

No. 1-11-0784

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUNG HWAN KIM on behalf)	Appeal from the
of ELIZABETH HOSOO PAK,)	Circuit Court of
)	Cook County
Petitioner-Appellee,)	
)	
v.)	No. 10 OP 20293
)	
JAE IL PAK,)	Honorable
)	Thaddeus Machnik and
)	Callie Lynn Baird,
Respondent-Appellant.)	Judges Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and JUSTICE KARNEZIS concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when, at a scheduled hearing on an existing emergency order of protection, attended by respondent's counsel, it denied respondent's motion for a continuance and issued a plenary order of protection on the initial emergency-petition evidence. Respondent's continuance motion and motion to reconsider the plenary order reasonably explained respondent's absence from the hearing in question for his employment in Saudi Arabia and included exhibits casting doubt upon a key allegation underlying a substantial term or condition of the plenary order.

¶ 2 Respondent Jae Pak appeals from orders of the circuit court issuing and maintaining an order of protection that enjoins him from contact with petitioner Sung Kim and their minor child

Elizabeth Pak (the minor). On appeal, he contends that the court erred by entering a plenary order of protection (1) without the statutorily-requisite findings, (2) without notice to respondent that a plenary hearing was to be held, and (3) when respondent was not in default and had not answered or responded.

¶ 3 Petitioner sought and received an emergency order of protection on September 3, 2010, encompassing petitioner, the minor, and Hyung Lee. Petitioner stated in her petition for an order of protection that she and respondent were in the process of divorcing though no dissolution petition had yet been filed, respondent was employed as a chemical engineer, the minor was five years' old, and petitioner was the minor's primary caretaker. Petitioner alleged that the minor made a specific allegation to Lee, petitioner's mother, of sexual abuse by respondent. When Lee informed petitioner of the allegation, petitioner took the minor to her physician, who told petitioner "that my daughter should not see her father and that he would be reporting to the authorities." The next day, respondent came to petitioner's place of work and threatened "that I may lose my daughter forever, and that he will not leave me alone," and so the police were summoned to remove respondent. Investigators for the Department of Children and Family Services (Department) interviewed petitioner and the minor and advised petitioner to seek an order of protection while the Department's investigation was pending. On the grounds that respondent was likely to abuse the minor, petitioner sought temporary legal as well as physical custody of the minor and the restriction or denial of visitation by respondent. The emergency order granted physical custody of the minor to petitioner with respondent's visitation reserved.

¶ 4 Attempts to serve process on respondent at his home on September 4, 11, 18, and 21 were unsuccessful, though the sheriff's return noted a dog in the yard during one attempt. On September 23, the court authorized service by publication, extended the emergency order of protection to October 14, and scheduled a hearing on a plenary order of protection for that date.

In October, publication service was effected. On October 14, the court extended the emergency order and reset the hearing on a plenary order to November 4. Respondent filed his appearance, through counsel, on November 2. On November 4, the court extended the emergency order to, and scheduled a hearing on the emergency order for, November 24. By agreed order that day, the emergency order was extended and the hearing on the emergency order reset to January 27, 2011. The record indicates that respondent and his counsel were in court on November 24.

¶ 5 On January 27, the court issued a plenary order of protection for two years, encompassing petitioner, the minor, and Lee. The order granted physical custody to petitioner and denied visitation to respondent. The record does not include a transcript of proceedings for that date but indicates that petitioner and her counsel were in court as was respondent's counsel while respondent was not, and that respondent's motion for a continuance was stricken.

¶ 6 Respondent timely filed a motion to reconsider and vacate the plenary order, arguing that he was out of the country when this case was commenced and that petitioner served him by publication knowing that he was not in the country. He explained that his employment takes him to Saudi Arabia "for months at a time" but he returns home "periodically to catch up with family and friends, particularly with" the minor. Respondent asserted that he filed a motion for continuance in open court on January 27 and that he could not have provided his counsel a signed affidavit earlier than he did. As to the underlying merits, respondent alleged that petitioner "has entrusted [the minor] with Respondent almost on a daily basis" whenever he was home and that the Department investigation found petitioner's abuse accusation to be unfounded. Respondent argued that the court erred in issuing the plenary order without either granting a continuance or holding an evidentiary hearing where he could testify. Respondent's substantive objection to the plenary order was that it denies him visitation with the minor for two years. Attached to the motion was the affidavit of respondent's attorney John Lee and the signed but not notarized

affidavit of respondent, both stating that respondent returned to his employment in Saudi Arabia just after Thanksgiving Day 2010 day and was unable to return to Illinois for the January 27 hearing. At that hearing, Lee averred, the court denied the continuance motion and issued the plenary order without hearing witnesses or other evidence.

¶ 7 Attached to the motion to reconsider was a copy of the continuance motion, in which respondent alleged that petitioner had twice accused him of abusing the minor and both times the Department found the allegations unfounded. Respondent promised to remain in Illinois for the trial or hearing of his case despite his employment in Saudi Arabia. He "expressly invoke[d] his constitutional right to confront and cross-examine his accuser" and sought a "final unchangeable" date for a trial or hearing where he would call petitioner as a witness. Attached in turn to the continuance motion were copies of two letters from the Department, from March 2009 and November 2010, stating that the Department investigated allegations of child abuse but determined they were unfounded. The latter letter concerned the allegations underlying the emergency petition herein. Also attached was an unsigned copy of respondent's affidavit, stating in relevant part that he was in Saudi Arabia from "around Labor Day 2010 through November 7, 2010" and again from "right after Thanksgiving" but would be in Illinois for a week around February 22, 2011. The continuance motion bore no filing stamps but was accompanied by a notice of motion for the existing January 27 court date.

¶ 8 The court heard the reconsideration motion on February 24. Petitioner argued that her petition and supporting evidence for the emergency order presented a sufficient evidentiary basis for the plenary order and that respondent failed to rebut with his own evidence because his affidavit was stricken as non-notarized. She argued that respondent's motions were "filled with mostly facts irrelevant to the circumstances for him not appearing." She also argued that she was ready for a hearing on a plenary order on November 24 but agreed to a continuance to January 27

"based on agreement with counsel that he would make [respondent] available on that day." Respondent's counsel denied that there was such an agreement and stated that he agreed to the continuance based on his own schedule rather than respondent's. The court noted that respondent was in court when the continuance to January 27 was issued and stated, against respondent's assertion "that his employer will not allow him to return to court," that "it's for [respondent] to decide what's more important and what he chooses to do," so that his absence from court on January 27 was by his choice. The court also found that there was "nothing in your motion *** to reconsider the issuance of the plenary order of protection that provides any legal basis for" vacating the plenary order. The court denied reconsideration, and this appeal timely followed.

¶ 9 Before proceeding to the merits, we reiterate that the record on appeal does not include a transcript or appropriate substitute (*see* Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for the proceedings of January 27, 2011, when the court issued the plenary order of protection. As appellant, respondent is obligated to provide us a sufficiently complete record of the trial court proceedings to support his claims of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). Conversely, our review is not precluded by the absence of transcripts where the record contains that which is necessary to dispose of the issues raised under the applicable standard of review. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007).

¶ 10 On appeal, respondent contends that the court erred by entering a plenary order of protection (1) without the statutorily-requisite findings, (2) without notice to respondent that a plenary hearing was to be held, and (3) when respondent was not in default and had not answered or responded.

¶ 11 An order of protection may grant a petitioner physical care of a minor child "to protect the minor child from abuse, neglect, or unwarranted separation from the person who has been the minor child's primary caretaker, or to otherwise protect the well-being of the minor child," and if "a court finds, after a hearing, that respondent has committed abuse *** of a minor child, there shall be a rebuttable presumption that awarding physical care to respondent would not be in the minor child's best interest." 750 ILCS 60/214(b)(5) (West 2010). An order of protection may determine the respondent's visitation rights "if any" where the order awards the petitioner physical care of a minor child, and the order "shall restrict or deny respondent's visitation with a minor child if the court finds that respondent has done or is likely to do any of the following: (i) abuse or endanger the minor child during visitation; (ii) use the visitation as an opportunity to abuse or harass petitioner or petitioner's family or household members; (iii) improperly conceal or detain the minor child; or (iv) otherwise act in a manner that is not in the best interests of the minor child." 750 ILCS 60/214(b)(7) (West 2010). Except for *ex parte* emergency orders of protection, "the court shall make its findings in an official record or in writing, and shall at a minimum set forth [that] the court has considered the applicable relevant factors, *** [w]hether the conduct or actions of respondent, unless prohibited, will likely cause irreparable harm or continued abuse, [and w]hether it is necessary to grant the requested relief in order to protect petitioner or other alleged abused persons." 750 ILCS 60/214(c)(3) (West 2010).

¶ 12 "A plenary order of protection shall issue if petitioner has served notice of the hearing for that order on respondent *** and satisfies the requirements of this Section for one or more of the requested remedies. For each remedy requested, petitioner must establish that: (1) the court has jurisdiction ***; (2) the requirements of Section 214 are satisfied; (3) a general appearance was made or filed by or for respondent or process was served on respondent ***; and (4) respondent has answered or is in default." 750 ILCS 60/219 (West 2010).

¶ 13 Because "[a]ny action for an order of protection is an expedited proceeding," a continuance for an interim or plenary order of protection "should be granted only for good cause shown and kept to the minimum reasonable duration, taking into account the reasons for the continuance. If the continuance is necessary for some, but not all, of the remedies requested, hearing on those other remedies shall not be delayed." 750 ILCS 60/213(b) (West 2010).

¶ 14 Generally, a "proceeding to obtain, modify, reopen or appeal an order of protection, whether commenced alone or in conjunction with a civil or criminal proceeding, shall be governed by the rules of civil procedure" including the "Code of Civil Procedure and Supreme Court and local court rules applicable to civil proceedings, as now or hereafter amended," so that the "standard of proof in such a proceeding is proof by a preponderance of the evidence." 750 ILCS 60/205(a) (West 2010), citing 735 ILCS 5/1-101 *et al.* (West 2010). Section 2-1301 of the Code of Civil Procedure provides that a "court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2010).

¶ 15 The decision to grant or deny a motion to vacate under section 2-1301 is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion or a denial of substantial justice. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (2008). We may find an abuse of discretion only where no reasonable person would take the trial court's position; that is, where the court acted arbitrarily or ignored recognized principles of law. *Jackson*, 384 Ill. App. 3d at 548-49. Whether substantial justice is being achieved by vacating an order is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, severity of the penalty resulting from the order, and the relative hardships on the parties from granting or denying vacatur. *Jackson*, 384 Ill. App. 3d at 549.

¶ 16 Here, respondent had appeared through counsel, had not filed a written answer or response, and had not been found in default. It is clear that respondent had proper notice that there would be proceedings in his case on January 27, 2011; there was an agreed order on November 24, 2010, extending the emergency order of protection to that date. However, it is not apparent that he had notice of a hearing on a plenary order of protection. The agreed order of November 24 and the previous continuance order of November 4 – the two orders following respondent's appearance – both state that the case was set for a hearing on the emergency order, not on a plenary order. Respondent was in court through counsel on January 27 and tendered a properly-noticed motion for continuance, clearly expressing respondent's eagerness for an evidentiary hearing on a date certain.

¶ 17 It is undisputed that the court then issued the plenary order upon the evidence supporting the initial issuance of the emergency order. The primary difference between the emergency and plenary orders (other than their duration) is that the former reserved the issue of visitation while the latter denied respondent visitation with the minor. Though the continuance motion was accompanied by an unsigned "affidavit," it was also accompanied by the Department letters casting doubt upon the key allegation that respondent abused the minor. Conversely, while respondent's motions also raised irrelevant or extraneous matters as petitioner has noted, respondent did not present evidence or arguments challenging the order of protection as applicable to petitioner and Lee nor petitioner's physical custody of the minor. As stated above, a court may continue matters for which a continuance is appropriate while addressing the remaining matters. The court here did not do so.

¶ 18 In his timely motion to reconsider and vacate the plenary order, respondent emphasized that his substantive objection was to the denial of visitation. Moreover, the reconsideration motion resolved any omission in his continuance motion by providing proper evidentiary support

for his explanation of his personal absence from the January 27 hearing. Though his own "affidavit" was still not notarized, attorney Lee's affidavit was, and it established that respondent was out of the country for his employment in Saudi Arabia at the time of the January 27 hearing. The court rejected the argument that respondent's "employer will not allow him to return to court" on the basis that his absence was wholly his choice to prioritize work over the instant case. Underlying that conclusion are inferences that a litigant should be able to take a day of absence from his employment to attend a scheduled court date, with travel time and convenience comparable to a daily commute, and that a litigant who does not do so has freely chosen the consequences. Such inferences are in most cases eminently reasonable and indeed a practical necessity for the functional operation of the courts. However, respondent works on literally the other side of the world from Illinois, with commensurate travel times and logistical issues, and we find the court's doctrinaire application of those inferences in the instant case unreasonable.

¶ 19 In summary, we conclude that substantial justice was not served by the denial of respondent's motion to reconsider and vacate the plenary order. Respondent demonstrated reasonable diligence by attending the hearing through counsel and timely seeking a continuance for an evidentiary hearing on a date certain when he could arrange for his return to this county. Respondent presented documents indicating the existence of a meritorious defense to a significant condition of the order of protection – the denial of visitation with the minor upon the allegation that he abused her – and that condition arguably imposes a severe hardship on respondent. Lastly, with respondent on the other side of the world, reserving the issue of visitation until his return would hardly have imposed a hardship upon petitioner or the minor.

¶ 20 Accordingly, the order of January 27, 2011, is vacated and this cause is remanded for a hearing to determine whether, and on what terms or conditions, a plenary order of protection may issue. The emergency order of protection issued on September 3, 2010, and extended from time

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to time thereafter is extended until that hearing is held.

¶ 21 Vacated and remanded with directions.