

Supreme Court No. 93645-5

Court of Appeals No. 33649-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

ESMERALDA RODRIGUEZ

Appellant

v.

LUIS DANIEL ZAVALA

Respondent

ANSWER TO BRIEF OF AMICUS CURIAE

Jacquelyn High-Edward
WSBA #37065
Co-Counsel for Appellant

Northwest Justice Project
1702 W. Broadway
Spokane, WA 99201
(509) 324-9128

Karla Carlisle
WSBA #40107
Co-Counsel for Appellant

Northwest Justice Project
1310 N. 5th Ave., Ste. B
Pasco, WA 99301
(509) 547-2760

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I. INTRODUCTION

Incidents of domestic violence involving children are not only heartbreaking; they are harmful and damaging to children. Amicus American Civil Liberties Union (ACLU) of Washington shares with the Northwest Justice Project and Esmeralda Rodriguez the concern that efforts to protect children from domestic violence are done without infringing on constitutional rights – those of the parent and the child. Respectfully, the ACLU’s amicus brief misses the mark, because it misconstrues both Ms. Rodriguez’s argument and the nature of the proceedings at issue in this case. Importantly, as reflected in Ms. Rodriguez’s briefing to the Court of Appeals as well as briefing to this Court, Ms. Rodriguez never asks this Court to automatically prohibit contact between a parent and child in all cases where a child is exposed to domestic violence in the home. Instead, Ms. Rodriguez asks this Court to construe the Domestic Violence Prevention Act (DVPA) to provide the protection from future abuse for families that the Legislature intended, consistent with the constitutional principles and with the language of the statute itself.

II. STATEMENT OF THE CASE

Ms. Rodriguez relies upon and incorporates the Statement of Fact in her Petition for Discretionary Review.

III. ARGUMENT

The ACLU of Washington's assertion that this Court should not prohibit contact between a parent and child without individualized findings and without a showing of actual risk of harm to the child is rooted in three fundamental misunderstandings about Ms. Rodriguez's argument: (1) the nature of a Domestic Violence Protection Order (DVPO) proceeding; (2) the process authorized by the DVPA; and, (3) the difference between a civil domestic violence protection order and a criminal "no contact" order. Ms. Rodriguez is not and has never asked this Court to make a blanket rule that contact between an abuser and his or her children be automatically prohibited when a child has been exposed to domestic violence in the home. In addition, the DVPA's remedies and procedure require individualized findings, and balances the constitutional rights of parents to make decisions regarding the care and custody of their children, with the need to protect families from domestic violence and abuse. Finally, a DVPO is inherently different than a criminal no contact order in the manner in which it is issued, the provisions available, the duration, and how it can be modified.

A. MS. RODRIGUEZ HAS NEVER ASKED ANY COURT TO ISSUE A BLANKET RULE THAT AUTOMATICALLY PROHIBITS CONTACT BETWEEN AN ABUSIVE PARENT AND THEIR CHILD WHEN DOMESTIC VIOLENCE OCCURS IN THE HOME.

Ms. Rodriguez has *never* advocated for a blanket rule that would automatically prohibit contact between a parent and child if domestic violence occurs in the home. Ms. Rodriguez is urging the Court to find that exposure to, and not just witnessing, domestic violence in the home, is mentally and physically detrimental to children and does, in fact, constitute domestic violence against the child. Such a determination under the DVPA does not result in an automatic prohibition on contact between the abusive parent and the child. In her Opening Brief at the Court of Appeals, Ms. Rodriguez urged the court to enter mandatory residential provisions stating:

Residential provisions in a DVPO ensure victims that if they leave their abuser, their children will be protected and cannot be used as tools for continued abuse. For both parties and children, a visitation schedule provides structure, consistency, and safety. Residential provisions are essential in meeting the legislative intent of the DVPA: a DVPO prevents domestic violence by making it safer for victims to leave their abusers, protect children and provide the abusive parent a safe and meaningful way to have ongoing contact with their children

Ms. Rodriguez's Opening Brief, pp. 19-20 (filed 11/6/15).

There is nothing in her briefing to this Court or to the Court of Appeals that suggests she is arguing for a blanket rule prohibiting contact. The ACLU's assertion of such is misleading and factually inaccurate. Ms. Rodriguez asks this Court to find the trial court abused its discretion when it refused to include any provisions for L.Z., particularly in light of the facts of this case and Ms. Rodriguez's credible testimony.

B. THE DVPA CONTEMPLATES CONTACT BETWEEN AN ABUSIVE PARENT AND CHILD, HAS AMPLE DUE PROCESS PROTECTIONS FOR PARENTS, AND DOES NOT CIRCUMVENT THE PARENTING PLAN PROCESS UNDER RCW 26.09.

As early as 1979, the Legislature recognized the individual and community harm domestic violence causes. *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 208-209, 193 P.3d 128 (2008). The DVPA was enacted to assist victims leave their abusers, end the violence, and protect their children. *Id.*, citing Laws of 1991, Ch. 301, § 1. The civil protection order allowed under the DVPA, is a "valuable tool to increase safety for victims and to hold batterers accountable" and is intended to provide "easy, quick and effective access to the court system." *Danny*, 165 Wn.2d at 209, citing Laws of 1992, Ch. 111 §1; *In re the Marriage of Stewart*, 133 Wn. App. 545, 552, 137 P.3d 25 (2006), *rev. denied*, 160 Wn.2d 1011 (2007).

The argument set forth by amicus ACLU of Washington directly contradicts this intent by creating barriers to protecting victims and children from abuse. While Ms. Rodriguez and counsel join the ACLU of Washington in its concern for parental rights, a basic and primary tenant of constitutional law is that these rights are not absolute and are always tempered by the impact that exercising those rights can have on others, especially children. The DVPA carefully balances these fundamental rights with the paramount need to protect children from abuse.

1. The DVPA Contemplates Contact Between an Abusive Parent and a Child.

The DVPA contemplates contact between an abusive parent and a child. A child in common between parties to a DVPO petition may be included on a DVPO in two ways. RCW 26.50.020(1)(a); RCW 26.50.060(1)(d). First, the child may be a protected party where the respondent is prohibited from committing acts of domestic violence against the child as well as order a variety of other protections. RCW 26.50.020(1)(a); RCW 26.50.060(1). The entry of such remedies is discretionary and is based on the court's determination of their necessity. RCW 26.50.060(1).

Second, whether the child is included as a protected party or not, the court may enter residential provisions, consistent with RCW 26.09, to ensure continued contact between the child and both parents. RCW 26.50.060(1)(d). Any residential provisions entered must comply with RCW 26.09 and are based on the court's determination of what is necessary in each particular case. RCW 26.50.060(1)(d); RCW 26.09.191(2)(m)(i).

Inclusion of a child in common, either as a protected party or with residential provisions, is essential to the intent of the DVPA and consistent with the structure of the DVPA. *Danny*, 165 Wn.2d at 209. The DVPA was passed to "encourage domestic violence victims to end abuse, leave their abusers, [and] *protect their children*." *Id.* at 210, 213 (emphasis added). After separation, as in Ms. Rodriguez's case, children are often the only vehicle remaining to control and terrorize the victim. WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES, § 2-32 (2006)¹. One abusive tactic employed by abusers is "holding children hostage

¹ The ACLU's reliance on the Domestic Violence Manual for the proposition that individualized facts must be made prior to prohibiting contact is misguided. The Domestic Violence Manual is not a manual solely for DVPA proceedings. The manual instructs judges on how to deal with domestic violence in all legal proceedings. In addition, the DVPA requires individualized findings before a decision prohibiting contact can be entered. RCW 26.50.020; RCW 26.50.060.

or abducting children in efforts to punish the abused party or to gain the abused party's compliance." WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES, § 2-37.

"The protection order proceeding is intended to be a rapid and efficient process" and since its enactment, the Legislature has amended the statute to improve the process so victims have "easy, quick and effective access to the court system." *Danny*, 165 Wn.2d at 209, *citing* Laws of 1992, Ch. 111 § 1; *Stewart*, 133 Wn. App. at 552 (2006). The DVPA stabilizes families in crisis by ending the abuse, protecting victims, and providing safe and stable contact between the abusive parent and child.

In this case, the trial court's error in failing to include L.Z. as a protected party in the order, and make residential/visitation arrangements for the child left both Mr. Zavala and Ms. Rodriguez without important protections for themselves and the child. If the court believed that continued contact between L.Z. and Mr. Zavala was warranted, it should have entered residential provisions. Instead, it denied all relief and effectively left Mr. Zavala and Ms. Rodriguez without any remedy, absent filing for a parenting plan – an action that was not necessarily appropriate or accessible for either

party. Such a decision was an abuse of discretion because it denies both parties effective remedies.

2. Due Process does not Mandate that a Court Make a Finding of Actual Risk of Future Harm Before Entering a DVPO that Prohibits Contact Between a Parent and Child Where the DVPA has Ample Due Process Protections and Where Any Deprivation is Temporary in Nature.

Without citing any authority, the ACLU urges this Court to adopt a standard requiring courts to find an “actual risk of future harm” before entering a DVPO prohibiting contact between a parent and child under the DVPA. Amicus of ACLU, pp. 4, 5, 9. Such a standard is in direct conflict with the plain language of the DVPA, requires speculation, and prescient predictions of future behavior. The statute requires that a petition for a DVPO allege that domestic violence *exists*, not that there is a likelihood it will exist at some future time. RCW 26.50.030(1). Due process does not require proof of future risk where the statute provides ample process to guard against any risk of erroneous deprivation, particularly where the deprivation is temporary.

In a DVPA proceeding, the petitioner must show that they are a victim of domestic violence by the respondent. RCW 26.50.030. The petitioner may petition on behalf of themselves or on behalf of

minor family or household members. RCW 26.50.020(1)(a). Domestic violence is defined, in part, as “physical injury, bodily harm, or assault or the infliction of fear of imminent physical injury, bodily harm, or assault. RCW 26.50.010(3)(a). Once this is established, the court may enter a myriad of remedies including protection for the parties’ minor children. RCW 26.50.060(1). The court may determine, based on the record, that contact between the abusive parent and the child should be prohibited. RCW 26.50.060(2). Where such a remedy is entered, the order may only last for one year (subject to renewal) and is always subject to a dissolution or parenting plan action, under RCW 26.09 or RCW 26.26². RCW 26.50.060(2); *Aiken v. Aiken*, 187 Wn.2d 491, 502, 387 P.3d 680 (2017). The plain language of the statute does not require a showing of “actual risk of future harm” before such a remedy can be entered. RCW 26.50 *et seq.*

Due process also does not require the added element of risk of future harm. This Court recently affirmed that the DVPA complies with due process protections for parents where their fundamental right to the care, custody, and control of their children are at stake.

² RCW 26.26 determines parentage for unmarried parents. It refers the court to RCW 26.09 for the standard for entering parenting plans. RCW 26.26.130(7).

Aiken, 187 Wn.2d at 498, 501; *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006). The DVPA provides procedural protections such as: (1) a petition and affidavit signed under oath alleging specific facts of domestic violence; (2) a hearing within 14-24 days; (3) personal service with five court days' notice; (4) a hearing before a judicial officer where the parties may testify; (5) a limitation to one year where the order prohibits contact with a minor child; (6) a written order; (7) the ability to file a motion to reconsider or revise the ruling; and (8) the ability to appeal the decision. RCW 26.50 *et seq.*; *Aiken*, 187 Wn.2d at 498, 501; *Gourley*, 158 Wn.2d at 468-469. In addition, at the discretion of the court, the respondent may be allowed discovery including depositions and compelling testimony. *Scheib v. Crosby*, 160 Wn. App. 345, 352-353, 249 P.3d 184 (2011).

There is no doubt that a parent's right to the care, custody, and control of their child is a fundamental constitutional right. *Aiken*, 187 Wn.2d at 502. It is also undisputed that the State has an obligation to protect children and prevent domestic violence. *Id.* A finding of "actual risk of future harm" is not required to ensure the proper balance between these competing interests given the extensive procedural protections in the DVPA and the temporary nature that any deprivation has on the parent's right.

3. The DVPA does not Circumvent the Parenting Plan Process Under RCW 26.09.

The ACLU incorrectly states the DVPA circumvents the parenting plan process. It does not. The ACLU's position requests this Court ignore the plain language of the statute and case law.

Relief under the DVPA shall not be denied or delayed on the grounds that the relief is available in another action. RCW 26.50.025(2). The plain language of the statute was recently affirmed in decisions by both Divisions I and III of the Court of Appeals. *Juarez v. Juarez*, 195 Wn. App. 880, 382 P.3d 13 (2016); *Maldonado v. Maldonado*, 197 Wn. App. 779, 391 P.3d 546, (2017). In *Juarez*, the Court of Appeals held that entering a short-term protection order, because of the availability of other relief or the pendency of another court proceeding, runs contrary to the DVPA. *Juarez*, 195 Wn. App. at 882. In *Maldonado*, the court found that a one-year order is only a temporary interruption of contact, not a *de facto* modification of an existing parenting plan. *Maldonado*, 197 Wn. App. at 554; *Stewart*, 133 Wn. App. at 554-555.

Most importantly, provisions in a DVPO are always subject to parenting plans entered under RCW 26.09. *Aiken*, 187 Wn.2d at 502. As such, any restriction placed on contact between a parent

and child through a DVPO can be changed, almost immediately, through initiating a parenting plan action. RCW 26.09.194; RCW 26.09.197. In most counties, a parent can have a hearing on a temporary parenting plan in five to 20 days of service.³ CR 6(d).

C. A CIVIL DOMESTIC VIOLENCE PROTECTION ORDER AND CRIMINAL NO-CONTACT ORDER ARE FUNDAMENTALLY DIFFERENT.

A civil DVPO and a criminal no-contact order issued under RCW 10.99 are profoundly different. While both prohibit contact between people, the manner under which they are issued, remedies available, duration, and the ability to modify them are substantially different.

A criminal no-contact order is issued within the context of a criminal proceeding – a proceeding initiated by the State. RCW 10.99. A prosecuting attorney may request a pre-trial criminal no-contact order to protect crime victims where there is probable cause to charge for the underlying crime. RCW 10.99.045. The crime victim has no control over whether the criminal no-contact order is issued or the restrictions imposed. RCW 10.99.040.

³ The timing of a temporary order hearing depends on the local rules as well as whether the case is an initial parenting plan case or a modification. CR 6(d).

Post-conviction criminal no-contact orders are issued by the court as a part of sentencing. RCW 9.94A.505(8). Such a criminal no-contact order may last as long as the overall sentence. RCW 9.94A.505(8); *State v. Armendariz*, 160 Wn.2d 106, 118-120, 156 P.3d 201 (2007). Again, crime victims rarely have a voice in whether the order is entered, its duration, or the provisions of the orders⁴. RCW 9.94A.505(8).

In criminal sentencing where the court imposes a no-contact order between a parent and minor child, the court must consider if the restriction is “reasonably necessary to accomplish the essential needs of the state” to protect the child. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). If necessary, then the restrictions must be narrowly tailored in terms of scope and duration to ensure that a parent’s right to the care, custody and control of their child is not unnecessarily infringed upon. *State v. Torres*, No. 33648-4-III/33744-8-III, slip. op. at 6 (Div. III, 2017). Such considerations are important because the order is sought and imposed by the State, can

⁴ Recently, Division III remanded a criminal sentence that imposed a five year criminal no-contact order between the defendant and his minor son. In remanding the no-contact order, the court cited with approval the DVPA’s limitation of a civil no-contact order to one year where it prohibits contact between a parent and child. *State v. Torres*, No. 33648-4-III/33744-8-III, slip op. at 6 (Division III, 2017) (published in part).

only be modified by the criminal court, and cannot be modified through a parenting plan or dissolution proceeding.

In contrast, the DVPO is a civil remedy that victims request (usually *pro se*) to protect themselves and their children from acts of domestic violence by the respondent. RCW 26.50.020(1). In a petition, the victim carries the burden of proof and must show by a preponderance of the evidence that the respondent has committed acts of domestic violence. RCW 26.50.020(1)(a).

If the petitioner meets this burden, the DVPA provides numerous remedies. RCW 26.50.060. Importantly, whether or not a child in common is included as a protected party on the order, the court may fashion residential provisions allowing contact between the respondent and his or her children. RCW 26.50.060(1)(d). If the order prohibits the respondent from contacting the respondent's minor children, the maximum length of the order is one year. RCW 26.50.060(2). Most importantly, however, the provisions of a DVPO are always changeable through a parenting plan proceeding and through a petition to modify the order. RCW 26.09; RCW 26.26.137; RCW 26.50.130; *Aiken*, 187 Wn.2d at 502.

The fundamental differences between a criminal no-contact order and civil protection order under the DVPA, render the ACLU's

contention that the criminal standard should be utilized in a DVPO procedure runs foul with the plain language of the DVPA. These differences include how the civil DVPO is obtained, the civil and expedient nature of the proceeding, remedies available, and how it can be modified.

VI. CONCLUSION

For the reasons stated above, as well as in her Petition for Discretionary Review and Supplemental Brief, Esmeralda Rodriguez respectfully requests that this Court reverse the decision of the Court of Appeals.

Respectfully submitted on May 2, 2017


JACQUELYN HIGH-EDWARD
WSBA #37065
Attorney for Appellant

 #45585
for
KARLA CARLISLE
WSBA #40107
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 2nd day of May, 2017, I caused a true and correct copy of this Answer to Brief of Amicus Curiae to be served on the Respondent via first class U.S. mail:

Luis Daniel Zavala – Respondent
DOC #391161
Monroe Correctional Complex
Intensive Management Unit (IMU)
PO Box 777
Monroe, WA 98272

Holly Brauchli (via email) – Counsel for Amicus Legal Voice
Bullivant Houser Bailey PC
1700 Seventh Avenue, Suite 1810
Seattle, WA 98101-1397
holly.brauchli@bullivant.com

Sara L. Ainsworth (via email) – Counsel for Amicus Legal Voice
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
sainsworth@legalvoice.org

William H. Block (via email)
Cooperating Attorney for ACLU-WA Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
wblock@msn.com

Nancy L. Talner (via email)
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
talner@aclu-wa.org



Nia R. Platt