

FILED

IN THE COURT OF APPEALS OF TENNESSEE

June 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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|-------------------------|---|----------------------------|
| KAREN ELAINE WHITE KITE | : | KNOX CHANCERY |
| | : | CA No. 03A01-9603-CH-00095 |
| Plaintiff-Appellant | : | |
| | : | |
| vs. | : | HON. FREDERICK D. McDONALD |
| | : | CHANCELLOR |
| | : | |
| ARLIN JAY KITE | : | |
| | : | |
| Defendant-Appellee | : | AFFIRMED AND REMANDED |

ROBERT R. SIMPSON, WITH ESHBAUGH, SIMPSON AND VARNER, OF
KNOXVILLE, TENNESSEE, FOR APPELLANT

WILLIAM C. CREMINS OF KNOXVILLE, TENNESSEE, and LAURA RULE
HENDRICKS, OF KNOXVILLE, TENNESSEE, FOR APPELLEE

MEMORANDUM OPINION

Sanders, Sp.J.

The Plaintiff has appealed from a chancery decree dismissing her petition for an order of protection because the hearing on the petition was not held within 10 days of the service on the Defendant of an ex parte order of protection, as required by the statute.

On December 27, 1995, the Plaintiff-Appellant, Karen Kite (Petitioner), filed a petition for an order of protection against her ex-husband, Defendant-Appellee Arlin Kite (Respondent), pursuant to TCA § 36-3-501, et seq. In her petition, she alleged the Respondent had abused and/or threatened to abuse her by certain specific acts on a number of occasions. As pertinent, petitioner asked: "That an Ex Parte Order of Protection, as provided for in Tennessee Code Annotated, Section 36-3-605, be immediately issued enjoining respondent from abuse or threatening abuse of the petitioner and that copies of the order be served upon the respondent and filed with the Knox County Sheriff; That a hearing in this cause be set for within ten days pursuant to Tennessee Code Annotated, Section 36-3-605, and that notice of the hearing be served upon respondent together with the Order of Protection; That upon the hearing of this cause, petitioner be granted an extended Order of Protection for a period of one year;"

In accordance with Petitioner's request, the chancellor issued an ex parte order of protection. As pertinent, the order provided: 1. Respondent is restrained and prohibited from abusing or threatening to abuse the Petitioner; 2. Respondent may be punished for contempt for violating the order; 3. Pursuant to TCA § 36-3-609 copies of the order were being issued to Knox County law enforcement agencies and the officers may arrest respondent for violation of the order; and 4. The matter was set for hearing January 22, 1996, at 9:30 a.m. and Respondent had the right to be represented by counsel. The order was issued by the chancellor on December 27, 1995, and was served on the Respondent on December 29, 1995.

When the case was called for trial on January 22, 1996, the Respondent filed a motion to dismiss on the grounds a hearing had not been held within 10 days of service of the order of protection on the Respondent as required by TCA § 36-3-605(b).

As pertinent, TCA § 36-3-605 provides:

(a) Upon the filing of a petition under this part, the courts may immediately, for good cause shown, issue an ex parte order of protection. An immediate and present danger of abuse to the petitioner shall constitute good cause for purposes of this section.

(b) Within ten (10) days of service of such order on the respondent under this part, a hearing shall be held, at which time the court shall either dissolve any ex parte order which has been issued, or shall, if the petitioner has proved the allegation of abuse by a preponderance of the evidence, extend the order of protection for a definite period of time, not to exceed one (1) year unless a further hearing on the continuation of such order is requested by the respondent or the complainant....

Upon the hearing to dismiss, it was the insistence of counsel for the Respondent that since the statute provided "within ten (10) days...a hearing shall be held..." and since no hearing was held within that period of time, the court was without authority to hold such a hearing. Counsel for Petitioner conceded the wording of the statute was mandatory and the ex parte order had terminated because no hearing was held within the 10-day period after service on Respondent. He insisted, however, that the provision requiring a hearing within 10 days was applicable only to the ex parte order and had no application to the petition for an order of protection. He makes the same argument on this appeal. He cited no authority to the trial court and cites none to this court to support this contention.

In sustaining the motion to dismiss, the court said:
"I think we are going to have to dismiss it, and here is why:
This is all statutory, it says, 'Within 10 days of service on respondent, a hearing shall be held.' And then that tells you what you can do at that hearing, 'At which time the Court shall either dissolve an ex parte order which has been issued or shall, if the petitioner has proved the allegation of abuse by a preponderance of the evidence, extend the order of protection for a definite time.' That is all we can do is extend the order, the order died, that is all we can do. I don't think we can now have a later hearing to create an order or extend an order. I think the statute, it could be drawn differently, it is hard to say better, maybe there is -- if they mean exactly what they say, you have got to have the hearing, then you either extend the order or dissolve it, and that is the end of the ball game so to speak as I see it."

The court explained to counsel he was dismissing the petition as a procedural matter. It was not being dismissed with prejudice and the order of dismissal would not prejudice Petitioner's right to file another petition. In addressing this matter, the court made the following observation: "[W]hen I walked in here this morning if I had known this motion was going to be made and didn't hear argument on it, I would have just denied the motion out of hand, it wouldn't have been possible that there would be a basis for dismissing it, but the more I consider it and read the statute, I think that it is dismissed. Now, what the effect of that will have on another petition being filed, I do not know. We will have to just wait and see. I am not going to say you can't, I am not going to -- I am not going to bar you from filing one, but we won't rule in advance of what

the effect of that will be. The problem you get into is we are right in the edge of the criminal law, we are, and once you get into that, it is a different ball game than just ordinary injunctions and that sort of thing. We have got much more room to move when we are talking injunctions than orders of protection."

The Respondent has appealed, presenting the following issue for review: "Did the trial court err in dismissing the petition for order of protection when no hearing was held within ten (10) days from the time Appellee was served with process?"

We hold the answer to the issue is negative, and affirm in accordance with Court of Appeals Rule 10(a).¹

The cost of this appeal is taxed to the Appellant and the case is remanded to the trial court for any further necessary proceedings.

¹. AFFIRMANCE WITHOUT OPINION.--The Court, with the concurrence of all judges participating in the case, may affirm the action of the trial court by order without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court.

(2) there is material evidence to support the verdict of the jury.

(3) no reversible error of law appears.

Such cases may be affirmed as follows: "Affirmed in accordance with Court of Appeals Rule 10(a)."

Clifford E. Sanders, Sp.J.

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.