Gdowski v Gdowski

6/23

Eighty three year old Michael Gdowski filed for a protective order against his 56 year old daughter, Diana, pursuant to Welfare and Institutions Code section 15657.03. He claimed physical and emotional abuse. Michael alleged his daughter had punched him on six occasions, yelled at him on several occasions, and intimidated his wife's caregiver. Michael and his other daughter, Sandra, disagreed with Diana regarding his wife's care. Based on Michael's declaration a temporary restraining order was issued.

Diana replied, declaring she had not committed any of the acts alleged. She contended Michael and Sandra had neglected Michael's wife and were disinterested in providing proper medical care for her. An evidentiary hearing took place on July 23, 2008. Michael testified consistent with his declaration, including descriptions of physical and verbal abuse by Diana.

On cross-examination, Michael admitted he had not reported the physical abuse until his petition to have himself appointed his wife's conservator. He was unable to provide much in the way of detail concerning the abuse allegations. Diana testified she and her father agreed about everything other than his investments and the care of his wife. She denied Michael's allegations completely.

The trial court stated in its ruling that this case was a *"close call."*

The court then stated the following:

It's one person's word against the other. The court has observed carefully the demeanor of this process. Frankly, the court is affected by the manner in which Michael was examined, and that Diana allowed that to happen.

The trial court stated to Diana's counsel, "…*I assume that your rather aggressive and confrontational cross-examination of Michael was consistent with your client's desire to treat her father in such a fashion. …There is a problem here. It's an elderly man that is having difficulty. His wife is disabled, and in need of a conservatorship. He has concerns about*

her. He has come to this court to ask for relief."…."What he got in response is an allegation that he is a bad person, and in some fashion that he is out for some evil motive and that he does not have the best interest of his wife. …The examination of him I think was abusive to him. … And I compared that to how Michael's counsel cross-examined Diana. With respect, without raising his voice, without being confrontational. …. The court observed that happening and your client didn't tap you on the shoulder and say to you this is my father you are speaking to. That was ***the straw that made the difference*** *in tipping the scale as to whether or not Michael has been treated in an abusive way."*

The trial court granted the protective order, effective for one year. Diana appealed.

Diana argued since there was no threat of ongoing abuse, there was no basis for a protective order. Michael pointed out on appeal that under W&I section 15657.03(c) the Elder Abuse Act, an order may issue with reasonable proof of a past act or acts of abuse. The Fourth DCA agreed with Michael, indicating that a protective order may issue based on evidence of past abuse without any showing the acts will be continued or repeated.

Diana also argued the trial court abused its discretion when it based its ruling on counsel's behavior, and not on substantial evidence. Here, the trial court stated, in effect, that the evidence was evenly balanced when it announced counsel's behavior in court and Diana's failure to control that behavior were "…the straw that…" tipped the scale. Michael bore the burden of establishing his case by a preponderance of the evidence. (*Bookout v Nelson* (2007) 155 Cal.App.4th 1131)

The Justices indicated they could not disregard the trial court's express acknowledgement that (1) the attorney's questioning and (2) Diana's failure to intervene were "the straw that made the difference." Because Diana was represented by counsel, she was not able to appear on her own behalf in court, or control the proceedings. An attorney has the right to control matters of ordinary trial strategy, such as whether a particular witness

should be called, whether certain evidence should be introduced, and whether an evidentiary objection should be interposed. (*In re Kerry O.* (1989) 210 Cal.App.3d 326) The manner in which cross examination will be conducted is another matter of trial strategy which is within the control of counsel.

The client properly cedes to his or her counsel the right to act in a manner that will protect the client's best interests. (See, *Beery v State Bar* (1987) 43 Cal.3d 802) To require a client to correct his or her counsel's behavior during the examination of a witness in order to avoid inferences as to the client's prior actions outside the courtroom would go against all these accepted principles of the attorney client relationship. Statement s and arguments by counsel are not evidence. (*People v Richardson* (2008) 43 Cal.4th 959) Therefore, Diana's counsel's questions of Michael could not have been evidence on which the trial court could rely.

Michael argues the court's language was merely advisory and should be treated as superfluous. Civil Code section 3537 provides: Superfluity does not vitiate. But here, the trial court's explanation of its decision was not superfluous. Instead, the ruling was based on an impermissible reason, the manner counsel questioned Michael on cross-examination. Counsel's questions could not have been evidence on which the trial court could rely.

The order is reversed.