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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001993-ME

JOHN STEPHEN TELEK — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 09-D-00441

SAMANTHA DAUGHERTY
(NOW BUCHER) — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

LAMBERT, JUDGE: John Stephen Telek has appealed from the Kenton Family Court's October 21, 2009, domestic violence order (DVO) granted to Samantha Bucher. John challenges the family court's jurisdiction to enter the DVO in this

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

case, as a hearing was held and the DVO was entered more than fourteen days after the emergency protective order (EPO) was entered in violation of KRS 403.740(4) and 403.745. John also challenges the family court's impartiality due to his filing of a petition for writ of prohibition related to this matter as well as the sufficiency of the evidence supporting the entry of the DVO. Because we agree with John that the family court lacked jurisdiction to hold a hearing or enter the DVO, we reverse and remand.

John and Samantha were never married, but have a son in common, J.T., born August 16, 1997. John filed a custody action in Kenton County in 2000 (action No. 00-CI-00155), which is currently pending on appeal to this Court.[2] The present domestic violence action arose as a result of an incident on August 17, 2009, when Samantha went to pick up J.T. from football practice. In her domestic violence petition filed the next day, Samantha stated as follows:

> At 7:30 pm, I attempted to pick up my son from football practice. Mr. Telek advised me that he was taking him home to his house, and that I could pick my son up at 8:30 pm. I reminded him that he was violating a court order and he stated "I wasn't found in contempt for that." As a [sic] stood by the passenger side door telling my son to come with me, Mr. Telek grabbed me by the wrist and yanked me. I told him to get his hands off me, and he shoved me out of the way. I yelled to a father of one of my son's teammates to help me. He stopped to see what

[2] John previously appealed several orders in the custody case related to child support, custody arrangements, and the supervision and enforcement of court orders in a 2008 appeal (appeal No. 2008-CA-002149-ME), which were affirmed in an opinion rendered April 2, 2010. The Supreme Court of Kentucky denied a motion for discretionary review of that opinion on November 10, 2010, and this Court's opinion is now final. John has two other current appeals pending from the same action (appeal No. 2009-CA-001683-ME and No. 2010-CA-001283-ME), which were recently consolidated. Those appeals arose from orders entered in 2009 and 2010.

> was going on and Mr. Telek backed off. Mr. Telek had been sentenced to jail time for violating multiple court orders just hours earlier by Judge Mehling in Kenton Family Court. All three of my children witnessed the incident.

Kenton Family Court Judge Lisa Bushelman entered an EPO on August 18, 2009, restraining John from committing any further acts of abuse or threats of abuse and from any contact or communication with Samantha. The EPO also required John to remain 500 feet away from her and her family at all times. The EPO was to be effective until August 26, 2009, the date on which the hearing was scheduled. John received service of the EPO on the date of its entry.

The parties appeared before Judge Christopher Mehling (who is also the presiding judge in the custody action) on August 26, 2009, in accordance with the EPO. Joshua Crabtree, J.T.'s guardian *ad litem* in the custody action, was not present that day, but had spoken with John's counsel prior to the court appearance. John's counsel reported that the GAL wanted to talk with J.T. about the incident and asked that the domestic violence issue be heard with issues pending in the custody action at the same time. The family court, in agreement with the suggestion that all matters be heard together, instructed the parties to get a date from Veronica for a hearing and stated that it would reissue the EPO every two weeks until the hearing took place. It did not require the parties to appear at those court dates when the EPO was to be reissued. The parties obtained a hearing date of November 13, 2009. In accordance with its statement from the bench, the family court reissued the EPO with a hearing date of September 9, 2009, and

further ordered the parties to use third party child exchanges. When John appeared on September 9th, the court reiterated that the parties need not appear at the domestic violence docket call, as the hearing would be held at a date and time outside of that docket. The EPO was reissued that day, and the next hearing was set for September 23, 2009.

On September 22, 2009, the day before the next scheduled hearing date, John filed a motion to dismiss the EPO. He argued that the EPO expired fourteen days after its original issuance date when no hearing had been held, so that the family court did not have jurisdiction to hold a hearing and consider the merits of the domestic violence petition. The following day, the parties argued the merits of this motion before Special Judge Steven Hayden. While the GAL agreed with John that his argument was legally correct, Samantha stated that John's attorney had requested the postponement so that the GAL could speak with J.T. and that she had been prepared to testify on August 26th. She also pointed out that they had both agreed to the November 13th hearing date. Special Judge Hayden deferred a ruling on the motion to dismiss to a later date, reissued the EPO, and set the next hearing date for October 7, 2009.

John filed a petition with this Court on September 29, 2009, seeking a writ of prohibition to prevent Judge Mehling and Special Judge Hayden from enforcing orders relating to the repeated issuance of the EPO entered August 18th. As in his motion to dismiss, John asserted that the family court lacked jurisdiction to reissue the EPO or to hold a hearing more than fourteen days from the date the EPO was

originally entered, as such action would be in violation of KRS 403.740(4). He also objected to the restraint the EPO placed upon his ability to attend J.T.'s school and sports functions. On October 16, 2009, this Court granted limited intermediate relief regarding John's attendance at J.T.'s sports games and practices, but declined to grant any further relief. The petition was later denied as moot when the DVO that is the subject of this appeal was entered.

The family court ultimately held a hearing on the domestic violence petition on October 21, 2009. Prior to the start of the hearing, John again raised the subject of his motion to dismiss. The family court denied the motion and proceeded with the hearing.

Samantha testified in accordance with her petition regarding what took place on the evening of August 17, 2009. She testified that while she had not been injured, she had been afraid. John disagreed with Samantha's version of events and testified that he did not grab her or shove her. Rather he stated that Samantha grabbed his hand. Finally, the GAL briefly testified regarding his discussion with J.T. The GAL stated that J.T. indicated to him that nothing had occurred that day.

The family court found that "something happened" and that John continuously failed to follow its orders and read orders in his favor. Specifically and upon John's request for specific findings, the court found that John had touched and pushed Samantha and that such behavior would continue in the future. Accordingly, the family court entered a DVO effective for a period of three years and restrained John from committing further acts of abuse or contacting Samantha.

The court additionally required John to remain 500 feet away from Samantha and her family with the noted exceptions of child exchanges and events related to J.T.'s sports and school. This appeal followed.

On appeal, John presents two arguments: 1) that the family court lacked jurisdiction to hold a hearing and enter a DVO; and 2) that there was not a sufficient factual basis to support the entry of the DVO. Intertwined with the second argument is John's contention that the family court is biased against him and should recuse itself from further action in the case due to its partiality. Samantha, proceeding *pro se*, filed a responsive brief contesting John's assertions. In her brief, Samantha made reference to and attached a letter from J.T.'s therapist and mentioned a later ruling in the custody action. John has requested that this Court strike those references, along with any other references she made to matters outside of the record. We agree with John that Samantha is only permitted to cite and attach documents to her brief that are in the record, and therefore we shall only consider references to the certified record contained in Samantha's brief.

We shall first consider whether the family court had the authority to reissue the original EPO and consequently retain jurisdiction to hold a hearing and enter a DVO. Because "jurisdiction is generally only a question of law[,]" *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004); *see also Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007), we shall review the family court's denial of John's motion to dismiss *de novo*.

We are guided by the Supreme Court of Kentucky in our construction of domestic violence statutes:

> [T]he domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence. *See* KRS 500.030 ("All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law."). But the construction cannot be unreasonable. *See Beckham v. Board of Education of Jefferson County*, Ky., 873 S.W.2d 575, 577 (1994) ("We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.").

Barnett v. Wiley, 103 S.W.3d 17, 19 (Ky. 2003).

Our decision in this case hinges on the interpretation of KRS 403.740(4) and KRS 403.745. The version of KRS 403.740(4) in effect at the time of the events of this case states as follows:

> An emergency protective order issued in accordance with this section shall be effective for a period of time fixed in the order, but not to exceed fourteen (14) days. Upon the issuance of an emergency protective order, a date for a full hearing, as provided for in KRS 403.745, shall be fixed not later than the expiration date of the emergency protective order. An emergency protective order shall be reissued for a period not to exceed fourteen (14) days if service has not been made on the adverse party by the fixed court date and time or as the court determines is necessary for the protection of the petitioner.[3]

[3] In HB 1, the General Assembly amended KRS 403.740(4), which took effect on July 15, 2010. The subsection now reads as follows:

> (4) An emergency protective order issued in accordance with this section shall be effective until the full hearing provided for in this subsection or in KRS 403.745, or until withdrawn by the court. Upon the issuance of an emergency protective order, the court shall set a date and time for a full hearing, within fourteen (14) days as provided for in KRS 403.745, and shall summon the adverse party to appear. If, at the hearing, the

KRS 403.745(2) directs that a "hearing shall be fixed not later than fourteen (14) days following issuance of the summons." Lastly, KRS 403.745(4) provides for the reissuance of a summons "if service has not been made on the adverse party by the fixed court date and time."

In addition to reviewing the applicable statutory authorities, we have sought guidance from the section of *Kentucky Practice – Domestic Relations Law* that addresses the reissuance of *ex parte* emergency protective orders:

> The order is effective for the period fixed in the order, but that period may not exceed fourteen days. When the order is issued the court must set a date for a full hearing, which must occur before the order expires. The respondent must be personally served with a copy of the emergency protective order, a copy of the notice setting the hearing date, and a copy of the petition. The statute directs that service be made pursuant to CR 45.03. If the respondent is not served before the date fixed on the order, the EPO must be reissued to remain effective. When an EPO is reissued it must be made effective at least for an additional fourteen days, and may be made effective for a period of time necessary, in the court's opinion, to provide protection for the petitioner. The

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adverse party is not present and has not been served, the emergency protective order shall remain in place, and the court shall direct the issuance of a new summons for a hearing set not more than fourteen (14) days in the future. If service has not been made on the adverse party prior to seventy-two (72) hours before that hearing or a subsequent hearing, the emergency protective order shall remain in place and the court shall continue the hearing and issue a new summons with a new date and time for the hearing to occur, which shall be within fourteen (14) days of the originally scheduled date for the continued hearing. Before issuing the new summons, the court shall note the length of time that has passed since the issuance of the emergency protective order, during which the adverse party has not been served. The court shall repeat the process of continuing the hearing and reissuing a new summons after noting the lapse of time since the issuance of the emergency protective order until the adverse party is served at least seventy-two (72) hours in advance of the scheduled hearing. In issuing the summons, the court shall simultaneously transmit a copy of the summons or notice of its issuance and provisions to the petitioner.

> court thus has the power to protect a petitioner whose batterer is avoiding service of the order and it may make the order effective for more than fourteen days, if necessary. Given the widespread difficulty of service on batterers this is an important protection for victims.
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> Attorneys should note that failure to serve an order on the respondent will not necessarily result in lack of protection to the petitioner, but that the order may need to be renewed so that it will remain effective and enforceable by law enforcement personnel. For example, suppose that the petitioner receives an ex parte order, but the respondent cannot be served prior to the fixed hearing date. At the attorney's request, the court extends the order pursuant to KRS 403.740. Sometime shortly thereafter, a neighbor calls the police to say that the batterer has broken into the victim's apartment. The police can respond to the call and give notice of the order and its terms to the batterer. Having given notice, they may enforce the order's terms immediately and act on any subsequent violation of the order. Once the respondent has notice of the order's terms, he or she is subject to arrest without a warrant on a probable cause basis. However, in order for this to happen the EPO must have been extended so that it continues to be effective. [Footnotes omitted.]

15 Louise E. Graham & James E. Keller, *Kentucky Practice – Domestic Relations Law* § 5:11 (2010). A footnote in the section further explains that "[a]n extension under [KRS 403.740] must provide at least a fourteen-day period and may provide for a longer period of time."

Based upon the statutory language and the section of *Kentucky Practice* quoted above, we must hold that the family court lost jurisdiction to hold a hearing and enter a DVO when a hearing was not held with fourteen days from the entry of the EPO. There is no question that John was served with the EPO on August 18,

2009, the date on which it was entered. KRS 403.740(4) explicitly limits the reissuance of an EPO to those situations where the adverse party was not served. Because John was served with the EPO, the family court did not have the necessary statutory authority to reissue the EPO. Accordingly, the family court committed reversible error when it denied John's motion to dismiss.

We issue this ruling reluctantly because of what transpired in court on August 26, 2009, before Judge Mehling, when counsel for John very clearly stated to the court the GAL's suggestion that the hearing be postponed so that he could speak with J.T. and that all of the issues from the present action and the custody action be heard together. Counsel did not indicate that there were any possible time limitations that would cause the EPO to expire before the hearing could be held, and he certainly did not inform the court or Samantha that the November date they decided upon would occur after the fourteen-day period had expired. While counsel for John did not owe any duty to Samantha, we recognize that Samantha has at all times been proceeding without counsel in this action and that counsel for John was very aware that she did not have counsel at the August 26th hearing.

Although John's counsel's actions, or lack thereof, could be construed to be a waiver, John cannot be equitably estopped from raising the jurisdictional defense.

> As we pointed out in *Commonwealth, Dept. of Highways v. Berryman*, Ky., 363 S.W.2d 525: 'The word 'jurisdiction' is more easily used than understood.' That case recognized the general elementary principle that subject-matter jurisdiction cannot be waived. *A party will not be estopped to show lack of subject-matter jurisdiction at any time. The parties may not confer*

> *subject-matter jurisdiction by agreement.* The problem, however, is in delineating the concept 'jurisdiction of the subject matter.' Chief Judge Desmond of the Court of Appeals of New York undertook to do so in *In Re Estate of Rougeron*, 17 N.Y.2d 264, 271, 270 N.Y.S.2d 578, 583, 217 N.E.2d 639, 643, in this language:
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> > 'In other words the rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, 'subject matter' does not mean 'this case' but 'this kind of case' * * *.'

Duncan v. O'Nan, 451 S.W.2d 626, 631 (Ky. 1970) (emphasis added).

While our ruling on the previous issue decides the case as a whole, we shall briefly mention John's request that Judge Mehling be required to recuse from further action in this case. Although our review of the videotaped record does not support John's claims regarding Judge Mehling's alleged bias and prejudice against him or his attorney, we decline to address this issue further as it was not raised below.

For the foregoing reasons, the DVO entered October 22, 2009, is reversed, and this matter is remanded for dismissal of the domestic violence action.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Carl E. Knochelmann, Jr. Covington, Kentucky	Samantha Daugherty Bucher, *Pro Se* Fort Thomas, Kentucky