Cite as 2010 Ark. App. 346

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-498

	Opinion Delivered April 21, 2010
MARTINE "TINA" OATES APPELLANT V. MICHAEL "MICKEY" OATES and MINOR CHILDREN APPELLEES	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRTEENTH DIVISION [DR-2008-1230] HONORABLE COLLINS KILGORE, JUDGE AFFIRMED

DAVID M. GLOVER, Judge

In companion decisions today our court affirms the divorce of the parties in this action, as well as the denial of appellant Martine Oates's petition for a permanent protective order, ending six years of litigation. Michael and Martine Oates were married on November 25, 1995. Their marriage was tumultuous. Over the years, Ms. Oates alleged that Mr. Oates had committed domestic abuse against her on numerous occasions. After repeatedly filing complaints for divorce followed by subsequent attempts at reconciliation, the parties finally separated in March 2008. Ms. Oates was granted a divorce from Mr. Oates in March 2009. In the divorce decree,[1] Mr. Oates was granted custody of the parties' three sons.

[1]The trial judge crafted a thirty-six-page opinion, incorporating extensive findings of fact and conclusions of law, based upon the parties' extensive history of litigation before him.

For reversal of the trial court's decision to grant custody of the three children to Mr. Oates, Ms. Oates argues that the trial court erred as a matter of law (1) in concluding that Mr. Oates did not engage in a "pattern of domestic abuse" under Ark. Code Ann. § 9-13-101 when there was no dispute that he committed "domestic abuse" against her on two occasions during their marriage; (2) in concluding that Mr. Oates's actions of March 7, 2008, did not constitute a third instance of "domestic abuse" sufficient to find a "pattern" under Ark. Code Ann. § 9-13-101; and (3) by admitting and relying upon expert-opinion testimony based on the widely discredited psychological theory of "Parental Alienation Syndrome." We affirm the decision of the trial court.

Whether Events of March 7, 2008, Constituted Domestic Abuse

We first address Ms. Oates's second point on appeal, whether the trial court erred in finding that Mr. Oates's actions on March 7, 2008, did not constitute a third act of domestic abuse. We do so because the same issue is raised and is being decided today in the companion case to this one. *Oates v. Oates*, 2010 Ark. App. 345. The other case concerns the trial court's denial of Ms. Oates's petition for a permanent protective order against Mr. Oates. The March 7th incident is a central issue in both cases. In the other case, this court decided that the events of March 7, 2008, did not rise to the definition of domestic abuse and affirmed the trial court's decision on this issue. Therefore, it is not necessary to again address it in this appeal.

Whether There was a Pattern of Domestic Abuse Under Ark. Code Ann. § 9-13-101

In her first point on appeal, Ms. Oates argues that the trial court erred in finding that Mr. Oates did not engage in a pattern of domestic abuse under Arkansas Code Annotated section 9-13-101(c) (Repl. 2009), when he had undisputedly committed domestic abuse against her on two occasions. This provision provides:

> (1) If a party to an action concerning custody of or a right to visitation with a child has committed an act of domestic violence against the party making the allegation or a family or household member of either party and such allegations are proven by a preponderance of the evidence, the circuit court must consider the effect of such domestic violence upon the best interests of the child, whether or not the child was physically injured or personally witnessed the abuse, together with such facts and circumstances as the circuit court deems relevant in making a direction pursuant to this section.
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> (2) There is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent in cases in which there is a finding by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse.

"Domestic abuse" is defined as "physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members." Ark. Code Ann. § 9-15-103(3)(A) (Repl. 2009). It is important to note that our statutes do not define "pattern of domestic abuse."

The trial court found that Mr. Oates had committed domestic abuse in 1997, during Ms. Oates's pregnancy with the parties' first child, when he put his fist through a wall and smashed at least one chair, and again in 2005, when, after an argument precipitated by his turning Ms. Oates's family pictures around, he "popped [Ms. Oates] on the bottom" and

grabbed her arms. Ms. Oates contends that the trial court was required to find as a matter of law that these two instances constituted a "pattern" of domestic abuse that would have given rise to the rebuttable presumption that Mr. Oates was not the proper person to have custody of the parties' children, and that the trial court read this statute too narrowly to conclude that these two acts of domestic abuse did not constitute a pattern. It is significant that the trial court also found that during the parties' tumultuous marriage, Ms. Oates had committed domestic abuse against Mr. Oates in 2002 when she struck him in the back of the head and also gave him a black eye. The trial court found that the two incidents involving Mr. Oates, which were approximately seven years apart, did not constitute a pattern of domestic abuse sufficient to create a rebuttable presumption that Ms. Oates was entitled to custody. In this vein, Ms. Oates also contends that the trial court should have considered the entire history of Mr. Oates's abusive conduct, regardless of whether each act constituted domestic abuse, to conclude that Mr. Oates had engaged in a pattern of domestic abuse.

Without an Arkansas statutory definition, Ms. Oates cites this court to the Alaska and Colorado statutes, both of which have statutory provisions that specifically define how many instances constitute a pattern. Section 25.24.150(g) and (h) of the Alaska Statutes provides:

> (g) There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.
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> (h) A parent has a history of perpetrating domestic violence under (g) of this section if the court finds that, during one incident of domestic violence, the parent caused serious physical injury or the court finds that the parent has engaged in more than one incident of domestic violence. The presumption may be overcome by a

> preponderance of the evidence that the perpetrating parent has successfully completed an intervention program for batterers, where reasonably available, that the parent does not engage in substance abuse, and that the best interests of the child require that parent's participation as a custodial parent because the other parent is absent, suffers from a diagnosed mental illness that affects parenting abilities, or engages in substance abuse that affects parenting abilities, or because of other circumstances that affect the best interests of the child.

Colo. Rev. Stat. § 18-3-401(2.5) defines "pattern of sexual abuse" under the unlawful sexual behavior portion of the statutes as "the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim." *Black's Law Dictionary* (8th ed. 2004) defines "pattern" as a "mode of behavior or series of acts that are recognizably consistent." Our legislature, however, as noted above, has not defined "pattern of domestic abuse."

This court reviews cases involving child custody and related matters de novo, reversing factual findings only if they are clearly erroneous, but the circuit court's conclusion on a question of law is given no deference on appeal. *Hodge v. Hodge*, 97 Ark. App. 217, 245 S.W.3d 695 (2006). While Ms. Oates urges this court to find, as a matter of law, that Mr. Oates has committed a pattern of domestic abuse against her, without a statutory definition, this court holds that this question is one of fact, not law. We therefore cannot say that the trial court was clearly erroneous in finding that two incidents of domestic abuse by Mr. Oates against Ms. Oates approximately seven years apart, with an intervening act of domestic abuse by Ms. Oates upon Mr. Oates, did not constitute a pattern of domestic abuse. We also disagree with Ms. Oates's contention that the trial court should have considered each allegation of abusive conduct, even if it did not amount to "domestic abuse." Our statute

requires that a person engage in a pattern of domestic abuse; if the acts did not rise to the definition of domestic abuse, they cannot be considered for purposes of the presumption.

Parental Alienation Syndrome[2]

Ms. Oates's final point on appeal is that Dr. Paul Deyoub's testimony, based on the discredited psychological theory of parental alienation syndrome (PAS), should have been excluded as unreliable. We are unable to address this argument because it is not preserved for appeal.

In the May 6, 2008 hearing, testimony was taken for both the custody case and the protective-order petition. At the hearing, Mr. Oates's counsel asked the trial court to reappoint Dr. Deyoub as the court-appointed expert in this case (Dr. Deyoub had been appointed by the court as an expert in a prior 2005 divorce action). His counsel further asked the trial court to allow Dr. Deyoub's testimony from a September 2007 hearing in the parties' prior 2005 divorce action to be admitted into evidence. It was this testimony, which also included Dr. Deyoub's prior psychological reports, that contained the PAS evidence to which Ms. Oates now objects. Ms. Oates's counsel consented that any prior testimony could be referenced by the trial court and/or used for purposes of cross-examination, but she specifically objected to Dr. Deyoub being accepted or appointed as an expert in the present case. At this time no objection to the testimony based on PAS was made by Ms. Oates's

[2]An amicus brief was filed pursuant to Ark. Sup. Ct. R. 4-6 in support of this point on behalf of the Arkansas Coalition Against Domestic Violence, Domestic Violence Legal Empowerment and Appeals Project, Leadership Council on Child Abuse & Interpersonal Violence, Justice for Children, National Coalition Against Domestic Violence, and National Association of Women Lawyers.

counsel. The trial court ruled that it would recognize and accept Dr. Deyoub's testimony from the previous hearing.

On June 9, 2008, the temporary order from the May 6, 2008 hearing was filed. That order reflects that pursuant to Rule 80 of the Arkansas Rules of Civil Procedure, the trial court found Dr. Deyoub's testimony in the parties' previous divorce action would be admitted as evidence in the current divorce action. Ms. Oates's counsel, by her signature, approved this order as to form. No motion to exclude Dr. Deyoub's testimony on the basis that it included testimony regarding PAS prior to the temporary order was filed; neither was a motion for reconsideration filed on this basis. The record reflects that Ms. Oates's counsel did not file a motion to exclude evidence of PAS until August 25, 2008, the first day of the final divorce hearing. On these facts, we hold that the motion was untimely. Objections to evidence must be made at the time the evidence is introduced. *Edwards v. Stills*, 335 Ark. 470, 504, 984 S.W.2d 366, 383 (1998).

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.