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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000113-ME

CLINTON RATLIFF — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 01-D-01023-003

DULCE BUCKMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,[1] SENIOR JUDGE.

KELLER, JUDGE: Clinton Ratliff (Ratliff) appeals from the Fayette Family Court's order extending a domestic violence order (DVO). On appeal, Ratliff argues that, because the DVO had expired, the court lacked jurisdiction to extend it, and that, when the court extended the DVO, it did so without conducting a

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

sufficient evidentiary hearing. Dulce Buckman, now Dulce Lesage (Lesage), argues that she filed a motion to extend the DVO prior to its expiration and that the filing of that motion extended the DVO until a hearing could be held. For the reasons set forth below, we affirm.

FACTS

On May 13, 2008, Lesage filed a domestic violence petition/motion alleging that Ratliff had sent threatening text messages; left threatening voice mail messages; refused to take the couple's minor child for medical treatment; and threatened Lesage's boyfriend. The family court issued an emergency protective order (EPO) and scheduled a hearing on Lesage's petition/motion for May 28, 2008. Following that hearing, the court issued a DVO requiring Ratliff to participate in a domestic violence assessment. The court also ordered Ratliff to not contact or communicate with Lesage and to refrain from sending her any text messages. The DVO remained in effect until November 28, 2008. We note that the order states: "TO RENEW THIS ORDER PLEASE CONTACT FAYETTE DISTRICT COURT 30 DAYS BEFORE IT EXPIRES."

On July 17, 2008, a report from Barbara Norris, MA, MSW, CSW, Domestic Violence Specialist, was filed with the court. Ms. Norris recounted a long history of allegations of abuse by Lesage as well as Ratliff's denials. Additionally, Ms. Norris noted that Ratliff had a lengthy history of criminal behavior, including several convictions for assault and numerous charges of intoxication. Ms. Norris stated that, after her evaluation, she did not find Ratliff to

be credible. Furthermore, she stated that he presented a high risk to the safety of Lesage and their son. Ms. Norris recommended that Ratliff have only supervised visitation with his son with "high security."

On November 25, 2008, three days before the expiration of the DVO, Lesage filed a motion to amend asking the court to extend the DVO for three years. On November 26, 2008, a report from Lloyd Jackson, LCSW of Advanced Solutions of Central Kentucky was filed indicating that Ratliff had completed a domestic violence program. A report from Peter B. Schilling, Ph.D., which was attached to Mr. Jackson's report, indicates that Ratliff "is a good father who is a positive influence in his son's life" as long as he maintains his sobriety. Dr. Schilling indicated that Ratliff was "stable in his sobriety" and that there had "been no recent anger management incidents." Dr. Schilling concluded that he thought there were "minimal risk factors in [Ratliff's] visitation with his son."

The parties, without counsel, attended a hearing on Lesage's motion to extend the DVO on December 3, 2008, and, at Ratliff's request, the court continued the hearing until December 18, 2008.[2] The court also issued an order extending the DVO until December 18, 2008. Following the December 18, 2008, hearing, the court issued another order extending the DVO to June 18, 2009. We note, as did the parties in their briefs, that the court did not hear any testimony regarding domestic violence during either the December 3, 2008, or the December 18, 2008, hearings. We also note, as did Lesage, that Ratliff, other than

[2] We note that the December 18, 2008, hearing had previously been scheduled to discuss time sharing issues.

challenging the court's authority to extend the DVO, did not ask to be heard or to testify.

STANDARD OF REVIEW

The issues raised by Ratliff are questions of law, which we review *de novo*. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

ANALYSIS

At the outset, we note that Kentucky Revised Statute (KRS) 403.750 provides for the issuance, reissuance, and amendment of DVOs. The procedures a court must undertake to issue, reissue, or amend a DVO differ significantly. In order to issue a DVO, the court must conduct a hearing as provided for in KRS 403.740 and 403.745 and make a finding that "an act or acts of domestic violence and abuse have occurred and may again occur . . . ." KRS 403.750(1).

The court may reissue a DVO "upon expiration." However, the statute does not require the court to hold a hearing, simply stating that "[w]ith respect to whether an order should be reissued, any party may present to the court testimony relating to the importance of the fact that acts of domestic violence or abuse have not occurred during the pendency of the [original] order." KRS 403.750(2). In *Kingrey v. Whitlow*, 150 S.W.3d 67 (Ky. App. 2004), this Court held that the family court is not required to find that additional acts of domestic violence occurred in order to reissue a DVO. The court may consider an absence of recent acts of domestic violence in determining whether to reissue a DVO; however, that is only one factor. *Id.* at 69-70. Other factors may include the

nature of the initial domestic violence, the victim's fear, and any likelihood domestic violence may re-occur absent reissuance of the DVO.

As to amending a DVO, KRS 403.750(3) simply states that "[u]pon proper filing of a motion, either party may seek to amend a domestic violence order." The statute does not state if or when a hearing must be held or what evidence the court may or should consider before amending a DVO.

Before the family court, Lesage filed a motion to amend the DVO. She did not state that she was seeking to have the DVO reissued. In its order granting Lesage's motion, the court found that acts of domestic violence and abuse had occurred and may occur again and stated that it was amending the DVO and extending it for six months. The court did not state that is was reissuing the DVO. While Lesage's motion and the court's order speak to amending the DVO, we hold that the court actually reissued the DVO. In doing so, we note that the essential term of the December 18, 2008, DVO, *i.e.*, no contact, is the same as the essential term of the May 28, 2008, DVO, and the court stated that it was extending that prior DVO. Therefore, we will treat the December 18, 2008, DVO as a reissuance of the May 28, 2008, DVO rather than as an amendment of that DVO.[3]

With the preceding in mind, we first address the issue of whether the court conducted an adequate hearing regarding reissuance of the DVO. "The

[3] Some, if not all, of the confusion regarding how to classify the court's order is inherent in Form AOC-275.3, the "Order of Protection" used by the court. That form contains a box for the judge to mark indicating he is issuing a "Domestic Violence Order" or an "Amended Domestic Violence Order." It does not have a place for the judge to mark indicating that he is reissuing a DVO. Furthermore, the forms provided for use by the public deal with amending, not reissuing a DVO.

function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase,* 690 S.W.2d 761, 763 (Ky. App. 1985). Initially we note that, although the court did not swear in either party, the court did ask the parties questions regarding their recent contacts, which the parties answered. Furthermore, the court had available for its review the reports of Ms. Norris, Mr. Jackson, and Dr. Schilling. Ratliff did not object to any of the reports and did not ask the court to illicit sworn testimony from the parties or for leave to call witnesses. Because Ratliff did not question the adequacy of the hearing before the family court, he is foreclosed from doing so now.

Furthermore, even if Ratliff had adequately preserved this issue for our review, the family court's failure to conduct a formal hearing was not error. As we previously noted, this Court held in *Kingrey* that the trial court is not required to find that additional acts of domestic violence occurred in order to reissue a DVO. The court may consider an absence of recent acts of domestic violence in determining whether to reissue a DVO; however, that is only one factor. *Kingrey,* 150 S.W.3d at 69-70. Herein, the family court had for its review the report from Ms. Norris indicating Ratliff continued to present a high risk to the safety of Lesage and their son. That report is sufficient to support the family court's decision to reissue the DVO even if Ratliff had presented testimony that no acts of domestic violence had occurred.

Next, we must determine if the family court had jurisdiction to reissue the DVO. On appeal, Ratliff argues that, once a DVO expires, a court no longer has jurisdiction to extend it. He notes that the DVO in question expired on November 28, 2008, and the family court did not enter any order extending it until December 3, 2008. Lesage argues that she filed her motion to extend the DVO on November 25, 2008, three days before the expiration of the DVO, and that the timely filing of her motion tolled the expiration of the DVO.

Although this is an issue of first impression, this Court recently addressed a similar issue. In *Fedders v. Vogt-Kilmer*, 2009 WL 2341495 (Ky. App. 2009)(2008-CA-000450-ME), Vogt-Kilmer filed for and received several DVOs ordering Fedders, her mother, to stay 500 feet from Vogt-Kilmer and to refrain from committing acts of domestic violence and abuse. Approximately one month after the last DVO expired, Vogt-Kilmer filed a motion to amend that DVO to extend it for an additional three years. The lower court granted Vogt-Kilmer's motion. This Court, in a "to be published opinion," held that "[o]nce the DVO expired with no additional action being taken during the applicable time frame, the DVO case had terminated. . . . [A]nd no further action could be based upon a DVO that had expired." *Id.* at *2.

We find the reasoning in *Fedders* persuasive. Once a DVO expires, absent any other action by the parties, the "DVO case" terminates. However, the difference between *Fedders* and the case herein is that, by filing her motion, Lesage took other action. Until the family court ruled on that motion, the case did

not and could not terminate. Therefore, the filing of Lesage's motion acted to automatically extend the DVO until the court could rule on her motion.

In reaching this conclusion, we rely not only on the reasoning of *Fedders*, but also on the purpose of the domestic violence statutes - protecting victims. *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003). To hold otherwise leaves victims of domestic violence seeking additional protection under a DVO at the mercy of family court clerks who may or may not be able to schedule a motion to reissue a DVO within the applicable timeframe. Furthermore, perpetrators of domestic violence could thwart their victims' attempts to obtain a reissuance of a DVO by evading service of summons or otherwise delaying a hearing until after the DVO expired.

We recognize Ratliff's argument that the language on page one of the DVO encouraging parties to file motions thirty days before the DVO's expiration should act as a warning not to wait until the last minute. However, the language is not mandatory. Furthermore, the language on page one appears to be in conflict with language on page three of the DVO which states that "[t]he Petitioner may return to the court, which issued this order, before expiration of this order to request that it be reissued for an additional period not to exceed three (3) years". No other time limit is set. Neither statement mandates that a motion to reissue a DVO be filed within any particular timeframe and the statement on page three implies that filing such a motion can be done at any time prior to the expiration date. Therefore, we are not persuaded by Ratliff's argument.

Finally, Ratliff analogizes the issuance of a DVO to the issuance of an emergency protective order (EPO). Under KRS 403.740(4) a court issuing an EPO must schedule a "full hearing" within fourteen days after issuing the EPO. According to Ratliff, if a hearing is not held within fourteen days, the EPO expires and issuance of a summons for the opposing party does not toll the fourteen day time period. Ratliff argues that, as with an EPO, filing of a motion and issuance of summons should not extend a DVO. However, Ratliff's analogy falls short because there is no language in KRS 403.750 setting a timeframe within which a hearing must be held before a DVO can be reissued. Furthermore, even if we accept Ratliff's analogy, KRS 403.740(4) provides for reissuance of an EPO "as the court determines is necessary for the protection of the petitioner." The family court herein determined that reissuance of the DVO was necessary for the protection of Lesage and her son; therefore, the cited language from KRS 403.740(4) supports the court's decision. Finally, we note that analogizing an EPO to a DVO is akin to comparing apples to oranges. An EPO, which is issued without a hearing, must have strict time limitations because the opposing party is entitled to due process. However, with a DVO, which cannot be issued without a hearing, due process is inherent.

CONCLUSION

For the foregoing reasons, we hold that the filing of a motion to extend, modify, or reissue a DVO prior to its expiration, automatically extends a

DVO until such time as the court can schedule a hearing. Therefore, we discern no error in the family court's extension of the DVO herein and affirm.

ALL CONCUR.

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