

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

CLAYTON R. HICKS,	:	
	:	
Petitioner-Appellee,	:	CASE NO. CA2008-12-151
	:	
- vs -	:	<u>OPINION</u>
	:	5/26/2009
	:	
AMANDA Y. BARKER,	:	
	:	
Respondent-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 08DV3954

Vicki L. Richmond, 1248 Nilles Road, Suite 7, Fairfield, Ohio 45014, for petitioner-appellee
Steven M. Runge, 401 South Main Street, Franklin, Ohio 45005, for respondent-appellant

HENDRICKSON, J.

{¶1} Respondent-appellant, Amanda Barker, appeals a decision of the Warren County Court of Common Pleas, Domestic Relations Division, granting a petition for a domestic violence civil protection order filed by petitioner-appellee, Clayton Hicks, on behalf of the parties' two minor children. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} Amanda and Clayton (respectively, "Mother" and "Father") were divorced in

February 2007. The couple retained shared parenting over their two minor children: Ja.H., born March 2, 1999 and Jo.H., born May 27, 2004. The present matter arose when Father picked up the children from an overnight visit at Mother's house on July 9, 2008. At this time, Father noticed bruises on then four-year-old Jo.H.'s left side and hip.

{¶3} Father filed for and was granted an ex parte temporary protection order against Mother on July 10, 2008. The ex parte order named both children as protected persons. After conducting a full hearing on the matter, the magistrate released a decision on September 8, 2008 issuing a five-year domestic violence civil protection order ("DVCPO"). The DVCPO named both children as protected persons and specified that Mother's parenting time would have to be supervised by her mother or grandmother. The order made the following findings of fact:

{¶4} "Respondent violated O.R.C. Section R.C. 3113.31 [the domestic violence statute] when she repeatedly struck [Jo.H.] with a plastic spoon causing bruising and redness on the left side of the child's back. Respondent's actions went beyond corporal punishment. There is a serious risk of harm to both children as Respondent admitted that using the plastic spoon is her chosen discipline method and Respondent admits difficulty in controlling the children, especially the youngest."

{¶5} Mother timely filed objections to the magistrate's decision. In an entry filed on November 12, 2008, the trial court overruled Mother's objections and adopted the magistrate's decision. While the trial court agreed that the punishment imposed was excessive, the court found that Jo.H. was not at a substantial risk of serious physical harm under the circumstances. The court nonetheless upheld the magistrate's decision on the basis that Mother's method of punishment created a substantial risk that the mental health or development of the children would be impaired if such punishment continued. Mother timely appeals, raising one assignment of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED IN FINDING THAT THE CHILDREN ARE IN DANGER OF OR HAVE BEEN A VICTIM OF DOMESTIC VIOLENCE AS DEFINED IN OHIO REVISED CODE 3113.31(A) AND ISSUING A CIVIL PROTECTION ORDER AGAINST APPELLANT."

{¶8} Mother disputes the trial court's finding that the children are in danger of or have been victims of domestic violence and asks this court to reverse the trial court's decision granting the DVCPO. According to Mother, the trial court's finding that Jo.H. is an abused child as defined by R.C. 2919.22(B)(4) is against the manifest weight of the evidence.

{¶9} A trial court may properly grant a protection order where it finds that the petitioner has shown by a preponderance of the evidence that the petitioner, or the petitioner's family or household members, are in danger of domestic violence. *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, paragraph two of syllabus. R.C. 3113.31(A)(1) enumerates the types of conduct that constitute domestic violence, including "[c]ommitting any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code[.]" R.C. 3113.31(A)(1)(c).

{¶10} In making its domestic violence finding, the magistrate focused upon the physical repercussions of Mother's conduct. Revised Code section 2151.031(C) defines an "abused child" as one who exhibits evidence of physical injury, excluding evidence of corporal punishment if such punishment is not prohibited by R.C. 2919.22. Accordingly, a parent who takes disciplinary action in the form of corporal punishment does not commit child abuse unless the action is barred by R.C. 2919.22, the child endangering statute. R.C. 2919.22(B)(3) prohibits all persons from administering corporal punishment which is excessive under the circumstances and creates a substantial risk of serious physical harm to

the child.

{¶11} A "substantial risk" is a strong possibility that a certain result may occur. R.C. 2901.01(A)(8). "Serious physical harm to persons" means any of the following:

{¶12} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶13} "(b) Any physical harm that carries a substantial risk of death;

{¶14} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶15} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶16} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

{¶17} As stated, the trial court upheld the DVCPO on different grounds. In making its domestic violence finding, the trial court focused more on the mental repercussions of Mother's conduct. The court cited R.C. 2151.031(D), which defines an "abused child" as one who suffers physical or mental injury that harms or threatens to harm the child's health or welfare due to the acts of his parents. The court also cited R.C. 2919.22(B)(4), which prohibits all persons from repeatedly administering unwarranted disciplinary measures when there is a substantial risk that such conduct, if continued, will seriously impair or slow the child's mental health or development.

{¶18} In reviewing the issuance of a protection order, the standard employed by an appellate court is contingent upon the nature of the challenge to the order. *Tabor v. Palacio*, Butler App. No. CA2007-01-002, 2008-Ohio-349, ¶17, quoting *Abuhamda-Sliman v. Sliman*, 161 Ohio App.3d 541, 2005-Ohio-2836, ¶9. Due to the fact that R.C. 3113.31 expressly

authorizes courts to fashion protection orders that are suited to the circumstances of a case, a trial court's decision on the scope of a protection order will not be overturned absent an abuse of discretion. *Ferris v. Ferris*, Clermont App. No. CA2005-05-043, 2006-Ohio-878, ¶26.

{¶19} On the other hand, a dispute regarding whether a protection order should have been granted at all necessarily entails a different standard. *Tabor* at ¶17. This is because the resolution of a challenge to the issuance of a protection order depends upon whether the petitioner has shown by a preponderance of the evidence that the petitioner, or the petitioner's family or household members, are in danger of domestic violence. *Id.* Therefore, an appellate court addressing such a challenge must determine whether there was sufficient, credible evidence to support the finding that the respondent engaged in acts or threats of domestic violence. *Id.* at ¶18. In view of the fact that Mother challenges the very issuance of the DVCPO, this is the standard we employ in the case at bar.

{¶20} The majority of the evidence consists of testimony elicited at the final hearing. We note that the trial court is in the best position to weigh the testimony and observe the witnesses' demeanor in order to gauge their credibility. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138. Thus, this court must not substitute its judgment for that of the trial court when there is competent and credible evidence supporting the trial court's findings of fact and conclusions of law. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶21} Father testified that he observed two significant bruises on Jo.H. after he retrieved the children from Mother's home on July 9, 2008. One was located on the left side of Jo.H.'s back, around the kidney area, and the other was on her hip. Each bruise was about two inches in diameter. Father opined that the bruises looked fairly fresh. Concerned, he photographed the bruises and took Jo.H. to see the family physician. Jo.H. was examined, but no treatment was prescribed.

{¶22} Although Father and Mother both admit to using corporal punishment to discipline the children, Father testified that he only used his hand. He stated that Mother told him she used a spatula to spank the children because spanking them by hand hurt her hand.

{¶23} Warren County Children's Services Board ("WCCSB") caseworker Gary Miller interviewed the children and Mother in the course of his investigation into the alleged abuse. Miller viewed Jo.H.'s bruises shortly after Father reported the matter and also opined that the bruises were fairly recent. Miller testified that Mother changed her story when attempting to explain the bruises. The first explanation Mother gave was that Jo.H. fell at a restaurant about a week and a half prior to Father noticing the bruises. Mother said she took Jo.H. to the hospital after this fall. Miller reviewed the hospital records, and found them to be inconsistent with Jo.H.'s bruises. When confronted, the second explanation Mother gave was that Jo.H. was a very active child who was always falling and running into things.

{¶24} Miller also testified that he directly questioned Mother about hitting the girls with a spoon. Mother showed Miller the plastic serving spoon she used to discipline Jo.H. on the day in question. Mother admitted that she used the spoon to discipline the children on more than one occasion, but insisted that she spanked the girls with the spoon on the buttocks only. Nonetheless, Miller testified that the location of Jo.H.'s bruises, on her mid torso, is not consistent with spanking on the buttocks. Miller stated that the shape of the spoon appeared to be consistent with the size and shape of Jo.H.'s bruises. He agreed that a certain amount of force was necessary to cause that type of bruising, and opined that such a form of discipline was not appropriate.

{¶25} Miller stated that the disposition choices afforded to WCCSB caseworkers after investigating allegations of child abuse are "unsubstantiated" (meaning the abuse did not occur), "indicated" (meaning the evidence supports that the abuse occurred, but the perpetrator did not admit to it), and "substantiated" (meaning the abuse did occur). From his

investigation, Miller made a finding that there was indicated abuse of Jo.H., perpetrated by Mother.

{¶26} Finally, Mother testified that Jo.H. is not as responsive to discipline as Ja.H. According to Mother, Jo.H. is more rambunctious and gets into trouble more often than her sister. Mother admitted that she had a hard time dealing with Jo.H., and stated that the child responded better to spankings than to timeouts.

{¶27} Mother also testified regarding the events surrounding the day of the alleged abuse. She stated that Jo.H. had been told numerous times to stop doing things. Jo.H. was in and out of the refrigerator, dumping juice on the floor, and fighting with her sister. Mother tried timeouts, and warned Jo.H. of a possible spanking. When Jo.H. still did not listen, Mother stated, she took the spoon and struck the child three or four times on the buttocks. All of this occurred in a span of about 45 minutes.

{¶28} We note that there were a number of inconsistencies in Mother's testimony. First, Mother's testimony was unclear as to how often she used the spoon to discipline Jo.H. Further discrepancies surrounded Mother's testimony about observing bruises on Jo.H. On direct examination, Mother admitted that she saw bruises on Jo.H. after imposing the punishment on the day in question. Also on direct, Mother claimed she had not noticed any bruises when she used the spoon to discipline the children before. However, on cross-examination, Mother testified that Jo.H. developed bruises on prior occasions when she was hit with the spoon. Mother maintained that she did not see bruising on Jo.H. after spanking her with the spoon on the day in question. Yet, also on cross, Mother explained that the bruises she viewed on Jo.H.'s back around the time of the punishment were actually sustained when Jo.H. fell from a fence eight days earlier.

{¶29} Mother also seemed to waiver on her stance on corporal punishment by spoon during her testimony. Mother admitted to using the spoon because spanking by hand hurt

her hand. She agreed that the spoon spanking was inappropriate in certain circumstances, and was not appropriate if it left bruises. However, at the close of cross, she said that she still felt that it was appropriate to spank the children with a spoon.

{¶30} In *Clark v. Clark* (1996), 114 Ohio App.3d 558, this court reversed a trial court's decision finding that Mr. Clark had abused his nine-year-old daughter, Nicole. Clark punished Nicole by swatting her with a paddle, which left a welt and a bruise on Nicole's right buttock. Despite finding that the punishment was clearly excessive, this court found that Clark's conduct did not create a substantial risk of serious physical harm to Nicole. No photographs were taken, nor was Nicole taken to a doctor. In addition, there was no evidence that Nicole was in great pain, had trouble sitting or walking, or suffered any incapacity, disfigurement, or substantial risk of death. The *Clark* decision emphasized that the holding in that case was narrow and confined to the facts of the case.

{¶31} We find that *Clark* is distinguishable from the present matter in that the present matter involves injuries inflicted on an area other than the buttocks. A significant factor in determining the risk of serious physical harm for purposes of R.C. 2919.22(B)(3) is the location of the injury. Injuries inflicted upon areas of the body which are in the immediate vicinity of vital organs creates a substantial risk of serious physical harm to the child that is not present when the punishment is administered to a child's buttocks. This matter is more akin to this court's decision in *State v. Burdine-Justice* (1998), 125 Ohio App.3d 707, although less severe.

{¶32} The evidence in this case demonstrates that at least one of Jo.H.'s bruises was located around the kidney area. During her interview with caseworker Miller, Mother never alleged that the location of the bruises was accidental because Jo.H. was struggling to avoid the spanking. In fact, Mother testified that she held the child down while she administered the punishment. The bruising is evidence of the force used to strike the young child with the

spoon. In order to inflict injuries with a plastic spoon, considerable force must be used in delivering the blows. In addition, Mother has displayed a pattern of force in disciplining the children, admitting that she hurt her own hand in delivering punishments and that she "whipped" the children regularly. Such force, applied to areas of the body housing vital organs, supports a finding that there is a substantial risk of serious physical harm to the child.

{¶33} "The propriety and reasonableness of corporal punishment in each case must be judged in light of the totality of the circumstances." *State v. Hart* (1996), 110 Ohio App.3d 250, 256. In view of the facts and circumstances of this case, we agree that the punishment imposed by Mother on Jo.H. was excessive under the circumstances and created a substantial risk of serious physical harm to the child. See R.C. 2919.22(B)(3). The injury to an area of Jo.H.'s body housing a vital organ supports this finding.

{¶34} We conclude that the record contains sufficient, credible evidence to support the finding that Mother engaged in acts or threats of domestic violence against Jo.H. *Tabor*, 2008-Ohio-349 at ¶18. Similarly, there was sufficient, credible evidence to support the domestic violence finding in relation to Ja.H. in view of this court's holding that "placing children in an environment where there is a substantial risk to their health and safety constitutes one form of domestic violence." *Ferris*, 2006-Ohio-878 at ¶28. While this court may not have imposed the considerable restriction of supervised visitation upon Mother, we do not find that the trial court erred in issuing the DVCPO.

{¶35} Mother's sole assignment of error is overruled.

{¶36} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *Hicks v. Barker*, 2009-Ohio-2445.]