

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0519

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NENA S. KRUGER,

Petitioner - Appellant,

v.

DALE R. KRUGER,

Respondent - Appellee.

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**APPELLANT'S OPENING BRIEF**

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On Appeal from the Montana First Judicial District,  
Lewis and Clark County, The Honorable James P. Reynolds, Presiding.

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## **STATEMENT OF THE ISSUE**

Did the District Court err by vacating the temporary order of protection and by failing to either extend it or make it permanent after it had been in place for over two years?

## **STATEMENT OF THE CASE**

On April 24, 2018 the District Court granted Petitioner, Nena Susanne Kruger (Nena), a temporary order of protection (TOP) against Respondent, Dale Kruger (Dale). The TOP also protected the parties' 15-year-old daughter, E.K., from Dale. DC-Docs. 3, 4. Although their daughter was initially listed on the TOP, at the end of the hearing on February 8, 2019, the District Court modified the TOP to allow their daughter to have contact with Dale as long as she initiated all contact. Or. of Protection Hrg. Tr. 159:3 to 160:15 (Feb. 8, 2019) (02/08/19 Tr.). The TOP protecting E.K. ended on April 24, 2019 when she was tragically killed in a car accident. DC-Doc. 40.

The hearing on the TOP was held on July 13, 2018, November 29, 2018, and February 8, 2019. DC-Doc. 57-1. Based upon Dale's oral renewal of his motion for the release of certain confidential criminal justice information (CCJI) related to recorded jail conversations, at the end of the hearing on February 8, 2019, the District Court set a deadline of three weeks for the parties to submit proposed findings. The three weeks was to begin running after the District Court had

reviewed the CCJI. 02/08/19 Tr. 74:9 to 75:1, 154:9 to 157:20. On March 8, 2019, Dale filed an Amended Motion for Release of Criminal Justice Information (CCJI Motion). DC-Doc. 36. Notice of Submittals were filed by Dale on July 18, 2019 and November 21, 2019, and by Nena on November 27, 2019. DC-Docs. 42, 43, 44. It took the District Court nine months from the date the CCJI Motion was filed to Order its release for an *in-camera* review on December 18, 2019. DC-Doc. 45. Although the Court apologized in footnote 1 of its December 18, 2019 Order for its delay in issuing the Order, in footnote 1 of the Court's September 23, 2020 Order the Court stated, "[C]onsideration of this matter was delayed by the parties' reviewing certain records from the Lewis and Clark County Detention Center, specifically phone calls made by Karl Kruger, the parties' son." DC-Doc. 45-1, 57-1. On December 23, 2019, the Lewis and Clark County Sheriff's Office deposited the recordings under seal for an *in-camera* review. DC-Doc. 46. On February 13, 2020, the Court issued an Order for Status Hearing stating, "This Court has been contacted by the Lewis and Clark County Sheriff's Office via the Support Services Division with regards to the status of the Temporary Order of Protection." DC-Doc. 47. A status hearing was eventually held on March 5, 2020 at which time the parties informed the Court they were waiting on the Court to review the CCJI, Dale withdrew his Motion for the CCJI for the sake of efficiency, and the Court set a date for the parties to submit proposed findings. DC-Doc. 49.

On September 23, 2020, the District Court vacated the TOP. DC-Doc. 57. In its Order, the District Court states in footnote 1 by April 17, 2020, “[T]he Court had been notified that the [TOP] had been removed from the County’s databases.” DC-Doc. 57-1. The first time the parties were notified that the TOP had been removed was in the District Court’s Order. A review of the record shows, the District Court did not notify the parties prior to its September 23, 2020 Order that the County had removed the TOP from its databases at least five months prior to the Court’s Order.

### **STATEMENT OF THE FACTS**

Two years and one-day shy of four months after the District Court granted Nena’s temporary order of protection, the District Court concluded it was not necessary to extend the order of protection. *Id.* The District Court made this conclusion despite its comment on the record during the second day of hearing testimony, “So if I issue an order of protection here today, all that does is just keep him away from her, which probably sounds like a good idea given the vitriolic relationship between these two people.” Or. of Protection Hrg. Tr. 26:11-15 (November 29, 2018) (11/29/18 Tr.).

Nena and Dale’s relationship began in 1984. They share two children, Karl Kruger (Karl) and E.K. 02/18/19 Tr. 100:1-3; Or. of Protection Hrg. Tr. 8:8-11 (July 13, 2018) (07/13/18 Tr.). In 2008, Nena and Dale filed for a legal separation

in the state of Washington. *Id.* 90:21 to 91:1, 106:6-11, 121:9-12, Ex. 7. Nena and Dale attempted to reconcile, and Nena moved with their children from Washington to Montana during Thanksgiving 2011. 07/13/18 Tr. 91:2-9; 02/08/19 Tr. 128:22-24. Nena and Dale resided on approximately 340 to 350 acres off Raven Road in the Birdseye area approximately twelve miles from Helena, Montana (the Property). 07/13/18 Tr. 9:13-23, 88:20 to 89:20.

Around June 2017, Nena and Dale began renting another residence located on the Property to Robert Smith (Bob) and his significant other, Debbie Miller (Debbie). *Id.* 7:5-12, 19, 8:14 to 9:25. Prior to becoming their tenants, Bob had become friends with both Dale and Nena, although he spent significantly more time with Dale. *Id.* 7:24 to 8:7.

Prior to Dale moving out of the residence and off the Property, Dale informed Bob and Debbie in late February 2018 that he was divorcing Nena and moving into his new home by April 1st. *Id.* 11:2-14. Dale moved out of the family home on March 30, 2018 to his new house in Deer Lodge. 07/13/18 Tr. 91:21 to 92:2; 02/08/19 Tr. 85:3-4, 128:25 to 129:2.

After an incident outside their insurance agent's office, Nena applied for a TOP on April 9, 2018, which was denied by the District Court because the allegations were "vague." 07/13/18 Tr. 99:3 to 100:14; DC-Doc. 57-2.

On April 13, 2018, Dale and Karl went to the Property to retrieve property. According to Dale, Nena gave him six rifles from the safe, and then Nena and Karl got into an argument about Karl wanting his guns and Dale wanting the rest of his guns. Dale testified that Karl got into an “angry little screaming fest” with Nena and Nena called 911. Dale and Karl drove down the road and talked to the Sheriff. 02/08/19 Tr. 89:1 to 90:2. Nena testified that after Karl became upset, Dale got really worked up and started shaking and turning red. 07/13/18 Tr. 95:11-16.

After Dale moved from the Property, Nena and Dale decided to finalize their divorce. 07/13/18 Tr. 91:2-9; 02/08/19 Tr. 129:8-13. On April 15, 2018, Nena drove to Washington and on April 16, 2018 appeared in court in Washington to finalize the dissolution of marriage. 07/13/18 Tr. 101:18 to 102:2.

On the night of April 16, 2018, Bob called Nena to let her know he had seen three different figures on the Property that night, but he wasn’t able to identify any of them. *Id.* 20:14 to 21:12.

Over the course of five days, from the date the dissolution of marriage was finalized on April 16, 2018 until April 20, 2018, Dale called Nena at least 12 times. Finally, on April 20, 2018, after Dale had called five to six times that day, Nena decided to answer the phone. Dale told Nena she had to meet with him. Nena told him she would not meet with him and told him she was afraid of him. Dale was yelling and screaming at Nena and telling her that is exactly why he wants to meet

with her to stare her right in the eyes. He told her if she refused to meet with him, there would be a “shit storm” coming her way. He then told her he had found out information about something she had done wrong in Washington, to which Nena told him she had no skeletons. He again asked her to meet with him and she told him no and hung up the phone. 07/13/18 Tr. 109:25 to 111:22. Although Dale denied telling Nena that there was going to be a “shit storm,” Dale did admit during his testimony that during his conversation with Nena she told him she was afraid to meet with him. 02/08/19 Tr. 149:13-25.

On April 19, 2018, Nena returned home to the Property to find the temperature of the residence was only 46 degrees. Nena went downstairs to investigate and found water spewing from the boiler. After shutting off the main water valve, she observed that someone appeared to have pried off a piece of the boiler and removed the control panel from the electrical wiring to the boiler. Based upon her observations, Nena believed someone had intentionally sabotaged the boiler. 07/13/18 Tr. 102:8 to 104:7. Nena contacted a plumber that same day to fix the boiler. When the plumber wasn't able to fix it that night, Nena and her daughter temporarily relocated to a hotel in Helena. *Id.* 103:3-12.

On Sunday, April 22, 2018, Nena discovered that someone had cut a hole in the back of her safe and removed everything from the safe except for three fly rods. *Id.* 104:17 to 105:8. Nena testified the following items had been stolen from

the safe: 12 to 18 rifles, at least 12 pistols, cash, her daughter's birth certificate and passport, Nena's passport, and vehicle titles. *Id.* 107:5-18. Nena contacted law enforcement on April 22, 2018 to report the burglary. *Id.* 106:13-19.

The last time Nena had opened the safe shown in Exhibit 1 was on April 13, 2018, when she was giving Dale the wood stock rifles. At that time, the inside of the safe did not have the hole and broken sheetrock shown in Exhibit 1. 07/13/18 Tr. 105:1 to 106:2, Ex. 1, 106:20 to 107:4. Approximately four of the rifles taken and two of the pistols taken from the safe were located in an outbuilding on the property. However, the rest were still missing. *Id.* 108:10-19.

Nena believes Dale and Karl took the guns. 07/13/18 Tr. 108:20 to 109:1. Nena explained the boot print shown on the garage door in Exhibit 2, which wasn't there prior to Nena leaving for Washington, was caused by a boot she had bought Karl for Christmas. *Id.* 106:6-11, 107:19 to 108:1, Ex. 2, 109:3-8. Additionally, Nena explained that Dale was the only person besides the installer that would have known how to sabotage their entire water heating system. *Id.* 109:3, 15-18. In fact, Dale admitted during his testimony that only him and the installer, Zach, would know the location of the heating system. 02/08/19 Tr. 95:18-23. Further, Nena believes Dale and Karl are the culprits, because of the way in which the safe was broken into and the fact that no other valuables in the home were taken nor were the two rifles located inside the garage taken. 07/13/18 Tr. 109:3, 9-14, 19-24.

On April 23, 2018 Nena initially applied for a TOP in Justice Court, which was denied because Justice Court determined she needed to file in District Court. Appendix B.<sup>1</sup> Following the Justice Court's advice, Nena then filed her TOP in District Court on April 23, 2018, which was granted by the District Court on April 24, 2018. DC-Docs. 3, 4.

On April 25 or 26, 2018, a day or two after the District Court granted Nena's temporary order of protection against Dale, Nena discovered the utilities had been cut off to her residence on the Property, even though she had not done anything to shut them off. She contacted the utility company and Internet company to have services turned back on. 07/13/18 Tr. 112:3 to 113:4. Dale testified that sometime on or after April 9, 2018, he shut off both the electricity and Internet to the Property because he didn't want to pay for it and didn't tell Nena or anyone else that he had them shut off. 02/08/19 Tr. 103:16-24, 143:18 to 145:20.

Nena also discovered there had been another theft at her residence after April 24, 2018. She discovered that someone had let the oil out of a six-wheeler stored in the barn and had also taken a stack of rifles that had been stored in the barn. Nena explained that only her, her daughter, and Dale knew the rifles were there. Nena reported this theft to law enforcement as well. 07/13/18 Tr. 113:5-19.

Nena testified Bob first told her in May 2018 that he felt she was in

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<sup>1</sup> This Justice Court TOP was not evidence in the hearing, but the District Court referred to it in its September 23, 2020 Order. As a result, it is included in the Appendix.

“imminent danger” from Dale. 07/13/18 Tr. 117:25 to 118:10. Nena explained that Bob stated he didn’t want to get involved, but did tell her the three different ways in which Dale told Bob he could hurt Nena, including pushing her down the stairs in the barn or having an accident with the six-wheeler. *Id.* 118:4-15. When Bob told her, Nena testified she was terrified, and was crying and shaking. *Id.* 118:16-20. Nena left town with her daughter on June 1, 2018 for about six weeks. *Id.* 36:22 to 37:1; 69:21-23.

After the TOP was issued on April 24, 2018, Bob had conversations with both Nena and Dale. Bob testified that during his conversations with Dale, Dale talked about wanting to hurt Nena on numerous occasions. 07/13/18 Tr. 12:4-10. Dale told Bob he was in a good position to just drive Nena off the road in the Polaris, or push her down a flight of stairs, or drop a rock on her from an overpass. *Id.* 12:19-24.

Although during his testimony Bob characterized Dale’s ideas to hurt Nena as venting, Bob testified at some point he decided he should tell Nena what Dale was saying. *Id.* 12:19-20, 13:13-15. Bob believed Nena had overheard a conversation he was having with Debbie, so he told Nena that Dale had issued these threats and she should be careful and cautious. *Id.* 13:16-25.

Bob testified he specifically told Nena the three different scenarios Dale had told him about hurting Nena. 07/13/18 Tr. 15:20 to 16:5. Bob had asked Dale if he

pushed Nena down the stairs, “Who would find the body?” Dale responded, “I don’t know, Kat maybe,” Nena and Dale’s daughter. *Id.* 16:6-16, 8:8-13. Bob testified that Nena seemed shaken and upset when Bob told her about Dale’s three different scenarios to hurt her. Nena also had a lot of anxiety as a result and asked Bob if he would talk to law enforcement about what Dale had told him. *Id.* 47:19 to 48:23.

Dale admitted that after the protection order was issued, while he was venting, he had told Bob that Bob was in a good position to drive Nena off the road in the Polaris, to push Nena down a flight of stairs and Kat could find her at the bottom, or to drop a rock on Nena from an overpass. 02/08/19 Tr. 146:8-24.

Bob testified because he was under a subpoena. 07/13/18 Tr. 16:18-23. He further explained that Nena had destroyed his life because prior to the hearing on July 13, 2018, Nena told Bob he has to leave the Property at the end of July. *Id.* 45:25 to 46:7.

During his testimony, Bob stated he had a two-month thread of text message conversations between him and Nena, and Debbie and Nena, in which Nena was pushing a narrative to get Bob to give a false statement to law enforcement. 07/13/18 Tr. 35:13-17. However, Bob admitted Nena never told him in those messages to lie to the officers or to make false statements. *Id.* 46:19 to 47:6. Additionally, the text messages read out loud in District Court during Bob’s

testimony did not establish that Nena told Bob to make a false statement to law enforcement -- what they did establish was that Nena was concerned for her safety if Dale wasn't arrested, that she was out of town due to this fear, that she didn't feel this would end, and that she was going to have the property appraised so she could sell it and move. *Id.* 67:16 to 77:15.

Karl was 22 years old when he testified. 02/08/19 Tr. 74:3-6. Karl testified on behalf of Dale. Karl testified he is an addict and he blames his mother for becoming an addict. *Id.* 66:6 to 67:1. However, he did admit that she tried to get him on a plane to go to treatment in a different state, but he ended up leaving treatment and she told him he could stay there and be homeless until he figured it out. *Id.* 67:2 to 68:5.

Although he testified his perception of his mother's character of honesty was that she had none, he also testified that he didn't have a close relationship with his mother. 02/08/19 Tr. 47:9-11, 23-25. He testified that his mother had called the police on him on more than one occasion. *Id.* 54:16-18. He also testified he was arrested during the summer of 2018 in Idaho and placed in jail. He called his mother from jail and asked her to bail him out. She did not bail him out, but his father did. *Id.* 54:22 to 55:22. At the time Karl testified, Karl had been living with Dale since he was released from jail in Idaho. *Id.* 55:23 to 56:2.

Since April 2018, Karl sent Nena numerous text messages in which he called her a “cunt” and made derogatory statements towards her. 02/08/19 Tr. 56:3-12. An example of one of those text message exchanges is shown in Exhibit 10, where Karl sends Nena a series of text messages on June 14, 2018 calling Nena a “lying cunt” and “fucking stupid bitch.” *Id.* 58:2 to 60:2, Ex. 10.

Karl also sent his mother a picture via text with him holding up a sign next to a larger sign on Montana Avenue in front of CVS when Karl was with Dale. 02/08/19 Tr. 60:22 to 61:5. The sign referenced the cause number in the District Court matter, DDR-2018-199, and claimed the Sheriff Department was supporting his “XWIFE’S PLT TO MURDER ME.” *Id.* 61:6 to 62:22, Ex. 11.

Dale admitted to violating the TOP when he had his son deliver a binder to his daughter at her place of work. 02/08/19 Tr. 122:20 to 123:16.

Dale further admitted that he had lied to his daughter and Nena during a conversation with his daughter prior to the April 24, 2018 temporary order of protection. *Id.* 142:5-13. According to Dale, his daughter and Nena wanted to know how he found out Nena’s first request for a restraining order in early April 2018 was not granted. Dale lied and told them he had helped the judge out of a ditch one time in the winter and the judge said, you know, give me your name and number, and if anything ever comes up, I’ll help you out. *Id.* 99:4-25. Dale explained that one of the reasons he lied was to “keep this thing spinning.” *Id.*

142:22 to 143:1. He stated, “There’s nothing better than some stress. . . So, this lie right here, I know what kind of spin that puts on things. It keeps things moving. To keep you in suspense and doubt and wondering.” *Id.* 143:2-14.

Even though Dale testified Bob told him Nena was trying to get Bob to kill Dale, which initially started as venting and then according to Bob became more serious, when asked on direct whether he was afraid of Nena, Dale initially responded by asking his attorney to explain “afraid.” 02/08/19 Tr. 105:11-20, 106:8-15.

At various points during his testimony, Dale became agitated and, as observed by the District Court, provided evasive answers. 02/08/19 Tr. 136:2-23. Through questioning by his attorney at the end of the hearing, Dale stated he would apologize to the District Court for his tone of voice and mannerisms. *Id.* 151:1-23.

Nena testified she believes Dale is capable of having someone kill her because he has a very violent temper. She testified she is very concerned for her safety. 07/13/18 Tr. 118:11 to 119:6. Nena also testified to Dale’s history of violence. In 2011, when Nena and Dale were attempting to reconcile, Nena told Dale she needed complete honesty from him. At that time, Dale informed her he had burned the house down on the Property in 2009 because he wasn’t working, didn’t have any money, and couldn’t keep up on the child support payments. Dale told Nena that he had hooked up a battery to the Porsche in the garage, shorted it

out because he found out that particular battery charger had recalls on it, and the battery charger had started a fire. The fire burned through the floor in the master bedroom and caused smoke and water damage to the house. 07/13/18 Tr. 114:5 to 115:8. During his testimony, Dale testified that in 2009, when he was living on the Property by himself, he had left the battery charger on the Porsche overnight and a fire started causing damage to the garage, Porsche, and another vehicle in the garage. 02/08/19 Tr. 83:9 to 84:16, 124:16 to 127:5.

Nena testified another fire occurred on the Property in 2015. 07/13/18 Tr. 115:9-15. Nena testified she woke up around 4:00 a.m. to smoke everywhere and the fire alarms going off. Nena, her two children, and Dale were all living in the house at the time. They were all able to get out of the house. *Id.* 116:6-25. In spring 2016, Dale told Nena he had burnt the house down in 2015 by testing different accelerants in the shop to determine where it would burn and there would be no trace of it. *Id.* 117:4-18.

### **STANDARD OF REVIEW**

The Court reviews a district court's decision to continue, amend, or make permanent an order of protection under an abuse of discretion standard. *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631. Under this standard, the Court determines whether the district court "acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Id.* The Court reviews a district

court’s findings of fact “to determine if they are clearly erroneous.” *In re Marriage of Olson*, 2008 MT 232, ¶ 20, 344 Mont. 385, 194 P.3d 619. “A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or our review of the record convinces us the district court made a mistake.” *Id.* The Court reviews a district court’s conclusion of law to determine if the Court correctly applied the law. *Id.*

### **SUMMARY OF THE ARGUMENT**

The substantial evidence presented during the hearing establishes that the TOP should have been either extended or made permanent. After keeping the TOP in place for over two years, the District Court erred by vacating the TOP. Not only does the District Court’s Order contain a number of errors and mistakes throughout, but also the District Court either misapprehended evidence or was mistaken in its Order as to the effect of the evidence, did not rely on the evidence presented, and relied on impermissible conclusions.

### **ARGUMENT**

#### **I. THE DISTRICT COURT ERRED BY VACATING THE TEMPORARY ORDER OF PROTECTION THAT HAD BEEN IN PLACE FOR OVER TWO YEARS AND BY FAILING TO EITHER EXTEND THE TOP OR MAKE IT PERMANENT.**

The Court should reverse the District’s Court’s September 23, 2020 Order vacating the April 24, 2018 TOP (Order) finding the District Court abused its discretion. Although there are a number of errors in the District Court’s Order

including those addressed in the Statement of the Case above, the date Nena applied for the TOP in District Court, the finding that Nena deeded the Property into her name contrary to the Washington decree, as well as others, the arguments below focus on the most serious errors.

As stated by this Court, “Section 40-15-101, MCA makes clear that the purpose of Title 40, chapter 15, MCA, is ‘to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking.’” *Lear v. Jamrogowicz*, 2013 MT 147, ¶ 22, 370 Mont. 320, 303 P.3d 790.

Pursuant to Montana statute, a petitioner may apply for a TOP if the petitioner is “in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in 40-15-102, has a relationship to the respondent if required by 40-15-102, and is in danger of harm if the court does not issue a temporary order of protection immediately.” Mont. Code Ann. § 40-15-201(1) (2017). Once a court issues a TOP, the court must hold a hearing within 20 days unless continued “at the request of either party for good cause or by the court.” Mont. Code Ann. § 40-15-202(1) (2017). The petitioner only needs to establish good cause for the TOP to be continued or made permanent. *Id.*; *Lear*, ¶ 26. In determining whether a TOP should be made permanent, the court should consider “the respondent’s history of

violence, the severity of the offense at issue, and the evidence presented at the hearing.” Mont. Code Ann. § 40-15-204 (2017).

**A. The District Court erred in relying upon the Justice Court’s April 23, 2018 denial of the TOP filed by Nena to support its Order vacating the TOP.**

In vacating the TOP, the District Court incorrectly relied on the Justice Court’s denial of the TOP filed by Nena on the same day the District Court granted its TOP. In paragraph 4 of its findings of fact, the District Court states, “The Justice Court denied Nena’s petition on April 23, 2018.” DC-Doc. 57-1. There is no further explanation in the Court’s findings of fact and a review of the transcript shows there was no evidence presented during the three days of testimony regarding the Justice Court denying a TOP filed by Nena on April 23, 2018. Despite this, in paragraph 4 of the District Court’s conclusions of law, the District Court references the Justice Court’s denial, stating, “Nena filed three separate petitions for order of protection, two of which were denied.” *Id.* 9. However, a certified copy of the Justice Court’s April 23, 2018 denial establishes the TOP was denied because it needed to be filed in District Court. The denial was not based upon the merits of the TOP. As a result, the District Court either misapprehended the effect of the Justice Court’s denial of the TOP or was mistaken as to why the Justice Court denied the TOP. Either way, the District Court erred by using the Justice Court’s denial to support its decision to vacate the TOP.

**B. The District Court erred in its conclusions of law by improperly considering that Dale’s threats against Nena had not been acted on and by not relying upon the evidence presented during the hearing.**

The District Court’s conclusions of law pertinent to its decision rely on improper considerations and are not supported by the evidence. First, in paragraph 4 of the District Court’s conclusions of law, after describing the threats Dale made towards Nena, to support vacating the TOP the District Court then states, “None of these threats have been followed through on, however.” DC-Doc. 57-9. Whether threats of harm, in this case, threats of killing someone, have been followed through with or not should not be used as the basis for vacating a TOP. As explained in *Lear*, the purpose of a TOP is to “promote the safety and protection of all victims.” Mont. Code Ann. § 40-15-101. The TOP, as it did here, put protection in place for Nena to prevent Dale from following through on his threats. If Dale had followed through on his threats against Nena during the time the TOP was in effect and Dale was not successful in having Nena killed, then the District Court could rely on that evidence in issuing a permanent order of protection. However, to rely on it as evidence to support vacating a TOP is contrary to the purpose of the statutory scheme and is clear error.

Second, the evidence presented at the hearing does not support the District Court’s conclusion of law in paragraph five stating, “Nena continued to reside with Dale after he allegedly made certain statements to her. This indicates that Nena

was not fearful of Dale.” DC-Doc. 57-9. The three specific ways in which Dale admitted he told Bob to kill Nena all occurred after the District Court issued the April 24, 2018 TOP. Both Dale and Nena testified Dale moved off the Property on March 30, 2018 and have not resided together since. Additionally, the only evidence presented at the hearing was that Nena was fearful of Dale. Further, to the extent that this conclusion of law is discussing statements Dale made to Nena during their marriage, it was clear error for the District Court to ignore Dale’s subsequent conduct after March 30, 2018 in determining whether his subsequent conduct caused Nena fear. Finally, this conclusion also appears to be arbitrary without conscientious judgment given the District Court’s statements during the second day of the hearing that issuing an order of protection is probably a good idea based upon the “vitriolic relationship” between Dale and Nena.

**C. The substantial evidence in the record below supports the District Court should not have found Dale’s testimony credible.**

In determining to vacate the TOP, the Court relies in findings of fact 25 through 29 on a number of statements made by Dale during his testimony. These statements amount to denials made by Dale regarding various accusations made by Nena during her testimony. Although there was conflicting testimony, Dale is the only one who admitted on the record that he had lied to Nena and E.K. in April 2018 with the sole purpose of causing stress and to “keep things spinning.”

Additionally, these findings are contrary to the District Court's own observations of Dale during his testimony that he was providing evasive answers.

### **CONCLUSION**

Nena respectfully requests this Court reverse the District Court's Order vacating the TOP and either find the TOP should be extended or made permanent, or remand for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of February, 2021.

By: /s/ Tara A. Harris  
Tara A. Harris  
*Attorney for Appellant*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Mac is 5,057 words, excluding certificate of service and certificate of compliance.

DATED this 3rd day of February, 2021.

By: /s/ Tara A. Harris  
Tara A. Harris  
*Attorney for Appellant*

**APPENDIX**

Order on Petition for Order of Protection ..... A

Justice Court Petition for Temporary Order of Protection  
and Request for Hearing ..... B

## **CERTIFICATE OF SERVICE**

I, Tara A. Harris, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellant’s Opening to the following on 02-03-2021:

Greg Beebe  
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Representing: Appellee  
Service Method: Conventional

Electronically Signed By: Tara A. Harris  
Dated: 02-03-2021

## CERTIFICATE OF SERVICE

I, Tara A. Harris, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-03-2021:

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Dated: 02-03-2021