

NO. 93645-5

SUPREME COURT OF THE STATE OF WASHINGTON

ESMERALDA RODRIGUEZ,

Appellant,

v.

LUIS DANIEL ZAVALA,

Respondent.

**AMICUS CURIAE BRIEF OF THE
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

The Domestic Violence Prevention Act enables courts to protect a victim's child from perpetrators of domestic violence. The Act is clear that the child need not be a victim of domestic violence in order to receive this protection. To hold otherwise would put children in Washington State at great risk—they would need to become victims of domestic violence before receiving protection. This outcome is contrary to the plain language of the statute, the Legislature's intent, the dynamics of domestic violence, and the best interests of children and families. Despite this, the trial court here found the mother's reports of domestic violence credible but refused to enter a protection order for two-year-old L.Z. The Department of Social and Health Services asks this Court to reverse and reaffirm the protections for children in the plain language of the Domestic Violence Prevention Act.

Parents should have the ability to seek protection orders for their children before their children become victims of domestic violence. And trial courts should have the discretion to include children in protection orders. Without this option, parents' ability to be protective caregivers will be compromised, and children may be exposed to dangerous situations.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted by the Washington State Department of Social and Health Services (Department). The Department is the administrative agency with responsibility for investigating allegations of child abuse and neglect, offering child welfare services to families, and when necessary, bringing child welfare situations to the attention of the juvenile court. RCW 74.13.031. In such situations, the juvenile court will find a child dependent if the child is abused or neglected or has no parent capable of adequately caring for the child such that the child is in circumstances which constitute danger of substantial damage to the child's psychological or physical development. RCW 13.34.030(6), .110. In dependency proceedings, the Department is responsible for providing remedial services to parents in order to safely reunify families. RCW 13.34.025.

Therefore, the Department has a strong interest in ensuring that parents have an ability to protect their children from exposure to domestic violence by obtaining a domestic violence protection order when appropriate. One of the Department's duties is to protect children when they are unsafe, and a parent's ability to obtain a protection order increases a parent's ability to protect a child. A parent's ability or inability to protect a child from domestic violence may affect whether the

Department's intervention is necessary and if the child is removed, whether a child can be safely reunited with a parent.

III. ISSUES ADDRESSED BY AMICUS CURIAE

The Appellant has well addressed whether a trial court must require proof of the domestic violence victim's child's fear of imminent physical harm before including the child on the domestic violence protection order. Therefore, the Department has focused on the following issues:

1. Whether a protection order may include the child of the victim of domestic violence without proof of the child's fear of imminent physical harm.
2. If so, whether it was an abuse of discretion for the trial court to deny inclusion of the victim's child on the protection order after finding the victim—who reported the respondent repeatedly physically assaulted her, threatened to kidnap the child, and threatened to kill her and the child—credible.

IV. STATEMENT OF THE CASE

The Department adopts the statement of the case from the Court of Appeals unpublished opinion, *Esmeralda Rodriguez v. Luis Daniel Zavala*, 195 Wn. App. 1047 (2016).

V. ARGUMENT

The Appellant has already articulated why two-year-old L.Z. was entitled to a protection order as a victim of domestic violence, based on his

mother's credible "fear of imminent physical harm, bodily injury or assault" on his behalf. The Department will not repeat those arguments here.

Even if this Court determines that L.Z. was not himself a "victim of domestic violence" as contemplated under RCW 26.50.020(1)(a), its analysis of whether the trial court should have issued an order protecting L.Z. should not end there. If the trial court enters a protection order for a victim of domestic violence, the court has discretion to enter a protection order for the victim's children or members of the victim's household, even if the court has not determined the children or household members are themselves victims of domestic violence. RCW 26.50.060(1)(f), (h). Here, the trial court abused its discretion by refusing to issue a protection order for two-year-old L.Z. after finding his mother was a victim of domestic violence and was credible, and the mother had reported that the respondent repeatedly physically assaulted her, threatened to kidnap the child, and threatened to kill both her and the child.

If this Court affirms the Court of Appeals by holding that the victim's child must possess "fear of imminent physical harm, bodily injury or assault" before the trial court may enter an order protecting the child, then a parent's ability to protect his or her children from exposure to domestic violence will be greatly limited—particularly for the most

vulnerable children who are pre-verbal or have a disability or impairment preventing such expression of fear. This result is contrary to the statute's plain language, could not be the Legislature's intent, and would be harmful to the children and families of Washington State.

A. Children Need Not Be Victims of Domestic Violence To Be Protected Under the Domestic Violence Prevention Act

Washington State's Domestic Violence Prevention Act, chapter 26.50 RCW, aims to give victims "easy, quick, and effective access to the court system" Laws of 1992, ch. 111, § 1. It explicitly gives parents the ability to seek protection for their children. The Act provides:

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

RCW 26.50.020(1)(a). "Family or household members" includes children, stepchildren, and grandchildren. RCW 26.50.010(6). Therefore, a parent may seek relief on behalf of his or her minor children.

After proper notice and a hearing, the trial court has discretion to provide any of the forms of relief in RCW 26.50.060(1). These forms of

relief include protections for a child, even if the child was not a victim of domestic violence. For example, the court may:

- “Order other relief as it deems necessary for the protection of the petitioner *and other family or household members sought to be protected*” RCW 26.50.060(1)(f) (emphasis added).
- “Restrain the respondent from having any contact with the victim of domestic violence *or the victim’s children* or members of the victim’s household.” RCW 26.50.060(1)(h) (emphasis added).
- “Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, *the victim’s children*, or members of the victim’s household.” RCW 26.50.060(1)(i) (emphasis added).
- “Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or *from the day care or school of a child.*” RCW 26.50.060(1)(b) (emphasis added).

The plain language of these options for relief make it clear that a child need not be a victim of domestic violence in order to receive protection under the Act. Statutory interpretation is reviewed *de novo*. *In re Dependency of D.L.B.*, 186 Wn.2d 103, 116, 376 P.3d 1099 (2016). If the language of the statute is unambiguous, then the reviewing court should rely solely on the statute’s language. *State v. Roggenkamp*,

153 Wn.2d 614, 621, 106 P.3d 196 (2005). “A statute is ambiguous if its plain language is susceptible to more than one reasonable interpretation.” *In re D.L.B.*, 186 Wn.2d at 117.

A “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.” *Roggenkamp*, 153 Wn.2d at 625. Likewise, “[w]hen the same word or words are used in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning.” *Medcalf v. Dep’t of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Roggenkamp*, 153 Wn.2d at 624 (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

Here, the options for relief in RCW 26.50.060(1) are clear and unambiguous. All the options that address protecting a child include the child as an optional protected party, in addition to the “petitioner” or “victim.” See RCW 26.50.060(1)(b), (f)-(i).¹ None of these options are

¹ For example:

RCW 26.50.060(1)(b): “Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child.” (emphasis added).

RCW 26.50.060(1)(f): “Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected” (emphasis added). See RCW 26.50.010(6) (including children and stepchildren in the definition of “family or household members”).

predicated upon finding the child is a victim of domestic violence. *See* RCW 26.50.060(1)(b), (f)-(i).

Interpreting RCW 26.50.060(1) as only applying protections to children who are victims of domestic violence would run afoul of basic tenets of statutory interpretation. It would render the portions of the statute differentiating the victim from the child meaningless, and it would disregard the Legislature's use of contrasting terminology when distinguishing the child from the victim. *See Roggenkamp*, 153 Wn.2d at 624 (reiterating that statutes should be construed so that all language is given effect and no part is superfluous). Furthermore, such an interpretation would lead to an absurd result because it would require that a child become a victim of domestic violence before being eligible for protection. *See State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009) (a reading of a statute that produces absurd results should be avoided).

The Legislature's decision to craft the Act so that children need not be victims of domestic violence before being protected demonstrates an understanding of the dynamics of domestic violence.

RCW 26.50.060(1)(h): "Restrain the respondent from having any contact with the victim of domestic violence or the victim's children or members of the victim's household." (emphasis added).

RCW 26.50.060(1)(i): "Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household." (emphasis added).

In order for victims to have meaningful protection orders, they must have an ability to seek protection for their children and courts must have authority to grant these requests, even if the children have not yet been victims of domestic violence. “[P]erpetrators actively seek opportunities to continue to exercise power and control over their victims using issues of parenting, custody, and visitation.” Anne Ganley & Margaret Hobart, *Washington State Department of Social and Health Services Children’s Administration Social Worker’s Practice Guide to Domestic Violence* 10 (Maureen Kelly ed.) (Rev. January 2016) (“*DSHS Domestic Violence Practice Guide*”).² If victims do not have an ability to seek protections for their children or courts do not have authority to restrict perpetrators’ contact with their children, perpetrators are able to use children to gain access to victims and continue exerting control. This undermines the efficacy of the victim’s protection order. Furthermore, without an ability to gain protection for their children, victims may be hesitant to seek protection for themselves since “[t]wo of the major reasons reported by [domestic violence] victims both for staying with and for leaving abusive partners are the safety and welfare of their children.” *Id.*

² Available at:
<https://www.dshs.wa.gov/sites/default/files/SESA/publications/documents/22-1314.pdf>

Children may also be in danger even if they do not possess a “fear of imminent physical harm, bodily injury or assault.” *See* RCW 26.50.010(3)(a) (definition of domestic violence). Children’s safety and adult victim’s safety are directly linked. *DSHS Domestic Violence Practice Guide* at 56. Children may be harmed, intentionally or unintentionally, when a perpetrator uses weapons or violence against an adult victim. Additionally, “[r]esearch indicates even when [domestic violence] victims separate from [domestic violence] perpetrators, their children may be exposed to equal amounts of threats and physical violence as children of parents still living together, *unless precautions are taken to ensure both the children’s and the [domestic violence] victims’ safety.*” *Id.* at 10 (emphasis added).

Although young or developmentally delayed children may not appreciate the risk of imminent harm they are exposed to under these circumstances, and therefore may not have the requisite “fear of imminent physical harm, bodily injury or assault,” they are no safer than a child who is cognizant of such threats. In fact, a child’s inability to identify and understand the threats presented by domestic violence render the child more vulnerable and in need of protection. Requiring a child to possess a “fear of imminent physical harm, bodily injury or assault” before protecting him or her unnecessarily places the child’s safety in jeopardy.

For children who cannot communicate fear due to age or development, this requirement may result in children actually experiencing “[p]hysical harm, bodily injury, or assault” before receiving protection under the Act. *See* RCW 26.50.010(3)(a) (definition of domestic violence).

The Legislature’s decision to structure the Act so that children need not be victims of domestic violence before being protected recognizes these truths about domestic violence. This Court should uphold the plain meaning of RCW 26.50.060(1) and safeguard the safety of children and victims in Washington State.

B. The Trial Court Abused Its Discretion By Refusing to Enter a Protection Order for L.Z.

The trial court has discretion when determining whether to issue a protection order. *Juarez v. Juarez*, 195 Wn. App. 880, 886, 382 P.3d 13 (2016). The court’s decision to grant or deny a protection order is reviewed for an abuse of discretion. *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006); *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). An abuse of discretion occurs when no reasonable person would have decided the issue as the trial court did. *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977). Here, in light of the mother’s report of events and the trial court’s credibility findings, it

was an abuse of discretion for the trial court to deny the mother's request for a protection order for two-year-old L.Z.

In her petition for protection, Ms. Rodriguez stated that Mr. Zavala had threatened and assaulted her before, averring under oath that he:

- “[G]ot on top of me when I was laying on the bed and began to put a pillow over my head preventing me from breathing.” *Rodriguez v. Zavala*, No. 33649-2-III, slip op. at 3 (Aug. 18, 2016).
- “[T]hreatened he is going to [do] something to my daughter so terrible it [is] going to make me want to kill myself.” *Id.*
- “[T]hreaten[ed] to kidnap our so[n] and I would never see him.” *Id.*
- “[W]ill call numerous times and if I don’t answer he will show up to see what I am doing.” *Id.*
- “[T]old me that once he is done with us (kill us) he will then kill himself.” *Id.* at 3-4.
- “[T]ook a knife and told me [he] would cut me in tiny pieces.” *Id.* at 4.

In addition to the history of violence and threats against Ms. Rodriguez and her children, Ms. Rodriguez detailed the particular event that precipitated her request for a protection order. A few weeks before the hearing, at about 2:00 a.m. Mr. Zavala appeared at and forcibly entered her home. *Id.* at 2. He wanted to talk to two year-old L.Z. *Id.* He was drunk, sleep deprived, or both. *Id.* She ordered him to leave and

threatened to call the police. *Id.* Mr. Zavala cornered her, choked her, and threatened to end what he had started. *Id.* Ms. Rodriguez yelled for a daughter to call 911, and in fear for her life, stabbed Mr. Zavala in the stomach. *Id.*

Mr. Zavala admitted he entered Ms. Rodriguez's home despite a previously existing restraining order at that time but denied injuring her. *Id.* at 4. He accused her of being the aggressor, stating she struck him after seeing kiss marks on his neck. *Id.* The trial court found Ms. Rodriguez's testimony more credible than Mr. Zavala's. *Id.* at 5.

In light of this credibility determination, it was an abuse of discretion for the trial court not to protect L.Z. under the options for relief available in RCW 26.50.060(1). No reasonable person could have concluded that L.Z. should not be included on the protection order where Mr. Zavala (1) violated a protection order by forcibly entering the Rodriguez house while L.Z. was there, (2) threatened to kidnap two-year-old L.Z., (3) threatened to kill Ms. Rodriguez and her children, and then himself, (4) choked Ms. Rodriguez and threatened to finish what he started, and (5) caused Ms. Rodriguez to stab him in the stomach to fight

for her life.³ Accordingly, this Court should find the trial court abused its discretion when declining to enter a protection order for L.Z.

C. Parents Need the Ability to Protect Their Children From Exposure to Domestic Violence In Order to Be Capable of Providing Adequate Care

The Legislature has recognized that “[d]omestic violence is a problem of immense proportions affecting individuals as well as communities.” Laws of 1992, ch. 111, § 1. It has “long been recognized as being at the core of other major social problems” including child abuse. *Id.* “[Domestic violence] perpetrators are much more likely than non-batterers to abuse their children physically” and are up to four times more likely to abuse their children sexually. *DSHS Domestic Violence Practice Guide* at 8. Domestic violence perpetrators may harm children in a variety of ways, including physical harm, endangerment through neglect, psychological terror, coercion to participate in the abuse, retaliation, and creation of role models that perpetuate violence. *Id.*

Children have the rights of basic nurture, physical and mental health, and safety. *See* RCW 13.34.020. Part of a parent’s role is meeting

³ Notably, Mr. Zavala’s behaviors are listed in the criteria Department social workers consider in determining high risk from domestic violence and need for immediate response. *DSHS Domestic Violence Practice Guide* at 58 (criteria including “DV perpetrator’s threats to kill or serious harm self or others”; “DV perpetrator’s threats or attempts to abduct or murder a child”; “DV perpetrator’s refusal to honor limits on contact with an adult DV victim and/or children (e.g., DV perpetrator’s refusal to obey no-contact orders)”).

their child's needs in these areas. *See In re K.M.M.*, 186 Wn.2d 466, 494, 379 P.3d 75 (2016) (to be fit, a parent must be able to meet their child's basic needs). In order to do so, parents must have an ability to protect their children from domestic violence, even if the child has not yet become a victim of domestic violence under the definition in RCW 26.50.010(3).

Being a victim of domestic violence is not a parental deficiency. *See In re D.L.B.*, 186 Wn.2d at 124. But capable parenting includes both the willingness and ability to provide adequate care so that a child is not "in circumstances which constitute a danger of substantial damage to the child's psychological or physical development." *See* RCW 13.34.030(6)(c) (one basis to find a child dependent). Therefore, in order to be capable caregivers, parents need an ability to seek protection for their children from domestic violence perpetrators. The Domestic Violence Prevention Act provides this avenue in RCW 26.50.060(1).

Were this Court to find that a child must be a victim of domestic violence before he could be protected under the Act, then other parents may be in the same position as Ms. Rodriguez, who through no fault of her own could not protect her child from Mr. Zavala. In such circumstances, the child may not have a parent "capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development."

RCW 13.34.030(6)(c) (one basis to find a child dependent). Thus, in order to protect the child, the Department may be required to intervene and initiate a dependency proceeding under chapter 13.34 RCW. In order for a dependency to be dismissed, a victim parent who is unable to obtain a protection order may need to pursue a contested parenting plan. Otherwise, the child would still remain vulnerable to the domestic violence perpetrator and the dependency could not be safely dismissed. The Department respectfully submits that parents and trial courts should instead have the ability to secure necessary protection for the children of domestic violence victims.

The Legislature crafted the Domestic Violence Prevention Act to empower parents to seek protection for their children and be the capable caregivers their children deserve. This Court should find that the Act protects children who have not yet become victims of domestic violence.

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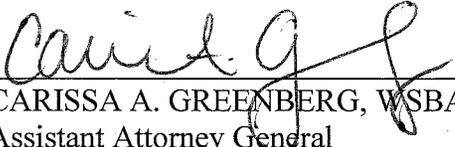
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VI. CONCLUSION

The Domestic Violence Prevention Act is clear that children need not be victims of domestic violence in order to be afforded protections under the Act. The trial court abused its discretion when it found the mother's reports of domestic violence credible but refused to enter a protection order for two year-old L.Z. This Court should not hold that children must first be victims of domestic violence before protection orders can be entered. Such a holding is contrary to the Act and would eliminate a necessary and essential tool for parents in Washington State to be capable and protective caregivers for their children.

RESPECTFULLY SUBMITTED this 31st day of March, 2017.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

I certify that on April 03, 2017, I served a true and correct copy of this **AMICUS CURIAE BRIEF OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES** and this **CERTIFICATE OF SERVICE** for delivery to the persons indicated below as follows:

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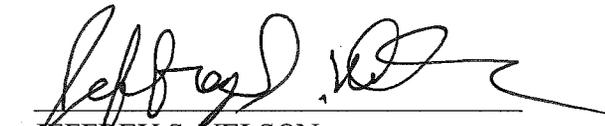
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 3rd day of April 2017, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant