

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000292-ME

TERRY M. THOMAS

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 07-D-00120

MELISSA K. THOMAS, (NOW NEAL)

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Terry Thomas appeals the entry of a domestic violence order entered against him by the Powell Circuit Court. After careful review, we reverse.

Terry Thomas and Melissa Neal were divorced by a decree of dissolution dated February 3, 2006, and were to share joint custody of their minor child, with Terry having visitation every Wednesday and every other weekend.

Subsequent to that agreement, Terry moved to Texas due to his current wife's employment. The distance rendered the previous custody and visitation agreement unworkable. Terry made several attempts to modify the timesharing with Melissa, but those attempts were unsuccessful. Terry then filed a motion to modify timesharing in the Powell Circuit Court and by order entered October 15, 2007, the court established a new timesharing schedule which reiterated the language from the separation agreement indicating that the parties were not to interfere with the relationship or communications between the other party and the minor child. Terry continued to have trouble with Melissa regarding their child. Melissa prevented Terry from speaking to the child over the phone and allegedly verbally abused Terry in front of the child. Terry also learned that Melissa was encouraging the child to call her new husband daddy.

On December 3, 2007, Terry filed a motion to hold Melissa in contempt for her violations of the October 15, 2007, order. Melissa filed a petition for an emergency protective order on December 7, 2007, but continued to have contact with Terry by phone and during exchanges of the minor child for visitation later during the month of December. Terry alleges that during these contacts, Melissa continued to verbally abuse him in front of the child. At the hearing on January 15, 2008, the emergency protective order was dismissed for Melissa's failure to appear.

In the interim, Terry learned that his motion for contempt would not be heard in December, due to the December docket's cancellation. The motion

was rescheduled for January 28, 2008, however, when Terry and his counsel arrived at the courthouse, they discovered the docket for that day had also been cancelled. Melissa appeared *pro se* at this hearing, and Terry's counsel attempted to discuss the visitation issues with her. Melissa refused to talk and claimed that she was being harassed. Terry's counsel explained that if she was appearing *pro se*, she would be held to the same standards as an attorney and that it was within the attorney's rights to speak with Melissa directly. Counsel also explained that it was within Terry's rights to seek modification of custody because it was clear that Melissa could not co-parent with Terry. Melissa then entered the Powell County Attorney's office and attempted to file charges of harassment against Terry's counsel, which were not ultimately filed.

Subsequently, Terry learned that Melissa had instead filed another petition for an emergency protective order against him. Terry denies ever speaking directly with Melissa on January 28, 2008. Terry was served with a new emergency protective order, which was allegedly based on Terry's desire to obtain custody of the minor child during a phone conversation that took place between Terry and Melissa while Terry was still in Texas and Melissa was in Kentucky. After the difficulty scheduling a hearing on his motion for contempt, being denied timesharing with his child, and witnessing Melissa's behavior on January 28, 2008, Terry filed a motion for emergency relief, which was heard on January 30, 2008. Because Terry was in Kentucky already, he requested that the trial court hear the domestic violence matter at the same hearing.

The trial court first addressed the contempt issues and questioned Melissa as to why Terry was denied timesharing and access to his child. The trial court then orally stated that Melissa was in contempt of the October 15, 2007, order and ordered Terry to have timesharing that day with the child. On its docket sheet, the court failed to note its oral order and instead overruled the motion for contempt.

The trial court then addressed the emergency protective order and after questioning Melissa stated that the domestic violence order had been an attempt to keep Terry from his daughter. The court did not see how Melissa could feel threatened by Terry or have any fear of him, as he resided in Texas at the time of the alleged threat, and the parties had been in contact with each other several times since then. The trial court did not understand how a mere phone call could be abuse or foster a fear of violence or abuse, given the circumstances. Terry also denied under oath that any threat or abuse had occurred. Melissa admitted that she had seen Terry several times since the alleged threat occurred and that Terry was a good father.

Despite the evidence to the contrary and its own statements regarding the absence of any violence or threat of violence, the trial court entered the domestic violence order. When Terry's counsel orally stated the standard under KRS 403.750, the judge stated, "I know the law but I am throwing the law out the window" and then stated that this was because he wanted to sleep that night. Terry's counsel then asked for a finding from the trial court that by a

preponderance of the evidence an act of domestic violence had occurred and may again occur. The trial judge then stated that he had already made such a finding three times and entered the domestic violence order. This appeal followed.

KRS 403.750 provides that a court may issue a domestic violence order (hereinafter “DVO”), effective for up to three years, if after a hearing it finds “from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]” KRS 403.750 defines domestic violence and abuse as including “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members.” The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim “was more likely than not to have been a victim of domestic violence.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

The trial court directly stated that Melissa only filed the protective order to keep Terry from seeing his daughter and that the court did not believe Melissa was threatened by the phone call, given her subsequent contact with Terry, both over the phone and in person. Further, the court stated it was throwing the law out the window and issuing the DVO despite the lack of a preponderance of evidence. We find that under these circumstances, the entry of the DVO was clearly erroneous and was not supported by the underlying facts as determined by the court. A person subject to a DVO is placed under severe restrictions and may suffer immediate loss of one’s children, home, financial resources, employment,

dignity, and is subject to immediate arrest and imprisonment for up to one year for violation of the DVO regardless of the situation or circumstances. *See Kingrey v. Whitlow*, 150 S.W.3d 67 (Ky.App. 2004) and *Wright v. Wright*, 181 S.W.3d 49 (Ky.App. 2005). Accordingly, absent a preponderance of the evidence, a DVO should not be entered lightly against the weight of the evidence. In the instant case, the court found that Melissa was neither abused or a victim of violence, nor was she in fear of abuse or domestic violence and instead, that she used the DVO to prevent Terry from seeing his child. Accordingly, we find the trial court's entry of a DVO to be clearly erroneous and improper under these circumstances.

For the above reasons, the Powell Circuit Court's entry of the DVO is hereby reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Jennifer McVay Martin
Lexington, Kentucky