

State of New Hampshire
Supreme Court

NO. 2022-0290

2022 TERM
AUGUST SESSION

Michelle Firmbach Nadeau

v.

Justin Nadeau

RULE 7 APPEAL OF FINAL DECISION OF THE
PORTSMOUTH FAMILY COURT

BRIEF OF DEFENDANT/APPELLANT, JUSTIN NADEAU

August 17, 2022

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RSA 173-B:5, VII 17

QUESTIONS PRESENTED

- I. Did the court erroneously determine that the plaintiff's motion for extension of protective order was timely filed?
Preserved: OBJECTION TO MOTION TO CLARIFY/LATE ENTRY (Feb. 18, 2022).
- II. Did the overall period of protective orders last longer than the statute allows?
Preserved: MOTION TO RECONSIDER (Apr. 7, 2022).
- III. Did the court err in extending the protective order for a full year?
Preserved: MOTION TO RECONSIDER (Apr. 7, 2022).
- IV. Was there insufficient evidence to extend the order of protection?
Preserved: MOTION TO RECONSIDER (Apr. 7, 2022); *Trn., passim*.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Initial Order of Protection

Justin Nadeau and Michelle Firmbach Nadeau were married and have two children, born in 2014 and 2016. The couple has been separated since 2019, and are involved in a pending divorce proceeding. Michelle resides in the former marital residence; Justin lives in an accessory apartment at his parents' house nearby.¹

The most recent parenting plan is a temporary order issued in the divorce case in February 2021, presided over by the same judge. TEMPORARY PARENTING PLAN (Feb. 25, 2021) (Dkt# 025), *Appx.* at 20.² Pursuant to it, Michelle has sole decision-making responsibility, and the children go to school in her district. Justin has routine visitation with some limitations:

Father to have visitation at his parents' house where he is living, and his parents are to be present during parenting time. While they do not need to be eyes on at all times, they are required to check in from time to time during parenting time, and to intercede if [Justin] drinks at all during parenting time, or is in some other way not able to parent the children safely and appropriately.

TEMPORARY PARENTING PLAN ¶ B.5(b) (spelling and minor punctuation corrected). In addition, Justin is required to provide a negative SoberLink at

¹To avoid confusion regarding shared surnames, the parties are referred to by their forenames. Both parties know where the other resides.

²The court recognized that this protective order proceeding and the divorce proceeding are related, NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 1 (Dkt# 041), and some documents in the divorce proceeding were entered into the record in the protective order proceeding. References to pleadings herein are to the protective order proceeding. References to the transcript, abbreviated herein as "*Trm.*" are to the hearing held on March 21, 2022, a copy of which has been submitted to this court.

the start of visitation sessions.³ TEMPORARY PARENTING PLAN ¶¶ B.1(a), B.6(b).

Exchange of the children for visitation is at the former marital home. The transportation order specifies that “[Justin’s] parents to pick up and drop off, or another mutually acceptable third party.” TEMPORARY PARENTING PLAN ¶ D. Regarding phone calls, the court ordered, “[w]hile the children reside with one parent, the other parent shall be permitted to speak by telephone with the children . . . at reasonable times.” TEMPORARY PARENTING PLAN ¶ E.1(a).

In October 2020, an incident occurred at the children’s doctor’s office, which resulted in simple assault charges against Justin. On October 19, 2020, Michelle filed a petition for a domestic violence protective order, based largely on that incident, which the court granted on a temporary basis the same day. DV PETITION (Oct. 19, 2020) (Dkt# 001); DV TEMPORARY ORDER (Oct. 19, 2020) (Dkt# 002). Four months later, on February 4, 2021, the court held a hearing on Michelle’s request for protective orders.

On February 25, 2021, the court issued a summary final order of protection, along with a narrative explanation. DV FINAL ORDER (Feb. 25, 2021) (Dkt# 023), *Addendum* at [24](#); DV NARRATIVE ORDER (Feb. 25, 2021) (Dkt# 024), *Appx.* at 8. The order generally restrains Justin from further unlawful acts, prohibits him from “coming within 300 feet” of Michelle, recommends he engage in counseling, instructs Justin’s parents to conduct the

³SoberLink is a remote alcohol monitoring system. “Soberlink supports accountability for sobriety through a comprehensive alcohol monitoring system. Combining a professional-grade breathalyzer with wireless connectivity, the portable design and state-of-the-art technology includes facial recognition, tamper detection, and real-time reporting to designated monitoring parties. With FDA 510(k) medical clearance, Soberlink is the trusted tool in family law, addiction recovery, and workplace compliance. Soberlink proves sobriety with the highest level of reliability and accuracy to foster trust and peace of mind.” *See* <<https://www.soberlink.com>>.

pick-ups and drop-offs, and obligates Justin's parents and SoberLink to confirm Justin's sobriety prior to visitations.

The final order, signed by the judge on February 25, 2021, and issued by the clerk on February 26, specifies: "This order of protection is in effect from 2/4/2021 to 2/3/2022." DV FINAL ORDER (Feb. 25, 2021) (Dkt# 023) (capitalization altered); NOTICE OF DECISION (Feb. 26, 2021) (Dkt# 026), *Appx.* at 26. The starting date the order specified, February 4, 2021, was the date of the hearing; the ending date is one day short of the hearing's one-year anniversary.

II. Request for Extension of Protective Orders

On February 8, 2022, just over a year later and a few days after the order of protection expired, Michelle filed two pleadings. First, she filed a “Motion to Clarify, or in the Alternative Motion for Late Entry for Extension of Final Order of Protection.” MOTION TO CLARIFY/LATE ENTRY (Feb. 8, 2022) (Dkt# 031), *Addendum* at [29](#). She also filed a form “Request for Extension of Domestic Violence or Stalking Protective Order,” with an addendum containing allegations. REQUEST FOR EXTENSION (Feb. 8, 2022) (Dkt# 032), *Appx.* at 33. Justin objected to both. OBJECTION TO MOTION TO CLARIFY/LATE ENTRY (Feb. 18, 2022) (Dkt# 034), *Appx.* at 49; OBJECTION TO MOTION TO EXTEND ORDER OF PROTECTION (Feb. 18, 2022) (Dkt# 035), *Appx.* at 37; REPLICATION TO OBJECTION (Feb. 28, 2022) (Dkt# 038), *Appx.* at 53.

In her motion to clarify, Michelle claimed an alleged discrepancy of dates; the protective order was signed by the judge on February 25, but the order specified the starting date was the day of the hearing, February 4. MOTION TO CLARIFY/LATE ENTRY ¶ 4 (Feb. 8, 2022) (Dkt# 031). Michelle argued that therefore the starting date was February 25, not February 4, and that the temporary order (issued the previous October) was in effect between February 4 and February 25. *Id.* ¶¶ 6-7. Michelle therefore claimed her request for extension, filed simultaneously, was timely filed, or, in the alternative, that its late entry may be excused. *Id.* ¶ 13.

Justin noted that the court specified that the end-date of the initial protective order was February 3, 2022, and that the statute provides that orders of protection are to be in effect for up to one year. RSA 173-B:5, VI (“Any order under this section shall be for a fixed period of time not to exceed one year.”). He also noted that the court’s form granting the initial protective order provides:

THESE ORDERS ARE EFFECTIVE
IMMEDIATELY AND REMAIN IN EFFECT
FOR ONE YEAR.

DV FINAL ORDER (Feb. 25, 2021) at 3 (Dkt# 023) (capitalization in original). Justin thus argued that Michelle's request for extension was late, and that the court lacked authority to bridge the gap.

Nonetheless, in a margin order the Portsmouth Family Court (*John Pendleton, J.*), excused Michelle's tardiness: "The order is good for 1 year from date the decision was issued. Motion to extend noted." MOTION TO CLARIFY/LATE ENTRY (Feb. 8, 2022) (Dkt# 031) (margin order). As to Michelle's request for extension, the court granted it pending a hearing. REQUEST FOR EXTENSION (Feb. 8, 2022) (Dkt# 032) (margin order); ORDER ON INITIAL EXTENSION (Feb. 28, 2022) (Dkt# 036), *Appx.* at 57.

On March 21, 2022, the court held a hearing, conducted by the parties' lawyers on offers of proof, on whether the order of protection should be extended. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 1 (Dkt# 041), *Addendum* at [32](#); *Trn.* at 3. The court then granted an extension until February 25, 2023. ORDER ON INITIAL EXTENSION (Feb. 28, 2022) (Dkt# 036).

III. Michelle's Allegations for Extension Show Innocent Conduct

At the March 21, 2022 hearing, the court heard Michelle's allegations and Justin's explanations, which the court restated in its order. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 2 (Dkt# 041). In granting the extension, the court summarized:

There has not been a finding of a violation of the current Final Order of Protection but there are sufficient facts still present that establish good cause for concern for the safety and well-being of [Michelle]. There remain concerns about the parties' ability to co-parent without emotional escalation by the [Justin]. The court continues to have some concern based upon incidents and actions over the past year that [Justin's] judgement is impacted. There remain criminal charges pending relating to an assault that occurred at the [child's] doctor's office.

NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4 (Dkt# 041). Although somewhat vague, several "concerns" apparently aroused the court's attention.

A. Ongoing Simple Assault Charges Unrelated to Protective Order

As a result of the October 2020 incident at the child's doctor's office that prompted Michelle to initially seek a protective order, Justin was charged with simple assault. At the time of the hearing on the protective order extension, the charges were pending, with trial scheduled the very next day.⁴ Michelle was necessarily a witness in that proceeding, as well as another civil proceeding, which she claimed caused her fear. *Trn.* at 10-11.

⁴Although not part of the record below, the mittimus from the criminal court indicates that Justin, represented by counsel, pleaded guilty to a non-domestic violence offense on March 22, 2022. He was sentenced to a fine, suspended upon condition of good behavior, no contact with Michelle, and continued counseling; the class-B misdemeanor conviction may be reduced to a violation after one year if those conditions are met. DISPOSITION & SENTENCING (Mar. 22, 2022), *Appx.* at 99.

The court recited the pending criminal case as a basis for extending the protective order. However, it did not explain how extending the protective order would further Michelle's safety, how being a witness in the assault case would cause her fear, or how any fear would extend beyond the next-day's resolution of the charges. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4 (Dkt# 041).

B. Justin's Phone and Video Calls With His Children

Justin sometimes records his phone or video calls when he is communicating with the children while they are at Michelle's residence. He sought to admit the recordings to show Michelle was not reasonably placed in fear by him. Michelle objected to their admission. The court declined to admit them because of their "very limited relevance." NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 3 (Dkt# 041).

C. Exchanges of Children Occur Without Conflict

Justin has lived separately from Michelle since 2019, and the couple routinely exchanges the children with assistance of Justin's parents. Michelle alleged that interactions regarding the children cause her fear, *Trn.* at 14, though she related no particular incident. *See* REQUEST FOR EXTENSION (Feb. 8, 2022) (Dkt# 032). The court suggested "emotional escalation" around co-parenting, but also recited no incident where co-parenting caused conflict. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4, (Dkt# 041).

D. Justin Does Not Spy on Michelle

Michelle alleged that Justin spies on her. She claimed that in his pleadings there are details that could not be known without spying. *Trn.* at 7, 11, 13. Justin pointed out that Michelle has no proof of him spying on her in any manner. *Trn.* at 26.

One of the spying incidents Michelle alleged was when Justin's lawyer,

who lives near Michelle's neighborhood, drove by on his commute, and reported to Justin whether the lights were on in Michelle's house on a day there was a scheduling snafu. *Trn.* at 9-10, 31. Another incident involved Michelle calling the police to report spying, which actually was an otherwise uninvolved couple taking pictures of dragonflies on her street. HAMPTON POLICE CALL RECORD (Mar. 17, 2022) (Defendant's Exhibit 14), *Sealed Appx.* at 8; *Trn.* at 8, 33.

The court held that the lawyer's presence was happenstance, and that there was no evidence of spying. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 2 (Dkt# 041); *Trn.* at 26.

E. Justin Maintains No-Contact by Waiting Down the Road

During regular exchanges of the children at Michelle's house conducted by Justin's parents, sometimes Justin rides with his parents, gets out of the car a distance away, and then reunites with his parents after they pick up the children. Justin does this to maximize his time with the children, and maintains a separation of more than 300 feet.

Michelle claims that the get-in/get-out occurs within eyesight of her house, is a violation of the no-contact order, and places her in fear. REQUEST FOR EXTENSION ¶16 (Feb. 8, 2022) (Dkt# 032); *Trn.* at 6-7.

The court wrote that it "continues to have some concern based upon incidents and actions over the past year." NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4 (Dkt# 041). Justin noted his drop-off/pick-up routine complies with the no-contact order, shows the assiduousness with which he maintains the required distance, is otherwise innocent behavior, and should not cause Michelle any concern. *Trn.* at 32, 36.

F. Justin Successfully Continues Counseling

Michelle alleges that because Justin has had substance misuse issues in the past, he needs to continue with his counseling. *Trn.* at 5-6, 14. Justin answered that he has been engaged in frequent and regular counseling, and that his counselor reported he is stable, sober, and a good parent. *Trn.* at 19, 22; PSYCHOTHERAPY COUNSELING REPORT at 2 (Dec. 28, 2021), Defendant’s Exhibit A, *Sealed Appx.* at 3. The court noted that the counselor’s report was largely irrelevant to the protective order proceedings. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 3 (Dkt# 041).

G. Justin Overwhelmingly Shows Sobriety in SoberLink Tests

Michelle suggested two SoberLink tests were positive.⁵ Both occurred on a Sunday in February 2021, out of a total 342 tests over a year-and-a-half. Michelle alleged Justin is in violation of conditions, and therefore protective orders should be extended. SOBERLINK REPORT (Oct. 23, 2020, to Mar. 17, 2020), Defendant’s Exhibit 15, *Sealed Appx.* at 9; *Trn.* at 6.

Justin pointed out that he has overwhelmingly shown compliance SoberLink tests, and that his counselor corroborated his sobriety. *Trn.* at 25. The court recognized Justin “appears to have remained sober.” NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 3 (Dkt# 041).

H. Justin Has Complied With Court Orders

Justin was first subject to the initial domestic violence protective order on October 19, 2020. With the court’s enlargement to “1 year from date the decision was issued,” MOTION TO CLARIFY/LATE ENTRY (Feb. 8, 2022) (Dkt# 031) (margin order), but without any statutory extension, that order was in effect until February 25, 2021, a total of over 16 months.

In that time, Justin complied with the no-contact orders stemming from

⁵SoberLink indicated possible blood alcohol level was .028 or .019, which is negligible.

this proceeding, the divorce proceeding, and the criminal case. Michelle alleged two violations: Justin getting out of his parents' car a block from Michelle's house and insufficient counseling. *Trn.* at 5-6. The court held that “[t]here has not been a finding of a violation” of any orders. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4 (Dkt# 041).

IV. Order of Protection Extended

After the hearing, the court granted an extension of the protective order because it has “concern based upon incidents and actions over the past year that [Justin’s] judgement is impacted,” and the (then) pending simple assault charges. NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) (Dkt# 041); NOTICE OF DECISION (Mar. 28, 2022) (Dkt# 044), *Appx.* at 105.

The parties filed motions for reconsideration and objections largely rearguing facts, which were denied. MOTION TO CORRECT RECORD (Mar. 23, 2022) (Dkt# 042), *Appx.* at 62; MOTION TO CORRECT PLEADING (Mar. 28, 2022) (Dkt# 045) (margin order), *Appx.* at 67; OBJECTION TO MOTION TO CORRECT (Apr. 4, 2022) (Dkt# 046) (margin order), *Appx.* at 73; MOTION TO RECONSIDER (Apr. 7, 2022) (Dkt# 048) (margin order), *Appx.* at 80; OBJECTION TO RECONSIDERATION (Apr. 18, 2022) (Dkt# 049), *Appx.* at 91; NOTICE OF DECISION (Apr. 26, 2022) (Dkt# 053), *Appx.* at 98.

This appeal followed.

SUMMARY OF ARGUMENT

The circuit court violated the protective order statute by allowing Michelle to untimely file an extension to her initial protective order, and by issuing protective orders that collectively last beyond the period statutorily allowed.

The court also erred by extending protective orders based on insufficient evidence. Michelle did not meet her burden of proof, and appears to be an unreasonably fearful plaintiff.

ARGUMENT

I. Court Unlawfully Enlarged Time Period of Initial Protective Order

Michelle's request for an extension was untimely filed. Her tardiness is controlled by this court's recent decision in *TP v. BP*, 171 N.H. 601 (2018), and this court should reverse.

In *TP v. BP*, the protective order specified it ended on December 15, 2016. That order was not actually issued until January 27, 2017. *TP v. BP*, 171 N.H. at 602. Given the time it takes for defendants to get served and request a hearing, for a hearing to occur within the 30-day window provided by the statute, RSA 173-B:3, VII, and for the court and clerk to issue orders, such delays of a month or more are routine in the circuit courts.

Construing the identical statute at issue here,⁶ this court determined in *TP v. BP* that domestic violence protective orders begin and end on the dates *specified* in the order, not the date the order is *issued*.

In *TP v. BP*, the plaintiff counted not from the date the order specified, but the later date on which the order was issued by the court. This court thus held that the plaintiff's request for an extension was untimely filed.

The present case is the same.

Michelle's protective order specified that it ended on "2/3/2022." Michelle filed her request for an extension on February 8, 2022, five days later, which was untimely.

Presumably to avoid the result of *TP v. BP*, Michelle filed a motion to "clarify." The court responded by moving the original end-date, sliding the end-date from where it was in its order, February 3, 2022, to the later "1 year

⁶RSA 173-B:5, VI ("Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the plaintiff, showing good cause, with notice to the defendant, for one year after the expiration of the first order and thereafter each extension may be for up to 5 years, upon the request of the plaintiff and at the discretion of the court.").

from date the decision was issued.”

Because *TP v. BP* held that the end-date of protective orders is the end-date specified in the order, and not the date the order was issued, the court here committed legal error.

Moreover, such date-sliding violates both the statute, which provides that protective orders “shall be for a fixed period of time not to exceed one year,” RSA 173-B:3, VI, and also the explicit terms of the protective order which specifies that it “remain[s] in effect for one year.” DV FINAL ORDER (Feb. 25, 2021) at 3 (Dkt# 023) (capitalization altered).

This court should reverse, and hold that Michelle’s request for extension was untimely filed.

II. Protective Orders are Unlawfully Lengthy

The domestic violence statute specifies that protective orders “shall be for a fixed period of time *not to exceed one year*, but may be extended by order of the court ... *for one year* after the expiration of the first order.” RSA 173-B:5, VI (emphasis added). The statute thus limits how long protective orders last. If the first is for a year, and the second another year, together they cannot lawfully add to more than two years.

Justin was first subject to a protective order on October 19, 2020, continuing to, under the current order, February 25, 2023. That is a total of 2 years, 4 months, and 6 days. However that period was reached or calculated, it is unlawfully 4 months and 6 days too long.

Thus, even if the protective order was lawfully extended, this court should order that it concludes on the two-year anniversary of when it was first imposed – October 19, 2022.

III. Insufficient Evidence to Extend Protective Orders

Plaintiffs seeking protective orders must show “more than a generalized fear for personal safety.” *Walker v. Walker*, 158 N.H. 602, 608 (2009). Rather, they must show “an ongoing, credible threat.” *Tosta v. Bullis*, 156 N.H. 763, 767 (2008). To extend a domestic violence protective order, the plaintiff must show “good cause.” RSA 173-B:5, VI; *MacPherson v. Weiner*, 158 N.H. 6 (2008). This court “review[s] sufficiency of the evidence claims as a matter of law and uphold[s] the findings and rulings of the trial court unless they are lacking in evidential support or tainted by error of law.” *MacPherson*, 158 N.H. at 10.

To justify its extension, the circuit court pointed to then-pending criminal charges stemming from an episode that was already a year-and-a-half in the past, in addition to “incidents and actions over the past year.”

NARRATIVE ON PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) at 4 (Dkt# 041).

The criminal case was resolved one day after this matter was heard. Beyond the anxiety any witness feels, a reasonable person is not generally in danger during courtroom proceedings. Moreover, any fear Michelle might have incurred from being a witness dissipated the next day. The then-pending criminal case, therefore, cannot justify a one-year extension, but at most, a one-day extension.

The other “incidents and actions” all involve innocent conduct. While Justin sometimes records his conversations with his children, as the court noted, those conversations had “very limited relevance.” Michelle could point to no particular conflict or fear-causing conduct when the parties exchange the children, and existing family court orders require exchanges by Justin’s parents at every transition.

Any spying Michelle alleged was limited to her imagination; neither Justin’s lawyer nor the dragonfly-watchers were spies. Justin climbing out of his

parents' car to maintain 300 feet of separation during exchanges shows assiduity in complying with the protective orders, concern for Michelle's feelings, and the value he places on spending time with his children.

Justin has followed through on his counseling, and has been sober.

Although "compliance with the [protective] order ... does not bar an extension," *MacPherson*, 158 N.H. at 10, unlike the defendant in *MacPherson*, Justin has not violated any orders.

Michelle may be an unreasonably fearful person – she claimed to be placed in fear merely by receiving Justin's pleadings, being a witness in criminal and civil proceedings, and overhearing Justin's phone calls with the children. *Trn.* at 14. Any fear she feels appears to be generalized and more self-manufactured than on-going, credible, or related to Justin.

In addition, the court imposed the protective order on its finding that Justin's "judgement is impacted," which is not the standard for issuance of a protective order.

Accordingly, this court should find that Michelle failed to offer sufficient evidence for an extension of the protective order, and that the circuit court erred in extending it.

CONCLUSION

The circuit court violated the statute by allowing Michelle to untimely file an extension to her initial protective order, and by issuing protective orders that collectively last beyond the period statutorily allowed. It also erred by extending protective orders based on insufficient evidence proffered by a plaintiff who appears unreasonably fearful.

Accordingly, this court should reverse, or in the alternative, shorten the period of protective orders to either the day the criminal case was resolved, or a cumulative total of two years.

Respectfully submitted,

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CERTIFICATIONS

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 3,983 words, exclusive of those portions which are exempted.

I further certify that on August 17, 2022, copies of the foregoing will be forwarded to Michelle Frimbach Nadeau, through the court's e-filing system.

Dated: August 17, 2022

Joshua L. Gordon, Esq.

ADDENDUM

1. DV FINAL ORDER (Feb. 25, 2021) [24](#)
2. MOTION TO CLARIFY/LATE ENTRY (Feb. 8, 2022) [29](#)
3. NARRATIVE PROTECTIVE ORDER EXTENSION (Mar. 21, 2022) [32](#)