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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

82283-2
No. 26148-4-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

In re the Marriage of:

ROBIN M. FREEMAN,

Respondent/Cross Appellant,

and

ROB R. FREEMAN,

Appellant/Cross Respondent.

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

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Rob R. Freeman

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A. INTRODUCTION

The trial court erred in this case by concluding Robin Freeman and her adult daughter, Yasmeeen Abdullah, have a reasonable fear of domestic violence that warrants an ongoing protection order against Rob Freeman.

Rob replies to the Brief of Respondent, with respect to his ex-wife's factual and legal allegations, as follows:

B. ARGUMENT

1. Domestic violence allegations are unproven.

a. Order for Protection

Three days after Rob filed for divorce, Robin sought a temporary protection order on an emergency basis, alleging Rob had committed acts of domestic violence.¹ CP 76.

Robin stated she had been assaulted after she had taken some pills and had gone to sleep on her bed. CP 78. Robin did not disclose she had actually been attempting suicide and had no recollection of events until she woke up hours later in a hospital emergency room. CP 7, 11. According to Robin, the county sheriff was investigating the episode. CP 10.

¹ An ex parte temporary order for protection requires an applicant to allege "that irreparable injury could result from domestic violence if an order is not issued immediately." RCW 26.50.070(1).

Robin then said she had gotten a no-contact order because Rob had become “out of control” and had “displayed his rifles” to her. CP 78. But Rob told his wife he would not hurt her.² *Id.* He was attempting to refute her accusation that he had stolen her jewelry and had hidden it among the firearms. CP 25. Robin failed to mention that she asked Rob’s company commander to release the no-contact order because she had overreacted and wanted Rob at home to work on remodeling projects.³ CP 10, 23.

Finally, Robin claimed Rob had “dragged Yasmeen down the hallway by the throat applying pressure points to cause her to black out.” CP 78. Robin did not witness the incident and did not even hear about it for a week. CP 7. At the time she applied for the protection order, she had already reported the matter to military authorities – accusing Rob of child abuse, child molestation, attempted murder, grand theft, and adultery. CP 7, 35.

Rob denies harming Yasmeen. He testified that he never struck Robin or the children. CP 13. Both civilian and military law enforcement personnel investigated Robin’s accusations. CP 35. Authorities have not charged Rob with any wrongdoing. CP 54.

² Robin is bigger and taller than Rob. CP 34.

³ Rob recounted another occasion when Robin phoned his commander to report that Rob was stealing food from their home freezer. Rob was present in the commander’s office at the time of the call. Believing there must be an intruder in the Freemans’ house, the commander urged Robin to call the police. CP 34.

Nevertheless, the court found that Robin had a reasonable fear of Rob “based on the previous incidents involving her daughter and the incidents involving weapons.” CP 31. The court stated that “because of her husband’s training and abilities and access to weapons it is reasonable that [Robin] should be concerned.” *Id.* A permanent domestic violence protection order was entered on those grounds. CP 31-32.

Without apparent legal basis, the court also announced a higher standard of conduct was to be imposed on Rob than on others accused of domestic violence because of his training and his career. CP 32. Rob was in a “special position” because he had been trained to use force and to use weapons of force. *Id.*

Rob had to delay leaving for his next assignment to attend the hearing. CP 16. His divorce was not yet final when he departed for Kentucky in 1998. CP 36. He has neither returned to Washington nor contacted his ex-wife and her children since that time. *Id.*

When Rob left Washington, he expected to pursue his military career elsewhere and to have no further contact with Robin or her children. He could not foresee his devastating injury – or how seriously the protection order would impact his livelihood almost a decade later.

b. Motion to Modify: Robin's Statement

When Rob filed a motion to modify the permanent order, Robin submitted a certified statement in response. CP 88. She did not testify orally at the modification hearing.

Robin asserted that, after the parties separated, someone had periodically rattled the windows, doors, and walls of her home and had repositioned the driver's seat in her locked car. CP 89. She presented no evidence linking Rob to these events. She herself noted that police advised her Rob could not be charged with a crime when she could not confirm seeing him violate the protection order. CP 88.

Robin also said she continued to be harassed after Rob left Washington, claiming the reappearance of flower vases that had disappeared during the divorce, a hole kicked in her bedroom wall, and missing tools and other items. CP 89. She did not assert Rob was responsible for these occurrences and noted they ended when she had new windows and doors installed in the house.⁴ *Id.*

c. Motion to Modify: Yasmeen's Testimony

Robin's daughter, Yasmeen Abdullah, was the only one to testify at the modification hearing. CP 93. She stated that on two

⁴ As a practical matter, it is difficult to understand how new windows and doors would deter someone who was determined to enter her residence.

occasions, soon after the protection order was entered, she saw Rob briefly near the high school she was attending. CP 45. Yasmeen gave no indication that she notified anyone about her observations.⁵

Yasmeen also mentioned occasions when she and her younger brother were home alone and “people tried to break in and we called the police but by the time they came they were not there.” CP 47. Robin misrepresents this testimony as Yasmeen’s description of how Rob tried to break into the house. Br. of Resp’t at 4.

Yasmeen, who is now an adult, left home to complete college in eastern Washington and law school on the East Coast.⁶ CP 45.

⁵ Contrary to Robin’s assertion, Yasmeen did not testify that Rob’s presence violated the protection order. Br. of Resp’t at 4.

⁶ Yasmeen testified that, under the protection order, Rob “couldn’t come within so many feet of me wherever I was.” CP 45. This is incorrect. The order granted Robin exclusive right to the family’s residence and restrained Rob from coming within 1,000 feet of Robin’s place of employment and her minor children’s schools. **The court expressed uncertainty about whether the protection order still applies to Yasmeen.** CP 50.

Those alleging they have been the victims of domestic violence may petition for relief on behalf of themselves and on behalf of *minor* family or household members. RCW 26.50.020(1) (emphasis added). According to Robin, the protection order should remain in place “[f]or my safety and the safety of my children.” CP 90. But the statute does not provide for extending an existing order to adult children. Doing so in this case would place Rob in the untenable position of monitoring the whereabouts of Robin’s children so as to avoid contact with them.

Robin's written statement and Yasmeen's oral testimony offer nothing more than unsubstantiated accusations. They cannot corroborate each other's accounts because each woman relates events that allegedly occurred when the other was not present.⁷ Robin presents no objective evidence, such as police reports or the statements of neighbors or friends. Yasmeen's testimony is unsupported by anyone – including her three siblings. They are both vague about details, effectively thwarting more than broad rebuttal of their claims. **Neither woman attests to seeing Rob violate the protection order at any time.**

Given the evidence, the trial court abused its discretion in denying the motion to terminate the protection order.

2. Robin tries to mischaracterize Rob's appeal.

Robin tries to mischaracterize this appeal as a challenge to the trial court's *factual findings* that Robin and Yasmeen remain in fear of Rob. Br. of Resp't at 1, 7. Rather, Rob explicitly assigns error to the trial court's *legal conclusions* that such fears are reasonable in light of the circumstances. Br. of Appellant at 1, 13-15.

⁷ Yasmeen's statement that "weird stuff" happened after she had seen Rob, but nothing "was for sure him" is too general to corroborate her mother's testimony, as Robin contends. CP 46; Br. of Resp't at 5.

Robin's first marriage was extremely violent. CP 8. And after her suicide attempt, Robin voiced concern about being a bad parent and continuing a cycle of violence. CP 8, 28. The record in this case reveals a deeply troubled family and an acrimonious divorce. But there is no objective proof that Rob committed domestic violence or has violated the protection order in any way.

Robin argues, in effect, that a permanent protection order must be immutable. Br. of Resp't at 12-13. The Domestic Violence Prevention Act contradicts this position by expressly providing for the modification of orders: "Upon application with notice to all parties and after a hearing, the court may modify the terms of an existing order for protection." RCW 26.50.130. The statute recognizes and accommodates changed circumstances.

Robin and Yasmeen insist that Rob poses an ongoing threat to their safety. But Rob left years ago, and he has not come back. He has not contacted his ex-wife and her children. And he has suffered disabling injuries that compel him to pursue a new career.

Even if substantial evidence supported factual findings that Robin and Yasmeen are currently in fear of Rob, such findings do not support the trial court's legal conclusions that the women's fears are reasonable under the circumstances. Implicit in the

Domestic Violence Protection Act is a requirement that the petitioner's fear be objectively reasonable.

3. Robin is not entitled to attorney fees on appeal.

"In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).

Robin first argues that she is entitled to attorney fees under RCW 26.50.060(1)(g) and RCW 26.50.060(3). Br. of Resp't at 19-20. RCW 26.50.060(1)(g) authorizes the award of attorney fees to a petitioner seeking a protection order. RCW 26.50.060(3) gives the court discretion to award attorney fees when the petitioner seeks renewal of an order or entry of a permanent order. But the statute does not provide for an award of fees when an action is brought to modify an existing order.

Robin also argues she should be awarded fees and costs under RAP 18.9 because Rob's appeal is frivolous. Br. of Resp't at 20. "A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts." *Daubner v. Mills*, 61 Wn. App. 678, 684, 811 P.2d 981 (1991).

Rob's appeal raises debatable issues and advances arguments grounded in the law and facts. There is a reasonable possibility of reversal in this case. The appeal is not frivolous.

In sum, Robin offers no recognized basis for an award of attorney fees on appeal. Her request should be denied.

4. Robin's cross-appeal is improper.

Robin filed a notice of cross-appeal on November 3, 2006. CP 106, A-1. She assigns error to the trial court's ruling not to award her attorney fees for the September 29, 2006 revision hearing, arguing that Rob's intransigence supports such an award. Br. of Resp't at 22-23.

When Robin moved the trial court for entry of an order awarding attorney fees, she requested fees for defending against both Rob's motion to modify and his motion to revise. CP 103, A-3. There is no evidence that intransigence was mentioned as a basis for the request.

"Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). "The appellate court may refuse to review any claim of error which was not raised in the trial

court.” RAP 2.5(a). The Court should decline to consider Robin’s cross-appeal altogether.

In any event, Rob’s exercise of his right to seek modification of the protection order, in accordance with statutory and procedural requirements, does not constitute intransigence.⁹

An appellate court reviews a trial court’s decision on attorney fees for an abuse of discretion. *In re Marriage of Burke*, 96 Wn. App. 474, 476, 980 P.2d 265 (1999). The party challenging the decision must demonstrate the trial court exercised its discretion in a manner that was “clearly untenable or manifestly unreasonable.” *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). Robin has made no showing that the trial court abused its discretion in this instance.

C. CONCLUSION

Individuals who seek protection orders must not be allowed to use the Domestic Violence Protection Act as a weapon to victimize those they accuse of wrongdoing. In this case, the trial court has allowed Robin to compromise her ex-husband’s

⁹ Washington courts have found intransigence when one party engages in obstructive behavior or delay tactics, files unnecessary motions, or participates in activities that make trial unduly difficult or that increase legal costs unnecessarily. See, e.g., *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997); *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996); *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

employability – based solely on unfounded accusations of domestic violence.

What more could reasonably be required to disprove the likelihood that Rob will commit acts of domestic violence in the future? He has stayed far away from Robin and Yasmeen for years. He has been a law-abiding citizen. Under these circumstances, there is no support for the trial court's conclusions that Robin and Yasmeen have a reasonable fear of domestic violence that warrants an ongoing order for protection.

Rob's challenge to the protection order is not frivolous, and the record does not support a finding of intransigence. Robin offers no recognized basis for an award of attorney fees. The Court should deny her requests.

The Court should clarify whether minors who become protected parties at the time a permanent order is issued retain that status as adults. The Court should also clarify whether a higher standard of conduct is to be imposed on those trained to use weapons and force than on others accused of domestic violence.

The Court should reverse the trial court's decision, holding that Rob's drastically changed circumstances are sufficient to terminate the existing protection order.

DATED this 9th day of October, 2007.

Respectfully submitted,



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Rob R. Freeman

Appendix

A-1

FILED
SUPERIOR COURT
THURSTON COUNTY WASH

06 NOV -3 P1:47

BETTY J GOULD CLERK

BY SP 10 DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

ROBIN M FREEMAN,
Petitioner,

v

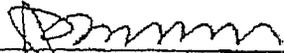
ROB R. FREEMAN,
Respondent.

No 98-2-00171-0

NOTICE OF
CROSS-APPEAL
TO COURT OF APPEALS

Robin M Freeman, Petitioner below, Respondent and Cross-Appellant herein, cross-appeals and seeks review by the designated appellate court of the orders appealed by Respondent/Appellant Rob R. Freeman, which denied Petitioner's motion for attorney fees. Copies of these orders (Order of Denial, entered August 9, 2006; Order Denying Motion for Revision, entered September 29, 2006; Findings of Fact/Conclusions of Law, entered September 15, 2006) are attached to this notice.

Dated this 3rd day of November 2006.


Patricia Novotny, WSBA 13604
Counsel for Petitioner
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Seattle, WA 98115
206-525-0711

Counsel for Appellant
Margaret Brost
1800 Cooper Point Rd SW, Ste 18
Olympia, WA 98502

ORIGINAL

FILED
SUPERIOR COURT
THURSTON COUNTY WASH.

06 SEP -1 A9:34

BETTY J. GOULD CLERK
BY DEPUTY

<input checked="" type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing is set
<input checked="" type="checkbox"/> Hearing is set
Date: <u>9/8/06</u>
Time: <u>9:00 a.m.</u>
Judge/Calendar: <u>Hirsch</u>

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
FAMILY & JUVENILE COURT

In re the Marriage of:

ROBIN M. FREEMAN,

Petitioner,

and

ROB R. FREEMAN,

Respondent.

NO. 98-2-00171-0

MOTION FOR ATTORNEY FEES

(NMFD)

Petitioner, Robin M. Freeman, by and through her attorney, CHARLES E. SZURSZEWSKI, of Connolly, Tacon & Meserve, hereby moves the court for entry of an order awarding attorney fees.

This motion is based upon the records and files herein and upon the Affidavit of Carter W. Hick in Support of Petitioner's Request for Attorney Fees.

Dated: Sept. 1st, 2006

 #36721
FOR
CHARLES E. SZURSZEWSKI, WSBA# 8300
Of Attorneys for Petitioner

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

06 SEP -5 AM 11: 37

BETTY J. GOULD, CLERK

BY BP 3
DEPUTY

<input checked="" type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing is set
<input checked="" type="checkbox"/> Hearing is set
Date: <u>9/8/06</u>
Time: <u>9:00 a.m. / 1:30 p.m.</u>
Judge/Calendar: <u>FAM</u>

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
FAMILY & JUVENILE COURT

In re:

ROBIN M. FREEMAN,

Petitioner,

and

ROB R. FREEMAN,

Respondent.

NO. 98-2-00171-0

AMENDED AFFIDAVIT OF CARTER W.
HICK IN SUPPORT OF PETITIONER'S
REQUEST FOR ATTORNEY'S FEES

(NMFD)

I, CARTER W. HICK, being first duly sworn, on oath, deposes and says:

That I am an attorney at Connolly, Tacon, and Meserve, attorneys for the petitioner in the above-captioned action and make this statement in support of the petitioner's request for attorney fees.

An itemized bill is attached to this affidavit which indicates the amount of attorney's fees the petitioner incurred to defend against the respondent's motion to modify the protection order and his motion to revise. Therefore, petitioner should be awarded attorney's fees in the amount of \$1,271.09.

AFFIDAVIT OF CARTER W. HICK IN SUPPORT
OF PETITIONER'S REQUEST FOR ATTORNEY'S FEES

- Page 1

H:\CES\Abdullah\Affidavit of Attorney Fees.fm . -

Connolly, Tacon & Meserve

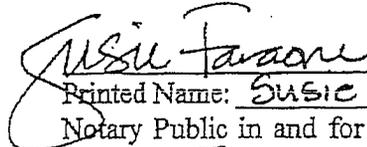
A PROFESSIONAL SERVICE CORPORATION
Attorneys at Law
201 5th Avenue SW, Suite 301
Olympia, Washington 98501-1060
Telephone 360 943-6747
Fax 360 943-9651

1 Dated this 5th day of September, 2006.

2
3 
4 CARTER W. HICK WSBA# 36721
Of Attorney's for Petitioner

5
6 SUBSCRIBED AND SWORN TO before me this 5th day of September, 2006.



25
26 
Printed Name: Susie Faraone
Notary Public in and for the State of Washington,
residing at Tumwater, WA
My commission expires 7-23-07

25 AFFIDAVIT OF CARTER W. HICK IN SUPPORT
OF PETITIONER'S REQUEST FOR ATTORNEY'S FEES
- Page 2

26 H:\CES\Abdullah\Affidavit of Attorney Fees.frm "

Connolly, Facon & Meserve

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Detail Transaction File List
 Connolly, Tacon & Meserve

Client	Trans Date	Trmr	R P	Tcd	Stnt # Rate	Hours to Bill	Amount	Ref #
Client ID 13019.003	Abdullah/Robin Marie							
13019.003	05/26/2006	33	A	48	225.00	0.20	45.00 Receive and review Motion to Modify/Terminate Order for Protection	ARCH
13019.003	05/26/2006	33	A	31	225.00	0.20	45.00 Draft letter to client	ARCH
13019.003	05/30/2006	34	A	102	95.00	0.10	9.50 Leave voice mail message for opposing attorney regarding transcript	ARCH
13019.003	05/30/2006	33	A	10	225.00	0.40	90.00 Phone conference w/client regarding motion and declaration Revise letter to client	ARCH
13019.003	05/31/2006	33	A	600	0.150		1.50 Photocopying charge	ARCH
13019.003	06/01/2006	33	A	48	225.00	0.20	45.00 Receive and review copy of DV hearing transcript	ARCH
13019.003	06/15/2006		A	701			191.00 Payment on account- thank you	ARCH
13019.003	07/05/2006	33	A	10	225.00	0.40	90.00 Phone conference w/client regarding hearing and declaration Draft declaration of client	ARCH
13019.003	07/10/2006		A	701			45.00 Payment on account- thank you	ARCH
13019.003	07/11/2006	33	A	54	225.00	0.20	45.00 Review and revise declaration of client regarding restraining order	ARCH
13019.003	07/14/2006	34	A	40	95.00	0.20	19.00 Prepare Affidavit of Fax	ARCH
13019.003	07/18/2006	34	A	10	95.00	0.20	19.00 Phone conference w/client regarding hearing.	ARCH
13019.003	07/18/2006	34	A	10	95.00	0.20	19.00 Phone conference w/client regarding hearing continuance.	ARCH
13019.003	07/28/2006	33	A	602			0.33 Long Distance Telephone	ARCH
13019.003	07/31/2006	34	A	103	95.00	0.10	9.50 Receive voice mail message from opposing attorney's office regarding hearing continuance.	ARCH
13019.003	07/31/2006	34	A	10	95.00	0.30	28.50 Phone conference w/client regarding hearing continuance and procedure. Phone conference with opposing attorney's office regarding opposing party's appearance in court.	ARCH
13019.003	08/08/2006	33	P	48	225.00	0.50	112.50 Receive and review letter from attorney and declaration from attorney	13
13019.003	08/08/2006	33	P	200	225.00	0.40	90.00 Telephone conference with client regarding allegations Research modification of DV order and prepare for hearing	14
13019.003	08/09/2006	33	P	17	225.00	1.70	382.50 Appear at court regarding hearing on motion to modify restraining order Conference with client regarding possible motion to revise Draft findings Draft letter to client	15
13019.003	08/21/2006	34	P	10	95.00	0.20	19.00 Phone conference w/client regarding hearing and attorney fees.	16
13019.003	08/22/2006		P	701			230.33 Payment on account- thank you	3
13019.003	08/28/2006	33	P	6	225.00	0.20	45.00 Telephone conference with staff and attorney in firm regarding findings and local rules.	17
13019.003	08/28/2006	29	P	16	195.00	0.50	97.50 Draft findings of fact; draft letter to attorney Brost	18
13019.003	08/30/2006	33	P	602			0.66 Long Distance Telephone	3
13019.003	08/31/2006	33	P	600	0.150		0.60 Photocopying charge	4
13019.003	08/31/2006	34	P	40	95.00	0.60	57.00 Prepare Motion for Attorney Fees; prepare Notice of Issue, prepare affidavit in support of attorney fees.	19
13019.003	08/31/2006	1	P	200		0.20	0.00 Review and further work on affidavit in support of attorney fees;	20

1021 Birchmont Dr #3019 003 Billable 7.00 1271.09 Abdullah/Robin Marie
 Payments 466.33 Domestic Violence

GRAND TOTALS

Billable 7.00 1271.09
 Payments 466.33