

March 21, 2022

Richard W. Davis, Jr.
Davis, Davis & Davis PC
P.O. Box 3448
Radford, VA 24143

Kathryn Zimmerman
(*confidential address in file*)

RE: Zimmerman v. Happe / CJ22-02

Dear Mr. Davis and Mrs. Zimmerman:

This matter comes before the Court on Respondent Dale Happe's appeal from the extension of a protective order granted to Petitioner Kathryn Zimmerman pursuant to Virginia Code § 19.2-152.10(B) in Floyd County General District Court on January 20, 2022.

On March 8, 2022, this Court heard oral argument from the parties. Through argument, the parties and the Court concluded that the resolution of the appeal turned on a single issue: whether an extension of a protective order under Virginia Code § 19.2-152.10(B) requires the Petitioner to present new or additional evidence to support the extension.

For the reasons set forth below, the Court finds that the Code section does not necessarily require presentation of additional evidence and AFFIRMS the extension of the protective order by the General District Court.

Factual Background

Petitioner obtained the original protective order against Respondent in this matter in January 2020. The original protective order spanned the two-year maximum allowable under the statute, set to expire in January 2022.

In support of the original protective order, Petitioner presented the Court with documentary evidence in the form of text messages and emails from Respondent to Petitioner and/or Petitioner's husband. While the evidence presented did not evince any overt violent

proclivity on the part of Respondent, the messages demonstrate a concerted and consistent effort to contact Petitioner with

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messages she clearly found to be inappropriate and unwarranted. At various points, Respondent—then married at the time of the exchanges—professes his love for Petitioner, describes medication he is currently using and its effects on him, and offers to purchase a van for Petitioner. Respondent also makes various references to Petitioner’s children and “missing” them.

Based on this evidence and Petitioner’s testimony, the Court in January 2020 granted the original protective order. Prior to the expiration of that order, Petitioner timely filed a motion for an extension under Virginia Code § 19.2-152.10(B). In support of her requested protective order extension, Petitioner re-submitted the prior documentary evidence regarding text messages and emails from Respondent.

Petitioner confirmed that she had not received any further written communication from Respondent since the date of the last message in her exhibit list: December 2019. Petitioner did note that she obtained the protective order the following month and had to change both her email and phone number in response to Respondent’s repeated attempts at contact.

Petitioner also testified on her own behalf. She appeared genuine in her testimony and somewhat frightened overall. She stated that she owns a company, Floyd Farm & Home, along with her husband and hired Respondent as lead carpenter in June 2017. For alleged performance issues, Petitioner eventually reduced Respondent’s role in her company from full-time employee to a subcontractor position. Because of her position as owner and human resource director for the company, Petitioner had to communicate with Respondent as “was necessary for daily operation.”

During this time period, Petitioner testified that Respondent “began to display unprofessional and obsessive behavior.” She testified that Respondent tried to court her (both Petitioner and Respondent were married at the time), “constantly sending [her] innuendos via text and showing up unannounced at [her] home.” In November and December 2019, Petitioner testified that Respondent sent such a considerable amount of correspondence that she had to change her phone number and email address.

On December 11, 2019, Petitioner testified that Respondent attempted to contact her in person while she was checking out at the grocery store. Petitioner stated that she attempted to ignore Respondent, but that he followed her out of the store without seemingly making any purchase at the store. Respondent emailed her again the following morning. Petitioner made the request for the original protective order soon thereafter.

On cross-examination by Respondent’s counsel, Petitioner confirmed that she did not request any criminal prosecution against Respondent in 2019. She further confirmed that

Respondent made no explicit threats of physical or sexual violence against her. However, Petitioner did testify that Respondent's actions cumulatively caused her to feel threatened and concerned for the safety of herself and her children.

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Since the protective order was issued, Petitioner testified that while she has had no verbal contact with Respondent, they have had "visual" contact. Petitioner stated that she had seen Respondent in their local community in public multiple times and felt that he was staring at her and her children. She further testified that her five and seven year old children are concerned for their safety as it pertains to Respondent.

Petitioner described Respondent's conduct toward her since the issuance of the protective order as follows: "The nonverbal, just the staring every time I go, every time I drive by, my vehicle goes near him in any way, shape or form, there is absolute staring. I mean it's just an intentional I'm still there at all times, makes his presence very, very noticeable."

Petitioner noted that they live in a "very small town" and sometimes she will see Respondent "flying down the road and whips into the bank and parks his truck directly across the bank [where Petitioner is located], or at the bank parking lot." She described Respondent "staring at me loading my children in my car while I'm getting fuel."

On direct examination from his attorney, Respondent testified that he had not emailed or attempted to contact Petitioner since the issuance of the original protective order. He also denied staring at Petitioner in public during the pendency of the protective order. He also denied attempting to threaten or intimidate Petitioner or her children in that time period.

When presented with the opportunity to cross-examine Respondent, Petitioner (self-represented) shook her head in silence in the negative.

During closing and oral argument, counsel for the Respondent contended that he was unable to locate any case law examining whether the Code section required new or additional evidence be presented on motion for the extension of the protective order. After its own search, the Court has similarly been unable to locate any case law on point.

For this reason, the Court looks to the legislative history of the statute for guidance on its interpretation.

Legislative History of Virginia Code § 19.2-152.10

In April 1997, the Virginia General Assembly codified the ability of victims of stalking to obtain protective orders through the passage of H.B. No. 1886. The passage of this bill resulted in the creation of Virginia Code §§ 19.2-152.8 (Emergency Protective Orders), 19.2-152.9 (Preliminary Protective Orders), and 19.2-152.10 (Protective Orders).

As originally drafted, Virginia Code § 19.2-152.10 set a maximum issuance period of two years for any protective order and did not provide petitioners the ability to seek any extension thereof. Over the course of the next twelve years, the General Assembly did not make any changes to either the maximum length of protective orders issued under this statute nor provide any method by which petitioners might seek an extension.

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In January 2010, the House of Delegates introduced House Bill No. 930 to amend various statutes, including Virginia Code § 19.2-152.10, to provide petitioners the ability to seek extensions on protective orders. As initially introduced, the amended statute would allow a petitioner to make an extension request for not more than one year “if the respondent continues to pose a threat to the health and safety of the petitioner and family...:

“B. The protective order may be issued for a specified period; however, unless otherwise authorized by law, a protective order may not be issued under this section for a period longer than two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Prior to the expiration of the protective order, a petitioner may request that the court extend the protective order. The order may be extended for a period not longer than one year **if the respondent continues to pose a threat to the health and safety of the petitioner and family** or household members of the petitioner at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the one-year period if no date is specified. Nothing herein shall limit the number of extensions that may be requested or issued.”

2010 Virginia Senate Bill No. 468, Virginia 2010 Regular Session (FULL TEXT - NETSCAN)
[Highlights from Code section amendment, bolded for emphasis.]

As it made its way through committees and various houses, the General Assembly extended the “one year” period to “two years” and substituted the language indicating the “if respondent continues to pose a threat” for “to protect the health and safety of the petitioner or persons who are family...”

B. ~~The~~ An **initial** protective order may be issued for a specified period; ~~however, unless otherwise authorized by law, a protective order may not be issued under this section for a period longer than~~ **of time up to a maximum** of two years. The **initial** protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. **Prior to the expiration of the initial protective order, a petitioner may file a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. The court may extend the initial protective order for a period not longer than one year to protect the health and safety of the petitioner or persons who are family or**

household members of the petitioner at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the one-year period if no date is specified. Nothing herein shall limit the number of extensions that may be requested or issued.

2010 Virginia Senate Bill No. 468, Virginia 2010 Regular Session (FULL TEXT - NETSCAN)
[Highlights and strikethrough from Code section amendment, bolded for emphasis.]

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The final amended approved and ratified by the General Assembly kept all of the language of the immediately preceding amendment while extending the maximum period of extension from one to two years:

B. The protective order may be issued for a specified period; ~~however, unless otherwise authorized by law, a protective order may not be issued under this section for a period longer than~~ of time up to a maximum of two years. The protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. **Prior to the expiration of the protective order, a petitioner may file a written motion requesting a hearing to extend the order. Proceedings to extend a protective order shall be given precedence on the docket of the court. The court may extend the protective order for a period not longer than two years to protect the health and safety of the petitioner or persons who are family or household members of the petitioner at the time the request for an extension is made. The extension of the protective order shall expire at 11:59 p.m. on the last day specified or at 11:59 p.m. on the last day of the two-year period if no date is specified. Nothing herein shall limit the number of extensions that may be requested or issued.**

2010 Virginia Senate Bill No. 468, Virginia 2010 Regular Session (FULL TEXT - NETSCAN),
[Highlights and strikethrough from Code section amendment, bolded for emphasis.]

This Court notes that through each stage of the amendment process, the General Assembly did not alter the final line of the amended statute at all: “Nothing herein shall limit the number of extensions that may be requested or issued.” Finally, at each stage from proposal to final passage, the House, Senate, and subcommittees all voted unanimously to pass the amendment. The General Assembly has not made any substantive changes to the statute since its passage in 2010 that would affect the Court’s analysis here.

With this examination of the statute’s legislative history, the Court returns to the primary issue to resolve this appeal: whether Virginia Code § 19.2-152.10(B) requires the introduction of additional or new evidence to support an extension of the protective order.

First, the statute itself does not contain any language on its face that would require the introduction of any additional evidence to support an extension. If the General Assembly had intended for such a requirement, the Court would expect to find such a requirement either in the

explicit text of the statute or in at least one of the various iterations of the amendment. As indicated above, the General Assembly did not include any language in the amended statute nor discuss any such requirement as evidenced in the legislative history.

Second, the Court takes note of the amendment made prior to the eventual passage of Subsection (B) in which the General Assembly altered the basis for the protective order extension. In the initial draft, the House proposed the following language:

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The order may be extended for a period not longer than one year **if the respondent continues to pose a threat to the health and safety of the petitioner and family** or household members of the petitioner at the time the request for an extension is made. (Emphasis added.)

The conditional language in this clause of the proposed amendment suggests that an extension may be granted on the condition that “the respondent continues to pose a threat to the health and safety of the petitioner and family.” The focus of this provision is on the conduct of the respondent and whether a danger has continued from the issuance of the prior protective order to the present. However, the General Assembly amended this language from a focus on the acts of the respondent to the health and safety of the petitioner:

The court may extend the initial protective order for a period not longer than one year **to protect the health and safety of the petitioner or persons who are family** or household members of the petitioner at the time the request for an extension is made. (Emphasis added.)

By removing the specter of “threat” from the calculation and instituting a standard of essentially maintaining the “health and safety” currently in place, the General Assembly granted the Court broad discretion to grant an extension of the initial protective order. The Court may extend such a protective order “to protect the health and safety of the petitioner or persons who are family” instead of focusing its inquiry on whether respondent “continues to pose a threat,” as initially introduced by the amendment.

Third, from a logical perspective, the protective order acts as a shield to protect the petitioner and their family members from an individual who had—at least at the initial issuance—demonstrated an ability or desire to harm, harass, or otherwise jeopardize the safety of the petitioner and/or their family. If the protective order accomplishes its goal, there should be no new or additional evidence for the petitioner to present at a hearing on a motion to extend under Virginia Code § 19.2-152.10(B). Thus, if the Court were to find that petitioner was required to provide new or additional evidence in the wake of an effective protective order, the Court would essential require either (a) evidence of a violation of the prior protective order by the respondent or (b) the prior protective order to lapse and subject the petitioner to possible jeopardy of her “health and safety” so that she could obtain new or additional evidence to support a new protective order.

Based on the legislative history and apparent intent of the General Assembly in unanimously passing Virginia Code § 19.2-152.10—particularly subsection (B)—the Court finds that requiring Petitioner to present new or additional evidence contravenes both the black letter and the spirit of the statute. Here, Petitioner presented credible evidence that she fears for the health and safety of herself and her four minor children as a result of Respondent’s actions that led to the issuance of the prior restraining order. Petitioner testified that she still sees Respondent in public and that, on those occasions, he has stared in her direction and toward her minor children. While

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the Court finds Respondent has not made any efforts to contact her since the protective order has been in place, the Court does note that Petitioner had to change her phone number and email as a result of Respondent’s repeated communications.

Moreover, the fact that both parties remain in the same small community without any material change in circumstance for either side also tips the scale in favor of maintain the status quo. Therefore, the Court finds that Virginia Code § 19.2-152.10(B) does not require Petitioner to supply new or additional evidence in support of her request for an extension of the protective order previously issued in January 2020.

Furthermore, based on Petitioner’s testimony at the hearing on March 8, 2022, the Court finds sufficient grounds to extend the protective order “to protect the health and safety of the petitioner or persons who are family or household members of petitioner” for an additional two years, as allowed under the statute.

For the reasons outlined above, the Court hereby AFFIRMS the extension of the protective order granted by the General District Court on January 20, 2022. Petitioner’s Protective Order shall remain in place until January 20, 2024.

Enclosed is a copy of the protective order that has been extended. The Clerk is to forward a copies of the order to be personally served on the parties.

Very truly yours,

K. Mike Fleenor, Jr., Judge
Floyd County Circuit Court

cc: Clerk of Court

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