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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002503-ME

ALEX FABRISCIO ARGOTTE — APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 07-D-00166

KATHLEEN RAE HENDERSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND THOMPSON JUDGES.

MOORE, JUDGE: The matter before this Court involves a Domestic Violence Order (DVO)[1] entered by the McCracken Family Court against the Appellant Dr. Alex Fabriscio Argotte. Argotte appeals the DVO entered against him on

[1] The original order was entered on September 10, 2007. After a motion by Argotte's counsel for a new trial, to alter, amend or vacate, the family court entered an order with specific findings of fact. All references to the order are to the November 9, 2007 order unless otherwise noted.

November 9, 2007, upon the complaint of Kathleen Rae Henderson. Upon a thorough review, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Argotte and Henderson had a two-year relationship that began in 2005. Argotte is a general surgeon at Lourdes Hospital in Paducah, Kentucky, and Henderson worked as a surgical technician for Argotte before they dated. Henderson spent one to two nights a week at Argotte's home at the beginning of their relationship; Argotte does not dispute Henderson stayed at his home but does contest the frequency of the stays.

The parties took a trip to California in October 2006, where an incident occurred in which Henderson suffered bruises to her face and neck that she attributed to Argotte. Argotte denied causing Henderson's injuries.[2] In December 2006, Henderson alleged that Argotte pushed her down some stairs at Argotte's home and injured her shoulder. Argotte took Henderson through the "backdoor entrance" of the Lourdes Emergency Room to have her shoulder x-rayed. [3]

The parties' relationship progressed to the next level when they obtained a marriage license on April 20, 2007. At this time, Henderson moved all

[2] Henderson took pictures of her injuries with her cell phone. These pictures were entered in the record as Plaintiff's exhibit 1.

[3] Argotte testified that he did take her through the backdoor of the hospital emergency room to save Henderson money. He also read the x-ray himself and prescribed Henderson pain medication. Argotte said this was a routine process, and a privilege the doctors at the hospital frequently used.

her clothes and toiletries to Argotte's home in Rubbermaid plastic storage bins. After acquiring the marriage license, Henderson testified that she stayed at Argotte's home every night he did not have his children.[4] Argotte did not allow Henderson to be there while his children visited; she alleged that she would take some clothes with her and go to her parents' house.[5] Argotte contends that Henderson stayed at his home one to two nights a week and on one occasion stayed seven days.[6]

Henderson signed an affidavit on April 30, 2007, at the office of Hargrove and Foster stating that she did not live with Argotte but with her parents in Calvert City, Kentucky. Attorney Charles Foster of Hargrove and Foster represented Argotte in the divorce proceedings against his ex-wife Melissa Argotte. Argotte and his attorney contend that this affidavit is directly contrary to Henderson's testimony, and both assertions by Henderson cannot be correct. Henderson's explanation for this affidavit is that she believed the affidavit would enable Argotte to maintain visitation with his children. Henderson testified she

[4] Argotte has children from a prior marriage. He has them an average of two days and two nights per week except on special occasions such as when they were out of town, etc.

[5] Henderson's mother testified that her daughter had not resided in her home for several months, except when Argotte had his daughters. Henderson also had no access to a cell phone and contact with Henderson had to go through Argotte.

[6] Argotte contends that they did not share anything or demonstrate to others that they were living together. Henderson contends she bought groceries with Argotte's credit card and cooked both breakfast and dinner for him. Argotte was adamant that this did not happen because he would not allow it.

continued to live with Argotte at his home until their relationship ended in late July 2007.

An altercation occurred between the two at Fat Moe's Restaurant in Paducah on August 3, 2007. After this incident, Henderson obtained an Emergency Protection Order (EPO) against Argotte and filed a Domestic Violence Petition (DVP) with the McCracken Family Court on August 6, 2007. Argotte also filed his own EPO against Henderson the week of August 6.[7] The court conducted three separate hearings and heard lengthy testimony on all three occasions before entering an initial order without specific findings on September 10, 2007.[8] After a motion by Argotte's counsel to alter, amend, vacate, or, in the alternative, for a new trial, the family court entered a November 9, 2007 order with specific findings of fact. The family court ultimately determined that the relationship between Argotte and Henderson qualified under the "living together" definition established in Kentucky Revised Statute (KRS) 403. 720(3) and 403.725(1). The order also made specific findings of fact concerning the relationship and the credibility of the testimony presented. This appeal followed.

II. KRS 403.720(3) CHALLENGE

Argotte first contends that the court erred in ruling that the parties lived together before and after April 2007 and by failing to establish an onset date.

[7] Argotte declined to go further with his petition after conferring with his attorney at the September 5, 2007 hearing.

[8] These hearings took place in family court on August 15, September 5, and October 3, 2007. The first focused on whether the couple had lived together, and the second concentrated on the events of August 3, 2007.

He challenges Henderson's standing to bring this action arguing their relationship does not qualify under the KRS 403.720(3) definition of an unmarried couple. This issue must be considered first to determine if the statutory definition of standing is met.

To consider this, we look to the Kentucky Supreme Court's adoption of the six-prong test used by the Kentucky Supreme court in *Barnett v. Wiley,* 103 S.W.3d 17 (Ky. 2003). These factors are nonexclusive; all factors do not have to be present to determine that a couple lived together. "There must be, at a minimum, proof that a petitioner seeking a DVO shares or has shared living quarters with the respondent before a finding can be made that the two are an 'unmarried couple.'" *Id*. at 20. The six prongs are:

> 1) Sexual relations between the parties while sharing the same living quarters;
> 2) Sharing of income or expenses;
> 3) Joint use or ownership of property;
> 4) Whether the parties hold themselves out as husband and wife;
> 5) The continuity of the relationship;
> 6) The length of the relationship.

Id. at 20.

The family court determined in its order that Argotte and Henderson had formerly lived together, so there was standing for either party to bring their petitions. Based on the *Barnett* test, the family court examined the nature of the parties' relationship in entering the following findings:

> 1) The parties engaged in sexual relations while sharing the same living quarters including the bedroom, kitchen

> of Respondent's home with Petitioner's clothes and toiletry items being placed there.
> 2) The Court cannot find that the parties specifically shared income or expenses but the parties did enjoy the benefits of living together including bed and board.
> 3) The parties jointly used the home of Respondent sharing the bedroom, kitchen, and other portions of the home.
> 4) The parties did not hold themselves out as husband and wife and the Court so finds.
> 5) The Court can make no finding on the continuity of the relationship between the parties.
> 6) The Court finds that the length of the relationship was approximately two years.[9]

We review the trial court's findings of fact pursuant to the clearly erroneous standard. "[W]e will give due deference to the trial court's opportunity to judge the credibility of the witness and will not disturb its findings of facts unless they are clearly erroneous, that is, not supported by substantial evidence." *Randall v. Stewart*, 223 S.W. 3d 121 (Ky. App. 2007). Kentucky Rules of Civil Procedure (CR) 52.01(a trial court's findings of fact may be set aside if clearly erroneous). Substantial evidence consists of "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co*., 474 S.W.2d 367, 369 (Ky. 1971). It is "evidence which would permit a fact finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The evidence must demonstrate "at a minimum proof that the petitioner seeking a DVO share or has shared living quarters with the respondent before a finding can be made that the two are an unmarried couple." *Randall*, 223

[9] *See* November 9, 2007 order.

S.W.3d at 124. The court found the testimony of Henderson and her mother to be more credible concerning the parties' relationship than Argotte's. Both parties filed Domestic Violence Petitions, and both parties selected the "unmarried, currently or formerly living together" choice on their respective petition. Argotte argued that he did not understand the complex legal terminology that was in the petition. He was not certain what the phrase "unmarried, currently or formerly living together" meant and thought he was checking the unmarried box. The family court did not believe Argotte's explanation that he did not understand the legal terminology due to his lack of understanding of the English language. Although not his native language, Argotte went to medical school in the United States, earned his medical license here, and has practiced in Kentucky for seven years. Furthermore, the Domestic Violence Petition was signed in front of victims' advocate, Janet Brown, who was present to answer any questions.

Argotte sealed his own fate on this issue when he selected on his petition the choice of "unmarried, currently or formerly living together." The family court was not persuaded by his explanation of his lack of comprehension of the phrase or what he was admitting about the parties' relationship by selecting the box. The family court determined that there was sufficient evidence to establish the parties had lived together and fulfilled the requirements of the statute. After a thorough review of the record, we find no basis for disturbing the family court's findings.

III. VOID FOR UNCERTAINTY CHALLENGE

Next, Argotte contends the trial court erred when it overruled his motion to dismiss on the basis that the term "lived together" as used in KRS 403.720(3) and 403.725(1) as being void for uncertainty.[10] Argotte argues that the language used in the statute is uncertain and susceptible to more than one reasonable interpretation and that the "man on the street" could not read the statute and comprehend the legislature's intent. We disagree.

A void for uncertainty interpretation is reserved for "non-punitive civil, regulatory, or spending statutes are also invalid if they are so unintelligible as to be incapable of judicial interpretation." *Board of Trustees of Judicial Form Retirement System v. Attorney General of Com.,* 132 S.W.3d 770, 778 (Ky. 2003). In *Folks v. Barren County,* 313 Ky. 515, 232 S.W.2d 1010, 1013 (1950), the Court determined that:

> But where the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.

A statute will only be overturned for uncertainty "where the intention of the legislature is so obscure as to defy a rational meaning, the law cannot be given effect." *Kerth v. Hopkins County Bd. of Ed.,* 346 S.W.2d 737, 741 (Ky. 1961). Kentucky Revised Statute 403.720(3) defines member of an unmarried couple as:

[10] Proper notice was given to the Attorney General's Office notifying them of a Constitutional challenge, but the Attorney General's office chose not to intervene in the matter.

> each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.

Kentucky Revised Statute 403.725(3) states:

> (1) Any family member or member of an unmarried couple who is a resident of this state or has fled to this state to escape domestic violence and abuse may file a verified petition in the District Court of the county in which he resides. If the petitioner has left his usual place of residence within this state in order to avoid domestic violence and abuse, the petition may be filed and proceedings held in the District Court in the county of his usual residence or in the District Court in the county of current residence. Any family member or member of an unmarried couple who files a petition for an emergency protective order in District or Circuit Court shall make known to the court any custody or divorce actions, involving both the petitioner and the respondent, that are pending in any Circuit Court in the Commonwealth. The petition shall also include the name of the court where filed.

Nothing in these statutes defies rational meaning or multiple interpretations. These statutes do not contain complex legal terminology that a lay person could not understand. These are terms used by people in the context of their daily lives. Further, the phrases are clearly designated by the correct punctuation to designate the distinct phrases, to avoid confusion. There is nothing to suggest that someone could not read the statute and easily comprehend its meaning.

Domestic violence statutes "should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic

violence. But the construction can not be unreasonable." *Barnett*, 103 S.W.3d at 18. Kentucky Revised Statute 500.030 states: "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." There is nothing in this statute that could be construed as unreasonable nor that would puzzle a reasonable person as to the intent of the legislature. Accordingly, the statute and its meaning are clear and not uncertain.

IV. DOMESTIC VIOLENCE RULING AND ONSET DATE

Finally, Argotte contends that the family court erred in finding that acts of domestic violence occurred on August 3, 2007, without finding an onset date of the parties' living together in order to address the events in California and in Argotte's home. In the original order, the family court determined that the couple had lived together on and prior to April 30, 2007. The family court made the following conclusions in its November 9, 2007 amended order concerning the relationship of the parties:

> A. Respondent and Petitioner "lived together" as that term is used in KRS 403.720(3) and 403.725(1) based upon Respondent's testimony being viewed by the Court as incredible and the Court did not believe much of anything Respondent said concerning the Petitioner residing with him nor found it to be believable or true. The Court relied upon the testimony of the Petitioner and the testimony of her mother and found it believable, credible and true.
>
> B. The Court finds that the Respondent's testimony on the California incident was particularly unbelievable and preposterous and finds that acts of violence occurred in California by him against the

Petitioner. The Court further finds that following such acts of violence the Respondent hid the Petitioner in Denton's Motel on Lone Oak Road in Paducah, Kentucky in order to hide her injuries from her family all of which are usual events coinciding with domestic violence.

C. The Court further finds that the usual events preceding domestic violence occurred in that the Respondent ostracized the Petitioner from her family; controlled her movement and locked her in his house detaining her in the bedroom and did not provide her with the code to the security system at his house, all of which supports the finding that the parties lived together and the Court's finding of domestic violence.

D. The Court further finds that the pushing incident in the basement of Respondent's home as testified to by the Petitioner was an act of domestic violence and the Court finds that the Respondent had the Petitioner medically treated by escorting her in the back door of Lourdes Hospital where he has privileges as a physician, all of which the Court finds to support it's [sic] finding of domestic violence.

E. The Court finds that the Respondent filed a verified petition for Domestic Violence in which he claimed that the parties lived together.

F. The Court finds that the Affidavit sworn to by the Petitioner in McCracken Family Court, Civil Action No. 02-CI-00759, in which Petitioner on April 30, 2007 swore that she "...does not reside with the Respondent" is consistent with a domestic violence victim such as Petitioner and with the duress and paramour control the Court often sees in domestic violence relationships. The Court further finds that the Petitioner appearing at Respondent's lawyer office and doing what she was asked to do and stating what she was told to do is consistent with such conduct of a domestic violence victim in domestic violence relationships.

Ultimately, it is within the discretion of the trial court to make the final determination regarding the credibility of a witness.

> [T]he trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part. The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness.

Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996).

The family court is granted the power to act under KRS 403.750(1):

> (1) Following the hearing provided for under KRS 403.740 and 403.745, the court, if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur, may:
> (a) Restrain the adverse party from any contact or communication with the petitioner except as directed by the court;
> (b) Restrain the adverse party from committing further acts of domestic violence and abuse;
> (c) Restrain the adverse party from disposing of or damaging any of the property of the parties;
> (d) Direct the adverse party to vacate the residence shared by the parties to the action;
> ...
> (h) Enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse.

Based on this enabling statute and the evidence, the family court concluded that there was sufficient evidence to determine that the couple lived together within the meaning of the statute. The statutory language does not require an onset date be established; it only requires evidence that "acts of domestic violence have occurred and may again occur." *Id*. The determination of an onset date is not essential to finding that domestic violence has taken place.

V. CONCLUSION

We must defer to the decision of the family court as to the credibility of the witnesses who testified at trial. The court found Argotte's own admission on his EPO that the parties lived together to be very convincing in and of itself. The court found that particular statement by Argotte to be a true and lasting testament of the genuine nature of their relationship. Based on the testimony presented, the family court determined that acts of domestic violence had occured. Because substantial evidence supports the family court's findings, we affirm the McCracken County Family Court's issuance of a DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard W. Jones
Murray, Kentucky

BRIEF FOR APPELLEE:

Brad Goheen
Benton, Kentucky