

# HOUSE BILL REPORT

## HB 1565

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### As Reported by House Committee On: Judiciary

**Title:** An act relating to the termination or modification of domestic violence protection orders.

**Brief Description:** Concerning the modification and termination of domestic violence protection orders.

**Sponsors:** Representatives Frockt, Rodne, Pedersen, Eddy, Goodman, Roberts, Walsh, Green, Jacks, Fitzgibbon, Reykdal, Kenney, Stanford, Billig and Kelley.

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 1/31/11, 2/3/11, 2/17/11 [DPS].

#### **Brief Summary of Substitute Bill**

- Requires respondents to permanent domestic violence protection orders and orders issued for a period of greater than two years to submit an affidavit setting forth relevant facts when filing a motion to modify or terminate an order, and requires the court to review the affidavits prior to granting a hearing on a motion.
- Prohibits the modification or termination of permanent domestic violence protection orders and orders issued for a period of greater than two years by a motion of a respondent unless the respondent proves by preponderance of the evidence that it is warranted or he or she will refrain from acts of domestic violence.
- Allows courts to require respondents to pay the costs and attorneys fees of petitioners.

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#### **HOUSE COMMITTEE ON JUDICIARY**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Chandler, Eddy, Frockt, Kirby, Nealey, Orwall, Rivers and Roberts.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Minority Report:** Do not pass. Signed by 1 member: Representative Klippert.

**Staff:** Kelly Pfundheller (786-7289).

**Background:**

A victim of domestic violence (the petitioner) can obtain a domestic violence protection order against a respondent. The order can provide several types of relief, including electronic monitoring, domestic violence perpetrator treatment, and a requirement that the respondent refrain from contacting the petitioner. Violation of a domestic violence protection order is a gross misdemeanor unless the respondent has two prior convictions for violating a domestic violence protection order or other similar federal or out-of-state order, in which case the violation is a class C felony.

If the court grants a protection order for a fixed time period, the petitioner may apply for renewal of the order. The court must grant a renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner, the petitioner's children, family, and household members when the order expires.

The court may issue an order exceeding one year or issue a permanent order if it finds that the respondent is likely to resume acts of domestic violence. A temporary or permanent order may be modified or terminated upon a motion by either the petitioner or respondent. However, the statute does not specify the grounds upon which modification should be granted or assign the burden of proof to one party or the other.

In a recent case, *In Re Marriage of Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010), the Washington Supreme Court (Court) reviewed the denial of a respondent's motion for termination of a protection order. The Court determined that a respondent bears the same burden of proof in a motion for termination or modification as is required to overcome a petition for renewal. The respondent must prove by a preponderance of the evidence that he or she will refrain from resuming acts of domestic violence. In granting the motion to terminate, the Court considered many factors, including the passage of time since the order was entered and the relocation of the respondent to a geographic area far from the petitioner. The Court declined to order the respondent to pay the petitioner's costs and attorneys' fees.

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**Summary of Substitute Bill:**

The Legislature finds that some of the factors articulated in the Court's decision in *In Re Marriage of Freeman* place an improper burden on petitioners and are not demonstrative of a respondent's likelihood to resume acts of domestic violence. The substitute bill sets forth the procedure for bringing a motion to modify or terminate a permanent domestic violence protection order or an order issued for a period of greater than two years. Standards are established regarding motions by respondents for modification and termination of permanent domestic violence protection orders and orders issued for a period of greater than two years.

### Motion and Affidavit.

A respondent's motion for modification or termination must include an affidavit stating the facts in support of modification or termination. The petitioner may file opposing affidavits. Upon reviewing the affidavits, the court must dismiss the motion unless there is adequate cause for a hearing.

### Standard of Proof.

If the respondent's motion is for termination, the respondent bears the burden of proving by a preponderance of the evidence that there has been a substantial change in circumstances such that the respondent is not likely to resume acts of domestic violence. In determining whether there has been a "substantial change in circumstances," the court may consider the following factors:

- whether the respondent has committed or threatened domestic violence, sexual assault, stalking, or other violent acts since the protection order was entered;
- whether the respondent has violated the terms of the protection order, and the time that has passed since the entry of the order;
- whether the respondent has been convicted of criminal activity since the protection order was entered;
- whether the respondent has either acknowledged responsibility for the acts of domestic violence that resulted in entry of the protection order or successfully completed domestic violence perpetrator treatment or counseling;
- whether the respondent has a continuing involvement with drug or alcoholic abuse, if such abuse was a factor in the protection order;
- whether the petitioner consents to terminating the protection order, provided that consent is given voluntarily and knowingly;
- whether the respondent or petitioner has relocated to an area more distance from the other party, giving due consideration to the fact that acts of domestic violence may be committed from any distance; and
- other factors relating to a substantial change in circumstances.

The court may not grant a motion solely based on the fact that time has passed without violations or the fact that the respondent or petitioner has relocated to an area more distant from the other party. Regardless of whether there is a substantial change in circumstances, the court may decline to terminate a protection order if it finds that the acts of domestic violence that brought about the order were of such severity that the order should not be terminated.

If the respondent's motion is for modification, the respondent bears the burden of proving by a preponderance of the evidence that modification is warranted and would not diminish the protections provided to the petitioner. If modifying the protection order would reduce the duration of the order or would eliminate provisions that restrain the respondent from harassing, stalking, threatening, or committing other acts of domestic violence, the court must consider the factors relating to whether there has been a substantial change in circumstances.

The petitioner bears no burden of proving that he or she has a current reasonable fear of imminent harm by the respondent in either a motion for modification or termination.

Costs and Attorneys' Fees.

The court may require a respondent to pay court costs and service fees in addition to the petitioner's costs and attorneys' fees incurred in responding to the motion.

Service.

A motion to modify or terminate an order must be personally served on the nonmoving party no fewer than five days prior to the hearing.

When a respondent files a motion for modification or termination, a licensed process server, sheriff, or other local law enforcement must personally serve the petitioner. If the petitioner files the motion, he or she can achieve service through another private party.

**Substitute Bill Compared to Original Bill:**

The standard of proof for a motion to modify or terminate is changed from "clear and convincing evidence" to "preponderance of the evidence." A list of factors is added for the court to consider when evaluating whether there has been a substantial change in circumstances. The court is prohibited from granting termination based solely on the fact that time has passed without violations or the fact that the respondent or petitioner has relocated to an area more distant from the other party (rather than prohibiting the court from considering those factors). The court is required to consider factors relating to substantial change in circumstances if a motion for modification would reduce the duration of the order or would eliminate the provisions in the protection order that would refrain the respondent from harassing, stalking, threatening, or committing other acts of domestic violence.

A licensed process server is added to the list of permissible means of achieving service of process of motions by the respondent.

Technical changes are made throughout, including changing terminology to conform to common practice and striking redundant language.

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**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This bill is the result of a recent Supreme Court decision, *In Re Marriage of Freeman*, where the Court had to develop a standard in the absence of guidance by the Legislature. However, permanent protection orders are only issued when there is compelling evidence of domestic violence, so the standard to modify or terminate an order should be clear and convincing evidence (rather than a preponderance of the evidence). The bill also resolves the issue with attorneys' fees by authorizing the Court to order fees to petitioners.

In the recent case, the Court overlooked the long and terrible history of violence underlying the case, and it emphasized factors that are irrelevant to a person's likelihood to commit acts of domestic violence. The Court considered the fact that the respondent had not violated the order since it was issued. However, the absence of violations demonstrates the effectiveness of an order rather than its futility. In considering whether or not to terminate an order, courts should focus on factors that demonstrate whether the person has changed, including, for example, evidence of remorse and the completion of counseling and treatment.

Abusers often use the courts to terrorize their victims. After an order is entered, a respondent can file motion after motion: motions to reconsider, motions to modify, motions to terminate, and motions to appeal. You cannot underestimate the trauma that exists in repeatedly returning to court. The bill will prevent this abuse by requiring that adequate cause must be established before a hearing is scheduled. This means that victims will not need to continue to go to court in order to keep the protection order in place.

(Opposed) While there are orders that arise out of violent contexts, those cases are not the norm. It is more common that these orders arise out of divorce and child custody proceedings. The courts issue these orders without adequate evidence, and then respondents suffer terrible legal repercussions.

The standard established by the Court is the proper standard. The *Freeman* factors were modeled on a New Jersey law, which is the only other state that issues permanent orders after an initial petition. These factors are sufficient for determining whether or not a change is warranted. The standard for getting the order is preponderance of the evidence, and there should not be a higher standard for modifying or terminating it.

It is already difficult to modify or terminate a protection order, and this bill will make it impossible, especially if a respondent is unable to get a petitioner's permission. By failing to specify what factors the courts can consider in these motions, the bill places an unfair burden on respondents. In effect, more litigation will occur as a result of the initial petition, and respondents will be less likely to attend treatment after an order is entered due to the lack of incentive.

**Persons Testifying:** (In support) Representative Frockt, prime sponsor; Grace Huang, Washington State Coalition Against Domestic Violence; Yasmeen Abdullah; Kathleen Diane Mongauzy; David Ward, Legal Voice; Debbie Brockman, Young Women's Christian Organization of Kitsap County; and Tammy Lynn Carey.

(Opposed) Rick Bartholomew, Washington State Bar Association Family Law Section; Lisa Scott, Taking Action Against Bias in the System; and Margaret Brost, Brost Law.

**Persons Signed In To Testify But Not Testifying:** None.