IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	
	)	
ROBIN M. FREEMAN,	)	No. 82283-2
	)	
Petitioner,	)	En Banc
	)	
v.	)	
	)	Filed September 2, 2010
	)	
ROB R. FREEMAN,	)	
	)	
Respondent.	)	
	)	

SANDERS, J.—In 1998 Robin Freeman (now known as Robin Abdullah) obtained a permanent protection order against her then-husband, Rob Freeman. Soon thereafter Rob[1] left Washington as part of a military reassignment; he claims he has never returned. In 2006 Rob moved to modify or terminate the permanent protection order. In this appeal, we must determine whether the superior court commissioner improperly declined to terminate the permanent protection order at that time. We affirm the Court of Appeals. The commissioner abused her discretion when she denied Rob's motion to terminate the order.

[1] We use the parties' first names for the sake of clarity.

FACTS

During dissolution proceedings, Robin sought an ex parte order of protection against Rob. A Thurston County Superior Court commissioner signed a temporary order of protection on January 23, 1998, which remained in effect until a February 4, 1998 hearing. After hearing testimony from both parties on February 4, the commissioner made the order permanent.

Two incidents underlie the permanent protection order. First, Rob pushed Robin's 16-year-old daughter, Yasmeen, into her bedroom.[2] While Rob characterized the incident as "escort[ing]" Yasmeen to her room after a "semi-heated" confrontation, Clerk's Papers (CP) at 13, he also admitted he physically forced Yasmeen down a hallway and through the threshold to her bedroom. *Id*. at 20. Rob testified:

> I tried to grab [Yasmeen] by the arm and she crouched down right away and I placed my hand openly and tried to go for the shoulder but she kept on moving so it was up on the side of the neck and I pushed her all the way down which was like six[,] seven feet. [I] [o]pened her door and put her inside and then closed the door.

Id. In contrast Robin claims Yasmeen was "rendered unconscious when [Rob] dragged her down the hall and applied pressure to points on her neck and head."

[2] Robin has four children from a previous relationship. All are now adults.

Pet. for Review at 2-3.

In the second incident Rob claims he opened his gun safe to show Robin that he had not hidden her jewelry inside, after Robin accused Rob of stealing it. Robin claims Rob inventoried his guns while telling her he was not going to harm her—acts Robin perceived as threats. When Robin told Rob she was scared of the guns, he replied, "[F]ine, fine you're scared." CP at 26.

The commissioner determined these two incidents placed Robin in a reasonable state of fear—particularly in light of Rob's extensive military training—and warranted the permanent protection order. The order prevented Rob from contacting Robin and her children, then aged 10, 12, 16, and 18.

More than eight years later, on May 31, 2006, Rob moved to modify or terminate the permanent protection order. In 2001, doctors had amputated Rob's left hand below the forearm. In response Rob sought retraining to pursue his career in the military, defense, or security industries, but most jobs required security clearance. The permanent protection order barred Rob from obtaining security clearance.

To support his motion to modify or terminate the permanent protection order, Rob claimed he "has not returned to Washington since he left in 1998." Resp. Br. of Appellant at 3. Moreover Rob claimed he has complied with the permanent

protection order and made no contact with Robin or her children since the divorce, lives in another state (Missouri), has no criminal record, and "simply do[es] not pose any kind of danger to anyone at this time." CP at 5. He further asserted, "I continue to have neither the inclination nor the ability to do anything to Robin." CP at 36.

Robin responded that she remains in constant fear of Rob. The basis for her present fear appears to be, in her own words, "ongoing disturbances at her home of unknown cause." Pet. for Review at 4. Chief among the unexplained disturbances are rattling windows, doors, and walls; repositioning of the driver's seat in her car; receiving Rob's mail at her house; reappearance of a flower vase on her dresser; missing tools; and a hole in her bedroom wall. Robin admits she has never seen Rob do any of these things.

On August 9, 2006 a court commissioner heard the motion to modify or terminate. Yasmeen, who was 25 years old at the time of the hearing, testified she saw Rob across the street from her high school six or seven years earlier. Rob's counsel denied the allegation, asserting Rob had not been in Washington State since the permanent protection order and had no intention to return.

The court commissioner found Robin's continuing fear to be "reasonable . . . based on the previous incidents involving her daughter and incidents involving

weapons." CP at 49. The commissioner denied Rob's motion to modify or terminate the permanent protection order. On September 1, 2006, Robin moved for $1,271 in attorney fees, which the court denied. The superior court denied a motion to revise the court commissioner's ruling.[3]

Rob appealed to the Court of Appeals, which reversed the commissioner's denial of Rob's motion to terminate. A unanimous Court of Appeals wrote:

> It is reasonable that a past act could inflict current fear, but that fear must still relate to a threat of *imminent* harm, injury, or assault. Here, due to time and distance, there is no evidence to support a current fear that physically harmful acts or threats of imminent harm would occur upon lifting the order.

In re Marriage of Freeman, 146 Wn. App. 250, 257, 192 P.3d 369 (2008). The Court of Appeals found the commissioner abused her discretion by denying Rob's motion to modify or terminate. "The commissioner did not consider all of the relevant facts and misapprehended others. . . . The denial of the motion to terminate or modify the order is based on untenable reasons and grounds." RCW 26.50.060(3). Robin sought discretionary review, which we granted.

ANALYSIS

We must decide whether the commissioner abused her discretion when refusing to terminate the permanent protection order. Whether to grant, modify, or

[3] "Because the superior court did not revise the commissioner's decision, the commissioner's decision stands as the decision of the superior court that is before us for review." *In re Interest of Mowery*, 141 Wn. App. 263, 274-75, 169 P.3d 835 (2007).

terminate a protection order is a matter of judicial discretion. The statute authorizing permanent protection orders provides: "[I]f … the court finds that the respondent is likely to resume acts of violence[,] . . . the court *may* either grant relief for a fixed period or enter a permanent order of protection." RCW 26.50.060(2) (emphasis added). If a victim petitions to renew an order of protection, the court "*may* renew the protection order for another fixed time period or *may* enter a permanent order as provided in this section." *Id*. at .060(3). (emphasis added). Similarly the provision authorizing modification or termination of permanent protection orders provides that "the court *may* modify the terms of an existing order for protection." RCW 26.50.130(1) (emphasis added).

The term "may" in a statute generally confers discretion. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999) (citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 381, 858 P.2d 245 (1993)). "Where 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." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

I. Permanent Protection Order

Washington's Domestic Violence Prevention Act (DVPA) defines domestic violence as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members . . . ." RCW 26.50.010(1). The legislature has articulated a clear public policy to protect domestic violence victims. *See* ch. 26.50 RCW; *see also* ch. 10.99 RCW (domestic violence official response act); RCW 10.99.010 ("The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.").

The legislature has authorized courts to make protection orders permanent in some circumstances:

> [I]f . . . the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

RCW 26.50.060(2). Such permanent protection orders, however, can be modified or terminated. "Upon application with notice to all parties and after a hearing, the court may modify the terms of an existing order for protection." RCW 26.50.130(1).

The modification statute fails to spell out grounds, factors, or standards

authorizing modification of a permanent protection order. *See id*. It also fails to mention which party bears the burden of modifying or maintaining the permanent protection order. *Id*. In this vacuum, we read the DVPA as a whole.

Most instructively, the statute authorizing renewal of a temporary order of protection provides:

> The court shall grant the petition for renewal unless the respondent proves by a *preponderance of the evidence* that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires.

RCW 26.50.060(3) (emphasis added). Both (1) blocking a renewal motion and (2) modifying a permanent order are sufficiently similar to warrant the same standard, particularly when the legislature has shown a preference for it. It certainly does not make sense to apply a standard to modify a permanent order that is lower than the standard required to renew a temporary order. As much as it is possible to prove a negative, Rob (the moving party) bears the burden of proving by a preponderance of the evidence (i.e., more likely than not) that he will not resume acts of domestic violence against Robin or her children.

In this matter of first impression it is not necessary to reinvent the wheel. In *Carfagno v. Carfagno*, 288 N.J. Super. 424, 672 A.2d 751 (1995), a New Jersey court embraced 11 factors guiding termination of a permanent protection order: (1)

whether the victim has consented to lift the order, (2) the victim's fear of the restrained party,[4] (3) present nature of the relationship between parties, (4) whether the restrained party has any contempt convictions for violating the order, (5) restrained party's alcohol and drug involvement, if any, (6) other violent acts on the part of the restrained party, (7) whether the restrained party has engaged in domestic violence counseling, (8) age and health of the restrained party, (9) whether the victim is acting in good faith to oppose the motion, (10) whether other jurisdictions have entered any protection orders against the restrained party, and (11) other factors deemed relevant by the court. *Id*. at 435. We believe New Jersey's guidelines provide a sensible framework for analyzing whether the preponderance of the evidence suggests a restrained party will commit a future act of domestic violence.

Robin asserts the permanent restraining order in this case should remain just that—permanent. Robin alleges the Court of Appeals improperly shifted the burden of proof from Rob to her, "requiring her to overcome a presumption that her present fear is unreasonable if not assuaged by the passage of time and distance." Pet. for Review at 7. Robin claims that "[u]nder the court's ruling, a perpetrator may have a

[4] The *Carfagno* court explicitly declined to evaluate the victim's subjective fear, opting instead to use an objective, reasonable person standard. "Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances. The court holds that courts should focus on objective fear." *Carfagno*, 288 N.J. Super. 437.

permanent order terminated if he proves he has complied with the order over a period of time, no longer lives in the vicinity, and claims a need for the order to be terminated." *Id*. at 6.

Robin's characterization oversimplifies the analysis. The relevant analysis, instead, includes whether Rob proved an unlikelihood of committing future acts of domestic violence *and* whether the facts support a current reasonable fear of imminent harm. While Rob bears the burden of proving by a preponderance of the evidence that he will not commit future acts of domestic violence, the facts must also support a finding that Robin's current fear of imminent harm is reasonable. We can only determine if the commissioner abused her discretion when denying a request to modify a permanent protection order if the facts of the matter are placed before us on review. This should not be confused with compelling Robin to prove her case again by overcoming a presumption.

Again, RCW 26.50.010(1) defines domestic violence as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." The facts supporting a protection order must reasonably relate to physical harm, bodily injury, assault, or the fear of *imminent* harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be in the present.

This notion dovetails with the legislature's authorization for courts to modify existing permanent protection orders. *See* RCW 26.50.130. While permanent protection orders are contemplated to be permanent when the facts require it, the legislature's grant of modification clearly authorizes the court to rescind some if the petitioner meets its burden. *Id*.

Robin cites two Court of Appeals cases, *Barber v. Barber*, 136 Wn. App. 512, 150 P.3d 124 (2007), and *Spence v. Kaminski*, 103 Wn. App. 325, 12 P.3d 1030 (2000), for the proposition that permanent protection orders can be permanent based on "past abuse and present fear" alone. Pet. for Review at 7. Robin's reliance on these cases is misplaced. These cases stand for the proposition that to renew or make permanent a protection order, the victim does not need to prove a new act of domestic violence *if the present likelihood of a recurrence is reasonable*. *See Spence*, 103 Wn. App. at 333; *Barber*, 136 Wn. App. at 513, 516. Unlike Robin, the victims in both *Spence* and *Barber* showed a reasonable present likelihood of violence, in addition to past abuse. *Id*. Notably, the victims had ongoing relationships with their abusers. In *Spence* the couple's relationship continued after a divorce as they bickered over child custody. "[T]he continuing relationship of the parties, who still struggled over custody issues, presented ongoing opportunities for conflict." *Spence*, 103 Wn. App. at 333. In *Barber* the

couple also interacted after their divorce. 136 Wn. App. 513. Robin, on the other hand, shows past abuse but the facts show recurrence of domestic violence is unlikely.

Here, to permit the permanent protection order to continue forever would hold Rob hostage to his decade-old imprudence. There is scant evidence that Rob would subject his former wife and her children to future domestic violence. Through his testimony, deeds, relocation, career ambitions, and now 10-year compliance with the permanent protection order, Rob has met his burden to prove that he will more likely than not refrain from future acts of domestic violence against Robin or her children.

The New Jersey factors weigh in favor of Rob. Namely, (factor 2) Robin's fear of Rob is objectively unreasonable;[5] (factor 3) they have had no contact for ten years; (factor 4) Rob has not violated the permanent protection order, so no contempt orders exist; (factor 5) Rob has no known problems with alcohol or drugs; (factor 6) Rob has no criminal record and has committed no other violent acts; (factor 8) Rob's health has suffered as a result of his war injury and amputation; (factor 10) the record does not reflect any other protection orders against Rob; and (factor 11) other relevant considerations include Rob's career ambitions.

[5] Robin's perception of unexplained household events is not enough to substantiate a reasonable continuing fear of Rob.

In contrast, the factors favoring Robin include the fact that (factor 1) Robin has not consented to lift the order and (factor 7) Rob has presumably not engaged in domestic abuse counseling. Robin's (factor 9) good faith is unknown. As Rob noted, he has "clearly moved on with his life and ha[s] not done anything to support Robin's continued fear of harm from him." Resp. Br. of Appellant at 9.

As much as it is possible to prove a negative, Rob has done so here.[6] The likelihood that Rob will commit future acts of domestic violence on these facts is low. Hand in hand with that determination, the facts do not suggest Robin's fear of Rob is based on a reasonable threat of imminent harm. Accordingly, the commissioner abused her discretion; she based her denial of Rob's motion to modify or terminate the permanent protection order on untenable grounds. *State ex rel. Carroll*, 79 Wn.2d at 26. We affirm the Court of Appeals termination of the order.[7]

II. Attorney Fees

Courts decline to award attorney fees under a statute unless there is a clear

[6] It is important to note that in many (perhaps most) cases the restrained party faces an uphill climb to prove that modification or termination of a permanent protection order is justified. Domestic violence with a reasonable prospect of recurrence constitutes a reason not to lift or modify the order. The court's discretion in reviewing the facts of each case is paramount.

[7] Because the permanent protection order will be terminated on the grounds above, we need not address the issue of whether it automatically terminated when Robin's children reached age 18.

expression of intent from the legislature authorizing such an award. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006). We review a grant or denial of attorney fees for abuse of discretion. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 758, 213 P.3d 596 (2009).

Robin concedes the DVPA "authorizes an award of reasonable attorney's fees incurred by a protected party in *seeking* an order or *renewal* of an order." Pet. for Review at 15-16 (emphasis added). But this case concerns neither the seeking nor the renewal of an order. It concerns the modification of one. By omitting a grant of attorney fees from the modification statute, the legislature intended that each party shoulder reasonable attorney fees. *See* RCW 26.50.130. There is no clear expression of intent from the legislature to authorize attorney fees for modification of permanent protection orders.

In any event the grant of attorney fees under the DVPA, where authorized, is discretionary. The statute authorizing issuance of protection orders provides: "[T]he court *may* provide relief as follows: . . . . Require the respondent to pay the administrative court costs and service fees . . . and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees." RCW 26.50.060(1)(g) (emphasis added). The statute authorizing renewal of a protection order contains the same discretion. *See* RCW 26.50.060(3) ("The court *may* award

court costs, service fees, and reasonable attorneys' fees as provided in subsection (1)(g) of this section." (emphasis added)). The commissioner did not err when she denied Robin's request for attorney fees. *See Morgan*, 166 Wn.2d at 758. We deny Robin's request for attorney fees here as well.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Susan Owens

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Tom Chambers