No. 82283-2

FAIRHURST, J. (dissenting) — In this case, we are asked what standard and factors are to be applied when a trial court determines whether a permanent order of protection should be terminated. The majority adopts 11 factors from a New Jersey decision, which was based on that state's substantially different protection order statute. I believe we should articulate a standard and factors based on our own state's statute and recognized public policy of protecting domestic violence victims. I dissent because I ultimately conclude that the commissioner did not abuse her discretion when she declined to terminate the order.[1] The Court of Appeals substituted its judgment for that of the trial court rather than applying the abuse of discretion standard.

Under our state's Domestic Violence Prevention Act (DVPA), chapter 26.50 RCW, a person may seek an order of protection by filing a petition alleging he or she is the victim of domestic violence. RCW 26.50.020(1). After notice and a

[1]I agree with the majority that Robin Freeman (now known as Robin Abdullah) is not entitled to attorney fees.

hearing, a court may enter an order of protection that can provide various forms of relief for the petitioner, including restricting where the respondent may go and whom he or she may contact. RCW 26.50.060(1)(a)-(*l*). Although the DVPA as originally enacted provided that protection orders may last no more than one year, Laws of 1984, chapter 263, section 7, the DVPA has since been amended to allow for orders lasting longer than one year and for permanent orders of protection if "the court finds that the respondent is likely to resume acts of domestic violence," RCW 26.50.060(2), to relieve victims of the trauma and costs associated with renewing orders of protection, S.B. Rep. on Substitute H.B. 2745, 52d Leg., Reg. Sess. (Wash. 1992). A petitioner may seek renewal of a fixed time order, which the court must grant "unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence." RCW 26.50.060(3).

Orders of protection may be modified following notice to all parties and a hearing. RCW 26.50.130(1). The modification statute does not distinguish between fixed time and permanent orders[2] and does not indicate the applicable level or burden of proof, nor what factors the court should consider in making its

[2]The modification statute was not changed when the DVPA was amended to allow for permanent orders of protection in 1992. The only amendments that have been made to the modification statute since its 1984 enactment address personal service and service by publication. *See* Laws of 2008, ch. 287, § 3; *compare* RCW 26.50.130 *with* Laws of 1984, ch. 263, § 14.

modification decision. *See id.* However, it is apparent to the parties, to the majority, and to me that the inquiry with respect to terminating a permanent order of protection must focus on whether the restrained party has shown by a preponderance of the evidence that he or she will not resume acts of domestic violence if the order is lifted. Majority at 8; Br. of Resp't/Cross-Appellant (Robin Abdullah) at 13-14; Resp. Br. of Appellant (Rob Freeman) at 7.

To guide its analysis, the majority adopts wholly the factors enunciated in *Carfagno v. Carfagno*, 288 N.J. Super. 424, 435, 672 A.2d 751 (1995),[3] reasoning that they "provide a sensible framework for analyzing whether the preponderance of the evidence suggests a restrained party will commit a future act of domestic violence." Majority at 9. The New Jersey court created the *Carfagno* factors to answer a different inquiry--namely, whether there is *good cause* to terminate a permanent order of protection to meet New Jersey's required showing. N.J. Stat.

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[3]The factors are as follows:

> (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.

Carfagno, 288 N.J. Super at 435.

Ann. § 2C:25-29(d) (2009) ("*Upon good cause shown*, any final order may be dissolved or modified . . . ." (emphasis added)); *Carfagno*, 288 N.J. Super. at 434-35 ("[C]ourts should consider a number of factors *when determining whether good cause has been shown* that the final restraining order should be dissolved upon request of the defendant." (Emphasis added.)). Good cause is not the Washington standard, and presumably results in more frequent terminations of permanent orders of protection than a standard narrowly focused on determining whether the restrained party will resume acts of domestic violence.[4]

Robin[5] and amici curiae[6] argue that the *Carfagno* factors should not be adopted, and that CR 60 provides the proper framework for a court to use when determining whether to terminate a permanent order of protection. Amici note that other states often look to their versions of CR 60 in evaluating motions to modify domestic violence protection orders.[7] CR 60(b)(6) provides that a court may vacate a final order if "it is no longer equitable that the judgment should have prospective application." This provision is helpful in that it directs the court to look at how

[4]It should be noted that no court outside of New Jersey has adopted these factors wholly.

[5]I use first names for the purpose of clarity.

[6]Legal Voice, Washington State Coalition Against Domestic Violence, and Sexual Violence Law Center filed an amicus brief (hereinafter Amici Curiae).

[7]Amici Curiae cite *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. Ct. App. 2007); *Mitchell v. Mitchell*, 62 Mass. App. Ct. 769, 821 N.E.2d 79 (2005); *Dvorak v. Dvorak*, 635 N.W.2d 135 (N.D. 2001). Br. of Amici Curiae at 18.

factual circumstances have changed since the permanent order of protection was initially entered, and to consider the continuing need for and efficacy of the permanent order. *See Metro. Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986). However, it provides no guidance as to the burden of proof, which factors are or are not appropriate for consideration, and appears, on its face, to allow a court to weigh factors like inconvenience to the restrained party against the likelihood of future domestic violence. Further, the effect of granting a motion under CR 60 is nullification of the order in question; the parties are left as though the order had never existed. *In re Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989). Where a permanent order of protection is terminated because circumstances have changed since the order was originally entered, it is inappropriate to terminate the order in such a way that, legally, it is as though the order never existed.

Because neither gives adequate and appropriate guidance to the courts, I find neither the *Carfagno* factors nor CR 60 completely satisfactory. Rather, we should look to the provisions of the DVPA first, and use these other authorities to supplement, rather than dictate, our analysis. In the context of terminating a permanent order of protection, the inquiry into whether the restrained party will

resume acts of domestic violence upon termination of the order is not made in a vacuum. Before a permanent order of protection can be terminated, it must have been entered; before a permanent order of protection can be entered, the court must have found the respondent likely to commit future acts of domestic violence if the order were to terminate. *See* RCW 26.50.060(2). The termination process should not become an avenue by which a restrained party may repeatedly revisit issues that have been resolved in prior proceedings--that would defeat the very purpose of permanent orders. Instead, the findings entered pursuant to the original permanent order of protection should be taken as verities, and the party seeking termination of a permanent order of protection must demonstrate by a preponderance of the evidence that conditions have changed such that the restrained party is *no longer* likely to commit acts of domestic violence against the petitioner or his or her family or household members upon termination of the permanent order of protection. *See* RCW 26.50.060(2), .130(1); CR 60(b)(6).

Whether conditions have changed such that the restrained party is no longer likely to commit future acts of domestic violence is a highly fact-specific inquiry, such that an exhaustive list of the relevant factors is probably not possible. Time alone cannot establish such a change in conditions, because if that were possible,

then no permanent order of protection would be truly permanent. A more sensible approach is to look to the "totality of the circumstances" and list examples of factors that can be considered in appropriate circumstances or cannot be considered at all. *See Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-08, 33 P.3d 735 (2001). The underlying question in determining which factors to consider must always be: *Does this factor address a change in circumstances that indicates it is no longer likely the respondent will commit future acts of domestic violence against the petitioner?*

While I do not support adopting the *Carfagno* factors wholly, some of the factors may be relevant to determining whether the restrained party is no longer likely to commit future acts of domestic violence. For example, factors that can be considered in appropriate circumstances are: the current nature of the relationship between the parties, whether the respondent has been convicted of contempt for violating the order, whether the respondent has a continuing involvement with drug or alcohol abuse,[8] whether the respondent has been involved in other violent acts with other persons, whether the respondent has engaged in counseling, the age and health of respondent,[9] and whether another jurisdiction has entered a restraining

[8]This factor is not relevant in this particular case because there is no evidence drugs or alcohol played a role in Rob's previous acts of domestic violence.

[9]This factor is only relevant if it tends to show the respondent is physically incapable of committing domestic violence. This will be the case only in very narrow circumstances, not present here, because domestic violence includes physical and sexual violence, threats of physical

order protecting the victim from the respondent. In appropriate cases, these factors all may directly relate to the question of the respondent's likely future conduct.

I believe the other *Carfagno* factors should not be considered. The victim's consent to remove the order is not evidence of the respondent's future conduct--this fact is already acknowledged by Washington law, which does not recognize the petitioner's consent as a defense where a restrained party is charged with violating a protective order. RCW 26.50.035(1)(c) ("'You can be arrested even if the person or persons who obtained the order invite or allow you to violate the order's prohibitions.'" (quoting order of protection)); *State v. Dejarlais*, 136 Wn.2d 939, 942, 969 P.2d 90 (1998). The victim's good faith in opposing the respondent's request also has nothing to do with the respondent's tendency to commit domestic violence in the future. Finally, the victim's current fear, which *Carfagno* explicitly states must be evaluated from an objective, rather than subjective, standpoint should not be considered. The fear factor shifts the focus onto the victim and creates the possibility, which was realized in this case, that the court will erroneously, if unconsciously, require the victim to prove his or her current fear is real and objectively reasonable.

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violence, and stalking. RCW 26.50.010(1)(a). Stalking includes harassing phone calls and electronic communications. RCW 9A.46.110(4). One would need to be very ill to be rendered physically incapable of sending threatening e-mails or making harassing phone calls.

The majority insists its holding does not require Robin to prove her current fear is reasonable. It articulates its analysis as considering "whether Rob proved an unlikelihood of committing future acts of domestic violence *and* whether the facts support a current reasonable fear of imminent harm." Majority at 10. However, it is clear that the majority's analysis inevitably saddles Robin with the burden of proving she is currently, reasonably fearful of future domestic violence upon the permanent order's termination. This is problematic for several reasons. First, the majority's emphasis on current, objectively reasonable fear elevates that *Carfagno* factor into an element without any justification. Second, contrary to the majority's assertion, it *is* "enough that the facts may have justified the order in the past." Majority at 10. As noted above, the fact that the permanent order of protection was entered in the first place reflects a finding by the trial court that the restrained party is likely to commit future acts of domestic violence upon the order's termination. It is therefore necessary that the order continues to operate unless and until Rob makes the necessary showing of changed circumstances, regardless of how Robin would feel if she were "reasonable." Third, the provision for renewal of orders of protection for a fixed time, which presumably should have a similar standard, does not require objectively reasonable fear; it merely requires petitioner to "state the

reasons" for renewal, then shifts the entire burden of proof onto the respondent to show he or she will not commit future acts of domestic violence if the order is lifted. RCW 26.50.060(3). The risk of improperly requiring the victim to prove the reasonableness of his or her fear, and thus carry the burden of proof for the overall determination, is significant enough that this factor should not be considered.

A court's decision on whether to modify an order of protection is discretionary, as the majority states. Majority at 5-6. Therefore, a court's modification decision is subject to review under our abuse of discretion standard and will not be disturbed unless it "'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 665, 669, 230 P.3d 583 (2010) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). "'A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would take.'" *Id.* at 669 (internal quotation marks omitted) (quoting *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009)). "'A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.'" *Id.* (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

The Court of Appeals in this case concluded that the commissioner abused

her discretion when the commissioner found that "'[i]t is not appropriate for the mere passage of time without any other showing to lift a person's reasonable fears that they may be a victim of domestic violence by someone who has hurt them in the past.'" *In re Marriage of Freeman*, 146 Wn. App. 250, 258, 192 P.3d 369 (2008) (alteration in original) (quoting Clerk's Papers (CP) at 55 (Finding of Fact 2.21)). The Court of Appeals reads this finding as indicating that the commissioner believed Rob had asserted only the mere passage of time as a reason for modifying the permanent order of protection. *See id.* That reading is inaccurate; the finding does not state that Rob asserted time as the only reason for modification.

The Court of Appeals then goes on to state that Rob also established "a compelling need for lifting the order and a lack of opportunity for contact." *Id.* However, Rob's "compelling need" that the order be lifted has absolutely no relevance to whether there is a likelihood of future domestic violence, and the "lack of opportunity for contact" is apparently something the Court of Appeals somehow determined on its own, based on the fact that Rob lives in another state. Such a conclusion ignores the ease of travel within the United States and the fact that domestic violence can occur through phone calls and agents. *See* RCW 9A.46.110(4); RCW 26.50.010(1)(a). Whether Rob has actually made any such

phone calls or enlisted third parties to commit acts of domestic violence has no relevance to the fact that such avenues of abuse are available to him despite his distance from Robin.

Finally, the Court of Appeals finds that "there is no evidence that Rob had hurt his wife" or her children at "any time." *Freeman*, 146 Wn. App. at 258. This announcement ignores the unchallenged findings at the 1998 hearing that Rob engaged in domestic violence and that an order of less than one year would be insufficient to prevent further acts of domestic violence. CP at 85, 87. The Court of Appeals on review should not substitute its own conclusion for the unchallenged findings of the commissioner who entered the order.

Like the Court of Appeals, the majority opinion appears to pay short shrift to the 1998 finding of domestic violence when it refers to Rob's actions as "his decade-old imprudence." Majority at 12. In its determination that the *Carfagno* factors weigh in favor of terminating the permanent order of protection, the majority considers such irrelevant factors as Rob's nonuse of drugs[1] and his loss of a hand.[11] Such factors do not establish that the situation has changed such that Rob is no

[1]Drugs were not a factor in the abuse in the first place; therefore, the absence of drugs does not make it less likely that Rob will engage in domestic violence in the future.

[11]Rob's injury has not rendered him incapable of engaging in domestic violence, so it is difficult to see how his loss of a hand impacts the likelihood of his resuming acts of domestic violence.

longer likely to resume domestic violence in the absence of a permanent order of protection.

There are some relevant *Carfagno* factors that favor termination of the permanent order of protection in this case: Rob has not contacted Robin in at least seven years, Rob lives in another state, he has no convictions for contempt for violating the order, the record contains no evidence that Rob has engaged in other violent acts, and there is no record that Rob is subject to any other restraining orders. While these factors weigh in favor of finding Rob less likely to resume domestic violence, they do not necessitate the conclusion that circumstances have changed such that Rob is no longer likely to commit future acts of domestic violence. On the other side, the record does not show that Rob has sought or received any counseling related to domestic violence. Combined with Rob's affidavit, which reflects a denial of responsibility for the earlier incidents of domestic violence, blames Robin for "any harm she has experienced," characterizes her as vengeful and "manipulative," and characterizes this proceeding as a "whine contest," I cannot say that no reasonable court could find that Rob has failed to meet his burden to terminate the permanent order of protection. CP at 34, 36. Nor can I say that such a determination is based on untenable grounds or reasons.

I would hold that the commissioner in this case did not abuse her discretion by denying Rob's motion to modify his permanent order of protection. Accordingly, I would reverse the Court of Appeals and would reinstate the commissioner's order.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Debra L. Stephens