

NOTICE

Decision filed 03/23/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140315-U

NO. 5-14-0315

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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LEANN MERCHANT,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	St. Clair County.
	)	
v.	)	No. 14-OP-186
	)	
RICHARD MERCHANT,	)	Honorable
	)	Patricia H. Kievlan,
Respondent-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Chapman and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's entry of an order of protection against the respondent is affirmed where the court's finding that the respondent committed abuse against the petitioner and the parties' three children was not against the manifest weight of the evidence; the court's findings that the respondent was not credible during trial did not misrepresent the respondent's testimony; and the court's ruling was based on the evidence presented before the court.

¶ 2 On March 28, 2014, the petitioner-appellee, LeAnn Merchant (LeAnn), sought and received an emergency order of protection in the circuit court of St. Clair County against her husband, the respondent-appellant, Richard Merchant (Richard). After a hearing held on April 14, 2014, the court granted a plenary order of protection against Richard to

LeAnn and the parties' three minor children. On June 3, 2014, the circuit court denied Richard's motions for rehearing, retrial, and modification as well as his motion to vacate the judgment or for other relief. The central issue on appeal is whether Richard's abuse of LeAnn and the three children was proven by a preponderance of the evidence. For the following reasons, we affirm the court's judgment.

¶ 3 On March 28, 2014, LeAnn filed a petition seeking an emergency order of protection against Richard pursuant to the Illinois Domestic Violence Act of 1986 (the Act) (750 ILCS 60/203 (West 2012)) for herself and the parties' three minor children: A.M., an 11-year-old daughter, L.M., a 10-year-old son, and A.M., a 7-year-old daughter. The petition alleged the following: on March 27, 2014, after Richard had been drinking throughout the evening, Richard and LeAnn began verbally fighting at the marital residence until it escalated to Richard's grabbing and shoving LeAnn in the presence of the parties' 11-year-old daughter, A.M. The petition alleged that Richard "got in [A.M.'s] face" and was "screaming on the top of his lungs at her." Also alleged was that Richard had played pornographic movies on numerous occasions while the children were in the home. The petition alleged that in fact, earlier in the month, 11-year-old A.M. accessed the family computer to complete schoolwork and found a pornographic movie playing, a movie that Richard had failed to turn off in the living room. Further, the petition alleged that LeAnn had recently disposed of three large garbage bags of Richard's pornographic movies and other material from within the home. Lastly, the petition alleged that Richard "rapes" LeAnn when he is intoxicated, with the most recent time occurring on March 18, 2014.

¶ 4 The emergency order of protection for LeAnn and the three children was issued on March 28, 2014. Pursuant to the circuit court's order, Richard was prohibited from committing acts of abuse or threats of abuse, including "harassment, interference with personal liberty, physical abuse, or stalking" and "intimidation of a dependent." Richard was ordered to stay at least 500 feet away from LeAnn and the three children, the parties' residence, LeAnn's employment, and the children's schools. Richard's visitation was reserved until further court order.

¶ 5 On April 14, 2014, a plenary hearing was held on the petition. LeAnn testified that on March 27, 2014, Richard "had his nose right up to [A.M.'s] nose screaming on the top of his lungs, and she was shaking, and I jumped in the middle of it." Upon LeAnn doing this, she testified that Richard then "shoved me against the closet." LeAnn testified that as she attempted to call 9-1-1, Richard chased after her and ripped the phone from her hands. LeAnn also indicated that during the altercation her son, L.M., had been awakened.

¶ 6 LeAnn testified that she did not feel comfortable with Richard's having visitation rights with the children, stating "Richard beat[s] my son" and the children no longer have fears of getting "their butts beat, they're not scared of getting their faces popped, they're not scared of anything" now that Richard cannot see them.

¶ 7 At the hearing, Officer John Dilday testified that LeAnn brought her three children to the police station to file a report on March 27, 2014, at around 9 p.m. At this time, he received statements from LeAnn and her oldest daughter, A.M. Officer Dilday testified that both LeAnn and A.M.'s statements were consistent with each other, stating that

Richard was "nose to nose with [A.M.] and yelled at her and it scared her." Officer Dilday further testified that no signs of physical abuse were present; however, both LeAnn and A.M. seemed emotional and unhappy over the events they had just described. Lastly, Officer Dilday testified that he had "no suspicion" that LeAnn was under the influence, so he allowed her to drive her three children from the police station to their grandparent's home that evening.

¶ 8 At the conclusion of the hearing, the circuit court instructed both parties to submit to a TASC evaluation and to follow through with treatment recommendations. Based upon the evidence, the court determined that LeAnn and the parties' three minor children had been abused as defined by the Act (750 ILCS 60/203 (West 2012)) and made them protected persons. The court ordered that Richard have no visitation until after the Department of Children and Family Services interviewed each child and completed a thorough investigation. The court granted LeAnn physical care and possession of the parties' three minor children.

¶ 9 We find it important to note that the order of protection expired by its own terms on December 28, 2014, therefore the issues before this court are either moot or arguably moot. However, even assuming the issues are rendered moot, this court finds the issues before us to be reviewable under the public interest exception to the mootness doctrine because of the societal interest in protecting victims of domestic violence. *Whitten v. Whitten*, 292 Ill. App. 3d 780, 784 (1997). Because of the important societal interest and possible future implications on the disposition of custody for the parties' three minor children, we therefore render a disposition on this matter.

¶ 10 In any proceeding to obtain an order of protection, the central inquiry is whether the petitioner has been abused. *Best v. Best*, 223 Ill. 2d 342, 348 (2006). The standard of proof before the circuit court is proof by a preponderance of the evidence. *Best*, 223 Ill. 2d at 348. Under section 214(a) of the Act (750 ILCS 60/214(a) (West 2012)), once the court finds that the petitioner has been abused, "an order of protection \*\*\* shall issue." Thus, this court may only reverse the circuit court's factual finding of abuse where the finding was 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 the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *In re D.F.*, 201 Ill. 2d 476, 498 (2002).

¶ 11 On appeal, Richard first argues that the circuit court erred in granting LeAnn's petition for order of protection in regard to the minor children, claiming that the court's finding that Richard abused the children was against the manifest weight of the evidence. Richard claims that no evidence was presented before the court that he abused his children, claiming there was no evidence that he knowingly acted in a way to cause them emotional distress on March 27, 2014, or during any prior events. We disagree.

¶ 12 Abuse is defined in section 103(1) as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation." 750 ILCS 60/103(1) (West 2012). Abuse does not include the "reasonable direction of a minor child by a parent." 750 ILCS 60/103(1) (West 2012). Section 103(14) defines "physical abuse" to include "knowing or reckless use of physical force" and "knowing or reckless conduct which creates an immediate risk of physical harm." 750 ILCS 60/103(14)(i),

(14)(iii) (West 2012). Section 103(7) defines "harassment" to include "*knowing* conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner." (Emphasis added.) 750 ILCS 60/103(7) (West 2012). "A person knows, or acts knowingly or with knowledge of \*\*\* [t]he result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2012). Lastly, under section 103(10), "intimidation of a dependent" includes "subjecting a \*\*\* dependent \*\*\* to \*\*\* the witnessing of: physical force against another." 750 ILCS 60/103(10) (West 2012).

¶ 13 Richard argues that he did not abuse his children. However, we believe sufficient evidence existed to support the circuit court's finding of abuse of the children; specifically physical abuse, harassment, and intimidation of a dependent. The record is replete with examples of Richard's reckless behavior towards his three minor children. First, LeAnn's testimony and Richard's admission that he "beats," "pops," and gives the parties' son, in Richard's own words, "whoopins," is but one example of physical abuse that is not mere direction of a minor child by a parent. Richard contends that his actions are reasonable discipline, thus not abuse. However, at the hearing, LeAnn testified that L.M. will often flinch when Richard approaches him too fast or begins to yell at him. Thus, this court disagrees that Richard's actions are reasonable direction of a minor by a parent.

¶ 14 Next, the circuit court found Richard's admission regarding his irresponsible handling of pornographic materials to constitute harassment. The record reveals that on two occasions his children were exposed to pornographic material on the family laptop, a computer the children have access to in the living room for school-related purposes. LeAnn testified that in October 2013, one of her daughters witnessed a pornographic movie that Richard had been playing while cleaning his bedroom. Next, on March 24, 2014, the oldest daughter turned on the family laptop to complete schoolwork and one of Richard's pornographic movies was playing. LeAnn testified that these movies were not hers, but were Richard's.

¶ 15 Despite the testimony above, Richard relies on *In re Marriage of Young*, 2013 IL App (2d) 121196, arguing that there was no evidence that he knowingly caused his children emotional distress, thus no evidence he harassed his children. However, *Young* is dissimilar to the case at issue. In *Young*, the appellate court reversed the order of protection because respondent's conduct was not found to be harassment under the Act. 2013 IL App (2d) 121196, ¶ 24. The court reasoned that harassment was not present because the Young children had never actually observed any pornography on the iPad in the home, thus there was no evidence that the children suffered emotional distress as a result of respondent watching pornography in the home. 2013 IL App (2d) 121196, ¶ 28. Unlike in *Young*, where the court refused to rule that the risk of emotional distress was great, here, the risk of distress is in fact great because minor children have been exposed, on two occasions, to pornographic imagery by their father. Thus, the evidence to which Richard cites does not clearly render the opposite conclusion for this court.

¶ 16 Next, testimony was presented that two of the three children were awakened and one child, A.M., was present during the parties' altercation. Specifically, the parties' oldest daughter, A.M., was involved in the heated argument on March 27, 2014, and witnessed Richard physically push and shove LeAnn. Officer Dilday testified that A.M. told him that her father "got nose to nose with her and yelled at her, and it scared her." Further, Officer Dilday testified that during A.M.'s interview it "seemed that she was advocating for [her] mother." As a result of the events that transpired, LeAnn testified that A.M. began to dry heave at the residence and while at the police station she became ill and threw up in a trash can.

¶ 17 After the closing of the evidence, the court indicated that Richard's testimony, in comparison to A.M.'s, LeAnn's, and Officer Dilday's, lacked credibility regarding the varying accounts of the altercation, specifically the events entailing A.M. The court stated:

"THE COURT: I can't imagine that your daughter left that house, and between the time she left your house and made it to the police department that she and her mother cooked up the story that you were nose to nose to her."

Based on the above evidence, this court believes sufficient evidence was presented that Richard intimidated a dependent on March 27, 2014.

¶ 18 This court cannot conclude that the circuit court's determination was unreasonable, arbitrary, and not based on the evidence presented at the hearing. We agree that the evidence was sufficient to establish that Richard abused his children; specifically that he



physically abused, harassed, and intimidated dependents. Therefore, this court believes the three minor children were properly made protected persons.

¶ 19 Richard next asserts that the circuit court erred in granting LeAnn's petition for order of protection because the court's finding that Richard abused LeAnn was against the manifest weight of the evidence. Richard claims there were no signs of abuse against LeAnn. However, testimony exists that Richard both physically and verbally abused LeAnn on March 27, 2014, as well as many times prior when he knowingly used physical force against LeAnn. Not only has LeAnn provided evidence that Richard shoved and pushed her on March 27, 2014, but she also testified that Richard "rapes" her frequently, at least two times per month, when he physically forces her to engage in sexual intercourse while he is intoxicated. Thus, this court cannot say that the circuit court's determination regarding Richard's abuse of LeAnn was unreasonable, arbitrary, or not based on the evidence presented at the hearing. Therefore, this court believes LeAnn was properly made a protected person.

¶ 20 Next, Richard asserts that the circuit court erred in granting LeAnn's petition for order of protection because the court's finding that Richard was not credible at trial misrepresented his testimony and was against the manifest weight of the evidence. Under the manifest weight of the evidence standard, the reviewing court should give deference to the circuit court as it is in the best position to observe the conduct and demeanor of the parties and the evidence. *Best*, 223 Ill. 2d at 350. As such, a reviewing court may not substitute its judgment for the circuit court's 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.

¶ 21 This court believes the circuit court had many plausible reasons to find Richard's testimony was not credible at trial. The record reflects that the court's determination was based heavily on its view that Richard's testimony was inconsistent with that of other witnesses regarding the events that transpired on March 27, 2014. In particular, the court noted the inconsistencies with Richard's testimony regarding LeAnn's alleged state of intoxication; accusations suggesting that LeAnn had assaulted him; and whether or not he became physically angry towards his oldest daughter, A.M. Throughout the hearing Richard indicated that LeAnn was "erratic" on March 27, 2014, stating that she had been drinking wine from the time she returned home from work. Richard even testified that LeAnn had poured a glass of wine to drink while the couple drove to a car dealership that night.

¶ 22 The circuit court did not find Richard's testimony to be credible. The court relied on the testimony of Officer Dilday, a 24-year patrol officer at the time, who testified that LeAnn was not under the influence, did not have the smell of alcohol on her breath, and had no signs of impairment when she arrived at the police station. The court noted this glaring inconsistency in Richard's testimony, stating:

"THE COURT: If this woman had drank a bottle of wine in an hour and was at the police department by 9:15, she clearly, clearly would have had the smell of alcohol on her breath, she would have been impaired. Her eyes would have been glassy, and she would have been impaired. I can't imagine that this police

officer is lying about that, because I simply cannot imagine that a police officer would allow a woman to leave the police department with her three children in tow to drive \*\*\* after she had been consuming somewhere between a half a bottle or a bottle and a half \*\*\*."

The court proceedings show that Richard was unable to provide specific details, physical evidence, or the use of witnesses to corroborate his accusations that LeAnn assaulted him on March 27, 2014, allegedly scratching his face and tearing his shirt. Furthermore, Officer Dilday testified that Richard informed him that he suffered no injuries on March 27, 2014. Thus, in light of the countless inconsistent statements throughout the hearing, this court believes the circuit court's finding was not against the manifest weight of the evidence.

¶ 23 Lastly, Richard asserts that the circuit court erred in denying his motions for rehearing, retrial, and modification of judgment as well as his motion to vacate the judgment or for other relief, because the findings were not based on the evidence presented to the court and thus against the manifest weight of the evidence. Richard argues that the court interjected evidence, disregarding Officer Dilday's testimony that A.M. did not seem scared while she was at the police station.

¶ 24 In affirming a circuit court's judgment, this court is not limited either by the circuit court's rationale or the parties' arguments. *In re Marriage of Holtorf*, 397 Ill. App. 3d 805, 811 (2010). A reviewing court may affirm the court's judgment on any basis supported by the record. *In re Marriage of Holtorf*, 397 Ill. App. 3d at 811. This court finds that the issuance of the order of protection for LeAnn and the three minor children

was not against the manifest weight of the evidence, but was in fact heavily supported by the evidence presented before the court. Not only does strong evidence exist that Richard physically abused, harassed, and intimidated his children, but there is also evidence that Richard physically abused LeAnn on more than one occasion. In fact, evidence exists that abuse against LeAnn was an ongoing occurrence when Richard became intoxicated. Thus, ample evidence was presented to the court to support the conclusion that abuse exists. Accordingly, we conclude that the circuit court did not err in granting LeAnn's petition for order of protection.

¶ 25 For the foregoing reasons, the circuit court's judgment is affirmed.

¶ 26 Affirmed.