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Case Updates

The following are summaries of cases involving domestic violence that we hope will be useful to practitioners. If you know of recent cases that you would like to be included in future newsletters please send them to Robin Runge at runger@staff.abanet.org.

Wilkins v. Ferguson, Nos. 05-FM-1555 and 05-FM-1556
(D.C. Court of Appeals, decided July 19, 2007)

Holding: DC Court of Appeals reversed the order of the trial court allowing the appellant's former husband to have unsupervised visits with their biological daughter, despite the court's prior findings that he had committed an intra-family offense against his former wife and child, and even though no health professionals recommended unsupervised visits.

Summary: Mr. Ferguson and Ms. Wilkins divorced and the court ordered joint legal custody, primary placement with the mother, and reasonable rights of visitation for the father. After the divorce was filed, but before it was final, there were allegations made by the child that Mr. Ferguson had touched her inappropriately. There was an investigation while a 12 month protective order was in place, and then the court found that Mr. Ferguson had touched the child inappropriately. His supervised visitation was suspended for the duration of the protective order, and continued after the findings. The court then heard from four experts, none of whom recommended that it would be in the best interests of the child to have unsupervised visits with her father. The trial court held that there was insufficient evidence to conclude that Mr. Ferguson had engaged in inappropriate touching of his daughter, and ordered for Mr. Ferguson to have unsupervised visitation with his daughter without any overnight stays.

The Court of Appeals reversed the decision because the record did not support the factual findings reached by the trial court. The opinion emphasizes several points in coming to its conclusion. First, the court states outright that "a history of domestic violence abuse will always be relevant to every custody and visitation

proceeding in which the abuser is involved." The court makes it clear that the legislature's intent in D.C. Code § 16-914(a)(3)(F) is to command that the burden be on the abuser to demonstrate the child's safety in visitation, and even when read in conjunction with the intent behind D.C. Code § 16-914(f)(1) and (2), the burden is not meant to be shifted to the custodial parent to demonstrate otherwise. Second, the court affirmed a DC Council finding that "a parent's commission of an intra-family offense could impact the custody decision and result in a limitation on parental visitation rights…and [that] intra-family offenses result in both emotional and physical harm to children." Third, the court stressed that a trial court may not ignore the uncontradicted opinions of expert witnesses without basis. Additionally, the Court of Appeals expresses concern with the trial court's focus on whether the child's allegations were true and reasons why the child might fabricate them. Citing several child sexual abuse cases as well as testimony from an expert on the psychological literature pertaining to child sexual abuse, the court held that the trial court's order for unsupervised visitation lacked "a firm factual foundation."

U.S. v. Arnold, 486 F.3d 177 (2007)

Holding: Defendant appealed his felon-in-possession-of-a-firearm conviction on grounds that the evidence did not support the verdict because the district court had admitted testimonial hearsay in violation of his Confrontation Clause rights. The Court of Appeals affirmed the district court's decision holding that a victim's hearsay descriptions to police officers of an armed assault she had just suffered and of the gun involved were not testimonial for purposes of the 6th Amendment Confrontation Clause.

Summary: Arnold, the Defendant, is a convicted murderer who was recently released from prison when the following incident took place. The adult daughter of Arnold's girlfriend called 911 and made statements to the operator that Arnold had pulled a gun on her and she was afraid he was going to shoot her. Very soon after the call, two police officers arrived at the residence and observed that the daughter was "visibly shaken and upset." She told the officers the name of her mother's boyfriend and again stated that he had pulled a gun on her and was trying to kill her. Shortly after the officers arrived, Arnold drove up to the scene in his mother's car. The officers noted that the daughter became visibly anxious again exclaiming "that's him, that's the guy who pulled the gun on me…" The officers conducted a pat down, and when that did not produce the weapon, asked for the mother's permission to search the car where they found the gun described by the daughter.

The District court admitted a redacted recording of the 911 call under the firmly rooted excited utterance hearsay exception. The court held that the declarant's hearsay descriptions to the police officers about the assault she had just suffered were sufficiently corroborated by non-hearsay evidence so as to be admissible under the excited utterance hearsay exception. The corroborating evidence

included: the call to 911, the fear and excitement in the declarant's voice on the recording, her demeanor as observed by the officers when they arrived on the scene, the renewed excitement when Arnold returned to the scene, and the gun matching the declarant's description that was found in Arnold's vehicle. The court's reasoning, which is affirmed by the Court of Appeals, was that the witness's description of past events was necessary for the officers to assess an "ongoing emergency" in contrast to the statements in *Davis v. Washington*, which were held to be testimonial. (126 S. Ct. 2266 (2006)). Accordingly, the court reasoned that the officers sought only to bring initial calm to the situation and to understand the threat to the public and their own safety. To the extent they made inquiries at all, they never strayed from asking questions clarifying the extent of the emergency and obtaining information necessary to resolve it. The Court of Appeals upheld the district court's ruling that the Confrontation Clause does not bar admission of statements admitted as excited utterances.

Boyd v. State, 866 N.E.2d 855 (Ind. Ct. App. 2007)

Holding: In Defendant's appeal of a misdemeanor battery conviction, the Court of Appeals of Indiana affirmed the trial court's holding that because the Defendant had murdered his wife, his 6th Amendment right to confront her as a witness and his right to object to the admission of her statement to the police on hearsay grounds were forfeited.

Summary: Ruth Boyd reported an incident regarding a physical alteration between her and her husband, Albert Boyd, to the police. The State later charged the Defendant with Class A misdemeanor battery and scheduled a trial. Before the misdemeanor trial took place, the Defendant murdered his wife. After the murder, the misdemeanor trial was postponed, and the murder trial proceeded with a jury ultimately finding him guilty.

A bench trial was later held on the admissibility of Ruth's statement to the police regarding the physical alteration. Boyd advanced three arguments against the admissibility of her statement. First, he argued that admitting the statements into evidence violated his 6th Amendment Confrontation Clause rights. Second, he argued that Ruth's statement was inadmissible hearsay. Finally, he argued that the statement should be excluded as cumulative of other evidence.

The Court of Appeals affirmed the trial court's decision that under the rule of forfeiture by wrongdoing, the Defendant had forfeited his right to confront the witness. The court explained that *Crawford v. Washington* recognizes that there are limits to a defendant's right to confront witnesses. (124 S. Ct., 1354, 1370 (2004)). In addition, the court found that Boyd also forfeited his right to confront witnesses under the Indiana Rules of Evidence by applying the doctrine of forfeiture by wrongdoing as a matter of common law. *See* Ind. Evid. R. 802; Ind. Evid. R. 101(a). The Court of Appeals also declined to find that the trial court

had abused its discretion in failing to exclude the statement as cumulative because while other evidence may have been sufficient to support the battery conviction, the statement corroborated the police officers' testimony and provided a specific account of the battery.

Dixon v. State of Indiana, No.49G21-0610-CM-198628 for publication (July 12, 2007)

Holding: On appeal for Defendant's conviction of invasion of privacy, the Court of Appeals of Indiana affirmed the trial court's holding because an officer's testimony about his course of action during an investigation is not hearsay. The court also held that the officer's testimony served as sufficient evidence that the Defendant had oral notice of the order for protection, specifically its condition that he stay away from his wife's residence.

Summary: The trial court issued an *ex parte* order of protection against the Defendant on behalf of his wife, which ordered him to stay away from her the residence. A couple months later, an officer was dispatched to the wife's residence where he found the Defendant arguing with his wife. Upon a warrant check, the officer discovered that the Defendant had not yet been served with the order but the wife presented the officer with a hard copy of the order and told him that she had given the Defendant the same. The officer did not arrest the Defendant, but told him that he was to stay away from his wife's residence. That same day, the officer was called back out to the residence where he again found the two arguing, and where he subsequently arrested the Defendant.

At trial, the officer testified to the events of that day and also to the statements made by the wife, specifically where she advised the officer that she had previously provided the Defendant with a copy of the order. The Defendant was subsequently convicted of Invasion of Privacy, which is the chare he appeals in this case. The Defendant argued that the officer's testimony was hearsay and that there was insufficient evidence because he did not have sufficient notice of the protective order against him and because his wife consented to the violation.

The Court of Appeals affirmed the trial court's decision, holding that the officer's testimony was not offered to prove the truth of the matter asserted, but to describe the officer's course of action on his first visit to the home, especially the fact that he had informed the Defendant of the protective order but did not arrest him. In addition, the evidence that the Defendant was given oral notice of the order and the provision that he was ordered to stay away from his wife's residence was sufficient for a fact-finder to find the Defendant guilty beyond a reasonable doubt. Finally, the Defendant claimed as a defense that his wife consented to his presence in the home citing Model Penal Code (Part I, art. 2, § 2:11 (1985)). This section of the Code states that consent of the victim may serve as a defense if such consent negates an element of the offense or

precludes the infliction of the harm or evil sought to be prevented by the law. The court states that lack of consent is not an element of invasion of privacy, and the wife's consent would not preclude the infliction of violence that the statute seeks to prevent. Additionally, the presence of the victim's decision to violate the protective order is not of consequence rather, it is the Defendant's knowing violation that supports his conviction.

People v. Giles, 40 Cal.4th 833, 152 P.3d 433 (Cal., 2007).

Holdings: The California Supreme Court held that:

- doctrine of forfeiture by wrongdoing is not limited to witness-tampering cases, but applies also where "wrongdoing" is same as current offense;

- defendant forfeited his right to object on confrontation clause grounds to admission of murder victim's prior, out-of-court statements concerning incident of domestic violence;

- facts supporting application of doctrine of forfeiture by wrongdoing must be proven by a preponderance of the evidence.

Excerpts: In this case, defendant admitted that he killed his ex-girlfriend, but claimed that the killing was committed in self-defense. Over defendant's objection, the trial court admitted the victim's prior statements to a police officer who had been investigating a report of domestic violence involving defendant and the victim. The prior incident had occurred a few weeks before the killing. The victim related that, during that incident, defendant had held a knife to her and threatened to kill her.

Did defendant forfeit his right to confront his ex-girlfriend about the prior incident of domestic violence by killing her and thus making it impossible for her to be at the murder trial? Does the doctrine of "forfeiture by wrongdoing" apply where the alleged "wrongdoing" is the same as the offense for which defendant was on trial? Under that equitable doctrine, a defendant is deemed to have lost the right to object on confrontation grounds to the admission of out-of-court statements of a witness whose unavailability the defendant caused.

The Court concluded that defendant forfeited his right to confront his ex-girlfriend when he killed her.

State for Protection of Cockerham v. Cockerham,
218 S.W.3d 298 (Tex.App.-Texarkana, 2007).
http://www.6thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=8679

Holding: The Texas Court of Appeals reversed and rendered in favor of the Protective Order Applicant/Appellant finding that:

- protective order at issue was not moot under the “collateral consequences” exception to the mootness doctrine, and

- trial court lacked discretion to *sua sponte* enter a Protective Order in Respondent’s favor (“mutual” Protective Order).

Excerpts: Amanda Cockerham appealed from a protective order entered on behalf of her father, James L. Cockerham, against her. She had applied for a protective order against her father and, after an extensive hearing, the trial court found that both father and daughter had engaged in family violence; the trial court ordered both to counseling and issued separate protective orders.

After having heard the evidence, the trial court made findings that both James and Amanda had committed family violence and entered two separate family violence protective orders, both to expire in December 2006, six months after entry. In one of the orders, the court granted Amanda's application for a protective order against James. That order has not been contested and has now expired due to the passage of time. In the second protective order, the court issued the order pursuant to Chapter 85 of the Texas Family Code. It mirrors the first order, except that it protects James from Amanda. It has likewise expired by its own terms.

A single contention was raised by the State on behalf of Amanda: that the trial court had no authority to enter a protective order against Amanda because James did not file a petition seeking such relief. Argument was based on general rules of pleading and on Section 82.022 of the Texas Family Code, which reads as follows:

> § 82.022. Request by Respondent for Protective Order
> To apply for a protective order, a respondent to an application for a protective order must file a separate application.
> Tex. Fam. Code Ann. § 82.022 (Vernon 2006).

The statute explicitly requires applications for protective orders to be made separately. Amanda's arguments under the Texas Rules of Civil Procedure are grounded on the basic idea that the judgment shall conform to the pleadings. *See* Tex. R. Civ. P. 301. There are sizable exceptions to that concept, most of which have to do with the idea that a matter may be tried by consent. In this case, all of the details of the fracas giving rise to the violent acts by James against Amanda which prompted her to seek a protective order were relevant. Amanda could not have successfully raised an objection to any part of the evidence concerning her role in the events which transpired. Trial by consent does not apply when the evidence of the unpleaded matter is relevant to the pleaded issues because it would not be calculated to elicit an objection. Therefore, there was no trial by consent of the issue of a protective order against Amanda.

The purpose of the pleading requirements of Rule 301 of the Texas Rules of Civil Procedure are to provide notice of the matters to be heard. In this situation, the case proceeded on only one pleading and request for relief; there was no indication to Amanda or her counsel that her father was also seeking entry of such an order. In fact, the record indicates that James was not seeking such an order. Even though the notice requirements are meager, they do exist for a good reason: to allow a respondent to realize that he or she must marshal a defense. In the absence of any provision for such an opportunity and because James did not file such an application, the appellate court concluded that the trial court had no authority to enter the protective order *sua sponte* in favor of James.

C. L. S. v. G. J. S.

--- So.2d ----, 2007 WL 841272, 2007 La. App. LEXIS 493 (La.App. 4 Cir.,2007).

Holdings: The Louisiana Court of Appeal found that:

- the Mother's evidence met the clear and convincing standard for the burden of proof in cases governed by the Violence Relief Act,
- there was no abuse of discretion in denying the Father the opportunity to have an independent child psychologist examine the Daughter
- the trial court's failure to appoint an attorney to represent the Daughter was an error, but it was a harmless error.

Exceprts: The trial court entered a judgment awarding the mother sole custody of her daughter. The mother had filed a petition requesting relief under the Post-Separation Family Violence Relief Act (Act), La. Rev. Stat. Ann. § 9:361 et seq., from sexual abuse that was allegedly perpetrated on the daughter by her father. The daughter's father appealed the judgment, but the appellate court affirmed, stating that the mother met her burden of proof in the case. Four expert witnesses testified that, in their opinion, the daughter had, or very likely had, suffered from sexual abuse. Also, the daughter disclosed the abuse to her mother, to a babysitter, and to two of the expert witnesses. According to the expert witness testimony, the daughter's sexualized behavior also clearly indicated that she had been sexually abused. The appellate court further found that the lack of physical evidence in no way meant that the daughter did not suffer sexual abuse. Additionally, because La. Code Evid. Ann. art. 1101(B) was applicable to cases governed by the Act, hearsay that would otherwise have been inadmissible could have been properly admitted in the case.
