

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001836-ME

CHARLES ROGERS, III

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 03-D-500804-001

KELLIE ROGERS

APPELLEE

OPINION AND ORDER
VACATING AND REMANDING

** ** *

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: Charles Rogers, III, appeals from an August 2, 2006 Amended Order of Protection entered by the Jefferson Circuit Court, Family Division, extending a domestic violence order (DVO) for a period of an additional three years. We vacate and remand for additional proceedings consistent with this Opinion.

Charles and Kellie Rogers had been married for approximately five years when Kellie filed a petition seeking a domestic violence order against Charles. In the March 15, 2003 petition, Kellie alleged that on two different occasions, Charles

threatened, in front of their children, to kill her.¹ At a March 26, 2003 hearing, Charles admitted making the threats. Though he stated that he should not have said them, he attributed them to a depressed mental state that was the result of his being laid off from his job, his inability to acquire new employment and his family's economic circumstances, *i.e.*, having no income except his unemployment benefits. At the conclusion of the hearing, the trial judge entered the DVO barring Charles from any further contact with either Kellie or their children. By its own terms, the DVO was to remain in effect through March 25, 2006. In conjunction with the DVO, Charles was also ordered to seek counseling. Kellie and Charles divorced approximately one year after the trial court entered the original DVO and eventually, in February 2006, Charles was awarded visitation with their daughter on alternate weekends, holidays and for an additional two weeks each year.

On February 8, 2006, Kellie moved to extend the DVO for an additional three-year period and, one month later, on March 8, 2006, the trial court held a hearing. Kellie's testimony reflected that the basis for her motion to extend the DVO was her continuing fear of Charles and the fears of her older two children. The only incidents raised by Kellie to support her motion were the ones in the original petition and several instances of controlling behavior engaged in by Charles *prior* to the issuance of the original DVO. During cross-examination, she admitted that Charles had not engaged in any acts of domestic violence or abuse during the pendency of the DVO.

¹ Charles and Kellie had one child, a daughter, together during their marriage. Kellie also had two other children from a prior relationship.

Testifying on his own behalf, Charles reiterated that he had committed no acts of domestic violence or abuse, or violated in any other way the terms of the DVO. Moreover, Charles indicated that even before he was ordered to, he had sought out counseling so that he could address his personal problems. He further testified that he continued with his therapy for months after the court-required sessions were completed in order to continue the improvement in his life and to become a better father to his daughter. Charles testified that his desire to be a better father was frustrated by the DVO because, although he was awarded visitation with her in his divorce proceedings, the DVO prevented him from attending her school functions and extracurricular events. According to Charles, this was his sole motivation for opposing Kellie's motion. He had no interest in contacting or being around Kellie and her older two children, but he wanted the opportunity to attend his daughter's school and extracurricular events without violating a court order.

Also testifying at the hearing was Ronald D. Dobbs, a licensed clinical social worker appointed by the trial court to work with Charles in the Domestic Violence Offenders Program. Dobbs testified that Charles worked hard in the program and had made “excellent” progress. He further indicated that while he was often confronted by people who merely “say the right things” in an effort to fool him, he was convinced that Charles was not one of them. Rather, he characterized Charles as one who was sincere in his efforts to change his behavior. Dobbs stated that of the approximately 4,500 people with whom he has worked, Charles was in the group that he believed had the lowest

likelihood to re-offend and that even within that subgroup, Charles was among those least likely to re-offend. In addition to Dobbs's testimony, Charles also referred the trial court to the report of Dr. Sally Brenzel, Psy.D., who had been appointed to evaluate the parties with respect to custody issues. Her report recommended that upon Charles's successful completion of counseling, he should share joint custody of his daughter with Kellie.

On June 30, 2006, the trial court, without making any specific findings other than “[t]he Petitioner has filed a motion to amend the Domestic Violence Order dated 4-21-04,” granted Kellie's motion and extended the DVO for an additional three-year period. The trial court specifically did *not* find that any acts of domestic violence or abuse “have occurred or may again occur.” A new Order of Protection was subsequently entered on July 11, 2006. Charles filed a motion seeking to alter, amend or vacate the Order. However, on August 2, 2006, aside from amending two provisions in the Order of Protection that were agreed to by the parties, the trial court denied Charles's motion. This appeal followed.

Kentucky Revised Statute (KRS) 403.750(1) provides that a court may enter a DVO “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[.]” Additionally, KRS 403.750(2) allows for the reissuance of a DVO. Specifically, this section provides that

[t]he number of times an order may be reissued shall not be limited. With respect to whether an order should be reissued, any party may present to the court testimony relating to the importance of the fact that acts of domestic violence or abuse have not occurred during the pendency of the order.

In *Kingrey v. Whitlow*, 150 S.W.3d 67 (Ky.App. 2004), this Court considered whether a DVO could be reissued when there is no evidence that the party against whom the order was entered has committed any additional acts of domestic violence or abuse during the pendency of the DVO. The Court held that a DVO could be reissued even where no additional violence or abuse had occurred.

The statute does not state the conditions under which a DVO may be reissued. However, it does state that any party may present testimony concerning the importance of the fact that domestic violence or abuse may not have occurred during the pendency of the previous order. KRS 403.750(2). Contrary to the circuit court's interpretation, we do not read the statute as requiring proof of additional acts of domestic violence or abuse during the prior period before a DVO may be reissued. Rather, the statute makes it clear that testimony that such acts did not occur may be presented for the court's consideration in determining whether or not to reissue the order.

Id. at 69.

Notably, Judge Knopf's concurring opinion in *Kingrey* discussed generally the requirements for extending a DVO:

I write separately to clarify the grounds necessary to support renewal of a DVO. It is important to remember that a person subject to a DVO is placed under significant restrictions. Consequently, a DVO should not be renewed merely at the request of the petitioning party. Rather, there must be some showing of a continuing need for the DVO.

. . . In making a decision to renew a DVO, “the fact that acts of domestic violence or abuse have not occurred during the pendency of the order,” KRS 403.750(2), is a relevant, but not controlling factor in making such a determination. The critical issue is whether the court finds that future acts of domestic violence remain a reasonable probability. There may be other conduct or circumstances, not amounting to a

violation of the prior DVO, which may nonetheless be relevant to considering the continuing need for the DVO. The trial court may also consider the nature, extent and severity of the original acts of domestic violence. In short, a court considering a motion to renew a DVO may consider the totality of the facts and circumstances in finding that acts of domestic violence and abuse may again occur if the DVO is allowed to expire.

Kingrey, supra, at 70-71. The respondent in *Kingrey* had actually been convicted of repeatedly violating the original DVO although he had complied with the latest DVO for three years. In addition, more recently, he had made some troublesome inquiries to third parties regarding property the petitioner had received in the divorce settlement. Finally, the “original acts of domestic violence which precipitated the entry of the prior DVO were ongoing and severe.” *Id.* at 71. With this “totality of circumstances”, this Court reversed the circuit court and reinstated the district court's order extending the DVO.

Turning to the present matter, the record reveals no evidence supporting Kellie's motion to extend the DVO other than her own testimony that she and the children remain fearful that Charles may once again resort to abuse if the DVO is permitted to expire. Under *Kingrey*, these fears and the nature and severity of the original acts of domestic violence may justify reissuance of the DVO. However, in order to reissue a DVO it is incumbent upon the trial judge to make findings that violence and abuse “have occurred *and may again occur*.” KRS 403.750 (emphasis supplied). In this case, the trial judge did not make those specific findings but simply found that a motion to “amend” the original DVO had been filed. It is not clear from this summary order whether the trial court applied the correct statutory standard. Indeed, because the requested relief was

sought in a motion to amend the expiration date of the original DVO rather than a motion to reissue (the language employed for these circumstances in KRS 403.750(2)), the applicable standard may well have been overlooked. Accordingly, we vacate and remand for entry of appropriate findings as required by KRS 403.750, including specifically past domestic violence and the potential for future violence and abuse.

Finally, the record in this case is replete with evidence that Charles opposed extension of the DVO for an additional three-year period solely because it hampered his ability to attend school functions, sporting events and other extracurricular activities in which his daughter participated. He specifically testified that he had no interest in contacting or seeing Kellie and her two older children, but was requesting relief from the DVO for the limited purpose of attending events involving his daughter. Consequently, if the trial court on remand finds that reissuance of a DVO is justified under KRS 403.750, the court should specifically consider whether a more narrowly-drawn order which would allow Charles's attendance at his daughter's school and extracurricular activities is appropriate.

Accordingly, we remand this matter for further proceedings consistent with this Opinion. Recognizing the unique nature of DVOs and the important objectives they serve, IT IS HEREBY ORDERED that the Circuit Court's August 2, 2006 Amended Order of Protection shall not be vacated until forty-five (45) days following the issuance of this Opinion in order to allow the trial court time to conduct the necessary proceedings.

ALL CONCUR.

ENTERED: August 3, 2007

/s/ Lisabeth H. Abramson
JUDGE, COURT OF APPEALS

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