IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KIMBERLY GOURLEY, Respondent, v. CLIFFORD GOURLEY, Petitioner.	)	No. 76270-8 En Banc Filed October 26, 2006

J.M. JOHNSON, J.—N. Gourley accused her father, Clifford Gourley, of sexual assault. As a result, N.'s mother, Kimberly Gourley,[1] sought and received a domestic violence protection order against Mr. Gourley, prohibiting contact between Mr. Gourley, herself, and their three children—14-year-old N., 14 year-old D., and 10-year-old K. On appeal, Mr. Gourley argues that in granting the petition for protection order, the commissioner improperly considered hearsay evidence and

[1] Kimberly Gourley will hereinafter be referred to as Ms. Gourley. Because the children in this case are minors, we refer to them by the initial of their first name.

violated his due process rights when he refused to allow cross-examination of N.

We reject Mr. Gourley's hearsay challenge because ER 1101(c)(4) allows courts to consider hearsay in protection order proceedings. We also reject Mr. Gourley's due process argument as all requisite procedures were followed. The facts of Mr. Gourley's case did not require cross-examination—although we note that allowing such cross-examination would not have been error.

I. Facts and Procedural History

In February 2003 the Gourley's neighbor reported to Child Protective Services (CPS) that N. and K. had disclosed that Mr. Gourley had sexually and physically abused them. However, when first interviewed by CPS, both girls denied the allegations.

During the subsequent investigation, N. described to a detective "multiple incidents of sexual touching" in which her father "rubbed her vaginal area both over and under her clothing on several occasions." Clerk's Papers (CP) at 39, 162. N. told the detective that before the CPS interview her father had convinced her to lie. N. also admitted to her mother and her personal counselor that she had in fact been abused by Mr. Gourley.

Mr. Gourley admitted to the detective that he applied aloe vera to N. while she was naked, including her bare breasts, but denied any sexual intent. He told the

detective that there may have been other times when he touched N.'s breasts. He acknowledged that it was wrong to do so and admitted that he needed counseling. The detective also reported that Mr. Gourley admitted "cautioning" N. before the interview with CPS, at which she denied the charges.

In April 2003 Ms. Gourley petitioned for a domestic violence protection order on behalf of herself and her children against Mr. Gourley. The petition explained that N. reported that her father had sexually assaulted her from November 2001 to March 2003. The petition was later supported by the declarations of Ms. Gourley, N.'s personal counselor, the investigating officer, and N. herself. In N.'s declaration, she expressed fear of continued sexual abuse.

While Mr. Gourley denied sexually abusing N., in his declaration he admitted the following:

> one night (last summer) when I was in bed, nearly asleep, [N.] had come into our bedroom and asked me to put aloe vera on her sunburn. I did, while she stood next to the bed. She didn't want lotion on her clothes, so she took them off. Just as I was finishing, [K.] came downstairs looking for a decongestant, so I left N. and helped K. find a decongestant in the kitchen. [N.] put her clothes on and joined us in the kitchen.

CP at 138-39. [2]

The hearing on the petition was continued twice at the request of Mr. Gourley, and he was allowed to depose Ms. Gourley. Mr. Gourley's counsel

also submitted a prehearing memorandum in which he argued that N.'s statements to third parties were inadmissible hearsay and could not be admitted without cross-examination. However, Mr. Gourley made no attempt to subpoena N.

Prior to the hearing, Mr. Gourley was formerly charged by information filed in the Superior Court of Snohomish County with child molestation in the second degree.

At the hearing, Mr. Gourley's counsel repeated his argument that the evidence was insufficient "without direct, nonhearsay testimony from [N.] which is subject to cross-examination." Report of Proceedings (RP) at 19. The commissioner expressed concern about allowing cross-examination of a victim in a civil case when a criminal charge was pending and explained that he would not allow cross-examination of a minor victim without giving the prosecutor an opportunity to object.

The commissioner found that an act of domestic violence had occurred—that it was more likely than not that inappropriate touching by Mr. Gourley of N. had occurred. The commissioner granted the protection order but made it "subject to

[2] The dissent misunderstands that Mr. Gourley himself made this admission in this filed declaration. This is the statement accepted at face value, not other oral representations Mr. Gourley made and later denied. *See* dissent at 6.

revision and subject to the dissolution action."

Mr. Gourley filed a motion for revision of the commissioner's ruling with the superior court. The superior court denied Mr. Gourley's motion finding that the "records submitted by defendant constitute sufficient facts on which to order the [domestic violence protection order]." CP at 14. Mr. Gourley appealed to the Court of Appeals. The Court of Appeals affirmed the commissioner's issuance of the protection order. *In re Gourley*, 124 Wn. App. 52, 55, 98 P.3d 816 (2004).

II. Analysis

A. ER 1101

Mr. Gourley argues that the commissioner improperly relied on hearsay evidence. This argument fails because ER 1101(c)(4) allows courts to consider hearsay in a chapter 26.50 RCW protection order proceeding.

Interpretation of a court rule is a question of law, subject to de novo review. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). In determining the meaning of a court rule, we apply the same principles used to determine the meaning of a statute. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Foremost, we consider the plain language of the rule and construe the rule in accord with the intent of the drafting body. *See id*. If the rule's meaning is plain on its face, the court must give effect to that plain meaning as an expression of

legislative intent. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004).

ER 1101 discusses the applicability of the evidence rules in various proceedings in Washington, including protection order proceedings:

> (c) . . . The rules (other than with respect to privileges) need not be applied in the following situations:
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> . . . .
>
> (4) *Applications for Domestic Violence Protection*. Protection order proceedings under RCW 26.50 and 10.14. When a judge proposes to consider information from a domestic violence database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.

The plain language of the rule indicates that the rules of evidence need not be applied in protection order proceedings.[3] ER 1101(c)(4); *see also Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002) (finding that "the rules of evidence, including the hearsay rule, need not be applied in protection order proceedings under chapter 26.50 RCW."). Therefore, the commissioner did not err when he considered hearsay evidence.

B. Due Process

[3] The history of the rule confirms this conclusion.

Mr. Gourley next argues that his due process rights were violated when the commissioner refused to allow testimony from and cross-examination of N. at the hearing. Because Mr. Gourley does not argue that chapter 26.50 RCW is facially unconstitutional, we only address whether his due process rights were violated under the specific facts of this case. We hold that they were not.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). Due process is a flexible concept in which varying situations can demand differing levels of procedural protection. *Id*. at 334. In evaluating the process due in a particular circumstance, we must consider (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Id*. at 335.

In the present case, Mr. Gourley claims a fundamental right to make decisions concerning the care, custody, and control of his children. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). However, the possible

length of the deprivation of the interest is also an important factor in the *Mathews* test. *Mathews*, 424 U.S. at 341. Thus, we must consider that Mr. Gourley's right was only temporarily restrained by the protection order. On its face, the duration of the protection order was only one year, and the order was further subject to orders issued in the dissolution action.

While Mr. Gourley has an important interest in the care, custody, and control of his children, the government has a compelling interest in preventing domestic violence or abuse. RCW 26.50.035 Findings—1993 c 350 ("[D]omestic violence is a problem of immense proportions affecting individuals as well as communities . . . [It costs] lives as well as millions of dollars each year . . . for health care, absence from work, and services to children."). To balance these two interests we must consider the procedures employed by the government and determine the risk that Mr. Gourley's interest was erroneously deprived.

The due process requirements of being heard at a meaningful time and in a meaningful manner are protected by the procedures outlined in chapter 26.50 RCW (which Mr. Gourley did not challenge as being unconstitutional). Chapter 26.50 RCW provides the following procedural protections: (1) a petition to the court, accompanied by an affidavit setting forth facts under oath, (2) notice to the respondent within five days of the hearing, (3) a hearing before a judicial officer

where the petitioner and respondent may testify, (4) a written order, (5) the opportunity to move for revision in superior court, (6) the opportunity to appeal, and (7) a one-year limitation on the protection order if it restrains the respondent from contacting minor children. *See State v. Karas*, 108 Wn. App. 692, 699-700, 32 P.3d 1016 (2001); chapter 26.50 RCW.

Here, the above procedures were followed and Mr. Gourley does not argue otherwise. Moreover, the commissioner, exercising his discretion, allowed Mr. Gourley the further procedural protection of additional discovery in that Mr. Gourley was permitted to subpoena and depose Ms. Gourley.[4] CP at 48-50.

Despite this, Mr. Gourley argues that chapter 26.50 RCW requires the additional procedural protection of cross-examination. Mr. Gourley bases this argument on language in RCW 26.50.020 and RCW 26.50.070(1), (4) that refers to a "full hearing" necessary before a one-year protection order can be entered. CP at 48-50.

RCW 26.50.020 deals with the jurisdiction of district and municipal courts in protection order proceedings and explains that when the district or municipal court jurisdiction is limited to issuance of a temporary order, the court must "set the full

[4] Mr. Gourley did not subpoena, or file a motion to subpoena, N. to testify.

hearing provided for in RCW 26.50.050 in superior court and transfer the case." RCW 26.50.020(5). RCW 26.50.070(1) explains that where appropriate, the court can grant an ex parte temporary order for protection, "pending a full hearing." "A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order . . . ." RCW 26.50.070(4).

However, no section of chapter 26.50 RCW explicitly sets forth the form the hearing must take or defines what is meant by "full hearing." When the term is used, it is juxtaposed against the "ex parte" hearing necessary for a temporary protection order. RCW 26.50.020, .070(1), (4). Therefore, nothing in the statutory scheme explicitly requires a trial judge to allow the respondent in a domestic violence protection order proceeding to cross-examine a minor who has accused him of sexual abuse.

Here, the commissioner did not abuse his discretion when he determined that cross-examination was unnecessary. The commissioner had ample evidence with which to make his determination, including Mr. Gourley's admission that he rubbed aloe vera on N.'s naked body. CP at 138. Thus, the need to cross-examine N. was obviated because Mr. Gourley himself confirmed N.'s declaration. Mr. Gourley's due process rights were not violated.

While the facts of this case did not require testimony or cross-examination,

live testimony and cross-examination might be appropriate in other cases. Our analysis here is limited to the facts of this case.

C. Attorney Fees

The Court of Appeals awarded attorney fees to Ms. Gourley. *Gourley*, 124 Wn. App. at 59. Ms. Gourley did not specifically renew her request of attorney fees to this court. However, pursuant to RAP 18.1(b),[5] we consider the request for fees to be a continuing request and affirm the award of fees to Ms. Gourley.

III. Conclusion

The legislature has carefully enacted protection order procedures in the hope of protecting the important interests implicated. Judges and commissioners must exercise discretion to determine whether cross-examination is necessary in a particular case to protect the rights involved; their judgment is crucial in such delicate proceedings. We affirm the Court of Appeals.

[5] RAP 18.1(b) provides in pertinent part: "The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court."

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Susan Owens