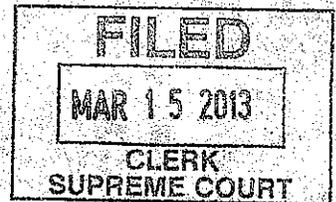


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-000737



PHILLIP SITAR

APPELLANT

v.

APPEAL FROM CRITTENDEN FAMILY COURT
HON. WILLIAM MITCHELL, JUDGE
FILE NO. 2003-D-00026-004

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT, PHILLIP SITAR

Submitted by:

KATHLEEN K. SCHMIDT
ASSISTANT PUBLIC ADVOCATE
DEPT. OF PUBLIC ADVOCACY
SUITE 302, 100 FAIR OAKS LANE
FRANKFORT, KENTUCKY 40601
(502) 564-8006
COUNSEL FOR APPELLANT

The undersigned does certify that copies of this Brief were mailed, first class postage prepaid, to the Hon. William Mitchell, Judge, Family Division, P.O. Box 398, Dixon, Kentucky 42409-0398; the Hon. Mary E. Rohrer, Assistant County Attorney, 217 West Bellville Street, P.O. Box 415, Marion, Kentucky 42064-0415; Ms. Loretta Glover, 423 N. Maple Street, Trailer # 10, Marion, Kentucky 42064; the Hon. Paul G. Sysol, 739 South Main Street, P.O. Box 695, Henderson, Kentucky 42419, and to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on March 15, 2013. The record on appeal was not checked out.

Kathleen Schmidt

KATHLEEN K. SCHMIDT

Introduction

Appellant, Phillip Sitar, appeals from the denial of his CR 60.02 motion, in which he argued that the Crittenden Family Court had neither jurisdiction nor sufficient evidence to grant an EPO/DVO filed by his former live-in girlfriend, Loretta Glover, on behalf of her daughter, A.B.

Statement Concerning Oral Argument

Phillip Sitar requests oral argument on this case as it presents an opportunity to interpret a portion of KRS 403.720.

Citations to the Record

The record consists of one volume of Transcript of Record cited as TR page number and three CDs cited as VR date; hour:minute:second.

Statement of Points and Authorities

Introduction	i
Statement Concerning Oral Argument	i
Citations to the Record	i
Statement of Points and Authorities	iii
Statement of the Case	1
<i>Sitar v. Commonwealth</i> , slip. op. 1-8 (Ky. App. 10/12/2012) (unpublished).....	4
KRS 403.725(3).....	passim
1. The Family Court did not have jurisdiction over either the EPO or the DVO granted against Phillip Sitar because no sufficient relationship between Sitar and the minor child on whose behalf the EPO/DVO was sought existed	5
CR 60.02 (e)	5
CR 60.02 (f).....	5
<i>Lowther v. Moss</i> , 239 Ky. 290, 39 S.W.2d 501 (Ky. App. 1931).....	6
A. Family court had no authority to grant EPO on its face	6
KRS 403.725 (1)	7
KRS 403.720 (2)	7,8,12
KRS 403.720 (4)	7,11
<i>Rivers v. Howell</i> , 276 S.W.3d 279 (Ky. App. 2008).....	7,11
CR 60.02	passim
<i>Duncan v. O'Nan</i> , 451 S.W.2d 626 (Ky. 1970).	9
B. Family Court had no jurisdiction to grant the DVO	10
<i>Barnett v. Wiley</i> , 103 S.W.3d 17 (Ky. 2003).....	11
<i>Johnson v. Branch Banking and Trust Co.</i> , 313 S.W.3d 557 (Ky. 2010).....	11
KRS 446.080 (4).....	11
<i>Hunter v. Mena</i> , 302 S.W.3d 93 (Ky. App. 2010).....	13
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	14
2. The EPO should not have been granted because the existence of imminent harm could not be found from the face of the petition	14
RCr 10.26	14
<i>Schoenbachler v. Commonwealth</i> , 95 S.W.3d 830 (Ky. 2003)	14

KRE 103(e)	14
<i>Brewer v. Commonwealth</i> , 206 S.W.3d 343 (Ky. 2006).....	14
<i>Martin v. Commonwealth</i> , 207 S.W.3d 1 (Ky. 2006).	14
CR 60.03	14,15
<i>Rogers Group, Inc. v. Masterson</i> , 175 S.W.3d 630 (Ky. App. 2005)	15
KRS 403.735.....	15
KRS 403.740 (1).....	15
Conclusion	17
U.S. Const. Amend. XIV.....	17

Statement of the Case

On September 26, 2011, Loretta Glover [the Petitioner] filed a domestic violence petition, on behalf of a minor child, alleging that Appellant Phillip Sitar [the Respondent] made her daughter engage in sexual acts with him on several occasions. TR 1, 3, 5. In the line which asked when these acts occurred, this appears:

Petitioner, on behalf of minor child(ren) says that on about, 2 0.

TR 1. See Appendix Item 2. In the section regarding the Respondent's relationship to the Petitioner, Glover checked "former spouse" but wrote right above it "x-boyfriend." She also wrote "Phillip is x-boyfriend" on the line made available in the same section for specifying information. TR 3. The Crittenden Family Court granted the EPO and set a hearing for October 4, 2011.

Both Glover and Phillip appeared in court that day. Phillip could not afford an attorney. Glover explained she and Phillip lived together for six years but had not lived together for two years. VR 10/4/11; 11:02:15. The allegations involved her 17 year old daughter A.B. who currently lived with her. Id., 11:02:00. The incidents occurred when her daughter was 12-15 years old. The last one happened when she was 15. Id., 11:02:35. Glover told the court about the allegations but also said she had no personal knowledge of the allegations. Id., 11:03:00. Glover said Phillip had never threatened Glover. Id., 11:03:55.

Phillip told the court the allegations were untrue. Id., 11:04:00. The Family Court continued the hearing for two weeks so the child, A.B., could testify since it had been presented with nothing but hearsay. Id., 11:04:40.

On October 18, 2011, the parties including A.B. appeared for the hearing. A.B. testified Phillip was her mother's ex-boyfriend. He lived in their home for six years, off and on, but had not lived with them for three years. VR 10/18/11; 11:02:48. The events in the petition had not happened since he left more than three years ago. Id., 11:03:15. She only told her mother about the events three months ago. She had no current contact with Phillip. Id., 11:03:27. When pressed about why she told her mother now, all A.B. would say was she just felt like her mother needed to know. Id., 11:04:00. While she afraid of Phillip, she could point to no incident which occurred to make her report now. A.B. described the alleged sexual abuse. She said Phillip did not force her but if she did not do it, he would call her names. Id., 11:04:10.

Phillip denied the allegations. He said A.B. was saying this because he and Loretta Glover were discussing marriage. He knew he was not a good boyfriend to Loretta before and was not good to her children- he had had a serious drinking problem. This was A.B.'s way of keeping her mother and him apart. Id., 11:05:35 *et seq.* While Glover admitted at the time that she and Phillip discussed getting married, she also believed her daughter. Id., 11:07:00. The allegations were being investigated by the police. Id., 11:07:20.

The Family Court acknowledged there were two completely different stories from people with personal knowledge. However, taking into account

Phillip's prior record, which the court said according to his criminal history, included several DVO violations and fourth degree assaults, it found by a preponderance of the evidence the allegations may have occurred. Id., 11:11:15-11:14:35. It noted he had not appealed from the October 18, 2011 order. Phillip told the court he lived in a trailer very close to Glover's trailer. The court said he did not have to move but could have no contact. Id., 11:14:35. A domestic violence order was entered that same day. TR 22-24.

Within the next two months, a criminal charge was filed alleging Phillip violated the domestic violence order. Phillip, by counsel, filed a motion pursuant to CR 60.02 to declare the October 18, 2011, domestic violence order void. TR 25-27. The County Attorney's Office moved to intervene and it then responded. The motion was heard on January 10, 2012. Phillip argued the EPO and DVO should never have been granted because the Family Court had no jurisdiction because a qualifying relationship between A.B. and Phillip had not been established. VR 1/10/12; 11:03:41- 11:07:10.

The Family Court overruled the motion to declare the October 18, 2011, order void. VR 1/10/12; 11:10:05; TR 34-5. In its written motion, it concluded that Phillip and Glover were "of the relationship required for standing to file a domestic violence petition, and this fact was established at the Hearing of this case on October 18, 2011." TR 34. See attached at Appendix Tab 4. In its oral comments, the Family Court noted that while there probably was some confusion about the boxes Glover checked, the court had jurisdiction because it did not know from the face of the petition if former spouse and ex-boyfriend both applied

to Phillip- it did not know any more about the relationship of the parties than what was presented to him. VR 1/10/12; 11:09:21.

Phillip appealed to the Kentucky Court of Appeals. He argued that the Family Court had no jurisdiction to grant either an EPO or DVO because no sufficient relationship existed between himself and the minor child on whose behalf the EPO/DVO was sought. He also argued that the EPO should not have been granted because the existence of imminent harm could not be found from the face of the petition.

The Court of Appeals found that on the domestic violence petition no specific date or dates for the alleged sexual abuse of A.B. by Phillip were alleged. *Sitar v. Commonwealth*, slip. op. at 2. It also noted that while Loretta Glover checked the box labeled former spouse, she wrote in "x-boyfriend" above it and on the next line wrote Phillip is x-boyfriend. *Id.* The Court found Loretta testified that Phillip had not lived with them for two years. *Id.* The Court also found at the second hearing Loretta acknowledged that she and Phillip had discussed marriage but had not set a date. *Id.* at 3.

The Court of Appeals concluded that the Family Court had jurisdiction to grant the EPO because Loretta Glover qualified as a "member of an unmarried couple" under KRS 403.725(3) because she and Phillip formerly lived together. *Id.* at 6. The Court of Appeals also concluded that the Family Court's issuance of the DVO based on the past allegations of abuse did not result in palpable error because the allegations were serious, the police were involved, Glover had been

advised to get a EPO and Phillip had a history of past violent offenses and DVO violations.

Phillip then filed a Motion for Discretionary Review in this Court based on the same arguments presented to the Court of Appeals. This Court granted that motion on February 13, 2013.

Further facts will be developed in the arguments themselves.

1. The Family Court did not have jurisdiction over either the EPO or the DVO granted against Phillip Sitar because no sufficient relationship between Sitar and the minor child on whose behalf the EPO/DVO was sought existed.

Preserved- Sitar presented both these issues in his arguments that the October 18, 2011 order was void under CR 60.02 and the trial court overruled his motion. TR 25-27, 34-35. See also VR 1/10/12; 11:03:41-11:07:00, 11:10:05.

Phillip Sitar, unrepresented by counsel because of poverty¹ (VR 10/4/11; 11:05:15), had a DVO entered against him on October 18, 2011. The original petition was filed by his ex-girlfriend, Loretta Glover, on behalf of Loretta's 17 year old daughter, A.B. TR 1, 3, 5. A mere two months later, counsel,² on behalf of Phillip, filed a Motion to Declare Order Void, pursuant to CR 60.02.³ TR 25-27.

CR 60.02 (e) allows a trial court "upon such terms as are just" to relieve a party from a judgment or order if "the judgment is void, ..., or it is no longer equitable that the judgment should have prospective application; ..." CR 60.02 (f)

¹ Loretta Glover herself listed Phillip's occupation as "disabled" on the EPO petition. TR 1.

² Appointed counsel represented Phillip after criminal charges were initiated alleging he violated the DVO order.

³ Phillip did not limit his CR 60.02 motion to any specific section of this rule.

allows relief for “any other reason of an extraordinary nature justifying relief.” “A judgment is void when the court, (a) does not have jurisdiction of the subject-matter, or (b) jurisdiction of the person of the adversely affected litigant, and (c) although it has jurisdiction of both the subject-matter and the person so affected, it proceeds to act in a manner and at a time forbidden by law with respect to the matters and things adjudicated. In other words, for a judgment to be valid, the court must have jurisdiction of both the subject-matter and the person, and also have authority to render the particular judgment or grant the particular relief at the time it did.” *Lowther v. Moss*, 239 Ky. 290, 39 S.W.2d 501, 503 (Ky. App. 1931).

Phillip argues that the DVO granted is void and inequitable for two related reasons.

A. Family court had no authority to grant EPO on its face

The Family Court had no authority to grant the original EPO signed on September 26, 2011, because the existence of a relationship between the Petitioner Glover, her minor child A.B., and Phillip, giving the court jurisdiction over the action, could not be found to exist from the face of the petition.

Only persons of a certain relationship are entitled to have the substance of their domestic violence petitions considered. KRS 403.725 (3) states that any “family member” or “member of an unmarried couple”, or “an adult family member or member of an unmarried couple on behalf of a minor family member”

may file a domestic violence petition described in KRS 403.725 (1). "Family member" means:

(2) "Family member" means a spouse, including a former spouse, a grandparent, a parent, a child, a stepchild, or any other person living in the same household as a child if the child is the alleged victim; ...

KRS 403.720 (2). "Member of an unmarried couple" as defined in KRS 403.720 (4):

means 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 are living together or have formerly lived together.

Forms have been authorized for use in filing domestic violence petitions.

On the form completed by Glover on September 26, 2011, she checked she was filing the domestic violence petition, not on behalf of herself, but on behalf of her minor child, A.B. A section also exists on the form regarding the Respondent's relationship to the Petitioner. See Appendix Item 2. Separate boxes for the following relationships exist: 1) spouse, 2) former spouse, 3) unmarried, with child in common, 4) unmarried, currently or formerly living together, 5) child, 6) stepchild, 6) parent, 7) grandparent, 8) person who lives in the same household as a child(ren) if the child(ren) is the alleged victim. Glover checked "former spouse" but wrote right above it "x-boyfriend." She also wrote "Phillip is x-boyfriend" on the line made available in the same section for specifying information. An ex-boyfriend, without another qualifying relationship, is not someone against whom a domestic violence order can be sought. See *Rivers v. Howell*, 276 S.W.3d 279 (Ky. App. 2008). An ex-boyfriend could qualify as part

of an unmarried couple if he and the Petitioner currently or formerly lived together. But that box was left blank.

Also, because the child was the alleged victim as opposed to Glover herself, even if Loretta Glover was a member of an unmarried couple, she could only file the petition on behalf of the "minor family member." KRS 403.725 (3). But A.B. could not be a "family member" under KRS 403.720 (2). She possessed none of the relationships necessary under that statute. She is not Phillip's child nor did Glover allege that she was. The form did not indicate Glover and A.B. lived in the same household as Phillip. In fact, in the next section of the form, question 3 asks the Petitioner to complete that question if the Respondent and Petitioner have minor children, and Glover wrote N/A out to the side and the remainder of that question was left blank. Nothing in the petition itself added any information to the relationship of the parties.

Therefore, the Family Court could not have found the existence of a relationship which gave it jurisdiction to hear the petition and grant the EPO from the face of the petition. If the EPO had been denied, no final hearing would have been held, and no DVO would have been entered on October 18, 2011.

The Commonwealth, who intervened in the CR 60.02 litigation because of the pending criminal case, responded by basically conceding the petition had been filled out "incorrectly," yet arguing the Family Court had jurisdiction because it was established at the October 18, 2012 final hearing. TR 28; VR 1/10/12; 11:07:35. The Family Court said all it had before it when the petition is presented was the form itself- it had no way of knowing if the couple was

married, and whether the Petitioner Glover was “double-describing” the Respondent Phillip by both checking “ex-spouse” and writing in “x-boyfriend.” Id., 11:08:52.

It was error for the Family Court to find from the petition that Glover intended to describe Phillip as both an ex-spouse and an ex-boyfriend. The only reasonable inference one can draw from the face of the form itself is that since Glover took the time to write out “x-boyfriend” **twice**, she was trying to communicate that was his only relationship to her. If she had been trying to say he was both an ex-spouse and an ex-boyfriend, it is inferable that she would have said that in her written description. The only reasonable inference is she was trying to clearly communicate Phillip was an ex-boyfriend. It defies logic to suggest that Glover’s open, notorious and concerted attempt at letting the court know that her relationship to Sitar was he was her ex-boyfriend could be reasonably viewed as some kind of attempt at “double-defining” a relationship. Parties were married or not. Parties who were married and divorced would not typically also carve out points in time where they were not married but then say they were ex-boyfriend/girlfriend. Indeed, reasonable behavior would be if a petitioner had been married to a respondent, and saw a form that had “former spouse” as an option, but not boyfriend or former boyfriend, she would check “former spouse” and add nothing else.

Without a qualifying relationship, the Family Court was without subject matter jurisdiction over the case. Subject matter jurisdiction means “this kind of case” and cannot be waived. *Duncan v. O’Nan*, 451 S.W.2d 626, 631 (Ky. 1970).

The only kind of case the court could hear was one where domestic violence between persons of a certain statutorily defined relationship occurred. No such relationship was demonstrated by the domestic violence petition. The trial court could not just ignore the patent inconsistency in the form. The point of having a form is so the trial court, without any other information, can reliably assess whether to grant the EPO, extending the process to at least a hearing where the parties can present evidence. The basic jurisdictional requirements in terms of standing and subject matter must be clear from the face of the form. An EPO should not be granted unless those requirements are clear because an EPO has serious consequences and initiates the DVO procedure.

B. Family Court had no jurisdiction to grant the DVO.

The evidence adduced at neither the October 4, 2011 nor October 18, 2011, hearings created a relationship sufficient to give the Family Court jurisdiction to grant the DVO. The DVO was sought by Glover on behalf of her minor daughter, A.B. Glover said Phillip had not threatened her and Glover made no allegations of domestic violence on behalf of herself. VR 10/4/11; 11:03:55. Since the abuse alleged was on behalf of the child only, the child's relationship to Phillip had to be sufficient to give the court jurisdiction to grant a DVO on the child's behalf. However, because A.B. was neither a "member of an unmarried couple" nor a "family member," no such jurisdictional relationship existed.

"To further that purpose and because of the potential tragic consequences of domestic violence, the domestic violence statutes should be construed liberally to afford protection to its victims. However, the construction is limited by

reasonableness.” *Rivers, supra* at 281, citing *Barnett v. Wiley*, 103 S.W.3d 17, 18 (Ky. 2003). Glover and A.B. testified that Glover and Phillip lived together for six years, but had not lived together in two or three years. A.B. was not Phillip’s child or stepchild, as Glover and Phillip were not married. Therefore, Glover could qualify as a member of an unmarried couple because Glover and Phillip had formerly lived together.⁴

But A.B. could not qualify as a member of an unmarried couple under KRS 403.720 (4) because she was not a child “of that couple.” VR 1/10/12; 11:04:55. She was Glover’s daughter only- she was related to Phillip by neither blood nor marriage, she was not his step-daughter, he had no legal claim to her. If he had tried to assert custody or visitation rights to A.B. after Glover moved out with A.B., he would have had no rights to assert. The term “of the couple” is not defined in Chapter 403. Therefore, it must be given its’ ordinary meaning. *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010); KRS 446.080 (4). “Of the couple” indicates both members of the couple were related to the child. “Of” is defined as “expressing the relationship between a part and a whole” as well as “indicating an association between two entities, typically one of belonging, in which the first is the head of the phrase and the second is something associated with it”

<http://oxforddictionaries.com/definition/english/of>. A.B. had no relationship as part of the couple that Glover and Phillip temporarily made. She was related only to her mother, Loretta Glover. She certainly did not belong to the couple. Child

⁴ The Court of Appeals believed that because Glover and Phillip were members of an unmarried couple and A.B. lived with them at the time the abuse was alleged to have occurred, the EPO and DVO were properly granted. Phillip respectfully asserts the Court of Appeals erred, as demonstrated hereinafter.

“of the couple” must be construed as reflecting a legally recognized relationship between the child and both members of the couple.

Additionally, the plain language of KRS 403.725 (3) limits Glover to filing a domestic violence petition on behalf of a “minor family member” and A.B. did not qualify as a family member. Again, she was not Phillip’s child. A.B. also was not living in the same household as Phillip, and had not lived in his household for several years. The word “living,” as used in KRS 403.720 (2), unmistakably means a current situation, and cannot include a situation where the Respondent formerly lived with the child who is otherwise unrelated to him.

This interpretation of the statute is reasonable. A domestic violence order is of limited usefulness when one is talking about the separate child of one partner in an unmarried couple who used to live together but have not shared a household for years and have no children together. No “familial” relationship binds these people together which would put the child at risk. In fact, the alleged abuse ended two to three years prior to the petition being filed. Phillip had not lived with Glover or A.B. since. A.B. said she had not seen Phillip, and she could not point to anything that happened which made her disclose the alleged abuse three to six years after it occurred. As Phillip’s counsel observed, A.B. and Glover had a remedy by way of seeking criminal charges against Phillip. VR 1/10/12; 11:06:00.

The Court of Appeals analyzed a situation where a girlfriend, Candace, and the defendant Samuel’s nephew, Christopher, all lived with Samuel. After the couple had trouble and an alleged incident of domestic violence occurred,

Candace filed an EPO on behalf of herself but also asking that Christopher be included in the EPO. The court granted the EPO/DVO. Reversing this action, the Court of Appeals held:

On the other hand, KRS 403.725(3) states in pertinent part that a petition “may be filed by the ... member of an unmarried couple *on behalf of* a minor family member.” KRS 403.725(3) (emphasis supplied). Candice was a member of an unmarried couple (*i.e.*, Candice and Samuel), and Christopher was **Samuel's** minor family member.² Therefore, she could have filed a petition on behalf of Christopher. But Candice's petition clearly was not filed on Christopher's behalf; Candice filed the petition on her own behalf. Therefore, Candice's petition could not justify entry of an order protecting Christopher.³ That portion of the DVO prohibiting Samuel's contact with Christopher must be stricken from the DVO.

2 We do not believe the legislature had this scenario in mind when it enacted KRS 403.725(3) but more likely envisioned the protection of the child of a domestic violence perpetrator by the perpetrator's partner who was not related to the child.

Hunter v. Mena, 302 S.W.3d 93, 96 (Ky. App. 2010) [emphasis added]. The interpretation of the Court of Appeals supports Phillip's view that A.B. was not a “family member” of Phillip. She was not his natural or adopted child; she was not even his step-child.

The interests the state has in protecting persons in certain relationships from domestic violence is not served by allowing this petition to be granted. This Court should recognize from the undisputed facts and the language of the statute itself that it is inequitable and a miscarriage of justice for Phillip to have been subjected to a domestic violence order, the violation of which carries criminal consequences. The Family Court had no jurisdiction to act in “this kind of case.”

The Kentucky General Assembly was not obligated to enact a domestic violence statute. But having opted “to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Phillip Sitar was denied due process of law when the Family Court denied his CR 60.02 motion to declare the domestic violence order of October 18, 2011 void or otherwise grant him relief from the EPO/DVO when no sufficient relationship between Phillip and the minor child on whose behalf the order was sought was established.

2. The EPO should not have been granted because the existence of imminent harm could not be found from the face of the petition.

Preservation: This issue is unpreserved but should be reviewed under RCr 10.26, which provides unpreserved error may be reviewed on appeal if it is “palpable” and “affects the substantial rights” of a defendant, resulting in “manifest injustice.” See *Schoenbachler v. Commonwealth*, 95 S.W.3d 830 (Ky. 2003). See also KRE 103(e). Relief under this provision is appropriate when “manifest injustice has resulted from the error,” where such error is clear or plain under current law. *Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006). Reversal is required when palpable error affects the fairness, integrity, or public reputation of the proceeding so as to be “shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Furthermore, CR 60.03 mandates that CR 60.02 “shall not limit the power of any court to entertain an independent action to relieve a person from a

judgment, order or proceeding on appropriate equitable grounds.” Since the trial court did not deny relief on this ground based on CR 60.02, this Court is free to grant relief based on CR 60.03. CR 60.02 and 60.03 are to be read in conjunction. *Rogers Group, Inc. v. Masterson*, 175 S.W.3d 630, 635 (Ky. App. 2005).

The Kentucky General Assembly has given trial courts the ability to review and grant emergency protective orders if the court “determines that the allegations contained therein indicate the presence of an immediate and present danger of domestic violence and abuse.” KRS 403.735, KRS 403.740 (1). The Family Court made such a finding based on the petition filed by Glover on September 26, 2011. TR 12-13. However, no alleged facts existed to support a finding of imminent and present danger based on the petition on its face.

Glover alleged that Phillip made her daughter commit sexual acts with him and that it happened several times. In the description, Glover never said when these acts occurred. In the line which asked when these acts occurred, this appears:

Petitioner, on behalf of minor child(ren) says that on about, 2 0 ,

TR 1. No specific month or dates were listed and, in fact, no year was even indicated. Nothing cogent can be inferred from “20.” Glover did not indicate in the petition that anyone was currently living together or lived in the same residence. Without some way to determine when the alleged sexual abuse

happened, it is simply not possible to find an imminent and present danger existed.

The Court of Appeals found that the serious nature of the charges plus Phillip's "history of violent offenses and violations of DVOs" tended to indicate the presence of an immediate and present danger of domestic violence and abuse. But a petition cannot be granted based on charges, however serious, for which absolutely no evidence as to the date of their occurrence is provided. Anyone could get an EPO by alleging the nature of the harm without any supporting evidence that the danger is imminent. If the danger is not imminent, other tools available in the criminal and civil justice system can be utilized for redress of harm.

Furthermore, the Court of Appeals erred in holding the EPO could be granted in part because of Phillip's criminal history. The Family Court did not have that knowledge from the EPO petition itself. And even once it saw that information at the DVO hearing on October 18, 2011, the Family Court did not appear to have details about the prior charges that indicated whether children were involved or whether they were in any way related to allegations of sexual abuse.

The Family Court had no basis on which to grant the EPO. The final hearing was held based on the EPO finding. Phillip suffered a manifest injustice similar to being convicted of a crime on less than sufficient evidence. Phillip's due process rights were violated. The DVO must be vacated.

Conclusion

The Family Court subjected Phillip Sitar to a domestic violence order even though it had no jurisdiction to do so because no sufficient relationship existed between Phillip and the minor child of his former girlfriend, Loretta Glover. The Family Court should have granted Phillip's CR 60.02 motion to declare the DVO void. The EPO should never have been granted because no imminent and present danger was shown to exist. Phillip Sitar's right to due process of law under the Fourteenth Amendment was violated. Phillip requests that this Court correct this inequity and reverse the Family Court's order and remand with directions to vacate the October 18, 2011 domestic violence order.

Respectfully Submitted,



Kathleen Kallaher Schmidt
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006, ext. 103

APPENDIX

Tab No.	Item Description	Record
1	<i>Phillip Sitar v. Commonwealth,</i> (Ky. App. 10/12/2012) (unpublished)	
2	Domestic Violence Petition	TR 1,3,5
3	Domestic Violence Order	TR 22-24
4	Order Denying Motion to Declare Void	TR 34-35