No. 93645-5

SUPREME COURT OF THE STATE OF WASHINGTON

ESMERALDA RODRIGUEZ,

Petitioner,

v.

LUIS DANIEL ZAVALA,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Statutes

Other Authorities

I. INTRODUCTION

Domestic violence is a terrible crime, and Washington State has long had a policy and legal structures aimed at punishing offenders and preventing its occurrence. *Amicus* American Civil Liberties Union of Washington ("ACLU") has been a steady advocate of these efforts and has filed *amicus* briefs and engaged in legislative advocacy in support of preventing domestic violence. Incidents of domestic violence involving children are particularly heartbreaking

At the same time, however, no-contact orders in a domestic violence case can affect fundamental and constitutionally-protected familial rights: the right of a parent to have contact with their child and the right of the child to have a relationship with that parent. These interests must be considered and balanced with the significant need to protect the victims. The structure established by Washington case law and statutes addresses this tension by requiring that orders be tailored to the particular facts and actual risks shown in each case.

This *Amicus* Brief addresses the third argument in Appellant mother's Petition for Discretionary Review, which asks this Court to mandate that a child of a parent who experiences domestic violence—particularly if the domestic violence occurs in the home—be automatically included as a person with whom contact is prohibited under a domestic

violence protection order ("DVPO"). It further requests that even if the person against whom the DVPO is issued is the child's other parent, the DVPO should deny all contact with the child.

Adopting this approach would not only violate the explicit directives of Chapter 26.09 RCW and Chapter 26.50 RCW and associated case law, it would also circumvent the parenting plan process of Chapter 26.09 RCW to the detriment of both the child and their parent, and would establish a constitutionally-suspect infringement of parental rights. This Court should not adopt such a far-reaching mandate, but should continue to require that trial courts make an individualized examination of whether there is a reasonable fear of future harm to the child, and that protective orders be limited to prohibiting contact in situations where the facts demonstrate an actual risk of harm to the child.[1]

II. STATEMENT OF THE CASE

The following facts should be considered in addition to the Statement of the Case as presented in Appellant mother's Supplemental Brief. First, the trial court found no reasonable threat of future harm to Lazaro[2] from mere contact with his father, stating that Lazaro was "not

[1] This Brief does not address the arguments of Appellant mother and *Amicus* Legal Voice that the Court of Appeals erred when it held that there must be proof that the child himself (as opposed to the mother) feared future harm to the child.
[2] This brief uses the same fictitious name of the child used by the Court of Appeals.

threatened in any manner" and "I'm not going to include your son in this order because he wasn't involved in any of this." RP 10-12.

Second, the trial judge did enter an order restraining the father from contact with Lazaro's mother and her daughters, and from being near the family residence, the mother's workplace, or the school of any of her daughters. RP 10-11. The trial court determined that this order would protect against future violence to any of these people.

At the same time, the court explicitly held that continued contact between Lazaro and his father was reasonable and proper, although difficult to arrange because of the order of no contact with the mother: "[n]ow, if you want to have visitation you've got a problem, and that problem is you cannot contact her at all. So, you cannot contact her to arrange visitation, but I'm not preventing you from visiting the child. So what I would strongly suggest is that you file an action for a parenting plan and then within the context of that figure out a way to get some visitation." RP 11. The trial court thus specifically determined that there could be circumstances in which Lazaro's father could have contact with him without threat to anyone and that the parenting plan process was the appropriate avenue to define that contact. The trial court also denied Lazaro's mother's request that a custody determination be made in the

DVPO proceeding, and urged the mother to engage in the parenting plan process, where that determination could be made. RP 12.

III. ARGUMENT

The Court should reject the argument that a child's mere presence in a home where domestic abuse occurs automatically requires an order forbidding parental contact with the child. First, the parent-child relationship is a fundamental right under both state and federal constitutions. Courts have repeatedly recognized that a court order restricting the parent-child relationship is justified only upon proof that the restriction is narrowly drawn to meet a compelling state interest.

In the case of protective orders restricting a parent's fundamental liberty interest in contact with their child, the courts have repeatedly held that there must be a finding of a reasonable fear of future harm based on the actual facts of the case. Adopting a rule mandating a bar on all parental contact with a child whenever there is domestic violence in the home would remove the power and obligation of the trial court to review the facts of each case individually, and would violate both the constitutional rights of Lazaro's father and Lazaro's rights and interests in maintaining a relationship with his father.

Second, the proposed rule would nullify both the procedural and substantive protections of Chapter 26.09 RCW, which governs visitation

and residential arrangements. Chapter 26.09 RCW embodies the principle that visitation with one's child is not automatically barred by an act of domestic violence against the other parent and that whether such visitation is appropriate depends on the particular facts of each case. Chapter 26.50 RCW (the Domestic Violence Prevention Act, or DVPA) allows a domestic violence order to include provisions governing residential placement of the child and restrictions on a parent's contact with the child, but also requires (as the Court of Appeals correctly found) that the principles and standards of Chapter 26.09 RCW be followed.

A. Constitutional Protection of Parental Rights Requires a Finding of Reasonable Fear of Future Harm to the Child Based on the Facts of the Case; Mandating an Assumption of Future Harm Infringes on Parental Rights and Unduly Harms the Parent-Child Relationship

In balancing the rights of the parent with the need to prevent harm to the child, this Court has long held that, in order to infringe on a parent's fundamental rights, the trial court must find based on the specific facts of the case that there is an actual risk of future harm from such contacts. The Court's approach appropriately weighs both the rights and harms at stake.

This Court has recognized that a parent's right to a relationship with his/her children is a "fundamental 'liberty' interest protected by the Fourteenth Amendment and also a fundamental right derived from the privacy rights inherent in the constitution." *In re Smith*, 137 Wn.2d 1, 15,

969 P.2d 21 (1980), *judgment aff'd sub nom. Troxel v. Granville,* 120 U.S. 57, 120 S. Ct. 2054, 137 L. Ed. 2d 49 (2007). *See also, e.g., Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The right does not belong just to parents; it is fundamentally important for children to maintain a relationship with their parents unless facts necessitating infringement on the relationship are present. Accordingly:

> Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.
>
> . . . .
>
> This court has emphasized that a state can only intrude upon a family's integrity pursuant to its parens patriae right when "parental actions or decisions seriously conflict with the physical or mental health of the child."

In re Smith, 137 Wn.2d at 15 (citing *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)). *See also Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

Much of the recent law in this regard has arisen in the closely-related area of no-contact orders imposed on parents in connection with sentencing. In *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010), after emphasizing that the fundamental parental right to participate in the lives of one's children, this Court held that:

> "[c]onditions that interfere with fundamental rights" must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order."

In Re Rainey, 168 Wn.2d at 377 (quoting *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). The Court further noted:

> As to the "reasonably necessity" requirement, the interplay of sentencing conditions [restricting parental contact] and fundamental rights is delicate and fact-specific, *not lending itself to broad statements and bright line rules*.

In re Rainey, 168 Wn.2d at 377 (emphasis added).

The application of these principles to actual situations is well illustrated by the courts' decisions in *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001) and *In re Rainey*, *supra*. In *Ancira*, the father had repeatedly violated no-contact orders, and the children had both witnessed the domestic violence and been upset by it, *Ancira*, 107 Wn. App. at 653. In connection with sentencing for the domestic violence, the trial court imposed a five year no-contact order regarding the father's contact with his children. The Court of Appeals reversed, finding that "parents have a fundamental liberty interest in the care, custody, and control of their children" and that limitations on those rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." *Id*. at 653-654.

The court acknowledged that preventing children from witnessing domestic violence can justify a protective order, but found there was no evidence that prohibiting *this* father from all contact with his children for a lengthy period was reasonably necessary to prevent them from the harm of witnessing domestic violence. *Id* at 654-655. "Nor does the record support the total prohibition of indirect contact with the children by telephone, mail, e-mail, etc." *Id.* at 655. The court struck the no-contact provisions and remanded for further proceedings. *See also State v Stanford*, 128 Wn. App. 280, 288-89, 115 P.3d 386 (2005).

Ancira was cited with approval in *Warren*, 165 Wn.2d at 34-35, confirming that crime-related prohibitions relating to fundamental rights must be narrowly drawn, and "[t]here must be no reasonable alternative way to achieve the State's interest." *Id.*[3]

The basic principle of *Ancira*, that limitations on a parent's contact with their children must be based on the need to prevent an actual risk of future harm, was again cited with approval by this Court in *In re Rainey*, 168 Wn.2d at 378, with the Court concluding:

[3] As the Court explained in *Warren*, "In *Ancira*, the court struck down the no-contact order because the children could be protected through indirect contact by phone or mail, or supervised visitation outside the presence of their mother (who was the victim of the domestic violence at issue)." *Id.* Thus, it was not reasonably necessary to cut off all contact with the children. *State v. Warren*, 165 Wn.2d at 35.

> But the facts of cases such as these are important . . . The question is whether, *on the facts of this case*, prohibiting all contact with L.R., including indirect or supervised contact, is reasonably necessary to realize the compelling interests described above.

168 Wn.2d at 379 (emphasis added). *See also Warren*, 165 Wn.2d at 35. On the specific facts in case before it, the *Rainey* Court found that a no-contact order was warranted but still remanded on the "fact specific" question of whether a lifetime ban could be justified. *In re Rainey*, 168 Wn.2d at 382.

In short, Washington courts have held that, in order to infringe on a parent's fundamental rights, the trial court must find, based on the specific facts of the case, that there is an actual risk of future harm and that the specific prohibition is reasonably necessary to prevent that harm. This Court should reject the proposed rule because it would circumvent that trial court determination.

B. Chapter 26.09 and Chapter 26.50 RCW Require that Residential and Visitation Rights Be Structured to Allow Parental Contact where Contact Is Consistent with the Welfare of the Child

Chapter 26.09 RCW, which establishes the principles and procedures for creating parenting plans, recognizes that certain past actions by a parent can require limitations on residential time. The statutes also provide, however, that limitations are appropriate only when,

and to the extent, actually required by the facts. Thus, although there are elaborate provisions for rebuttable presumptions in favor of restrictions on parents who have (or where persons in their households have) committed sex offenses, there are equally elaborate provisions for rebuttal of the presumptions. *See, e.g.*, RCW 26.09.191(2)(d) & (f).

Applicable to this case, RCW 26.09.191(2)(a) provides that a parent's residential time shall be limited if it is found that the parent has engaged in a history of domestic violence, but the statute then goes on to require that the focus of the limitations must be "reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." RCW 26.09.191(2)(m)(i). The limitations the court may impose include, but are not limited to "[s]upervised contact between the child and the parent . . . ." *Id*.

Most important, a court may not restrain all contact with the child unless the court "*expressly finds based on the evidence* that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time . . ." *Id.* (emphasis added).[4]

[4] The fact that, under RCW 26.50.060, a petitioner for a domestic violence order can petition on behalf of both themselves and for family and household members, and an

The legislature has struck a careful balance between the fundamental rights of parents and the state interest in protecting children and preventing domestic violence. Parental rights may be limited, and all residential contact may be prohibited, but such a prohibition must be expressly based on evidence and a finding that limitations on residential time will not adequately protect the child. In contrast, the proposed rule that the mere presence of the child in the home justifies a complete no-contact order would be contrary to the requirements of the statute and to all of this Court's holdings requiring individualized consideration, *see, e.g., In re Rainey, supra*.

This is not to say that a protective order in a domestic violence case can never temporarily bar all contact. For example, if there is evidence that an abusive parent may use contact with the child as a tool or conduit to continue abuse of the other parent, the statutes provide a mechanism for considering those facts and providing appropriate protections. In *Stewart v. Stewart*, 133 Wn. App. 545, 137 P.3d 24 (2006), *review denied*, 160 Wn.2d 1011, 161 P.3d 1027 (2007), for example, the trial court found that the father had repeatedly used custody exchanges as

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order of protection may restrain the respondent from having contact with "the victim of domestic violence or the victim's children or members of the victim's household," does not mean that children must mandatorily be included in every DVPO. The plain language of the statute is "*or*" the children and household members, not "*and.*"

an opportunity to commit abuse against the mother in the presence of the children, resulting in actual harm to the children. It imposed a protective order in favor of the children and suspended the parenting plan pending a motion for revision based on these facts. This was an order based on actual facts showing a likelihood of actual harm to the children, recognizing "the protection order court must consider the same factors [as the parenting plan court] in making its temporary orders." *Stewart*, 133 Wn. App. at 553.

A court acting under Chapter 26.50 RCW is bound by the requirement of Chapter 26.09 RCW that it may not bar all parental contact unless it "*expressly finds based on the evidence* that limitations on the residential time with the child *will not adequately protect* the child from the harm or abuse that could result if the child has contact with the parent requesting residential time . . . ." RCW 26.09.191(2)(m)(i) (emphasis added). *See also Stewart*, 133 Wn. App. at 55; *Rodriguez v. Zavala*, Court of Appeals Decision at 13. An individualized examination of the facts is required.

The Domestic Violence Manual for Judges further underscores that an individualized examination of the facts is necessary:

> [D]omestic violence is not in of itself child maltreatment . . . . However, for some DV cases with children present, the children *may* be harmed or emotionally and

> developmentally impacted due to their being used as weapons against the DV adult victim by the perpetrator or as a result of being exposed to the violence. This is not true for all children and has to be carefully assessed.

Wash. State Supreme Court Gender & Justice Comm'n, "Domestic Violence Manual for Judicial Officers," Washington Courts, at Ch.2, 9 (2015), https://www.courts.wa.gov/content/manuals/domViol/Complete%20Manual%202015.pdf.

> There is too much variance in impact of domestic violence on children to attempt to render findings without knowing the specifics of the domestic violence pattern, its impact on the children, its impact on the adult victim, the lethality assessment, the co-occurring issues (substance abuse, mental health, and poverty) and the protective factors in the individual case.

Id. at Ch. 2, 56.

Adoption of a mandated assumption that contact with the child will automatically cause future harm would significantly affect the rights of parents involved in domestic violence situations, as well as unnecessarily damage children's relationships with their parents. The Washington State Legislature has rejected such a sweeping rule and required consideration of the individual facts of each case, an appropriate decision required by the principle that the infringement on parental rights must be narrowly drawn to meet a compelling state need.

IV. CONCLUSION

Domestic violence is a dreadful crime, and the legislature and courts have created a careful structure both to punish perpetrators and to prevent re-occurrences. Under this structure, the finding that a parent committed an act of domestic violence should not automatically and necessarily strip the offending parent of all contact with their child, if contact can be structured in a way that protects against reasonable fear of future harm to the victim and other members of the household.

Amicus ACLU addresses only the third issue raised in Appellant mother's Petition for Review[5] and takes no position on the ultimate disposition of this case. It instead urges that, regardless of the disposition, this Court reaffirm that the correct standard for evaluation of whether to forbid a parent's contact with their child is whether there is a reasonable fear—based on the actual, individual facts of the case—of future harm if such contact is not forbidden.

RESPECTFULLY SUBMITTED this 31st day of March, 2017.

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[5] Thus, *Amicus* ACLU takes no position on the argument that the Court of Appeals erred in holding that there must be evidence that the child himself had a fear of harm.

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