RENDERED: FEBRUARY 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001539-ME

BRIDGET DASCH APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 05-D-00133

STEVE KELLEY ON BEHALF OF THE
MINOR CHILDREN CAILIN KELLEY
AND CONOR KELLEY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Bridget Dasch appeals the August 12, 2009, domestic violence order ("DVO") entered by the Fayette Family Court. Steve Kelley,

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

Dasch's former husband, obtained the DVO on behalf of their two children. For the following reasons, we vacate and remand for dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

The marriage between Kelley and Dasch was dissolved in Fayette Circuit Court on December 27, 2006. During their marriage, they had a son and a daughter, who, at the time of the incident, were six and three, respectively. Under the provisions of the settlement agreement, which was incorporated into the decree of dissolution, the parents shared joint custody and Kelley's timesharing arrangement was to have the children every other weekend plus Tuesday and Thursday evening from 5:00 p.m. until 8:30 p.m.

Since the entry of the decree, the record shows that Dasch and Kelley have a long court history that is divisive and adversarial. In April 2009, Dasch learned that she would be relocating to Florida because of her current husband's military commitment. She immediately gave notice to Kelley about the move so that they could revise the timesharing plan. Although they have participated in mediation about a change in timesharing, no agreement has been reached between them. Kelley, however, has not filed a motion with the court to change the timesharing arrangement.

Kelley filed a petition for a DVO on July 24, 2009, against Dasch on behalf of the children. On the evening prior to Kelley filing the emergency protective order ("EPO") petition, he discovered red marks on his daughter's bottom while preparing the children for a bath. He reported that, after discovering

the red marks, he asked his son what had happened. Apparently, his son told him that Dasch had yanked his sister by the hair from the tub and spanked her for a long time. In addition, the little boy supposedly told Kelley that his mother told him not to tell anyone and that, if he did, he would be in trouble.

Kelley then contacted his attorney who advised him to take the children to the emergency room and contact the Cabinet for Health and Family Services ("Cabinet"). Nonetheless, he did not contact Dasch after discovery of the red marks or inform her that he was taking the children to the hospital. She only learned the children's whereabouts when dad did not return them after his scheduled timesharing. In fact, Dasch had to contact Kelley to find out that the children were at the hospital.

In the petition for the DVO, Kelley alleged that Dasch had severely spanked her daughter when she discovered that the little girl had painted the bathroom with red fingernail polish. Further, he claimed he was fearful that she might lose control again and physically punish the children. Thereafter, an EPO was issued by the family court and a hearing on the petition was scheduled for August 3, 2009. The EPO awarded temporary custody of the children to Kelley. Subsequently, the hearing was rescheduled to August 12, 2009, at the request of the father.

At the hearing, Kelley put on three witnesses – himself and two Cabinet social workers. During Kelly's testimony about the statements his son made to about the incident, Dasch objected to Kelley's testimony on the basis that

it was hearsay. Initially, the court sustained the hearsay objection but later re-evaluated this ruling. After the re-evaluation, the court ruled that the son's statements to the father regarding the incident were admissible under the hearsay exceptions for statements made for the purpose of medical treatment and exited utterance. Dad then testified as to the son's description of the event.

His next witness was Sonya Tanksley, an investigative social worker for the Cabinet, who was on-call the night of the incident. Tanksley said that upon her arrival at the hospital she spoke with the six-year old son who said that his mother grabbed his sister by the hair out of the tub and spanked her for a long time. Tanksley, however, never spoke directly to the parties' daughter. Additionally, Tanksley stated that red marks like those on the little girl's bottom typically show that the injury is new and conceded that the children had been with dad prior to going to the hospital. After conferring with her Cabinet supervisor, Tanksley was instructed to send the children home with Kelley for the night. Tanksley admitted that she did not review the couple's court records prior to sending the children home with the dad. Tanksley also testified that on that evening she also spoke with Dasch at the hospital. She described Dasch as upset and added that Dasch did not want the children to go home with dad. According to Tanksley, Dasch was not cooperative.

Kelley's last witness was Lashonda Jackson, an investigative caseworker for the Cabinet. She said that she went to see dad, mom, and the children four days after the hospital visit. Jackson commented on the day of her

visit the marks had faded with some slight bruising in the area. As was the case with Tanksley, Jackson had not reviewed the parties' court records prior to meeting with everyone. Importantly, Jackson opined that, although it was her belief that mother did spank the child, she also thought that the spanking was a one-time event, would not occur again, mom was not a danger to the children and would not physically punish the children again. Interestingly, neither Cabinet social worker chose to remove Dasch's infant daughter from her during the pendency of the action. At the end of Kelley's case, Dasch moved for a directed verdict, which the court denied.

Next, Dasch presented her case. She stated that she never spanked her children and did not believe in corporal punishment. Further, Dasch explained that in the past she has requested several times that Kelley and his wife not spank the children. On the day in question, she was preparing to bath the children when she discovered that her daughter had painted the bathroom with nail polish. While Dasch admitted raising her voice to her daughter, she claimed that she sent her daughter to her bedroom but did not spank her. At that time, Dasch called a neighbor to get advice on how to remove the polish. Apparently, the neighbor asked if she had spanked the child, and Dasch said that she had not. She, then, pursuant to the timesharing agreement with Kelley, delivered the children to him. Dasch also testified that there was a long history of dad making accusations against her when things did not go his way, and this incident was not the first time that Kelley made a complaint about her to the Cabinet.

Next, Jonathan Keller testified on behalf of Dasch. He was the next door neighbor that she called to get advice about nail polish removal. Keller corroborated her testimony and said that when he asked her if she spanked the little girl, Dasch said that she had not spanked her daughter as that would not have been helpful. Keller, further, said that he had never seen her spank her children and that he knew she had a strong aversion to corporal punishment. Dasch's next witness was Brenda Mulcahy. Mulcahy had been supervising mom's visit with the children since the issuance of the EPO. Mulcahy said she had never seen Dasch spank her children and found it hard to believe mom would spank them.

At the end of the testimony, the court entered its finding that it believed that mom spanked the child, and additionally, the court found that the mother's denial of the spanking indicated that an act of domestic violence was likely to occur again. Then, the court went on to order a modification of the timesharing between the parties. Previously, Kelley had the children every other weekend from Friday night to Sunday night plus every Tuesday and Thursday evening from 5:00 to 8:30 p.m. The court, however, although making no finding that it was in the best interest of the children to modify the timesharing, changed the timesharing agreement and provided Kelley with more time. In the DVO, Dasch was ordered to: 1) not commit further acts of domestic violence and abuse; 2) not dispose of or damage any property of the parties; 3) receive assessment and treatment; and also, the DVO modified the timesharing so that Kelley now had the children after school on Tuesday and Thursday, including overnight, and every

other weekend through the Monday morning. The DVO was ordered in effect until August 12, 2012. This appeal follows.

ISSUE

Dasch contends that, the court's findings in the case are flawed. First, she contends that the DVO failed to meet the standard set forth in KRS 403.750. Next, Dasch maintains that the court erred by failing to grant her motion for directed verdict at the close of Kelley's case. Furthermore, she claims the court incorrectly entered evidence, which could be characterized as hearsay, on two different occasions. Finally, Dasch makes the case that the court erred by modifying the timesharing agreement between the parties in a manner that is inconsistent with KRS 403.320 and 403.270. Conversely, Kelley argues that sufficient evidence existed for the entry of the DVO; the court properly denied the motion for directed verdict; the purported hearsay evidence was properly admitted; and lastly, the court properly modified the timesharing arrangement.

STANDARD OF REVIEW

The appellate standard of review for a family court's factual determinations is whether the findings were clearly erroneous. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id*. Finally, a reviewing court shall not set aside findings of fact unless clearly

erroneous, and shall give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Kentucky Rules of Civil Procedure (CR) 52.01.

ANALYSIS

Prior to entry of a DVO, the court must find "from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and 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.'" *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). In addition, Kentucky statutory law defines "'[d]omestic violence and abuse' [as] physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]" KRS 403.720(1).

As discussed in *Rankin v. Criswell*, 277 S.W.3d 621, 624 (Ky. App. 2008), domestic violence proceedings are not criminal matters, but the consequence for both parties are very significant. The consequences of the court granting a DVO to both parties was artfully described in *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005):

> If granted, it may afford the victim protection from physical, emotional, and psychological injury, as well as from sexual abuse or even death. It may further provide the victim an opportunity to move forward in establishing a new life away from an abusive relationship. In many cases, it provides a victim with a court order determining custody, visitation and child support, which he or she

> might not otherwise be able to obtain. The full impact of EPOs and DVOs are not always immediately seen, but the protection and hope they provide can have lasting effects on the victim and his or her family.
>
> On the other hand, the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator. To have the legal system manipulated in order to "win" the first battle of a divorce, custody, or criminal proceeding, or in order to get "one-up" on the other party is just as offensive as domestic violence itself. From the prospect of an individual improperly accused of such behavior, the fairness, justice, impartiality, and equality promised by our judicial system is destroyed. In addition, there are severe consequences, such as the immediate loss of one's children, home, financial resources, employment, and dignity. Further, one becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be.

Thus, we conclude, notwithstanding the large numbers of domestic violence cases in family courts, it is still paramount that the courts provide each party with a full evidentiary hearing.

In examining this record, we must ascertain whether the court accurately determined that Kelly met the burden of proof by a preponderance of the evidence. The proof must have established that Dasch inflicted an act of domestic violence on her children and may do so again. Clearly, the parties dispute the most essential element of the case – whether Dasch spanked her daughter. The record contains a picture of the child's injury, which cannot be contraverted. But Dasch denies spanking the child and provided testimony from a

contemporaneous witness, Keller, who spoke with her on the phone immediately following the nail polish incident. He says that, following his query about whether Dasch spanked the little girl, Dasch denied doing so. In short, dad says she spanked the little girl, and mom says she did not spank her.

Furthermore, all evidence presented to the court about the actual act of domestic violence was based on the secondhand statements of Kelley and Dasch's six-year old son. Besides the picture of the child's bottom, the only evidence in this case was the son's statements. In other words, the court never heard directly from the child. While we are not suggesting the child should have been required to testify, the nature of the evidence, reports of his statements, weakens the reliability of the proof about what happened.

Moreover, we cannot fail to recognize that the parties were engaged in a very contentious relationship. Kelley and Dasch appeared to be in constant conflict about the children including disputes about the children's discipline, timesharing arrangement, and medical treatment. Moreover, regarding past domestic violence, the only previous protective order was one to protect Dasch. And, according to both parties, Kelley was the one who used corporal punishment against the children. Further, they had sought court and state intervention on more than one occasion. In fact, we find it worthy to note that around 7:00 p.m., minutes before the father reported his daughter's red bottom to his attorney, he emailed Dasch about a timesharing issue.

As previously referred to, "[t]he 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.'" *Baird,* 234 S.W.3d at 387. It is our task to determine whether the court's finding that the mother committed an act of domestic violence is supported by substantial evidence; that is, "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998) (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). Although a different finding might or been made whether that the mother committed an act of domestic violence, we will not substitute our opinion for that of the court. Therefore, we accept the court's finding on that issue.

But now we address the second element necessary for the issuance of a domestic violence order, that is, the court must also find that such an act "may again occur." With regard to the second element, the evidence is extremely weak and virtually non-existent. Granted the likelihood of future domestic violence is a difficult element to prove, nonetheless, in making such a determination, a court is able to consider the nature and extent of the underlying act of domestic violence, any past history of domestic violence or protective orders, and the petitioner's reasonable fear of the perpetrator based upon past actions. First, examining the act itself, we observe that it was a spanking which was a one time event. The past history between the parties shows no previous domestic violence by the mother.

Indeed, the only past history is that the father has spanked the children before, and the mother had a DVO against him to protect herself. Finally, in terms of the children's fear of the mother, the only party that testified that the children feared the mother was Kelley. Other witnesses claimed that the children's behavior showed that they wanted to be with their mother. Kelley himself admitted that he had never seen Dasch spank the children and he knew she was against corporal punishment. Finally, and most significant, Kelley's own witness, Jackson, the on-going social worker in the case stated that she believed that the spanking was a one-time, isolated occurrence, and would not occur again. Jackson went on to say that mom was not a danger to the children and would not physically punish the children again. The court's opinion was that the mother's denial about the spanking compelled a finding that abuse might occur again. In light of the record and the testimony, we believe that substantial evidence was not provided to support the family court's conclusion that an act of domestic violence may occur in the future, and that the court's finding were erroneous on that element. Consequently, we vacate the DVO.

Although the remaining contested issues are moot as we have vacated the DVO, we will briefly address them. Dasch argues that her motion for directed verdict at the close of Kelley's case should have been granted. For a trial court to grant a directed verdict the requirements are to "consider the evidence in its strongest light in favor of the party against whom the motion was made and must give [that party] the advantage of every fair and reasonable intendment that the

evidence can justify." *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 775 (Ky. App. 2000) (*quoting Lovins v. Napier,* 814 S.W.2d 921, 922 (Ky. 1991). Given that "a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ**[,]"** we believe, in the case at hand, that the court did not err in denying the directed verdict motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

Second, we recognize that a dispute existed as to whether certain statements by Kelley were properly admitted under exceptions to the hearsay rules. Clearly, a DVO petition is subject to the same evidentiary standards as other forms of evidence. *See Dawson v. Com.*, 867 S.W.2d 493, 496-497 (Ky. App. 1993). Here, having reviewed the record, listened to the hearing, and reviewed the briefs, we observed that the issue and the rulings are very confusing. Since we have vacated the DVO, it is not necessary for us to make a determination as to the correctness of the court's rulings on hearsay. Furthermore, Dasch did not object to the social workers' testimony about what her son said to them so that the issue was not preserved for our review and, as such, is harmless error. But we must caution that it is imperative for trial courts to allow only admissable statements under the evidentiary rules.

The final issue for our review is whether the court erred in modifying the timesharing agreement between the parties. As we are vacating the DVO, the modification of the timesharing agreement reverts to the previous agreement and

our discussion has no impact. Nonetheless, we believe that the court erred in its modification of the timesharing based on the DVO petition. After the court entered the DVO, it entertained the in-court request by Kelley to modify the timesharing. Although a court through a DVO is permitted to modify the custody and visitation arrangements under KRS 403.750, KRS 403.320, and KRS 403.270, it must comply with the formalities imposed by these statutes. Here, the family court did not comply with them. The hearing itself shows that dad requested a change in timesharing, and his request was granted. Nothing was stated showing the change to be related to the entry of the DVO or in the best interests of the children. It is imperative that if timesharing arrangements are to be changed through the DVO process, the court follow the statutory strictures, provide a rationale for ordering temporary custody and show it is in the best interest of the children.

CONCLUSION

Despite our usual deference to a trial court's factual findings, in this case, we conclude that the court's finding about whether domestic violence may occur again is clearly erroneous as the appellant did not meet the preponderance of evidence standard. Accordingly, we vacate the DVO entered against Dasch and remand this case to Fayette Family Court for entry of an order dismissing the August 12, 2009 DVO.

ALL CONCUR.

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