

RENDERED: NOVEMBER 6, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-000610-ME

EDWARD BRYAN CISSELL

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
FAMILY COURT DIVISION

v.

HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 07-D-500011

ALICE MARIE CISSELL;  
AUDREY CISSELL; ALEXANDRA  
CISSELL; AND AVA CISSELL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Jefferson Family Court. The appellant asked to be exempt from the ban of firearms placed upon him after a Domestic Violence Order (“DVO”) was issued against him. The family court

denied his request and this appeal followed. Based upon the following, we affirm the decision of the Jefferson Family Court.

### FACTUAL BACKGROUND

Appellant, Edward Bryan Cissell, and appellee Alice Cissell were married in 1995 and later divorced in 2007. After the divorce, Alice moved to Louisville with the couple's three children, Audrey (age 8), Alexandra (age 4) and Ava (age 2). The children are co-appellees in this appeal.

On January 16, 2007, Alice filed a DVO petition. The court originally issued an Emergency Protective Order ("EPO") finding that there was a threat of immediate harm or danger to the petitioner. The order was to continue in effect until the hearing date, January 17, 2007, in the Jefferson Family Court Division Two.

On August 6, 2007, the family court entered an order restraining Bryan from further acts of abuse, threats of abuse and from contact with Alice. This order was to continue in effect until August 5, 2010. The following additional terms were set forth:

- 1.) [Bryan Cissell] is restrained from any contact or communication with the . . . Petitioner [Alice Cissell];
- 2.) [Bryan Cissell] shall remain at all times and places at least 1,000 feet away from the Petitioner and members of Petitioner's family or household, no contact includes any and all of Pet[itioner's] extended family, and
- 3.) [Bryan Cissell] be restrained from disposing of, or damaging, any property of the parties.

Bryan was also “ordered not to possess, purchase or attempt to possess, purchase or obtain a firearm during the duration of this order.” The order provided that this was “[i]n order to assist in eliminating future acts of domestic violence and abuse.”

Bryan filed a *pro se* motion on October 20, 2008, requesting the court allow the U.S. Army to issue firearms to him as well as to allow visitation with one of his children. The court denied his motion and on March 31, 2009, Bryan moved for reconsideration of the order and amendment based upon his military service. The family court held a hearing on March 31, 2009, and denied Bryan’s motion to reconsider. Bryan then brought this appeal.

#### STANDARD OF REVIEW

Kentucky Revised Statutes (KRS) 403.750(1) provides that the district court may enter a domestic violence order “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[.]” “Domestic violence and abuse,” as defined in the statutes, includes “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 or members of an unmarried couple[.]” KRS 403.720(1). A DVO may restrain the adverse party from certain conduct, including contacting or communicating with the victim, committing further acts of domestic violence and abuse, and disposing of or damaging any of the parties' property. KRS 403.750(1)(a)-(c). *Kessler v. Switzer*, 289 S.W.3d 228 (Ky. App. 2009). The

limitation of one's abilities to hold firearms is also a limitation which may be placed.

In reviewing the issuance of a DVO, an appellate court may not disturb it unless there is a finding that the trial court committed clear error. *See*, Kentucky Rules of Civil Procedure (CR) 52.01, *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

## DISCUSSION

Bryan contends that, pursuant to 18 U.S.C.A. § 925 (2003), the family court erred in not exempting him from the ban against possessing firearms. That statute provides that:

(a)(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Bryan argues that the exceptions carved out in the above statute involve a conviction for the misdemeanor crime of domestic violence. He contends that the issuance of a DVO is not a conviction for the misdemeanor crime of domestic violence.

Bryan cites the case of *Cottrell v. City Of Hillview*, 2005 WL 1993032 (Ky. App., 2005)(2004-CA-000327-MR). *Cottrell*, however, is an unpublished case and as such is not binding precedent in this matter. CR 76.28(4).

Appellees assert, however, that Bryan falls within the 18 U.S.C.A. 922(g) exception. They cite to the fact that Alice originally filed a criminal complaint against Bryan in November of 2006 for harassment. Bryan subsequently pled guilty to the charge on April 19, 2007, in Jefferson District Court. They also point to a criminal complaint filed against Bryan by his sister-in-law, Norma Cissell, for harassing communications in Woodford District Court. On August 27, 2007, Bryan was convicted of this offense. Finally, the appellees point to Bryan's guilty plea to criminal mischief, wanton endangerment, menacing and failure to stop and render aid on March 3, 2009.

Pursuant to 18 U.S.C.A. 921 (33)(A)(2006), a "misdemeanor crime of domestic violence" is an offense that:

(i) is a misdemeanor . . . .

(ii) has an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

The appellees argue that while the DVO was in August of 2007, and did not technically constitute the above, it was based upon the actions in the misdemeanor crimes Bryan engaged in and, as a result, should be applied here.

We agree.

This very situation fits squarely within the purpose of the ban of firearms in domestic violence cases. Bryan has been involved in various criminal actions regarding Alice and her family prior to the entry of the current DVO from which he takes this appeal. Based upon these actions, the family court judge determined that Bryan should not have access to firearms and we do not believe it was clear error for the judge to do so. Thus, we affirm the decision of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin Glogower  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Terry W. Holloway  
Louisville, Kentucky