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No. 92631-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

vs.

CYNTHIA L. AIKEN,

Respondent.

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEFS

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 ORIGINAL

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I.

APPELLANT'S ANSWERS TO LEGAL VOICE AND THE
WASHINGTON STATE COALITION AGAINST DOMESTIC
VIOLENCE ARGUMENTS

1. In both Rideout and Gourley this court already implicitly recognized that due process requires a full hearing to include testimony and the opportunity for cross examination when there are contested facts and a respondent requests a testimonial hearing.

Mr. Aiken is not seeking to reverse Gourley but rather to have a clear opinion from the court as to what process is due to respondent's in DVPO hearings. Due Process and a testimonial hearing should be available to all Washington citizens regardless of the county in which their case arises. Snohomish County appears to be one of the counties that does not allow for a testimonial hearing in spite of this court's prior rulings. In Mr. Aiken's case he was not allowed to testify in front of the court commissioner, nor was Ms. Aiken required to testify in front of the court commissioner. The evidence and information before the court was a written record,

much of it unsworn. The court commissioner was without any ability or opportunity to see the demeanor of the witnesses under oath or to have the allegations tested in the “crucible of the courtroom.” *In re Marriage of Rideout*, 150 Wash.2d 337, 77 P.3d 1174 (2003).

The majority of Justices in Gourley agreed that a testimonial hearing with the opportunity for cross-examination is warranted in cases with disputed fact issues. *Gourley v. Gourley*, 158 Wn.2d 460 145 P.3d 1185 (2006). On the narrow facts of Gourley, this court held there was no violation of due process or abuse of discretion given Mr. Gourley did not request a testimonial hearing, did not subpoena witnesses, and where the uncontested evidence was itself sufficient. *Id.* at 470 – 471.

In this case, due process required a testimonial hearing and cross-examination of adverse witnesses pursuant to both Rideout and Gourley. *Id.*

2. The per curiam Gourley opinion has not provided sufficient direction to our trial or appellate courts.

Gourley and Rideout were both decided upon very limited facts, including that the petitioners in those cases never requested

the trial court allow a full testimonial hearing. *Id.* Both decisions clearly note the preference for our lower courts to conduct testimonial hearings where there are disputed factual issues. *Rideout* at 352 ; *Gourley* at 470-471. In the present case, a full testimonial hearing was requested and denied without any findings or basis given by the court below. (CP 191-194, CP 16, and CP 141). Accordingly, Mr. Aiken was denied the opportunity to present his case and defend himself from the allegations in a reasonable manner; he was denied due process. The Snohomish County Superior Court has done away with the necessity of a full testimonial hearing on the merits in DVPO cases (*Gourley* was a Snohomish County Matter and Snohomish County's Local Rules discourage even the idea of a testimonial hearing despite this court's prior rulings). SCLSPR 94.04(f)(6). There are reported cases confirming that other counties already allow for a testimonial hearing establishing that such procedures are not overly burdensome nor do they undercut the purpose of the DVPA. See for e.g. *Heckler v. Cortinas*, 110 Wn.App. 865 (2002) and *Blackmon v. Blackmon*, 155 Wash. App. 715 (2010).

This court should clearly set forth that due process protections are violated when a court summarily denies a

respondent's request for a testimonial hearing and cross examination of adverse witnesses in order to address contested factual issues.

3. The Procedures provided to Mr. Aiken did not Satisfy Due Process.

Balancing the parties' interests.

This issue is addressed in the answer to arguments from the other amicus brief below.

Risk of erroneous deprivation and value of additional safeguards.

This issue is also addressed in the answer to arguments from the other amicus brief below. However, Justice Sanders' Gourley dissent is particularly instructive on the potential risk of erroneous deprivations under a court process without any live testimony or cross-examination:

The risk of erroneous deprivation under this procedure is extreme. And the utility of allowing the cross-examination of the alleged victim is obvious. Courts have long recognized cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 1367 (3d ed.1940). See also *Goldberg v. Kelly*, 397 U.S. 254,

269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *In re Rideout*, 150 Wash.2d at 352 (“it may often be preferable for the superior court judge or commissioner to hear live testimony of the parties or other witnesses.”).

Although the right to confront one’s accuser may not apply in some civil proceedings, *Chmela v. Department of Motor Vehicles*, 88 Wash.2d 385, 392, 561 P.2d 1085 (1977), “due process may guarantee the right to cross-examine witnesses even if the confrontation clause does not apply directly.” *In re Det. of Brock*, 126 Wash.App. 957, 963, 110 P.3d 791 (2005).

In *Flory v. Department of Motor Vehicles*, 84 Wash.2d 568, 527 P.2d 1318 (1974), the respondent challenged hearing procedures for driver’s license revocation which barred the tribunal from considering live testimony. Relying on *Goldberg*, we held the requirements of a due process hearing “included the right to confront adverse witnesses, the right to present evidence and oral argument, and the right to representation by counsel.” *Id.* at 571, *See also Little v. Rhay*, 8 Wash.App. 725, 509 P.2d 92 (1973) (holding that although the Sixth Amendment right to confront witnesses may not apply directly in civil proceedings “the due process of law clauses in the Fifth and Fourteenth Amendments give one the opportunity to cross-examine in civil proceedings as a matter of constitutional right.”).

Gourley at 480-481.

II.

APPELLANT'S ANSWERS TO NORTHWEST JUSTICE PROJECT'S
ARGUMENTS

1. **This case is not limited to seeking in court testimony of children.**

Child testimony is but one part of this appeal. Nevertheless, this court in Gourley specifically noted that failure to seek to depose or, upon being denied a deposition, to subpoena the teenaged witness was fatal to Mr. Gourley's due process arguments. *Id.* at 470-71. In this matter, the request below was for a full testimonial hearing consistent with Gourley and Rideout. (CP 191-194). The court not only denied that specific relief but went even further and specifically prohibited the deposition or subpoenaing of R.A. to appear for the hearing. (CP 16;141).

This case involves the parent child relationship in a contested proceeding that had been investigated and reported upon by a GAL prior to Ms. Aiken seeking her ex parte order and, ultimately, a final hearing on her petition. The pro tem

commissioner hearing the motion summarily denied Mr. Aiken's requests without any findings or discussion. (CP 16; 140-141).

Mr. Aiken was able to conduct a discovery deposition, but it was clear that Ms. Aiken had no first hand knowledge of the details of the allegations from R.A. nor the timing of events or surrounding circumstances. (CP 71-75). Accordingly, Ms. Aiken was unable to shed any light on the most significant issues related to her petition for a protection order. Moreover, Mr. Aiken was not allowed to testify on his own behalf or to have an opportunity to present and test the fact contentions through cross examination weighed "in light of observation of demeanor and related factors." *Rideout* at 352.

2. Allowing a deposition or cross-examination of a child on information the Petitioner has no knowledge of will not transform or undermine the purpose of a court hearing in a DVPO matter.

The court's purpose in all matters that come before it is not simply to accept a petition as accurate; it is a search for the truth. The government's interest in domestic violence protection order proceedings does not defeat additional due process protections for

respondents. Unquestionably, the government has a compelling interest in protecting victims of domestic violence. *Schall v. Martin*, 467 U.S. 235, 264, 104 S. Ct. 2403 (1984). This interest is not thwarted, however, by granting respondents a testimonial hearing and the opportunity for cross-examination. A clear holding that a respondent is entitled to these due process protections would not change or impact *any* provision in the DVPA, including the almost nonexistent evidentiary standards for petitioners.

The DVPA already has transformed this process into an extremely shortened time with automatic and significant protections for all petitioners. A petitioner initiating these civil actions are not charged any filing fee, do not have to pay for personal service of process, and are “provided the necessary number of certified copies at no cost.” RCW 26.50.040; .030(4). Once the petition is filed, a petitioner receives a hearing within two weeks of the date of the show cause order. RCW 26.50.050. Many courts employ facilitators to assist petitioners in filing out forms and often times petitioners appear at these hearings with a DV advocate for support.

In the face of the provisions intended to protect petitioners, the DVPA affords a respondent at least the following procedural

protections: (1) a petition to the court, setting forth facts under oath, (2) service of notice within five days of the hearing, (3) a full hearing before a judicial officer where the petitioner and respondent may testify, (4) a written order from the court, (5) the opportunity to move for revision, (6) the opportunity to appeal, and (7) a one-year limitation on the protection order if it restrains the respondent from contacting minor children. *See State v. Karas*, 108 Wash.App. 692, 699-700, 32 P.3d 1016 (2001); RCW 26.50 et. seq.

The court should recognize that notice and an opportunity to be heard constitute the floor, and not the ceiling, of procedural due process when a proceeding implicates serious property and liberty interests. *See, e.g., In re A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015) (“*at a minimum* [due process] requires the right to notice and an opportunity to be heard” (emphasis added)). This appeal gives this Court the opportunity to clearly set forth what procedural protections are necessary in proceedings for domestic violence protection orders, an issue this Court’s plurality opinion in *Gourley v. Gourley* appears to have left open for interpretation. 158 Wn.2d 460, 470, 145 P.3d 1185 (2006).

In its narrow holding, this Court recognized that, while the facts in *Gourley* “did not require testimony or cross-examination, live testimony and cross-examination might be appropriate in other cases.” *Gourley*, 158 Wn.2d at 470. Mr. Gourley’s admissions alone were enough to justify entry of a protection order in that case. Because of the interests involved and the nature of the DVPA’s penalties, due process should require a testimonial hearing and the opportunity for cross-examination in instances where a respondent contests the allegations and requests a testimonial hearing. Protection orders can prevent the respondent from having any contact with his or her children, exclude the respondent from his or her home, and restrain a respondent from coming within a specified distance of a particular location and require him or her to pay for and be subjected to electronic monitoring. RCW 26.50.060(1)(b),(c),(h) and (j). These are significant restrictions that cannot be minimized. *Santosky v. Kramer*, 455 U.S. 745, 758–59, 102 S. Ct. 1388 (1982); *State v. Clausen*, 65 Wash. 156, 192, 117 P. 1101 (1911). *Kent v. Dulles*, 357 U.S. 116, 125–26, 78 S. Ct. 1113 (1958) (“[f]reedom of movement is basic in our scheme of values”

and is a liberty interest “of which the citizen cannot be deprived without the due process of law.”)¹

The important property and liberty interests impacted by DVPA protective orders warrant more than minimal due process protections. The penalties for violating a protective order can be severe – violation of a protection order is a gross misdemeanor, “constitute[s] contempt of court,” and the person is subject to arrest without a warrant. RCW 26.50.110(1)(a), (2), and (3). Following allegations that an order has been violated, the respondent may be compelled to appear and show cause why he or she “should not be found in contempt of court and punished accordingly.” RCW 26.50.110(6). A person can be criminally punished for inadvertently violating a protection order; petitioner’s invitation is no defense to violation. RCW 26.50.035(1)(c). The gravity of the consequences for breaking a protection order, even involuntarily, enhances the need for a testimonial hearing and an opportunity for

¹ In rejecting Mr. Aiken’s due process challenge, the lower court noted that “freedom of movement cannot be used to impair the individual rights of others.” *Aiken v. Aiken*, 191 Wn. App. 1009, 2015 WL 6874962, at *3, review granted, 185 Wn.2d 1017 (2016). The truth of this statement is uncontested, however, the first element of the *Mathews* test instructs courts to consider “the private interest impacted by the government action.” *Mathews*, 424 U.S. at 335. In every case, that means the interests held by the respondent.

cross-examination before an order is entered. *See Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780 (1971) (“The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.”).

Although the DVPA provides criminal penalties, respondents are not entitled to many of the protections of a criminal proceeding: respondents do not have the benefit of a presumption of innocence; do not have a right to an attorney (regardless of their indigent status); and the allegations need not be supported with proof beyond a reasonable doubt. In fact, there is no specific standard of proof that must be met²—the petition need only state “*specific facts and circumstances* from which relief is sought.” RCW 26.50.030(1) (emphasis added).

On the other hand, the DVPA places heavy evidentiary burdens on a respondent. For example, courts are *required* to grant petitions to renew protective orders “unless the *respondent* prove[s] *by a preponderance of the evidence* that the respondent will not resume acts of domestic violence.” RCW 26.50.060(3)

² Mr. Aiken did raise this issue as part of his underlying appeal and argued for a standard of clear, cogent and convincing evidence when a parent child relationship is impacted.

(emphasis added). Respondents moving to modify or terminate protection orders must carry an even higher evidentiary burden: first, to even get a hearing on the motion, the respondent must demonstrate “adequate cause” and then, if the respondent survives the adequate-cause hearing, he or she must satisfy the “preponderance of the evidence” standard. RCW 26.50.130(3)(a) and (4). When bringing a motion to terminate, the respondent must clear yet a third hurdle and prove that there has been a “substantial change in circumstances.” RCW 26.50.130(3)(a). This is markedly different than motions to terminate or modify brought by petitioners—courts must “hear th[os]e motion[s] without an adequate cause hearing” and there is *no* standard-of-proof requirement. RCW 26.50.130(5).

Standards of proof reflect “the degree of confidence our society thinks [the factfinder] should have in the correctness of factual conclusions for a particular type of adjudication.” *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804 (1979) (quoting another source); *see also Hardee v. State, Dep’t of Soc. & Health Servs.*, 172 Wn.2d 1, 7-8, ¶ 11, 256 P.3d 339 (2011). The low evidentiary standards for petitioners substantially increase the risk of an erroneous deprivation of respondents’ liberty and property

interests. Even when society or the legislature has set a low (or in this context an unspecified) standard for proof, “we must be mindful that the function of legal process is to *minimize the risk of erroneous decisions.*” *Addington*, 441 U.S. at 425 (emphasis added). To reduce the risk of an erroneous deprivation, due process requires a testimonial hearing with an opportunity for cross examination of adverse witnesses.

These factors create an imbalance in power between the parties that is entirely unrelated to the strength of either side’s evidence. In turn, this imbalance erodes the benefits gained from an adversarial proceeding. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (emphasizing that “our adversarial system of justice” is “premised on the well-tested principle that truth-as well as fairness-is best discovered by powerful statements on both sides of the question” (internal quotation marks omitted)). Not attributable to the merits of the case, this power disparity increases the risk of erroneous deprivations.

The lower court concluded that Mr. Aiken’s right to due process was not violated because Mr. Aiken (1) received the procedural protections of the DVPA, (2) was allowed to depose Ms. Aiken, and (3) was allowed to present documentary evidence and

argument to the court. *Aiken v. Aiken*, 191 Wn. App. 1009, 2015 WL 6874962, at *3, *rev. granted*, 185 Wn.2d 1017 (2016). These “protections” do not adequately lower the risk of erroneous deprivations. Because Ms. Aiken was not the source of the accusations against Mr. Aiken, her deposition was of limited value and she was unable to answer factual questions surrounding the allegations in her own petition. (CP 71-75). Respondents must be given the opportunity to testify, and to show that the evidence against them is untrue, particularly where “the reasonableness of the action depends on fact findings.” *Greene v. McElroy*, 360 U.S. 474, 496, 79 S. Ct. 1400 (1959). This opportunity is important to test “documentary evidence, [but] it is even more important where the evidence consists of the testimony of individuals.” *Greene*, 360 U.S. at 496.

It has been asserted that the constitutional right to confrontation is “*explicitly limited to criminal prosecutions.*” See Resp. to Pet. For Review at 12 (emphasis added). Although this is not a criminal case, the Sixth Amendment does not contain any limiting language. See U.S. Const. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”). Rather, the Sixth Amendment

guarantees criminal defendants the right to cross-examination. It does not limit that right only to criminal proceedings.

In civil proceedings, due process, not the Sixth Amendment, confers the right to cross-examination. *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103, 83 S. Ct. 1175 (1963) (“procedural due process often requires confrontation and cross-examination”); *Reilly v. Pinkus*, 338 U.S. 269, 276–77, 70 S. Ct. 110 (1949) (even in administrative hearings for fraud, respondents are entitled to cross-examination). Under these circumstances, a meaningful hearing includes live testimony and cross-examination before the trier of fact.

The Washington State Legislature explicitly stated that, through the DVPA, it “intends to ... require *reasonable*, coordinated measures to prevent domestic violence” and “enhance the ability of the justice system to respond quickly and *fairly*.” S.H.B. 2777, ch. 274, § 101 (emphasis added). It is reasonable and fair to recognize a due process guarantee to testimonial hearings

and cross-examinations when the relevant facts are disputed and the respondent has requested a testimonial hearing.

III.

CONCLUSION

This Court should reverse and clearly hold that, in DVPO matters, due process entitles respondents to testimonial hearings and an opportunity for cross examination of adverse witnesses when facts are in dispute and a testimonial hearing is requested.

Respectfully submitted this 1st day of November 2016

A handwritten signature in black ink, appearing to read 'A. Shields', with a large, stylized flourish at the end.

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Dear Clerk,

Attached is Appellant's Answer to Amicus Curiae Briefs for filing in Aiken v. Aiken, Case No. 92631-0. Please confirm receipt, thank you.

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