2014 IL App (5th) 130430-U

NO. 5-13-0430

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



| | | |
|---|---|---|
| DAWN W., | ) | Appeal from the |
| | ) | Circuit Court of |
| Petitioner-Appellee, | ) | Madison County. |
| | ) | |
| v. | ) | No. 13-OP-525 |
| | ) | |
| MICHAEL W., | ) | Honorable |
| | ) | Neil T. Schroeder, |
| Respondent-Appellant. | ) | Judge, presiding. |

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's entry of an order of protection against the respondent is affirmed where the court's finding that the respondent committed abuse was not against the manifest weight of the evidence; the court's findings complied with section 214(c)(3) of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/214(c)(3) (West 2012)); the court did not err in awarding the petitioner the physical care and possession of the parties' minor children; and the court did not err in awarding the respondent limited, supervised visitation of the minor children.

¶ 2 The petitioner, Dawn W., sought an order of protection in the circuit court of Madison County against her ex-husband, the respondent, Michael W. The trial court entered an emergency order of protection on May 24, 2013, and ultimately issued a plenary order of protection on August 1, 2013. On appeal, Michael asserts that the trial court's order must be reversed because it was against the manifest weight of the evidence; that the trial court's findings did not comply with section 214(c)(3) of the Illinois Domestic Violence Act of 1986 (the Act) (750 ILCS 60/214(c)(3) (West 2012)); that the court allowed Dawn to improperly

use the order of protection as a vehicle to modify custody without meeting the standards set forth in section 610(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610(b) (West 2012)); and that "there was an insufficient finding of fact to support limited supervised visitation." For the following reasons, we affirm.

¶ 3 The parties divorced in April 2012 following a 10-year marriage and had one child, E.W., age nine. Michael was awarded custody of E.W. and primary guardianship of M.W., age seven. The record indicates that Dawn is not the biological mother of M.W., but she was made the secondary guardian over the child. On May 24, 2013, Dawn filed a petition for an emergency order of protection on behalf of herself and the two children against Michael. In the petition, she alleged that in May 2013, she picked M.W. and E.W. up from their father's house for summer visitation. During the drive to Dawn's house, M.W. and E.W. told Dawn that the prior evening, they had returned home to their father's house after visiting a neighbor and found him "passed out from drinking beer" on the hallway floor in front of the bathroom. The neighbor's daughter was with them, and after finding Michael in the hallway, she had them pack an overnight bag and took them home with her. Later that evening at Dawn's house, M.W. also told Dawn about another incident involving Michael. According to the petition, Dawn observed M.W. wince and pull away when Dawn was tickling her. When Dawn asked M.W. what was wrong, M.W. told her that Michael had stepped on her. M.W. said that she had asked Michael for a fudgesicle, and he responded by saying that she "couldn't have a fudgesicle until mommy paid him the money she owed him." Michael then called Dawn a "fucking bitch" and said that Dawn was not M.W.'s "real mommy." Then, Michael stepped on M.W., and when M.W. told him that it hurt, he stepped on her harder. Following a hearing, the trial court granted the emergency order of protection, finding that Michael had abused Dawn and/or the children. The court awarded Dawn the physical care and possession of the minor children, and visitation was reserved until further order of the

court. Michael was eventually awarded supervised visitation with the minor children.

¶ 4 On August 1, 2013, a hearing was conducted for a plenary order of protection. The following evidence was adduced at this hearing. We will set forth only those facts pertinent to resolving the issues on appeal. Dawn testified concerning the incidents that occurred in May 2013. She testified that she had picked up M.W. and E.W. from their father's house for summer visitation. During the drive home, M.W. and E.W. told her that they had found their father "passed out drunk the night before in the hallway in front of the bathroom door." After unsuccessfully attempting to wake him, they went home with one of their neighbors. Later that same day, M.W. and Dawn were "playing" on the back porch. When Dawn began tickling M.W. on her right side, M.W. pulled away and winced. Dawn asked what was wrong, and M.W. said that Michael had "stepped on her." M.W. explained that she had asked him for a fudgesicle, and he had responded that "she couldn't have one until her mother paid him the money that she owed him." When M.W. told him that he was hurting her, he responded by stepping down harder and telling her that her mother was a "fucking bitch" and "wasn't her real mom." Dawn observed two bruises on M.W.'s right side that were consistent with M.W.'s story. After observing the bruising, Dawn took M.W. to the emergency room at Memorial Hospital in Belleville. M.W. was examined by an emergency room physician and was diagnosed with chest wall pain.

¶ 5 Michael testified as follows concerning the circumstances surrounding the children staying the night with the neighbor. He explained that he had attended a neighborhood "block party" that evening and had drank no more than six beers from 4 p.m. until 10 p.m. M.W. and E.W. had planned on spending the night with the neighbor, a plan that had been established before he had started drinking. He explained that he was sleeping in the bathroom because he felt nauseous after arriving home and decided to stay there until he felt better. M.W. and E.W. observed him in the bathroom. They had come home to pack an

overnight bag to stay at the neighbor's house. After packing their bags, they left. He explained that he was not intoxicated and that he was just "upset to [his] stomach."

¶ 6 Michael admitted placing his foot on M.W.'s chest, but explained that it was done in a "playful manner." He explained that M.W. frequently threw temper tantrums when things did not go her way, and he used "playful" interactions to redirect her misbehavior. He testified that he had occasionally played too rough with his daughters, but that he would stop when they said that he was hurting them. He explained that he had put his foot on M.W.'s chest and not in the area where the bruising was located. He admitted telling M.W. that she could have a fudgesicle when Dawn paid him child support. He denied calling Dawn a "fucking bitch" during this incident, but acknowledged using that phrase in reference to Dawn in conversation with others. He also denied telling M.W. and E.W. that Dawn was not M.W.'s real mother, but acknowledged saying this to others in conversation.

¶ 7 The testimony of M.W. was presented by stipulation. It was stipulated that M.W. would testify that on the evening of the neighborhood party, she went to her father's home with her sister and a neighbor girl and found him "passed out, unresponsive, in the hallway floor," and that neither she nor her sister could wake him. The neighbor girl suggested that M.W. and E.W. pack an overnight bag and stay the night with her. With regard to the incident involving the fudgesicle, it was stipulated that M.W. would testify that she had asked her father for a fudgesicle and her father replied that she could not have a fudgesicle until "her mommy paid the money that she owed to her daddy." Michael called Dawn a "fucking bitch" and said that M.W.'s real mother was not Dawn. Michael then "stepped on her and when she asked him to stop, he did it harder." Her mother took her to the emergency room, and M.W. told the emergency room doctor that her father had stepped on her right chest wall, she had asked him to stop, but he pushed harder, and that she has had pain in that area since the incident occurred. It was also stipulated that E.W. was present to witness "what occurred

at the house that evening" and would verify everything that M.W. said.

¶ 8 At the conclusion of the hearing, the trial court found that Michael had committed abuse. Specifically, the court stated as follows with regard to its finding:

> "Based on what I have heard today, I do find that abuse has occurred, that [Michael] has admitted performing the acts. He states that those acts were performed in a loving and playful way. However, there's also been evidence, and I believe some of it came from [Michael] himself, that at the time of this loving and playful placing of his foot on his seven year old daughter that he was angry, that he was making comments regarding collection of child support, referring to that in reference for the reason why he placed–or immediately prior to placing his foot, that the child wasn't getting a fudgesicle because mom hasn't paid her child support.
>
> I find it hard to believe that after making that statement that he lovingly and playfully placed his foot on his seven year old daughter and that after she said it hurt, he pressed down harder. So I do find that an incident of abuse occurred with respect to [M.W.]
>
> The issue as what is the proper remedy, to a large extent I do believe that this is something that should be taken up in the family case; however, I don't think that the Court has as [*sic*] choice.
>
> *** I take the language that the Court shall issue the Order of Protection to mean exactly what it says, shall issue. So the Court shall issue the Order of Protection.
>
> I'm going to issue it for one year. *** My basis for one year is that I expect that whatever custody issues are ongoing in the family case should be resolved within a year. *** "

Accordingly, the court entered a written plenary order of protection against Michael. The

order itself was a form on which the trial court marked appropriate boxes and filled in blanks. The court marked the following findings on the form order: that Michael had abused the minor children; the conduct or actions of Michael, unless prohibited, would likely cause irreparable harm or continued abuse; it was necessary to grant the requested relief to protect the minor children; and the abused persons were unable to bring this petition on their own behalf due to age, health, disability, or inaccessibility. The court granted the following requested relief: prohibited Michael from harassing, interfering with the personal liberty of, physically abusing, or stalking the minor children; prohibited him from committing any acts of willful deprivation, neglect, or exploitation toward the minor children; ordered him to stay 300 feet away from the minor children; prohibited him from entering or remaining in the residence or household while under the influence of drugs or alcohol and constituting a threat to the safety or well-being of the minor children; and prohibited him from removing the minor children from the physical care of Dawn, the minor children's school or school grounds, or babysitter/daycare provider or other person *in loco parentis*. The court awarded Dawn the physical care and possession of the minor children and awarded Michael supervised visitation. The order of protection was set to expire on August 1, 2014.

¶ 9 On August 2, 2013, Michael filed a motion to reconsider, arguing that the court failed to make the necessary factual findings pursuant to section 214(c)(3) of the Act (750 ILCS 60/214(c)(3) (West 2012)). On August 23, 2013, the trial court entered an order denying Michael's motion to reconsider, noting that it had made findings in accordance with section 214(c)(3) of the Act. Michael appeals.

¶ 10 On appeal, Michael argues that the trial court's order must be reversed because it was against the manifest weight of the evidence; that the trial court failed to make specific findings of abuse as required under section 214(c)(3) of the Act; that the court failed to make a specific finding that the order of protection was necessary to prevent future abuse, which

is also required under section 214(c)(3) of the Act; that the trial court allowed Dawn to improperly use the order of protection as a vehicle to modify custody without meeting the standards set forth in section 610(b) of the Illinois Marriage and Dissolution of Marriage Act; and that "there was an insufficient finding of fact to support limited supervised visitation."

¶ 11 First, Michael argues that the trial court's order must be reversed because it was against the manifest weight of the evidence. In any proceeding under the Act (750 ILCS 60/101 to 401 (West 2012)) to obtain an order of protection, the central inquiry is whether petitioner has been abused. *Best v. Best*, 223 Ill. 2d 342, 348 (2006). Section 201(a)(i) of the Act provides that "any person abused by a family or household member" is a protected person. 750 ILCS 60/201(a)(i) (West 2012). Section 214(a) of the Act authorizes the issuance of an order of protection if the court finds that petitioner has been abused by a family or household member. 750 ILCS 60/214(a) (West 2012). Abuse as defined in section 103(1) of the Act includes physical abuse, harassment, intimidation of a dependent, interference with personal liberty, or willful deprivation. 750 ILCS 60/103(1) (West 2012). However, abuse does not include "reasonable direction of a minor child by a parent." 750 ILCS 60/103(1) (West 2012). Section 103(14) of the Act defines "physical abuse" to include "knowing or reckless use of physical force, confinement[,] or restraint" or "knowing or reckless conduct which creates an immediate risk of physical harm." 750 ILCS 60/103(14)(i), (iii) (West 2012).

¶ 12 A finding of abuse made under the Act will be reversed only if it is against the manifest weight of the evidence. *Best*, 223 Ill. 2d at 348-49. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *In re D.F.*, 201 Ill. 2d 476, 498 (2002). Under the manifest-weight-of-the-evidence standard of review, a reviewing court may not substitute its judgment for the trial court concerning the

credibility of the witnesses, the weight to be given to the evidence, or the inferences to be drawn. *In re D.F.*, 201 Ill. 2d at 499.

¶ 13 In this case, the trial court found that Michael committed abuse when he placed his foot on M.W.'s chest and when he pressed down harder after she said that his actions were painful. Although Michael testified that the acts were performed in a loving and playful manner, the court determined that the comments made immediately prior to the incident were indicative of Michael's true state of mind. The court stated that it was hard to believe that after making comments regarding Dawn not paying child support, Michael lovingly and playfully placed his foot on his seven-year-old daughter. We agree with the trial court that the evidence in this case was sufficient to establish that Michael committed abuse. Michael testified that he had made comments regarding the collection of child support and then placed his foot on M.W.'s chest. The stipulation of M.W.'s testimony indicated that Michael had placed his foot on her chest and that when she told him that it hurt, he pressed down harder. It also indicated that Michael had made a comment about Dawn paying child support and that he had called Dawn a "fucking bitch." The trial court expressly resolved issues of credibility against Michael when it found that Michael's actions were not performed in a playful and loving manner. Accordingly, we find that the court's issuance of the order of protection is supported by the evidence.

¶ 14 The next issue raised by Michael involves the sufficiency of the trial court's findings. Specifically, Michael argues that the court failed to make specific findings of abuse as required under section 214(c)(3) of the Act and failed to make a specific finding that the order of protection was necessary to prevent future abuse, which is also required under section 214(c)(3) of the Act. Michael argues that "it is clear that the trial court did not sufficiently consider all of [the] statutory factors enumerated in 750 ILCS 60/214(c)(3) before crafting the order and checking the boxes on the form order. A careful review of the

record reveals that, at most, the trial court gives a nod to the statutorily enumerated factors, but makes no application therein to the facts of the case."

¶ 15 In determining whether to grant a specific remedy, the court is required to consider relevant factors, including the nature, frequency, severity, pattern, and consequences of the past abuse and the likelihood of danger of future abuse. 750 ILCS 60/214(c)(1)(i) (West 2012). The court is required to make its findings in an official record or in writing and shall *at a minimum* set forth that the court has considered the relevant factors of section 214(c)(1); whether the conduct or actions of respondent, unless prohibited, will likely cause irreparable harm or continued abuse; and whether 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 2012).

¶ 16 Admittedly, the form order entered by the trial court in this case does not include a handwritten recitation of the court's oral statements, and the requisite statutory language was preprinted on the form order. However, the Act requires the court to *at a minimum* set forth in its order that it considered the appropriate factors, and this was accomplished in this case. Specifically, the court's written order stated that the court had considered the following in entering its finding of abuse: "all relevant factors, including, but not limited to the nature, frequency, severity, pattern, and consequences of Respondent's past abuse, neglect, or exploitation of Petitioner or any family/household member, *** and the likelihood of danger of future abuse, neglect, or exploitation of the party(ies) to be protected; and, if a child(ren) is/are involved, the danger that any minor child(ren) will be abused, neglected, or improperly removed from the jurisdiction, improperly concealed within the State, or improperly separated from the child(ren)'s primary caretaker." Additionally, under the findings section of the order, the court indicated that it had found that Michael had committed abuse; that the conduct or actions of Michael, unless prohibited, would likely cause irreparable harm or continued abuse; and that it was necessary to grant the requested

relief to protect the minor children. In addition to the written order, the court made oral findings at the hearing that Michael had committed abuse by placing his foot on his seven-year-old daughter's chest and by pressing down harder when M.W. told him that he was hurting her. The court further found that Michael's actions were committed while he was angry and were not performed in a loving and playful manner. Additionally, the court found that Michael had made comments to M.W. regarding the collection of child support immediately before he placed his foot on her chest. Accordingly, the trial court's findings met the statutory requirements.

¶ 17 Michael next argues that the trial court allowed Dawn to improperly use the order of protection as a vehicle to modify custody without meeting the standards set forth in section 610(b) of the Illinois Marriage and Dissolution of Marriage Act. We disagree.

¶ 18 Section 214(b)(5) of the Act (750 ILCS 60/214(b)(5) (West 2012)) specifically provides that the circuit court may award the physical care and possession of a minor child to petitioner as a remedy under the Act. Section 214(b)(5) states:

> "Physical care and possession of the minor child. In order 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, the court may do either or both of the following: (i) grant petitioner physical care or possession of the minor child, or both, or (ii) order respondent to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis.
>
> If a court finds, after a hearing, that respondent has committed abuse (as defined in Section 103) of a minor child, there shall be a rebuttable presumption that awarding physical care to respondent would not be in the child's best interest." 750 ILCS 60/214(b)(5) (West 2012).

¶ 19 In this case, Michael cites *Radke v. Radke*, 347 Ill. App. 3d 1123 (2004), and *Wilson v. Jackson*, 312 Ill. App. 3d 1156 (2000) as support for his position that Dawn improperly used the order of protection to circumvent the requirements of section 610(b) of the Illinois Marriage and Dissolution of Marriage Act for the modification of custody. However, we note that in *Radke* and *Wilson*, the reviewing courts concluded that the petitioners had requested orders of protection in an attempt to obtain visitation and custody of the minor children and not for the primary purpose of preventing abuse. Unlike the cases cited by Michael, the evidence presented at the hearing on the plenary order of protection in the present case supported the court's finding that Michael had committed abuse. According to section 214(b)(5) of the Act, once the circuit court has found that respondent has committed abuse, there is a rebuttable presumption that awarding physical care of the minor children to respondent would not be in the minor children's best interests. The court's decision to place the minor children in their mother's care was within the remedies available to victims of abuse under the Act. The court issued the plenary order for one year, reasoning that the ongoing custody issues in the dissolution proceedings would be resolved within one year. The trial court is in the best position to determine the appropriate remedy under the Act because the court was able to observe the witnesses and assess their credibility. *In re Marriage of Blitstein*, 212 Ill. App. 3d 124, 132 (1991). Accordingly, we conclude that the trial court did not err in awarding Dawn the physical care and possession of the minor children as a remedy under the Act.

¶ 20 Last, Michael argues that "there was insufficient finding of fact to support limited supervised visitation." We disagree.

¶ 21 Section 214(b)(7) of the Act (750 ILCS 60/214(b)(7) (West 2012)) allows the circuit court to determine the visitation rights, if any, of respondent in any case in which the court awards the physical care or temporary legal custody of a minor child to petitioner. Section

214(b)(7) states:

> "The court 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 2012).

¶ 22 In this case, the court granted Michael supervised visitation with the children after awarding Dawn the physical care and possession of the minor children. The court found that Michael had committed abuse during the time that he had physical custody of the minor children and therefore was within its discretion to restrict Michael's visitation with the minor children. Accordingly, we conclude that the court did not err in awarding Michael limited, supervised visitation.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

¶ 24 Affirmed.