

IN THE COURT OF APPEALS OF IOWA

No. 1-962 / 11-0373
Filed January 19, 2012

MARIA FETTKETHER,
Plaintiff-Appellant,

vs.

RICHARD KASTER,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Terry Rickers, Judge.

Maria Fettkether appeals the district court's denial of her request to extend a protective order under Iowa Code section 236.5. **AFFIRMED.**

Michelle Mackel-Wiederanders and Danni Harris of Iowa Legal Aid, Des Moines, for appellant.

Alan M. Wilson of Miles Law Firm, Corydon, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Maria Fettkether and Richard Kaster have two children together, T.F. born 2006, and R.K. born 2007. The parties were never married, and Richard is now married to Annette Kaster. On December 18, 2009, Fettkether filed a petition for relief from domestic abuse against Kaster, stating that Kaster had pushed her down a ramp in October 2009, broke her nose during an argument in front of their children in June 2009, broke her toe in July 2007, and broke her pinkie finger when Kaster attempted to punch her in the head in 2006. Fettkether also alleged Kaster punched their children in the chests when they were in trouble. A temporary protective order was entered on December 18, 2009.

On January 4, 2010, an Iowa Code chapter 236 protective order was entered against Kaster, to remain in effect until January 4, 2011. See Iowa Code § 236.5 (2009). The protective order granted temporary custody of the children to Fettkether with visitation granted to Kaster on alternating weekends. On September 27, 2010, Fettkether requested a modification of the protective order. The district court modified the order to include provisions that the parties do not assault or harass each other, and that necessary communication about the children would be through Annette Kaster; the district court denied Fettkether's request for supervised visitation.

On December 15, 2010, Fettkether moved to extend the protective order against Kaster. The matter came on for hearing on January 26, 2011, after which the district court denied the motion. On February 4, 2011, Fettkether filed a motion to reconsider and amend the judgment, which was denied. Fettkether appeals.

Our review of equitable proceedings is de novo. Iowa R. App. P. 6.907. While we give weight to the district court's findings of fact, we are not bound by them. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

Fettkether claims the district court should have granted her motion to extend the existing protective order due to the severe history of abuse and ongoing conflict between herself and Kaster, as well as the Iowa Department of Human Services' (DHS) child abuse findings against Kaster for denial of critical care. She further argues the appellate court should adopt "an expansive and liberal list of criteria for district courts to apply when considering extensions of civil protection orders." Iowa Code section 236.5(2) states, in pertinent part:

An order for counseling, a protective order, or approved consent agreement shall be for a fixed period of time not to exceed one year. The court may amend its order or a consent agreement at any time upon a petition filed by either party and after notice and hearing. The court may extend the order if the court, after the hearing at which the defendant has the opportunity to be heard, *finds that the defendant continues to pose a threat to the safety* of the victim, persons residing with the victim, or members of the victim's immediate family. . . . The number of extensions that can be granted by the court is not limited.

(Emphasis added.) Our supreme court has recognized that "chapter 236 is protective rather than punitive in nature." *Christenson v. Christenson*, 472 N.W.2d 279, 280 (Iowa 1991). Just as articulated in Iowa Code section 236.4, Fettkether had the burden to prove by a preponderance of the evidence that Kaster continued to pose a threat to her safety. See Iowa Code § 236.4(1) ("[P]laintiff must prove the allegation of domestic abuse by a preponderance of the evidence."); Iowa R. App. P. 6.904(3)(f) ("In civil cases, the burden of proof is measured by the test of preponderance of the evidence."). "To sustain this

burden the evidence to support the claim, when fully and fairly considered, must produce the stronger impression and be more convincing when weighed against the evidence in opposition thereto.” See *Christensen v. Iowa State Highway Comm’n*, 252 Iowa 1351, 1353, 110 N.W.2d 573, 574–75 (1961).

The parties do not dispute that Kaster abused Fettkether in the past, but Fettkether maintains Kaster poses an ongoing threat to herself and the children. Fettkether cites several incidents as indicative of the threat Kaster poses. In July 2010, the parties’ son R.K.—who was described as being nearly albino—was sunburned when Kaster had R.K. outside all day, without protective clothing or sunscreen. R.K. received first and second-degree burns, and was transferred to the University of Iowa Hospitals and Clinics for treatment of his burns. Following this incident, DHS performed a child abuse assessment, and concluded the incident was founded as a denial of critical care—failure to provide proper supervision, and placed Kaster on the Central Abuse Registry. Following the incident, DHS developed a safety plan, in which Kaster’s wife, Annette, agreed to supervise Kaster’s visits with the children. At the January 26, 2011 hearing, Kaster and Annette testified that R.K. burned his hand on the stovetop while in their care. The incident remained under investigation by DHS at the time of the hearing. Fettkether also testified to an incident in December 2010, where Annette called her for sixteen minutes and was “cussing [Fettkether] out” while Kaster was in the background “saying stuff and [Annette] was relaying the messages . . . saying I was worthless and everything else.” At the hearing, Annette denied allegations of verbal abuse toward Fettkether. Fettkether feared

that without the protective order, the verbal abuse would escalate into physical acts of aggression toward her.

In its ruling on Fettkether's motion to reconsider, the district court stated:

The court recalls the January 26 hearing, including the witnesses' demeanor and the general content of their testimony. The court in no way seeks to minimize the unacceptability of [Kaster's] previous abusive conduct. However, as stated at the January 26 hearing, the court does not find by a preponderance of the evidence that Kaster currently poses a threat of intentional abuse to Fettkether or her children.

The court appreciates the fact that Fettkether does not trust Kaster, and that she finds it difficult to forget the brutish, cowardly behavior that he exhibited when he physically abused her in the past. The court nevertheless believes, despite Kaster's character flaws, he now understands that he cannot physically abuse Fettkether in the future if he hopes to maintain any meaningful relationship with his children.

An action is currently pending in Polk County District Court ... to permanently determine the parties' child custody, visitation, and support obligations. This action is long overdue. Because of Kaster's prior abusive behavior, he will have to suffer the consequences of negative presumptions concerning his future role in his children's upbringing. Because of apparently careless or neglectful parenting over the past several months, Kaster's contact with his children is currently subject to the restrictions of a DHS safety plan. Should Fettkether request (in the pending Chapter 600B action) a temporary injunction prohibiting threatening or harassing behavior on the part of Kaster, this court fully expects that such a request will be granted. However, this court does not believe that the foregoing factors are sufficient to mandate an extension of a Chapter 236 protective order.

On our de novo review, we agree with the district court. The purpose of Chapter 236 is to provide protective relief to the victim upon a finding of domestic abuse. However, for the order to be continued beyond one year, the protected party must show by a preponderance of the evidence that "the defendant continues to pose a threat to the safety of the victim, persons residing with the victim, or members of the victim's immediate family." Iowa Code § 236.5(2); see Iowa R.

App. P. 6.904(3)(f) (establishing the burden of proof as a preponderance of the evidence).

This record reflects that the parties live approximately seventy-five miles apart, and at visitation drop-off and pick-up times, Kaster does not talk to Fettkether. Instead, the two parties communicate through Annette. Fettkether clearly continues to harbor a fear of Kaster, but Fettkether testified that in the past year, Kaster never violated the protective order. Although the DHS has determined that Kaster has denied critical care to one of his children, and Kaster was proven to have abused Fettkether prior to the initial protective order, we—like the district court—conclude that Fettkether failed to prove by a preponderance of the evidence that Kaster continued to pose a threat to herself or the children. Therefore, we affirm the district court.

AFFIRMED.