

No. 1-15-1553

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARIA NAVA-MENDOZA,)	Appeal from the Circuit
)	Court of Cook County.
)	
Petitioner-Appellant,)	
)	
)	
v.)	No. 15 OP 70159
)	
)	
RIGOBERTO LUNA,)	
)	
Respondent-Appellee.)	Honorable
)	Patrice Ball-Reed,
)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court is affirmed, where the petitioner failed to show that the entry of a plenary order of protection to cover a period of six months rather than two years was an abuse of discretion or a violation of her due process rights.

¶ 2 The petitioner, Maria Nava-Mendoza, appeals from the entry of a plenary order of protection under the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/101 *et seq.* (West 2012)) protecting herself and her minor son, R.L., from alleged acts of abuse by the

respondent, Rigoberto Luna. The petitioner alleges that the court erred in entering the order for a period of six months rather than two years, the maximum allowable under the Act. 750 ILCS 60/220 (West 2012). She also asserts that the court's order effectively denied her of her due process rights under the United States and Illinois constitutions. For the reasons that follow, we affirm.

¶ 3 On January 9, 2015, the petitioner sought an emergency order of protection against Luna based upon the following allegations. On January 8, 2015, Luna followed the petitioner from her place of employment to her home and began arguing with her concerning the parties' son, R.L. Luna insulted the petitioner, slapped her several times and threw her to the ground. He then got on top of the petitioner, grabbed her arms and threatened to kill her. Luna left the petitioner's home after a neighbor knocked on her window. The petition alleged a prior instance of abuse by Luna in October of 2014, and that the petitioner had initiated proceedings for a protective order against Luna in December of 2013. There were no allegations of any form of abuse against R.L.

¶ 4 On January 9, 2015, the circuit court entered the emergency order of protection prohibiting Luna from engaging in further abuse or harassment of the petitioner or R.L., and barring him from most other forms of contact with the petitioner or R.L. subject to reserved visitation rights between the parties. The order did not specify any particular visitation dates or times, but granted the petitioner the right to deny Luna access to the child if Luna arrived for visitation under the influence of drugs or alcohol, or behaved in a violent or abusive manner.

¶ 5 Thereafter, the court extended the order of protection twice, entering agreed dispositional orders on January 30, 2012, and again on March 12, 2015. The March 12 order modified the original order of protection to incorporate a more detailed schedule for Luna's visitation with R.L. Specifically, Luna was permitted visitation with R.L. every other weekend from Friday at 5

p.m. to Sunday at 3 p.m., with the exchange to take place at a police station. The order limited communications between the petitioner and Luna to include only text messages regarding visitation logistics.

¶ 6 At the commencement of the April 21 hearing, the parties entered into a stipulation that, in the event the court granted a plenary order of protection, the visitation schedule as stated in the March 12, 2015, order would remain in place. At the hearing, the petitioner testified that she and Luna had dated for two years until December 2013, and that they had one child together, R.L., who was four years old. On January 8, 2015, at 11 p.m., the petitioner was on her way home from work when Luna began following her. When they reached the petitioner's house, Luna demanded to see R.L., but the petitioner refused because the child was sleeping. Luna became very upset and struck the petitioner in the face with an open hand three or four times, grabbed her by the hair and threw her to the ground. Luna got on top of the petitioner and continued to pull her hair as she lay pinned on the ground. The petitioner tried to defend herself by scratching Luna and biting his finger. Luna terminated the assault when a neighbor knocked on the petitioner's window and said she was going to call the police. Later, the petitioner heard a knock on her door, but did not respond, because she feared it was Luna.

¶ 7 The petitioner testified regarding two incidents of abuse that occurred prior to that alleged in the January 9, 2015 petition. In January 2014, shortly after the parties separated, Luna came to the petitioner's house at 11 p.m. and wanted to take R.L. with him. According to the petitioner, she was already in bed with the child, but Luna attempted to remove R.L. by force. The pair argued, and Luna removed his belt and hit the petitioner on the back several times. The petitioner obtained an emergency order of protection shortly thereafter, but then agreed to dismiss that case because Luna promised that he would change his behavior. In October 2014, as

the she was exiting Luna's truck to retrieve R.L. from school, Luna grabbed her by the arms, pulled her out of the truck and bit her finger, causing it to bleed.

¶ 8 The petitioner testified to three occasions during which Luna violated the January 9, 2015 emergency order of protection. The first occurred on January 25, 2015 at 11 p.m. After leaving work, the petitioner was walking home with her boyfriend, Jose Alvarez, when Luna came up behind them and hit Alvarez on the head with an object, causing his head to bleed. Luna threatened to kill both the petitioner and Alvarez and to take R.L. Criminal charges were brought against Luna as a result of this incident. The second violation occurred on April 10, 2015, when Luna approached the petitioner from behind as she walked from the train station to the bus stop, and again threatened to kill both her and Alvarez. The third violation occurred on April 12, 2015, the week before the plenary hearing, when Luna followed the petitioner and R.L. from the police station after a visitation exchange. Luna again threatened to kill the petitioner and Alvarez, causing R.L. to become scarred.

¶ 9 On cross-examination, the petitioner testified that she works eight hours every day and that, during this time, Luna's sister babysits for R.L. The petitioner also stated that it was customary for Luna to visit R.L. at 11 p.m. at night because that was the time both she and Luna got off of work.

¶ 10 Luna testified that on January 8, 2015, he went to the petitioner's home about 11 p.m. to see R.L. He stated he was concerned because, despite his efforts to contact the petitioner, he had not heard anything about his son for eight days. He also testified that he intended to give the petitioner a money order for R.L.'s school tuition. When Luna arrived, he told the petitioner that they "needed to talk" regarding R.L., but she responded that she had nothing to talk to him about. According to Luna's account, the petitioner struck him first and he grabbed her arms in an effort

to defend himself. Luna denied ever striking, biting or threatening to kill the petitioner. Luna also denied striking Alvarez on January 25, 2015, but claimed Alvarez began to choke him. According to Luna, Alvarez and the petitioner threatened to "take R.L." and never allow him to see the child. Finally, Luna testified that the couple had an argument regarding R.L. during the visitation exchange on April 12, 2015, in front of the police station, and that he had been asked to leave by a security guard.

¶ 11 At the conclusion of the evidence, the petitioner requested that the court enter a plenary order of protection extending for a period of two years. She also requested that the existing agreement between the parties regarding Luna's visitation with R.L. remain in effect for that time period. The circuit court granted the plenary order of protection (order), incorporating the visitation agreement. However, the duration of the order was only six months, expiring on October 21, 2015. The order prohibited Luna from abusing, harassing, intimidating, stalking or otherwise interfering with the liberty of the petitioner or R.L. The order also barred Luna from attempting to telephone or otherwise contact either the petitioner or R.L., except with regard to the logistics of his visitation. In explaining its decision to extend the order for a period of six months rather than two years, the court stated that, although it believed the petitioner had proven her case of abuse by Luna, it also believed that Luna had been angry on many occasions because he did not have contact with R.L. As a further basis for its decision to limit the duration of the order, the court stated as follows:

"Counsel, I'm giving that latitude to allow them to go into paternity court to get something more specific and with regard to child support as well because that needs to be – they need something structured. Because both of them are working late at night and this other person is babysitting, I am not sure what that entails. So I do believe she does

have a responsibility to get something more structured done. This is very temporary, Counsel."

¶ 12 In response to an inquiry by the petitioner's counsel, the court again stated that the reason for the order's shorter duration was to encourage the petitioner to go to parentage court to obtain "something more specific" with reference to the parties' care of R.L. In particular, the court noted that the existing order: "doesn't allow for giving them resource in terms of parenting. It doesn't allow for [Luna] to get an actual order of support so that he can pay through the system and she doesn't have to see him *** [or] talk with him." Finally, the court reiterated that the existing order "is very flimsy in terms of what I can do. They need something more structured and *** specific."

¶ 13 On appeal, there is no issue regarding the circuit court's finding of abuse under the Act or its issuance of a plenary protective order on behalf of the petitioner and R.L. Rather, the petitioner's assignments of error derive exclusively from the court's limitation of the order to six months' duration instead of the maximum allowable two years under the Act. 750 ILCS 60/220(b) (West 2012)

¶ 14 Initially, we note that the parties appear uncertain about the standard of review in this case. The petitioner asserts, without reference to specific authority, that this court reviews decisions regarding the duration of protective orders under the "manifest weight" standard of review, while Luna appears to contend that our review is limited to whether the court's order constituted an abuse of discretion.

¶ 15 In a proceeding to obtain an order of protection, the central inquiry is whether the petitioner has been abused. *Best v. Best*, 223 Ill. 2d 342 (2006). Once a finding of abuse has been made, the trial court is compelled under the express language of the Act to issue an order of

protection. 750 ILCS 60/214(a) (West 2010); *Best*, 223 Ill. 2d at 348. The determination of whether abuse has occurred presents issues of fact which, under the plain language of the Act, must be proven by a preponderance of the evidence. *Id.* at 348. The court in *Best* observed "when trial court makes a finding by a preponderance of the evidence, this court will reverse that finding only if it is against the manifest weight of the evidence." *Id.* Accordingly, a finding that a petitioner has been abused under the Act will be reversed only if it is against the manifest weight of the evidence. *Id.* at 349.

¶ 16 In arriving at a finding of abuse, the court is vested with no particular discretion under the Act, other than to apply the law to the facts at issue. *Best v. Best*, 358 Ill. App. 3d 1046, 1051 (2005), *aff'd*, *Best*, 223 Ill. 2d 342. By contrast, when a circuit court crafts an order of protection following a finding of abuse, it "acts as a shaper of remedies" and, in that capacity, employs "true discretion." *Frank v. Hawkins*, 383 Ill. App. 3d 799, 816 (2008) (citing *Best*, 358 Ill. App. 3d 1053). The Act includes a nonexclusive list of factors to be considered and evaluated by the court in exercising this discretion (see 750 ILCS 60/214 (West 2012)), and sets time ranges for the duration of orders of protection. A plenary order, for example, is generally to be valid for a "fixed period of time, not to exceed two years" (750 ILCS 60/220(b) (West 2012)), and "may be extended one or more times, as required." 750 ILCS 60/220(e) (West 2012). Accordingly, although we review a finding of abuse using a manifest weight standard, we review the court's granting of remedies in an order of protection under an abuse of discretion standard. *Frank*, 383 Ill. App. 3d at 816.

¶ 17 The petitioner urges that the limitation of the protective order to six months in length was in error because it did not take into account the severity of the abuse to which she was subjected or the risk of further abuse. She argues that the duration of the order was based solely upon the

fact that the parties have a child in common, and the court's "subjective belief" that it was in the parties' interests for the petitioner "to file additional proceedings." We disagree.

¶ 18 The provisions of the Act are to be “liberally construed” in order to “promote [the Act’s] underlying purposes.” 750 ILCS 60/102 (West 2012). One of these stated purposes is to “[s]upport the efforts of victims of domestic violence” in the following manner:

"[T]o avoid further abuse by promptly entering and diligently enforcing court orders which prohibit abuse and, when necessary, reduce the abuser's access to the victim and address any related issues of child custody and economic support so that victims are not trapped in abusive situations by fear of retaliation, [or] loss of a child****" 750 ILCS 60/102(4) (West 2012).

¶ 19 To this end, the Act affords courts wide latitude to enter orders preventing and shielding victims from further abuse, but also to provide for the safety and well-being of the minor children of those victims. For instance, Section 214 of the Act authorizes the court to determine visitation rights and set schedules for visitation between the child and a respondent (750 ILCS 60/214(b)(7) (West 2012)), to award temporary custody of the child to the petitioner (750 ILCS 60/214(b)(6)), and order temporary child support payments, once it is determined the respondent has a legal obligation to support that child. 750 ILCS 60/214(b)(12).

¶ 20 In this case, the petitioner sought an order of protection on behalf of both herself and R.L. The resulting order not only protected both parties from abuse, harassment, or intimidation by Luna, but also barred Luna from most forms of contact with the petitioner and R.L. apart from weekend visits. Importantly, while the court believed the petitioner had suffered abuse at the hands of Luna, it also found that many of the parties' conflicts resulted from Luna's perception that he'd lost contact with or control over R.L. In fact, the record suggests that the petitioner at

times disregarded Luna's attempts to communicate with her about R.L., ignoring his telephone calls and telling him they "had nothing to talk about" regarding the child. In limiting the duration of the order, the court stated its concern that the parties' rights and responsibilities with regard to R.L. were ill-defined and uncertain. The court also questioned the existing child care arrangement, under which, according to the petitioner's testimony, R.L. was being cared for by Luna's sister at night while the parties worked late shifts. In light of these facts, the court could reasonably have concluded that the petitioner's interest in being free from further contact with Luna, and the potential for ongoing abuse, would be best served by having the respective rights and duties with regard to R.L. clearly defined and structured from the outset. Further, in the event Luna violated the order within the six month period, the petitioner could exercise her right to have the order extended. The standard of review in this case is highly deferential: this court generally will find an abuse of discretion only when the circuit court's decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004). We are unable to conclude that the circuit court's limitation of the duration of the protective order amounted to an abuse of discretion under this standard.

¶ 21 The petitioner also asserts that the order of protection amounted to a violation of her federal and State due process rights (U.S. Const. amend. XIV; IL Const. Art. 1, § 6), under the "unconstitutional conditions" doctrine. See *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013). We disagree.

¶ 22 The doctrine of "unconstitutional conditions" restrains the government from denying or threatening to deny a benefit to a person because she exercises a constitutional right. *Koontz v. St. Johns River Water Management District*, 122 S. Ct. 2586, 2594 (2013). The Supreme Court

has adopted a two-part test for evaluating claims under this doctrine. First, the court must ascertain whether there is "an essential nexus between the condition burdening [the] rights and a legitimate state interest," and, second, whether there is a "rough proportionality between the burden on the individual and the harm the government seeks to remedy through the condition." *McElwain v. Office of Illinois Secretary of State*, 2015 IL 117170, ¶ 29, citing *Dolan v. City of Tigard*, 512 U.S. 374, 386–91 (1994).

¶ 23 The petitioner argues that the order imposed an "unconstitutional condition" upon her by withholding "the benefit of the protection to which [she] was entitled" in an effort to coerce her into filing an action under the Illinois Parentage Act of 1984 (750 ILCS 45/1 et seq. (West 2012)). She maintains that it was her right to determine whether or not to file such an action or any other proceeding with regard to her family.

¶ 24 However, even assuming that the petitioner's choices with regard to her family are encompassed within constitutionally-protected privacy rights, she fails to convincingly articulate what rights or benefits were denied to her by the court's order. In fact, the order of protection entered in this case provided comprehensive protection to both the petitioner and R.L., barring Luna from most forms of contact with these parties apart from his visitation with R.L. The order is also subject to modification or extension under the Act. The limitation upon the duration of the order was not a "withholding of protection," but rather fell properly within the broad discretionary power conferred to the circuit court under the Act. Accordingly, the petitioner's argument fails.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court entering a plenary order of protection on behalf of the petitioner and R.L.

¶ 26 Affirmed.