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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001655-ME

DELORIAN MALONE — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 15-D-502276-001

SHALIMAR BIANCA BROWN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Delorian Malone, appeals from an order of the Jefferson Family Court denying his motion to dismiss for lack of jurisdiction and entering a domestic violence order (DVO). Finding no error, we affirm.

On September 11, 2015, Appellee, Shalimar Brown, filed a petition for a DVO in the Jefferson Family Court. Therein, she claimed that she and Malone had been living together for a few weeks and that she was pregnant with

Malone's child. Brown alleged that on September 5, 2015, she and Malone got into an argument during which she slapped him and he thereafter responded by trying to strangle her. She further stated that later the same day, they again got into an argument during which Malone threw her to the ground and dragged her out of the house and down the front steps. Brown claimed that following the incident, Malone began posting false accusations on social media and urging people to harass her. Brown stated in her petition that she was afraid of Malone and wanted an order prohibiting him from contacting her personally or through third parties.

On September 12, 2015, the day after Brown filed the petition, Malone filed a sworn cross-petition relating to the same incident. Malone claimed therein that during the two altercations on September 5, 2015, Brown had slapped him as well as punched him twice in the face. Malone stated that he also suffered numerous scratches during the altercation with Brown.[1]

An evidentiary hearing was held on October 6, 2015. As a preliminary matter, the family court denied Malone's motion to dismiss for lack of jurisdiction. At the close of the hearing, the family court concluded that both parties had established by a preponderance of the evidence that domestic violence and abuse had occurred and was likely to occur again in the future. The family court entered one-year no contact DVOs in favor of each party. Malone thereafter

[1] Although Malone's petition is not contained in the family court record on appeal, pictures of his scratches were included in a certified supplemental record filed in this Court.

appealed to this Court as a matter of right.[2] Additional facts are set forth as necessary in the course of the opinion.

Appellate review of a trial court's decision regarding issuance of a DVO "is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion." *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008). As a reviewing court, we do not reach our own findings of fact or reweigh the evidence. Rather, we examine the trial court's findings only to determine if substantial evidence supports the findings. CR 52.01 provides that a trial court's "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id.* CR 52.01; *Stanford Health & Rehabilitation Center v. Brock*, 334 S.W.3d 883, 884 (Ky. App. 2010).

In this Court, Malone argues that the family court erred in denying his motion to dismiss for lack of jurisdiction. He contends that he and Brown were not an unmarried couple who were living together as required by KRS 403.725 and thus, Brown did not have standing to petition for a DVO and the family court did

[2] Brown has not filed a brief or otherwise participated in the appeal in this Court.

not have jurisdiction to hear the matter. Further, notwithstanding jurisdiction, Malone argues that there was insufficient evidence to warrant the DVO against him. We disagree with him on both issues.

KRS 403.725 provides that "[a]ny family member or member of an unmarried couple" may file a petition for a protective order under the domestic violence statutes. The definition of "member of an unmarried couple" is contained in KRS 403.720(3) and includes "each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who is living together or have formerly lived together." "Living together" is not defined in the DVO statutes.

In *Barnett v. Wiley*, 103 S.W.3d 17, 18 (Ky. 2003), our Supreme Court first considered the meaning of "living together" within the context of the DVO statutes. While recognizing that the DVO statutes should be construed liberally to offer the greatest amount of protection possible, the Court was clear that any interpretation of the statutes must be reasonable in light of the terms the General Assembly utilized in the statute, and that in using the term "living together," the General Assembly clearly intended to limit the DVO statutes to those cohabitating in some manner. *Id* at 19. Accordingly, the Court held that "there must be, at a minimum, proof that the petitioner seeking a DVO shares or has shared living quarters with the respondent before a finding can be made that the two are an 'unmarried couple' under KRS 403.725." *Id.* at 20.

Malone points out that the *Barnett* Court identified six indicia of cohabitation: (1) sexual relations between the parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship. *Id.* Malone argues the evidence showed that Brown had merely been a guest in his and his mother's home for several weeks, she did not pay any living expenses, and they did not hold themselves out as husband and wife. As such, Malone argues that the indicia set forth in *Barnett* were not present and the family court's determination that he and Brown were cohabiting is unsupported by substantial evidence.

We are persuaded by the rationale set forth in the recent unpublished opinion of this Court in *McIntosh v. Campbell*, 2014–CA–002084–ME (June 19, 2015):[3]

> Given the varied ages, socioeconomic backgrounds, and lifestyles of modern-day couples, it would be virtually impossible to come up with a definitive test for cohabitation. Cohabitation is sometimes the product of a carefully thought out plan whereby the couple selects a residence together, shares household chores, comingles their finances, and plans for their futures together. Other times, it occurs with little or no thought or planning by the couple. One couple might purchase a joint residence and furnish it together. Another might decide to live together in an already established residence that is in one of their names alone. Some couples may equally share the household expenses. In other couples, one party might cover most of the expenses. The scenarios are varied and vast. For this reason, it is important to recognize that the six indicia identified by the *Barnett*

[3] 2015WL3826246.

> court do not make up a litmus test. Rather, the indicia are meant to be part of a larger analysis. The overall analysis should take into account the six indicia in combination with the unique circumstances of the couple at issue.
>
> Some couples may live together for years before an act of domestic violence occurs. Other couples might experience domestic violence in the first few days or weeks of cohabitation. The statute contains no minimum period of time the couple must have cohabitated before there is standing to seek a DVO.

As the family court herein found, Brown moved to Louisville from California when she found out she was pregnant with Malone's child. She did, in fact, move in with Malone and his mother, albeit for a short period of time. While Brown did not share in the household expenses in the limited time she was there, it is undisputed that the couple shared a bedroom and had sexual relations on at least one occasion. Further, the parties were apparently in the process of looking for an apartment to live together at the time the trouble erupted between them. While there exists contradictory evidence in the record, we cannot agree with Malone that the record is devoid of evidence sufficient to support the family court's cohabitation finding. Therefore, we agree with the family court that Brown had standing to seek a DVO under Kentucky's domestic violence statutes.

A trial court may issue a DVO after a full evidentiary 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." KRS 403.750(1).[4] *See Baird v.*

[4] Effective January 1, 2016, this provision was re-enacted under KRS 403.740(1).

Baird, 234 S.W.3d 385, 387 (Ky. App. 2007). The preponderance of the evidence standard requires that the evidence believed by the fact-finder be sufficient that the petitioner is more likely than not a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). KRS 403.720(1)[5] provides that "'[d]omestic violence and abuse' means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple." In construing these statutes, we must read them liberally and in favor of protecting domestic violence victims while taking care not to adopt an unreasonable construction. *See Barnett,* 103 S.W.3d at 19 (citing *Beckham v. Board. of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994)).

In ruling from the bench, the family court herein stated:

> [B]oth parties - even just using their own testimony against themselves and not even using the other's testimony against them – clearly, it's been established by a preponderance of the evidence, um, by like a landslide, that acts of domestic violence or abuse occurred that night and are likely to reoccur given the fact they're getting ready to have a baby and there's incidents in the past. Not a lot of incidents which once again begs the question - does it really need to have gone this far? . . . But here's what I do know. That both of them proved beyond a preponderance of the evidence that an act of domestic violence, to wit, they both assaulted each other and you don't even need to touch the other person, you need to threaten to touch the other person.

[5] Effective January 1, 2016, KRS 403.720(1) now provides that "[d]omestic violence and abuse" means 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.

Admittedly, the evidence of record in this case supporting the DVOs is less than overwhelming. Certainly, we agree with the family court that the parties' own testimony established that an act of domestic violence or abuse occurred on the day in question. However, the individual items of proof likely would not support a conclusion that domestic violence was more than likely to again occur. With this in mind, we nevertheless conclude that the allegations in the petitions, the parties' clear animosity toward each other despite the fact they were expecting a child together, as well as the fact they apparently continued to try and perpetuate their versions of the incident through social media, third parties or otherwise, combined to constitute substantial evidence supporting the trial court's finding pursuant to KRS 403.720 that an assault, or the fear of an assault, was likely to occur in the future. Furthermore, it is not within our province to question the credibility of the evidence or testimony that the family court observed for itself. As such, we cannot definitively say that the family court committed clear error when it found it more likely than not that both parties were victims of domestic violence and that they might be again. Therefore, we affirm the family court's issuance of cross-DVOs.

ACREE AND TAYLOR, JUDGES, CONCUR IN RESULT ONLY.

BRIEF FOR APPELLANT:

David S. Mejia
Louisville, Kentucky

BRIEF FOR APPELLEE: