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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000113-ME

CATHERINE HEASTON APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 12-D-503216

STEVEN T. SMITH APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Catherine Heaston appeals the Jefferson Circuit Court's order dismissing her petition for a domestic violence order (DVO). After a careful review of the record, we reverse and remand because Heaston's due process rights were violated when she was not provided a full evidentiary hearing and because

the circuit court's decision has denied this Court the ability to conduct a meaningful appellate review of Heaston's allegations of domestic violence.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2012, Heaston filed a domestic violence petition against Smith, contending that they had lived together previously, but that she moved out and into a friend's house less than one week before she filed her petition. Heaston alleged that Smith had come to her friend's house, broken into Heaston's car, and removed the glove box from the car. Heaston stated in her petition that she had told Smith several times to leave but he would not do so; and that Smith yelled at her friends, and once her friend called the police, Smith left before the police arrived. Heaston also alleged that Smith had been calling her telephone, but she had not replied to any of his text messages or telephone calls. She asserted in her petition that she feared for her life and she wanted no contact with Smith.

Approximately one week after filing her initial petition for a DVO, Heaston filed another petition for a DVO in an attempt to amend her prior petition. In the "amended" petition, Heaston stated that a police detective told her that she should file an amended petition because she had not included everything that had occurred in her initial petition. Heaston alleged that on November 4, 2012, Smith texted her saying that if she "knew what was good for [her], . . . [she] would not say anything about his children to anyone." She contended that Smith held her down and confined her against her will, holding her hostage, and that he had physically and sexually assaulted her on several occasions. Heaston asserted that

"[o]n one occasion he held [her] down on the bed, grabbed [her] by the hair, and violently shook [her] while holding his fist up as if he would hit [her]." Heaston contended in the "amended" petition that she feared for her safety and the safety of her family and friends. She stated that Smith informed her in the past that he had been arrested for "pulling a gun on another person." Heaston alleged that Smith told her he still owned a firearm. She also asserted that Smith drinks occasionally, and he had been violent while drinking.

The court entered an emergency order of protection (EPO) for Heaston and against Smith on November 22, 2012. A hearing was subsequently held. At the beginning of the DVO hearing, Heaston's counsel stated that Donald Gulick, the parenting coordinator from Smith's separate divorce case with his ex-wife, indicated that he had obtained permission to remain in the courtroom during the hearing. Heaston's counsel stated he had no objection to that, as long as Mr. Gulick would not be testifying, and Smith's counsel responded that he was not going to call Mr. Gulick as a witness. Heaston's counsel moved for the separation of witnesses, but because Smith's counsel said that Mr. Gulick would not be called as a witness, Mr. Gulick was permitted to remain in the courtroom.

During the hearing, Heaston testified that she had lived with Smith for approximately two months. Heaston attested that on one occasion, approximately six months before she filed her petition, she and Smith had an argument and he ended up on top of her, when he repeatedly bit her breasts and he forced her to perform oral sex on him for about one minute. Smith subsequently apologized to

Heaston for the incident, and Heaston continued to go out with Smith. They saw a counselor for a period of time. Heaston testified that Smith hit her on various occasions and that he made vague threats to harm her if she ever spoke with anyone about his two daughters. The court repeatedly told Heaston and her counsel during the hearing that they needed to hurry the testimony along because it only had a limited amount of time for the hearing.[1] The court cut Heaston's direct examination short so it could continue with other parts of the hearing.[2]

On cross-examination, Heaston admitted that since she filed her DVO petition, she had spoken with Smith's ex-wife on multiple occasions. Heaston's counsel objected to the relevance of whether she had spoken with Smith's ex-wife. Smith's counsel responded that it was relevant because counsel believed Heaston and Smith's ex-wife had colluded to make up these allegations of abuse, and this was why Mr. Gulick was in the courtroom for the hearing. According to Smith's counsel, there was a very heated custody battle between Smith and his ex-wife over their two daughters in their divorce case. The court stated that it would help the parties move the hearing along by noting that the court had "taken a look at the divorce file, and [the court] will take judicial notice of those things which are

[1] The court reminded the parties that the hearing was only scheduled to last two hours because the court had a meeting with the Administrative Office of the Courts after the hearing. The court stated that the parties were aware of the limited time that would be available when they scheduled the hearing.

[2] When the court stopped the direct examination of Heaston, she had been testifying for approximately an hour and ten minutes. Smith's counsel then was permitted to cross-examine Heaston for half an hour. Smith then testified on direct examination for six minutes before the court stopped the hearing. Heaston's counsel was not permitted to cross-examine Smith because the time allotted for the hearing had expired.

appropriate public record."[3] Smith's counsel then moved to admit into evidence Mr. Gulick's report from Smith's divorce proceeding. Heaston's counsel objected because he had never seen the report, it was unsigned, and counsel did not think it was relevant. Smith's counsel stated, in regard to the fact that it was unsigned, that the person who prepared it, Mr. Gulick, was sitting right behind him in the courtroom during the hearing. Heaston's counsel replied by stating that the report appeared to be "testimonial-type evidence" but Smith's counsel had represented at the beginning of the hearing that Mr. Gulick would not be testifying. The court ruled that Mr. Gulick's report was part of a public court record because it had been filed in Smith's divorce proceeding, and the court explained that it would admit the report "solely for the purpose of showing that the accusations ha[d] been raised in that [proceeding]. Obviously to the extent there are statements of fact, it's not a court order, so the court can[not] rely on those statements, but it clearly shows that the issue has been raised in the other case." Smith's counsel contended that Mr. Gulick was an officer of the court, so he was bound by CR[4] 11.[5] The court responded "I'll reserve and reconsider that," but the court never stated how it

[3] Heaston's counsel objected to Mr. Gulick's report, but counsel did not object to the court having reviewed the remainder of the divorce file and taking notice of things from the divorce file (other than Mr. Gulick's report) that the court considered to be "appropriate public record."

[4] Kentucky Rule(s) of Civil Procedure.

[5] If Mr. Gulick was in fact an officer of the court bound by CR 11, as Smith's counsel alleged, CR 11 requires such papers to be signed, but Mr. Gulick's report was not signed. Pursuant to CR 11, "If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." In this case, Mr. Gulick did not sign the report after Heaston's counsel noted during the DVO hearing that it had not been signed. Thus, it should have been stricken from the record in this case.

ultimately ruled after reconsidering it.

Smith also testified briefly during the hearing, in which he denied ever having physically or sexually abused Heaston. After Smith explained to the court what the exhibits detailing his work schedule meant, and he testified that he was in Alaska for work during several of the August 2012 dates on which Heaston had alleged incidents between them, the court stopped the hearing because the time allotted for the hearing had expired. Smith's counsel informed the court he had more questions for Smith, as well as other witnesses to present, and Heaston's counsel informed the court he would like to cross-examine Smith, but the court stopped the hearing nonetheless, stated that it found Heaston was not credible (without any explanation as to why the court found her not credible), and dismissed her DVO petition.

Heaston moved to alter, amend, or vacate the court's order dismissing her DVO petition. In her motion, she alleged that the hearing was cut short due to the circuit court's schedule that day and that the hearing had ended before she could "complete her testimony [and] call her additional witnesses." Heaston also asserted that due to the hearing's time restraints, her attorney was not able to cross-examine Smith concerning Heaston's allegations that Smith raped and sodomized her and that she was in fear of him abusing her in these ways again. She further argued that there appeared to have been an *ex parte* communication between the court and Mr. Gulick prior to the hearing.[6]

[6] We assume this argument about the appearance of an *ex parte* communication is based upon Mr. Gulick having asked the court before the hearing if he could sit in the courtroom during the

The circuit court denied Heaston's motion to alter, amend, or vacate. The court reasoned that during the DVO hearing, the court

> heard extensive testimony from [Heaston] and did not find her credible. [Heaston] elected to spend [the] majority of the 2-hour hearing on her testimony; [court] has authority to require parties to complete testimony in time allotted. Parties were advised at [the] time [the] hearing [was] scheduled [court] had an already scheduled meeting [with the Administrative Office of the Courts] at 11:00. Court[']s contact with [the parenting coordinator] was merely his request to sit in on [the] hearing. No *ex parte* communication [regarding the] case.

Heaston now appeals, contending that: (a) the circuit court improperly relied upon extrajudicial evidence in denying her DVO petition; (b) the "evidence" received from an extrajudicial source was inadmissible under other evidence principles; and (c) the DVO hearing was not the full evidentiary hearing mandated as a matter of due process.

II. STANDARD OF REVIEW

In reviewing a circuit court's decision concerning a petition for a DVO,

> 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. Findings are not clearly erroneous if they are supported by substantial evidence. Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. A reviewing court must give due regard to the trial court's judgment on the credibility of the witnesses. Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious

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hearing.

> disposition under the circumstances, at least an unreasonable and unfair decision.

Abdur-Rahman v. Peterson, 338 S.W.3d 823, 826 (Ky. App. 2011) (internal quotation marks and citations omitted).

Further, KRS[7] 403.750(1)

> permits a court to enter a DVO if, following the hearing, the court finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur. . . . [T]he Supreme Court of Kentucky [has] defined the preponderance standard as requiring that the evidence be sufficient to establish that the alleged victim was more likely than not to have been a victim of domestic violence.

Wright v. Wright, 181 S.W.3d 49, 52 (Ky. App. 2005) (internal quotation marks omitted).

> 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 v. Criswell, 277 S.W.3d 621, 626 (Ky. App. 2008).

III. ANALYSIS

A. EXTRAJUDICIAL EVIDENCE

[7] Kentucky Revised Statute(s).

Heaston first alleges that the circuit court improperly relied upon extrajudicial evidence in denying her DVO petition. Specifically, she contends that the circuit court erred in admitting the unsigned report from Mr. Gulick, and that the report had been part of Smith's divorce proceeding from his ex-wife, to which Heaston was not a party. Heaston asserts that the court should not have taken judicial notice of Mr. Gulick's unsigned report even if it had been filed in another court record. Heaston also argues in her second claim on appeal that the report was inadmissible under other evidence principles.

We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "It is well settled that extrajudicial evidence, not part of the record, cannot form the basis of a decision. Moreover, where the trial court fails to fully articulate its decisional basis, appellate courts are prevented from discharging their duty of meaningful appellate review." *Carpenter v. Schlomann*, 336 S.W.3d 129, 132 (Ky. App. 2011) (internal quotation marks and citation omitted). In *Carpenter*, this Court concluded that "any finding of domestic violence based on extrajudicial evidence would be clearly erroneous." *Carpenter*, 336 S.W.3d at 132. It stands to reason that the inverse of that would also be true, *i.e.*, any finding based upon extrajudicial evidence that there was *no* domestic violence would also be clearly erroneous.

In the present case, at the beginning of the DVO hearing, Heaston's counsel moved for the separation of witnesses. Because Smith's counsel stated

that Mr. Gulick was not going to be called as a witness, Mr. Gulick was permitted to remain in the courtroom during the DVO hearing. At that time, Heaston's counsel was unaware that opposing counsel was going to seek to admit a report purportedly written (but unsigned) by Mr. Gulick.

The Parent Coordinator's report that was allegedly written by Mr. Gulick provided, in pertinent part, as follows:

> While there have certainly been bumps in the road over the past year while this Parenting Coordinator has been involved in the case, the parties have gradually been working together more cooperatively with regard to (parenting time) scheduling issues and children's activity issues over the past three or four months such that the Parenting Coordinator has been increasingly less involved in resolving these issues. The current situation, where [Smith's ex-wife] has filed motions to appoint a Guardian Ad Litem and doctorate-level counselor for the girls, and has unilaterally withheld the children from [Smith] during his court ordered parenting time, is an extreme aberration which the Parenting Coordinator believes was caused by the "perfect storm" of [Smith] breaking up with his former girlfriend, Catherine Heaston; Catherine Heaston filing two EPO petitions against [Smith]; Catherine Heaston sharing with [Smith's ex-wife and the ex-wife's husband] her dramatic accusations against [Smith]; the children experiencing some of [Heaston's] anger at [Smith] during the breakup and the continuing fall[-]out from that break up in both households. . . .
>
> The Parenting Coordinator has carefully reviewed both of Catherine Heaston's EPO petitions filed against [Smith] on 11/14/12 and 11/22/12. The 11/14/12 petition is relatively benign and an EPO was not issued as a result of that petition. A subsequent petition, filed on 11/22/12, contains lengthy, as yet unsubstantiated accusations the credibility of which is suspect. An EPO was issued as a result of that petition. More importantly, Ms. Heaston's

> accusations about Mr. Smith do not, in the Parenting Coordinator's opinion, directly affect his relationship to the children.
>
> Nevertheless, the Parenting Coordinator is concerned that [Smith's ex-wife], who has admittedly been in contact with Catherine Heaston, as well as another former girlfriend of [Smith's], . . . appears to have chosen to accept unchallenged the worst about [Smith] from women who are no longer in a relationship with him and certainly have an "ax to grind." The Parenting Coordinator is keeping an open mind about the allegations made against [Smith] by Catherine Heaston, but chooses to believe him innocent until proven guilty, especially in light of his experiences with [Smith] over the past year which give him no reason to believe that [Smith] is capable of the worst of the accusations lodged against him by Catherine Heaston in her second EPO petition.

The report continues, claiming that Heaston had "apparently threatened" Smith's daughters and that Heaston had an "apparent emotional instability." However, the report appears to be based largely on hearsay from Smith himself, as it repeatedly states that Smith reported to Mr. Gulick what other people, including Smith's children, had purportedly told Smith about Heaston. For example, the report stated in part as follows:

> [Smith] has reported to me that the children have told him that they believe [Heaston] is conspiring with [Smith's ex-wife and her husband] against their father and they find that extremely upsetting. It appears that the facts justify the children's concerns in this regard. To begin with, Catherine Heaston apparently threatened the girls, at the time she and [Smith] broke up, with giving information to their mother so that their mother could take them away from [Smith]. In addition, the girls have reportedly overheard and seen evidence at their mother's

> home that their mother and [her husband] are in contact with [Heaston] regarding her attempts to hurt their father.

Regarding the admission of Mr. Gulick's report, the circuit court ruled that the report was part of a public court record because it had been filed in Smith's divorce proceeding, and the court explained that it would admit the report "solely for the purpose of showing that the accusations ha[d] been raised in that [proceeding]. Obviously to the extent there are statements of fact, it's not a court order, so the court can't rely on those statements, but it clearly shows that the issue has been raised in the other case." When it used the term "accusations," it appears the court was referring to the fact that Heaston's allegations from her DVO petitions were somehow being used in the divorce proceedings as it related to custody of Smith's two minor daughters.

Mr. Gulick's report should not have been admitted into evidence in the present case for myriad reasons. First, it was not signed, nor was it authenticated. *See generally* KRE[8] 902; CR 11. Second, Heaston was not a party to the case for which the report was prepared, and she never was provided an opportunity to refute the allegations in the report. *See Rankin*, 277 S.W.3d at 625 (holding that the court erred in considering files that were not admitted into evidence and to which the party against whom they were considered "had no opportunity to examine or refute."). Third, most of the allegations in the report, including that Heaston had colluded with Smith's ex-wife, were based entirely on speculation from Smith and, allegedly, his children. Fourth, many of the

[8] Kentucky Rule(s) of Evidence.

accusations in the report were based upon hearsay that had been related to Mr. Gulick by a biased party, *i.e.*, Smith, and much of it was hearsay based upon hearsay. *See generally* KRE 802, 803, and 805. Fifth, the copy of the report that was admitted into evidence in this case did not include a copy of the file stamp that is typically placed on the front page of a document when it is filed in court, so there is no proof in the record before us that Mr. Gulick's report was actually filed with the circuit court in the separate divorce proceeding.

Further, to the extent the circuit court took judicial notice of the report,

> [a] judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the county from which the jurors are drawn, or in a nonjury matter, the county in which the venue of the action is fixed; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

KRE 201(b). In the present case, the court took judicial notice of the fact that the accusations of physical and sexual abuse had been raised in the divorce case. However, this finding was based upon the report, and the copy of the report admitted in the present case does not contain a file stamp from the circuit court showing that it was actually filed in that other action. Furthermore, as we previously noted, the report was not signed and, pursuant to CR 11, it should not have been admitted into evidence. Therefore, the circuit court abused its discretion in admitting the report that was purportedly prepared by Mr. Gulick into evidence in this DVO proceeding.

Yet, pursuant to CR 61.01:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In this case, we do not find that the error in admitting the report prepared by Mr. Gulick affected Heaston's substantial rights. The court noted that it was admitting the evidence solely for the purpose of showing that the accusations had been raised in the divorce case. The circuit court further explained that, to the extent the report contained statements of fact, the court would not rely upon those statements because they were not contained within a court order. Heaston's substantial rights were not affected due to the circuit court's limited purpose for admitting the evidence. Thus, the error of admitting the report into evidence was harmless.

Heaston also alleges in her brief that, aside from Mr. Gulick's report, the court took judicial notice of some of the other contents of the file from Smith's divorce proceedings, to which Heaston was not a party. During the DVO hearing, the court stated it had "taken a look at the divorce file, and [the court] will take judicial notice of those things which are appropriate public record." However, the court never specified what parts of the divorce file it looked at, or of which parts it

took judicial notice. Because this claim was not preserved for our review, Heaston asks us to review it for palpable error. Pursuant to CR 61.02,

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In *Rankin*, 277 S.W.3d at 625, this Court held that when a circuit court considers files by reading them silently "without admitting them as evidence and without informing the parties as to their contents," the court errs in considering such files particularly when the parties have been given "no opportunity to examine or refute them." This is exactly what occurred in Heaston's case: The circuit court reviewed the file from Smith's divorce case, to which Heaston was not a party, out of the presence of the parties in this case. Heaston had no opportunity to examine or refute the contents of the divorce file, nor did the court inform her of the contents of the file that the court reviewed. Therefore, the circuit court erred in considering the remainder of Smith's divorce file. Furthermore, we find that this affected Heaston's substantial rights and, consequently, it amounted to palpable error.

"It is well settled that extrajudicial evidence, not part of the record, cannot form the basis of a decision. Moreover, where the trial court fails to fully articulate its decisional basis, appellate courts are prevented from discharging their duty of meaningful appellate review." *Carpenter*, 336 S.W.3d at 132 (internal

quotation marks and citation omitted). In Heaston's case, the circuit court merely stated that it was dismissing the DVO petition because it found her not credible. Although "credibility determinations are within the exclusive province of the fact-finder," *Smith v. Commonwealth*, 339 S.W.3d 485, 488 (Ky. App. 2010), and we typically do not question them, in this case the circuit court considered extrajudicial evidence from Smith's divorce case without any explanation of what evidence it considered. Thus, because the circuit court failed to fully articulate its decisional basis, it has prevented us from conducting a meaningful appellate review on the merits of Heaston's domestic violence allegations, and we must reverse because this amounts to palpable error affecting Heaston's substantial rights.

B. FULL EVIDENTIARY HEARING

Although our reversal for the aforementioned reason would normally render the remainder of Heaston's claims moot, we will address Heaston's due process claims prior to remanding the case. Heaston contends that the DVO hearing was not the full evidentiary hearing mandated as a matter of due process. Specifically, she asserts:

> Here, the [circuit] court did indeed afford the parties a total of two hours in which to present evidence, and observed the deadline fairly rigidly. [Heaston] recognizes that the time limit itself was not objectionable *per se*. The problem arose, however, when it became

> clear, as the time was nearly run out, that the court was accepting the incompetent and grossly prejudicial Gulick document (and its contents), on some level; and had already consulted a separate divorce file to which [Heaston] was not a party. At this point, [Heaston] was afforded no remaining time to call and cross-examine the document's author, who was tainted in any event by virtue of having sat through the hearing in violation of the witness separation order. Nor was [Heaston] afforded any remaining time in which to cross-examine [Smith] himself. . . .
>
> Here, it was not the *amount* of time afforded on the clock that created a denial of a meaningful opportunity to be heard, but rather the lack of time *remaining*, once the Court committed the error it did. Without affording any opportunity to cross[-]examine either [Smith] or the hearsay declarant Don Gulick, or to put on evidence in rebuttal to this material, due to rigid enforcement of time limits, the Court ensured (quite possibly unwittingly) that the evidentiary errors became so prejudicial that [Heaston] was fundamentally denied a meaningful opportunity to be heard. It was denial of a "meaningful" opportunity to be heard because it concerned the primary piece of evidence on what turned out to be the only issue of importance to the court – namely, the credibility of [Heaston].

(Footnote omitted).

Smith argues in his appellee brief, however, that after Heaston's counsel objected to the admission of Mr. Gulick's report, and the objection was overruled, Heaston failed to seek to cross-examine Mr. Gulick about the report. In other words, Smith contends that to the extent Heaston bases her claim that she was denied a full evidentiary hearing on her counsel not being provided the opportunity to cross-examine Mr. Gulick, this claim is not preserved for appellate review. We have reviewed the complete video recording of the DVO hearing, and

we agree that this claim was not preserved for our review. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Regardless, Heaston asks us to review it for palpable error pursuant to CR 61.02.

Heaston's counsel did not seek to cross-examine Mr. Gulick; therefore, we do not find that manifest injustice resulted from the fact that counsel was not provided the opportunity to cross-examine Mr. Gulick. Thus, this claim lacks merit.

Regarding Heaston's claim that she was unable to cross-examine Smith, due to the allotted time for the hearing having elapsed, this claim was preserved for review during the hearing to the extent that Heaston's counsel expressed his desire to cross-examine Smith. However, Heaston's counsel did not move to continue the hearing to allow time for that cross-examination. Yet, in her motion to alter, amend, or vacate, Heaston alleged that the hearing was truncated and she was unable to "complete her testimony, call her additional witnesses, and . . . cross-examine [Smith]." Heaston also argued in her motion to alter, amend, or vacate that her counsel was not permitted to make a closing statement due to the time for the hearing having been cut short.

"This Court has held that the full [DVO] hearing required is not met when testimony is not given or when testimony is cut short." *Carpenter*, 336 S.W.3d at 131.

The Court in *Wright*[, 181 S.W.3d at 53] stated:

> because of the immense impact EPOs and DVOs have on individuals and family life, the court is mandated to provide a full hearing to each party. To do otherwise is a disservice to the law, the individuals before the court, and the community the judges are entrusted to protect. While we realize the tremendous responsibility entrusted to the trial judges in these cases, we also realize the awesome impact each case has and, as such, must insist that a full evidentiary hearing be afforded to the parties as provided for by the statutes and court rules. . . .
>
> We are not unmindful that courts with EPO and DVO jurisdiction are inundated with such claims. Nevertheless, as reflected in *Wright*, the consequences of such proceedings are gravely important to both parties. As a result of the volume and the nature of protection claims, courts may be tempted to give them less attention than they deserve, but these proceedings are entitled to the same dignity as any court proceeding.

Carpenter, 336 S.W.3d at 131-32.

In the present case, the DVO hearing was truncated: Heaston's counsel was not permitted to do rebuttal with Heaston, to cross-examine Smith, or to call additional witnesses. Additionally, the parties were not permitted to give closing arguments. We are mindful of the extremely heavy dockets of the family court and the discretion necessary to manage its docket. Nonetheless, due process trumps all else, and this hearing – even for legitimate reasons – was summarily ended before Heaston's due process rights were realized. Thus, Heaston did not get the full evidentiary hearing to which she was entitled.

Further, "[a] civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Cabinet for Health and Family Services v. A. G. G.*, 190 S.W.3d 338, 345 (Ky. 2006). "However, confrontation and cross-examination are not rights universally applicable to civil proceedings." *Id*. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 346.

Accordingly, the order of the Jefferson Circuit Court is reversed, and this case is remanded for further proceedings for the reasons set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

F. Todd Lewis
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BRIEF FOR APPELLEE:

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