RENDERED: JUNE 1, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000876-ME

C. G. APPELLANT

v.

APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 06-D-00020-001

B. J. H. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: C. G. appeals from the dismissal of her petition for a domestic violence order (DVO). The appellant contends that the family court erred in failing to find that an act of domestic violence and abuse occurred and that the family court abused its discretion in dismissing her petition for a DVO. We affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The parties' daughter, M. R. H., was born in January 1998. When the four-year marriage of the appellant and the appellee, B. J. H., was dissolved in November 2002, joint custody of M. R. H. was awarded and the appellant was designated the primary residential custodian. On March 8, 2006, the appellant filed the domestic violence petition underlying this appeal, in which she alleged that the appellee had sexually abused their daughter. An emergency protective order (EPO) was issued restraining the appellee from committing further acts of abuse or threats of abuse and from contacting the appellant. The EPO also temporarily suspended the appellee's visitation rights and awarded temporary custody of M. R. H. to the appellant. An EPO with identical restrictions was issued on March 17, 2006, and was effective through March 31, 2006. The family court conducted a hearing on March 31, 2006, after which it entered an order dismissing the domestic violence petition. At the conclusion of the hearing, the court noted that the appellee had filed in the related dissolution action a motion to modify custody of M. R. H. The family court limited the appellee's visitation with M. R. H. pending its ruling on the motion to modify custody. In this appeal we review solely the dismissal of the domestic violence petition.

A DVO may be entered by a court after a full evidentiary hearing "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred or may again occur . . . ." KRS 403.750(1). The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim "was more likely than not to have been a victim of domestic violence." *Commonwealth*

v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996). The trier of fact "has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part. The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witnesses." *Anderson*, 934 S.W.2d at 278 (citations omitted).

On appellate review of a court's decision to dismiss a domestic violence petition, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See* CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A finding of fact supported by substantial evidence is not clearly erroneous. In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citations omitted), the Kentucky Supreme Court stated that substantial evidence is

> "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

The appellant first asserts that the family court erred in failing to find that she met her burden of proving by a preponderance of evidence that M. R. H. was a victim of domestic violence and abuse. We disagree.

The appellant highlights the evidence supporting her allegations; however, she overlooks the responsibility placed in the family court to hear the testimony, consider the evidence, and make credibility judgments. Regardless of whether this panel would reach the same conclusion as the family court, our task on appeal is to determine whether the family court's finding is clearly erroneous. The parties were afforded a full evidentiary hearing, during which the court asked many questions. The finding that the appellee did not sexually abuse his daughter was supported by testimony of the appellee, a state police detective, the supervisor of the Child Protective Services branch, and a social worker from Child Protective Services. Since the finding is supported by substantial evidence, it is not clearly erroneous.

Next, the appellant contends that the court abused it discretion in disregarding the testimony of Dr. Fay C. McCutchan, M. R. H.'s therapist. She emphasizes the court's statement from the bench at the conclusion of the hearing that it was "flabbergasted" by Dr. McCutchan's recommendation that M. R. H. not see her father for a year and claims that the court disregarded Dr. McCutchan's testimony solely because it disagreed with that recommendation. The record does not support the appellant's argument. The court stated that it was not persuaded by Dr. McCutchan's testimony because she was "unduly influenced by comments of the mother." During the

hearing, the court also noted its difficulties with Dr. McCutchan's recommending that the appellee's visitation rights be suspended for a year based solely on the appellant's information and her therapy sessions with M. R. H., without conferring with school personnel or M. R. H.'s physician.

This Court recently emphasized the "enormous significance" of a DVO petition in *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky.App. 2005). The family court was familiar with the history of the parties, including the dismissal of petitions for a DVO filed previously to the one at issue here. The family court was within its authority to weigh the testimony, make credibility judgments, and conclude that no act of domestic violence and abuse occurred. Since the court's finding is supported by sufficient evidence and is not clearly erroneous, we may not disturb its decision.

The appellant also raises issues concerning the court's orders relating to the appellee's motion to modify custody in the parties' dissolution action. This appeal covers solely the dismissal of the appellant's petition for a DVO, and we have addressed the issues relating to the petition for a DVO. We do not address the arguments relating to the appellee's motion to modify custody as we lack jurisdiction over interlocutory orders. In his brief, the appellee requested this court to strike portions of the appellant's brief. Inasmuch as the appellee did not make this request by a separately-filed motion, we will not strike portions of the briefs, and take no position on those issues.

The family court order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald L. Gulick
Louisville, Kentucky

BRIEF FOR APPELLEE:

Travis Combs, Jr.
Louisville, Kentucky