

h/k

NO. 92631-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

v.

CYNTHIA L. AIKEN,

Respondent.

AMENDED AMICI CURIAE BRIEF OF LEGAL VOICE AND
THE WASHINGTON STATE COALITION AGAINST
DOMESTIC VIOLENCE

Laura K. Clinton, WSBA No. 29846
laura.clinton@bakermckenzie.com
BAKER & MCKENZIE LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 452-7023

David Ward, WSBA No. 28707
dward@legalvoice.org
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101
Telephone: (206) 682-9552

David S. Law, WSBA No. 22338
dlaw@skellengerbender.com
SKELLENGER BENDER PS
1301 5th Ave., Suite 3401
Seattle, WA 98101
Telephone: (206) 623-6501

Attorneys for Amici

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF INTEREST OF AMICI CURIAE.....3

III. STATEMENT OF THE CASE3

IV. ARGUMENT.....3

 A. Stare Decisis Militates Against Reversing *Gourley*.3

 B. *Gourley*'s Constitutional Holding Was Correct.7

 C. *Gourley* Properly Held that a "Full Hearing" Under
 RCW 26.50 Does Not Require Live Testimony or
 Cross-Examination.11

 D. The Procedures In This Case Satisfied Due Process.14

 1. Mr. Aiken's private interest is important, but
 so is the government's interest in protecting
 domestic violence survivors and preserving
 a streamlined process for them to obtain
 orders of protection.....15

 2. Both the risk of an erroneous deprivation
 and the probable value of additional
 safeguards were extremely low in this case.....18

V. CONCLUSION.....20

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Aiken v. Aiken</i> , 2015 Wash. App. LEXIS 2738 (Wn. Ct. App., Nov. 9, 2015) (unpublished).....	12
<i>Beatson v. Beatson</i> , 2015 Wn. App. LEXIS 1894 (Aug. 11, 2015) (unpublished).....	6
<i>Blackmon v. Blackmon</i> , 155 Wn. App. 715, 230 P.3d 233 (2010).....	6
<i>Chmela v. State Dep't of Motor Vehicles</i> , 88 Wn.2d 385, 561 P.2d 1085 (1977).....	9
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 145 P.3d 1185 (2006).....	<i>passim</i>
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974).....	12
<i>House v. Erwin</i> , 81 Wn.2d 345, 501 P.2d 1221 (1972).....	4, 6
<i>In re Marriage of Freeman</i> , 169 Wn.2d 664, 239 P.3d 557 (Wash. 2010).....	14
<i>In re James</i> , 79 Wn. App. 436, 903 P.2d 470 (1995).....	10
<i>In re Marriage of Rideout</i> , 150 Wn.3d 337, 77 P.3d 11174 (2003).....	2, 10
<i>Kimble v. Marvel Entm't LLC</i> , 135 S. Ct. 2401, 192 L.Ed. 2d 463 (2015).....	4, 5
<i>In re Marriage of Barone</i> , 100 Wn. App. 241, 996 P.2d 654 (2000).....	13

<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893 (1976).....	<i>passim</i>
<i>In re Pers. Restraint of Wheeler</i> , 188 Wn. App. 613, 354 P.3d 950 (2015).....	13
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833, 112 S. Ct. 2791 (1992).....	4
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	10
<i>Scheib v. Crosby</i> , 160 Wn. App. 345, 249 P.3d 184 (2011).....	10
<i>State v. Dejarlais</i> , 136 Wn.2d 939, 969 P.2d 90 (1998).....	13
<i>State v. J.P.</i> , 149 Wn. 2d 444, 69 P.3d 318 (2003).....	12
<i>State v. Karas</i> , 108 Wn. App. 692, 32 P.3d 1016 (2001).....	13
<i>State v. Rohrich</i> , 132 Wn.2d 472, 939 P.2d 697 (1997).....	9
<i>State v. Stalker</i> , 152 Wn. App. 805, 219 P.3d 722 (2009).....	5, 13
<i>State v. Sullivan</i> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	11
<i>State v. Veliz</i> , 176 Wn.2d 849, 209 P.3d 75 (2013).....	14
<i>Windust v. Dep't of Labor & Indus.</i> , 52 Wn.2d 33 (1958).....	5

STATUTES AND RULES

Domestic Violence Prevention Act
RCW 26.50*passim*

RCW 9A.40.060 14

RCW 26.50.130, *et seq.* 14

Laws of 1992, ch. 111, § 1 13

Laws of 2011, ch. 137, § 1 14

Laws of 2015, ch. 38, § 2 14

SECONDARY AUTHORITIES

ANNUAL CASELOAD REPORT 78,
<https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2015.pdf> 18

BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF
JUSTICE, FAMILY VIOLENCE STATISTICS 1 (2005),
<http://www.bjs.gov/content/pub/pdf/fvs02.pdf> 16

U.S. CONST. art. I, § 22 9

U.S. CONST. amend. VI 9

WASHINGTON STATE DEPARTMENT OF HEALTH, DOMESTIC
VIOLENCE, HEALTH OF WASHINGTON STATE REPORT 1
(2013),
www.doh.wa.gov/Portals/1/Documents/5500/IV-DV2013.pdf 16

WASHINGTON STATE COURTS, SUPERIOR COURT 2015
ANNUAL CASELOAD REPORT 78,
<https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2015.pdf> 18

I. INTRODUCTION

Amici curiae Legal Voice and the Washington State Coalition Against Domestic Violence (WSCADV) urge the Court to uphold its decision in *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006), and affirm its proper application by the lower courts in this case. Ten years ago, this Court unequivocally held that determining what procedural due process protections are required in a domestic violence protection order (DVPO) hearing under RCW 26.50 is a fact-specific inquiry, requiring an analysis of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). *Gourley*, 158 Wn.2d at 467-70. Under circumstances very similar to the present case, the *Gourley* Court held that a respondent does not have an absolute constitutional or statutory right in a DVPO hearing to compel a child victim to testify in court or to be subjected to cross-examination prior to the entry of a year-long DVPO.

The present case is indistinguishable from *Gourley* in every material way. As was the case in *Gourley*, here a mother sought a DVPO to protect her daughter, who had recently disclosed parental abuse. The responding party, the girl's father, deposed the mother and demanded the opportunity to depose the child and question her in court before the issuance of the DVPO. Here, as in *Gourley*, the trial court found that the

evidence of domestic violence supported the entry of a year-long DVPO, and refused to allow the respondent to compel his child (here, a 14-year old girl who attempted self-harm out of fear of her father) to testify and be cross-examined in the DVPO proceeding. Again as in *Gourley*, the DVPO issued by the trial court restricted the father's contact with the child for up to one year, subject at all times to modification in the parents' contemporaneous dissolution case.

Mr. Aiken does not challenge the facial constitutionality of RCW 26.50, Washington's Domestic Violence Prevention Act (DVPA), or directly ask the Court to reverse *Gourley*. He does not urge modification of the court rules and case law that explicate a respondent's rights in DVPO proceedings – rights that are different in kind from the constitutional protections afforded to defendants in criminal trials. Rather, Mr. Aiken makes the remarkable argument that *Gourley* entitled him to cross-examine his suicidal daughter before a DVPO could be entered. In so doing, Mr. Aiken misconstrues decades of this Court's jurisprudence, including the holdings in *Gourley*, *Rideout*, and the confrontation clause cases on which he relies.

The Court of Appeals properly held that Mr. Aiken's due process rights were satisfied under the facts of this case. *Amici* urge this Court to do the same.

II. STATEMENT OF INTEREST OF AMICI CURIAE

Amici incorporate by reference the statement of interest set forth in their Motion for Leave to File *Amici Curiae* Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt Respondent's Statement of the Case as set out in her supplemental brief and her response to the petition for review.

IV. ARGUMENT

A. *Stare Decisis* Militates Against Reversing *Gourley*.

Mr. Aiken is plainly seeking to overturn *Gourley*, whether he acknowledges it or not. He asserts that the "main issue" he presents is whether "[i]n a contested hearing under the Domestic Violence Prevention Act, Ch. 26.50, may a court deny the request for live testimony and cross-examination of the witnesses without violating due process?" Supp. Br. at 5.¹ By asking this Court to adopt a bright-line rule that trial courts must permit every DVPO respondent to cross-examine adverse witnesses on demand if there are contested facts raised in the proceeding, Mr. Aiken asks the Court to abandon its holding in *Gourley* and to adopt a quasi-summary judgment standard on DVPO hearings, whereby a respondent can demand trial-like proceeding by simply contesting the allegations.

¹ In his original petition for review, Mr. Aiken did not argue that *Gourley* was incorrectly decided or should be overruled in any way.

Due process does not require such a rule, and neither does the statute, as *Gourley* held. The Court should decline Mr. Aiken's invitation to overrule its prior decision, regardless of how the current Justices might rule if the issues in this case were ones of first impression.

On the constitutional issue, *Gourley* was correctly decided (*see infra* Section B), and the Court should adhere to its prior ruling. "Overruling precedent is never a small matter. Stare decisis – in English, the idea that today's Court should stand by yesterday's decisions – is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't LLC*, 135 S. Ct. 2401, 2409, 192 L.Ed. 2d 463 (2015) (quoting *Michigan v. Bay Mills Indian Comm.*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 1089 (2014)). "Application of that doctrine . . . is the 'preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28, 111 S. Ct. 2597 (1991)). "Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office." *House v. Erwin*, 81 Wn.2d 345, 348, 501 P.2d 1221 (1972). Even in the area of constitutional rights, courts must tread cautiously when considering the potential abdication of prior holdings. *See Planned*

Parenthood v. Casey, 505 U.S. 833, 853, 112 S. Ct. 2791, 2808 (1992) (“While we appreciate the weight of the arguments made on behalf of the State . . . arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis.”).

On the statutory front, *Gourley* correctly interpreted the DVPA, which does not provide an absolute statutory right to cross-examination (*see infra* Section C), and the Court should reject Mr. Aiken’s suggestion that the ruling should be modified. “[S]tare decisis carries enhanced force when a decision . . . interprets a statute.” *Kimble*, 135 S. Ct. at 2409; *see also Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 35 (1958). “[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *State v. Stalker*, 152 Wn. App. 805, 813, 219 P.3d 722 (2009) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). Particularly here, where the Washington Legislature has not amended the DVPA in any relevant way since *Gourley* was decided, the Court should reject Mr. Aiken’s suggestion that *Gourley* incorrectly interpreted the statute.

Nor has Mr. Aiken made any showing whatsoever that the *Gourley*

ruling is harmful. This Court has repeatedly held that stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *House*, 81 Wn.2d at 348 (quoting *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). In other words, “[o]verruling a case always requires ‘special justification’ – over and above the belief ‘that the precedent was wrongly decided.’” *Id.* at 2404 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 189 L. Ed. 2d 339, 349 (2014)). The lower courts have relied on *Gourley*’s direction and applied the *Mathews* test in evaluating due process rights in DVPO proceedings. *See, e.g., Blackmon v. Blackmon*, 155 Wn. App. 715, 722, 230 P.3d 233 (2010); *Beatson v. Beatson*, 2015 Wn. App. LEXIS 1894 (Aug. 11, 2015) (unpublished). Mr. Aiken’s dissatisfaction with the result below is not evidence that this approach is not working to protect the rights of parties, or that it is applied incorrectly by the judges and commissioners who hear DVPO matters.

Mr. Aiken’s request for a bright-line rule cannot be squared with this Court’s holding in *Gourley*, which emphasized that due process is a “flexible concept” and properly leaves discretion for trial courts to evaluate the need for live testimony or cross-examination in DVPO proceedings based on the unique facts and circumstances of each case. *Gourley*, 158 Wn.2d at 467. Indeed, because such proceedings are

intended to be streamlined and accessible for survivors of violence, it is particularly important for the Court to adhere to *stare decisis* here, rather than initiate the sweeping changes in practice that would result if Mr. Aiken's argument is accepted.

B. *Gourley's* Constitutional Holding Was Correct.

Gourley made it clear that the question of whether due process requires live testimony or cross-examination in a specific DVPO proceeding must be evaluated under the particular facts of the case. In so holding, the Court considered — and *rejected* — the bright-line rule Mr. Aiken advocates. The *Gourley* court confirmed that procedural due process “is a flexible concept in which varying situations can demand differing levels of procedural protection.” 158 Wn.2d at 467. To define the appropriate level of procedural protection for a respondent in a DVPO hearing, *Gourley* applied the classic *Mathews* test, which requires consideration of the private and public interests at stake, the risk of erroneous deprivation, and the probable value, if any, of additional procedural safeguards under the particular facts of the case. *Id.* at 467-68 (citing 424 U.S. at 335).

Mr. Aiken claims that *Gourley* stands for an altogether different proposition, asserting that “[i]n a per curiam decision, eight of the Justices in *Gourley* agreed that due process requires a testimonial hearing and the

opportunity to cross-examine witnesses when there are disputed fact issues” Pet. for Rev. at 1-2. This is a shocking mischaracterization.

Gourley does not hold that a respondent has a constitutional right to conduct live testimony and cross-examination in DVPO proceedings when there are “disputed fact issues.” To the contrary, the majority instead emphasized the need for judicial officers to exercise their discretion in each DVPO case to determine whether due process is satisfied, noting:

The legislature has carefully enacted protection order procedures in the hope of protecting the important interests implicated. *Judges and commissioners must exercise discretion to determine whether cross-examination is necessary in a particular case* to protect the rights involved. Their judgment is crucial in such delicate proceedings.

Id. at 470-71 (emphasis added). If the Court had intended to announce a broad and sweeping rule that respondents could demand cross examination and trial courts were constitutionally required to permit it – a ruling that would fundamentally impact how thousands of DVPO cases are adjudicated in Washington each year – it would have done so directly.

Rather, Mr. Aiken’s assertion appears to be based on a single passage in the lead opinion in *Gourley*, which observed that the record included “Mr. Gourley’s admission that he rubbed aloe vera on N.’s [his daughter’s] naked body” and that “the need to cross-examine N. was

obviated because Mr. Gourley himself confirmed N.'s declaration." *Gourley*, 158 Wn.2d at 470 (cited in Pet. Supp. Br. at 2). Mr. Aiken argues that this passage requires live testimony and cross-examination *unless the respondent admits the allegations* in the DVPO petition. The case cannot be read to hold this; rather, Mr. Gourley's admissions were part of the fact-specific inquiry into whether additional protections were required in that proceeding. *See id.* at 470.

To the extent Mr. Aiken argues that a trial-like proceeding is constitutionally required by analogy to criminal law, he is woefully mistaken. Cases such as *Davis v. Alaska*, 415 U.S. 308 (1974) rely on the Confrontation Clause, which applies only in criminal proceedings. *See* Pet. for Rev. 9 (citing 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974)); *see also, e.g., State v. Rohrich*, 132 Wn.2d 472, 476-78, 939 P.2d 697 (1997); *Chmela v. State Dep't of Motor Vehicles*, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977) ("Neither the right of confrontation under our constitution, article 1, section 22, amendment 10, nor the sixth amendment to the United States Constitution nor the due process clauses have been violated. Const. art. 1, § 22 (amendment 10) and the Sixth Amendment are each inapplicable in civil cases").

Furthermore, even if a similar common law right to live testimony and cross-examination existed in the civil context, it would not apply to

the DVPA because “[t]he legislature has the power to supersede, abrogate, or modify the common law.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008) (citing *State v. Estill*, 50 Wn.2d 331, 334-35, 311 P.2d 667 (1957)). *See also Scheib v. Crosby*, 160 Wn. App. 345, 352-53, 249 P.3d 184 (2011) (DVPOs are “special proceedings” in which “the trial court retained the inherent authority and discretion to decide the nature and extent of any discovery under the DVPA.”).

Similarly, Mr. Aiken’s reliance on *In re Marriage of Rideout* is misplaced. In *Rideout*, this Court affirmed a contempt order issued on the basis of documentary evidence alone. 150 Wn.2d 337, 352, 77 P.3d 11174 (2003). In *Rideout*, this Court observed that it may be preferable to hear live testimony in contempt of court proceedings, but the Court did not hold that live testimony is constitutionally required. To the contrary, “trial judges and court commissioners routinely hear family law matters” and they may decide disputed issues, including credibility determinations, based on documents alone. *See id.* at 350-52; *In re James*, 79 Wn. App. 436, 442, 903 P.2d 470 (1995) (trial courts generally “may weigh the credibility of each party based on sources other than oral testimony” in domestic relation cases. “These [sources] might include the plausibility of a party’s position, consistency with information in the court file . . . and affidavits of persons other than the parties.”).

C. *Gourley* Properly Held that a “Full Hearing” Under RCW 26.50 Does Not Require Live Testimony or Cross-Examination.

Mr. Aiken argues that the DVPA’s inclusion of the term “full hearing” should be interpreted to grant him a statutory right to demand R.A.’s live testimony and cross-examination. Pet. Supp. Br. at 9-11. *Gourley* considered and directly rejected this argument. *See Gourley*, 158 Wn.2d at 469-70 (analyzing and rejecting argument that the term “full hearing” in the DVPA requires the additional procedural protection of cross-examination). In pressing this claim, Mr. Aiken plagiarizes – virtually word for word – an amicus brief that the Washington State Trial Lawyers Association Foundation submitted to this Court ten years ago in *Gourley*.² Regardless of his inspiration, however, Mr. Aiken’s argument is misplaced; *Gourley*’s statutory holding was correct at the time, and has been confirmed by subsequent legislative action.

While the DVPA does not *preclude* a court from ordering a more extensive hearing when one appears necessary, the statute does not *require* trial-like hearings. When construing a statute, the court’s overarching goal is to effectuate the legislature’s intent. *State v. Sullivan*, 143 Wn.2d 162,

² Indeed, pages 9-12 of Mr. Aiken’s supplemental brief (among other portions of the brief) are almost entirely lifted from WSTLAF’s 2006 *Gourley* amicus brief. *See* Brief of Amicus Curiae Washington State Trial Lawyers Ass’n Found. at 11-12, 15-17, *Gourley v. Gourley*, 158 Wn.2d 460 (2006) (No. 76270-8). Justice Stephens, at that time a private attorney, co-authored the brief from which Mr. Aiken so liberally borrows. *Id.*

174-75, 19 P.3d 1012 (2001). This Court looks first to the plain language of the statute when faced with an interpretation issue. *State v. J.P.*, 149 Wn. 2d 444, 450, 69 P.3d 318 (2003). Courts “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.* (quoting *State v. Delgado*, 138 Wn.2d 723, 727, 63 P.3d 792 (2003)). If the plain language of the statute is unambiguous, then this court’s inquiry is at an end. *Id.*

Here, “no section of chapter 26.50 RCW explicitly sets forth the form the hearing must take or defines what is meant by ‘full hearing.’ When the term is issued, it is juxtaposed against the ‘ex parte’ hearing necessary for a temporary protection order.” *Gourley*, 158 Wn.2d at 469. Furthermore, “nothing in the statutory scheme explicitly requires a trial judge to allow the respondent in a domestic violence protection order proceeding to cross-examine a minor who has accused him of . . . abuse.” *Id.* at 469-70; *Aiken v. Aiken*, 2015 Wash. App. LEXIS 2738, at *8 (Wn. Ct. App., Nov. 9, 2015) (unpublished).

Thus, the statutory term “full hearing” means only a hearing distinct from an *ex parte* process, one in which notice has been given and the respondent has an opportunity to be heard. This is the only legitimate reading of the statute in light of the legislative admonition, repeated throughout the DVPA, that the process for seeking an order that is simple

and accessible to victims. *See, e.g.*, Laws of 1992, Chapter 111, sec. 1. As this Court has repeatedly confirmed, the Washington State Legislature intends that Washington's courts treat domestic violence as a public, as well as a private, problem. *State v. Dejarlais*, 136 Wn.2d 939, 944, 969 P.2d 90 (1998); *accord State v. Karas*, 108 Wn. App. 692, 700, 32 P.3d 1016 (2001); *In re Marriage of Barone*, 100 Wn. App. 241, 247, 996 P.2d 654 (2000). To read the statute as Mr. Aiken suggests would undermine the very purpose of the law. *Gourley* correctly interpreted the DVPA.

Furthermore, the legislature has confirmed *Gourley's* interpretation by a decade of acquiescence. "The legislature is presumed to be familiar with past judicial interpretations of statutes, including appellate court decisions." *In re Pers. Restraint of Wheeler*, 188 Wn. App. 613, 620, 354 P.3d 950 (2015) (citing *State v. Stalker*, 152 Wn. App. 805, 812-13, 219 P.3d 722 (2009), *review denied*, 168 Wn.2d 1043 (2010) ("[L]egislative inaction following a judicial decision interpreting a statute often is deemed to indicate legislative acquiescence in or acceptance of the decision.")). *See also Stalker*, 152 Wn. App. at 813 ("where statutory language remains unchanged after a court decision the court will not overrule clear precedent . . . "). Thus, while two Justices indicated in a concurring opinion in *Gourley* that they "would hold that a 'full hearing' under chapter 26.50 RCW includes the right to cross-examine adverse

witnesses,” 158 Wn.2d at 471, the Legislature has subsequently confirmed that this was not its intent in enacting the DVPA.

In contrast, the Legislature has not hesitated to promptly act when it believes the Court has misinterpreted statutory protections for domestic violence survivors. For example, in the wake of *In re Marriage of Freeman*, the Legislature characterized the holding as “an improper burden on the person protected by the order” and the House passed a bill amending RCW 26.50.130’s framework for terminating or modifying a DVPO. Laws of 2011, ch. 137, § 1; 169 Wn.2d 664, 239 P.3d 557 (Wash. 2010). Likewise, in reaction to this Court’s ruling in *State v. Veliz*, the Legislature modified RCW 9A.40.060 to replace the term “court ordered parenting plan” with “order making residential provisions for the child.” Laws of 2015, ch. 38, § 2; 176 Wn.2d 849, 209 P.3d 75 (2013). *Gourley*’s statutory holdings should be affirmed.

D. The Procedures In This Case Satisfied Due Process.

The Court of Appeals properly applied the *Mathews* test, which requires consideration of: (1) the private interest impacted by the government action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the additional burden that added procedural safeguards

would entail. *Id.* at 467-68 (citing 424 U.S. at 335). *Amici* endorse Ms. Aiken's analysis of the *Mathews* factors, and make the following additional observations regarding the interests at stake and the risk of error versus the value of compelled testimony in this case.

1. Mr. Aiken's private interest is important, but so is the government's interest in protecting domestic violence survivors and preserving a streamlined process for them to obtain orders of protection.

Mr. Aiken, like every parent, "has an important interest in the care, custody, and control of his children." *Gourley*, 158 Wn.2d at 468. The restriction on Mr. Aiken's contact with R.A., however, was temporary and subject to modification at any time in the parallel marital dissolution proceeding. As *Gourley* recognized, "the possible length of the deprivation of the interest is . . . an important factor," and it is appropriate to "consider that Mr. [Aiken's] right was only temporarily restrained by the protection order." *Id.* at 468. In *Gourley*, as here, "the duration of the protection order was only one year" and "the order was further subject to orders issued in the dissolution action." *Id.*

In contrast, the state has at least two compelling interests in DVPO proceedings: (1) the prevention of domestic violence, and (2) the immense additional burden on the court system that Mr. Aiken's proposed procedural safeguards would entail.

Washington State has an extremely strong interest in providing a readily accessible proceeding that enables survivors to obtain protection for them and their families from future abuse, in order to help curb the devastating toll on society exacted by domestic violence. Between 2009 and 2012, approximately 3.5 million violent crimes were committed in the United States against family members, with approximately 40% of these crimes resulting in injury. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FAMILY VIOLENCE STATISTICS 1 (2005), <http://www.bjs.gov/content/pub/pdf/fvs02.pdf>. In Washington, in 2011 alone, 47,444 domestic violence offenses were reported to the police. WASHINGTON STATE DEPARTMENT OF HEALTH, DOMESTIC VIOLENCE, HEALTH OF WASHINGTON STATE REPORT 1 (2013), www.doh.wa.gov/Portals/1/Documents/5500/IV-DV2013.pdf.

Children who are exposed to domestic violence “are at risk for problems in their social, emotional, and cognitive development and for family violence as adults.” *Id.* at 1. Of course, not all domestic violence is even reported; thus, police reports “likely underestimate the prevalence of domestic violence.” *Id.* There is no question the State of Washington has a compelling interest in ensuring that the DVPA continues to provide survivors with a means of escaping this prevalent form of systemic violence. Requiring trial-like proceedings is contrary to this interest: The

threat of compelled cross examination is likely to intimidate vulnerable witnesses, and create a strong disincentive for survivors, particularly children, to seek protection. In most DVPO cases, the parties are unrepresented, meaning that survivors would be cross examined by the alleged abuser directly. This shift would undermine the central purpose of DVPOs and give respondents a means of controlling the process that the legislature did not intend.

Furthermore, imposing the type of bright-line requirement that minor children must testify in person and be subject to cross-examination in DVPO proceedings would put parents in an impossible situation. On the one hand, they do not seek to stop further contact with the abusive parent, they may be later regarded as failing to protect their children, resulting in a Child Protective Services report and a subsequent dependency case. On the other hand, if they do seek protection, they force their children to undergo the emotional trauma and potential danger of having to testify in court and be cross-examined by an abusive parent. The state has a clear interest in avoiding such perverse results.

The state also has an interest in reducing the barriers to access to protection orders and allowing courts to manage their caseloads. Imposing a mandatory requirement that live testimony and cross-examination be allowed in any contested DVPO case would create a

tremendous burden on the court system and on survivors. It would essentially allow respondents to convert streamlined DVPO hearings into trials by raising any fact dispute. This rule would upend local court dockets: Washington state courts receive and adjudicate tens of thousands of DVPO petitions each year. In 2015 alone, individuals filed 15,797 petitions. See WASHINGTON STATE COURTS, SUPERIOR COURT 2015 ANNUAL CASELOAD REPORT 78, <https://www.courts.wa.gov/caseload/content/archive/superior/Annual/2015.pdf>. Requiring an extended trial-like proceeding on demand for each contested petition would dramatically change the process and the pace at which DVPO proceedings are conducted and would preclude victims from receiving prompt legal protections.

2. Both the risk of an erroneous deprivation and the probable value of additional safeguards were extremely low in this case.

In the absence of cross-examination, the risk of an erroneous deprivation of Mr. Aiken's interest in contact with his daughter was insubstantial. The trial court's decision to grant the DVPO was supported by substantial evidence confirming R.A.'s suicidal state and her stated reasons for self-harm. The DVPO petition and Ms. Aiken's subsequent declaration state that R.A. had overdosed on pills and cut herself, attempting suicide at least twice. See, e.g., Resp. Br. 12, 15. Additional

statements from healthcare providers, psychiatrists, and school counselors all indicated that R.A. engaged in harmful behavior and attempted suicide due to her fear of visitation with her father.

Mr. Aiken had ample opportunity to be heard before the DVPO was entered. He was given notice of the hearing and an opportunity to appear, and his request for an extended hearing was granted. He was able to depose Ms. Aiken, R.A.'s mother, as well as other witnesses. He had the opportunity to present his own declarations and the declarations of others. He admitted to some of the conduct that formed the basis of his daughter's allegations, while denying that it was harmful to her. Mr. Aiken was represented by counsel, who argued his position to the court. Further, Mr. Aiken's ability to move at any time to modify the DVPO in the dissolution proceeding gave him a substantial procedural safeguard -- beyond any value that the cross examination of a vulnerable child would have afforded him. In that proceeding, Mr. Aiken had rights to conduct discovery, hire experts, and request further investigation by the guardian ad litem who could make recommendations to the court. His due process rights were fully satisfied by the process in the hearing below.

Under these circumstances, the trial court properly applied *Gourley* both by denying the request for testimony and cross-examination and by engaging in a thoughtful and lengthy case specific analysis of the

circumstances. The probable value of deposing or cross-examining R.A. was not only very low, but also foreseeably dangerous to a child at risk. If R.A. were compelled to testify, the probative value of her testimony would be reduced by the risk of extreme stress and coercion inherent in an adverse parent-child relationship. The trial court did not abuse its discretion in denying Mr. Aiken's requests subject to further proceedings in the marital dissolution action.

Here, the Domestic Violence Prevention Act functioned as the Legislature intended: the trial court properly applied its discretion to the individualized circumstances of the case and fashioned appropriate relief to provide quick and efficient protection to R.A., without prejudice to the father's ability to pursue a final resolution of his residential time with R.A. in the ongoing family law case. The rulings below should be affirmed.

V. CONCLUSION

For these reasons, *amici* Legal Voice and WSCADV urge this Court to uphold *Gourley* and affirm the rulings below.

Respectfully submitted this 13th day of October, 2016.

By:

s/Laura K. Clinton



Laura K. Clinton, WSBA No. 29846
laura.clinton@bakermckenzie.com
BAKER & MCKENZIE LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 452-7023

David Ward, WSBA No. 28707
DWard@LegalVoice.org
LEGAL VOICE
907 Pine Street, Suite 500
Seattle, WA 98101
Telephone: (206) 682-9552

s/David S. Law

David S. Law, WSBA No. 22338
dlaw@skellengerbender.com
SKELLENGER BENDER PS
1301 5th Ave., Suite 3401
Seattle, WA 98101
Telephone: (206) 623-6501

*Attorneys for Amici Legal Voice and
Washington State Coalition Against Domestic Violence*

Oct 13, 2016, 11:39 am

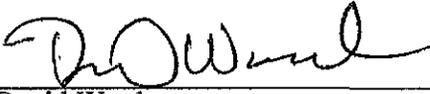
CERTIFICATE OF SERVICE

RECEIVED ELECTRONICALLY

I certify under penalty of perjury that on October 13, 2016, I caused the Amended Amici Curiae Brief of Legal Voice and the Washington State Coalition Against Domestic Violence in *Aiken v. Aiken*, Case No. 92631-0, to be served upon the following parties listed below as follows:

Gail B. Nunn O'Loane Nunn Law Group, PLLC 2707 Colby Ave., Ste. 1204 P.O.Box 5519 Everett, WA 98206 gail.nunn@onglaw.com Attorney for Respondent	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail (per consent) <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Aaron Shields The Shields Law Firm, PLLC 3301 Hoyt Avenue Everett, WA 98201 aaron@theshieldslawfirm.net Attorney for Appellant	<input checked="" type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail (courtesy) <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mark Ferraz Northwest Justice Project 2731 Wetmore Ave., Ste. 410 Everett, WA 98201 markf@nwjustice.org Jennifer Ammons 715 Tacoma Ave. South Tacoma, WA 98402 jennifera@nwjustice.org Attorneys for <i>Amicus Curiae</i> Northwest Justice Project	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail (per consent) <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Dated at Seattle, Washington this 13th day of October, 2016.



David Ward

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, October 13, 2016 11:41 AM
To: 'David Ward'
Cc: 'Clinton, Laura K'; David Law
Subject: RE: Filing in Aiken v. Aiken, no. 92631-0

Received 10/13/16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:
http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:
<http://dw.courts.wa.gov/>

From: David Ward [mailto:dward@legalvoice.org]
Sent: Thursday, October 13, 2016 11:09 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'Clinton, Laura K' <Laura.Clinton@bakermckenzie.com>; David Law <DLaw@skellengerbender.com>
Subject: Filing in Aiken v. Aiken, no. 92631-0

Dear Clerk of the Court:

Please find attached the following documents for filing in Aiken v. Aiken, no. 92631-0:

- Amended Amici Curiae Brief of Legal Voice and the Washington State Coalition Against Domestic Violence (WSCADV)
- Certificate of Service

The amended brief is being filed in response to a letter dated October 10 from Commissioner Pierce, which granted Legal Voice and WSCADV leave to file an amici curiae brief, but directed counsel to file an amended brief that did not include an appendix.

The person filing the brief is:

David Ward, WSBA No. 28707
(206) 682-9552, ext. 112
dward@legalvoice.org

Sincerely,
David Ward

David Ward

Legal & Legislative Counsel

Legal Voice

907 Pine St., Suite 500

Seattle, WA 98101

206-682-9552 x112

[Facebook](#) ▪ [Blog](#) ▪ [Website](#)