[Cite as *Dowhan v. Dowhan*, 2012-Ohio-5830.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SHARON DOWHAN,	:	**O P I N I O N**
Petitioner-Appellee,	:	**CASE NO. 2012-L-037**
- vs -	:	
TERRANCE DOWHAN,	:	
Respondent-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 11 DV 000019.

Judgment: Affirmed.

Pamela D. Kurt, and *Randy A. Vermilya,* 30432 Euclid Avenue, Suite 101, Wickliffe, OH 44092 (For Petitioner-Appellee).

Edwin V. Hargate, 18519 Underwood Avenue, Cleveland, OH 44119 (For Respondent-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Terrance Dowhan, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, denying his motion to modify the Domestic Violence Civil Protection Order ("CPO") entered against him in favor of his ex-wife, appellee, Sharon Dowhan, and the parties' three minor children. Appellant sought to modify the CPO by removing the children as protected persons. At issue is whether

the trial court abused its discretion in denying appellant's motion. For the reasons that follow, we affirm.

{¶2} The parties were married in 1993. They lived in Eastlake, Ohio. Sharon had a four-year-old daughter, A.P., from a prior relationship, who lived with them. Three children were born as issue of the marriage. Appellant routinely assaulted his wife and the children, resulting in multiple convictions for domestic violence. Appellant's violence escalated when he was drinking.

{¶3} Between 1988 and 2006, appellant was convicted of OVI five times and incarcerated twice. In 2005, the parties separated, but, thereafter, appellant often came to Sharon's home unannounced and uninvited and continued his abuse. In 2008, he was convicted of felony OVI and sentenced to prison. Later that year, Sharon filed for divorce. A divorce was granted to her in 2009. The court named Sharon as the residential parent and legal custodian of the children.

{¶4} Appellant served three years in prison and the North East Ohio Community Alternative Program ("NEOCAP") from March 2008 until April 2011 on his felony OVI conviction. Shortly before his release from NEOCAP, in February 2011, he wrote a letter to Sharon threatening her with serious physical injury. After receiving this letter, on February 8, 2011, Sharon filed a petition for a CPO on behalf of herself and the parties' three minor children. On the same day, the court issued an ex parte CPO against appellant in which Sharon and the children were listed as the protected persons. The court set the matter for hearing on February 17, 2011. The parties, through their respective counsel, jointly moved to continue the hearing until after appellant was

released from NEOCAP. The court granted the motion and continued the hearing to April 25, 2011 to accommodate appellant.

{¶5} Although appellant was released on April 18, 2011, neither he nor his attorney attended the hearing. In granting Sharon's petition, the court found that appellant, through multiple letters written to Sharon, including one written in February 2011, has placed her in fear of imminent serious physical harm for herself and the three children. The CPO, entered on April 25, 2011, ordered appellant to stay away from Sharon and the three children and to keep a distance of at least 1,000 feet. The CPO, by its terms, is to expire in five years on April 22, 2016.

{¶6} Appellant did not appeal the CPO. Instead, seven months later, on November 17, 2011, he filed a motion to modify the CPO to remove the children as protected persons. The court held a hearing on the motion on February 23, 2012. In support of his motion, appellant called his former employer, Terrance Chubb, owner of Chubb Construction. Mr. Chubb said he has known appellant for 25 years as a cement worker and that after his release from prison, he hired appellant to work for his company. He said appellant did a good job, but no longer works for him. Mr. Chubb said that before being convicted of felony OVI in 2008, he thought appellant had resolved his drinking problem. Mr. Chubb has never visited appellant's family and offered no testimony concerning appellant's relationship with Sharon and the children.

{¶7} Cathy May, appellant's friend since junior high school, testified appellant has had a serious drinking problem for 30 years. She said appellant told her he wants to be involved with his children. On cross-examination, Ms. May said she has seen appellant screaming at Sharon on the telephone in the bar where Ms. May worked as a

bartender. Ms. May said she had no idea what appellant has put Sharon and the children through, but she said that, due to him, the family lost their home. She said she was aware that Sharon has left the home with her children to get away from appellant. She said she does not know if appellant is still drinking.

{¶8} Appellant said he has tried to "get sober" several times in the past without success. He said that, although he still has an alcohol problem, he regularly attends AA and has not had alcohol or drugs since he went to prison in 2008. However, appellant's AA sponsor, who appellant said he sees regularly, did not testify on his behalf.

{¶9} Appellant said the last time he spoke to any of his children was before he went to prison. He said that before 2008, due to his drinking, he routinely neglected them. He said he would like to be able to ask his children to forgive him. He asked the court to remove his children as protected persons from the CPO so he could have a relationship with them. Appellant did not dispute or even address the countless acts of domestic violence he committed against Sharon and the children concerning which they testified.

{¶10} On cross-examination, appellant admitted his children, D.D., age 14, and T.D., age 18, were afraid of him when he was fighting with their mother. Further, appellant admitted he wrote a letter to Sharon shortly before being released from NEOCAP, in which he threatened to "get her no matter what." He testified he wrote the letter because he was angry with Sharon because, he said, she sold their business for less than it was worth while he was in prison. Although appellant blamed his drinking for whatever misconduct he may have committed, he admitted he was sober when he wrote this letter.

{¶11} In opposition to appellant's motion, Sharon and the two eldest children testified that appellant terrorized the family for years and that she and the children lived in constant fear of him up to the time he went to prison in 2008.

{¶12} A.P., Sharon's daughter and appellant's step-child, who is 22, testified that appellant has been involved in her life since she was four years old when her mother married him. She said that she has been afraid of appellant her entire life, and that because of appellant, her childhood was a living hell. She always asked what kind of mood he was in when she came home from school to prepare herself for his violent outbursts.

{¶13} A.P. testified that her mother and siblings were at their home only ten per cent of the time. They would routinely have to leave the house because appellant would come home and assault her mother and the children. A.P. said that until appellant went to prison, he assaulted her many times. He often pushed A.P. against a wall and hit her. He repeatedly spit on her. The family's escape route was pre-planned. When appellant would assault her mother or the children, the children would run out of the house and through the neighbor's backyard. Their mother would pick them up in their van and drive around all night while the children slept in the van.

{¶14} A.P. testified that during family vacations, while she and her siblings were riding in the family's car with appellant and her mother in the front seat, he often burned her mother with cigarettes, forcing her to jump out of the car, thus terrifying the children.

{¶15} A.P. testified she has seen appellant almost kill her mother many times. She has seen appellant push her mother against a wall choking her. She has seen him push her mother down a flight of stairs. A.P. testified she wanted to die every day of her

childhood because of the abuse appellant inflicted on her and her mother. A.P. said her "whole childhood is a blur of violence and negativity because of this man."

{¶16} A.P. testified that as a result of appellant's years of abuse, she had debilitating panic attacks while she was in high school. At that time she was prescribed antidepressants, which she no longer needs because appellant is no longer in their lives. A.P. said that her family is now in a place of "healthiness and positivity" with their mother because appellant has been out of their lives for the past four years. She said that allowing appellant to have contact with her siblings would be the "worst idea she ever heard."

{¶17} A.P. said appellant has no idea of the suffering he caused the family because he does not think he has done anything wrong. She said he views himself as a victim and never thinks about the harm he caused her mother or the children. She said she is afraid for her sister, D.D., age 14, and her brother, S.D., age 12, if appellant is allowed to have contact with them.

{¶18} T.D., the parties' eldest son, age 18, testified that before appellant went to prison, he was always worried about having to escape from appellant, about not being able to stay in their home, about not being safe, and about appellant coming home and causing trouble. Since appellant went to prison and has been out of their lives, all T.D.'s worrying has stopped.

{¶19} T.D. said he is afraid of appellant because of the things he has seen him do to his mother and siblings. He said appellant would scream at his mother and hurt her and destroy their property, such as their dishes, tables, chairs, and other furniture. He has witnessed appellant choking his mother and A.P.

{¶20} T.D. said he is concerned about appellant having access to his brother, S.D., and his sister, D.D. T.D. said he does not want them to be exposed to appellant and the environment in which T.D. and A.P. were forced to live because of him. In response to a question from the court, T.D. said that even if appellant was no longer drinking and was going to AA and was working, he would still not want to talk to appellant because he has already been given too many chances.

{¶21} Sharon testified that she is afraid of appellant because of his violence. On one occasion, he attempted to run her over with his truck. On another, he knocked out her front tooth. On one occasion in 2007, while they were separated and living apart, he broke into the home in which Sharon was living with the children. Sharon was sleeping at the time and appellant woke her up by punching her in the face. The children were home and witnessed the assault. She said that appellant has been convicted of domestic violence several times in which she was the victim.

{¶22} Sharon said she is also afraid for her children. In 2008, just before appellant went to prison, while appellant was beating her, T.D., who was then 15, tried to stop him. Appellant threw him across the room. T.D. ran out of the house. Sharon and the children ran down the street after him, and a neighbor picked them up and took them to the police station. T.D. made a police report and appellant was charged with domestic violence against him.

{¶23} Sharon said appellant's abuse of the children was physical and emotional. She said he struck her daughter, A.P., several times. She said that when A.P. was only eight years old, appellant would call her a "fat pig." At times he called A.P. a "c _ _ _."

He told A.P. he was going to tell the other children that she was not their sister. He told A.P. he was going to make her live on the street.

{¶24} Sharon testified she and the children were never safe in their home. She devised a safety plan for her and the children to protect themselves from appellant. She stored clothes for the children in their van. When appellant became violent, she and the children would leave in the van. She would drive them around all night while the children slept in the van. She said she would return because she was not working then and had no money. She said appellant told her she was worthless so often that, for a long time, she believed it.

{¶25} Sharon testified that appellant was violent with her and the children whether or not he was drinking. She said that appellant was not always drinking when he would become violent with them. She said his violence merely intensified when he was drinking.

{¶26} Sharon testified that shortly before appellant was released from NEOCAP, in February 2011, he wrote her a letter in which he called her a "c _ _ _" and wrote, "B _ _ _ _, I hate you with everything in me." He called her a "worthless piece of s _ _ _." He wrote, "Pig you put me in prison." Sharon said that in this letter, he referred to NEOCAP as "this b _ _ _s _ _ _ program." Sharon testified that in this letter, appellant said he was not afraid of the judge, the court system, jail, or going back to jail and that he was "going to get [her] no matter what." He wrote, "my aim is to hurt you for doing all you have done to me." In that letter, appellant also threatened Sharon's mother and brother. He wrote, "I have nothing to lose if I go back to prison." He said, "You thought

your troubles with me would be over after three years but B _ _ _ _ they are only about to begin."

{¶27} Sharon strongly opposed appellant's motion to modify and said that if the children are removed from the CPO and appellant is able to have contact with them, she is afraid for their safety.

{¶28} The trial court in its judgment entry, dated April 4, 2012, denied appellant's motion to modify the CPO. The court found: "Father's * * * desire to ask the children for their forgiveness cannot overcome the testimony of Mother, [A.P., and T.D.] as to the brutality the children have experienced along with their present fear of a reoccurrence of imminent physical harm from Father as to Mother and their siblings. The Respondent has not sustained his burden of proof as to the motion to modify the [CPO]."

{¶29} Appellant appeals the trial court's judgment, asserting three assignments of error. Because they are related, they shall be addressed together. They allege:

{¶30} "[1.] The trial court erred in failing to modify the civil protection order based upon R.C. 3113.31 where appellee failed to establish by a preponderance of the evidence sufficient credible evidence that appellant's children are in danger of domestic violence; that appellee's resulting fear regarding the children was not reasonable; that events were too remote to support a cpo [sic].

{¶31} "[2.] The trial court erred in failing to modify the civil protection order as there is no current incident of domestic violence between the parties or the children sufficient to support a finding that the children were in imminent danger of domestic violence at the time of the filing of her petition.

{¶32} "[3.] The trial court erred in failing to modify the civil protection order based upon R.C. 3113.31 where the trial court failed to tailor the order or scope of the order to the particular circumstances of this case, which is an abuse of discretion."

{¶33} As a preliminary matter, we note that appellant's assignments of error are confusing because each asserts two arguments which are inconsistent with each other. In each assignment of error, appellant argues that the trial court (1) erred in denying his motion to modify the CPO because (2) Sharon failed to prove she was entitled to a CPO. It is thus unclear whether he is challenging the CPO or the court's denial of his motion to modify it. Because appellant did not timely appeal the CPO, arguments challenging its validity are barred by res judicata. Thus, our review is limited to whether the trial court abused its discretion in denying appellant's motion to modify.

{¶34} Initially, appellant argues that, although *he* filed the motion to modify, Sharon had the burden to prove that the children are in danger of domestic violence. However, as discussed below, appellant, as the movant, had the burden of proof. Moreover, appellant argues the appellate standard of review is whether the trial court's judgment was supported by competent, credible evidence. To the contrary, as noted below, the abuse of discretion standard applies on review of a ruling on a motion to modify a civil protection order.

{¶35} Before granting a civil protection order, "the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner or petitioner's family or household members are in danger of domestic violence." *Felton v. Felton*, 79 Ohio St.3d 34 (1997), paragraph two of the syllabus.

{¶36} "Domestic violence" is defined in R.C. 3113.31(A)(1) as "the occurrence of one or more of the following acts against a family * * * member: (a) [a]ttempting to cause or recklessly causing bodily injury; (b) [p]lacing another person by the threat of force in fear of imminent serious physical harm * * *; (c) [c]ommitting any act with respect to a child that would result in the child being an abused child * * *."

{¶37} R.C. 3113.31(C) provides that "[a] person may seek relief under this section on the person's own behalf, or any parent * * * may seek relief under this section on behalf of any other family * * * member, by filing a petition with the court."

{¶38} Further, R.C. 3113.31(E)(3)(a) provides: "[a]ny protection order issued * * * under this section shall be valid until a date certain, but not later than five years from the date of its issuance * * * *unless modified* * * * as provided in division (E)(8) of this section." (Emphasis added.)

{¶39} R.C. 3113.31(E)(8)(a) states that a trial court "may modify" a civil protection order. The word "may" in a statute connotes an intent on the part of the General Assembly to vest the court with discretion in those matters. *Kuptz v. Youngstown City School Dist. Bd. of Edn*., 175 Ohio App.3d 738, 2008-Ohio-1676, ¶18 (7th Dist.). Thus, absent an abuse of discretion, we will not disturb a ruling on a motion to modify a civil protection order. *Twitty v. Bowe*, 10th Dist. No. 09AP-953, 2010-Ohio-1391, ¶6; *Jones v. Rose*, 4th Dist. No. 09CA7, 2009-Ohio-4347, ¶5. The term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Caudill v. Thomas*, 11th Dist. No. 2009-P-0087, 2011-Ohio-524, ¶17.

{¶40} Further, R.C. 3113.31(E)(8)(b) provides that either the petitioner or the respondent can file for a modification and that the *moving party* has the burden of proof to show by a preponderance of the evidence that the modification is appropriate because either: (1) the CPO is no longer needed or (2) its terms are no longer appropriate.

{¶41} Thus, the party moving to modify a civil protection order has the burden of proof to show his or her entitlement to modification. Since appellant filed the motion to modify, he had the burden to prove by a preponderance of the evidence that the CPO is no longer needed or that its terms are no longer appropriate. Sharon did *not* have the burden to prove domestic violence because she already met that burden when the trial court issued the CPO. Since appellant failed to appeal the CPO, it is res judicata.

{¶42} Turning now to appellant's substantive arguments, first, he contends the court erred in denying his motion to modify because Sharon failed to prove the children are in danger of domestic violence. However, the trial court found in the CPO that appellant's conduct met the definition of "domestic violence" at R.C. 3113.31(A)(1)(b) in that he placed Sharon in fear of imminent serious physical harm for the children. Thus, if appellant is challenging the CPO, this argument is barred by res judicata because it could have been made in an appeal of the CPO. Alternatively, if he is arguing the children are no longer exposed to the danger of domestic violence, entitling him to modification, he had the burden of proof. Based on appellant's history of violence against Sharon and the children and his recent threatening letter, the court was entitled to find, as it did, that appellant did not meet his burden.

{¶43} Next, appellant argues the trial court erred in denying his motion because, he contends, the CPO was based solely on acts of domestic violence he committed before going to prison, which, he claims, were too remote to support the CPO. He argues that Sharon had the burden to prove recent acts of domestic violence.

{¶44} To the extent this argument challenges the CPO, it is barred by res judicata. To the extent appellant is arguing there were no current acts of domestic violence so the CPO should have been modified, he had the burden of proof. However, the argument is defeated by the following finding in the CPO: "The Respondent through letters written to the Petitioner, as recently as Feb. 2011, has placed her in fear of imminent serious physical harm as to herself and [the] three minor children." Placing a person in fear by threat of harm is an act of domestic violence. R.C. 3113.13(A)(1)(b). Thus, contrary to appellant's argument, the CPO was not based solely on acts of domestic violence he committed before he went to prison. The trial court was therefore entitled to find, as it did, that appellant did not meet his burden.

{¶45} Appellant's reliance on a series of cases, *e.g.*, *Young v. Young*, 2d Dist. No. 2005-CA-19, 2006-Ohio-978, to support his argument that Sharon had the burden to prove recent acts of domestic violence is unavailing for two reasons. First, in those cases, the defendants appealed the issuance of a civil protection order where the petitioner has the burden of proof, not the denial of a motion to modify. Second, the defendants in those cases did not communicate a present intent to harm the petitioners.

{¶46} Next, appellant argues the court erred in denying his motion to modify because Sharon failed to meet her burden to prove she had a reasonable fear of *imminent* physical harm for the children. However, since the trial court found in the

CPO that appellant placed Sharon in fear of imminent serious physical harm as to herself and the children, this finding is, likewise, res judicata. Further, because appellant sought modification, he had the burden to prove Sharon's fear was no longer reasonable. Based on the record, the court was entitled to find, as it did, that he failed to meet his burden.

{¶47} Next, appellant argues Sharon failed to meet her burden to prove domestic violence via his letter because it merely showed his anger toward Sharon, not the children. He argues that because his letter only referred to Sharon, the trial court should not have included the children in the CPO. If appellant is challenging the CPO as having been improperly based on the letter, his argument is barred by res judicata. If, instead, he is arguing it is *no longer* reasonable for Sharon to consider the letter a threat to the children, he had the burden of proof.

{¶48} In determining whether Sharon's fear for her children stemming from appellant's letter was reasonable, the trial court was entitled to consider the parties' history. "Threats of violence constitute domestic violence for the purpose of R.C. 3113.31 if the fear resulting from those threats is reasonable." *Lavery v. Lavery*, 9th Dist. No. 20616, 2001 Ohio App. LEXIS 5360, *4 (Dec. 5, 2001). Further, "[t]he reasonableness of the fear should be determined *with reference to the history between the petitioner and the defendant*." (Emphasis added.) *Gatt v. Gatt*, 9th Dist. No. 3217-M, 2002-Ohio-1749, ¶7, citing *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 816 (10th Dist.1992).

{¶49} There is no dispute that Sharon was the victim of unabated physical abuse at the hands of appellant for 15 years. During this time, Sharon saw countless acts of

physical abuse committed by appellant against the children. Appellant does not dispute that he committed acts of domestic violence against A.P. and T.D. Since they would have been entitled to a civil protection order, "it follows that any remaining children of the family would also properly fall within the ambit of the CPO." *Carpeno v. Carpeno*, 11th Dist. No. 2004-L-202, 2005-Ohio-7046, ¶14. In light of appellant's history of domestic violence against the children, the trial court was entitled to find, as it did, that appellant failed to prove Sharon's fear for her children was no longer reasonable.

{¶50} Finally, appellant argues he was entitled to a modification of the CPO because his prior acts of domestic violence involved alcohol abuse and he has addressed that problem. However, Sharon testified that appellant's violence was not limited to his alcohol abuse; he was violent even without using alcohol. She said his drinking merely intensified his violence. Appellant's threatening letter, written when he was sober, shows he does not need alcohol to threaten violence. Moreover, appellant, as the movant, had the burden of proof. Yet, he presented only his self-serving assurances that he had consumed no alcohol or drugs since going to prison and that he wanted to have a relationship with the children. It is significant that he did not call his AA sponsor as a witness, especially since he testified he sees him regularly and did not give any explanation for his absence. In these circumstances, the trial court was entitled to discount appellant's protestations of sobriety and reform and, instead, to give credit to the eloquent and heartbreaking testimony of Sharon, A.P., and T.D.

{¶51} We hold the trial court did not abuse its discretion in finding appellant failed to meet his burden of proof and in denying his motion to modify the CPO.

{¶52} For the reasons stated in this opinion, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.