

RENDERED: JULY 24, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-001793-ME

KEVIN K. ANDREWS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JOAN L. BYER, JUDGE  
ACTION NO. 14-D-501156

JUDGE JOAN BYER, JEFFERSON  
COUNTY FAMILY COURT; AND  
KELLY OPELT-ANDREWS

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: JONES, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Kevin K. Andrews (Father) appeals the Domestic  
Violence Order (“DVO”) entered against him by the Jefferson Family Court. For  
the following reasons, we affirm in part, reverse in part and remand.

## **I. FACTUAL AND PROCEDURAL BACKGROUND.**

Kelly Andrews (Mother) and Father were divorced in 2010 in Bloomington, Monroe County, Indiana. As a part of that proceeding, the Indiana circuit court determined the initial child custody and visitation agreement. Mother and the parties' minor child, of whom she has sole legal and primary physical custody, now permanently reside in Louisville, Kentucky, while Father continues to reside in Indiana.

In May 2014, Mother filed for an Emergency Protective Order ("EPO") in Jefferson Family Court requesting that the court restrain Father from any further contact with her as well as from committing any further acts of abuse or threats of abuse against her. This EPO required that Father stay 500 feet away from Mother and be restrained from any communication with her unless pertaining to their minor child. However, no allegations of abuse against the child were made, and Father was not ordered to stay away from the minor child.

At the June 2, 2014, hearing on the protective order, at which both parties were present, Mother testified that Father had committed domestic violence against her while she was pregnant with their child. She further testified Father had sent her threatening email and text messages on a continuous basis, beginning at the dissolution of their marriage in 2010 and continuing to the time of the hearing on the protective order. The trial court issued a DVO, finding that Mother had shown by a preponderance of the evidence that an act or acts of domestic violence had occurred and may occur again, thereby meeting the standard required

for issuance of the DVO. As permitted by KRS<sup>1</sup> 403.741, the trial court considered Father's criminal history in making its decision, which included a history of violent crimes, notably against women. The court further ordered Father to attend a Batterer's Intervention Program. The DVO terms mirrored those of the EPO, prohibiting Father from committing further acts of domestic violence and from contacting Mother, and requiring him to stay 500 feet away. The trial court, however, also applied these restraints on Father in regards to the minor child.<sup>2</sup> Subsequently, Father filed an appeal of the DVO entered by the Jefferson Circuit Court.<sup>3</sup>

## II. STANDARD OF REVIEW.

Prior to the entry of a DVO, a trial 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[.]" KRS 403.750(1). The preponderance of the evidence standard is satisfied "when sufficient evidence establishes that the alleged victim was more likely than not to have been a victim of domestic

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> As an aside, about the time of the issuance of the protective order and concomitant hearing, a number of motions were apparently pending in the Monroe (Indiana) Circuit Court regarding child support and parenting time. As a part of that proceeding the Indiana court noted that "[Mother] stated that it was not her intention to include the parties' child . . . as a protected person in her Jefferson County, Kentucky protective order." Mother also moved to transfer jurisdiction over the child custody and support matters from Indiana to Jefferson County, Kentucky based on inconvenient forum. The Indiana court denied this motion.

<sup>3</sup> Mother has not filed a brief with this court. Under these circumstances, the Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permit the panel to reverse the trial court's order if the appellant's brief reasonably appears to support such a result. We do not believe the father's brief justifies the reversal of the DVO.

violence.” *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). As defined by KRS 403.720(1), “domestic violence and abuse” includes “physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.”<sup>4</sup>

Such factual determinations of the trial court's finding of domestic violence are subject to a clearly erroneous standard of review. CR<sup>5</sup> 52.01; *Caudill v. Caudill*, 318 S.W.3d 112, 114-15 (Ky. App. 2010) (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). The findings “are not clearly erroneous if they are supported by substantial evidence.” *Id.* at 114-15. “Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men.” *Asente*, 110 S.W.3d at 354. “[I]n 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 judge were clearly erroneous or that [the judge] abused his [or her] discretion.” *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted). Abuse of discretion occurs when a court's decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted). “We are [further] mindful of the trial court's opportunity to

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<sup>4</sup> KRS 403.720(1) was amended April 1, 2015 to include “stalking” in the definition of “domestic abuse and violence.” 2015 Ky. Acts ch. 102.

<sup>5</sup> Kentucky Rules of Civil Procedure.

assess the credibility of the witnesses[.]” *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010). As to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Id.*; *Keeney v. Keeney*, 223 S.W.3d 843, 848–49 (Ky. App. 2007).

### **III. ISSUES ON APPEAL.**

Father claims that the trial court erred in issuing the DVO, and in including the minor child in the DVO. First, Father argues the court erred in issuing the DVO because Mother did not present evidence at the hearing that amounted to physical “domestic violence,” nor did she present “current” evidence of such physical violence. Second, he argues that the DVO should not extend to the minor child as this was never the intent of Mother, and no allegations of abuse were made against the minor child. Third, he argues that he should not be required to attend the Batterer’s Intervention Program as no “current” evidence supports the need for this program. Finally, he argues the trial court “ran rampant” over him during the DVO hearing, thereby violating his rights to represent himself and free speech and denying him of a “fair and unbiased” hearing.

#### **A. Sufficiency of the Evidence.**

Father argues that Mother did not present sufficient evidence to prove the past occurrence and likely reoccurrence of domestic violence and abuse. The language of KRS 403.720(1) includes the infliction of fear of imminent injury in the definition of domestic violence. Thus, a showing of actual injury or recent abuse is not required to procure a DVO. Rather, the evidence that Father had

physically injured the mother before, and that she was in fear of future injury and harassment is sufficient. At the hearing, Mother testified to the continued harassment and anger exhibited by Father, and provided the appropriate documentation via email and text messages, as well as records of the physical injuries she sustained while pregnant. Sufficient evidence was presented to show that Mother was the victim of a past act or acts of domestic violence, and that such violence may occur again. We disagree that the trial court lacked sufficient evidence of domestic abuse, and affirm the trial court's issuance of the DVO.

**B. Inclusion of Minor Child in DVO.**

Father argues that the court did not have jurisdiction to extend the provisions of the DVO to include the minor child, thus modifying his visitation with the minor child. In this case, Indiana is the state with continuing and exclusive jurisdiction to modify any custody arrangement. According to KRS 403.826,

[e]xcept as otherwise provided by KRS 403.828, a court of [Kentucky] cannot 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 the court of the other state determines . . . that a court of [Kentucky] would be a more convenient forum under KRS 403.834; or [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.

No dispute exists that the Monroe (Indiana) Circuit Court first made a child custody determination in the parties' dissolution action. In its order denying Mother's motion for transfer due to inconvenient forum, the Indiana court

acknowledged the Jefferson Family Court's DVO, but noted that "[Mother] stated it was not her intention to include the parties' child . . . as a protected person in her Jefferson County, Kentucky protective order filing." Although Mother and child now reside in Kentucky, since Father continues to reside in Indiana, Indiana retains continuing and exclusive jurisdiction to modify any custody agreement. KRS 403.826. Therefore, a Kentucky court does not have the required jurisdiction to modify the custody and visitation schedule established by the Indiana court. *Id.* The exception to this rule provides for the "temporary emergency jurisdiction" of a minor child "if the child is present in this state and . . . it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." KRS 403.828(1).

In this case, although an EPO was filed, it contained an explicit exception of the minor child. Mother never alleged that Father abused or threatened the minor child, and Mother also did not ask for the child to be included in the DVO. The trial court's extension of protective conditions with respect to the parties' minor child was therefore erroneous.

### **C. Imposition of Counseling Services.**

Father's third argument is that the trial court erred by mandating he attend the Batterer's Intervention Program. Suffice it to say, having found domestic violence had occurred and may occur again, the trial court was authorized to "[d]irect that either or both parties receive counseling services available in the community." KRS 403.750(1)(h).

#### **D. Violation of Rights and Judicial Bias.**

Finally, Father complains of the manner in which the trial court conducted the DVO hearing, claiming that he was impermissibly silenced by the court, violating his rights to represent himself and free speech, and that the trial judge was biased against him. We note that, under KRE<sup>6</sup> 611, the trial court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) [m]ake the interrogation and presentation effective for the ascertainment of the truth; (2) [a]void needless consumption of time; and (3) [p]rotect witnesses from harassment or undue embarrassment.” Having reviewed the video record, we believe the trial court properly exercised the discretion and latitude it was permitted, and that a violation of Father’s rights did not occur.

#### **IV. CONCLUSION.**

As noted, the trial court properly issued the DVO order with respect to Mother, but erred in including the minor child within the protective conditions of the DVO. Accordingly, we affirm in part and reverse in part. This matter is remanded to the Jefferson Family Court with directions to modify the DVO to exclude the minor child.

ALL CONCUR.

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<sup>6</sup> Kentucky Rules of Evidence.



BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

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Bloomington, Indiana