Earl May Have Had to Die, But He Also Had the Right to Counsel

Procedural Due Process in the Context of Domestic Violence Actions

Ethan Chase

Though I, personally, have no interest in the defense of the abusers of children and their family, I do—as all lawyers should—have an interest in ensuring that our system of justice provides adequately fair processes for adjudicating those cases to finality. Kentucky's children deserve as much. Considering the nature of the rights at stake in family court, those rights are among those afforded the highest constitutional protections. In domestic violence actions in particular, our family courts are confronted with intimate and complex problems affecting families. Mindful of rights so fundamental, Courts—and lawyers—must be vigilant of the sufficiency of due process afforded in these cases. The procedures currently afforded to respondents in domestic violence actions, and respondent parents, especially, are insufficient considering the seriousness of the rights at stake.

A. The Rule and its Exceptions.

It is well-settled law in Kentucky that even an indigent civil litigant is not constitutionally entitled to appointment of counsel, except in extremely limited circumstances. For example, if imprisonment is a potential consequence of civil contempt, then counsel may be appointed. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993). Or, if a prisoner fails to defend a civil action brought against them, a guardian *ad litem* **must** be appointed for them before a judgment can be entered. Kentucky Rule of Civil Procedure (CR) 17.04; *Davidson v. Boggs*, 859 S.W.2d 662 (Ky. App. 1993). In 2021, our Supreme Court recognized another exception to this rule in holding that minor children also have the right to counsel when named as a party to domestic violence and interpersonal protection actions. *Smith v. Doe*, 627 S.W.3d 903, 904 (Ky. 2021); CR 17.03. Nevertheless, our Supreme Court has accepted that, "the right to counsel is not afforded in a civil case such as a DVO hearing." *Gutierrez v. Com.*, 163 S.W.3d 439, 442 (Ky. 2005). Practitioners should realize that more recent caselaw concerning the various rights implicated in domestic violence cases—including the constitutional right to bear arms and the fundamental right to the care, custody and control of one's children—inform a constitutional mandate that requires one more exception to this rule. Additional procedural protections, such as court-appointed counsel, are constitutionally necessary to ensure these fundamental rights in domestic violence proceedings.

B. The Rights Implicated in Domestic Violence Actions Involving Children.

The Supreme Court of the United States, in the case of *District of Columbia v. Heller,* held that the Second Amendment protects an individual's right to possess firearms for certain purposes, including self-defense in the home. 554 U.S. 570 (2008). In *McDonald v. City of Chicago,* the Supreme Court expounded on *Heller*, holding the right to bear arms was a "fundamental" right. 561 U.S. 742 (2010). The Court reasoned that the Second Amendment applies both to laws imposed by the federal government and laws enacted at the state and local level by way of the due process clause of the Fourteenth Amendment. In *New York State Rifle & Pistol Association v. Bruen*, the Court resolved two of the questions left open following *Heller* and *McDonald:* (1) does the right to bear arms extend beyond the home, and (2) how are courts meant to assess a claimed infringement of the right? 597 U.S. 1 (2022). Ultimately, the Court held that the protections of the Second Amendment extend beyond the home, and announced the standard to assess Second Amendment challenges to firearm laws: when the plain text of the Second Amendment covers the regulated conduct, the Constitution presumptively protects it. To justify a regulation of that conduct, the government must demonstrate that a challenged law is consistent with the "historical tradition" of firearm regulation in this country. *Id.* The Court, of course, did not articulate which historical tradition or traditions lower courts were to look to when measuring whether a firearm restriction was violative of the Second Amendment.

Most recently, in the matter of *United States of America v. Rahimi*, the Supreme Court

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addressed the question of whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence orders, is violative of the Second Amendment. 602 U. S. ____ (2024). This case, out of the Fifth Circuit, involves the appellate court's holding that, on their face, prohibitions against firearm possession by perpetrators of domestic violence are unconstitutional. 61 F.4th 443, 448 (5th Cir.), cert. granted, 143 S. Ct. 2688, 216 L. Ed. 2d 1255 (2023). Domestic violence advocates, along with the United States government, have argued that the United States has a deeply rooted tradition of disarming individuals who pose a danger to others or to the community at large. Ultimately, on June 21, 2024, the Supreme Court held that, when a person is determined by a court to pose a credible threat to the physical safety of an intimate partner, that individual can be temporarily disarmed consistent with the Second Amendment as part of a protective order. *Id.* Nevertheless, the majority opinion by Chief Justice John Roberts reiterated the Court's continued application of the framework established in *Bruen*, and the constitutional import and application of the Court's Second Amendment jurisprudence.

The Court in the last decade has undoubtedly elevated the Second Amendment as a fundamentally protected right. In March of this year, two seemingly irreconcilable opinions from our Court of Appeals and Supreme Court broached—but did not directly confront—the interplay of the Second Amendment guarantees, the deeply important protections afforded to victims of domestic violence, and the right of parents to the care, custody, and control of their children. *See Aldava v. Johnson*, 686 S.W.3d 205, 207 (Ky. 2024); *and cf. Aldava v. Baum*, ---- S.W.3d ----, No. 2023-CA-1038-ME, 2024 WL 1335252 (Ky. App. Mar. 29, 2024). As a result, the questions of whether removing firearms from the hands of domestic violence abusers in Kentucky is constitutionally permissible as a question of state law, or what procedural safeguards are required before doing so, are still very much open.

While not an enumerated right under the United States or Kentucky Constitution, the right of parents to the care, custody, and control of their children has been recognized as one inherent to our understanding of life and liberty in American society. It is also a right often implicated in domestic violence actions. Section 1 of the Kentucky Constitution provides that all citizens "are, by nature, free and equal, and have certain inherent and inalienable rights," including "the right of enjoying and defending their lives and liberties." Section 2 of the Kentucky Constitution, in turn, helps ensure that guarantee of individual liberty by forbidding the Commonwealth from exercising "absolute and arbitrary power over the lives, liberty and property" of its citizens. *See e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest ... of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Morgan v. Getter*, 441 S.W.3d 94, 111-12 (Ky. 2014).

In Kentucky, the Courts of Appeals have been historically considerate—if not outright protective—of the fundamental rights of litigants in cases affecting the parent/child relationship. In 2020, our Supreme Court held that it was well within a trial court's discretion to determine if the due process clause afforded indigent parents with the right to expert funding in termination of parental right cases. *Cabinet for Health & Fam. Svcs. v. K.S.*, 610 S.W.3d 205 (Ky. 2020). In K.S., the Court recognized that "[t]wo strands of case law—one federal and one unique to Kentucky—define the scope of procedural protections afforded to parents in child welfare proceedings." *Id.* at 214. Kentucky's caselaw, when considering those protections in this context, and "in certain circumstances," goes beyond federal protections, because "a parent's right to custody and care of his or her children is a uniquely important liberty interest," whether the impediment of the right is "[t]emporary or not." *Id.*

Domestic violence actions involving children are unique, even among the already singular nature of proceedings in family court. Regardless of whether a Domestic Violence Order (DVO) issues, a reviewing court must, immediately upon its filing, consider the petition *ex parte*, and determine whether an Emergency Protective Order (EPO) should issue pending a hearing. Kentucky Revised Statutes (KRS) 403.730. EPOs prohibit contact between the respondent and the protected parties—often, their children—until the time of the hearing or in six months after its issuance if no hearing is held. KRS 403.735. Relatedly, KRS 403.270 creates a rebuttable presumption that parents are entitled equally to the care, custody and control of their children. When one parent has committed an act of domestic violence and an order has been entered to that effect, this presumption is automatically rebutted. KRS 403.315. The custody and domestic violence statutes further empower a court to make temporary custody determinations for up to three years, allowing Courts to prohibit a respondent parent from contacting their child. KRS 403.822; KRS 403.320; KRS 403.735; KRS 456.050. Additionally, when an EPO and/or DVO are entered, the right to possess and purchase firearms is immediately and effectively suspended under both federal and state law. Considering the foregoing, the potential for an unsavvy *pro se* parent litigant to have their fundamental rights—both to bear arms and raise their children—negatively affected is astronomically high.

C. An Experiment with Constitutional Guardrails.

The adjudication of matters concerning the family has provided a constitutional prerogative in Kentucky since the 2002 amendment to section 112 of the Kentucky Constitution, which allowed for the designation of family court divisions. Kentucky has moved toward a unified family court: a court specializing in, and with jurisdiction to address, a broad array of legal problems confronting families. See KRS 23A.100. This experiment in therapeutic justice is constantly a work in progress.

As regular practice in the context of termination and dependency cases, courts across the Commonwealth appoint counsel for indigent parents. *See e.g.*, KRS 620.100(1)(b) (dependency, neglect, and abuse proceedings); KRS 625.080(3) (involuntary termination of parental rights proceedings); KRS 199.502 (non-consensual adoption proceedings). In domestic violence cases involving children, courts are required to appoint counsel for minor children. *Smith v. Doe*, 627 S.W.3d 903, 904 (Ky. 2021); CR 17.03. Our Supreme Court has specifically instructed Kentucky's courts to employ "the analytical framework set out in *Matthews v. Eldridge*" to determine whether fairness necessitates additional procedural protections beyond those already afforded. *K.S.*, 610 S.W.3d at 215. Those factors are "(1) the private interest at stake; (2) the government's interest in administrative efficiency; and (3) whether the additional procedures sought will increase the accuracy of fact-finding and reduce the risk of erroneous deprivation." *Id.*

As our Supreme Court in *K.S.* opined, "[t]he question of what procedures are necessary to protect a right is a question of constitutional law for a judge, not a question to be determined by state legislatures." 610 S.W.3d at 213. Currently, in domestic violence cases—which often affect both the right to parent and the right to bear arms—there are no procedural protections beyond those afforded in every other civil case. Considering the recent development in federal law, and our high Courts' protective approach to parental rights, the sufficiency of procedural protections of parents in these actions is worth careful examination.

D. Appointing Counsel Would Ensure Constitutional Guarantees and Inspire Public Confidence.

In my view, when squarely faced with the question of whether an indigent parent is entitled to counsel in a domestic violence action, a court in Kentucky should closely consider and carefully examine the factors in *Eldridge* to determine if the rights at risk warrant more protection than what is currently afforded. Employing those factors in an appropriate case, and with the import of the rights at stake top of mind, Kentucky courts must reach the conclusion that the appointment of counsel is constitutionally required. In acknowledging as much, courts can ensure constitutional guarantees of fundamental fairness, and bolster public confidence in the integrity of Kentucky's Family Court experiment in therapeutic justice.

Ethan Chase is a partner at Reczek Chase Law, a family law practice in Louisville. Before joining the firm in 2022, Ethan was staff attorney to Deputy Chief Justice Debra Hembree Lambert of the Kentucky Supreme Court. Currently, he serves as a court-appointed guardian ad litem on the domestic violence docket of the Jefferson County Circuit Court, Family Court Division One. He practices divorce, custody, adoption and domestic violence cases in Jefferson, Oldham and Bullitt Counties. He's an alumnus of the University of Louisville Brandeis School of Law. ■

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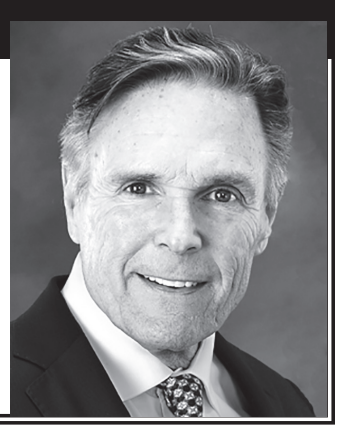

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