

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-327

MARCH TERM, 2008

Shelly Murphy	}	APPEALED FROM:
	}	
	}	
v.	}	Orange Family Court
	}	
	}	
George Murphy, Jr.	}	DOCKET NO. 49-5-07 Oefa

Trial Judge: M. Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

Defendant appeals the family court’s order granting plaintiff a final relief-from-abuse order on behalf of herself and the parties’ son and daughter. On appeal, defendant claims that the court erred by: (1) excluding the testimony of the parties’ former counselor; (2) finding that defendant abused plaintiff and that there was a danger of further abuse; and (3) including the parties’ children in the order. We affirm.

The family court granted plaintiff a temporary relief-from-abuse order on May 30, 2007. At the time, the parties were going through a divorce. In July 2007, the court held a final hearing on plaintiff’s request for a permanent relief-from-abuse order. Plaintiff testified on her own behalf concerning defendant’s abuse. Plaintiff described a particular incident of abuse on May 23, 2007, which prompted her to file the petition. Plaintiff testified that she met defendant at her mother’s workplace to discuss their divorce and some financial matters. During the conversation, defendant became emotional and plaintiff started to leave the car in which they were talking. Defendant grabbed plaintiff’s arm to prevent her from leaving. Plaintiff left, but she testified that defendant’s nails broke her skin and left a mark on her arm. Plaintiff testified that defendant told her that part of him wanted to take her away and no one would ever see her again. She explained that this made her “very scared” and that she didn’t feel safe. Plaintiff also testified that on prior occasions defendant had kicked her in the stomach and bruised her arms, and that she had been mentally abused by defendant. During her testimony, plaintiff mentioned that she and defendant had attended two counseling sessions together and listed some of the issues discussed. Plaintiff opined that she did not feel safe from defendant without the relief-from-abuse order. Plaintiff’s mother testified and corroborated plaintiff’s version of the May incident. Plaintiff’s mother also remembered seeing bruises on her daughter’s arms on previous occasions.

At the beginning of defendant's case, defendant sought to call the parties' former counselor as a witness. The court expressed some concern that there was no release from the parties pertaining to the content of their therapy sessions. Plaintiff stated that she was not willing to sign a release and objected to the testimony. In response, defendant's attorney stated:

Well, in essence I think the Court's ruled, and Your Honor, her offer would have been in that situation, that, um, by making some of the assertions that she has in terms of what's happened here, that in essence by putting the facts that were discussed in counseling, um, in question here before the Court on the relief from abuse, that, you know, she's waived whatever privilege she would have as to that. I mean, our only offer as far as her testimony is concerned is that, um, a lot of the behavior that has been alleged to have happened here today was never presented to her in those counseling sessions and all the parties were there and available, and if the Court is saying without a release that we can't get into that then I just won't present the testimony; that's all.

The court then stated that plaintiff had not waived her privilege during her testimony because she had not testified to anything specific about the counseling sessions. The court also explained that the counselor's testimony about "what she didn't hear" was not relevant to the proceedings. Defendant did not object further.

Defendant then testified. He admitted that during his conversation with plaintiff on May 23 he was emotional and that he "reached out and grabbed [plaintiff's] arm or touched her arm" because he "wanted to get her attention so she didn't leave."

The court issued oral findings. The court found that it was reasonable for plaintiff to have been concerned following the incident on May 23. The court found plaintiff's testimony credible that prior abuse had occurred and that plaintiff's mother's testimony corroborated the allegations. The court found that plaintiff had met her burden by a preponderance of the evidence, that defendant "abused her, that he has caused her physical harm, that he has attempted to cause her physical harm, and that he has placed her in fear of imminent serious physical harm," and that there was a danger of further abuse. The court did not find that defendant had abused the children, but did find that there was a credible threat to the physical safety of the children. The court ordered defendant to refrain from abusing, stalking, harassing or contacting plaintiff, and to stay 300 feet away from plaintiff, her residence, her work, the children and the children's schools. The court ordered defendant to refrain from abusing the minor children, but did allow defendant to contact the children by telephone or in writing and explained that the children could "make the decision if they want to see their father." Defendant appeals.

We review the factual findings of the family court "in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence, and we will not set aside the findings unless they are clearly erroneous." Coates v. Coates, 171 Vt. 519, 520 (2000) (mem.) (quotation omitted). Accordingly, "[we] will uphold factual findings if supported by credible evidence, and the court's conclusions will stand if the factual findings support them." Id.

Defendant's main argument on appeal centers on the court's decision to exclude the testimony of the parties' former counselor. Defendant claims that the court erred in excluding this testimony for several reasons: (1) the court lacked the authority to raise the issue sua sponte; (2) plaintiff's reference to the counseling during her testimony waived the privilege so there was no need for a formal waiver; (3) the counselor's testimony was relevant and the court erred in concluding otherwise; and (4) the court abused its discretion in precluding the counselor from testifying as an expert without allowing defendant to present her credentials, qualify her as an expert, or illicit the facts underlying her opinion. We do not reach these claims, however, because we conclude that defendant failed to preserve these arguments for review. See Deyo v. Kinley, 152 Vt. 196, 200 (1989) (explaining that "failure to object below precludes review by this Court"). After the court explained its reservations about allowing the parties' counselor to testify and plaintiff objected to the testimony, defendant's attorney withdrew the request to allow the counselor to testify. Defendant neither objected to the court raising the issue of whether the testimony was privileged sua sponte, nor did defendant object to the court's rulings that the testimony was privileged and not relevant. See Passion v. Dep't of Soc. & Rehab. Servs., 166 Vt. 596, 598 (1997) (mem.) (holding that matters not objected to in original proceeding will not be considered on appeal and that "an objection on one ground in the proceeding below does not preserve a claim of error on other grounds"). Finally, at no time did defendant seek to have the counselor testify as an expert. Defendant's sole proffer of the counselor's testimony was that it would be about "facts that were discussed in counseling," and specifically that the abuse allegations were "never presented to her in those counseling sessions." Defendant's failure to preserve these objections below precludes our review on appeal.

Defendant also argues that there was insufficient evidence to support the court's findings that defendant abused plaintiff and that there was a danger of further abuse. Plaintiff had the burden of proving by a preponderance of the evidence that defendant had abused her. See 15 V.S.A. § 1103(b); Coates, 171 Vt. at 520. The statute defines abuse as, among other things "[a]ttempting to cause or causing physical harm" or "[p]lacing another in fear of imminent serious physical harm." 15 V.S.A. § 1101(1). The trial court's findings that defendant abused plaintiff and that there was a danger of abuse are supported by the credible testimony of plaintiff and her mother that defendant had caused plaintiff physical harm and plaintiff was afraid of further harm from defendant. See LaMoria v. LaMoria, 171 Vt. 559, 561 (2000) (mem.) (upholding findings supported by credible testimony). Thus, we find no reason to disturb the findings. We reject defendant's contention that it was improper for the court to rely on the statements of plaintiff and plaintiff's mother to find that there was prior abuse. The trial court found both plaintiff and her mother to be competent witnesses and there was nothing improper in the court's findings that relied on their testimony. See id. ("As the trier of fact, it is the province of the family court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). In addition, there is no merit to defendant's argument that the trial court relied on nothing more than plaintiff's own subjective fear for its finding that there was a danger of further abuse. The court found that given defendant's behavior and statements on May 23, it was reasonable for plaintiff to have been concerned and scared.

Defendant's final claim is that the court's findings do not support its decision to include the children in the relief-from-abuse order because there was no credible threat to the physical safety of the children. Defendant argues that the court did not find that he abused his children, and therefore that it was improper to include them in the relief-from-abuse order. Although the

court did not find defendant abused the children, the court did find that defendant represented a threat to the physical safety of the children. Moreover, under the statute, “[i]f the court finds that the defendant has abused the plaintiff and that there is a danger of further abuse, the court shall make such orders as it deems necessary to protect the plaintiff, the children, or both.” 15 V.S.A. § 1103(c). In interpreting this section in the past, we have explained that it is not necessary for the family court to find that a defendant abused a child to include the child in a relief-from-abuse order. Benson v. Muscari, 172 Vt. 1, 7 (2001). In addition, it was not error for the court to allow defendant to have telephone and written contact with the children, and allow the children to make the decision as to whether they wanted to see their father. The abuse-prevention statute “is designed to provide immediate relief to victims of domestic violence,” and not to provide resolution of custody disputes. Rapp v. Dimino, 162 Vt. 1, 4 (1993). The court’s order provides the immediate protection that it found necessary, while preserving the issues of permanent custody and parent-child contact “without prejudice to either party” for resolution “in the divorce matter.”

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice