

FILED: January 5, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STEPHANIE KATHLEEN HEMINGWAY,
Petitioner-Respondent,

and

JASON DANIEL MAUER,
Respondent-Appellant.

Washington County Circuit Court
C104430RO

A147428

JoAnn B. Reynolds, Judge pro tempore.

Submitted on November 30, 2011.

Gilbert B. Feibleman and Feibleman & Case, P.C., filed the brief for appellant.

No appearance for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Vacated and remanded.

1 SCHUMAN, P. J.

2 As part of a continuing dissolution proceeding, husband appeals from the
3 trial court's decision to continue a restraining order against him based on the Family
4 Abuse Prevention Act, ORS 107.700 to ORS 107.735 (FAPA). ORS 107.718(10)
5 (allowing hearing to contest *ex parte* FAPA order). Because husband was denied the
6 opportunity to cross-examine wife's witness, we vacate the order and remand.

7 Under ORS 107.718(1), a court may issue a FAPA restraining order upon a
8 showing that the petitioner:

9 "[H]as been the victim of abuse committed by the respondent within
10 180 days preceding the filing of the petition, that there is an imminent
11 danger of further abuse to the petitioner and that the respondent represents a
12 credible threat to the physical safety of the petitioner or the petitioner's
13 child[.]"

14 "Abuse," in turn, is defined as:

15 "(a) Attempting to cause or intentionally, knowingly or recklessly
16 causing bodily injury.

17 "(b) Intentionally, knowingly or recklessly placing another in fear of
18 imminent bodily injury."

19 ORS 107.705(1).

20 The proceedings that led to the issuance of the restraining order in this case
21 are apparently part of what was then an ongoing dispute between the parties over the
22 terms of the child custody provisions of their dissolution. After an incident in which
23 husband had allegedly abused wife's child from a former relationship, wife petitioned for,
24 and obtained, a FAPA restraining order based, not on the incident itself, but on other

1 alleged contacts that had occurred within 180 days preceding her filing of the petition.
2 According to wife, husband abused her within the statutory time limit by, first,
3 threatening during a telephone conversation to kill her and, second, by charging at her and
4 striking the hood of her car as she was driving out of his driveway after dropping off the
5 parties' child. Husband asserted that, although several telephone conversations occurred
6 in the relevant time frame, he never threatened wife's life. Regarding the car-charging
7 incident, he testified that he was simply trying to get wife's attention because he believed
8 that she was driving away with a key to his apartment.

9 During the hearing on the FAPA, Boyd, a Department of Human Services
10 (DHS) social worker who was in the process of investigating wife's claim that husband
11 had physically abused her child, obtained permission to address the court. He informed
12 the court that "there is an active DHS investigation with respect to physical abuse by
13 [husband] toward the older child_[,] * * * I'm here to inform the court that I have concerns
14 about [husband] having any additional contact with these children." Husband, who was
15 not represented by counsel at the hearing, asked the court for permission to question
16 Boyd. The court responded that Boyd had not been sworn in. Husband then asked that
17 Boyd be sworn in, and he was.

18 At that point, the court invited Boyd to "add something." Boyd stated, "The
19 reason that we have not filed for custody of these children is because we have a protective
20 parent. Should [wife] have allowed the children to visit or see [husband], I would have
21 filed a juvenile petition in court_[,] I have that much concern." He later also told the court

1 that he believed that husband had a "need for services such as anger management." The
2 court then asked husband if he had any questions for Boyd. Husband replied that the
3 proceedings were "happening out of order." The court then apparently agreed to proceed
4 in a more orderly fashion, and told him that he would have the opportunity to "ask [Boyd]
5 questions" when Boyd returned to the stand.

6 Ultimately, the court believed wife's version of the incidents and ordered, as
7 part of the restraining order, that "while the DHS investigation is pending there will not
8 be any contact unless DHS arranges for some supervised contact with either child." The
9 court also ruled, "So I am continuing the restraining order_[s] and I am ordering for the
10 brief time of the DHS investigation, no contact with the children_[s] unless DHS arranges
11 for supervised."¹ Husband then interjected, "I'm not allowed to question the DHS
12 person_[s] even though he was supposedly called as a witness?" to which the court replied:
13 "You know what, we ran out of time, can't do it." The court subsequently issued an order
14 continuing the restraining order.

15 On appeal, husband asserts two assignments of error. In the first, he
16 contends that the trial court abused its discretion when it did not permit him to cross-
17 examine wife's witness, Boyd. We agree. In *Howell-Hooyman and Hooyman*, 113 Or
18 App 548, 550-51, 833 P2d 328 (1992), the trial court curtailed proceedings in a domestic

¹ The record does not disclose whether, or when, the DHS investigation ended or what its result was. After a police investigation, all of the charges against father for the alleged abuse of wife's child were dismissed.

1 relations case before the husband, appearing *pro se*, had the opportunity to complete
2 cross-examining the wife and putting on his case. We held:

3 "A trial court, in the exercise of sound discretion, has the authority
4 reasonably to control the presentation of evidence and the examination of
5 witnesses. OEC 611(1). The exercise of that authority is reasonable only if
6 it is fundamentally fair and allows opportunities for a reasonably complete
7 presentation of evidence and argument. *See State ex rel Fulton v. Fulton*,
8 31 Or App 669, 672, 571 P2d 179 (1977). Absent a ruling that the evidence
9 was (or would be) irrelevant or redundant, OEC 402, it was error for the
10 trial court to deny husband the opportunity to complete his cross-
11 examination and to present his case-in-chief."

12 Although husband in the present case did have the opportunity to tell the court his version
13 of the relevant events, he did not have the opportunity to cross-examine Boyd in order to
14 explore Boyd's "concerns" about husband's relationship with wife's child and husband's
15 need for "anger management." These statements appear to have affected the court's
16 decision to fashion the order so as to prevent husband from associating with wife's child
17 and the couple's child without DHS supervision, not to mention the court's credibility
18 finding in favor of wife. The lack of a "fundamentally fair" hearing allowing husband "a
19 reasonably complete presentation of evidence and argument" is apparent.

20 Our conclusion that husband was not permitted completely to attempt to
21 undercut wife's evidence renders it impossible for us to address his second assignment of
22 error, in which he urges us to review the proceeding *de novo* and argues that the evidence
23 did not support the court's order. We therefore vacate the order and remand for further
24 proceedings.

25 Vacated and remanded.