

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001865-ME

WILLIAM WILSON

APPELLANT

APPEAL FROM BOURBON CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 11-D-00068

RITA JUNE MILTON

APPELLEE

OPINION
REVERSING

** ** * ** * ** *

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: William Wilson appeals from the September 13, 2011, Domestic Violence Order (“DVO”) of the Bourbon Circuit Court, Family Court Division, sought by Rita June Milton and entered on behalf of William and Rita’s four minor children. The order also granted temporary custody of the children to Rita and allowed for supervised visitation between William and the children.

Because we hold that the trial court's findings were unsupported by substantial evidence and that the trial court abused its discretion, we reverse.

The parties were previously married, have four children together, and were divorced in 2003 in Tennessee. The two oldest children, ages 15 and 13, reside primarily with Rita, in Acworth, Georgia. The two youngest children, ages 11 and 9, reside primarily with William, in Paris, Kentucky. On September 12, 2011, Rita filed a domestic violence petition on behalf of all four children, in which it was alleged that William had spanked the 11-year-old with a belt on Tuesday, September 6, 2011, leaving a bruise on his buttocks.¹ The petition contained no allegations of domestic violence against Rita. An emergency order of protection was entered the same day. On September 13, 2011, an evidentiary hearing was conducted on the petition. William attended and was not represented by counsel. Rita attended with her attorney. After hearing sworn testimony from William and Rita, the trial court entered a DVO, on behalf of all four children, effective for one year. The trial court also granted temporary custody of all four children to Rita with William allowed supervised visitation at a visitation center, to be determined. This appeal followed.

William makes the following arguments to this Court: 1) the trial court's finding that domestic violence occurred was not properly supported by the evidence, 2) the trial court failed to conduct a full evidentiary hearing, 3) the trial court failed to properly consider the factors set out in Kentucky Revised Statutes

¹ Rita June Milton discovered the bruise on the child during regular visitation when the children traveled to visit with her in Georgia on the weekend of September 9-11, 2011.

(KRS) 403.270 when it awarded temporary custody to Rita, and 4) William did not receive a fair and impartial hearing by the family court. Rita did not file an appellee's brief.

Domestic violence is governed by KRS Chapter 403, which provides that the trial court may enter 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 403.750(1). "Domestic violence and abuse" is defined as:

[P]hysical 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). "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) (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)).

Our review of a trial court's decision to grant or deny a DVO "is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion." *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008). We will not set aside findings of fact unless they are clearly erroneous, or unsupported by substantial evidence. Kentucky Rules of Civil Procedure (CR) 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). "[F]indings of fact are clearly erroneous only if they are manifestly against

the weight of the evidence.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) (citation omitted). Because the trial court is in the best position to judge the credibility of the evidence, we will not substitute our opinion for that of the trial court with regard to the weight given to certain evidence, including the testimony of witnesses. CR 52.01; *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). Additionally, an abuse of discretion occurs only where the court's decision is “unreasonable, unfair, arbitrary or capricious.” *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

The evidence presented during the hearing, regarding alleged domestic violence against the children, was composed entirely of hearsay. “A DVO petition is subject to the same evidentiary standards as other forms of evidence.” *Rankin v. Criswell*, 277 S.W.3d 621, 625 (Ky. App. 2008). “Unless an exception applies, hearsay contained in the petition cannot be considered as evidence.” *Id.* at 625. Rita did not observe the alleged abuse against the child nor did any of the children testify at the hearing. In fact, Rita was in Georgia on the date of the alleged abuse in Kentucky.

The only other testimony considered at the hearing was from an unidentified individual who presumably was a social worker from the Department for Community Based Services (DCBS) in Kentucky. This unidentified witness also presented a picture of the 11-year-old’s buttocks that he had received from the DCBS in Acworth, Georgia. Apparently, Rita had contacted the Georgia social services office the weekend of the children’s visit and a social worker in Georgia

purportedly took the picture. The picture was not authenticated and thus was not properly introduced into evidence. Kentucky Rules of Evidence 1002.

Nevertheless, the family court admitted the photo as Rita's only exhibit.

William's testimony was candid, and he admitted that he occasionally spanked the children as a last resort form of discipline and that he was cooperating with DCBS. His testimony also indicated that Rita had a history of filing petitions and complaints with courts and social services in Kentucky, Tennessee, and Georgia, whenever the parties were having a custody disagreement. He further testified that he believed the domestic violence petition was entered in an attempt to gain custody of the children while Rita awaited a pending appeal in Tennessee on the custody issue.

In support of entry of the DVO, the family court made no findings regarding domestic violence between William and the children. Although the box on the DVO was checked which found "it was established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse has occurred and may again occur," the court did not recite any such finding from the bench or even address the issue of domestic violence. Instead, the court focused entirely on the issue of custody and made the following statement from the bench:

[t]his court can give emergency relief with regard to custody. And that's what the courts inclined to do today, based on the testimony. And the fact that there have been repeated referrals causes the court concern. This won't be the final say, however, in any custody action. That will have to be resolved in either the Tennessee courts or brought through an action through Georgia or

here for custody. The Court is going to go ahead and grant the domestic violence order and order the respondent to stay five hundred feet away from the children except at a supervised visitation center. . . . You can have until further orders of this or other court with jurisdiction, because any custody determination would take precedent over a domestic violence order and this needs to be litigated in the proper custody court. This court doesn't have a custody action in front of it but by statute is permitted to make a finding of temporary custody. Under KRS 403.270, the court has considered that criteria and finds that it is in the children's best interest to be placed with their mother, the petitioner, until this can be further litigated.

The family court's statements make clear that the court was focused on the issue of custody and not the children's protection. By its own admission, the trial court observed that the matter needed "to be litigated in the proper custody court," but entered the DVO nonetheless. The family court also observed on the record that a custody order would take precedence over a domestic violence order, implying that a change in custody would negate the DVO. However, a successive custody order does not act to retroactively eliminate a DVO. Instead, in Kentucky, the DVO may be amended only by petition of one or both of the parties. KRS 403.750(3). Furthermore, entry of a DVO should take place only upon the specific finding that domestic violence has actually occurred. KRS 403.750(1). The evidence in this case does not support such a finding.

The domestic violence statutes "were enacted for the purpose of permitting victims of 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.” *Rankin*, 277 S.W.3d at 624. That purpose is not furthered by entry of the DVO in the case before this Court. “Under the preponderance standard, the evidence must establish that the alleged victim was more likely than not to have been a victim of domestic violence.” *Id.* at 624.

[T]he 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.

Rankin, 277 S.W.3d at 624-625. We agree that KRS 403.750 allows the trial court to award temporary custody concurrent to a DVO. However, we are not convinced that the evidence supported the finding of domestic violence that would sustain a DVO to which a custody determination could attach.

As we have already determined, the hearsay testimony and the photograph were not properly admitted and should not have been considered by the court. The unidentified and purported social services employee from Kentucky² who testified at the hearing relied totally on hearsay evidence from Georgia, rather than his own investigation. This appears to be totally improper, since the alleged abuse occurred in Kentucky, seven days prior to the hearing. The only supporting non-hearsay evidence considered by the family court was William’s admission that

² Based upon the record before this Court, we cannot conclude that this unidentified individual was, in fact, a Department for Community Based Services employee actually assigned to investigate the allegations of abuse in this case. The individual was sworn in but never identified before giving testimony at the evidentiary hearing. William Wilson was also not permitted to cross-examine the unidentified witness.

he spanked his children on occasion, which is not sufficient to support a DVO in this case. Accordingly, entry of the DVO with regard to the children was without sufficient proof of domestic violence. Rita's testimony of prior abuse against her during the parties' marriage prior to 2003 was irrelevant nor properly before the court, especially since she testified that she had not observed any domestic violence against the children in 2011. We can only conclude, based on the record below, that the family court's order was not supported by sufficient evidence and the family court abused its discretion in issuing the DVO, especially as a vehicle for the improper transfer of child custody to Rita. Because our ruling reverses the family court's order, we shall not address William's remaining arguments.

For the foregoing reasons, the September 13, 2011, Domestic Violence Order of the Bourbon Family Court is reversed and set aside.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy M. Mattox
Georgetown, Kentucky

NO BRIEF SUBMITTED FOR
APPELLEE