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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000543-ME

STEPHANIE CHANDELLIER MEADOWS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN SCHRADER, JUDGE
ACTION NOS. 07-CI-00279 & 07-D-00016-001

RICHARD LEON MEADOWS, JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES¹

HENRY, SENIOR JUDGE: Stephanie Chandellier Meadows appeals from an order of the Fayette Circuit Court denying her motion to alter, amend or vacate a domestic

violence order which it had entered against her on behalf of her minor child, Margo

Nancy Meadows. Stephanie contends that there was insufficient evidence to support the

entry of such an order. We disagree and therefore affirm.

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Stephanie married Richard L. Meadows on April 29, 2000. Their daughter, Margo, was born on November 14, 2005. On January 5, 2007, Richard obtained an emergency protective order against Stephanie. At that time, the couple had separated, but both were still residing in the marital home. Richard occupied a self-contained room in one part of the house. In his petition for the emergency order, Richard made the following allegations:

She [Stephanie] came storming into the room where I live, screaming & insulting me. She threw the coffee table & everything on it against the sofa. Then, she grabbed a brass lamp & started smashing it against the sofa & end table, breaking the lamp, crushing & tearing the lamp shade & shattering the bulb. Next, she threw the end table down on the lamp shade. Then she went into the kitchen, grabbed a chair, & threw it into my room. Finally, she kicked the basement door three times & slammed the door twice, while continuing to scream at & insult me.

About 3 months ago, Stephanie told me that when our then 11-month-old baby daughter wouldn't stop crying, Stephanie slapped her face 3 times. When I protested, Stephanie replied that sometimes babies need to be slapped.

Yesterday, my daughter Margo had an unexplained injury to her eye which my wife claims resulted from a fall.

One week later, on January 12, 2007, Richard filed a petition for dissolution of marriage. Richard's domestic violence petition came up for a hearing on January 16, 2007. Prior to the hearing, the parties met outside the courtroom where they arrived at a temporary agreement which resolved a number of issues relating to the dissolution action,

and also custody and timesharing arrangements for Margo. As part of the agreement, Richard undertook to dismiss the domestic violence petition against Stephanie.

At the hearing, Stephanie's counsel notified the court that Richard wished to dismiss the petition. The court indicated that while it would allow Richard to dismiss the domestic violence petition on his own behalf, it was concerned about Margo's welfare and wished to proceed with testimony about Richard's allegations that Stephanie had committed acts of domestic violence against the child.

The court heard testimony from Stephanie and Richard. When questioned by the court, Richard repeated the allegations he had made in his petition.

Q. And when you protested Stephanie replied that "sometimes babies need to be slapped?"

A. Yes, your honor.

Q. Is that true?

A. Yes, your honor.

Q. And then yesterday, yesterday being January 4, "Margo had an unexplained injury to her eye, which Stephanie claimed resulted from a fall?"

A. Yes, your honor. Uh, my, Stephanie said that she had been trying to feed Margo and talk on the [inaudible] same time while she was in her shop and that she had dropped Margo. That's how Stephanie explained the abrasion to her eye. But it was the day after Stephanie had come in and ransacked the room where I was living, smashing a lamp and overturning furniture and throwing furniture and it seemed like an extraordinary coincidence that this might have happened the day after Stephanie had gone into a violent rage against me.

After hearing the testimony of the parties, the court dismissed Richard's emergency protective order against Stephanie, but entered a domestic violence order against Stephanie on behalf of Margo. Stephanie filed a motion to alter, amend or vacate the order, arguing that there had been no allegation or testimony to support a finding that domestic violence had occurred, or might occur. The circuit court denied the motion and set forth additional findings in an opinion entered on February 15, 2007. This appeal followed.

Before issuing a domestic violence order, the trial court must first conduct a hearing and find by a preponderance of the evidence “that an act or acts of domestic violence and abuse have occurred and may again occur.” Kentucky Revised Statutes (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.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). “Domestic violence and abuse” is defined 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).

In support of its decision to enter the domestic violence order on Margo’s behalf, the circuit court relied on the following evidence: that Stephanie had admitted slapping Margo three times when she would not stop crying, and had indicated that she would do it again if necessary; that Stephanie had thrown and broken furniture in

Richard's room; and that Margo had an unexplained injury near her eye which Richard stated had been caused when Stephanie dropped the baby. The court also relied on evidence relating to Stephanie's arrest for shoplifting at a department store. When she was detained at the store, Stephanie pretended to faint and fell to the floor with Margo in her arms, even though Stephanie herself had described Margo as fragile with a congenital hip problem. The court also relied on a letter from Stephanie's physician which described Stephanie as suffering from depression and exhibiting uncharacteristic behaviors or "disinhibition" as a result of either the depression or the medication that was prescribed to treat the condition.

Stephanie contends that this evidence was insufficient to support entry of the order because Richard did not actually witness Stephanie slapping Margo, or inflicting the injury near her eye. Stephanie points to conflicting evidence, namely, her own testimony that Margo had received the eye injury while in Richard's care. Stephanie also casts doubt on Richard's credibility by questioning why he failed to file a petition for an emergency protective order immediately after Stephanie told him she had slapped Margo. As to the episode when she threw the furniture around the room, Stephanie argues that Richard never alleged that her actions resulted in a physical injury to Richard or Margo, or that Richard or Margo was in fear of imminent physical injury at that time. She has also provided a copy of a letter from the Cabinet for Health and Family Services indicating that the allegation of abuse had been investigated and found to be unsubstantiated.

[Kentucky Rules of Civil Procedure] CR 52.01 provides that findings of fact may be set aside if clearly erroneous. However, we must bear in mind 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 he abused his discretion.

Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

Abuse of discretion occurs when a court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994) (citations omitted).

Under this standard of review, we cannot say that the circuit court's decision to enter the order against Stephanie was clearly erroneous, or an abuse of discretion. In large part, the court's decision hinged on an assessment of the credibility of the witnesses.

[T]he 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 witness.

Anderson, 934 S.W.2d at 278 (internal citations omitted).

The circuit court chose to believe Richard. Stephanie's comments regarding slapping the child, coupled with her uncontrolled anger in throwing the furniture around in Richard's room, and the occurrence of Margo's eye injury the very next day, were substantial evidence supporting the finding that acts of abuse had occurred and were more likely than not to occur in the future, and also evidence supporting a finding of infliction of fear of imminent physical injury. As to the Cabinet's finding that the allegations of abuse were

unsubstantiated, this was an independent determination by the Cabinet of which Stephanie was informed in a letter dated February 19, 2007, two days **after** the entry of the circuit court's opinion denying her motion to alter, amend or vacate. This letter never formed part of the record below, was never considered by the circuit court when making its decision, nor was it subsequently brought to the circuit court's attention by means of a motion made pursuant to CR 60.02. It may not, therefore, be considered on appeal, because “[t]he function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review.” *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985).

Stephanie further argues that the court’s reliance on the evidence of the shoplifting episode and the symptoms of her depression was improper, because this evidence was not introduced at the domestic violence hearing, but rather at the subsequent custody hearing (which is not in the record before us). Even without this evidence, however, there was substantial evidence to support the court’s decision to enter the domestic violence order.

For the foregoing reasons, the opinion of the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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