

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2012-SC-737

PHILLIP SITAR

APPELLANT

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

COMMONWEALTH OF KENTUCKY, et al.

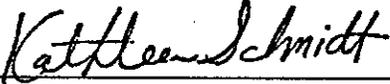
APPELLEE

REPLY BRIEF FOR APPELLANT, PHILLIP SITAR

Submitted by:

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The undersigned does certify that copies of this Reply 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 April 25, 2013. The record on appeal was not checked out for the purpose of this Reply Brief.



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Purpose of Reply Brief

The purpose of this reply brief is to respond to the specific arguments made by the Appellee that are not already addressed by the Brief for Appellant.

I.

While Kentucky's domestic violence laws may have been drafted with the intent of protecting victims as expeditiously as possible, it is equally clear that all statutes are construed using the same rules. "The first principle of statutory construction is to use the plain meaning of the words used in the statute. See *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky.2005)." *Commonwealth v. Sears*, 206 S.W.3d 309, 311 (Ky. 2006). On that, both the Appellant and the Appellee agree. The plain language of the terms defined in the domestic violence statutes leave no doubt as to what relationships are necessary to give a court jurisdiction to grant an EPO or DVO. The Appellant asserts Glover and A.B. did not fall within those relationships.

Appellate courts have not hesitated to reverse trial courts who have granted protective orders, however well-intentioned, to non-qualifying persons. See *Barnett v. Wiley*, 103 S.W.3d 17 (Ky. 2003); *Rivers v. Howell*, 276 S.W.3d 279 (Ky. App. 2008) (finding the trial court clearly erred because its holding that a boyfriend and girlfriend were an unmarried couple was not supported by substantial evidence); *Randall v. Stewart*, 223 S.W.3d 121 (Ky. App. 2007). If the Appellant can show that the family court in this case had no jurisdiction and it was inequitable to grant an EPO or DVO against him because Glover or A.B. did not have a sufficient relationship with him, then he has made a substantial showing sufficient to merit relief under CR 60.02.

A.

The Appellee argues that although Glover clearly made a mistake on the form when she checked "former spouse," the trial court could still grant the EPO because an available box was checked. The Appellee argues that the relationship information Glover wrote in twice, that Sitar

was an ex-boyfriend, is irrelevant, and therefore the trial court could just ignore it. That simply ignores the point of using the form. The purpose of having the form is so the trial court, without any other information, can 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 reasonably clear from the face of the form. An EPO should not otherwise be granted because an EPO has serious consequences and initiates the DVO procedure.

The Appellee argues for some sort of liberal interpretation of EPO forms because citizens are sometimes untrained or uneducated. But under that argument, Glover's form still fails. Looking at the face of the whole form, the trial court could not reasonably find Glover had standing. It is impossible to ignore that she wrote twice that Phillip was an ex-boyfriend. The family court's finding that she had standing was not supported by substantial evidence. Serious consequences arise from having an EPO granted, even when a DVO hearing will be held shortly. Legal consequences arise from violating an EPO. A respondent's movements are often curtailed, families are often separated, and citizens are often rendered homeless and their property seized temporarily based on EPOs. The dire consequences of an EPO/DVO were described in *Rankin v. Criswell*, 277 S.W.3d 621, 624-625 (Ky. App. 2008).

There is a reason why Glover had a hard time filling out this form accurately; that is because her current relationship to the Appellant did not give her standing for an EPO. He had not lived in the home with Glover and A.B. for two years. It defies logic to suggest that Glover's open, notorious and concerted attempts at telling the family court her relationship to the Appellant was he was her ex-boyfriend could be reasonably viewed as an attempt at "double-defining" a relationship. See Brief for Appellant, p. 9.

B.

A.B. is not a “minor family member” under KRS 403.720 (2). She does not qualify as a “family member” under the term “child” because she is not alleged perpetrator’s child. All the terms in KRS 403.720 (2) refer to specific relationships, i.e. stepchild, spouse, etc. The relationship must be to someone, i.e. someone’s stepchild or spouse. The only relationship that matters is the one to the perpetrator. The relationship to the petitioner is irrelevant.

The Appellee erroneously reads KRS 403.725 (3) to say “child” includes any child, even one unrelated to the accused or the petitioner. That runs contrary to the plain meaning of the statute. If the legislature intended to allow a member of an unmarried couple to file a petition on behalf of any person under the age of 18, then the legislature would have called that person a “minor.” A “child” implies a relationship to another specific person- her parent. If one logically extends the Appellee’s argument, Glover could have filed a petition on behalf of a school friend of A.B. who was unrelated to Glover or the Appellant and was not living with them. The legislature did not intend to protect a minor with a tenuous or non-existent tie to the accused or even the other member of the unmarried couple.

An example of why the Appellant’s construction of “family member” is correct lies in the phrase “or any other person living in the same household as the child if the child is the victim.” If the phrase did not refer to a person living in the same household as both the accused and child, it would allow a former live-in girlfriend to file for an EPO/DVO, years after the relationship ended, for her child who has no legal relationship to the accused and no current contact with the accused. That construction makes no sense in light of the intent of the statute. A child unrelated

to the accused, and who is not currently living with the accused, is not at risk and is not a member of a family. In effect, no family exists.

The Appellee has incorrectly perceived the facts of *Hunter v. Mena*, 302 S.W.3rd 93 (Ky. App. 2010). It is of no import that the nephew of the accused was added to the order granting the petition of a member of an unmarried couple “as an afterthought” or whether the Court’s comments were dicta. They are still persuasive as a correct interpretation of the statute.

II.

The Appellee argues RCr 10.26 does not apply because EPO/DVOs are civil proceedings. First, this appeal arose from the denial of a CR 60.02. Second, *Rankin, supra*, only states that EPO/DVO proceedings are not criminal. It holds nothing about whether palpable error can be raised concerning an error in that kind of proceeding.

Even if RCr 10.26 does not apply, this Court can and should still review the Appellant’s claims on the merits. In *Hunter v. Mena, supra*, the Court considered a claim on appeal that the family court was not vested with subject matter jurisdiction to grant a DVO. The claim had not been raised the issue below. The Court explained that normally the Court would be confined to asking “whether the alleged error resulted in manifest injustice.” *Id.* at 96. “Manifest injustice” is similar to the standard used in the palpable error rule of RCr 10.26. See e.g. also KRE 103 (e), using the same standard for erroneous evidentiary rulings. It is apparent that even civil litigants may raise unpreserved error as causing a manifest injustice. Being exposed to the consequences of an order an onerous as an EPO when the issuing court had no jurisdiction to impose those restrictions qualifies as a manifest injustice.

But the Appellant can demand a merits review from this Court whether a manifest injustice occurred or not. The Court in *Hunter* went on to hold that “when the error urged on appeal is that the family court lacked subject matter jurisdiction, consideration of this error is undertaken without regard to [the] failure to raise it previously.” *Id.*, citing *Gullett v. Gullett*, 992 S.W.2d 866, 868–69 (Ky. App. 1999).

The seriousness of the allegations does not negate the essential element that the danger be imminent. The criminal justice system can investigate and redress crimes, even those occurring years earlier, in many ways. However, the EPO system is not, and should not be, one of them. EPOs protect the petitioner by separating the petitioner from the person currently threatening her. That remedy is unnecessary when the threat is not imminent. If no date has been provided for the event causing the fear, the trial court cannot rationally assess the potential harm. No timeline could be inferred from Glover’s form.

It is irrelevant that other agencies advised Glover to file the petition. That does not mean they believed, or even understood, the requirements for granting a DVO could be met.

Conclusion

Appellant Paul Sitar requests that this Court reverse and vacate the domestic violence order entered by the trial court.

Respectfully Submitted,



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