

**NO: 93456-8**

**SUPREME COURT OF THE STATE OF WASHINGTON**

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MEGAN ROAKE,  
Respondent/Appellee

v.

MAXWELL DELMAN,  
Petitioner/Appellant

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**Supplemental Brief of Megan Roake**

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## A. INTRODUCTION

Megan Roake, a student at the University of Washington, filed this Sexual Assault Protection Order (SAPO) petition in which she alleged that fellow student Maxwell Delman violently sexually assaulted her. The trial court did not permit Roake to complete her testimony and erroneously dismissed Roake's petition, despite a lack of evidence contesting the brutal allegations. The Court of Appeals properly reversed and remanded for further proceedings. The Supreme Court has now accepted Maxwell Delman's petition for review of *Roake v. Delman*, 194 Wash. App 442 (2016).

In his petition, Delman asks this Court to reverse the Court of Appeal's well-reasoned opinion on the grounds that his due process rights were violated. Specifically, Delman claims that a sexual assault petitioner has to prove both nonconsensual sexual conduct and reasonable fear of future dangerous acts in order to be granted a full SAPO. This is incorrect. The Court of Appeals properly held that the legislature required only that the petitioner prove by a preponderance of the evidence that a sexual assault occurred. Though the allegations of "reasonable fear of future dangerous acts" are a component of the petition, it is not ultimately

needed to be proved for entry of a final SAPO. Delman's attempts to apply criminal legal standards to a civil special proceeding are unsupported by law. As such, the Court of Appeals properly reversed and remanded the trial court's dismissal order. Roake respectfully asks this Court to affirm.

## **B. ARGUMENT**

Delman erroneously asserts that it is his due process rights that were violated through the SAPO proceeding initiated by Roake. In fact, the record shows that the trial court went above and beyond in protecting Delman while violating Roake's basic due process right to be heard. Specifically, the trial court cut Roake off mid-testimony. ROP 14-23. The trial court never allowed her to resume, and instead, dismissed her petition. ROP 23-32; CP 97-99. The reversal and remand by the Court of Appeals was proper in allowing Roake to pursue a hearing for a full protection order.

The concept of due process is flexible and should be afforded as the situation demands. *Buffelen Woodworking v. Cook*, 28 Wn. App 501, 505, 625 P.2d 703 (1981) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). In determining how much process is due, the court considers the

private interest to be protected, the risk of erroneous deprivation of that interest by the presently employed procedures, and the government's interest in maintaining or modifying those procedures. *Buffelen Woodworking v. Cook*, 28 Wn. App 501, 505, 625 P.2d 703 (1981)(quoting *Mathews v. Eldridge*, 424, U.S. 319, 335, 96 S.Ct. 893 (1976)). Delman insists on asserting criminal due process standards into the civil SAPO proceeding, which is far beyond what the situation demands as Delman's opposing party was not the State, but an individual petitioner. PFR 7-10.

Despite the private interests in criminal and civil proceedings being quite different, Delman seeks to make the concept of due process rigid and narrowly limits its purpose and application by ignoring facts presented in the record. He uses criminal standards when discussing a civil special proceeding. The crux of Delman's appeal is insisting that Roake did not provide any information in her SAPO petition meeting the requirements of RCW 7.90.020, demonstrating reasonable fear of future dangerous acts based on "specific statements or actions made at the same time of the sexual assault or subsequently thereafter." However, in her petition, besides stating that she did not know him and did not know what he was capable of, Roake also provided details of being bitten, choked

and bleeding on the floor due to the violence of the assault. CP 4; ROP 66, 7-11. Here, it is crucial to consider the purpose of the protection order as a civil process and special proceeding, while not only weighing the due process interest of the respondents but also the petitioners, especially where, unlike the criminal system and in this appeal, parties are mostly pro se litigants.

### **1. RCW 7.90 Comports with Due Process**

Due process has been identified as “the fundamental right to be heard at a meaningful time and in a meaningful manner.”

*Gourley v. Gourley*, 158 Wn.2d 467, 145 P.3d 1185 (2006) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893 (1976)).

Washington has consistently held that protection order proceedings, specifically domestic violence protection orders (DVPO), provide due process to the respondent. Washington has consistently found that domestic violence protection orders statutory procedures satisfy “the inherently flexible demands of procedural due process.” *State v. Karas*, 108 Wn. App. 692, 700, 32 P.3d 1016, 1021 (2001). See also *Spence v. Kaminski*, 103 Wn. App. 325, 335, 12 P.3d 1030 (2000); *Gourley*, 158 Wn.2d at 468–69, 145 P.3d 1185; and *Blackmon v. Blackmon*, 155 Wn. App. 715, 722, 230 P.3d 233 (2010).

Most recently, this Court has reaffirmed its position on due process in protection order proceedings, finding that “safeguards for both those seeking protective orders and those subject to them are built into chapter 26.50 RCW.” *Aiken v Aiken*, No. 92631-0, 2017 P.3d WL 121548. In the *Aiken* case, the court provided clarification regarding its due process decision in *Gourley*. When balancing the interests of the state and respondent, the state’s interest greatly outweighed the respondent’s interest. Here, factoring in Roake’s interest as a petitioner seeking a protection order, further weighs in favor of the state’s interest.

*Aiken* thoroughly resolved the due process arguments raised in DVPOS based on *Mathews* and is applicable to aspects of this case. The *Mathews* factors considered the private interest affected by the action, the risk of erroneous deprivation of the interest by the procedure, and the government’s interest in maintaining the procedure. *Mathews* 424 U.S. at 321.

a. Fundamental Liberty Interest in RCW 7.90

In *Aiken*, the Court determined that the first *Mathews* factor weighed in favor of the respondent. He had a fundamental liberty interest to make decisions regarding the care, custody, and control of his child. *Aiken* at 4 (citing *Gourley* Wn.2d at 468); *Troxel v.*

*Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Also like *Gourley*, the respondent was deprived of this interest only temporarily—he was restrained by the protection order for one year and the modified order was subject to the dissolution action. *Id.*; see also *Mathews*, 424 U.S. at 341 (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975) (“possible length of wrongful deprivation of” interest at stake “is an important factor in assessing the impact of” the government action)). This interest for a respondent does not exist in the sexual assault protection order, which clearly distinguishes itself as being a remedy available only to victims of sexual assault who do not have a qualifying domestic relationship to their perpetrator.

Delman does not have the same interest as in DVPOs for the fundamental right to make decisions regarding the care, custody and control of biological children, should a SAPO be issued. Delman’s sole interest affected by an issuance of a SAPO is his freedom of movement. That restraint too is limited. In a permanent order, a SAPO respondent’s movement is virtually unrestricted except that there is a distance restriction from the petitioner’s home, workplace, school and often person. Delman’s freedom of movement is only inhibited should he knowingly

encounter Roake or seek out her home, work or school. This is also the balancing between Delman's liberty interest with Roake's interest in health (or recovery) and privacy.

b. Risk of Erroneous Deprivation of Interest in RCW 7.90

The second *Matthews* factor the court considered was the risk of an erroneous deprivation of the interest by the statutory procedure. *Matthews* 424 U.S. at 321. RCW 7.90 sets out clear procedures to prevent the risk of a respondent's liberty interests being erroneously deprived. First, to even meet the threshold of filing a SAPO petition, the petitioner must allege nonconsensual sexual conduct or penetration, along with reasonable fear of future dangerous acts, by an affidavit under oath, stating specific facts and circumstances from which relief is sought. RCW 7.90.020(1). This is not a long, drawn out process. The court must order a hearing within 14 or 24 days upon receipt of the petition, depending on the type of service. RCW 7.90.050.

The respondent must be served at least five days before the hearing. RCW 7.90.050. The court shall issue an ex parte temporary order for protection where the petition alleges nonconsensual sexual conduct or penetration and there is good cause to grant the ex parte order. RCW 7.90.110(1). A respondent

has the opportunity to contest the ex parte temporary order. RCW 7.90.110(2); RCW 7.90.130(2)(e). If issued, the ex parte temporary order generally may not exceed 14 days, but it can be renewed if the hearing is continued. RCW 7.90.120(1)(a); RCW 7.90.121. There is no restriction on a respondent seeking additional time beyond the threshold five day notice period in order to prepare to respond to the petitioner's allegation.

At the hearing, both petitioner and respondent have an opportunity to be heard. Due to the nature of the special proceeding, documentary evidence may be substituted for live testimony. However, even when as fundamental a liberty interest as physical liberty is at stake, the United States Supreme Court found that substitutes for live testimony such as affidavits, depositions, and documentary evidence may be sufficient. *Aiken* at 5 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)).

After this hearing, if the petitioner has shown by a preponderance of the evidence that the respondent committed nonconsensual sexual conduct or penetration, the court is obligated to issue a protection order excluding the respondent from petitioner's dwelling, prohibiting the respondent from coming within

a certain distance from the petitioner, restraining the respondent from having any contact with the petitioner, and granting other relief as appropriate. See RCW 7.90.090. A full sexual assault protection order is limited to a maximum duration of two years, though it may be renewed upon petitioner's motion and proper notice to respondent. RCW 7.90.120(2); RCW 7.90.121. All these steps ensure that there is no erroneous deprivation of a respondent's liberty interest.

Roake followed the statutory requirements, filing a petition where she provided details of nonconsensual sexual conduct and penetration, along with acts during the assault that caused her reasonable fear of future dangerous acts. CP 1-5. An ex parte temporary order was issued, and Delman received notice of the hearing the very next day, well in advance of the minimum five days. CP 6-8, 12. There were two in-court agreed reissuances of the temporary order, the second one after Roake had already started testifying, allowing Delman further time to prepare for the full SAPO hearing. CP 14, 32. In fact, in response to the petition, Roake's pleadings and court-terminated testimony, Delman filed nearly 70 pages in responsive pleadings, but did not contest the allegation of nonconsensual sexual conduct. 33-70, 80-96. At the

last hearing, Delman requested the court dismiss before going forward with the evidentiary hearing. The court did. CP 97-99. Roake was never afforded a meaningful opportunity to be heard. The court did not make a determination if she had met her burden of proving a sexual assault by a preponderance standard. Delman's argument of a violation of his due process has no merit.

c. State's Interest in RCW 7.90

Under the third and final *Mathews* factor, the Court determines the government's interest in maintaining the procedure. Where sexual assault is greatly underreported and victims receive limited protection through the criminal process, the government has a compelling interest to ensure that victims have a civil remedy to seek protection. RCW 7.90.005; 2006 Wash. Sess. Laws, ch 138 § 1; 2007 Wash. Sess. Laws, ch 212 § 1). Lastly, as this Court has noted in *Aiken*, protection order proceedings are designed to provide emergency relief. Because many victims are unable to retain counsel, the system is designed for use by pro se litigants. *Aiken* at 5 (quoting *In re Marriage of Barone*, 100 Wn. App. 241, 247, 996 P.2d 654 (2000).) These government interests are compelling and outweigh Delman's interest. The State and

Roake's interest outweighing Delman's interest is not a violation of due process.

## **2. Criminal Standards Should Not be Imposed on Civil Special Proceedings**

Where Washington criminal law has developed from within common law, special proceedings have developed outside of common law. The court defined special proceedings as solely proceedings created or completely transformed by the legislature, including "actions unknown to common law (such as attachment, mandamus, or certiorari), as well as those where the legislature has exercised its police power and entirely changed the remedies available (such as the workers' compensation system)." *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 982, 216 P.3d 374 (2009). For example, in Washington actions under the Administrative Procedure Act, chapter 24.05 RCW are special proceedings, *King County Water Dist. No. 90 v. City of Renton*, 88 Wn.App. 214, 944 P.2d 1067 (1997); garnishment proceedings, *Snyder v. Cox*, 1 Wn.App. 457, 462 P.2d 573 (1969); and unlawful detainer actions, *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007); sexually violent predator actions, see *In re Detention of Williams*, 147 Wn.2d 476, 488, 55 P.3d 597 (2002),

as are will contests, *In re Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16 (2006).

Other states have adopted similar standards within their civil codes, typically defining an ordinary action as one based in common law and a special proceeding as any other action. See, e.g., *Tide Water Associated Oil Co. v. Superior Court*, 43 Cal.2d 815, 822, 279 P.2d 35 (1955); *Dow v. Lillie*, 26 N.D. 512, 520, 144 N.W. 1082 (1914). This standard protects the separation of powers because it preserves this court's abilities to set its own court rules for traditional actions but allows the legislature to set rules for newly created proceedings. *Putman v. Wenatchee Valley Med. Center*, P.S., 166 Wn.2d at 982.

Analogizing to the DVPO, reading Chapter 26.50 RCW as a whole and applying extrinsic aids, it is apparent that this is a special proceeding not governed by the civil rules. *Scheib v. Crosby*, 160 Wn.App. 345, 350, 249 P.3d 184 (2011). RCW 26.50 protection orders are special proceedings because the legislature established them as a distinct form of action. See *Spence v. Kaminski*, 103 Wn.App. 325, 12 P.3d 1030 (2000); *State v. Karas*, 108 Wn.App. 692, 700, 32 P.3d 1016 (2001) (citing *Spence*); *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185

(2006) (citing *Karas* ); and *Blackmon v. Blackmon*, 155 Wn.App. 715, 230 P.3d 233 (2010) (citing *Gourley*). Similar to the DVPO statute, the legislature and courts identified the SAPO as a special proceeding as well. ER 1101; Title 7. Where sexual assault remedies are not based in common law, but are developments only in recent decades based on increased recognition of rape no longer being a private matter but of public concern, it is important to recognize the classification of the SAPO as a special proceeding. The application of criminal law standards will diminish the very purpose of the statute, as described in its legislative intent.

### **3. Court of Appeals Decision Is Consistent with the Legislative Intent of RCW 7.90**

RCW 7.90, known as the Sexual Assault Protection Order statute has been available to victims in Washington only since 2006. There is almost no case law on the SAPO statute. Instead, often case law on RCW 26.50 is analogized and applied to the SAPO statute. The court's primary objective in interpreting a statute is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). For this determination, the “preamble or statement of

intent can be crucial to interpretation of a statute.” *Towle v. Dep't of Fish & Wildlife*, 94 Wn.App. 196, 207, 971 P.2d 591 (1999).

RCW 7.90.005 states that:

Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim. It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.

The purpose is clear. The legislative intent of the SAPO statute is based on three rationales: 1) that short of murder, sexual assault is the most heinous crime, inflicting humiliation, degradation and terror; 2) that most cases are not reported, fewer are prosecuted; and, 3) that the victim should be afforded a civil remedy to have the perpetrator stay away. RCW 7.90.005. The statute is specific to victims of sexual assault who do not have a qualifying domestic relationship with the respondent, as defined by RCW 26.50.010. *Id.*

The Legislature clearly sought to make the SAPO statute fill a crucial gap between the existing protection order statutes. It is also clear from the legislative history that the SAPO statute was created as a remedy for sexual assault victims for the following reasons. First, it was in response to the domestic violence protection order statute not protecting victims of sexual assault who did not have a qualifying domestic relationship with their assailant. *See generally* 2006 Wash. Sess. Laws, ch 138 § 1; 2007 Wash. Sess. Laws, ch 212 § 1. Second, anti-harassment orders were responsive to a pattern of conduct, whereas often times a sexual assault may occur only once. *See* 2006 Wash. Sess. Laws, ch 138 § 1. Lastly, a protective remedy was necessary for victims who chose not to report their sexual assault, where investigations take a lengthy time, or where criminal charges are not filed, leaving the victim without the protection of a criminal no-contact order. *Id.* Laws of 2006, ch 138 § 1.

Sexual assaults take a toll mentally and physically on the victim often in ways that are unique to the sexual nature of the assault. *See e.g.*, Marjorie R. Sable PhD, MSW, Fran Danis PhD, MSW, Denise L. Mauzy MSW, and Sarah K. Gallagher MSW, *Barriers to Reporting Sexual Assault for Women and Men:*

*Perspectives of College Students*, Journal Of American College Health, 55 (3), 157-162, 2006. As the legislature's declaration indicates, one of every six adult women is a victim of a sexual assault in their lifetime. Perpetrators of sexual violence are less likely to go to jail or prison than any other criminals. Out of every 1,000 rapes 7 will face criminal charges and 6 will be incarcerated. See generally, Rape, Abuse & Incest National Network (RAINN), *The Criminal Justice System: Statistics*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited on January 14, 2017).

It is this very limitation of the criminal justice system that makes it critical that the procedures of the civil SAPO not mimic standards developed through the criminal process, instead allowing for an accessible remedy and due process for a population of victims who are largely pro se litigants.

#### **4. Delman's Interpretation of RCW 7.90 is Erroneous**

Statutory interpretation begins with the plain meaning of the statute. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). In order to interpret a statute, each of its provisions "should be read in relation to the other provisions, and the statute should be construed as a whole." *Weyerhaeuser Co. v.*

*Tri*, 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (citing *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988)).

Additionally, statutes must be interpreted so that all the language used is given effect, with no portion rendered meaningless or superfluous. *City of Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).

The sexual assault protection order statute first passed in 2006 unanimously by the legislature of Washington. *See generally*, 2006 Wash. Sess. Law. 1-31. The original bill contained no language on reasonable fear. Upon review, the Senate included amended language related to the reasonable fear of future dangerous acts. RCW 7.90.020; 2006 Wash. Sess. Laws, ch 138 § 1. The amended language was specifically required for the affidavit as a part of the petition, but no requirement was included for the court to make a finding of reasonable fear for the issuance of a full order of protection. The legislature clearly omitted language related to reasonable fear as a part of the finding by a preponderance requirement. RCW 7.90.090. Here, reasonable fear of future dangerous acts is only required for the petition, not for the final order.

Furthermore, under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Omissions are deemed to be exclusions. *State v. Williams*, 29 Wn.App. 86, 91, 627 P.2d 581 (1981). The legislature has expressly provided that a petitioner include a statement about reasonable fear of future dangerous acts in the affidavit of a sexual assault protection order. In the absence of such statutory language for the final finding of a sexual assault, it can be inferred that the legislature did not intend for the petitioner to continue to have to prove reasonable fear for a final order. The Court of Appeals interpreted the statute correctly, per the legislative intent.

Finally, requiring a finding or even trying to define “reasonable fear” for a full order would limit who could file and qualify for protection under the SAPO statute, creating only another gap in the civil process. For example, the statute recognizes that alcohol and intoxicants may be a factor in the occurrence of a sexual assault. RCW 7.90.090(4)(a); RCW 7.90.090(4)(b). Where a petitioner may have memory loss or loss of consciousness due to intoxication leading to an inability to articulate specific statements

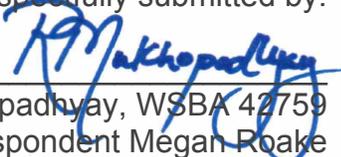
or acts at the time of the sexual assault that would cause reasonable fear of future dangerous acts, the petitioner would never be able to receive a full protection order. Or a petitioner with development delays or a disability that prevents them from expressing fear could not qualify for full protection. Defining reasonable fear, where victims may experience different effects of a sexual assault (i.e. feeling completely numb or experiencing disbelief) would also limit who can receive full protection despite having experienced a sexual assault. The Court of Appeals appropriately reversed and remanded this case. This Court should affirm.

### **C. CONCLUSION**

The Court of Appeals appropriately exercised its authority in reversing and remanding the case at hand. Ms. Roake asks the Court to affirm the decision and allow on remand for her to seek the protection she initially filed for.

Dated on February 6, 2017.

Respectfully submitted by:

  
Riddhi Mukhopadhyay, WSBA 42759  
Attorney for Respondent Megan Roake

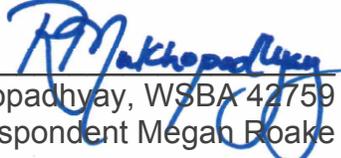
## CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served one copy of the foregoing document by electronic mail to:

1. The Clerk of the Supreme Court of Washington at [Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov);
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Respectfully submitted by:

  
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