2023 WL 219515
Unpublished Disposition
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NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

Appeals Court of Massachusetts.

S.G.
v.
A.K.

22-P-553
|
Entered: January 18, 2023.

By the Court (Sullivan, Hand & Walsh, JJ.[3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** The defendant purports to appeal from a District Court judge's ex parte abuse prevention order and its subsequent extension following a hearing after notice; as discussed below, we consider only so much of the defendant's appeal as addresses the extension order, dismissing as moot so much of the appeal as purports to be from the ex parte order.[1] He argues that the judge erred by extending the initial order because the plaintiff did not meet her burden of proof; the judge failed to make specific and detailed factual findings; and the judge failed to consider the evidence that the defendant presented at the hearing. For the following reasons, we affirm.

Background. The plaintiff and defendant were in a dating relationship and had two children together. On March 7, 2022, the plaintiff filed an ex parte motion for an abuse prevention order. According to the plaintiff's affidavit, their older child kicked their younger child, causing their younger child to cry. In response, the defendant "grabbed" the older child and "dropped her on [the] bed." The plaintiff also described previous physical and emotional abuse including that the defendant: "forced a second pregnancy"; grabbed her arm while she was pregnant and held her arm behind her back; "physically gestured aggressive behaviors"; emotionally abused her and "gaslight[s]" her; screams at her; and "refuses to allow [her] any financial independence." Based on the plaintiff's affidavit and her testimony during the ex parte hearing, the judge issued an abuse prevention order on March 7, 2022, which was set to expire on March 21, 2022. The court order also included a custody provision temporarily awarding custody of the two children to the plaintiff.

On March 21, 2022, the plaintiff and defendant appeared in court for a two-party extension hearing after notice. During the hearing, the plaintiff testified that the most recent physical abuse occurred over two years ago, but that she was seeking the restraining order because he grabbed their eldest child "by the outside of her arms[,] picked her up aggressively, [and] dropped her on the bed." She also stated that she was concerned because of his past behavior, which placed her in fear of imminent harm, and because his behavior was escalating.

***2** In response, the defendant disputed the plaintiff's allegations and pointed out discrepancies between what the plaintiff told the police about the incident involving the child and her testimony in court.[2] In the police report, officers wrote that the plaintiff reported that the defendant "walked over to the bed and lightly tossed [the eldest child] onto the bed yelling at her to stop." The defendant also provided the judge with the details of a separate assault charge, for which the defendant was on pretrial probation and in which the plaintiff was the victim. The judge, relying on the defendant's criminal record, the testimony during the hearing, and the affidavit from the ex parte hearing, extended the order for one year.

Discussion. As an initial matter, the motion judge's March 7, 2022 ex parte order is rendered moot by the March 21, 2022 extension. Noelle N. v. Frasier F., 97

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Mass. App. Ct. 660, 661 (2020) (defendant is not entitled to appellate review of an ex parte abuse prevention order if the order is extended in the trial court at the hearing after notice). Accordingly, we dismiss so much of the defendant's appeal as purports to be from the ex parte order. V.M. v. R.B., 94 Mass. App. Ct. 522, 527 (2018). As to the March 21, 2022 extension order, we review for an abuse of discretion. See Crenshaw v. Macklin, 430 Mass. 633, 636 (2000).

1. Burden of Proof. The defendant argues that the abuse prevention order was issued in error because the plaintiff did not meet her burden of proof. We are not persuaded for the reasons set forth below.

"A plaintiff who seeks a restraining order under G. L. c. 209A, whether the initial, ex parte order, or its extension, carries the burden of proving by a preponderance of the evidence that she is suffering from abuse." Noelle N., 97 Mass. App. Ct. at 664. The plaintiff may show abuse by showing that the family or household member is either "(a) attempting to cause or causing physical harm; (b) placing another in fear of imminent serious physical harm; [or] (c) causing another to engage involuntarily in sexual relations by force, threat or duress." G. L. c. 209A, § 1 "Abuse." "When a person seeks to prove abuse by fear of imminent serious physical harm, our cases have required in addition that the fear be reasonable." Iamele v. Asselin, 444 Mass. 734, 737 (2005) (quotation omitted).

Here, there was no abuse of discretion. The judge was permitted to rely upon the plaintiff's testimony and affidavit, which established that the defendant had acted violently toward the plaintiff in the past and that his behavior was escalating, as evidenced by the plaintiff's account of the defendant's emotionally abusing her and the incident involving their older child. See C.R.S. v. J.M.S., 92 Mass. App. Ct. 561, 563 (2017) (plaintiff met her burden where she testified regarding at least two separate incidents of physical assault; defendant's controlling behavior; verbal abuse; and emotional abuse). The motion judge was permitted to "draw reasonable inferences from the circumstantial evidence described above." Commonwealth v. Gordon, 407 Mass. 340, 350 (1990). There was no error in concluding that the plaintiff met the legal definition of abuse on these facts.

We are also not persuaded by the defendant's argument that claimed inconsistencies between the plaintiff's statement in the police report and her testimony at the restraining order hearing renders her unable to meet her burden of proof. First, the record is not clear that the trial judge had the police report before him during the March 21, 2022 hearing. Second, even if the trial judge had considered the police report during that hearing, credibility determinations by the judge are entitled to "the utmost deference." Ginsberg v. Blacker, 67 Mass. App. Ct. 139, 140 n.3 (2006). Third, even without the incident on March 6, 2022, involving their daughter, the plaintiff's testimony regarding previous violence, its escalation, and ongoing verbal and emotional abuse was sufficient to prove a threat of imminent harm by a preponderance of evidence. For all these reasons, we hold that the trial judge did not abuse his discretion by finding that the plaintiff met her burden of proof.

***3** 2. Trial judge's consideration of evidence. The defendant also contends that the trial judge failed to consider all the evidence presented to him. The transcript does not support this argument; it is apparent from the record that the judge listened carefully to both parties' evidence and considered all of the evidence before making his decision. The fact that the judge rejected the defendant's version of events does not mean that the judge failed to consider the defendant's testimony. Rather, as the judge explicitly noted, his decision turned on his assessment of the evidence as he credited it. Credibility determinations fall squarely within the judge's considerable discretion. See Noelle N., 97 Mass. App. Ct. at 664, quoting Yahna Y. v. Sylvester S., 97 Mass. App. Ct. 184, 185 (2020). We discern no abuse of discretion here.

3. Factual findings. Finally, the defendant argues that the motion judge failed to make findings upon which his decision was based regarding the custody provision. To the extent that the defendant appears to rely on the special findings required under G. L. c. 209A, § 3 (d), that provision states that a court may award:

> "the plaintiff temporary custody of a minor child; provided, however, that in any case brought in the probate and family court a finding by such court by a preponderance of the evidence that a pattern or serious incident of abuse, as defined in section 31A of chapter 208, toward a parent or child has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. ... If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child." (Emphasis added).

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The defendant's argument is unpersuasive as it fails to consider G. L. c. 209A, § 3, in its entirety. Separate from the finding of abuse under G. L. c. 209A, § 3 (d) relates to a different finding issued by a judge of the Probate and Family Court when making temporary and final custody orders. We agree with the plaintiff that G. L. c. 209A, § 3 (d), only applies to a case brought in the Probate and Family Court. Cf. Howell v. Sheriff of Essex County, 101 Mass. App. Ct. 542, 546 (2022), quoting Berg v. Ciampa, 100 Mass. App. Ct. 569, 571 (2021) ("When construing a statute, we look at the language as a whole, and 'strive to give effect to each word'"). We also note that construing G. L. c. 209A, § 3, in this manner is consistent with the fact that a custody order made by the Probate and Family Court, which would supersede any custody order made by the District Court, is more permanent and thus requires more detailed factual findings. See G. L. c. 209A, § 3, final par. ("If the parties to a proceeding under this chapter are parties in a subsequent proceeding in the probate and family court department ..., any custody or support order or judgment issued in the subsequent proceeding shall supersede any prior custody or support order under this chapter").

It is also well established that when we are able to determine a reasonable basis for the order in the judge's rulings and order, there is no requirement for additional specific findings of fact. G.B. v. C.A., 94 Mass. App. Ct. 389, 396-397 (2018). In this case, given the judge's explanation in the transcript, and the testimony of the parties, there was a reasonable basis for the order.

***4** So much of the appeal as is from the ex parte abuse prevention order entered March 7, 2022, is dismissed as moot.

Order entered March 21, 2022, extending abuse prevention order affirmed.

All Citations

Slip Copy, 2023 WL 219515 (Table)

Footnotes

[3] The panelists are listed in order of seniority.

[1] In the defendant's notice of appeal, he specifies that he "appeals ... from the Order entered in this action on March 7, 2022 ... which Order was extended on March 21, 2022 for one year until March 17, 2023." The plaintiff argues that we should interpret the defendant's notice of appeal as addressing only the March 7, 2022 ex parte order and not its extension. See Mass. R. A. P. 3 (c) (1), as appearing in 481 Mass. 1603 (2019) ("The notice of appeal shall ... designate the judgment, decree, adjudication, order, or part thereof appealed from"). On the contrary, the defendant's notice of appeal specifically designates the extension order and otherwise sufficiently put the plaintiff on notice that the defendant was contesting that order; we thus deem the appeal from the extension order to be properly before us. See Fazio v. Fazio, 91 Mass. App. Ct. 82, 84 n.7 (2017) (notice of appeal sufficient so long as it fairly informs other parties of what is at issue on appeal). Contrast Robinson v. Boston, 71 Mass. App. Ct. 765, 770 (2008) (certain orders challenged on appeal were "not referenced in the earlierfiled notice of appeal" and therefore were "not properly before this court and will not be considered on appeal") (quotation omitted).

[2] The defendant was charged with assault on a minor child and his criminal case was pending at the time of the extension hearing.

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