

**Appendix 7:
Sample DVO Appeal Brief**

HARDIN CIRCUIT COURT
CASE NO. _____
ON APPEAL FROM
HARDIN DISTRICT COURT
CASE NO. 97-D-00127-001

D
v.
T

APPELLANT

STATEMENT OF APPEAL FROM DISTRICT COURT

APPELLEE

APPEAL FROM: Hardin District Court, Elizabethtown Division, Action No. 97-D-00127-001

TRIAL JUDGE: Kimberly Winkenhofer Shumate

DATE OF ORDER APPEALED FROM ENTERED: July 17, 1997

DATE NOTICE OF APPEAL FILED: August 12, 1997

APPELLANT COUNSEL FOR D (Petitioner below):

Jennifer Jordan Hall
Oldfather & Morris
1330 South Third Street
Louisville, KY 40208
(502) 637-7200

APPELLEE COUNSEL FOR T (Respondent below):

Pro Se below/Unknown on appeal.

This case has not been on appeal before.

This litigation involves denial of a Domestic Violence Order (DVO).

DISTRICT COURT DISPOSITION: Denial of DVO solely on grounds that Petitioner is not entitled to protection from domestic violence under KRS 403.715 *et seq* because she is a member of a same-sex couple. (Copy of opinion attached).

RELIEF SOUGHT: Reversal of district court Order and ordering district court to enter a DVO.

ORAL ARGUMENT: Appellant respectfully requests oral argument on this issue.

SUMMARY OF THE FACTS:

After seeking shelter at the Lincoln Trail Domestic Violence Program in Elizabethtown, Kentucky, Appellant D filed, pro se, a Petition for an Emergency Protective Order ("EPO") on July 8, 1997 (attached hereto at Tab 1) against Appellee, T. Her request for an EPO stated that from "February to July, 1997 ... Petitioner was subjected to continual verbal abuse and intimidation through physical contact such as being punched and pushed into a car and tackled. Petitioner is intimidated by Respondent because it has occurred alone and while there were others around. Petitioner is unsure of stability of Respondent's mental state when around her. (See Petition for EPO attached at Tab 1). The Petition for EPO identified Appellant as unmarried, that she had lived with Appellee in an intimate relationship and was Appellee's ex-girlfriend.

On the same day that Appellant filed her Petition the district court entered an Emergency Protective Order restraining Appellee T from any contact or communication with D by requiring T to be at least 500 feet away; restraining T from committing further acts of domestic violence and abuse, and of disposing or damaging any of the parties' property. (See EPO entered July 8, 1997 attached at Tab 2). As required under KRS 403.740, after the EPO was entered a hearing date was set for July 15, 1997 to determine whether to enter a Domestic Violence Order ("DVO").

After holding the DVO hearing on July 15, 1997, where both Appellant D and Appellee T were present pro se, the district court denied Appellant's Motion for a DVO solely on the grounds that same-sex couples are not entitled to protection from domestic violence through EPOs or DVOs under Kentucky's Domestic Violence and Abuse statute, KRS 403.715 *et seq.* (See July 17 Order at Tab 3) (hereinafter "Order"). The district court denied the DVO solely on a legal grounds i.e., the court's statutory interpretation of KRS 403.720 to not include protection of same-sex couples. Appellant appeals the district court's ruling on statutory and constitutional grounds. Pursuant to CR 24.03 and KRS 418.075, the Attorney General of the Commonwealth of Kentucky has been notified that this case involves a challenge to the constitutionality of KRS 403.720 as interpreted by the district court.

STATEMENT OF LEGAL ISSUES PRESENTED:

The district court denied Appellant a DVO solely on the grounds that the Appellant and Appellee were a same-sex couple. That ruling is in direct violation of KRS 403.720 which provides that EPOs and DVOs are available to a "member of an unmarried couple" who are living together or who have formerly lived together. KRS 403.720. Second, the district court's denial of a DVO solely on the basis of Appellant's status as a member of a same-sex couple is unconstitutional as it denies equal protection under the laws. For these two reasons, the district court's Order should be overruled.

I. Protection from Domestic Violence Is Available To Same-Sex Couples Under KRS 403.715 *Et seq.*

A. Under The Plain & Unambiguous Language Of KRS 403.715 *eq seq.* Same-Sex Couples Are Entitled To Protection From Domestic Violence.

Kentucky's domestic violence and abuse legislation provides that protective orders are available to "any family member of any *member of an unmarried couple* who is a resident of this state or has fled to this state to escape domestic violence and violence...." KRS 403.725. As defined by the legislature:

'Member of an unmarried couple' means each member of an unmarried couple which allegedly has a child in common, any children of that couple, or a member of an unmarried couple who are living together or have formerly lived together.

KRS 403.720(3). It is elementary that in interpreting statutory meaning:

If the words of the statute are plain and unambiguous, the state must be applied to those terms without resort to any construction or interpretation.

Kentucky Unemployment Insurance Commission v. KACO Unemployment Insurance, Ky. App. 793 SW.2d 845, 847 (1990); *see also, ITT Commercial Financial Corp. v. Madisonville Recaping Company, Inc.*, Ky. App., 793 S.W.2d 849,852 (1990). Here, the statute defines unmarried couples in gender neutral terms as couples "who are living together or have formerly lived together." The statute nowhere defines the terms "couple" or "unmarried" and nowhere or limits application of these terms to "man and woman." Rather, "unmarried couple" is left a self-defining term which the legislature felt needed no definition.

"Simple words when considered in a statute are generally accorded their ordinary and accepted meaning." *Thompson v. Bracken County*, Ky., 294 S.W.2d 943, 946 (1956). "Unmarried," unless defined otherwise, applies to any person who has not been recognized as married under the laws of Kentucky. As the district judge herself pointed out, same-sex couples are not entitled to the social benefit of marriage in Kentucky. Therefore, any same-sex couple by definition would be "unmarried." "Couple" when accorded its ordinary and accepted meaning,

connotes an intimate relationship between two persons. The legislature could have specifically excluded “same-sex” couples from coverage under the “unmarried couples” language, but, the legislature did not do that. The language is plain, unambiguous and on its face the “unmarried couples” language is inclusive insofar as it applies to any couple that is not married and are living together, whether a couple is the same-sex or opposite-sex.

B. The Legislative Intent and Purpose Was To Protect Persons, Regardless of Gender or Sexual Orientation, From Domestic Violence.

If this Court does not find the language of KRS 703.715 *et seq* plain and unambiguous, then it must look to the purpose and intent of the legislation in interpreting the statute.

A fundamental rule of construction is that the applicability and scope of the statute may be determined by ascertaining the legislature’s intent and purpose, considering the evil the law was intended to remedy and other prior and contemporaneous facts and circumstances that throw intelligible light on the intentions of the law-making body.

Brown v. Hoblitzell, Ky., 307 S.W.2d 739.744 (1956).

The evil the legislature was fighting here was domestic violence and abuse. The Kentucky legislature first passed domestic violence and abuse legislation in 1984 with the stated purpose being:

1. To allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible.
2. To expand the ability of law enforcement officers to effectively respond to situations involving domestic violence and abuse so as to prevent further such incidents and to provide assistance to the victims.

KRS 403.715. The purpose of the domestic violence statute was to give “persons” who are victims of domestic violence “protection against further violence and abuse” so their lives will be “as secure and uninterrupted as possible.” KRS 403.715(1). The legislature intended to “expand the ability of law enforcement offices to effectively respond to situations involving domestic violence and abuse so as to prevent further such incidents and provide assistance to the victims.” KRS 403.715(2). The legislature was unequivocal in setting forth its purpose: to protect people from the harms of domestic violence, to make people secure, and to make their lives as safe as possible. This protection applies to all “persons who are victims of domestic violence and abuse.” Nowhere does the statute limit itself on the basis of gender, male or female, or sexual orientation, i.e. opposite-sex or same-sex couples. The legislation applies in gender neutral terms to any person who in a domestic situation suffers violence and needs short-term protection.

Even in specifically defining “a member of an unmarried couple,” the legislature used gender neutral language, using the word “member” of an unmarried couple. KRS 403.720(3). If the legislature had wanted to limit the definition of unmarried couples to couples of the opposite-sex then it could have done so. (See KRS 344.362 which specifies “an unmarried couple of the opposite-sex” and KRS 231.110 which deals with regulation of places of entertainment and makes prohibitions relating to “any man or woman who are not married to each other.”) The legislature did not choose to limit domestic violence protection to opposite-sex couples. Such limitation would have been at odds with the purpose of the domestic violence and abuse legislation, which was to protect *all* persons who are victims of domestic violence and abuse from further violence, whether married or unmarried, child or adult.

The legislative history of the domestic violence and abuse statute is instructive in this regard. As first enacted in 1984, EPO/DVO protection was only available to “family members” which was limited to spouses, parents, children, stepchildren or any other persons related by consanguinity or affinity within the second degree. KRS 403.720. In 1988, the protection from domestic violence was amended to include members of unmarried couples with children in common and former spouses. KRS 403.720 as amended in 1988. In 1992, the domestic violence and abuse statute was further amended to protect “a member of an unmarried couple” “who are living together or had formerly lived together.” KRS 403.725.

During the 1992 House Judiciary Committee legislative hearings on the “unmarried couple” amendments, the question of same-sex couples was directly raised by members of that committee. (Hearing H.B. 115, House Judiciary Committee, March 3, 1992). The committee had an opportunity to amend the statute to exclude same-sex couples from “unmarried couples” protection but did not do so. The bill passed through the judiciary committee on a unanimous vote. (See Affidavit of Sherry Currens attached at Tab 4). This legislative history directly contradicts the conclusions drawn by the district court, for which the court cited no supporting authority, that the legislature intended to exclude same-sex couples.

C. The District Court Inappropriately Engaged In
Judicial Legislation

Given the legislative purpose and plain legislative language, the district court had no basis to deny the DVO. Put differently:

KRS 446.080(1) requires the courts to construe all statutes liberally in order to carry out the intent of the legislature and that the *courts may not engage in judicial legislation under the guise of interpretation.*

Commonwealth v. Shivley, Ky., 814 S.W.2d 572, 573 (1991) (citation omitted). Here, the district court did exactly that, engaged in judicial legislation. The district court decided that “same-sex couples cannot be married under Kentucky law and therefore cannot be construed as couples under the provisions of 403.275 [sic] protection for EPOs and DVOs.” Order at 2. Nowhere in the legislation is it stated that because one cannot be married one cannot be part of an unmarried couple. “Under the rule of liberal construction, the words employed in the statute must be given their ordinary meaning. *In effect, exceptions not made cannot be read therein.*” *Commonwealth v. Shivley*, Ky., 814 S.W.2d at 573. Unfortunately, that is exactly what the district court did. The district court read exceptions into the statute that nowhere exist nor comport with the stated legislative purpose of protecting all persons regardless of gender or sexual orientation from domestic violence and abuse. Simply put, any same-sex couple is by definition unmarried (because they can’t marry) and therefore qualifies for protection if they or have formerly lived together.

Where there are no exceptions designated in the statute, the language is to be given its plain and unambiguous effect. *Commonwealth v. Shivley*, Ky., 814 S.W.2d at 573. Here, the language is very simple. The protection applies to unmarried couples who live together or who have lived together. The legislature makes no exceptions for different types of unmarried couples. The statute is about preventing violence, it is not about sexual orientation. Domestic violence is condemned by the legislature, no matter what type of unmarried couple, i.e., the sexual orientation of an unmarried couple is irrelevant. The district court's imposition of limitations and exceptions otherwise is in violation of the statutory language and should be overruled.

D. Agencies Enforcing Domestic Violence Statutes
Protect Members of Same-Sex Couples.

While courts have the ultimate responsibility in matters relating to statutory construction, "generally the courts give great deference to any agency interpretation of the regulations and the law underlying them..." *Delta Airlines, Inc. v. Commonwealth*, Ky., 689 S.W.2d 14, 20 (1985); see also *Barnes v. Anderson National Bank of Lawrenceburg*, 293 Ky. 592, 167 S.W.2d 833, 835 (1943). Put differently:

Where statutory language is capable of being understood by reasonably well-informed persons in two or more different senses, the construction given the language by the administrative authorities charged with its enforcement is relevant and often persuasive.

First Industrial Plan v. Kentucky Board of Tax Appeals, Ky., 300 S.W.2d 70, 72 (1973).

Significantly, the agencies charged with interpreting or enforcing the domestic violence and abuse statute have included protection of same-sex couples. Pursuant to KRS 15.717, the Attorney General has developed a prosecutor's manual for Kentucky's Commonwealth Attorneys and County Attorneys establishing policies and procedures for the

prosecution of domestic violence related crimes. Every Commonwealth Attorney and County Attorney in the state of Kentucky has a copy of that manual, which provides that in determining whether a Petitioner for an EPO/DVO is “a member of an unmarried couple,” “officers should make the determination of whether or not parties are a ‘couple’ or ‘living together’ *without being influenced by gender or sexual orientation or whether or not sexual activity is involved.*” (See Domestic Violence Prosecution and Procedural Manual, Office of the Attorney General 1997 at 3 attached at Tab 5). EPOs and DVOs are enforced on the basis of whether a party is an unmarried couple and are living together or have lived together. Sexual orientation and gender has nothing to do with the application of the statute.

There has been no confusion among the agency charged with enforcing the domestic violence and abuse statute. The term “unmarried couple” in KRS 403.720 is understood to protect members of same-sex as well as opposite-sex couples. These interpretations of KRS 403.720 are relevant and support this Court statutorily construing Kentucky’s domestic violence and abuse statute to include protection of same-sex couples.

II. If KRS 403.715 *Et Seq* Is Interpreted To Exclude Same-Sex Couples, It is Unconstitutional.

If KRS 403.715 *et seq* does in fact, as held by the district court, exclude same-sex protection under the law. Sections 2, 3, 59 and 60 of the Kentucky Constitution expressly guarantee equal treatment provided by the law. *Perkins v. Northeastern Log Homes, Ky.*, 808 S.W.2d 809 (1991); *Tabler v. Wallace, Ky.*, 704 S.W.2d 179 (1986). Under that equal protection rubric, the Kentucky Supreme Court has found homosexuals entitled to equal protection under the law. In *Commonwealth v. Wasson, Ky.*, 842 S.W.2d 487 (1993), the Supreme Court struck down Kentucky’s sodomy law, which applied only to same sex couples, as

violating an individuals' right to privacy and right of equal protection guaranteed under the Kentucky Constitution. The Kentucky Supreme Court held that the purpose of the equal protection clause:

Is not only to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities... The Equal Protection Clause protect[s] disadvantaged groups from discriminatory practices, however deeply ingrained and longstanding.

Commonwealth v. Wasson, Ky., 842 S.W.2d at 499 (emphasis in original) (citations omitted).

The *Wasson* court held that "homosexuals do not become 'fair game' for discrimination simply because their sexual practices are not considered part of our mainstream traditions." *Id.* The key point in *Wasson* is that the "equal protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly." *Id.*

Here, the legislature made a value choice that domestic violence and abuse should be prevented and prosecuted. That value must be applied evenhandedly to everyone in the Commonwealth, no matter what gender or sexual orientation. The district court in excluding same-sex couples from domestic violence was punishing those couples solely on the basis of their sexual preference, which is prohibited under *Wasson*. *Commonwealth v. Wasson*, Ky., 842 S.W.2d at 499.

The *Wasson* court held that homosexuals "are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis for different treatment." *Commonwealth v. Wasson*, Ky., 842 S.W.2d at 500. Here as in *Wasson*, there is no rational basis for singling out same-sex couples and prohibiting them from protection under the domestic violence statute. In effect, "this is punishing people because they are different [same-sex couples]

rather than because of what they are doing [unmarried couple].” *Commonwealth v. Wasson, Ky.*, 842 S.W.2d at 501. If same-sex couples are unmarried (which under Kentucky law can be their only status) and are living together or have lived together they qualify for protection under the statute.

The issue here is not sexual orientation, but rather equal access to the law, as one group cannot be excluded while other groups are included. “We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.” *Commonwealth v. Wasson, Ky.*, 842 S.W.2d at 501. The district court Order unfairly shifted the focus from “unmarried couple” status to the heterosexual or homosexual identity of unmarried couples. This is no different than if the court had denied a multi-racial unmarried couple a DVO merely because they were multi-racial. To place additional burdens and requirements (denial of EPO/DVO protection) on a particular class of people (same-sex couples) which the Kentucky Supreme Court has recognized as suspect is not rationally related to the purpose of preventing and prosecuting domestic violence and abuse.¹

Last year the United States Supreme Court, which does not have as protective or expansive equal protection laws as does Kentucky, struck down an amendment to the Colorado Constitution which would have prohibited all legislative, executive or judicial action designed to protect homosexual persons from discrimination, as violating the equal protection clause. *Romer v. Evans*, ___ U.S. ___, 116 S.Ct. 1620 (1996). The United States Supreme Court held:

Our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities...respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare... The guarantee of equal protection of the laws is a pledge of the protection of equal laws.'

Romar v. Evans, 116 S.Ct. at 1628 (citations omitted). As with the legislation that was struck down by the United States Supreme Court, interpreting KRS 403.270 to exclude same-sex couples "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Romar v. Evans*, 116 S.Ct. at 1627. What is constitutionally unacceptable is "a statute-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romar v. Evans*, 116 S.Ct. at 1627.

There is no reason to exclude same-sex couples from domestic violence protection. If those couples are unmarried and if they live together or have lived together, as is the case with Appellant and Appellee, they qualify for protection just like any other similarly situated couple (i.e., any other unmarried couple that lives or has lived together). The district court's exclusion of same-sex couples from protection under the domestic violence and abuse statute denies a class of people equal protection of the laws and should be struck down as violative of the Kentucky's Constitution's guarantee of equal protection under the law.

RELIEF SOUGHT:

Appellant requests that this Court reverse the district court's denial of the Domestic Violence Order ("DVO"), which was based solely on the grounds that Appellant was a member of a same-sex couple, and that the district court be ordered to enter a DVO based on the evidence of domestic abuse presented at the DVO hearing on July 15, 1997.

Respectfully submitted,

JENNIFER JORDAN HALL
Counsel for Petitioner
Oldfather & Morris
1330 So. Third St.
Louisville, KY 40208
(502) 637-7200

¹ The district court's solace for same-sex couples that they can seek legal redress by filing criminal assault charges and seek no contact orders, is irrelevant and unpersuasive in an equal protection constitutional analysis. See Order at 2. Criminal no contact orders do not provide the immediate protection so often needed in violent domestic situations and provided by DVO's through mandatory arrest provisions for violations. Indeed, the failure of the criminal system to deal with domestic violence situations is the reason domestic violence legislation was enacted in the first place.