

IN THE COURT OF APPEALS OF IOWA

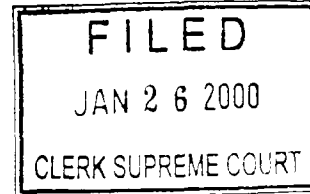
No. 1999-348 (9-601) / 98-1788

Filed January 26, 2000

TARA DAVIS,
Appellee,

vs.

TODD DAVIS,
Appellant.



Appeal from the Iowa District Court for Monona County, Phillip S. Dandos,
Judge.

Todd Davis seeks a reversal of the district court's adjudication of domestic
abuse. **REVERSED.**

W. J. Giles, III, Sioux City, for appellant.

No appearance for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

~~Todd~~ and Tara Davis were married in 1992 and have two children, Samantha and ~~Dexter~~. On September 7, 1998, the parties separated and Tara moved out of the marital residence with the children. On September 16, 1998, Tara filed a domestic abuse petition against Todd. After a hearing on September 24th, the district court found Todd guilty of domestic abuse and entered a protective order. Todd filed a timely appeal on September 30th. On November 23rd, Tara requested that the district court cancel the protective order. Following a hearing, the court granted her request. On February 5, 1999, our supreme court found that the district court did not have jurisdiction to rescind the protective order while the matter was on appeal. The court ordered that the case be remanded for the limited purpose of affirming or rescinding the September 24th protective order. The district court subsequently rescinded the protective order on February 8th.

Now that the protective order has been rescinded, we are asked to review the district court's original finding that Todd committed domestic abuse. Unfortunately, the court made no credibility findings in this classic "he said, she said" situation. It was Tara's burden to prove her allegation of domestic abuse by a preponderance of the evidence. See Iowa Code § 236.4(1) (1997). Tara's statements at the hearing regarding the nature of the abuse were vague and inconsistent. Although Tara claimed Todd would touch her sexually and "force" himself on her, she also testified that she hadn't had intercourse with Todd for the past nine months. In her petition, Tara claimed that she feared for the lives of both herself and her children. However, at the hearing she stated that Todd was a good and nurturing father and agreed that he should have unlimited visitation with the children. Finally, when

asked directly what relief she sought from the court, Tara did not refer to protection from ~~abuse~~. Instead, she said:

All I ask is for everybody to listen to what the kids would like, not what I want or Todd wants or [mother-in-law] wants. Let them make the decision. I have not harped at them where they want to live. I told them from the start that it was up to them.

This was one of several statements Tara made at the hearing which indicate that her main objective in filing this action was for child custody purposes rather than protection from domestic abuse. On our de novo review of the record, we find Tara failed to meet her burden to prove her allegation. We conclude that the court's finding of domestic abuse was not supported by a preponderance of the evidence and therefore reverse.

REVERSED.

Vaitheswaran, J., concurs; Streit, P.J., dissents.

STREIT, P.J. (dissenting)

~~Reason.~~ The trial judge made a finding of domestic abuse that was wholly dependant upon who to believe. The majority's choice to find lack of evidence because the petitioner's "statements at the hearing regarding the nature of the abuse were vague and inconsistent" ignores the trial court's superior ability to judge credibility.