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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000135-ME
AND
NO. 2009-CA-001444-ME

PAULA OSTER — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2011-SC-000362-DE

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JERRY J. BOWLES, JUDGE
ACTION NOS. 06-CI-503122 AND 07-D-500373

ALAN OSTER — APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: Paula Oster (Paula) has appealed from an order of the Jefferson Family Court modifying a Massachusetts custody order and granting Alan Oster (Alan) sole custody of the parties' two minor children. Consolidated

with that appeal is Paula's appeal from the three-year Domestic Violence Order (DVO) entered by the family court. In its initial opinion, this Court affirmed the order of the Jefferson Family Court modifying the Massachusetts custody order and granting Alan sole custody of the parties' two minor children. *Oster v. Oster*, 2009-CA-000135-ME, 2011 WL 1196333 (Ky. App. Apr. 1, 2011). As to the DVO, this Court concluded that the family court lacked subject matter jurisdiction, and we vacated the DVO. *Id*.

The Supreme Court of Kentucky subsequently granted discretionary review and remanded the case to this Court for further consideration in light of *Daugherty v. Telek*, 366 S.W.3d 463 (Ky. 2012). After careful review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts of this case, as previously set forth by this Court, are as follows:

> Paula and Alan were married in Boston, Massachusetts, on April 2, 1998. In October 1999, Paula filed a Complaint for Divorce in the Probate and Family Court of Suffolk County, Massachusetts. It appears that the parties had an ongoing relationship for the next five years. At the time Paula filed for divorce, she was pregnant with the parties' first child, a son, born February 22, 2000. The parties had a second son who was born on June 6, 2002.
>
> The older son was removed from the parties' care and placed into foster care on two occasions as a result of neglect and domestic violence. On the first occasion, the parties' son was approximately four months old. He sustained a head injury, lost consciousness, and suffered a seizure when Paula allegedly struck him in the head when she attempted to hit Alan during an argument. The

second removal occurred in September of 2001 when the parties reportedly had an altercation in which the police became involved. Because of the parties' involvement with law enforcement and ongoing difficulties, the older son was again placed in foster care.

On December 16, 2004, and five years after Paula filed her Complaint for Divorce, the parties entered into a Separation Agreement. Under the terms of this agreement, Paula was to have "sole custody legal and physical custody" of the two children and was granted leave to move the children from Massachusetts to Delaware. Alan was to have overnight visitation with the children two weekends each month. Additionally, Alan was to pay Paula $288 per week as child support and was to continue to pay health insurance for the children. Paula was responsible for the first $100 of any uninsured healthcare expenses, and the parties were to equally share the responsibility of such expenses thereafter. The Separation Agreement was incorporated into a Judgment of Divorce Nisi that became final on March 16, 2005.

Alan remarried in April 2005. In August 2005, Alan and his current wife relocated to Louisville, Kentucky. On or about October 29, 2005, Paula and the two children moved to Louisville so that the children could have access to both of their parents. On August 10, 2006, Alan filed a Petition to Register a Foreign Custody Decree in the Jefferson Family Court and filed a motion requesting a temporary restraining order to prohibit Paula from removing the children from the Louisville Metro area. The next day, the family court issued the requested restraining order. Paula moved to Massachusetts with the children sometime near the date the family court issued the restraining order.[1] After Paula left Kentucky with the children, the family court issued a subsequent restraining order on August 18, 2006, requiring Paula to return the children to Alan's custody. Additionally, on September 27, 2006, Alan filed a Motion to Enforce Custody

[1] Paula alleges that she moved to Massachusetts on August 9, 2006, prior to the issuance of the restraining order. However, Alan alleges that Paula left for Massachusetts after discovering that Alan was bringing an action to modify custody and on the same day the restraining order was issued.

Agreement Between Parties or in the Alternative to Modify Custody.

Eventually, the Massachusetts Probate and Family Court entered an order on October 5, 2006, ordering Paula to return the children to Alan in Kentucky within forty-eight hours. Thereafter, Paula returned to Kentucky with the children. On October 9, 2006, the Jefferson Family Court entered an order accepting jurisdiction over the issue of child custody after concluding that the children had resided in Kentucky as their home state for more than six months.

On July 3, 2007, Alan filed a Supplemental Motion to Modify Custody. On December 20, 2007, the family court entered an order awarding temporary sole custody of the minor children to Alan. It also ordered Paula's time with the children to be supervised at The Family Place.

The trial court held a two-day hearing on May 21 and May 22, 2008. Because additional time was required, the hearing continued and concluded on August 13, 2008. On December 19, 2008, the family court entered an order granting Alan sole custody of the two children. The order further provided that Paula was to have therapeutic visitation with the children only, through the children's therapist. Paula was also ordered to pay Alan $60 per month in child support, plus $2.39 per month as her share of the cost of the children's health insurance. It is from this order that Paula appeals.

On January 4, 2009, and two weeks after the family court entered the December 19, 2008, order, Paula sent an e-mail of an article about a non-custodial parent who killed his son instead of paying child support to her sister with a copy to Alan (the E-mail). The E-mail contained no text other than the article.

On January 5, 2009, Alan filed a Domestic Violence Petition on behalf of himself and the two children. In the petition, Alan stated that Paula engaged in an act of domestic violence when she sent him the E-mail only two

> weeks after the family court ordered her to pay child support. Alan stated that he took this as a threat to harm the children. He noted that Paula had been diagnosed with a personality disorder. Alan further stated that Paula had no other purpose in sending this article other than to cause him fear and intimidate him. On that same day, the family court entered an Emergency Protective Order (EPO) on behalf of Alan and the two children against Paula.
>
> Due to various continuances, the domestic violence hearing was continued until March 10, 2009. On that day, the family court entered a DVO, which provided that Paula could not have contact with Alan or the children for a period of three years. On March 20, 2009, Paula filed a Kentucky Rule of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the DVO. The family court held a hearing on the motion on March 26, 2009, and denied the motion in an order entered on July 9, 2009. It is from the DVO that Paula also appeals.
>
> By order entered on April 13, 2010, this Court consolidated Paula's appeal from the December 19, 2008, order granting Alan sole custody of the children, and her appeal from the July 9, 2009, order denying her motion to alter, amend, or vacate the DVO. On February 14, 2011, Paula filed a motion for leave to argue subject matter jurisdiction during the oral argument scheduled for February 17, 2011. Because the response time on that motion did not expire until February 22, 2011, in the interest of fairness to the parties and judicial economy, this Court cancelled oral argument. Alan filed a response and a motion to strike Paula's motion.

Oster v. Oster, 2009-CA-000135-ME, 2011 WL 1196333 (Ky. App. Apr. 1, 2011).

Because we deemed it unnecessary, oral argument was not rescheduled. Thus, Paula's motion for leave to argue subject matter jurisdiction at oral argument is moot. Likewise, Alan's motion to strike Paula's motion is moot. However, the

substantive issue of subject matter jurisdiction raised in Paula's motion is addressed below.

STANDARDS OF REVIEW

The issues raised by Paula have different standards of review. Therefore, we set forth the appropriate standard of review as we address each issue.

ANALYSIS

1. Custody Order

As to her appeal from the December 19, 2008, custody order, we adopt our analysis from our previous opinion:

> With respect to the December 19, 2008, order, Paula first contends that the Jefferson Family Court lacked subject matter jurisdiction to modify the Massachusetts custody order. Although Paula raises this issue for the first time on appeal, "[t]he question of subject matter jurisdiction may be raised at any time and is open for the consideration of the reviewing court whenever it is raised by any party." *Gullett v. Gullett*, 992 S.W.2d 866, 869 (Ky. App. 1999). "Whether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*." *Biggs v. Biggs*, 301 S.W.3d 32, 33 (Ky. App. 2009).
>
> In 2004, the General Assembly adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Kentucky Revised Statutes (KRS) 403.800, *et seq*. Paula contends that, pursuant to KRS 403.826, the trial court did not have jurisdiction to modify the Massachusetts custody order. We disagree.
>
> KRS 403.826 provides the following:
>
> > Except as otherwise provided in KRS 403.828, a court of this state shall not modify a child custody determination made

> by a court of another state unless a court of this state has jurisdiction to make an initial determination under KRS 403.822(1)(a) or (b) and:
>
> (1) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under KRS 403.824 or that a court of this state would be a more convenient forum under KRS 403.834; or
>
> (2) A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

First, we note that KRS 403.822(1)(a) provides that:

> (1) Except as otherwise provided in KRS 403.828, a court of this state shall have jurisdiction to make an initial child custody determination only if:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; . . .

Because the children lived in Kentucky for a period of six months before Alan commenced the proceeding, and because Alan continued to live in Kentucky, the family court would have initial jurisdiction pursuant to KRS 403.822(1)(a).

Next, the requirements under KRS 403.826(1) were met because the Massachusetts Probate and Family Court relinquished any jurisdiction it may have had over these custody proceedings to Kentucky in its order entered on

October 5, 2006. In that order, the Massachusetts Probate and Family Court ordered Paula to return the children to Alan in Kentucky within forty-eight hours. The court then stated that "[t]he issue of custody and visitation is solely within the jurisdiction of the Kentucky court." Accordingly, the Jefferson Family Court did have jurisdiction pursuant to KRS 403.826 to modify the Massachusetts custody order.

Paula next contends that even if the family court had subject matter jurisdiction, it applied the wrong standard in modifying custody of the parties' children. Specifically, Paula argues that the family court incorrectly applied the "best interest" standard instead of the "serious endangerment" standard.

As provided in *London v. Collins*, 242 S.W.3d 351, 354 (Ky. App. 2007):

> Findings of fact may be set aside only if they are clearly erroneous. Whether or not the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them. If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact. The legal conclusions are reviewed *de novo*. Finally, if the factual findings are not clearly erroneous and the legal conclusions are correct, the only remaining question on appeal is whether the trial court abused its discretion in applying the law to the facts.

(Citations omitted).

Pursuant to KRS 403.340(2)(a), no motion to modify a custody order shall be made earlier than two years after its date unless there is reason to believe "[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]" As noted above, Alan filed a motion to Enforce Custody

Agreement Between Parties or in the Alternative to Modify Custody on September 27, 2006. Because Alan's custody modification request came within two years of the Massachusetts order granting sole custody to Paula, the "serious endangerment" standard provided in KRS 403.340(2)(a) applies to the instant case.

Having reviewed the December 19, 2008, order, we believe that the family court did apply the "serious endangerment" standard. First, the family court specifically noted that it was applying the "serious endangerment" standard provided in KRS 403.340(2) when it stated the following:

> Pursuant to KRS 403.350, the Court reviewed Dr. [Alan] Oster's motion and the allegations contained in the two (2) affidavits attached to the motion. Following that review the Court found adequate cause to proceed. Under KRS 403.340(2), the Court may modify a custody decree that has been in existence less than two (2) years when the children's present environment may seriously endanger their physical, mental, moral, or emotional health.

Additionally, the family court noted that:

> The Court finds that the environment created by Ms. [Paula] Oster's emotional and mental issues in conjunction with the parties' inability to cooperate in the children's best interest seriously endangers the children's long term physical, mental, moral, and emotional health. Therefore the Court will grant Dr. [Alan] Oster's motion for sole custody.

Although the family court made a reference to "the children's best interest," it is clear from the order that the court only did so with respect to the parties' inability to cooperate with one another, not to support its change of custody. Thus, despite Paula's argument to the contrary,

> the family court did not apply the "best interest" standard.
>
> We note Alan's argument that the family court was not required to apply the "serious endangerment" standard. Having concluded that the family court properly applied the "serious endangerment" standard, this argument is moot. Thus, we do not address it.
>
> Having determined that the family court applied the correct standard, we address whether there was sufficient evidence to support the court's conclusion that the "serious endangerment" standard was met. In its order, the family court noted that the court-ordered custody evaluator, Dr. Cebe, and other healthcare professionals, provided testimony regarding their concerns for Paula's "personality issues and mental health status." The court noted that these professionals testified that they believe Paula "suffers from symptoms of severe depression as well as 'compulsive, borderline, histrionic and dependency features that impair her functioning.'" The court further noted that Paula's mental health issues are having a negative impact on the children.
>
> Additionally, the court noted that while Alan has issues of his own, he has demonstrated the capacity to better provide for the children. However, Paula "has a great deal of work to do toward her mental health and stability. She must get herself into a position emotionally, mentally, and professionally whereby she can support herself and provide financial and emotional support for the children, and move beyond the break up of her marriage."
>
> Based on the testimony at the hearing, the court was not clearly erroneous in determining that Paula may seriously endanger the physical, mental, moral, or emotional health of the parties' two children. Therefore, the family court did not abuse its discretion in granting Alan's motion to modify custody.

Oster v. Oster, 2009-CA-000135-ME, 2011 WL 1196333 (Ky. App. Apr. 1, 2011).

2. Domestic Violence Order

a. Subject Matter Jurisdiction

In Paula's February 14, 2011, motion she argues that the family court lost subject matter jurisdiction to hold the domestic violence hearing and enter the DVO because it did not hold the hearing within fourteen days from the entry of the EPO as required by KRS 403.470(4) and KRS 403.475. Specifically, her argument is based on the premise that the family court's failure to follow a statutory procedure left it without subject matter jurisdiction to issue a domestic violence order.

We note that Paula did not raise this issue in the lower court. However, she argues that this is a question of subject matter jurisdiction which may be raised at any time and cannot be "conferred by waiver or consent." *Gullett*, 992 S.W.2d at 868-69. As previously noted, "[w]hether a trial court acts within its jurisdiction is a question of law; therefore, our review is *de novo*." *Biggs*, 301 S.W.3d at 33.

As set forth in *Daugherty v. Telek*, 366 S.W.3d 463, 466-67 (Ky. 2012):

> Subject matter jurisdiction of each Court within the Court of Justice is established by the constitutional provisions and statutes assigning to the courts specific types of claims and causes of action ("kinds of cases"). *See Hisle v. Lexington–Fayette Urban County Gov't,* 258 S.W.3d 422, 429–30 (Ky. App. 2008).
>
> We have often noted, most recently in *Harrison v. Leach,* 323 S.W.3d 702, 705–06 (Ky. 2010) (*quoting Duncan v. O'Nan,* 451 S.W.2d 626, 631 (Ky.1970)), that "subject matter jurisdiction does not mean 'this case' but *'this kind of case.*'" We also quoted *Duncan* in *Gordon v. NKC Hospitals, Inc.,* 887 S.W.2d 360 (Ky.1 994), in

which we explained that a court is deprived of subject matter jurisdiction only where that court has not been given, by constitutional provision or statute, the power to do anything at all. To determine subject matter jurisdiction, the pleadings should be examined and taken at face value. The court has subject matter jurisdiction when the "kind of case" identified in the pleadings is one which the court has been empowered, by statute or constitutional provision, to adjudicate. *Id.* at 362.

Once filed, a court has subject matter jurisdiction of the case so long as the pleadings reveal that it is the kind of case assigned to that court by a statute or constitutional provision. A court, once vested with subject matter jurisdiction over a case, does not suddenly lose subject matter jurisdiction by misconstruing or erroneously overlooking a statute or rule governing the litigation.

We agree with the expression of the law recited by the Court of Appeals in *Hisle,* 258 S.W.3d at 429–30: "Once a court has acquired subject matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction."

. . . .

In this matter, there is no question that domestic violence proceedings under KRS Chapter 403 are within the subject matter jurisdiction of the family court division of the [Jefferson] Circuit Court. Section 112(6) of the Kentucky Constitution authorizes the designation of one or more divisions of the Circuit Court within a judicial circuit as a family court division, and further provides that "[a] Circuit Court division so designated shall retain the general jurisdiction of the Circuit Court and shall have additional jurisdiction as may be provided by the General Assembly." Further, KRS 23A.100(2), which assigns specific types of cases to family court divisions of the Circuit Court provides, in relevant part: "In addition to general jurisdiction of Circuit Court, a family court division of Circuit Court shall have the following additional jurisdiction: (a) Domestic violence and abuse

> proceedings under KRS Chapter 403 subsequent to the issuance of an emergency protective order in accord with local protocol under KRS 403.735[.]"

(Footnotes omitted).

Therefore, what Paula regards "as the family court's failure to follow a statute is, at most, the erroneous *exercise* of subject matter jurisdiction—it is not a lack of subject matter jurisdiction and it does not affect the existence of subject matter jurisdiction." *Id*. at 467. Because this issue was raised for the first time in Paula's motion, it is not properly before us. *See McGinnis v. McGinnis*, 920 S.W.2d 68, 73 (Ky. App. 1995). Therefore, we do not address it.

b. Due Process Violation

With respect to the DVO, Paula next argues that her constitutional right to due process was violated when the family court admitted evidence of prior alleged domestic violence that was not pled in the domestic violence petition. As correctly noted by Paula, the only alleged act of domestic violence listed in the petition was the E-mail Paula sent to Alan. Paula contends that, pursuant to KRS 403.730(1)(c), the only events of alleged domestic violence that could be introduced at the domestic violence hearing were those specifically listed in Alan's petition. Thus, Paula argues that because the domestic violence petition was only based upon the E-mail that Paula sent to Alan, no other evidence of prior alleged domestic violence could be introduced at the hearing. We disagree.

KRS 403.730(1)(c) addresses the minimum requirements of what needs to be included in a domestic violence petition, which are "[t]he facts and circumstances which constituted the alleged domestic violence and abuse[.]" Paula does not cite to, nor can we find, any Kentucky law that requires an individual to list every past act of domestic violence in the Petition for Domestic Violence. In *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987), this Court made it clear that "[d]ue process requires, at the minimum, that each party be given a meaningful opportunity to be heard." In this case, a full hearing was held wherein Paula testified and had the opportunity to be heard. Thus, her due process rights were not violated.

c. Sufficient Evidence

Finally, Paula argues that there was not sufficient evidence to support the family court's finding that an act or acts of domestic violence occurred and will occur again. As stated in *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010):

> [KRS] 403.750 permits a court to enter a DVO following a hearing "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[.]" Under the preponderance standard, the court must conclude from the evidence that the 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). On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous. Kentucky Rules of Civil Procedure ("CR") 52.01; *Reichle v. Reichle,* 719

> S.W.2d 442, 444 (Ky. 1986). But with regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Keeney v. Keeney,* 223 S.W.3d 843, 848-49 (Ky. App. 2007).

KRS 403.720(1) defines "domestic violence" as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault . . . ." Alan contends that after receiving the E-mail, he was in fear of imminent physical injury or assault by Paula against him and the two children. Pursuant to KRS 503.010, "'[i]mminent' 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."

Having carefully reviewed the record, including the domestic violence hearing, we conclude that there was sufficient evidence that an act or acts of domestic violence occurred and may occur again. Only two weeks after she was ordered to pay Alan child support, Paula sent Alan the E-mail. At the domestic violence hearing, Paula testified that she sent Alan the E-mail to show him how hostilities and actions during litigation could affect children. She further testified that she felt like the children were being caught in middle of the fighting and that she wanted it to stop before something happened to the children.

Alan testified that, after receiving the E-mail from Paula, he was in fear that he and the two children were in danger of imminent physical injury, serious physical injury, or assault by Paula. Alan further testified that during their

marriage, Paula hit him on various occasions, even striking him with a three-hole punch on one occasion. Alan admitted as evidence the custody evaluation performed by Dr. Cebe in the custody action. Referenced in the custody evaluation was an instance of abuse where Paula attempted to strike Alan, but instead hit the parties' four-month-old son causing him to seize and lose consciousness. Alan also testified about an instance in February 2007 where the parties' younger son had a second-degree burn on his thigh after being in Paula's care. Additionally, incorporated by reference at the domestic violence hearing, were the family court's prior findings of fact that Paula inappropriately threw a cup at the children when she was angry.

We agree that Alan's testimony regarding Paula's past activity, viewed separately and in isolation, may not have supported the DVO. However, we believe that, based on the proximity in time between when Paula was ordered to pay child support and when she sent the E-mail, as well as Alan's testimony of

previous acts of violence by Paula, there was sufficient evidence to support the DVO. Accordingly, the family court's entry of the DVO was not clearly erroneous.

CONCLUSION

For the foregoing reasons, we affirm the order of the Jefferson Family Court modifying the Massachusetts custody order and granting Alan sole custody of the parties' two minor children. Additionally, we affirm the DVO entered by the family court.

Further, as set forth above, Paula's motion for leave to argue subject matter jurisdiction at oral argument and Alan's motion to strike are DENIED as moot.

ALL CONCUR.

ENTERED: November 9, 2012

/s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

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