

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

MARGARET PRICE-LUTSON : **CASE NO. 2007 CVH 01156**
Petitioner :
v. : **DECISION/ENTRY**
MARK ANDERKIN :
Respondent :

Stephan D. Madden, attorney for the petitioner Margaret Price-Lutson, Madden & Oswall Co., LPA, 810 Sycamore Street, Fifth Floor, Cincinnati, Ohio 45202.

Eric C. Deters & Partners, PSC, Eric C. Deters and Mark C. Eppley, attorneys for the respondent Mark Anderkin, 635 West 7th Street, Suite 401, Cincinnati, Ohio 45203.

This matter is before the court upon the respondent Mark Anderkin's objections to the report of the magistrate filed on December 24, 2012.

The court scheduled a hearing on the respondent's objections on February 15, 2013. The court then took the issues raised in the objections under advisement.

Upon consideration of the objections, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of the parties, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The petitioner Margaret Anderkin, now Margaret Price-Lutson, filed a petition for a sexually oriented offense protection order on behalf of her daughter C.P. against the respondent Mark Anderkin on June 29, 2007. Mark Anderkin is C.P.'s paternal grandfather.

After a hearing, an *ex parte* order of protection was granted on July 2, 2007. A full hearing was conducted on the matter on September 4, 2007, at which time the magistrate granted an order of protection against the respondent for the maximum period of five years. That order listed both C.P. and Margaret Anderkin as protected parties.

The magistrate did not make any specific findings of fact other than that the petitioner met her burden and the magistrate checked the box on the order indicating that the court found by a preponderance of the evidence that (1) the petitioner or the petitioner's family or household member(s) are in danger or have been a victim of a sexually oriented offense as defined in Ohio Revised Code 2950.01, committed by the respondent and (2) the orders issued as a result are equitable, fair, and necessary to protect the persons named in the order from sexually oriented offenses.

On July 23, 2012, the petitioner filed a motion to extend the order of protection. A hearing was conducted on the motion on December 11, 2012, at which time the magistrate granted the petitioner's motion to extend the order of protection until December 11, 2017 but extended the protection only as to C.P. and not as to the petitioner. The petitioner further provided that the respondent not be present within 25

yards of the protected person, which was a reduction from the 500 feet set forth in the original order.

On December 20, 2012, the respondent filed a motion requesting the issuance of written findings of fact and conclusions of law.

On December 24, 2012, the respondent filed his objections to the magistrate's decision to extend an order of protection in the case for the petitioner's minor child C.P. The respondent specifically objects to the magistrate's determination that the protection order is necessary to protect the petitioner and her minor daughter. The respondent argues that the evidence presented at the hearing on this matter did not support such a finding. Instead, the respondent asserts that there was testimony given by Linda Cox, Ian Anderkin, and Candice Anderkin that the respondent did not pose a threat to C.P.'s well-being and safety.

Additionally, the respondent specifically objects to the magistrate's determination that the respondent would repeat the alleged offense if given the opportunity. The respondent argues that the testimony presented regarding the respondent's behavior and conduct were contrary to the magistrate's assumption that the respondent would repeat the alleged offense if given the opportunity.

The magistrate filed a report setting forth findings of fact and conclusions of law on January 22, 2013, and the court adopted the recommendations of the magistrate. The respondent did not file an objection to the magistrate's report setting forth written findings of fact and conclusions of law.

C.P. is now eight years of age; she was three years old at the time the initial protection order was granted. The petitioner, C.P.'s mother, is now divorced from Ian

Anderkin, C.P.'s father.

The petitioner is the residential parent of C.P. but she and Ian Anderkin have shared parenting. Ian Anderkin lives at 6534 Hollow Lane and his father, the respondent Mark Anderkin, lives at 6540 Hollow Lane. These residences are separated by two houses.

The respondent has complied with the protection order for the past five years. When C.P. spends the night with her grandmother, the respondent leaves the house and stays at his sister's home.

The petitioner stated that she fears Ian Anderkin will not protect C.P. from Mark Anderkin. She testified that her daughter's accusations that the respondent touched her led to the breakdown of her marriage to Ian Anderkin because he did not believe the accusations. The respondent testified that the allegations against him were false and that the counseling he sought was limited to learning how to deal with false accusations. Ian Anderkin and Candy Anderkin, the respondent's wife, testified that they believe C.P. wants to see the respondent. Candy Anderkin testified that she wants C.P. to be around the respondent and Ian Anderkin testified that he believes the accusations of sexual abuse are false and that the idea of sexual abuse was planted in C.P.'s mind by other actions of her mother.

LEGAL ANALYSIS

Pursuant to Civ.R. 53(D)(4)(d), a trial court shall rule upon a party's objections to a magistrate's report. In reviewing the objections to the magistrate's report, this court

must “undertake an independent review as to the objected matters to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law.”¹ The independent review requirement “however, does not prohibit this court from deferring to the magistrate's resolution of credibility because the magistrate retains a superior position, as the trier of fact, to consider the demeanor of witnesses and evaluate their credibility.”²

Pursuant to R.C. 2903.214(E)(2)(b), “[a]ny protection order issued pursuant to [R.C. 2903.214] may be renewed in the same manner as the original order was issued.” To grant a sexually oriented offense protection order, a court must find by a preponderance of the evidence that the petitioner or the family or household member of the petitioner are in danger of or have been a victim of a sexually oriented offense as defined in Ohio Revised Code 2950.01, committed by the respondent, and that an order of protection and its provisions are equitable, fair and necessary to protect the persons named in the order from sexually oriented offenses.

There is no case law in Ohio setting forth the standard under which a court is to examine a motion for extension of a sexually oriented offense protection order. In *Woolum v. Woolum*, 131 Ohio App.3d 818, 723 N.E.2d 1135 (Ohio App. 12th Dist., 1999), the Twelfth District Court of Appeals addressed the extension of a domestic violence protection order. In that case, the appellate court noted that such a determination must be made on a case-by-case basis.³

¹ Civ.R. 53(D)(4)(d),

² *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009 -Ohio- 3139, at ¶ 14, citing *Henneke v. Glisson*, 2nd Dist. No. CA2008-03-034, 2008-Ohio-6759, at ¶ 29.

³ *Id.*

The *Woolum* court held that “[w]hen a petitioner is seeking a [domestic violence] civil protection order pursuant to R.C. 3113.31, ‘the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner or petitioner’s family or household members are in danger of domestic violence.’”⁴ The appellate court discussed the renewal of the protection order as follows:

“The renewal of the civil protection order in this case was based not only upon past domestic violence, but upon past domestic violence coupled with present threats of future violence. In this case, appellant threatened to make appellee’s life miserable and to kidnap appellee’s children. Thus, when coupled with past domestic violence, these new threats warranted renewal of the civil protection order, even though the threats, in and of themselves, did not rise to the level of domestic violence as defined in R.C. 3113.31(A)(1).”⁵

In *Lain v. Ververis* (Oct. 18, 1999), 12th Dist. No. CA99-02-003, 1999 WL 893611, the same court reviewed the extension of a civil stalking protection order. In that case, the petitioner presented no evidence at the hearing for the extension of the order of any threats or violence since the original order.⁶ The appellate court held that the trial court erred in issuing the renewed protection order.⁷ However, the court also stated that this holding “should not be construed as saying that a threat or violent act from the past can never be the basis for renewing a CPO or issuing a new CPO. Rather, we adhere to our holding in *Woolum* * * * which requires some evidence that there remains a ‘present threat of future violence’ before a trial court may renew or issue a CPO.”⁸

⁴ *Id.*, quoting *Felton v. Felton* (1979), 79 Ohio St.3d 34, 679 N.E.2d 672, paragraph two of the syllabus.

⁵ *Id.* at 822.

⁶ *Lain* at *3.

⁷ *Id.*

⁸ *Id.*

While these cases are instructive, the extension of a sexually oriented offender protection order involves somewhat different considerations. Specifically, to be entitled to a sexually oriented offense protection order, one must establish that they have been or are in danger or being the victim of a sexually oriented offense committed by the respondent and that the orders are equitable, fair and necessary to protect them from sexually oriented offenses. After conducting the initial full hearing on this matter on September 4, 2007, this court found that the protected party had been the victim of a sexually oriented offense. This finding is the final judgment of a legal and factual issue based upon the evidence presented at the full hearing. Accordingly, this issue cannot be re-litigated during a full hearing on the request for renewal of the protection order.

In the present case, the respondent Mark Anderkin presented the testimony of his wife Candice Anderkin, his son Ian Anderkin, his sister Linda Cox, and his pastor Bill Hounshell. The testimony presented by these witnesses was largely opinion evidence that the accusations against the respondent are false. Since the validity of the underlying finding is not relevant to the motion currently before the court, the opinion testimony of these witnesses on the issue of the respondent's innocence is also not relevant.

Additionally, a sexually oriented offense protection order is unique in that once an individual is the victim of a sexually oriented offense, that status does not change. Thus, a court must determine whether a protection order is still equitable, fair and necessary to protect the victim of the sexually oriented offense when determining whether to renew the order of protection.

In the present case, the original protection order did not specify whether its

finding was that C.P. had been the victim of a sexually oriented offense or was in danger of being the victim of a sexually oriented offense by the respondent. However, there was evidence presented during the original hearing that C.P. was sexually abused by the respondent and that the offenses which were committed were sexual imposition and/or gross sexual imposition. To find that the petitioner met her statutory burden, the prior magistrate must have found this evidence to be credible. Accordingly, the original finding logically must have been that C.P. was the victim of a sexually oriented offense, and the magistrate at the earlier hearing specifically found that by the requisite burden of proof it had been established that the respondent committed the offense.

In reviewing the respondent's objection to the magistrate's report, this court conducted a thorough review of the transcripts provided by the respondent pursuant to Civ.R. 53(D)(3)(b)(iii) and carefully examined the evidence before the magistrate.⁹ The court has also considered carefully the objections raised by the respondent and does not find any of them to be well-taken.

Based upon this review, the Court finds that renewal of the protection order against Mark Anderkin and protecting C.P. is warranted. While there was no evidence presented that Mark Anderkin violated the terms of the protection order by having any contact with C.P. since the order was issued in 2007, the fact still remains that C.P. is currently a very young child. At eight years old, C.P. must rely on others for her care and protection. Notably, C.P.'s father Ian Anderkin testified at the hearing on this matter that he does not believe the allegations against his father, and a clear inference can be drawn from his testimony that he would allow C.P. to be around the respondent if not for

⁹ *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009 -Ohio- 3139, at ¶ 14.

the protection order. In issuing the original protection order, the prior magistrate found that the respondent committed a sexually oriented offense against C.P. when she was three years old. A sexually oriented offense by a relative against a child is an offense of opportunity and access. At eight years old, C.P. is still vulnerable to being the victim of another similar offense by the respondent.

As a result, the court finds by a preponderance of the evidence that the order of protection is still equitable, fair and necessary to protect C.P., the victim of a sexually oriented offense by the respondent when she was three years old, from further sexually oriented offenses. The court further finds that the protection order shall be renewed for a period of five years.

However, the court does not find that the petitioner Margaret Price-Lutson, formerly Margaret Anderkin, is entitled to further protection. There was no evidence presented at the full hearing on this matter that would support a finding that Margaret Price-Lutson has been, or is in danger of being, the victim of a sexually oriented offense committed by the respondent. As a result, the court declines to issue the order with respect to Margaret Price-Lutson.

Accordingly, the court finds after an independent analysis of the record that the magistrate has properly determined the factual issues and appropriately applied the law.

CONCLUSION

The respondent's objections to the magistrate's decision is not well taken and

shall be overruled and the magistrate's decision is hereby adopted.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 14th day of May 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride