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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000862-ME

THAD B. PARSONS — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 09-D-00017

STEPHANIE L. CALVERT — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,[1] SENIOR JUDGE.

MOORE, JUDGE: This is an appeal by Thad B. Parsons from a Domestic Violence Order (DVO), which included a modification of custody and visitation, entered by the Bourbon County Family Court and the court's subsequent denial of Parsons's motion to vacate the DVO. After a thorough review, we vacate and

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

remand for more specific findings on the DVO. But, we order that the conditions of the DVO (1) restraining Thad from contacting his ex-wife, Stephanie L. Calvert, except telephone contact concerning the children and (2) ordering that he must stay 1000 feet from her shall not be vacated forty-five (45) days from the issuance of this opinion. The family court shall hold an evidentiary hearing in conformity with this opinion within that time.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the dissolution of their marriage, Thad B. Parsons and Stephanie L. Calvert shared joint custody of their two children, who are both under the age of four. Stephanie is the primary residential custodian. Thad had timesharing on Tuesdays, Thursdays, and every other weekend.

On March 27, 2009, Stephanie petitioned for a protective order against Thad. In her petition, Stephanie alleged:

> [On March 26, 2009,[2] Thad] arrived to drop the kids off after his timeshare, he refused to get the children out of his truck and kept yelling about the kids' medical bills, [on March 19, 2009] when we discussed the same issue, [Thad] threw our youngest son's shoe at me, I was holding [the son] and the shoe hit Thomas and me. [Thad] refused to leave and I called the police. [Thad] has previously shoved me to the ground, hit, slapped and dragged [the daughter] our oldest. [Thad] has blocked me from leaving the room in my home while saying "I haven't touched you." [Thad] has refused to leave my home after dropping the children off, been threatening and intimidating. Ever since I became engaged his anger has been escalating and I am fearful he will become physically violent with me or the kids again.

[2] The petition actually reads "3/26, 2007," but from the testimony it is clear "3/26, 2009" was intended.

The family court entered an Emergency Protective Order (EPO) and held a hearing on April 9, 2009. At the hearing, neither party was represented by counsel, although Stephanie is an attorney herself. The hearing resulted in the family court's entering a three-year DVO. The DVO restricted Thad's contact with Stephanie; modified the parties' custody arrangement granting sole custody to Stephanie; modified Thad's visitation rights with the children taking away his visitation on Tuesdays and Thursdays; prohibited Thad from drinking alcohol the day before visitation and during visitation; prohibited Thad from physically disciplining the children; and ordered that the children shall have "proper beds" at each home. Thad was also ordered to undergo domestic violence counseling and a parenting program called "FIT."

Thad thereafter sought legal counsel in regard to the DVO. Counsel for Thad timely filed a motion to vacate the DVO, which the court denied. As grounds for denying the motion, the court stated it relied on the allegations in the petition and its recollection that a law enforcement officer lived next to Stephanie. The court recalled that the officer, who did not testify at the DVO hearing, would come over to assist Stephanie if she needed it. The court noted that it found this "very compelling."

Thad now appeals, contesting the entry of the DVO and the subsequent denial of his motion to vacate. On appeal, Thad asserts that there was not sufficient evidence presented to justify the entry of the DVO. Thad also argues

that his due process rights to notice and a proper hearing were violated, the court considered inadmissible hearsay, the court considered irrelevant allegations, and the court went outside the scope of domestic violence when it modified his visitation rights and custody of the children.

Thad argues that by waiting almost a week after the "shoe incident" to file the domestic violence petition, Stephanie was not in fear of physical violence. He asserts that Stephanie only requested a protective order after Thad showed concern that Stephanie had two pit bulls living in her house with the children.

Thad further calls into question Stephanie's motives by pointing to her proposition to enjoin Thad's midweek visits with the children. He argues that

> [s]he was very specific about timesharing. She knew exactly what she wanted regarding timesharing. This calls into question her motives. If she wasn't afraid of [Thad] seeing the children on weekends, why would she be afraid of [Thad] seeing the children on a week night? Clearly, this visitation issue has nothing to do with domestic violence or the threat of same. This visitation issue has to do with convenience. Domestic violence court is not the forum to deal with visitation issues regarding convenience.

We turn now to the merits of this appeal.

II. STANDARD OF REVIEW

Prior to entry of a DVO, the court must find "from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur . . . ." Kentucky Revised Statute (KRS) 403.750(1). 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. *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). The definition of domestic violence and abuse, found in KRS 403.720(1), 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 . . . ."

We bear in mind that in reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial court were clearly erroneous or that it abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); Kentucky Rule of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id.* A reviewing court must give due regard to the trial court's judgment on the credibility of the witnesses. *Id.* "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted).

III. ANALYSIS

As pointed out in *Rankin v. Criswell*, 277 S.W.3d 621, 624 (Ky. App. 2008), domestic violence proceedings are not criminal matters, but the consequence for both parties are very significant.

> The filing of a DVO petition has enormous significance to the parties involved. If granted, it may afford the victim protection from physical, emotional, and psychological injury, as well as from sexual abuse or even death. It may further provide the victim an opportunity to move forward in establishing a new life away from an abusive relationship. In many cases, it provides a victim with a court order determining custody, visitation and child support, which he or she might not otherwise be able to obtain. The full impact of EPOs and DVOs are not always immediately seen, but the protection and hope they provide can have lasting effects on the victim and his or her family.
>
> On the other hand, the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator. To have the legal system manipulated in order to "win" the first battle of a divorce, custody, or criminal proceeding, or in order to get "one-up" on the other party is just as offensive as domestic violence itself. From the prospect of an individual improperly accused of such behavior, the fairness, justice, impartiality, and equality promised by our judicial system is [sic] destroyed. In addition, there are severe consequences, such as the immediate loss of one's children, home, financial resources, employment, and dignity. Further, one becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be.

Id. at 624-25 (quoting *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005)).

The *Wright* Court sympathized with the family courts and the heavy dockets under which they must perform their duties and the need to operate with

speed and efficiency. Nevertheless, it cautioned that courts are required to provide each party with a full evidentiary hearing. *Rankin*, 277 S.W.3d at 625 (citing *Wright*, 181 S.W.3d at 53).

"Finally, we emphasize that a DVO petition is subject to the same evidentiary standards as other forms of evidence." *Rankin*, 277 S.W.3d at 625 (citing *Dawson v. Commonwealth*, 867 S.W.2d 493, 496-497 (Ky. App. 1993)). Unless an exception applies, hearsay cannot be considered as evidence. In *Rankin*, the court erroneously relied on the petition, which contained hearsay statements allegedly made by the child that were repeated to the petitioner by a third-party.

> Because a DVO can be entered only after the court finds that there is an immediate and present danger of domestic violence, at a minimum, the statute requires the following: (a) specific evidence of the nature of the abuse; (b) evidence of the approximate date of the respondent's conduct; and (c) evidence of the circumstances under which the alleged abuse occurred. After conducting the evidentiary hearing, the court must then decide whether, under the preponderance of the evidence standard, domestic violence has occurred and may occur again.

Rankin, 277 S.W.3d at 626.

In the case *sub judice*, after reading the petition aloud before both parties at the hearing, the court asked Stephanie if the facts alleged in the petition were accurate. Stephanie answered the court's question in the affirmative and stated that the petition did not explain the entire situation. The court then informed the parties that she would consider the relationship as a whole rather than rely

solely upon the petition. The court did not inquire into specific evidence or circumstances surrounding the allegations in the petition.

Stephanie was given the opportunity to testify first. She stated that the complained conduct had been going on for about two years--apparently the time period since the demise of the parties' marriage. She relayed to the court statements allegedly made by her daughter, who was four-years old at the time of the hearing and three-years old when the parties separated, that Thad made statements he was going to kill Stephanie when she started dating after their separation. Stephanie did not testify that she heard these alleged statements from Thad, and she did not testify that she took action in regard to these alleged statements.

Stephanie also testified as to statements made by her daughter, allegedly made when the daughter was three-years old, which Stephanie took to mean that Thad had followed Stephanie at times when he had visitation with the children. Stephanie did not testify to any threats or actions taken by Thad. The court inquired whether this caused Stephanie to be fearful, and Stephanie responded affirmatively.

Stephanie testified as to a statement made by the daughter regarding an incident when the daughter wanted to purchase something at a church event and Stephanie responded that she did not have the money to do so. The daughter replied, "Didn't daddy pay you? You've got half of daddy's money and all of yours. Didn't daddy pay you?"

Another statement of her daughter as to which Stephanie testified was that she had prayed to God that she, the daughter, would die. Stephanie insinuated that this statement was in regard to the statements the daughter repeated that were allegedly made by Thad.

Stephanie later told the court that after the daughter visited with Thad, she would come home and say that she was not allowed to love Stephanie's boyfriend. This clearly upset Stephanie.

Additionally, Stephanie testified as to statements allegedly made by her neighbor, a state trooper who said he would come over if Stephanie ever needed him to. She stated the neighbor knew the parties' visitation schedule and that he was around to help her if she needed him.

Stephanie testified about other instances of conduct but did not testify as to when the events occurred or the circumstances surrounding them. She explained to the court that Thad opened the door of her car, while she had the car in gear, and began yelling at her through the open door while she was trying to drive away. Stephanie did not identify any threats Thad made against her at that time, but only that he yelled. Thad stopped yelling, and Stephanie drove away.

Stephanie testified that the "things" that occurred "recently" included that on Valentine's Day of 2009, a day allotted for Stephanie to have the children, Thad showed up unexpectedly at Stephanie's and telephoned her from her driveway with gifts for the children. Stephanie testified that Thad had not exercised visitation with the children on Christmas or Father's Day but that he

wanted to see them on Valentine's Day. Stephanie stated that Thad's unscheduled presence placed her in fear, particularly because she did not have any other adults with her at the time. She did not, however, testify as to why his presence caused the fear. Instead, Stephanie testified that she believed Thad would knock on her door until she let him in. So, she informed Thad over the telephone that he could bring in the gifts for the children and then he had to leave. She testified that Thad came in and left as she requested without incident. Stephanie did not testify as to any threats, acts of violence or intimidating behavior on the part of Thad during this visit.

Stephanie also referenced the incident of Thad's throwing a child's shoe at her mentioned in her petition. She testified that the daughter had gotten in between them and said, "Don't fight. Don't fight."

Despite not having included it in her petition and not having mentioned it during her testimony, the court asked Stephanie whether she or Thad had any substance abuse problems. Stephanie responded that she did not but that Thad drank a lot during the end of their marriage. Their marriage was dissolved in early January 2008. Stephanie stated that she did not know if Thad still drank but "assume[d]" that he did socially and this "concerned [her] greatly."

Later, unprovoked by Stephanie's testimony, the court asked if Thad had access to weapons. Stephanie replied that Thad had many guns. However, neither before the court's question nor after did Stephanie state that she feared or had any reason to fear that Thad would use a weapon against her.

Thad was given the opportunity to answer the court's questions. The court initially asked, "Can you see how your conduct is making her fearful?" Although Thad failed to particularly address many of the accusations against him, he stated that he disagreed with much of Stephanie's testimony. The court asked about the daughter's comments and also asked if Thad spanked her. Thad stated that if she needed it, he would spank her on the bottom.

After hearing ten to eleven minutes of testimony, the court found a preponderance of the evidence showed that an act or acts of domestic violence and abuse had occurred and may again occur. During the hearing, the court stated directly in regard to Stephanie's testimony about what the daughter had stated to her, "that's what I'm concerned about. A four-year old can't make that stuff up."

The court then informed Thad that if this conduct continued, he may be denied all visitation with the children. The court queried whether Thad's visitation with the children should be supervised. Thereafter, the parties engaged each other directly regarding visitation. Stephanie spoke up that she wanted the children's visitation to continue with Thad, but she did not want the weeknight visitations because the children had some behavior problems after their visits with Thad. Stephanie did not detail what these problems were or how, or if, they were related to her claims of domestic abuse. Stephanie also had testified that it took a long time to get Thad to exercise regular visitation, but she continued to push for him to do so. She stated that she had worked for two years to get Thad to have regular visitation with the children and that he had two children who needed him to

"step up to be a dad." Thad stated that he had been exercising regular visitation. Stephanie denied this and stated that "for good or bad [she] chose [Thad] to be their father. Right or wrong [she had] tried to get [Thad] to be involved."

Once the parties ended this debate, the court continued with the entry of the DVO. In the DVO, the court restricted Thad's contact with Stephanie; modified the custody arrangement, granting Stephanie sole custody; modified Thad's visitation rights, taking away his Tuesday and Thursday evenings with the children; prohibited Thad from drinking alcohol the day before visitation and during visitation; prohibited Thad from physically disciplining the children; and ordered that the children shall have "proper beds" at each home. Thad was also ordered to undergo domestic violence counseling and a parenting program called "FIT." The DVO is to expire three years after its entry.

We give due regard to the court's judgment on the credibility of witnesses and bear in mind that in reviewing the decision of a trial court, the test is not whether we would have decided it differently. The problem we have on review is that statements made by the family court indicate that its decision was influenced by numerous statements of hearsay evidence, which is contrary to *Rankin*, 277 S.W.3d at 625. At issue is Stephanie's testimony regarding statements allegedly made by her daughter, which comprised much of her testimony, and the statement regarding her neighbor, the state trooper.

The inherent problems with the family court's reliance on the hearsay statements are set forth in *G.E.Y. v. Cabinet for Human Resources,* 701 S.W.2d 713, 715 (Ky. App. 1985).

> We agree when a judge acts as a fact finder it is presumed that he will be able to disregard hearsay statements. However, where, as here, it is apparent that he relied on the hearsay in making his decision, the error in the admission of the unreliable evidence cannot be deemed harmless or nonprejudicial. As the court noted in *Santosky* [*v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)] , citing *Woodby v. INS*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966), "[J]udicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment." *Id.*, p. 757, n. 9, 102 S.Ct. at p. 1397, n. 9. (Emphasis our own.) Here, the evidence meets neither test.

As noted *supra,* the court spoke several times regarding the alleged hearsay statements. At one point, the court addressed Thad and asked, "What about your daughter making these comments?" The court also stated, "a four year old can't make that stuff up" and that these statements "concerned [the court]." And in coming to its decision on the motion to vacate, the court stated that it found the neighbor's alleged statements "very compelling." Given the family court's indication on the record that it relied upon the hearsay testimony submitted by Stephanie in reaching its decision, this was highly prejudicial to Thad pursuant to *G.E.Y.,* 701S.W.2d at 715, and was an abuse of discretion by the trial court.

When the hearsay statements are removed and the remaining testimony is evaluated, it is debatable whether the statutory definition of domestic

violence and abuse in KRS 403.720(1) is met. We are aware that "[d]omestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence." *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003) (citing KRS 500.030) ("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."). "But the construction cannot be unreasonable." *Id.* (citing *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994) ("We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used."). While we give much deference to a decision by the family court, it cannot act arbitrarily, capriciously or unreasonably. *See Kuprion*, 888 S.W.2d at 684.

The definition of domestic violence and abuse, found in KRS 403.720(1), 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 . . . ." In KRS 403.720(1), the General Assembly included the qualifier in defining injury, abuse, assault, or threats of including "imminent" physical injury. Pursuant to KRS 503.010, "'imminent' means impending danger and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse."

As noted *supra*, once the hearsay statements are removed, it is questionable whether the statutory definition of domestic abuse has been satisfied. But, construing the statute liberally toward protecting victims from domestic violence and preventing future acts of domestic violence, we believe this matter should be remanded to the family court for a more extensive hearing and specific findings under the statutory criteria set forth in KRS 403.720. The family court is admonished that the factors outlined in *Rankin*, 277 S.W.3d 621, shall be utilized on remand to assess the likelihood of the danger that was alleged in the petition. Thus, we vacate the DVO and remand for proceedings consistent with this opinion with the qualification below.

Because the DVO serves a significant purpose and for the protection of the petitioner, we will not vacate until forty-five (45) days following the issuance of this opinion the conditions of the DVO ordering (1) that Thad shall stay 1000 feet away from Stephanie except during the exchange of the children and (2) that Thad shall only contact Stephanie by telephone if it regards the children. Within that time, the family court shall conduct an evidentiary hearing in conformity with this opinion.

Furthermore, if a DVO is issued on remand under the *Rankin* standards and the statutory criteria of KRS 403.720, the conditions of the DVO shall conform to preventing the conduct forming the basis for a DVO. The purpose of a DVO is to prevent further acts of violence and not to control conduct that has no connection to alleged acts of abuse. As an example of this, we point out that

absolutely nothing in evidence showed that Thad's consumption of alcohol was attributable to any of the conduct of which Stephanie complained. Indeed, her testimony was that she *believed* Thad now only drank socially.

Turning to Thad's other arguments on appeal, we will briefly address these issues. Although a court is permitted to modify the custody and visitation arrangements through the DVO under KRS 403.750,[3] KRS 403.320,[4] and KRS

[3] (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:

. . . .

(e) Utilizing the criteria set forth in KRS 403.270, 403.320, and 403.822, award temporary custody; [or]

. . . .

(h) Enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse.

[4] In relevant part, this statute provides:
(2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

403.270,[5] the family court did not comply with any of the formalities imposed by those statutes.

The family court modified the custody arrangement *sua sponte* by granting sole custody to Stephanie and modified Thad's visitation by cutting out all weeknight visitations with his children. The court, however, did not take testimony on the statutory factors and did not make any of the necessary statutory findings regarding the best interests of the children for either a change in visitation or modification of custody. Thus, this was clearly erroneous. There being no statutory findings for a change in custody and visitation, we vacate the court's orders regarding such and remand for entry of an order vacating the custody and visitation orders.

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[5] In relevant part, this statute provides:

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

. . . .

(3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

IV. CONCLUSION

We VACATE the DVO IN PART, leaving in effect for FORTY-FIVE (45) DAYS after the issuance of this opinion only the conditions of the DVO regarding Thad's staying 1000 feet away from Stephanie and that he shall not have any telephone contact with her unless it regards the children. We REMAND this case to the Bourbon Family Court for an evidentiary hearing, in conformity with this opinion, within FORTY-FIVE (45) DAYS. We VACATE the remaining conditions of the DVO and orders entered against Thad and REMAND this case for entry of an order dismissing all other conditions of the DVO and all associated orders entered therewith against Thad.

ALL CONCUR.

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