment of his military career goals, for which he needed a security clearance. He is ineligible, however, for such a clearance given the existence of the permanent order of protection. Rob argued that he had no contact with his former wife since the entry of the order, he currently lived in Missouri, he had no violations of any law, and he posed no danger to anyone.

Robin responded that she was fearful of Rob during her marriage as well as during the separation and divorce, and she and her children continue to be fearful of him. She asserted that even after the divorce was final, Rob continued to harass her and violate the order of protection. She pointed to unexplained events that she attributed to Rob, including: rattling of the windows, doors, and walls of her house; repositioning of the driver's seat of her car; receiving Rob's mail at her house; reappearance of missing flower vases; and a hole kicked into her bedroom wall. Robin conceded that she had never seen Rob do any of these things. But she stated: "I am terrified of this man. For my safety and the safety of my children, I wish to keep this protection order in place." Clerk's Papers (CP) at 91.

On August 9, 2006, a court commissioner heard the matter. Yasmeen Abdullah, Robin's daughter, who was 16 years old at the time that the order of protection was entered and 25 at the time of the hearing, testified that after the order was entered in 1998, she saw

Rob across the street from her high school and in the student parking lot, watching her. Rob's counsel argued that Rob had lived outside of the state since 1998 and he did not intend to return. Even if Robin proved early violations of the protective order, he argued, there has been no contact for at least six years.

Finding that Robin is currently in fear of Rob and concluding that the fear is objectively reasonable, the motion to modify or terminate the order was denied. Revision was denied as was Robin's request for attorney fees.

DISCUSSION

Robin initially obtained a temporary ex parte domestic violence order of protection pending a full hearing. RCW 26.50.070. After notice and hearing, an order of protection can be made permanent "if . . . the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires" on other terms. RCW 26.50.060(2). The court here made the finding for a permanent order.

The court may modify the terms of an order of protection upon application and notice. RCW 26.50.130. The grant of a modification or termination is discretionary. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (the legislature's use of the term "may" in a statute generally confers discretion). We will not disturb such an exercise of discretion on appeal absent a showing of abuse. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Abuse of discretion occurs

where the trial court's action is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* "Because the superior court did not revise the commissioner's decision, the commissioner's decision stands as the decision of the superior court that is before us for review." *In re Interest of Mowery*, 141 Wn. App. 263, 274-75, 169 P.3d 835 (2007).

The modification statute does not specify the grounds upon which a modification should be granted or assign the burden to one party or the other. The provision for *renewal* of an order of protection, however, requires only that the petitioner state the reason for a renewal and the 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." RCW 26.50.060(3). Then the court "may renew the protection order for another fixed time period or may enter a permanent order as provided in this section." *Id.* The respondent's burden would logically not be reduced in an action to modify or terminate a permanent order. Thus, at a minimum, the respondent must show that he will 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.

Washington courts have held that no recent or new act of domestic violence need be shown to renew an order of protection or to make one permanent. *Barber v. Barber*, 136

Wn. App. 512, 515-16, 150 P.3d 124 (2007). Rather, a past history of abuse or threatened abuse plus present fear is sufficient to meet the standard. *Spence v. Kaminski*, 103 Wn. App. 325, 332-33, 12 P.3d 1030 (2000). The trial court in this case found that Robin has a current fear of Rob, which, it concluded, was objectively reasonable. We disagree.

At worst, the past acts in this case involve an assault to the then-16-year-old daughter and a perceived threat of the use of firearms.

Yasmeen Abdullah, the victim of the assault, is no longer covered by the order. RCW 26.50.020(1) provides protection to a petitioner and “minor family or household members.” Ms. Abdullah was named in the order as a minor to whom the order applied. She is no longer a minor and the order does not apply to her, a point the commissioner addressed, though without certainty.³

The other past act involved a perceived threat with firearms. According to Robin, she accused Rob of taking her jewelry from the home, and Rob 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. At that time, Robin told Rob that she was scared and he said, “fine, fine you’re scared.” CP at 26. The commissioner scolded Rob for not being sensitive to Robin’s fear of weapons and told Rob that he should conduct himself more

³ The commissioner stated: “I’m not sure this order covers her any longer since she is an adult.” CP at 50.

carefully if he wanted to protect his career and reputation.⁴ It was Robin's concern regarding Rob's firearms and military training that inflicted the fear of imminent harm, injury, or assault.

Rob correctly points out that the authority that address "current fear" and a past incident that makes the current fear reasonable also involved facts that would satisfy the requirement of imminence because the opportunity for conflict in those cases continued to exist. *See Spence*, 103 Wn. App. at 332-33 (the parties' continuing relationship while they struggled over custody issues, together with evidence that the petitioner continued to be afraid of the respondent, was sufficient to persuade a rational person that the petitioner was in fear of imminent physical harm); *Barber*, 136 Wn. App. at 513, 515 (evidence of postdivorce abuse and respondent's acts that inflicted current fear of harm). *See also Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002) (holding, in case where there were recent acts of pounding on walls, "the [Domestic Violence Prevention Act, chapter 26.50 RCW,] does not require infliction of physical harm; rather, the infliction of 'fear' of physical harm is sufficient").

⁴ 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 all I should say. I will just alert you to the special position you find yourself in because of your training and your career. That means you probably have to conduct yourself a little differently [than] other people who are in a similar situation." CP at 32.

It is reasonable that a past act could inflict current fear, but that fear must still relate to a threat of *imminent* harm, injury, or assault. Here, due to time and distance, there is no evidence to support a current fear that physically harmful acts or threats of imminent harm would occur upon lifting the order.

Rob argues that he has moved on with his life. He has had no contact with Robin or her children since he was deployed to Kentucky in 1998, and he has not returned to the state of Washington since then. Rob points out that he was never charged with violating the protection order and none of the suspicious goings on could be attributed to him.

Finally, we address the two incidents in which Yasmeeen thought she saw Rob across the street from her school and in the student parking lot in 1998, after the entry of the orders of protection. The order required Rob to be 1,000 feet from the minor children's schools. It is unclear from the record whether Rob actually violated the order; Robin did not attempt to prosecute Rob for a violation. And Yasmeeen presented no testimony that Rob did anything on these occasions to threaten her or attempt to contact her.⁵

Rob notes the hardship the order visits on his career, which is, though not part of the standard, rather compelling when considering the amount of time that has passed since the entry of the order and considering the current status of the parties.

Significantly, the commissioner entered a finding of fact that:

⁵ Because this allegation was contained in testimony rather than in a pleading, Rob did not have an opportunity to respond as he was not present for the hearing.

It is not appropriate for the mere passage of time without any other showing to lift a person's reasonable fears that they may be a victim of domestic violence by someone who has hurt them in the past.

CP at 55 (Finding of Fact 2.21).

Rob showed more than the mere passage of time. He showed a compelling need for lifting the order and a lack of opportunity for contact. Further, there is no evidence that Rob had hurt his wife or the other children at anytime.

The commissioner did not consider all of the relevant facts and misapprehended others. Due to these changed circumstances, Robin's current fear is not reasonable. The denial of the motion to terminate or modify the order is based on untenable reasons and grounds.

On cross-appeal, Robin contends that the superior court abused its discretion for failing to award her attorney fees on revision. She sought them under RCW 26.50.060(1)(g) or .060(3). We find no error.

RCW 26.50.060(1)(g) provides that "[u]pon notice and after hearing, the court may" order attorney fees upon the issuances of a protection order. RCW 26.50.060(3) provides that "[t]he court may award court costs, service fees, and reasonable attorneys' fees" upon hearing for renewal. The trial court's decision whether to award attorney fees is plainly discretionary upon the issuance of an order of protection or renewal. But the statute concerning modification or termination of an order does not address attorney fees. *See* RCW 26.50.130.

Washington follows the American rule—that each party in a civil action will pay its own attorney fees and costs—unless modified 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). Our courts decline to award attorney fees under a statute unless there is a clear expression of intent from the legislature authorizing such an award. *Id.* at 303. There are express provisions for attorney fees upon the issuance of an order of protection and upon its renewal. But there is no mention of an award for modifications of such orders. We can, therefore, presume no legislative intent for an award of attorney fees.

Robin also claims she was entitled to attorney fees for Rob's intransigence. As Rob correctly notes, this argument was raised for the first time on appeal, and it should not be considered. RAP 2.5(a); *King County v. Guardian Cas. & Guar. Co.*, 103 Wash. 509, 175 P. 166 (1918) (question regarding authority for fees should not be considered for the first time on appeal); *Bierce v. Grubbs*, 84 Wn. App. 640, 645, 929 P.2d 1142 (1997) (fee issue could not be raised for first time on appeal); *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983) (challenge to amount of fees could not be raised for first time on appeal).

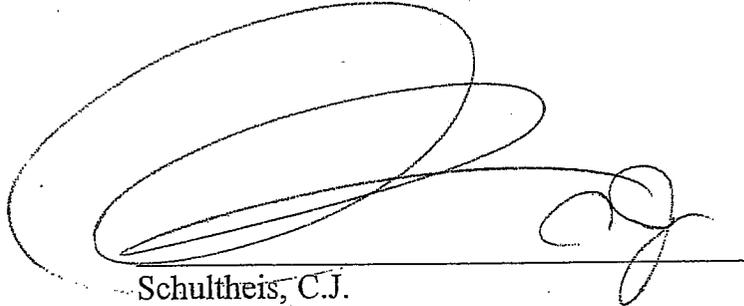
Finally, Robin seeks attorney fees for a frivolous appeal. Under RAP 18.9(a), an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). As is

evidence from this opinion, Rob's appeal was not frivolous. Further, as stated above, there is no statutory basis for attorney fees.

CONCLUSION

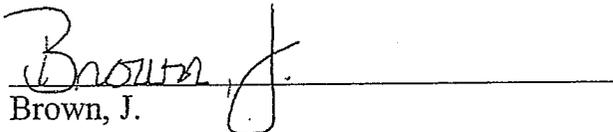
We reverse the denial of the termination of the order of protection and remand for the entry of an order consistent with this opinion. We affirm the trial court's decision on attorney fees and deny the request for attorney fees on appeal.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

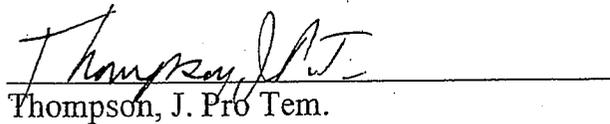


Schultheis, C.J.

WE CONCUR:



Brown, J.



Thompson, J. Pro Tem.

FILED
OCT 24 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ROBIN M. FREEMAN,
Petitioner,

v

ROB R. FREEMAN,
Respondent.

No. 26148-4-III

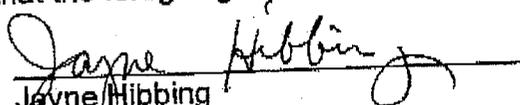
DECLARATION
OF SERVICE

Jayne Hibbing certifies as follows:

On October 10, 2008, I served upon the following true and correct copies of
Petition for Review, and this Declaration, by:
depositing same with the United States Postal Service, postage paid
arranging for delivery by legal messenger.

Margaret Brost
1800 Cooper Point Rd. SW, Ste 18
Olympia, WA 98502

I certify under penalty of perjury that the foregoing is true and correct.


Jayne Hibbing
3418 NE 65th Street, Suite A
Seattle, WA 98115
206-525-0711

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