IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER SWANSON, III,	§	
	§	No. 64, 2013
Respondent Below-Appellant,	§	
	§	Court Below: Family Court of the
v.	§	State of Delaware in and for
	§	New Castle County
JACKLYN P. DAVIS	§	
	§	File No. CN12-06267
Petitioner Below-Appellee.	§	

Submitted: May 15, 2013
Decided: June 20, 2013

Before **HOLLAND**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

On this 20th day of June 2013, it appears to the Court that:

(1) Respondent-below/Appellant Walter Swanson, III[1] appeals from a Family Court grant of a Protection from Abuse ("PFA") order requested by Petitioner-Below/Appellee Jacklyn P. Davis. Swanson raises four claims on appeal. First, that Petitioner failed to establish the existence of subject matter jurisdiction and therefore the PFA should be vacated. Second, that the Family Court erred in upholding the handwritten notes as protected by the attorney-client privilege. Third, that the Family Court erred in denying Respondent's motion to take the deposition of the police officer. And finally, that the Family Court erred

[1] All parties names have been changed to pseudonyms pursuant to Delaware Supreme Court Rule 7(d).

by failing to allow Respondent to use text messages and telephone records to impeach Petitioner's credibility and corroborate Respondent's defense. We find no merit to Swanson's appeal and AFFIRM the Family Court's decision.

(2) Davis and Swanson had a dating relationship from January through June, 2012. The pair met while Davis was at Swanson's Range Rover dealership shopping for an automobile. During their dating period, the two saw each other at least several times a week. During the time, neither party was dating anyone else. The parties estimate they went on fifty dates during the five month period. In May, the parties took a joint vacation to Canada to visit friends. After the vacation, Davis became disenchanted with Swanson. She informed him she did not want to be romantically involved with him any longer and wanted to just be friends. In late May, Davis had a party at her house and invited Swanson. At the party, Davis reiterated she wanted both of them to see other people. Swanson agreed, but called Davis a "defiant bitch." Soon after, Davis noticed Swanson was following her.

(3) Davis testified she saw Swanson's distinctive Jaguar car driving "back and up and back" in front of her house, five or six times per night between May 26 and May 31. Davis was scared and confused by Swanson's odd behavior. She invited Swanson to her house, along with another friend, to talk to him and diffuse the situation. During this meeting, Swanson showed Davis pictures of beds he was

considering buying for Davis' new home. He also said, "You can come live with me, baby." Davis again told Swanson she wanted to just remain friends.

(4) Swanson then began to indicate to Davis he was following her. He would tell her he knew she was at certain retailers. He came into a store she was patronizing, saying he saw her car out front. While Davis was at a restaurant entertaining clients, she stepped outside for a cigarette and saw Swanson stopped in his convertible, with the top down, "glaring" at her.

(5) On June 15, Swanson called Davis eight times on her office phone. She spoke with him, and agreed to go to his residence for dinner. When she arrived, Swanson appeared to be very ill, and asked Davis to stay the night to help him during her illness. Davis agreed. The next morning, the two went to a store and then to Swanson's car dealership. While at the dealership, Swanson commented to his general manager, "See, I told you she'd come back." About a week later, Swanson again invited Davis over for dinner. Swanson greeted her at the door wearing a short sleeved shirt, no pants and heavy cologne. Swanson then told Davis he was bipolar and "borderline." During dinner, Swanson told Davis he had a root cellar below his house which he called his "dungeon," and said that was "where all [of his] ex-girlfriends go." On a later phone call, Swanson told Davis he was getting back together with his wife.

(6) A week later, after an apparent time of no communication, Swanson called Davis to ask if she noticed he had been away. He said to her, "I want to call you. I want to call you every day, let me correct myself, every minute of every day." On July 18, Davis was outside of her place of work when Swanson drove into the parking lot. He asked her, "Aren't you going to come over and say 'Hi'?" Davis was startled by his sudden appearance, and called for a co-worker to come outside. Swanson then "glared" at Davis in a manner she considered threatening, and she informed him that she "wasn't interested" and asked him "to stay away from me and my family." Soon after, Davis sent Swanson a message, stating:

> While we were close a couple of months ago…I am not interested in any contact with you. …I do not wish for a response to this e-mail. This is how I feel and what I need. I would hate for anything more to come of this. Good bye, W[alter].

In the message, she instructed him to "respect" her boundaries and not to go near her, her family, her residence or her car.

(7) On July 24, Swanson was again seen driving by Davis' house in a black Range Rover. Later that same day, Davis was driving with her daughter through Alapocas Woods in Wilmington, when a black Range Rover approached her at high speed and "chased" her. Later that night, a white Range Rover ran Davis and her daughter off of the road near their home. Davis observed Swanson driving the Range Rover during the incident.

(8) Over the next two months, Davis repeatedly saw Swanson following her while driving. In October, Swanson again forced Davis off of the road when she was driving with her daughter. In early November, Davis found her tires slashed and observed a man of the same height and build as Swanson urinating on her driveway.

(9) On November 9, 2012, Davis filed for a Protection from Abuse order. The order was granted *ex parte* on the same day. Swanson appeared in Family Court a week later to contest the order and was granted a continuance to prepare for trial. Davis later requested a continuance due to the death of her attorney, and a second continuance to amend her petition. The trial was held December 28, 2012. During the trial, Swanson claimed to have been out of the state during many of the incidents he was alleged to have harassed Davis.

(10) The Commissioner found Swanson committed at least six acts of abuse after Davis asked Swanson to not contact her. The Commissioner granted Davis' motion for a Protection from Abuse order, and ordered Davis to have no contact with Davis for two-years. The Commissioner also ordered Swanson to pay $12,000 in attorney's fees. Swanson filed a request for Review of the Commissioner's Order. The Family Court reviewed the Commissioner's order,

addressed all of Swanson's objections and affirmed the order.[2] This appeal followed.

(11) When reviewing a Family Court's order, our standard and scope of review involves a review of the facts and law, as well as the inferences and deductions that the Family Court has made.[3] To the extent that the issues on appeal implicate rulings of law, we conduct a *de novo* review.[4] To the extent that the issues on appeal implicate rulings of fact, we conduct a limited review of the factual findings of the Family Court to assure that they are sufficiently supported by the record and are not clearly wrong.[5] We will not disturb inferences and deductions that are supported by the record and that are the product of an orderly and logical deductive process.[6] If the Family Court has correctly applied the law, our review is limited to abuse of discretion.[7]

(12) Swanson's first two claims attack the Family Court's finding of subject matter jurisdiction. The Delaware General Assembly amended the Protection from Abuse Act in 2007 "to reflect substantive relationships not previously included

[2] *Swanson v. Davis*, File. No. CN12-06267, Pet. No. 12-36703 (Del. Fam. Feb. 1, 2013) (Order).
[3] *Powell v. Dep't of Servs. for Children, Youth, & Their Families*, 963 A.2d 724, 730 (Del. 2008); *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).
[4] *Powell*, 963 A.2d at 730–31; *In re Heller*, 669 A.2d 25, 29 (Del. 1995).
[5] *Powell*, 963 A.2d at 731; *In re Stevens*, 652 A.2d 18, 23 (Del. 1995).
[6] *Id.*
[7] *Powell*, 963 A.2d at 731; *Solis*, 468 A.2d at 1279.

under the law."[8] The legislation, codified at 10 Del. C. § 1041, altered the relationships included in the term "protected class" to include, in relevant part:

> [P]ersons in a current or former substantive dating relationship. For purposes of this paragraph, neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a substantive dating relationship. Factors to consider for a substantive dating relationship may include the length of the relationship, or the type of relationship, or the frequency of interaction between the parties.[9]

"If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls."[10] "[A] statute is ambiguous only if it is reasonably susceptible to different interpretations, or 'if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.'"[11] The statute here is clear and unambiguous. It sets forth several factors the Family Court may consider in analyzing whether a relationship should be categorized as a "substantive dating relationship." The word "substantive" is not misleading or ambiguous, and can be defined by a search of any dictionary. Substantive means:

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[8] S.B. 57, 144th General Assembly (Del. 2007) (enacted).
[9] 10 *Del. C.* § 1041(2)(b).
[10] *Insurance Com'r of State of Delaware v. Sun Life Assur. Co. of Canada*, 21 A.3d 15, 20 (Del. 2001) (*citing Dir. of Revenue v. CAN Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003).
[11] *Id*. (*citing Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010) (*quoting Dir. of Revenue*, 818 A.2d at 957).

> 1. Substantial. 2. Independent in function or existence: not subordinate. 3. Not imaginary: actual. 4. Of or relating to the essence or substance: Essential.[12]

Swanson conceded that the couple had a dating relationship. The couple interacted on a near-daily basis during the time period at issue. Swanson invited Davis to live with him, the two went on a vacation together, and had dinner together fifty times in a five month period. Swanson engaged in behavior that a reasonable person would consider amorous, including cajoling Davis to come to dinner at his house, and then greeting her at the door in boxer shorts. Swanson said to Davis, "I want to call you every day, let me correct myself, every minute of every day." Applying the plain language of the statute, there is substantial evidence to conclude Swanson and Davis had a "substantive dating relationship."

(13) Swanson claims that because he never stated the dating relationship was "romantic" or "serious," the Family Court erred in so finding. Swanson also highlights the fact that the two did not have a sexual relationship. The statute does not create a shibboleth for the determination of a substantive dating relationship, but rather lists factors the Family Court may consider in making a case-by-case determination. Simply because Davis did not use any magic words, or did not

[12] Webster's II New College Dictionary, 1100 (1995). *See also* Merriam-Webster's Collegiate Dictionary, 1245 (2003) (defining "substantive" as "real rather than apparent" and "expressing existence.").

engage in a sexual relationship with Swanson, does not mean the two were not in a substantive dating relationship.

(14) Swanson next claims the Family Court erred in finding handwritten notes of Davis' in preparation for this litigation to be covered by attorney client privilege. During her deposition, Davis revealed she had taken written notes relating to her recollection of the events at issue. Davis, through her attorney, asserted privilege over the notes and the content of the handwritten notes were not released to Swanson. The Family Court made a finding that the notes Davis took "were made in preparation for the litigation" and therefore covered by attorney-client privilege. We review a trial court's application of discovery rules for abuse of discretion.[13] The standard for review of a trial court's evidentiary rulings is abuse of discretion.[14]

(15) "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[15] The privilege can be waived if the

[13] *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006).
[14] *Sammons v. Doctors for Emergency Services, P.A.*, 913 A.2d 519, 535 (Del. 2006).
[15] D.R.E. 502(a)(2).

"holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter."[16]

(16) It is not disputed that Davis' notes were prepared for her attorneys in anticipation of litigation. A party to litigation does not waive the privilege by filing a document with the court prepared in reliance on disclosures made within the attorney-client relationship. "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[17] Davis' notes fall within the protection of attorney-client privilege.

(17) Swanson also claims the Family Court erred in not granting him a continuance to depose a police detective who spoke to Davis during the investigation. The Family Court found there was no need for Swanson to depose the detective, as he had ample opportunity to review the police records, talk with the officer informally, and question the officer on the witness stand.

(18) Family Court rules limits formal discovery to depositions of the parties and Requests for Production.[18] Any additional discovery must be sought with a formal motion before the court.[19] Swanson did not file his motion to depose the detective until December 8, 2012, nearly a month after learning of the PFA petition

[16] D.R.E. 510.
[17] D.R.E. 502(b).
[18] Fam. Ct. Civ. R. 26(a).
[19] *Id*.

and mere weeks before the trial. Under Family Court scheduling rules, a response was not required from Davis until December 31, 2012, after the trial would have concluded. Swanson subpoenaed the officer to testify at trial and was granted time to review police records and talk with the officer. His motion was not ripe for consideration based upon when he filed it. Even if it was, prejudice has not been shown.

(19) Finally, Swanson claims the Family Court erred by not allowing Swanson to present evidence, meant to impeach Davis' credibility, of text messages and mobile phone records. As to the text messages, at trial Swanson sought to introduce into evidence photocopies of text messages allegedly sent by Davis. The text messages would have allegedly shown that Davis continued to have contact with Swanson even after she claims he began to frighten her. Davis objected to the introduction of the photocopies for lack of authentication and for being in violation of the best evidence rule. Davis did not object to the use of the documents to refresh witness' recollection, to which Swanson's counsel replied, "I'll accept that." The trial judge sustained the objection, stating, "[T]he best way to authenticate the texts were actually sent to the Respondent would have been to authenticate them by calling a custodian of the cell phone company." The texts could also have been authenticated under D.R.E. 901, testimony by a witness with

knowledge, by circumstantial evidence of distinctive characteristics,[20] or through expert testimony or comparison with authenticated examples.[21] Swanson did not pursue any line of authentication, but rather sought to read the text messages into the record.

(20) When Davis objected to the substantive introduction of the content of the text messages, Swanson argued the text messages could be authenticated by the Family Court examining his cell phone and seeing the text messages on the screen. The Family Court refused to authenticate in this manner. The American Law Reports note the importance of proper authentication in electronic communication:

> As a preliminary step to the admittance of documentary evidence, there must be authentication, which involves introduction of evidence sufficient to demonstrate that the writing is what the offering party claims it to be. …Granted, increased use of and adherence to Internet security protocols has decreased the likelihood that an outsider can fool the systems completely so as to convince the recipient's system that the mail is being sent from the purported sender. However, this doesn't mean that a third party can't use the sender's e-mail without his knowledge or permission, or that electronic records can't be tampered with, so authentication is a serious issue.[22]

It was not an abuse of discretion for the Family Court to not accept Swanson's attempt to authenticate the text message by passing his phone to the commissioner.

[20] D.R.E. 901(b)(4).
[21] D.R.E. 901(b)(3).
[22] Jay M. Zitter, *Authentication of Electronically Stored Evidence, Including Text Messages and E-Mail*, 34 A.L.R. 6th 253 (2008).

As the A.L.R. notes, even such an examination would not definitively authenticate the text messages.

(21) Swanson also sought to introduce mobile phone records which he claims would have shown he was not in Delaware during some of the stalking incidents. The Family Court found that Swanson had not properly authenticated the business records.[23] Business records may be admitted "if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, *all as shown by the testimony of the custodian or other qualified witness*."[24] Such records can be authenticated by a "written declaration of its custodian or other qualified person" that the business record "(A) was made at or near the time or occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters, (B) was kept in the course of regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice."[25] A party seeking to introduce a business record must "make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."[26]

[23] (B-94; 95; 161.)
[24] D.R.E. 803(6) (emphasis added).
[25] D.R.E. 902(11).
[26] D.R.E. 902(11).

(22) There is no evidence in the record that Swanson provided any notice to Davis that he intended to use the business records at trial. During trial, Swanson sought a continuance to subpoena a Verizon Wireless employee to authenticate the records. Swanson had sufficient time to prepare for trial and the Family Court did not abuse its discretion in denying what would have been a fourth continuance of the case.

(7) NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice