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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-1194-ME

BRITTNEY HOWE — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 25-D-00121-002

MICHAEL HOWE; K.H., A MINOR CHILD; L.H., A MINOR CHILD; AND R.H., A MINOR CHILD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; CALDWELL AND A. JONES, JUDGES.

THOMPSON, CHIEF JUDGE: Brittney Howe (Appellant) appeals from an order of protection/domestic violence order (DVO) entered in Warren Circuit Court barring her contact with her former husband, Michael Howe (Appellee), their two minor children, and Appellee's child from a prior marriage. Appellant argues that

the facts do not support the entry of a DVO. After careful review, we conclude that the circuit court erroneously found that domestic violence had occurred and was likely to occur again. Accordingly, we reverse the DVO of the Warren Circuit Court.

FACTS AND PROCEDURAL HISTORY

Appellant and Appellee were married on February 22, 2022, in Warren County, Kentucky. They separated on November 1, 2023, and have lived apart since that time. The parties have two biological children, and Appellee has a child from a prior marriage. In 2023, Appellee filed a petition for dissolution of marriage, which resulted in a decree of dissolution of marriage being entered on December 3, 2025. Appellee was granted custody of the children.

On March 26, 2025, during the pendency of the dissolution proceeding, Appellee filed a petition for a DVO. In support of the petition, Appellee alleged that on March 5, 2025, the Warren Circuit Court awarded temporary, emergency custody of the three children to Appellee based on Appellant's erratic behavior involving Appellee and the children. Per the custody order, Appellant was allowed supervised visitation with the children.

Appellee alleged that on March 6, 2025, Appellant's mother, Debbie Devoe, was supervising Appellant's visitation of the children at Ms. Devoe's residence. According to the petition, Appellant attempted to take the children from

the residence in violation of the visitation order. Ms. Devoe called the police, who made contact with Appellant and then left the residence. After the police left the residence, Appellant left with the children. Ms. Devoe again called the police, who located Appellant and arrested her on a charge of custodial interference and disorderly conduct in the second degree.[1] The circuit court subsequently terminated Appellant's visitation rights.

Appellee further alleged that around midnight on March 25, 2025, Appellant showed up unannounced at his residence and demanded to take Appellee's child from Appellee's prior marriage. Appellant had no visitation rights to this child nor the parties' biological children. The police were summoned again, resulting in Appellant's arrest for trespass in the third degree[2] after she refused to leave. The following day, Appellant returned to Appellee's residence, again refused to leave and was arrested for a second time for trespass in the third degree.

At the time of the filing of the petition, Appellee alleged that Appellant was in jail. He stated that he was fearful that upon her release, Appellant would continue to stalk and harass himself and the three children.

[1] Kentucky Revised Statutes (KRS) 509.070 and KRS 525.060.

[2] KRS 511.080.

During the pendency of the third dissolution proceeding, which occurred contemporaneously with these events, Appellee sought temporary sole custody of the children. This was based on Appellant having taken the children to the doctor or hospital 20 or more times during a 30-day period, when there was no medical need for such visits.

The circuit court entered an emergency protective order, and the matter was continued by agreement of the parties. On September 1, 2025, Appellant, through counsel, moved to modify the March 26, 2025 temporary protective order. In support of the motion, Appellant stated that the underlying issues leading to the March 26, 2025 order had been resolved.

A hearing on the matter was conducted on September 15, 2025, where the circuit court heard the testimony of Warren County Deputy Sheriff John Bailey and Appellee. The Guardian *ad Litem* recommended the entry of the DVO. Appellant did not testify.

The court took judicial notice of Appellant's arrests, and the underlying dissolution proceeding. After hearing the proof, the court entered the DVO barring Appellant from contact with Appellee and the children for a period of one year. In granting the DVO, the court reasoned that the children have an innate fear of being taken to the hospital. This fear, it found, which Appellant brought about by her unnecessary and repeated visits to the doctor and hospital, was

sufficient to support the statutory basis for the issuance of the DVO. The court noted that none of the other grounds for issuing a DVO were present. This appeal followed.

STANDARD OF REVIEW

On review of a domestic violence order, the question is not whether we would have decided the matter differently. *Gibson v. Campbell-Marletta*, 503 S.W.3d 186, 190 (Ky. App. 2016). Rather, we must determine if the circuit court's findings were clearly erroneous and if the decision constituted an abuse of discretion. *Id.* An abuse of discretion occurs if the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

ARGUMENT AND ANALYSIS

Appellant argues that the circuit court erred in granting the DVO. After directing our attention to the standard of review, Appellant recites the statutory definition of domestic violence, and the elements which must be proved for the issuance of a DVO. Appellant maintains that none of these elements are present herein. She argues that no evidence of harm or violence was presented, nor any testimony of fear of imminent injury, assault, or abuse. Appellant notes that the sole basis of the court's order was its finding that the children might fear going to the doctor. She asserts that this is insufficient to support a finding of domestic

violence, and that the complete lack of evidence of past, present, or future threats of violence or abuse or fear of harm wholly undermines the court's conclusion. She seeks an opinion reversing the DVO.

> A court may grant a DVO, following a full 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). "'Domestic 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[.]" . . . KRS 403.720(1).[3] To satisfy the preponderance standard, the evidence believed by the fact-finder must show that the victim "was more likely than not to have been a victim of domestic violence." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). "On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous." *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

Hohman v. Dery, 371 S.W.3d 780, 782 (Ky. App. 2012).

In issuing the DVO, the Warren Circuit Court noted that the sole element upon which it based its finding of domestic violence was the children's possible fear generated by Appellant repeatedly and unnecessarily taking them to the doctor and hospital. Judge Wilson surmised that the children might be afraid of these visits, stating that, "I have never taken one of my children to the hospital

[3] The definition for domestic violence and abuse is now found in KRS 403.720(2).

where they did not have an innate fear of what was happening. That is my concern." The court expressly found that none of the other KRS 403.720(2) elements, such as physical injury, sexual abuse, *etc.*, were present.

The question for our consideration, then, is whether the potential fear created in the children by the repeated visits to the doctor and hospital was sufficient to satisfy the fear of serious injury element set out in KRS 403.720(2). We conclude that it does not. In *Jones v. Jones*, No. 2009-CA-001968-ME, 2010 WL 2867971 (Ky. App. Jul. 23, 2010), for example, a panel of this Court determined that a wife's threat over the telephone to shoot her husband in the head, even coupled with the husband's knowledge that she owned a gun, did not constitute a fear of serious injury for purposes of the DVO statute because it was not part of a pattern of ongoing threats. In the matter before us, no threats of violence were made by Appellant against Appellee or the children, and none were proven.

Similarly, in *Noble v. Noble*, No. 2011-CA-001867-ME, 2012 WL 1231991 (Ky. App. Apr. 13, 2012), a wife alleged in the midst of a divorce proceeding that the husband threatened to kill their child if the wife sought to bring the child to her residence. The circuit court's entry of a DVO was reversed by a panel of this Court, based on the panel's conclusion that, "there was no evidence of a past pattern of repeated serious abuse, [n]or of any past incidents from which the

family court could reasonably infer that [the husband's] alleged statement inflicted a fear of imminent serious physical injury." *Noble*, 2012 WL 1231991 at *3. Again, while the conduct of Appellant herein was likely violative of one or more prior custody orders, and resulted in a criminal conviction,[4] Appellant did not threaten harm to Appellee or the children.

CONCLUSION

"While domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence, the construction cannot be unreasonable. Furthermore, we give much deference to a decision by the family court, but we cannot countenance actions that are arbitrary, capricious or unreasonable." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010) (internal quotation marks and citations omitted).

Per *Caudill* and *Buddenberg*, *supra*, we are mindful of the circuit court's opportunity to assess the credibility of the witnesses in making a finding of domestic violence. The record amply demonstrates that Appellant violated visitation orders of the circuit court, committed one or more criminal acts via her interference with Appellee's custodial rights, and acted in an irresponsible and chaotic manner toward Appellee and the children. While we empathize with

[4] On December 5, 2025, Appellant entered a guilty plea on an amended charge of custodial interference (KRS 509.070).

Appellee's plight, our review of the DVO is constrained by the clear language of KRS 403.740(1), KRS 403.720(2), and the supportive case law.

The sole basis of the circuit court's finding of domestic violence was its conclusion that the children might fear being repeatedly and unnecessarily taken to the doctor and hospital. Judge Wilson based this finding on his own experience as a parent. We cannot conclude that fear of repeatedly going to the doctor or hospital can reasonably be construed as meeting the "fear of . . . serious physical injury" element of KRS 403.720(2).

For purposes of the Kentucky Penal Code, KRS 500.080(19) states that,

> "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, prolonged loss or impairment of the function of any bodily organ, or eye damage or visual impairment. For a child twelve (12) years of age or less at the time of the injury, or for any person if the relationship between the perpetrator and the victim meets the definition of a family member or member of an unmarried couple as defined in KRS 403.720, or a dating relationship as defined in KRS 456.010, a serious physical injury includes but is not limited to the following:
>
> (a) Bruising near the eyes, or on the head, neck, or lower back overlying the kidneys;
>
> (b) Any bruising severe enough to cause underlying muscle damage as determined by elevated creatine kinase levels in the blood;

(c) Any bruising or soft tissue injury to the genitals that affects the ability to urinate or defecate;

(d) Any testicular injury sufficient to put fertility at risk;

(e) Any burn near the eyes or involving the mouth, airway, or esophagus;

(f) Any burn deep enough to leave scarring or dysfunction of the body;

(g) Any burn requiring hospitalization, debridement in the operating room, IV fluids, intubation, or admission to a hospital's intensive care unit;

(h) Rib fracture;

(i) Scapula or sternum fractures;

(j) Any broken bone that requires surgery;

(k) Head injuries that result in intracranial bleeding, skull fracture, or brain injury;

(l) A concussion that results in the child becoming limp, unresponsive, or results in seizure activity;

(m) Abdominal injuries that indicate internal organ damage regardless of whether surgery is required;

(n) Any injury requiring surgery;

(o) Any injury that requires a blood transfusion; and

(p) Any injury requiring admission to a hospital's critical care unit[.]

While it is reasonable to conclude that the parties' children would be afraid of repeated visits to the doctor or hospital, such fear does not satisfy the "fear of . . . serious physical injury" element of KRS 403.720(2). As acknowledged by the circuit court, the record does not support any other basis for a finding of domestic violence under KRS 403.740(1). The circuit court's conclusion that domestic violence occurred, and was likely to occur again, was clearly erroneous. *Buddenberg*, *supra*. Accordingly, we reverse the DVO of the Warren Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Matthew J. Baker Bowling Green, Kentucky	Casey A. Hixson Bowling Green, Kentucky