

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003130-MR

COURTNEY L. GOULD

APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE HON. DENNIS A. FRITZ, JUDGE
ACTION NO. 99-D-00034

DWAINA L. BURKHARDT

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: HUDDLESTON, KNOPF and MILLER, Judges.

KNOPF, Judge: Courtney Gould appeals from a domestic violence order issued by the Trimble Circuit Court on November 5, 1999, ordering him to avoid telephone and physical contact with Dwaina Burkhardt other than reasonable contact for pick-up and delivery of the parties' child for purposes of visitation. Having concluded that the circuit court did not err, we affirm.

The parties engaged in a extramarital relationship that resulted in the birth of a son in January 1998. Shortly thereafter, they separated and Courtney filed a complaint in March 1998 in Henry Circuit Court concerning paternity, child

custody, child support, and property matters. On March 13, 1998, the circuit court held a hearing on a domestic violence petition filed by Dwaina alleging physical and domestic abuse by Courtney. On March 23, 1998, the circuit court issued an order with factual findings that, inter alia, awarded the parties joint custody of their son with Dwaina as primary residential custodian, granted Courtney visitation, and imposed a domestic violence order (DVO). Under the DVO, Courtney was required to avoid contact with Dwaina except for purposes of facilitating visitation. Although the court initially set a 90 day period for the DVO, Dwaina voluntarily agreed to termination of the DVO after 30 days.

Nevertheless, the parties continued to experience acrimonious relations that led to Dwaina filing another DVO petition on October 1, 1999, in Trimble District Court. In the petition, she alleged that Courtney was harassing her, that he filed a false report with the Department of Social Services alleging she had struck and injured the parties' child, and that she was afraid for herself and the child. The district court issued an emergency protective order (EPO) the same day temporarily suspending child visitation. On October 19, 1999, a trial commissioner held a hearing and reinstated partial visitation. On November 2, 1999, the district court held a another hearing on the petition. The district court ordered continuation of the EPO and suspended all visitation pending a hearing in circuit court.

On November 5, 1999, the circuit court conducted an evidentiary hearing on the petition. Dwaina's attorney argued

that Courtney had engaged in a pattern of harassing and threatening activity for the past two years. Dwaina testified that she had obtained an EPO in the past based on physical abuse, that there was a pending assault case against Courtney, and that she continued to have problems with Courtney dealing with exchange of their child for visitation. She stated that over the previous few months, Courtney had called her repeatedly on her cellular phone up to 15 times a day. She also recalled one incident where he indicated that he was following her on the highway while speaking with her on the cell phone. Dwaina stated that Courtney had filed a false report with the Cabinet for Families and Children accusing her of hitting their child in the face and causing his nose to bleed. Counsel offered a report of the investigation into Courtney's allegation finding that the complaint was unsubstantiated.¹ He also offered notes from a family physician disputing Courtney's claim that the child had suffered an injury to its nose. Dwaina also stated that Courtney had left a voice-mail message at her place of employment that was distributed to several of her co-workers accusing her of having struck and injured the parties' child. She said Courtney had told her that he would kill anyone that tried to take the child away from him, and that if anything happened to her then "the child would be all his." Dwaina testified that she feared for her own safety and her son's safety. She indicated that she

¹ The Cabinet filed a criminal complaint in district court charging Courtney with filing a false report.

believed Courtney could possibly hurt their son and blame it on her in order to obtain custody or greater control over the child.

Courtney testified that Dwaina had lied about his conduct in order to keep him from seeing his son. He stated that she was exaggerating the number of times he telephoned her and that she had lied about his past activity. He stated that most of his telephone calls were merely responses to telephone calls from Dwaina. He said that he was not intentionally following her but he sometimes saw her on the road because they traveled the same area. Courtney repeated his accusation that Dwaina had hit their son and described the incident. He disputed the physician's statements and the Cabinet investigator's report concerning his complaint about Dwaina striking their child. He indicated that he had not intended to distribute the voice-mail message about his accusation to others at Dwaina's workplace.

Following the testimony and the arguments of counsel, the circuit court found that the statutory requirements had been met and issued a DVO ordering Courtney to avoid cellular telephone contact with Dwaina, to withdraw immediately in any accidental public meeting, and to remain at least 250 feet away from Dwaina and her family except for reasonable contact for pick-up and delivery of their child. This appeal followed.

Courtney challenges the DVO on two grounds involving subject matter jurisdiction and sufficiency of the evidence. First, he contends that the circuit court did not have jurisdiction to issue the DVO. He cites KRS 403.725(1), which provides for filing of verified domestic violence petitions in

the district court in the county where the petitioner lives. He acknowledges that under KRS 403.725(4), a circuit court in which a marriage dissolution or child custody action is pending has jurisdiction to issue a protective order, but he maintains that no such action was pending in Trimble Circuit Court. Thus, he concludes that only the Trimble District Court had subject matter jurisdiction to issue a DVO in this case. We disagree.

As Dwaina points out, KRS 403.735(3)(c) allows for joint jurisdiction by district and circuit courts pursuant to a local protocol reviewed and approved by the Kentucky Supreme Court. The Kentucky Supreme Court has approved a Domestic Violence protocol for the 12th District and Circuit Courts in Henry, Oldham, and Trimble Counties. Section IV of the protocol dealing with removal of domestic violence cases to the circuit court provides in relevant part as follows:

B. If the parties to a domestic violence case have pending within this Circuit a dissolution or child custody action, the District Judge presiding at the EPO hearing shall remove the case to Circuit Court upon the request of either party. The presiding District Judge may remove the case sua sponte if, in his or her opinion, the domestic violence matter presents issues so intertwined with the Circuit Court action as to require a Circuit Judge's order for final resolution. (Emphasis added.)

At the beginning of the November 1999 hearing before the circuit court judge, the attorneys indicated that the district court had transferred the case to the circuit court because there was a pending child custody action involving these parties in Henry Circuit Court. We note that at the time, Judge Fritz was the only circuit court judge in the 12th circuit and

had presided over the circuit court action in Henry County. While it is unclear whether the district court transferred the case to the circuit court upon the request of a party or sua sponte, we believe the circuit court had jurisdiction to hear the matter and issue a DVO in this case pursuant to KRS 403.735(c) and the 12th Circuit local protocol.

Courtney's second issue concerns the sufficiency of the evidence to support the DVO. Under KRS 403.750(1), a court may issue a DVO "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur. . . ." KRS 403.720(1) defines "domestic 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. . . ." In discussing the preponderance of evidence standard of proof in KRS 403.750(1), the Supreme Court stated:

It merely requires that the evidence believed by the fact-finder be sufficient that the defendant [petitioner] was more likely than not to have been a victim of domestic violence.

It has long been held that 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.

Commonwealth v. Anderson, Ky., 934 S.W.2d 276, 278 (1996) (citations omitted).

In the current case, the circuit court thoroughly analyzed the requirements of the statute in finding that Dwaina had established by a preponderance of the evidence that acts of domestic violence and abuse had occurred and may occur in the future. It felt that Courtney's acts had created an atmosphere of veiled intimidation and that he had exhibited an intense desire to control the situation involving his visitation with the child. The court relied primarily on the two incidents involving Courtney's cellular phone call to Dwaina indicating that he was watching or following her on the roadway and his leaving a message at Dwaina's workplace accusing her of striking her child.

Viewing the evidence as a whole, we believe there was sufficient evidence to support the issuance of a DVO. The two incidents emphasized by the circuit court indicate Courtney's attempt to intimidate Dwaina and threaten her status as primary residential custodian of their child. Although the court relied primarily on these two incidents, other evidence indicated that Courtney had repeatedly called Dwaina on the telephone, had assaulted her in the past, had stated he would do anything to prevent anyone from taking the child from him, and had filed a false report accusing Dwaina of child abuse. The circuit court judge had issued an earlier DVO in the paternity/custody action and was familiar with the acrimonious relationship of the parties. Dwaina testified that she feared physical harm to herself or to her child from Courtney's desire for and possible attempt to gain control over the child. As indicated earlier, the circuit court is free to weigh the evidence and determine the

credibility of the witnesses. Especially in the area of domestic violence, trial courts must be given flexibility and discretion in dealing with difficult issues in order to prevent possible injury. The DVO restricted contact between the parties but allowed Courtney to continue the previously established visitation schedule. We believe the evidence supported the issuance of a DVO and the limited restrictions imposed by the court.

For the foregoing reasons, we affirm the order of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Grant M. Helman
Smith & Helman
Louisville, Kentucky

BRIEF FOR APPELLEE:

Armand I. Judah
Louisville, Kentucky