RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

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

PAULA OSTER — APPELLANT

v.

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

ALAN OSTER — APPELLEE

OPINION AND ORDER
AFFIRMING IN PART AND
VACATING IN PART

** ** ** ** **

BEFORE: CAPERTON, COMBS AND KELLER, JUDGES.

KELLER, JUDGE: Paula Oster (Paula) appeals 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. For the reasons set forth below, we affirm in part, and vacate in part.

FACTUAL AND PROCEDURAL BACKGROUND

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 Agreement Between Parties or in the Alternative to Modify 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.

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.

Because we deem 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 and responded to in Alan's response is addressed below.

Additional facts will be developed as necessary.

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

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 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.

2. Domestic Violence Order

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. In his response to that motion, Alan argues to the contrary. Although this issue was not raised in the lower court, "[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*, 992 S.W.2d at 868-69. Additionally, [j]urisdiction of the subject matter cannot be conferred by waiver or consent." *Id*. Therefore, we address whether the family court had subject matter jurisdiction. 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.

To determine whether the family court had jurisdiction to hold a hearing and enter a DVO, we must turn to KRS 403.470(4) and KRS 403.475. The version of KRS 403.740(4) in effect at the time of the events of this case states as follows:

> An emergency protective order issued in accordance with this section shall be effective for a period of time fixed in the order, but not to exceed fourteen (14) days. Upon the issuance of an emergency protective order, a date for a full hearing, as provided for in KRS 403.745, shall be fixed not later than the expiration date of the emergency protective order. An emergency protective order shall be reissued for a period not to exceed fourteen (14) days if service has not been made on the adverse party by the fixed court date and time or as the court determines is necessary for the protection of the petitioner.[2]

[2] The General Assembly amended KRS 403.740(4), which took effect on July 15, 2010, and now reads as follows:

> An emergency protective order issued in accordance with this section shall be effective until the full hearing provided for in this subsection or in KRS 403.745, or until withdrawn by the court. Upon the issuance of an emergency protective order, the court shall set a date and time for a full hearing, within fourteen (14) days as provided for in KRS 403.745, and shall summon the adverse party to appear. If, at the hearing, the adverse party is not present and has not been served, the emergency protective order shall remain in place, and the court shall direct the issuance of a new summons for a hearing set not more than fourteen (14) days in the future. If service has not been made on the adverse party prior to seventy-two (72) hours before that hearing or a subsequent hearing, the emergency protective order shall remain in place and the court shall continue the hearing and issue a new summons with a new date and time for the hearing to occur, which shall be within fourteen (14) days of the originally scheduled date for the continued hearing. Before issuing the new summons, the court shall note the length of time that has passed since the issuance of the emergency protective order, during which the adverse party has not been served. The court shall repeat the process of continuing the hearing and reissuing a new summons after noting the lapse of time since the issuance of the emergency protective order until the adverse party is served at least seventy-two (72) hours in advance of the scheduled hearing. In issuing the summons, the court shall simultaneously transmit a copy of the summons or notice of its issuance and provisions to the petitioner.

KRS 403.745(2) provides that a "hearing shall be fixed not later than fourteen (14) days following issuance of the summons." Finally, KRS 403.745(4) provides that "[a] summons may be reissued if service has not been made on the adverse party by the fixed court date and time."

In this case, the family court did not hold a hearing within fourteen days from the entry of the EPO. As previously noted, the family court entered the EPO against Paula on January 5, 2009, and scheduled the domestic violence hearing for January 15, 2009. Paula was served on January 7, 2009. Both parties were present with counsel in the family court on January 15, 2009. However, the family court continued the hearing and re-issued the EPO. While it is unclear from the record before us why the hearing was continued, in his response to Paula's motion for leave to argue subject matter jurisdiction, Alan explained that the family court judge ordered them to reschedule for another date.

Because the court was closed due to weather on January 15, 2009, the family court again re-issued the EPO and continued the hearing until February 12, 2009. On February 12, 2009, the family court re-issued the EPO and continued the hearing until February 24, 2009. It is unclear from the record why the hearing was again continued; however, it does appear from the record that neither party was present at the scheduled hearing. On February 24, 2009, the hearing was continued until March 10, 2009, on the family court's own motion due to a conflict with a trial in an unrelated matter. A re-issued EPO does not appear in the record.

Finally, on March 10, 2009, the family court held the domestic violence hearing and entered the DVO.

KRS 403.740(4) limits the reissuance of an EPO to those situations where the adverse party was not served. Because Paula was served on January 7, 2009, the family court did not have the requisite statutory authority to re-issue the EPO. Thus, the family court lost jurisdiction to hold a hearing and enter the DVO when a hearing was not held within fourteen days from the entry of the EPO.[3]

We note that Paula raises two other arguments with respect to the DVO. First, she 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. Second, she 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. Because the family court lacked jurisdiction to enter the DVO, these arguments are moot. Thus, we do not address them.

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. The DVO entered on March 10, 2009, is vacated.

[3] We note that this issue is similar to the issue recently addressed by this Court in *Telek v. Daugherty*, 2009-CA-001993, 2010 WL 5128651 (Ky. App. Dec. 17, 2010). Because a motion for discretionary review was filed and is still pending, this case is not final. However, due to its similarity, we find its analysis of KRS 403.470(4) and KRS 403.475 to be instructive.

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: April 1, 2011

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

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