

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-23-0643

SEBASTIAN ALEXANDER KEITEL,

Respondent and Appellant,

v.

AVANLEE CHRISTINE OKRAGLY,

Petitioner and Appellee.

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DR-56-2022-627-PP, Honorable Donald Harris,
Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF ISSUES TO BE PRESENTED

- I. Whether the lower court's reliance on inadmissible hearsay, which resulted in the issuance of the Permanent Order of Protection for One (1) Year against Respondent-Appellant, was an abuse of discretion constituting reversible error?

- II. Whether the lower court engaged in an abuse of discretion through its failure to follow the statutory scheme pursuant to MCA §§ 40-15-102(1)(a) or (b) and 40-15-204(1) and (4).

STATEMENT OF THE CASE

Respondent and Appellant, Sebastian Alexander Keitel ("Sebastian"), brings this action to the Montana Supreme Court on appeal from the lower court's issuance of a Permanent Order of Protection for One (1) Year against Sebastian and in favor of Petitioner and Appellee, Avanlee Christine Okragly ("Avanlee"), which included the parties' minor child as a protected party.

Sebastian and Avanlee have never been married but have one child together, namely A.M.O., age 19 months. Avanlee lives in Billings, Montana; Sebastian lives in Bozeman, Montana. A Stipulated Civil No Contact Order was entered into by the parties on April 10, 2023. Thereafter, a Stipulated Final Parenting Plan was agreed to by the parties and was adopted by the lower court on May 17, 2023.

Despite the Final Parenting Plan and the parties living in two separate counties, on September 12, 2023, Avanlee filed a Petition for Temporary Order of

Protection against Sebastian wherein she claimed that Sebastian was using law enforcement to harass her as opposed to requesting their assistance to enforce the Final Parenting Plan. A hearing on the petition was held on October 2, 2023. The only individuals to testify at the hearing were Sebastian, Avanlee, and Avanlee's stepfather, Derrick Tracy.

During the hearing, the lower court conducted direct examination of Avanlee, during which the following occurred: (1) inadmissible hearsay was elicited as a result of the court's questions and over Sebastian's counsel's objections on the record; and (2) the lower court failed to follow the statutory scheme in granting a permanent order of protection in favor of Avanlee. As a result of the hearing, the Court issued a Permanent Order of Protection for One (1) Year against Sebastian.

STATEMENT OF FACTS

Sebastian and Avanlee became acquainted through mutual friends when living in New York City and engaged in certain conduct that resulted in the conception and later the birth of the parties' son, A.M.O. The parties' son was born in June 2022 (age 19 months). Prior to the child's birth, Sebastian initiated a paternity action in New York (File No. 315700, Docket No. P-02859-22) to compel Avanlee to submit to a prenatal paternity test in order to establish paternity. It was determined that Sebastian was the biological father. Once paternity was established, the case was automatically converted to a support action per New York law, wherein Sebastian

was ordered to pay Avanlee \$3,000 per month in child support, exclusive of childcare costs of approximately \$1,200 per month (Avanlee lives with her mother, who provides the childcare while she works from home). So Avanlee receives approximately \$4,200 per month if she continues to restrict Sebastian's parenting time.

After A.M.O.'s birth in June 2022, Avanlee moved to Montana and Sebastian soon followed in order to fulfill his parental obligations and responsibilities. Sebastian has no family in Montana and no ties to Montana. Unfortunately, ever since Sebastian's relocation to Montana, Avanlee has engaged in conduct contrary to the minor child's best interest by filing the underlying petition for order of protection, which included a request to severely restrict Sebastian's access to his own son.

The Court will note that in April 2023, the parties entered into a Stipulated Civil No Contact Order providing that the parties' were to conduct child transitions at the door of Avanlee's residence. Dkt # 46. The Stipulated NCO was negotiated between the parties after Avanlee filed for a TOP. The NCO specifically provides: "Sebastian shall approach the front door to exchange the minor child." *Id.* Clearly, the terms of the NCO are proof-positive of Avanlee's lack of fear of Sebastian.

Of note, the parties entered into a Stipulated Final Parenting Plan in May 2023 providing Sebastian with weekend overnight parenting time with A.M.O. every

other weekend. Merely months later, after Avanlee engaged in several violations of the Final Parenting Plan and interference with Sebastian’s parenting time, Avanlee again filed for a TOP requesting that Sebastian’s parenting time be restricted entirely. Based on a review of the record, it’s unfortunate that Avanlee is abusing the judicial process to punish Sebastian. Accordingly, Sebastian files this appeal.

STANDARD OF REVIEW

The Montana Supreme Court “reviews a district court's findings of fact to determine if they are clearly erroneous.” *In re Marriage of Olson*, 2008 MT 232, ¶ 20, 344 Mont. 385, 194 P.3d 619. “A finding of fact is clearly erroneous if the district court ‘misapprehended the effect of the evidence, or our review of the record convinces us the district court made a mistake’.” *Id.*

The Montana Supreme Court “will not overturn a district court’s decision to continue, amend, or make permanent an order of protection absent an abuse of discretion.” *Lockhead v. Lockhead*, 2013 MT 368, ¶ 12, 373 Mont. 120, 123-24, 314 P.3d 915, 918 (citing *Schiller v. Schiller*, 2002 MT 103, ¶ 24, 309 Mont. 431, 47 P.3d 816). Further, “the Court's standard of review for custody and visitation is whether substantial credible evidence supports the district court's judgment, and we will uphold the district court's findings and conclusions unless they clearly demonstrate an abuse of discretion.” *Schiller*, 2002 MT at ¶ 24.

“The question under this standard is not whether [the appellate court] would have reached the same decision as the trial judge, but whether the trial judge acted arbitrarily without conscientious judgment or exceeded the bounds of reason.” *Id.* (citing *Newman v. Lichfield*, 2012 MT 47, ¶ 22, 364 Mont. 243, 272 P.3d 625).

SUMMARY OF THE ARGUMENT

The Montana Code Annotated provides that a Permanent Order of Protection can be issued after a hearing if certain statutory criteria are met. Specifically, “[t]he court may, on the basis of the respondent’s history of violence, the severity of the offense at issue, and the evidence presented at the hearing, determine that to avoid further injury or harm, the petitioner needs permanent protection. The court may order that the order of protection remain in effect permanently.” MCA § 40-15-204(1). Further, “[a]n order of protection may include restraining the respondent from any other named family member who is a minor. If this restriction is included, the respondent must be restrained from having contact with the minor for an appropriate time period as directed by the court or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or endangered by the environment of abuse.” MCA § 40-15-204(4). Here, neither of the criteria were met for the lower court to issue a Permanent Order of Protection for One (1) Year, which included the minor child.

Furthermore, the trial court's reliance on inadmissible hearsay in issuing a permanent order of protection that included the minor child, where a Final Parenting Plan is already in place, constitutes clear error because "unsworn reports where there is no right to cross-examine come within the hearsay rule and are inadmissible in a child custody case." *Puccinelli v. Puccinelli*, 2012 MT 46, ¶ 1, 364 Mont. 235, 235, 272 P.3d 117, 118.

In this case, the lower court (1) improperly relied on inadmissible hearsay in issuing a permanent order of protection, and (2) failed to comply with the statutory scheme required to issue a permanent order of protection not only for Avanlee, but also for the minor child, A.M.O. Sebastian is a capable, committed, and loving parent, who relocated his entire life from New York to Montana in order to parent his only son. Sebastian has stepped-up to the plate to accept the responsibility and privilege of being a father – a move that most courts would openly welcome. Instead, Sebastian is being punished for daring to contact law enforcement whenever Avanlee has violated the parenting plan by either denying him his court-ordered parenting time with A.M.O. or refusing to provide Sebastian with A.M.O.'s location.

ARGUMENT

I. The lower court's reliance on inadmissible hearsay in issuing a Permanent Order of Protection against Respondent-Appellant constitutes an abuse of discretion resulting in reversible error.

The Montana Supreme Court reviews all of the issues on appeal for an abuse of discretion. *State v. Hamby*, 1999 MT 319, ¶ 13, 297 Mont. 274, 276-77, 992 P.2d 1266, 126 (internal citation omitted). “The question of admissibility of testimony under a hearsay exception is left to the sound discretion of the trial court. We will not overrule the district court's decision that a hearsay exception applies absent an abuse of discretion.” *Id*; see also *State v. Norgaard* (1982), 201 Mont. 165, 176, 653 P.2d 483, 488. “An abuse of discretion applies to the admissibility of other testimony, as well.” *Id*; see also *State v. Mason* (1997), 283 Mont. 149, 154, 941 P.2d 437, 441.

A statement is inadmissible as hearsay when it is offered to prove the truth of the matter asserted by someone other than the declarant while testifying at a trial or hearing. Mont. R. Evid. 801(c), 802. The Montana Supreme Court has long followed the rule that “unsworn statements made out of court with no opportunity afforded to confront the writer and question him as to their veracity are hearsay.” *Puccinelli v. Puccinelli*, 2012 MT 46, ¶ 17, 364 Mont. 235, 239, 272 P.3d 117, 121 (internal citations omitted). Further, “unsworn reports where there is no right to cross-examine come within the hearsay rule and are inadmissible.” *Id*.

The Court's reasoning for issuing the Permanent Order of Protection was not to protect Avanlee from threat of bodily harm or injury, but rather, to force the parties to follow the Parenting Plan to a "T". Hr'g Tr. P. 58:20-21. The Court went on to state that there was "no doubt in [its] mind that Ms. Okragly and her family are being harassed and stalked [by law enforcement]," even though the only way the Court could have reached this conclusion was if it relied on inadmissible hearsay evidence. The only admissible evidence demonstrates that Sebastian contacted law enforcement for assistance in enforcing the Parenting Plan when Avanlee either failed to make the child available to Sebastian during his court ordered parenting time or failed to notify Sebastian of the child's whereabouts. The lower court then took it one step too far by concluding that Sebastian contacted law enforcement for the sole purpose of harassing Avanlee. Hr'g Tr. p. 56:16-20. In fact, the lower court engaged in a lengthy discussion about how the appropriate avenue for what Avanlee was requesting was to file a motion for contempt, yet the court issued a permanent order of protection anyway. Hr'g Tr. p. 56:5-19.

The only individuals to testify at the October 2, 2023 hearing were Petitioner-Appellee, Avanlee Okragley, Respondent-Appellant, Sebastian Keitel, and Derrick Tracy, Avanlee's stepfather. *No other witnesses testified.*

Here, the written reports of law enforcement submitted by Avanlee, along with Avanlee's testimony wherein she repeats out-of-court statements allegedly

made by law enforcement officers to prove the truth of the matter asserted (i.e., that Sebastian was calling law enforcement on Avanlee to harass her and threaten her with a kidnapping charge) constitute classic hearsay, which are inadmissible pursuant to M.R.E. Rule 801(c), Rule 802. In fact, Avanlee was dishonest about the number of reports that Sebastian allegedly made to law enforcement. Hr'g Tr. pp. 21:13-22:13. Sebastian directly refuted the hearsay testimony when he stated that while he did call law enforcement to conduct a welfare check and to find out where his son was, he never reported that Avanlee had kidnapped their son. Hr'g Tr. P. 46:8-12.

Based on a simple review of the hearing transcript, the district court issued a Permanent Order of Protection based on inadmissible hearsay, and nothing more. Further, no applicable hearsay exceptions were indicated on the record as to the basis for allowing inadmissible hearsay into evidence. The Court either (a) elicited hearsay testimony from the witness, or (b) allowed hearsay into the record over Respondent-Appellant's objection.

Further, the district court judge improperly controlled and conducted direct examination of Avanlee by asking leading questions that were intended to elicit hearsay responses, to wit:

Judge Harris: *Arigh. And were you told by the police what prompted the welfare check?*

Avanlee: That I was in the process of moving out of the state with my son, and Sebastian had no idea where his child was.

(emphasis added) Hr’g Tr., p. 6:20-23. With this question alone, the Court elicited hearsay from the witness – i.e., what the police allegedly told her. There were no police officers present in the courtroom to testify on this issue, and Respondent-Appellant was never given an opportunity to cross-examine the declarant of these statements, which is impermissible pursuant to the Montana Rules of Evidence.

The Court further allowed impermissible hearsay evidence, over Respondent-Appellant’s objections, when the Court permitted Avanlee to testify as to alleged statements made by a Billings Police Department Officer, a Yellowstone County Sheriff’s Officer, and an FBI field agent. Hr’g Tr., pp. 9:19-12:25. Respondent-Appellant properly lodged hearsay objections to those statements coming in, both of which were improperly overruled. *Id.* But for the admission of these hearsay statements, the Court would not have been able to formulate an opinion, much less a factual finding, that Sebastian used law enforcement for the sole purpose of harassing or threatening Avanlee.

Based on the testimony before the Court, the only times that Sebastian called law enforcement to conduct a welfare check or to locate his son were when Sebastian was supposed to have parenting time with his son under the Parenting Plan. By way of example, Avanlee testified that she was, in fact, in New York with the parties’

son for two (2) weeks without notifying Sebastian of the child's location. Hr'g Tr., p. 10:2-8. Nevertheless, Sebastian only called law enforcement and the FBI field office upon the advice of his former counsel to document any parenting plan violations for purposes of filing a contempt motion, if necessary. Yet, the lower court made the following findings upon which it relied in issuing the permanent order of protection:

Judge Harris: I find it extraordinarily disturbing that there was an FBI report based upon false information, and there's only one way that FBI agent could have gotten that information, and that was from Sebastian or perhaps his father. This idea that you would indulge the FBI's thinking that a kidnapping had gone on and you would deprive Adam of the care of his mother, is just shocking to me.

Hr'g Tr. pp. 54:24-55:5. Taking into consideration reports in a child custody proceeding without requiring the authors to testify at a hearing constitutes reversible error. Yet, the Court clearly relied on Avanlee's testimony as to what an FBI agent purportedly said, and the documents attached to the Petition for Temporary Order of Protection's containing hearsay statements, such as police reports and emails authored by Frederick Keitel and Katie Heller. None of the authors of these documents were present in the courtroom or made available for Respondent-Appellant to cross-examine. Of note, the Court indicates its review and reliance on the police reports. Hr'g Tr. P. 55:19-22. Reliance on the same in issuing a Permanent Order of Protection, which the district court did here, constitutes reversible error.

The Order of Protection Hearing was really a parenting modification hearing, yet no motion was pending requesting a modification of the parenting plan due to a change in circumstance of the child pursuant to MCA § 40-4-219. The hearing transcript clearly shows the Court's reliance on inadmissible hearsay evidence in issuing a Permanent Order of Protection, which was, in reality, an amendment of the Parenting Plan by placing geographical restrictions on Sebastian's parenting time despite absolutely no evidence – direct, circumstantial or otherwise – that a restriction on Sebastian's parenting time should be instituted. The Court relied on inadmissible police reports and inadmissible hearsay statements from law enforcement officials in concluding the following:

Judge Harris: What I'm really concerned about, if you ask me do I think that Ms. Okragly and her family are being harassed and stalked, the answer to that question is no doubt in my mind, because you don't take these actions unless you mean to do harm.

Hr'g Tr. p. 56:16-23. By "actions" the lower court is referring to Sebastian's calls to law enforcement in a desperate attempt to enforce the parenting plan when Avanlee refused to make A.M.O. available for his parenting time or was traveling out of state with A.M.O. during Sebastian's parenting time and refusing to provide A.M.O.'s location or whereabouts. This alone constitutes reversible error.

II. The Court's failure follow the statutory criteria of MCA §§ 40-15-201(1) and (4) and 40-15-102(1)(a) or (b) was an abuse of discretion and constituted reversible error.

“This Court will not overturn a district court's decision to continue, amend, or make permanent an order of protection absent an abuse of discretion.” *Boland v. Boland*, 2018 MT 288N, ¶ 7, 394 Mont. 389, 430 P.3d 1014; *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631; *Keller v. Trull*, 2007 MT 108 ¶ 7, 337 Mont. 188, 158 P.3d 439; *see also In re Marriage of Coogler*, 2004 MT 122, ¶¶ 14, 24, 321 Mont. 243, 90 P.3d 414.

A. No evidence was introduced demonstrating Avanlee was the victim of assault or other statutorily enumerated crime.

Here, the Court failed to issue oral findings of fact and conclusions of law on the record, instead issuing a written order where the Court made a finding that “[Appellee] is in danger of harm.” Dkt # 107. However, the record fails to support a finding that Avanlee was the victim of assault or other statutorily enumerated crime. MCA § 40-15-102(1)(a) and (b), and that she was not under reasonable apprehension of bodily injury. No evidence was presented during the hearing that Avanlee was in danger of bodily harm if the Order of Protection was not made permanent. Notably, Avanlee denied any history of physical harm and failed to demonstrate reasonable apprehension of bodily injury if the order was not made permanent. Instead, Avanlee testified that she was “afraid of [Sebastian] getting poor counsel for two years...” and “if this is left unabated, this will escalate [sic] quickly to physical [sic] harm and potentially taking [A.M.O.]” Hr’g Tr. Pp. 25:12-26:16. Clearly the matter was not being left unabated at the time of the hearing, and

failure to get a different attorney is not the jurisdictional prerequisite to obtaining a permanent order of protection.

B. No evidence was introduced demonstrating that A.M.O. was “in substantial danger of harm or unreasonably endangered” by Sebastian.

Where the record lacks substantial credible evidence that the minor child is in substantial danger of harm or unreasonably endangered by Respondent, the child is not a victim of abuse, and there is no indication that the child lived in an abusive environment, then the minor child should not be included as a protected party. *See Schiller v. Schiller*, 2002 MT 103, ¶ 26, 309 Mont. 431, 436, 47 P.3d 816, 819.

In *Schiller*, the Court refused to restrict the mother’s contact with the minor child, finding that there was a lack of evidence to support a finding that the child was in substantial danger of harm or unreasonably endangered by the allegedly offending parent. Further, the court noted that the child did not witness any abuse between the parties. In this matter, Avanlee has never alleged that Sebastian has placed the A.M.O. in substantial danger of harm or unreasonable endangered A.M.O., nor is there any allegation by Avanlee that Sebastian is unable to provide a safe and suitable home environment for A.M.O. Further, A.M.O. is but 19 months old, so barely old enough to witness any abuse - let alone testify to being a witness to abuse - that Avanlee never alleges to have occurred in the first place.

This case is nothing more than Sebastian finding himself unable to effectively communicate with Avanlee when it comes to co-parenting their son, and Avanlee

abusing the avenue made available by the court to restrict Sebastian’s parenting time. The parties already have a Final Parenting Plan in place – a parenting plan that they voluntarily entered into. The Court will note that ineffective communication is not the statutory criteria for a permanent order of protection, yet the lower court issued a permanent order of protection including the A.M.O. as a protected party anyway.

CONCLUSION

For the foregoing reasons, Respondent-Appellant respectfully requests this Court provide the following relief:

- (1) Reverse the lower court’s ruling issuing a Permanent Order of Protection for One (1) Year against Sebastian Ketieli;
- (2) Strictly in the alternative, an order reversing the lower court’s ruling to include the minor child, A.M.O. as a protected party; and
- (3) Any further relief the Court deems appropriate.

Dated this 29th day of January 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionally spaced type 14 font and does not exceed 10,000 words.

Dated this 29th day of January 2024.

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