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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000578-ME

ALISHIA MICHELLE OGLESBY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 08-D-00020

MATTHEW STEVEN LUCKETT

APPELLEE

AND: NO. 2008-CA-000579-ME

ALISHIA MICHELLE OGLESBY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NOS. 08-D-00017 & 08-D-00021-001

JOHN THOMAS OGLESBY

APPELLEE

OPINION
VACATING AND REMANDING
APPEAL NO. 2008-CA-000578-ME
&
AFFIRMING APPEAL NO. 2008-CA-000579-ME

** ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Alishia Michelle Oglesby (“Alishia”) appeals from two domestic violence orders (“DVO”) entered against her by the Hopkins Circuit Court. Although Alishia filed separate appeals, the two cases share common facts and will be heard together.

Appellee Matthew Steven Luckett (“Matthew”) is Alishia’s ex-husband. They have a thirteen-year old son, M.L., of whom they share joint custody. Appellee John Thomas Oglesby (“John”) is Alishia’s current husband.¹ John and Alishia have two sons, M.O., age two, and D.O., age ten.

On February 4, 2008, John filed a domestic violence petition against Alishia on behalf of himself and their children, alleging physical and mental abuse by Alishia. On February 5, 2008, Matthew filed a domestic violence petition against Alishia on behalf of M.L. and himself, alleging Alishia was not taking care of M.L. Alishia, who had moved to Clarksville, Tennessee, with the children, was served with an emergency order of protection and summons in both cases.

On February 18, 2008, the Hopkins Circuit Court held a lengthy combined hearing on both petitions. The court heard testimony from John,

¹ John and Alishia filed for divorce in January 2008.

Matthew, Alishia, Alishia's friend, William Dial, and a social worker from the Cabinet for Health and Family Services. At the conclusion of the hearing, the court issued a one-year DVO against Alishia restraining her from contacting Matthew and granting him temporary physical custody of M.L. The court also issued a one-year DVO restraining Alishia from contacting John and granting him temporary physical custody of M.O. and D.O. These appeals followed.

Pursuant to KRS 403.750, the court may enter a DVO following a hearing "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[.]" Under the preponderance standard, the court must conclude from the evidence that the 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). Further, 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 . . . [.]". On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

I.

***Oglesby v. Luckett*, 2008-CA-000578**

We first address the DVO entered against Alishia on behalf of Matthew and M.L. She contends that the order must be vacated because there was no evidence she committed acts of domestic violence against them. After careful review, we agree.

At the hearing, Matthew testified that he believed M.L. suffered domestic violence while with Alishia because M.L. excessively missed school and used drugs. Matthew also testified that, when Alishia moved out of the Oglesby residence, she left M.L. at a friend's house for three days. Matthew further acknowledged that he became worried about M.L. after members of John Oglesby's family told him that D.O. sustained bruises and a shoulder injury in Clarksville.

Alishia refuted Matthew's allegations, but acknowledged that M.L. sometimes fought with his stepfather, John. Alishia testified that she left the marital home with M.L. on January 19, 2008, because M.L. and John were involved in a physical altercation. She testified that, after leaving John, she and the three children moved to Clarksville.

We have carefully reviewed the record, and are compelled to conclude that the evidence does not support the court's finding that "an act(s) of domestic violence or abuse has occurred and may again occur." Matthew did not allege, nor was there evidence, that Alishia committed any act of domestic violence or abuse against him. Furthermore, Matthew's testimony regarding Alishia's actions toward

M.L. did not constitute domestic violence as defined in KRS 403.720(1).² A

Domestic Violence Order is no trivial matter. In *Wright v. Wright*, 181 S.W.3d 49 (Ky. App. 2005), a panel of this Court addressed the consequences of a DVO. The Court noted,

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. * * * 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.

Id. at 52.

We are cognizant that the domestic violence statutes were enacted “[t]o allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible.” KRS 403.715(1). Nevertheless, despite the deference owed the trial court, we must conclude the court abused its discretion by finding that Matthew and M.L. were “more likely than not” victims of domestic violence perpetrated by Alishia. *See Anderson*, 934 S.W.2d at 278. Consequently, we vacate the DVO entered against Alishia on

² Arguably, Matthew’s testimony showed that Alishia made poor parenting choices; however, there was no evidence she caused M.L. “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault[.]” KRS 403.720(1).

behalf of Matthew and M.L. and remand this case to Hopkins Circuit Court for entry of an order dismissing the petition.

II.

Oglesby v. Oglesby, 2008-CA-000579

We now address the DVO entered against Alishia on behalf of John and their two children. Alishia contends that the DVO should be vacated because there was no evidence that she committed acts of domestic violence. After careful review of the record, we disagree.

John testified that Alishia and he had a history of physical altercations, which he felt would continue in the future. John testified that, on January 17, 2008, Alishia punched him, pulled his hair, and spit on him during an argument about finances. He stated that, in the past, she had unnecessarily given M.O. Nyquil to make him sleep. And, based on a conversation with D.O., John feared that Alishia was needlessly medicating both children while they were living in Clarksville. After John picked up the children in Clarksville, D.O. complained of bruises and shoulder pain. D.O. explained to John that he was injured while staying with Alishia's friend, William Dial. Finally, the court also heard testimony from a social worker who had interviewed D.O. She advised the court that D.O. had witnessed his parents hitting and shoving each other.

Based on the testimony at the hearing, the evidence supported the trial court's finding of domestic violence. We are aware that, "in reviewing the decision of a trial court the test is not whether we would have decided it

differently, but whether the findings of the trial judge were clearly erroneous or that [s]he abused h[er] discretion,” *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Under the circumstances, we cannot say the court abused its discretion in issuing the DVO against Alishia on behalf of John and the two children.

Alishia next argues that the court failed to make specific findings of fact pursuant to CR 52.01. However, a review of the record shows that Alishia did not request specific findings of fact following the hearing; consequently, this argument is not preserved for our review. CR 52.04; *Cherry*, 634 S.W.2d at 425.

Finally, Alishia contends that she will suffer adverse consequences if the DVO is enforced. Although Alishia’s circumstances are unfortunate, we are mindful that she received a full and fair hearing in the trial court. The trial judge heard Alishia’s testimony but obviously found the evidence presented by John to be more credible. *See Anderson*, 934 S.W.2d at 278. Consequently, we will not disturb the DVO entered on behalf of John and the two children.

For the reasons stated herein, we vacate the domestic violence order issued against Alishia Oglesby on behalf of Michael Luckett and M.L. in Appeal No. 2008-CA-000578-ME and remand the case to Hopkins Circuit Court for entry of an order dismissing the petition.

In Appeal No. 2008-CA-000579-ME, we affirm the domestic violence order issued against Alishia Oglesby on behalf of John Oglesby, D.O., and M.O.

ALL CONCUR.

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