

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Marriage of

CHERRY D. MUHAMMAD, nka CHERRY GILBERT,

Appellant,

and

DAWUD D. MUHAMMAD,

Respondent.

DOCKET NO. 75061-1

BRIEF OF *AMICI CURIAE*

THE BATTERED WOMEN'S JUSTICE PROJECT OF
THE PENNSYLVANIA COALITION AGAINST DOMESTIC
VIOLENCE,
THE NATIONAL ASSOCIATION OF WOMEN LAWYERS,
DOMESTIC VIOLENCE REPORT

IN SUPPORT OF PETITION FOR REVIEW

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- A. IDENTITY OF PETITIONER**
- B. COURT OF APPEALS DECISION**
- C. ISSUES PRESENTED FOR REVIEW**
- D. STATEMENT OF THE CASE**

Amici Curiae accepts and adopts the Identity of Petitioner, Court of Appeals Decision, Issues Presented For Review, and Statement of the Case as set forth by Appellant, Cherry Gilbert, in the Motion for Discretionary Review.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Violence against women is an epidemic in our society.¹ Recognizing this, in 1984 the Washington State Legislature enacted the Domestic Violence Prevention Act (“DVPA”).² Whereas safety and access to the courts are two overriding public policies of the DVPA,³ law

¹ Patricia Tjaden & Nancy Thoennes, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTES OF JUSTICE AND CENTERS FOR DISEASE CONTROL, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, NCJ 181867, 26 (2000) (“[T]he most frequently reported intimate partner violence by far was physical assault: 22.1 percent of surveyed women...said they were physically assaulted by an intimate partner at some time in their lifetime...About 1.3 million women...are physically assaulted by an intimate partner annually in the United States....”), at <http://www.ojp.usdoj.gov>.

² Wash. Rev. Code § 26.50 *et seq.* (2004).

³ See State of Washington v. Karas, 108 Wn. App. 692, 698, 32 P.3d 1016 (Wash. App. 2001).

is not self-implementing.⁴ The strong public policy and plain language of the DVPA alone are not enough to keep women safe from abuse.

Public policy supports practices that encourage domestic violence victims to come forward and seek court assistance. When petitioners obtain a protection order, they should not then be denied meaningful access to justice in subsequent collateral proceedings. The trial court's decision to deny Appellant Gilbert a share of Dawud Muhammad's pension benefits solely because she obtained a protection order, contravened her fundamental right to meaningful access of the courts.

1. THE TRIAL COURT'S ACTIONS ABRIDGE THE RIGHT OF COURT ACCESS AND HAVE A CHILLING EFFECT ON ALL VICTIMS OF DOMESTIC VIOLENCE.

a. Courts Cannot Abridge the Constitutional Right of Court Access.

Access to the courts is a fundamental right of every individual,⁵ essential to the protection of individual rights.⁶ Access to the courts in a manner that is meaningful is the necessary means by which justice is

⁴ Andrea C. Farney & Roberta L. Valente, *Creating Justice Through Balance: Integrating Domestic Violence Law Into Family Court Practice*, 54 JUV. & FAM. CT. J. 35, 40 (2003) ("The law must be more than a 'paper construct' and must be made available and meaningful through the actions and practices of lawyers and judges.").

⁵ See *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) ("The right of access...is basic to our system of government...[and] a fundamental right protected by the constitution.").

⁶ *Id.*

served.⁷ Moreover, access to justice is recognized as a fundamental right under Washington law, holding a prominent place among the individual rights protected by the Washington Constitution.⁸ Meaningful access to justice requires unhampered access to the court and presumes the availability of judicial relief without abridgement of fundamental rights.⁹

b. Meaningful Access Includes the Right to Be Heard By a Fair and Impartial Arbitrator, Unabridged and Free of Bias.

Domestic violence is primarily perpetrated by men against women; and severe violence in a relationship results in the victimization of a woman in at least 90 percent of the cases.¹⁰ Gender-based discrimination and stereotypes continue to pervade society and persist in the law¹¹ and

⁷ See Boddie v. Connecticut, 401 U.S. 371, 377 (1971)(Due process requires a meaningful opportunity to be heard for those who have no choice but to settle their disputes through the judicial process.).

⁸ WASH. CONST. art. I, §10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”); see Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 819 P.2d 370, 374 (1991); see also Housing Auth’y of King County v. Saylor, 87 Wn.2d 732, 750, 557 P.2d 321, 331 (1976)(Horowitz, J., concurring in the result)(“in the exercise of its judicial power to interpret general clauses in our constitution, the court may properly take into account relevant public policy considerations in order to give specific content to these general clauses.”).

⁹ Harrison v. Springdale Water & Sewer Comm., 780 F.2d 1422, 1428 (8th Cir. 1986) citing Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981); Ferranti v. Moran, 618 F.2d 888, 892 (1st Cir. 1980); Russell v. Oliver, 552 F.2d 115, 116 (4th Cir. 1977)(The constitutional right of access to the courts cannot be impaired, either directly or indirectly, or in retaliation for filing lawsuits.).

¹⁰ See e.g., OFFICE OF THE ADMINISTRATOR FOR THE COURTS, FINAL REPORT OF THE WASHINGTON STATE DOMESTIC VIOLENCE TASK FORCE 3 (1991) (citations omitted).

¹¹ Hernandez v. Ashcroft, 345 F.3d 824, 838-9 (9th Cir. 2003), 2003 U.S. App. LEXIS 20364, 36 (2003) citing H.R. REP. NO. 103-395, at 26 (stating “current [immigration] law fosters domestic violence,” and Congress’s intent was that the Violence Against Women Act “be so interpreted as to remedy the widespread gender bias and ignorance that have resulted in governmental harm, rather than help, for survivors of domestic violence.”).

family courts, particularly in property distribution decisions.¹²

The right to be heard fairly and impartially is abridged when courts allow gender bias to guide their decision-making. Indeed, a woman's rights should not be diminished or negated by her choice to be free of domestic abuse. Rather, courts are most effective in deterring batterers and preventing future abuse when they hold perpetrators of abuse accountable.¹³ In this case, however, the trial court concluded that "[b]y virtue of the obtaining of the permanent domestic violence prevention order" Muhammad's ability to be employed was limited¹⁴ and, "she [Gilbert] has to recognize the consequences" of filing for a protection order.¹⁵

¹² See MASSACHUSETTS SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, reprinted in 24 NEW ENG. L. REV. 745, 774 (1990) ("First, it is troubling that although society is now recognizing that many of the problems affecting women -- domestic violence, lack of child support, inequitable distribution of assets after divorce -- are not purely private matters, women are still being told by the court that these are, indeed, family problems for them to work out with their husbands or ex-husbands: they do not belong before a judge."); see also, OREGON SUPREME COURT, THE REPORT OF OREGON SUPREME COURT/ OREGON STATE BAR TASK FORCE ON GENDER FAIRNESS 56 (1998) ("In marital dissolutions, women tend to receive monetary dispositions... that place them at a significant short- and long-term financial disadvantage. When women have primary care and custody of their children, these financial disadvantages harm their children, as well."); OFFICE OF THE ADMINISTRATOR FOR THE COURT, FINAL REPORT OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURT 55-58 (1989).

¹³ Muhammad had a history of violence against women. In fact, his former wife filed a declaration stating "While we were married, Muhammad put a loaded gun to my head and threatened to shoot me." Clerk's Papers (CP) at 92. Given Muhammad's history of domestic violence against women, holding him accountable is particularly important.

¹⁴ CP at 17.

¹⁵ Report of Proceedings (RP)(Jan. 24, 2002) at 2-4.

Instead of holding Muhammad accountable, the trial court abridged Gilbert's right to access the court for protection when it denied a "just and equitable" distribution of marital property solely because she obtained a protection order.¹⁶ In so doing, the court created the disturbing perception of gender bias. By its reasoning, had Gilbert not sought protection, but rather endured Muhammad's life-threatening abuse, she would have been entitled to an equitable portion of the couple's assets.

In *Amici's* experience, all too often, when victims of domestic violence seek court intervention, they are met with a legal system that is biased against them and hostile to their need for justice.¹⁷ When the trial court failed to treat Gilbert fairly and without bias, it closed the courthouse doors to her. If the promise of the DVPA is to be fulfilled, the trial courts of Washington State and the nation must keep the courthouse doors open to victims of domestic violence. To punish victims in collateral proceedings for having obtained a protection order, or to further subject

¹⁶ RP at 8 (trial court reasoned that Gilbert should not receive a portion of Muhammad's pension because he was not going to be a police officer "unless something is done about this protection order business").

¹⁷ See James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999); see also Joan S. Meier, *Symposium: Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657, 672 (2003) ("For instance, the Wellesley Battered Mothers' Testimony Project found...that these mothers were commonly treated as 'hysterical and unreasonable,' with 'scorn, condescension and disrespect,' and were prevented from being heard in court.").

them to gender bias and unfairness in court proceedings, renders the constitutional right of meaningful access to the courts, meaningless.

c. A Chilling Effect Will Result If Courts Are Permitted to Limit Domestic Violence Victims' Right to Marital Assets Based On Their Seeking Safety Through the Justice System.

“It is an act of supreme courage for battered women to implore the civil legal system to bring its authority to bear against the violence and terrorism of batterers.”¹⁸ The decision to leave an abusive relationship is a difficult and dangerous one for victims of domestic violence.¹⁹ The stakes for women are even higher when abusers are members of law enforcement, as in this case.²⁰

Economic self-sufficiency is often “a critical factor in the decision-making of battered women considering separation from the batterer...the

¹⁸ Barbara J. Hart, *Safety and Accountability: The Underpinnings of a Just Justice System* (1998) (unpublished manuscript, on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence), available at <http://www.vaw.umn.edu>.

¹⁹ Id.; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY* (2003) (“Many battered women find themselves in dangerous positions because the courts often do not give credence or sufficient weight to a history of partner abuse in making decisions about child custody and visitation.”), available at <http://www.apa.org>; see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 6 (1991) (“At the moment of separation or attempted separation...the batterer's quest for control often becomes most acutely violent and potentially lethal.”).

²⁰ NATIONAL CENTER FOR WOMEN AND POLICING, FACT SHEET ON POLICE-OFFICER INVOLVED DOMESTIC VIOLENCE (“Victims of a police officer are particularly vulnerable because the officer who is abusing them has a gun, knows the location of battered women's shelters, and knows how to manipulate the system to avoid penalty and/or shift blame to the victim.”), at <http://www.womenandpolicing.org>.

most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him.”²¹ For these reasons, economic resources are imperative for women’s safety²² and are often part of a victim’s on-going need for access to the justice system.

Moreover, battered women are often compelled back into an abusive relationship because of the lack of economic resources.²³ “Inadequate material resources render women more vulnerable to battering.”²⁴ All too often, women are forced to choose between poverty and continued abuse—which exacerbates women’s poverty.²⁵ domestic violence is the leading cause of homelessness of women²⁶ and complicates the ability of victims to become self-sufficient.²⁷

²¹ Barbara J. Hart, *The Legal Road to Freedom* (1991) (unpublished manuscript, on file with the Legal Department of the Pennsylvania Coalition Against Domestic Violence), available at www.mincava.umn.edu.

²² Eleanor Lyon, *Poverty, Welfare and Battered Women: What Does the Research Tell Us?* National Electronic Network on Violence Against Women 1 (Dec. 1997) (“Several studies in the past ten to fifteen years have documented the importance of economic resources for battered women’s decision-making.”), at <http://www.vawnet.org>.

²³ Hart, supra note 21 at 4.

²⁴ Donna Coker, *Piercing Webs of Power: Identity, Resistance, and Hope in LatCrit Theory and Praxis: Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1020 (2000) (citations omitted).

²⁵ NOW LEGAL DEFENSE AND EDUCATION FUND, SURVIVING VIOLENCE AND POVERTY: A FOCUS ON THE LINK BETWEEN DOMESTIC AND SEXUAL VIOLENCE, WOMEN’S POVERTY, AND WELFARE (2002) (“As a series of recent studies demonstrate, domestic and sexual violence threaten survivors’ employment and economic security, which in turn creates and sustains women’s poverty.”), available at <http://www.nowldef.org>.

²⁶ See THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES 82 (2002) (“Domestic violence was identified by 11 cities as a primary cause of homelessness.”) available at <http://www.usmayors.org>.

²⁷ Lyon, supra, note 22 at 4.

Allowing the trial court's decision to become precedent will have far reaching consequences for victims of domestic violence. Attorneys will have to inform women that they may suffer unknown and unintended collateral consequences as a result of seeking a protection order, further deterring victims from accessing the courts for protection.

F. CONCLUSION

Courts that discourage petitioners through their policies, procedures and biases deter victims from seeking the access that is strongly promised in the DVPA. Individuals have a fundamental right to access the courts, and this critical door must be kept open without any barriers to justice and safety.²⁸

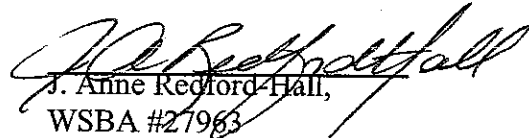
If courts are permitted, as in this case, to blame and punish victims of domestic violence solely because they pursue their legal rights to protect themselves from violence, there will be a chilling effect upon future access to the court by victims. Victims of domestic violence will not seek court intervention and protection if they will be left destitute as a result. As a primary tool for victims of domestic violence to achieve safety in Washington State, the DVPA would be foreclosed as a viable

²⁸ As Washington State Supreme Court Chief Justice Alexander declared, "Each time a poor person is denied access to the justice system – to assert or defend important legal rights – a small piece of our democracy dies." Gerry Alexander, *Legal Services Too Crucial to Take Cut*, SEATTLE POST-INTELLIGENCER, Feb. 27, 2002, available at http://seattlepi.nwsourc.com/opinion/59977_justiceop.

option for victims, contrary to public policy and the plain language of the statute.

Based on the foregoing, *Amici Curiae*, the Battered Women's Justice Project, the National Association of Women Lawyers and the Domestic Violence Report, respectfully submit that this Court should take review to clarify and to affirm that it is the public policy of Washington State to prevent domestic violence rather than punish its victims, by allowing meaningful access to the courts.

Respectfully submitted this 23rd day of February, 2004.



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