

NO. 69314-0

**IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I**

In re:

Angela Michelle Wright, Appellant

v.

Ryan Michael Olney, Respondent,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 APR 11 PM 3:16

Appeal from the Superior Court of Snohomish County
The Honorable David A. Kurtz

No. 12-2-00794-1

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Ms. Wright seeks protection for her and her minor children, Sophia and Bentley, from Bentley's father, Ryan Michael Olney, under the Domestic Violence Prevention Act (DVPA). CP 1-189. Ms. Wright respectfully requests the appellate court to reverse the trial court's order and grant her a one year order that includes Bentley.

On August 16, 2012, the only case before the court was Ms. Wright's DVPA action. CP 13-28. The parties' parentage action was filed, but no parenting plan was in place.¹ In the DVPA action there was evidence that Mr. Olney committed domestic violence against Ms. Wright and the children.³ CP 49, CP 62-93, CP 99-114, CP 120-150, CP 178-189.

The trial court granted Ms. Wright a five year order. CP 17-21. The court did not make any findings about credibility of either party. CP 13-21. The court denied her request for a one year order that included her children. CP 13-21. Ultimately, the court included Sophia as a protected party because she was not Mr. Olney's child. CP 13-21. The court held that there is an insufficient basis to enter a protective order as to Bentley. CP15.

¹ Snohomish County Superior Court Cause No. 12-5-00042-4.

³ Before the court on August 16, 2012 were police reports, text messages, and emails, affidavits from a corroborating witness the children's maternal grandmother, Mr. Olney's June 19, 2012 conviction, and the court's previous finding that Mr. Olney committed domestic violence. CP 57-61, CP 62-64, CP 65-93, CP 99-114, CP 120-145, CP 146-147, 178-189.

II. REPLY ARGUMENT

- A. THE TRIAL COURT'S FINDING THAT THERE WAS AN INSUFFICIENT BASIS TO ENTER AN ORDER FOR PROTECTION INCLUDING BENTLEY IS AN ABUSE OF DISCRETION BECAUSE THE FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court's finding that there was an insufficient basis to issue a protective order as to three year old Bentley is an error because the trial court used the wrong legal standard. Further the trial court's finding that Bentley did not need protection or parenting provisions is not supported by substantial evidence in the record. The record is very much to the contrary: there is substantial evidence of domestic violence perpetrated by Mr. Olney upon Ms. Wright that occurred frequently in the presence of the children and often including the children. As this court has found, psychological harm to children caused by witnessing acts of domestic violence by one parent against another is domestic violence and a proper statutory basis for an order for protection. In re Marriage of Stewart, 133 Wn. App. 545, 550-551, 137 P.3d 25 (2006), rev. denied, 160 Wn.2d 1011 (2007).

Relief under the DVPA is statutorily prescribed by chapter 26.50 RCW. Whether to grant relief, modify, or terminate a DVPO is a matter of judicial discretion. Freeman v. Freeman, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). However, discretion must be based on reason. Coggle v.

Snow, 56 Wn. App. 499, 505, 784 P.2d 554 (1990), citing State ex rel. Ross v. Superior Court, 132 Wash. 102, 107, 231 P. 453 (1924).

When “the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Freeman, 169 Wn.2d at 671.

A decision is made on untenable grounds or for untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard. Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). See State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003), quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990). A decision is untenable if the trial court's decision is “manifestly unreasonable” or if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” Mayer, 156 Wn.2d at 684.

Findings cannot be upheld on appeal if they are not supported by substantial evidence in the record. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-708, 64 P.3d 1 (2003). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the asserted premise. Pilcher v. State, 112 Wn. App. 428, 435, 49 P.3d 947 (2002).

An order for protection is a civil remedy, and therefore needs only to be supported by a preponderance of the evidence. City of Tacoma v. State, 117 Wn.2d 348, 351-52, 816 P.2d 7 (1991); Reese v. Stroh, 128 Wn.2d 300, 312, 907 P.2d 282 (1995); Spence v. Kaminski, 103 Wn. App. 325, 330, 12 P.3d 1030 (2000). Further, the rules of evidence do not apply in domestic violence protection order proceedings. ER1101(c)(4).

Finally, recent acts of domestic violence are not required in order to obtain a domestic violence protection order. Spence, 103 Wn. App. at 333-334; Muma v. Muma, 115 Wn. App. 1, 7, 60 P.3d 592 (2002). To show present fear of imminent physical harm domestic violence victims are not barred from re-alleging domestic violence previously asserted in support of prior protection orders. Muma, 115 Wn. App. at 6-7.

The trial court erred in denying Ms. Wright a one year DVPO that included Bentley because it had substantial evidence of domestic violence by Mr. Olney against Ms. Wright and both children. CP 46-54, CP 57-61, CP 65-93, CP 99-114, CP 120-145, CP 146-147, CP 178-189. Although the trial court did not make any specific findings as to the credibility of the parties, the trial court indeed found that Mr. Olney committed acts of domestic violence regardless of his denials. CP 17-21. The same trial court, *less than two years earlier*, found that Mr. Olney committed acts of domestic violence against Ms. Wright and her infant daughter. CP 145.

Both of Ms. Wright's children witnessed repeated domestic violence against their mother by Mr. Olney. CP 46-54, CP 62-64, CP 65-93, CP 99-114, CP 120-145, CP 178-189. The children's exposure to domestic violence committed by Mr. Olney was corroborated by the children's maternal grandmother. CP 57-61, CP 120-145, CP 146-147. She attested to being on the phone with Ms. Wright during incidents of domestic violence and hearing her grandchildren cry in the background. CP 57-61, CP 120-145, CP 146-147. The court also had medical records from the time Bentley was born showing Evergreen Hospital's efforts to safeguard Ms. Wright and Bentley from Mr. Olney. CP 99-114.

There was substantial evidence before the trial court that showed Mr. Olney tried to interfere with Ms. Wright's child custody as another way to abuse her, including, but not limited to threatening to take the children, taking pictures of Sophia in his marijuana room and sending them to Sophia's father and threatening to send them to CPS. CP 120-145, CP 148-150. The court had multiple police reports documenting Mr. Olney's history of protection order violations. CP 65-93, CP CP 120-145, CP. There was evidence that Mr. Olney had been arrested for negligent conduct with a fire arm. CP 94-98. The trial court even had a copy of Mr. Olney's Finding and Sentence proving, beyond a preponderance of the

evidence, he was the perpetrator in a domestic violence case where Ms. Wright was the victim. CP 178-189.

The trial court's finding that there was an insufficient basis to issue a protective order as to Bentley is not supported by substantial evidence in the record. The trial court could not make such a finding but for applying an incorrect standard of evidence or applying unsupported facts. Hence, the trial court abused its discretion.

B. MR. OLNEY'S INTERPRETATION OF RCW 26.50.060(1)(d) RENDERS PARTS OF THE STATUTE MEANINGLESS AND SUPERFLUOUS AND IS CONTRARY TO THE LEGISLATIVE INTENT OF THE DOMESTIC VIOLENCE PREVENTION ACT.

Mr. Olney's interpretation of RCW 26.50.060(1)(d) violates the rules of statutory construction by rendering parts of the statute meaningless and superfluous and it is contrary to the legislature's intent of the DVPA. Issues of statutory construction are issues of law that are reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

"[T]he court's fundamental duty" in interpreting statutes is to "ascertain and carry out the intent of the legislature." Spence, 103 Wn. App. at 333. However, if a statute is "susceptible to more than one reasonable interpretation, it is considered ambiguous" and the court must look to the rules of statutory construction, legislative intent, and case law

to determine the statute's meaning. Cockle, 142 Wn.2d at 808. "It is well settled that a statute must not be construed in a manner that renders any portion thereof meaningless or superfluous." Id. at 809.

Ms. Wright argues that the RCW 26.50.060(1)(d) is mandatory in every situation where a DVPO is entered and there are minor children between the parties. Mr. Olney interprets RCW 26.50.060(1)(d) to mean the provision is mandatory "only if the court determines that protection of the child is needed, then the language of paragraph (1)(d) kicks in." Respondent's Response Brief, p. 12. The parties' two interpretations of the statute make it ambiguous and the rules of statutory construction, legislative intent, and case law apply. Cockle, 142 Wn.2d at 808.

1. RCW 26.50.060(1)(d) Should Be Interpreted To Require Residential Provisions For Minor Children Of The Parties Because Any Other Interpretation Would Render Parts Of The Statute Superfluous And Inconsistent With The Legislative Intent Of The Domestic Violence Prevention Act.

"The primary goal of statutory construction is to carry out the legislative intent." Cockle, 142 Wn.2d at 807. In doing this, the court must examine the statute as a whole, giving meaning to all of the "language used," and ensure that any interpretation of one provision is harmonized with the other provisions to ensure proper construction of the statute. City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294

(1996); Tommy P. v. Board of County Com'rs of Spokane County, 97 Wn.2d 385, 645 P.2d 697 (1982). The ambiguity in RCW 26.50.060(1)(d) resides in the use of the permissive word “may” and imperative word “shall” within the same provision. RCW 26.50.060(1)(d). Specifically, RCW 26.50.060(1) states that after notice and a hearing, the court “may” order the following relief. RCW 26.50.060(1). The provision then lists a number of different forms of relief the court may award. RCW 26.50.060(1). One of the listed forms of relief states that “... the court shall make residential provisions with regard to the minor children of the parties.” RCW 26.50.060(1)(d) (emphasis added).

Although the legislature specifically used the word “shall” in no part of RCW 26.50.060(1) other than in RCW 26.50.060(1)(d), Mr. Olney argues that the use of the permissive word “may” in RCW 26.50.060(1) should be interpreted to mean that RCW 26.50.060(1)(d) only applies when the court has determined that protection of the child is needed. Respondent’s Response Brief, p. 12. This interpretation violates principals of statutory construction and renders the use of the imperative word “shall” meaningless and superfluous.

“Where a provision contains both the words “shall” and “may,” it is presumed that the lawmaker intended to distinguish between them, “shall” being construed as mandatory and “may” as permissive.” Scannell

v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). As such, the legislature's use of the word "shall" in RCW 26.50.060(1)(d) makes entry of residential provisions for minor children of the parties mandatory. Id. It is assumed that when the legislature chose to use the word "shall," particularly in light of its earlier use of the word "may" that it intended residential provisions to be mandatory in cases where there were children in common. Id.

Further, Mr. Olney's interpretation that residential provisions are only required when the court determines the child requires protection has no foundation in the language of the statute. RCW 26.50.060(1)(d). At no time does the statute condition entry of residential provisions on a finding by the court that the child requires protection. RCW 26.50.060(1)(d). The effect of Mr. Olney's interpretation of RCW 26.50.060(1)(d) is to give no meaning to the word "shall."

On the other hand, Ms. Wright's interpretation of the statute is consistent with statutory construction and gives meaning to all portions of the statute. RCW 26.50.060(1) is an array of remedies available to the court in entering a DVPO. Depending on each situation, the court could order a myriad of protections including domestic violence perpetrator treatment or award the use of the home or vehicles, etc. RCW 26.50.060(1). Not every remedy is required in every DVPO case. RCW

26.50.060(1). However, RCW 26.50.060(1)(d) is the only remedy that utilizes the imperative word “shall.” As such, in every case involving minor children of the parties, the court must order residential provisions. RCW 26.50.060(1)(d).

Requiring residential provisions in all cases involving minor children of the parties is consistent with statutory construction and gives meaning to all words used in the statute.

2. Requiring Residential Provisions For Minor Children Of The Parties Is Consistent With The Legislative Intent Of The Domestic Violence Prevention Act.

In enacting the DVPA, the legislature declared:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: [c]hild abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

State v. Dejarlais, 136 Wn.2d 939, 944, 969 P.2d 90 (1998) citing LAWS OF 1992, Ch. 111, § 1. Since the original passage of the DVPA, the legislature has furthered a strong public policy of preventing domestic violence by taking “concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable.” Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 213,

193 P.3d 128 (2008), citing LAWS OF 1991, Ch. 301, §1. The Legislature also noted that “children ‘are deeply affected by the violence’ in their homes ‘and could be the next generation of batterers and victims.’” Id.

Entering residential provisions for minor children of the parties in every case where a DVPO is entered ensures the legislature’s intent to prevent domestic violence by encouraging victims to leave their abusers and protect their children. There are a number of barriers to victims leaving their abusers. WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES, §2-32 (2006). Of importance to the issue of residential schedules is the perpetrator’s escalating violence and control at the time of separation. Id. Research establishes that domestic violence escalates at the time of separation and that separation is the most dangerous time for victims. Id. at §2-29. “Perpetrator’s escalate their physical and sexual assaults against victim, children, or others as well as escalate their intimidation by stalking, attacks against property, threats to take children, and false reports” to government agencies. Id. at §2-32. Threats to take the children are often rooted in a history of the perpetrator withholding the children from the victim after violent episodes to “ensure that the abused party will not flee the abuser.” Id. at §2-36.

“Even after separation, batterers use the children as pawns to control the abused party.” WASHINGTON STATE GENDER AND JUSTICE COMMISSION, DOMESTIC VIOLENCE MANUAL FOR JUDGES, §2-36 (2006). When the victim is no longer under the batterer’s control, “the perpetrator’s main vehicle for continued contact and control of the adult victim is through the children” *Id.* One abusive tactic employed by batterers is “holding children hostage or abducting children in efforts to punish the abused party or to gain the abused party’s compliance.” *Id.* at §2-37.

Residential provisions in a DVPO mitigate the batterer’s ability to continue to abuse the victim through the children. For both parties and the children, it provides structure and consistency in the visitation schedule. In situations, as in this case, where the abuser has committed acts of domestic violence in front of the children, protective measures can be entered to ensure that both the victim and the children are safe during exchanges and visits.

For victims without a parenting plan⁴, it also provides security. If the batterer violates the residential provisions it is more likely that law enforcement would intervene and the batterer can be held in contempt.

⁴ For many reasons, including safety, many domestic violence victims chose not to bring a case in family court. For these victims, complete statutory relief in a DVPO is of critical importance.

Residential provisions are essential in meeting the legislative intent of the DVPA. It prevents domestic violence by encouraging victims to leave their abusers and protect their children by providing them, and their children, with protection from the abuser's continued efforts to control the victim through the children.

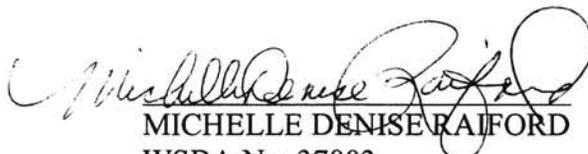
C. REQUEST FOR ATTORNEY FEES AND COSTS

Ms. Wright renews her request for attorney fees and costs pursuant to RAP 18.1. Under RCW 26.50.060(1)(g) the court may order reasonable attorney fees and costs to the petitioner.

III. CONCLUSION

Ms. Wright respectfully requests the court to find that there was sufficient evidence to include Bentley on the order of protection, the court erred when it failed to enter residential provisions in the DVPO, and Ms. Wright is entitled to reasonable attorneys fees.

RESPECTFULLY SUBMITTED ON THIS 11th day of April 2013.


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IN THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

In re:

ANGELA MICHELLE WRIGHT,
Appellant,

vs.

RYAN MICHAEL OLNEY,
Respondent,

No. 69314-0

CERTIFICATE OF SERVICE

MICHELLE D. RAIFORD, being first duly sworn upon oath, deposes and says:

I am the attorney of record for the Appellant in this action. On the 11th day of April, 2013, I emailed using the email address of nick@hermanrecor.com and delivered using the legal courier, North Sound Due Process LLP, a copy of *Appellant's Reply Brief*, and a copy of this *Certificate of Service* to the following:

CERTIFICATE OF SERVICE - 1 of 2

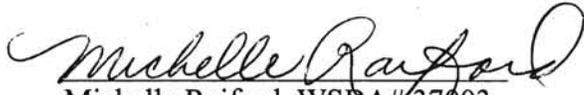
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Dated this 11th day of April, 2013 in Everett, Washington.


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