2013 IL App (1st) 121222-U

FIFTH DIVISION
June 28, 2013

No. 1-12-1222

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).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIANE NOVAK, Petitioner-Appellee, v. JOHN NOVAK, Respondent-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County 05 D 4510 Honorable Naomi H. Schuster, Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Justice Howse dissented.

O R D E R

¶ 1 HELD: (1) The trial court's factual findings substantially complied with statutory requirements; (2) respondent was not prejudiced by the failure to include a definition of "harassment" in the preprinted order of protection; and (3) the order of protection is not an unconstitutional prior restraint.

¶ 2 Respondent John Novak appeals from an order of protection entered by the trial court in favor of petitioner Diane Novak, his former spouse, pursuant to the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/101 *et seq.* (West 2010)). On appeal, respondent argues that: (1)

the order of protection, prohibiting the dissemination of a specific email, is an unconstitutional prior restraint of his free speech under the first amendment; (2) the trial court failed to make the minimum factual findings as required under section 214(c)(3) (750 ILCS 60/214(c)(3) (West 2010)); and (3) the order of protection fails to define the term "harassment" as required under section 221(a)(1) (750 ILCS 60/221(a)(1) (West 2010)).

¶ 3 On October 2, 2007, the trial court entered the judgment of dissolution of marriage, dissolving the parties' marriage. The judgment included the marital settlement agreement, executed by the parties on September 18, 2007. The agreement stated that parties had four children and all were of legal age at the time of the settlement. The marital settlement agreement outlined the division of the parties' properties, businesses, and set forth the maintenance for petitioner.

¶ 4 In April 2011, respondent filed a petition to clarify the judgment for dissolution of marriage. Respondent asked the trial court to resolve a disagreement over petitioner's maintenance and the money petitioner received from the parties' business. In June 2011, petitioner filed a petition for rule to show cause for respondent's failure to pay monthly maintenance under the terms of the marital settlement agreement. Without the court's approval, respondent had reduced the previously agreed maintenance payments due to petitioner. Petitioner sought the unpaid balance and attorney fees.

¶ 5 Also in 2011, the parties sold a property in Indiana that was covered by the marital settlement agreement. The agreement stated that the proceeds of the sale would be divided evenly between the parties, but that respondent was responsible "for the payment of any and all

costs associated with property and any improvements" until the property was sold. Respondent's property accountant sent petitioner's attorney a letter stating that respondent did not intend to pay petitioner her portion of the sale, as directed in the marital settlement agreement. Respondent deducted costs associated with the property, including mortgage payments, from the amount due petitioner and sought $174 from petitioner.

¶ 6 On December 15, 2011, respondent sent petitioner the email at issue. In the email, he told petitioner that if she wanted to keep the information in the email private, then she should tell her attorney that she was not interested in recouping the attorney fees and was not seeking any additional money from the Indiana sale. The email was addressed to respondent's attorney with instructions to forward to petitioner's attorney. We note that the email contains numerous typographical errors and have tried to indicate the errors when quoting portions of the email, but the errors are too numerous to address in each instance. Two sets of briefs were filed on appeal, one set included the full body of the email and the other redacted certain portions. For purposes of this appeal, we need only to refer to the redacted briefs.

¶ 7 Respondent stated that he was not going to pay petitioner's attorney fees or give petitioner her share of the sold property "with out consquenses" [*sic*.] for petitioner. Respondent wrote that petitioner had received "way more than she is entitled to regardless of divorce decreed." Respondent discussed his belief that petitioner was not entitled to a portion of his business because she "contributed nothing in regard to our financial success[.]"

¶ 8 Respondent stated that the "bottom line" was:

"If I am to pay D additional undue and inappropriate costs then I

> am going expose/sham her be sending a letter to her Mother, siblinds and maybe even cosins outlining what I had to endure for way too many years– the letter will contain at least the following." [*Sic*.]

¶ 9 Respondent then described several private and personal incidents that he asserted occurred during the parties' marriage and were damaging to petitioner. The email concluded with the following paragraph:

> "Ther are so many additional I can reminiss about my tolerance of the madness and disfuntional culture that existed because of Dianes inabiltiesw and self serving nerorisi – however I will limit to the above @ this time – Let me know what U want me to write – Checks and leter or would U prefer to wave the attoerney fees and the Indiana money just settle for the messly 525 cash and 200k morage paydown per year ??? agreeding to the garenntee 525 per year was the 2nd worst thing I ever did in my life." [*Sic*.]

¶ 10 On December 21, 2011, respondent called petitioner because he had not received a response to the email. He asked if she had received the email and petitioner said she had not. Respondent forwarded the email to petitioner again. Later that morning, respondent sent petitioner another email, stating "Let me kn 2day – don't have 5 days anymore –like to get vletter in Xmass cards! Don't wanna B late 4 rthe holioday!!!!" [*Sic*.]

¶ 11 That day, after receiving respondent's email, petitioner filed an *ex parte* emergency

petition for an order of protection based on the threats to reveal sensitive information in respondent's email. The trial court entered the emergency order of protection that day. The order prohibited respondent from harassing and interfering with the personal liberty of petitioner and enjoined respondent from sending the email to anyone including, but not limited to petitioner's family, contacting petitioner in any manner, except by email, and sending any harassing correspondence regarding petitioner to any third parties. The emergency order of protection was set to remain in effect until January 11, 2012, which was subsequently extended.

¶ 12 After she had received the emergency order of protection, petitioner discovered another email sent by respondent earlier on December 21. According to petitioner, respondent wrote, "D, my attorney told me you thought I was going to send letter to kids letting them know what a lazy entitled piece of s*** I know you to be. I would never mention how I feel about you to our children, never."

¶ 13 In January 2012, petitioner filed another petition for rule to show cause, alleging that respondent had failed to pay petitioner her share of the sale proceeds from the Indiana property. Petitioner also asserted that she has incurred attorney fees and costs in preparation of this petition, which is attributable to respondent's conduct. Petitioner sought the payment of her share of the Indiana property and her attorney fees.

¶ 14 In February 2012, respondent filed a motion to vacate and dismiss the emergency order of protection, asserting that the order of protection violated his free speech rights. Also in February 2012, the trial court entered an order of adjudication of indirect civil contempt, directing respondent to divide the proceeds of the Indiana property sale equally with petitioner pursuant to

the marital settlement agreement. Respondent paid the money due petitioner after the entry of the contempt order. The trial court also denied respondent's motion to vacate and extended the emergency order of protection until April 4, 2012.

¶ 15 On April 4, 2012, the trial court conducted an evidentiary hearing on the issuance of a plenary order of protection. Respondent did not appear at the hearing, but his attorney was present. The only witness at the hearing was petitioner.

¶ 16 Petitioner testified that there were no disputes between herself and respondent for the first few years after the dissolution. However, around June 2011, she stated that respondent "didn't continue to pay the alimony" that was part of the dissolution agreement.

¶ 17 She received a phone call from respondent on December 21, 2011. During the phone call, respondent told her that he had "no intention" that she receive 50% of the proceeds from the sale of the Indiana property and that he was not going to pay her attorney fees. If petitioner persisted, then there would be "consequences." Petitioner described respondent as "bitter," "angry," and the conversation was "more of a diatribe." She stated that respondent said that if she did not back off on her claims, then he was going to make her suffer by disclosing "all sorts of marital secrets" from their 31-year marriage.

¶ 18 After the phone call, petitioner stated that she felt like she had been in a "train wreck" and was afraid of respondent. Petitioner testified that this incident was not the first instance of abuse. She said, "This may be a first written abuse, but [respondent] has abused me all [during] our marriage. He's left black and blue marks. He's threatened me with rape. He has spanked me. He has pushed me against the wall." She was afraid that he would come to her house.

¶ 19 Petitioner then read the email sent by respondent on December 15 and said the contents of the email made her feel "betrayed to the highest degree." She said if respondent disclosed the private information learned during their marriage, then she "would be very embarrassed, shamed." Petitioner admitted that some of the actions in the email were true, but some were not true. Petitioner testified that she was shaking, pacing, and hyperventilating after reading the email. She said that felt like she was "caught up in a tornado" and felt "very vulnerable" and "very afraid." She said respondent was "someone whose got an explosive anger and a lot of power and [she felt] like [she] need[ed] protection from him."

¶ 20 Shortly thereafter, petitioner received the second email from respondent stating that he wanted her answer or he would disclose the private information in his Christmas cards. Petitioner described this email as respondent "upping the ante." Petitioner stated that she felt "sickened" and felt like she needed help after receiving this email. She then called her attorney and filed the petition for emergency order of protection, which was entered that day, December 21, 2011.

¶ 21 Petitioner testified that she was currently seeking a plenary order of protection because she wanted to protect herself and needed the trial court's help. She was concerned that respondent would send the email if he got angry. Petitioner stated that she felt "like it's only a matter of time before he gets angry again." She was concerned that respondent "could sabotage" occasions in which the families are together with their four children. If respondent disclosed that private information, then petitioner believed her relationships would not be the same, including with her children. She said that "there's no way that the relationships would be the same. They

would be altered." She stated that she believed her children would see this information and her relationship with the children and her family would be "damaged."

¶ 22 Following arguments, the trial court entered its ruling. The court granted the petition for a plenary order of protection, finding that respondent's conduct warranted the issuance of the order. The court found the communication from respondent to petitioner to be troubling because it was a threat for the purpose of obtaining relief in the underlying dispute. The plenary order of protection prohibited respondent from harassment and from sending the email communication or the contents thereof to anyone, including but not limited to petitioner's family or the parties' children. The written plenary order of protection was entered into effect until April 4, 2014.

¶ 23 This appeal followed.

¶ 24 On appeal, respondent argues that the order of protection is an unconstitutional prior restraint on his right to free speech, the trial court failed to make the required minimum factual findings under section 214(c)(3) of the Act (750 ILCS 60/214(c)(3) (West 2010)), and the order of protection failed to define "harassment" as required under section 221(a)(1) (750 ILCS 60/221(a)(1) (West 2010)). According to the mandate of the Illinois Supreme Court, we will consider the nonconstitutional issues first. See *Mulay v. Mulay*, 225 Ill. 2d 601, 611 (2007).

¶ 25 Respondent contends that the trial court's oral findings following the evidentiary hearing did not make the minimum factual findings required under section 214(c)(3). 750 ILCS 60/214(c)(3) (West 2010). Petitioner initially responds that respondent forfeited this argument by failing to object to the factual findings in the trial court. However, "Supreme Court Rule 366(b)(3)(ii) provides that, in nonjury cases, '[n]either the filing of nor the failure to file a

post-judgment motion limits the scope of review.' " *In re Marriage of Henry*, 297 Ill. App. 3d 139, 141 (1998) (quoting Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994)). As the *Henry* court observed, "because the alleged error pertains to the trial court's findings, the respondent could not have raised this issue until after the trial court entered its judgment." *Henry*, 297 Ill. App. 3d at 143. "Thus, Supreme Court Rule 366(b)(3)(ii) enables a party to raise certain issues for the first time on appeal." *Henry*, 297 Ill. App. 3d at 141. Accordingly, respondent has not forfeited this issue.

¶ 26 The parties disagree on our standard of review. Respondent asserts that because the issue involves statutory interpretation, we review the issue *de novo*. See *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 79 (2009). Petitioner disagrees, contending that the proper standard of review is manifest weight of the evidence. Petitioner points out that the Act indicates that the burden of proof in the trial court is by a preponderance of evidence. See 750 ILCS 60/205(a) (West 2010). "When a 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." *Best v. Best*, 223 Ill. 2d 342, 348-49 (2006). Although we are reviewing a plenary order of protection issued under the Act, issues raised by respondent are limited to statutory interpretation and do not challenge the trial court's ultimate factual conclusion. Accordingly, we will review the questions of statutory interpretation *de novo*.

¶ 27 Section 214(c)(3) provides:

> "(3) Subject to the exceptions set forth in paragraph (4) of this subsection, the court shall make its findings in an official

record or in writing, and shall at a minimum set forth the following:

(i) That the court has considered the applicable relevant factors described in paragraphs (1) and (2) of this subsection.

(ii) Whether the conduct or actions of respondent, unless prohibited, will likely cause irreparable harm or continued abuse.

(iii) 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 2010).

¶ 28 Of the "applicable relevant factors described in paragraphs (1) and (2)," the only factor relevant to the instant case is:

"(1) In determining whether to grant a specific remedy, other than payment of support, the court shall consider relevant factors, including but not limited to the following:

(i) the nature, frequency, severity, pattern and consequences of the respondent's past abuse, neglect or exploitation of the petitioner or any family or household member, including the concealment of his or her location in order to evade service of process or notice, and the

> likelihood of danger of future abuse, neglect, or exploitation to petitioner or any member of petitioner's or respondent's family or household." 750 ILCS 60/214(c)(1)(I) (West 2010).

¶ 29 Respondent asserts that the trial court did not comply with this statute because the factual findings "did not discuss, or even identify, the applicable relevant factors described" in the statute. Respondent also contends that the trial court failed to make any findings regarding the likelihood of future abuse or that the entry of the order of protection was necessary to protect petitioner. We observe that respondent's argument does not challenge the trial court's factual finding that petitioner met her burden of proof, but only whether the trial court's findings complied with the statute. The legislature specifically provided that the Act "shall be liberally construed and applied to promote its underlying purposes," which include recognizing that "the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability" and supporting "the efforts of victims of domestic violence to 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." 750 ILCS 60/102(3), (4) (West 2010).

¶ 30 At the April 2012 evidentiary hearing, the trial court made the following findings on the record.

> "The Court finds that it does have proper jurisdiction of the

parties and the subject matter to these proceedings. The Court finds that the conduct as alleged in the petition for plenary order of protection would warrant the issuance of a plenary order of protection and prohibit the respondent, John Novak, from harassing the petitioner, Diane Novak.

I find that there's been no testimony to support the sought relief of interference with personal liberty of Diane, and, therefore, that remedy, although not specifically addressed will be denied.

I'm particularly troubled by the communication from John to Diane as it appears to relate to a threat that if she does not proceed in a certain manner, namely, tell her attorney that she's no longer seeking any additional money from the Indiana sale, and that she's not interested in recouping her attorney's fees, that the email wouldn't — would be disseminated to her mother, siblings and possibly even cousins, and that's what bothers me most about the email communication of John is that it was a threat with the stated purpose that he would then be able to obtain the relief that he was seeking in the underlying dispute between the parties that came before this Court in 2011.

And, therefore, the plenary order of protection will prohibit harassment and from sending the email communication or the

> contents thereof to anyone including, but not limited to, Diane's family or the parties' children.
>
> I cannot anticipate what John is going to do in the future, as I'm reluctant, other than the prohibition against harassment and the specific prohibition from disseminating the email, as I've outlined, or the contents thereof, to anyone, that any further prohibitions might improperly infringe upon one's constitutional rights."

The trial court also denied petitioner's request that all future communication be limited to email, noting that the parties continued involvement with business affairs might require additional communication.

¶ 31 According to section 214(c), the trial court needed to set forth its findings on the record, including that it considered the relevant factors, whether the conduct of respondent would likely cause irreparable harm or continued abuse, and whether it was necessary to grant the relief requested to protect petitioner. It is undisputed that the trial court's oral findings did not reference the statute or its requirements. The question before us is whether the failure to specifically set forth the statutorily directed findings on the records requires reversal. For the reasons that follow, we conclude that it does not.

¶ 32 In *In re Marriage of McCoy*, 253 Ill. App. 3d 958 (1993), the respondent appealed the entry of an order of protection entered in favor of the petitioner, his former spouse. The parties' marriage was dissolved and the petitioner was awarded custody of their children with visitation for the respondent in December 1992. In April 1992, the petitioner filed her first emergency

petition for an order of protection after the respondent allegedly hit the petitioner in the abdomen and shoved her against a car. The emergency order of protection was entered *ex parte* and following a hearing, the trial court extended the order until April 1993.

¶ 33 In February 1993, the petitioner filed her second emergency petition for an order of protection, asserting that the respondent was putting pressure on the children for visitation in contravention of the custody order, he threatened the petitioner, he came to the petitioner's workplace and acted in a threatening manner, and he had attempted suicide.

¶ 34 The evidence presented at the hearing showed that following the custody ruling in December 1992, the respondent had gone to the petitioner's workplace at the sheriff's office and stood outside the door to see if the petitioner " 'had a smile on her face.' " *McCoy*, 253 Ill. App. 3d at 961. After a swim meet, the respondent had the children ask the petitioner if he could take them out for lunch. When the petitioner refused the request, she testified that the respondent threatened her life. She also stated that the respondent called the children on multiple occasions and tried to set up visitation and the children would cry when she refused. Following the hearing, the trial court entered a plenary order of protection in favor of the petitioner and the children until April 1995.

¶ 35 On appeal, the respondent first argued that it was improper to include the children in the order of protection. The reviewing court held that "the Act implicitly recognizes the potential for direct or indirect victimization of the children of an abused person by the statutory provision making them protected persons under the Act." *McCoy*, 253 Ill. App. 3d at 963. However, even if a nexus was required, the court concluded that such nexus had been met when the respondent

admitted that he pressured the children to ask the petitioner for visitation in contravention of the custody order and the children became upset when the petitioner refused. *McCoy*, 253 Ill. App. 3d at 963.

¶ 36 The respondent also asserted that the entry of the plenary order was improper because the trial court failed to make sufficient findings. The reviewing court held that the trial court's findings met "the minimum statutory requirements and support the restrictions imposed on respondent." *McCoy*, 253 Ill. App. 3d at 965. "A reviewing court will not overturn an order for lack of greater specificity when the record supports the statutorily required findings." *McCoy*, 253 Ill. App. 3d at 965.

> "While the written order might have contained more express findings, the official record of the hearing held April 13, 1993, indicates the court found the evidence established respondent as a violent person whom petitioner had reason to fear and, given respondent's attempts to circumvent the visitation orders entered in the dissolution case, it was proper to prevent him from contacting the children at school by prohibiting his presence at times they were in attendance." *McCoy*, 253 Ill. App. 3d at 965.

¶ 37 The respondent also argued that the trial court failed to balance the hardships regarding his prohibition from his children's school. The reviewing court noted that such action is permitted under section 214(b)(3), which provides for " 'stay away' " orders if reasonable given a balance of the hardships. *McCoy*, 253 Ill. App. 3d at 965; see also 750 ILCS 60/214(b)(3) (West

2010). "While the court made no specific reference to any hardship incurred by respondent, there is no evidence respondent argued that to the trial court. Moreover, respondent's attempts to circumvent prior orders of court fully justify the restriction imposed." *McCoy*, 253 Ill. App. 3d at 965. The court held that the respondent failed to present any claim of hardship and waived his claim. *McCoy*, 253 Ill. App. 3d at 965.

¶ 38 In the instant case, the trial court did not explicitly reference the factors set forth in the statute. But we find that the trial court did make factual findings and the record supports the entry of the order of protection under section 214(c). The relevant factual findings include past abuse, the nature and severity of the abuse, whether the respondent's conduct will cause harm to the petitioner, and whether the order of protection is necessary to protect the petitioner from future abuse. See 750 ILCS 60/214(c)(1), (c)(3) (West 2010). Further, the trial court's order implicitly found that the order of protection was necessary to protect petitioner from the likelihood of future abuse.

¶ 39 The trial court's factual findings touched on each of these points. The trial court outlined the harassing conduct of respondent, specifically the threats to petitioner that he would disseminate private information if she did not capitulate to his demands, and recognized the harm such information would have on petitioner. During the course of a year, respondent repeatedly refused to adhere to the terms of the marital settlement agreement, forcing petitioner to seek court intervention, and even then respondent failed to comply. His actions culminated in the harassment of petitioner by intimidating her with the release of potentially damaging information. The record demonstrates that the pattern began because respondent had determined

that petitioner was not entitled to her agreed maintenance payments. Rather than seek court approval, respondent sent petitioner a letter indicating what he determined was the proper amount of maintenance. He then refused to pay petitioner her share from the Indiana property sale and ultimately was found in contempt by the trial court. Respondent's conduct continued to escalate, resulting in the threatening email. Respondent questioned the entire marital settlement agreement in the December 15 email by complaining about his continued maintenance payments and how he "never expected to be paying D. 525k out of my pocket 4 years after the divorce." Respondent's threats indicated that he was disputing his continued obligations under the marital settlement agreement, which would continue into the future. The record established the pattern and nature of respondent's actions and abuse as well as the potential for future harm. The trial court's decision to enter the order of protection indicated a finding that it was necessary to protect petitioner from future abuse, which is supported by the record.

¶ 40 Additionally, the trial court tailored the findings to the evidence presented and specifically denied petitioner's relief for interference with personal liberty and declined to limit the parties' communication to email only. "Whether reversal would be necessary in a case where no specific findings are made by the circuit court, but the record justifies the entry of an order of protection, we reserve for another case. Suffice it to say, the circuit court should abide by the specific statutory mandate to make appropriate findings." *In re Marriage of Healy*, 263 Ill. App. 3d 596, 602 (1994). While the trial court should have followed the requirements of section 214(c), we do not find that this constitutes a reversible error. Based on our review of the record, we find that the trial court made oral findings setting forth the basis for the entry of the order of

protection under section 214(c) and the record supports this entry.

¶ 41 Further, the cases relied on by respondent are distinguishable. In those cases, the trial court either did not make any factual findings or the findings were insufficient to find compliance. See *Henry*, 297 Ill. App. 3d at 143 ("Neither the transcript from the proceedings nor the protective order indicates that (1) the trial court considered the applicable relevant factors; (2) the respondent's alleged conduct would likely cause irreparable harm or continued abuse; and (3) it was necessary to grant the requested relief in order to protect the petitioner, her husband, and the parties' two children. Although the trial court stated that it believed that it was inappropriate for the parties' children to be around weapons and that the children were aware of 'volatile circumstances,' such comments do not satisfy the requirements of section 214(c)(3) of the Act"); *Healy*, 263 Ill. App. 3d at 601 (the reviewing court found insufficient evidence to support an order of protection and also noted that trial court made no findings and when the respondent requested such findings, the court stated "I don't have to give an explanation. I listen and I weigh the evidence"); *People ex. rel Minteer v. Kozin*, 297 Ill. App. 3d 1038, 1043 (1998) (reversing the entry of an order of protection because there was insufficient evidence that the respondent abused the petitioner, but also "the trial court made no findings, oral or written, regarding the relevant factors"); *Hedrick-Koroll v. Bagley*, 352 Ill. App. 3d 590, 594 (2004) (the trial court offered no oral findings, made only a "cursory finding" in its written decision that "Petitioner has proven her Petition by her burden of proof" and since there was "nothing in the record indicating that the trial court examined petitioner under oath or affirmation, we cannot confirm that the court complied with section 214(c)(4)").

¶ 42 In contrast, the trial court in the instant case made factual findings on the record about respondent's harassment and threats and considered the impact on petitioner. The court also weighed the evidence and determined that petitioner failed to support her claim for interference with liberty. The record supports the trial court's findings and its entry of the order of protection.

¶ 43 Next, respondent asserts that the order of protection failed to define "harassment" as required under section 221(a)(1) and that the failure to define the term in the order renders the order of protection defective as a matter of law. 750 ILCS 60/221(a)(1) (West 2010). Petitioner maintains that the plenary order of protection does not need to define "harassment" and that respondent fails to cite any cases that have held that the failure to include a definition makes the order defective as a matter of law.

¶ 44 Section 221(a)(1) states, in relevant part, that "[p]re-printed form orders of protection shall include the definitions of the types of abuse, neglect, and exploitation, as provided in Section 103." 750 ILCS 60/221(a)(1) (West 2010). Section 103(a)(7) defines "harassment" as "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." 750 ILCS 60/103(a)(7) (West 2010).

¶ 45 Here, the form order of protection contains a section listing the possible forms of behavior that the respondent is prohibited from committing toward the protected person under the order. The listed options include harassment, which was selected in the order of protection at issue. The order does not include the definition of harassment from section 103.

¶ 46 Respondent makes a general argument that individuals subject to orders of protection

need to be aware of the legal definition of harassment and notes that the legal definition is different from the common dictionary definition. However, respondent does not argue that he was prejudiced or unaware of the definition of harassment and unable to discern what conduct he was prohibited from doing. The order specifically stated that respondent was prohibited from disseminating the email or the contents thereof to anyone. The order explicitly informed respondent what conduct he was to refrain from doing toward petitioner. While the form was not in strict compliance with section 221(a)(1), we decline to find the plenary order of protection to be void when the prohibited conduct was detailed in the order and respondent has not demonstrated that the absent definition prevented him from adhering to the order.

¶ 47 Finally, we reach respondent's argument that the order of protection is an unconstitutional prior restraint on his free speech rights under the first amendment. Respondent contends that the order of protection is overbroad and not narrowly tailored to serve a compelling government interest. He asserts that under the order of protection, he is prohibited from discussing "specific matters that occurred during his marriage without limitations of any kind" with anyone, including friends, family, police, lawyers, or therapists. Thus, respondent argues that the order of protection acts as a prior restraint on his free speech. While respondent has framed his argument as a constitutional challenge to the order of protection, essentially he contends that the Act as applied to him acts as a prior restraint.

¶ 48 Petitioner responds that the injunction against the dissemination of the contents from the December 15 email properly restrains unprotected speech. She maintains that respondent's conduct is unprotected speech under the constitution and may be restrained. Petitioner also

asserts that respondent's overbreadth concerns are illusory because the injunction is in place for a finite period of two years and the information contained in the email has only been used by respondent "for harassing and abusive purposes." Further, petitioner notes that respondent never raised these purported legitimate uses of the information in the trial court.

¶ 49 "A prior restraint has been defined as a 'predetermined judicial prohibition restraining specified expression.' " *In re A Minor*, 127 Ill. 2d 247, 264 (1989) (quoting *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir.1975)). "Because a speaker's defiance of a judicial order can place the speaker in contempt even if his speech is ultimately held to be protected [citation omitted], a prior restraint freezes the flow of ideas during the course of litigation, and tends to deprive the public of timely news, information, and comment." *In re A Minor*, 127 Ill. 2d at 265.

¶ 50 The overbreadth doctrine "reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 436 (2006). "Its concern with 'chilling' protected speech attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from pure speech toward conduct and that conduct, even if expressive, falls within the scope of otherwise valid laws." *Pooh Bah Enterprises*, 224 Ill. 2d at 436-37.

¶ 51 We note that the cases cited by respondent to support his argument regarding the applicability of the strict scrutiny standard involved the press or other publications. See *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982) (newspaper was

challenging a Massachusetts law that forbade the press and the general public from being present during the testimony of the minor victim in a sex offense trial); *In re A Minor*, 127 Ill. 2d 247 (1989) (issue presented was whether a newspaper that discovers the name of a minor charged in a criminal proceeding through its own investigation can be prevented from reporting that information once it has entered the public domain); *Montgomery Ward & Co. v. United Retail, Wholesale & Department Store Employees of America, C.I.O.*, 400 Ill. 38 (1948) (retail store sought to enjoin union from publishing, issuing, or circulating certain papers, pamphlets and other publications that it claimed were defamatory and libelous). In contrast, the present case does not involve a publication or court access for the press for the benefit of the general public, but rather, the threatened disclosure of marital secrets to force a former spouse to acquiesce to respondent's demands.

¶ 52 Illinois courts have previously considered the constitutionality of the Act in the context of harassing speech. In *People v. Blackwood*, 131 Ill. App. 3d 1018 (1985), the defendant was charged with violating an order of protection on behalf of his former wife, by threatening and verbally harassing her. The defendant threatened his ex-wife by calling her a " 'f*** whore,' a dead b*** and that he had a plot waiting for her." *Blackwood*, 131 Ill. App. 3d at 1020. On appeal, the defendant raised multiple issues, including a challenge of the constitutionality of the Act. *Blackwood*, 131 Ill. App. 3d at 1020. The defendant's argument was that "the statutory language is so vague and overbroad that the possibility of criminal penalties thereunder necessarily chills certain constitutional rights." *Blackwood*, 131 Ill. App. 3d at 1022.

¶ 53 The *Blackwood* court first considered whether the Act was vague. "A statute is void for

vagueness where it fails to adequately give notice as to what action or conduct is proscribed." *Blackwood*, 131 Ill. App. 3d at 1023. The court declined to find the Act unconstitutionally vague.

> "The Domestic Violence Act contemplates the protection of a potential victim from the universe of physical and psychological abuses which only someone as close as a relative can inflict. A statute which has its objective a safety net against such interferences cannot be expected to address every conceivable form of abuse. Thus, a certain measure of generality must be tolerated to give effect to the intended scope of the Act." *Blackwood*, 131 Ill. App. 3d at 1023.

¶ 54 The court also examined the defendant's challenge that the Act was overbroad because "it may be reasonably interpreted to prohibit constitutionally protected conduct." *Blackwood*, 131 Ill. App. 3d at 1023-24. The defendant asserted that "the proscription of threatening or harassing his ex-wife could be interpreted to chill his exercise of First Amendment rights." The reviewing court found this argument "devoid of merit." *Blackwood*, 131 Ill. App. 3d at 1024. "The only speech for which defendant could be reasonably punished under the Act is that form of expression which would not be subject to constitutional protection under any circumstances." *Blackwood*, 131 Ill. App. 3d at 1024.

> "The argument raised in defendant's brief concerning possible applications of the Act to innocent speech is equally unavailing. A

> statute is unconstitutionally overbroad when a *reasonable* interpretation might infringe upon protected expression. The examples proffered by defendant involve patently unreasonable applications of the criminal provisions of the Act. Thus, there is no serious threat to First Amendment rights." (Emphasis in original.) *Blackwood*, 131 Ill. App. 3d at 1024.

¶ 55 Similarly, in *People v. Reynolds*, 302 Ill. App. 3d 722 (1999), the defendant was found guilty of violating an order of protection on behalf of his former wife and contended that the Act was unconstitutional on appeal. The defendant violated the order of protection by sending a threatening note to his ex-wife inside a birthday card to one of their children. The note stated that the charges arising from a previous violation of the same order of protection had been "dropped." *Reynolds*, 302 Ill. App. 3d at 724.

¶ 56 The *Reynolds* court first considered the defendant's argument that the definition of "harassment" under the Act as applied to him was vague. The court concluded the statute was not vague because the order informed the defendant that he was prohibited from intimidating his ex-wife, he "should have known his objective was not a reasonable purpose," and his conduct fit within the definition of harassment. *Reynolds*, 302 Ill. App. 3d at 727.

¶ 57 As to the defendant's overbreadth challenge, the court, citing *Blackwood*, noted that the Act had already been held not to be overbroad. *Reynolds*, 302 Ill. App. 3d at 727 (citing *Blackwood*, 131 Ill. App. 3d at 1023-24). "[T]he doctrine of overbreadth is designed to protect first amendment freedom of expression from laws written so broadly the fear of punishment

might discourage taking advantage of that freedom." *Reynolds*, 302 Ill. App. 3d at 727-28.

> "Here, the element of expression that may come under the definition of harassment is not constitutionally protected. As the Act provides, the speech that section 103(7) would inhibit must be unnecessary to accomplish a reasonable purpose, would cause another reasonable person emotional distress, and actually does cause the petitioner emotional distress. Such speech, punishable under the Act, would not be constitutionally protected and, therefore, the statute would not be overbroad." *Reynolds*, 302 Ill. App. 3d at 1028 (citing *Blackwood*, 131 Ill. App. 3d at 1024).

¶ 58 Here, respondent's overbreadth argument fails because the speech prohibited under the order of protection is not protected. The December 15 email was a threat to petitioner that he would embarrass and humiliate her to family and friends regarding specific private incidents that occurred during their marriage if she did not capitulate to his demands. Under *Reynolds* and *Blackwood*, this speech is not protected under the first amendment. Petitioner characterized respondent's actions as "potentially criminal." Regardless, Illinois courts have held that speech found to be harassment under the Act is not protected speech. Respondent has not challenged the fact that his email was harassment under the Act. He explicitly threatened to humiliate and damage his former wife with marital secrets known for many years that he was using solely to intimidate her into forgoing her legal rights and capitulate to his demands. Accordingly, this speech is not protected.

¶ 59 Moreover, the trial court's order enjoining respondent from disseminating the email from December 15 to "anyone including, but not limited to, [petitioner's] family or the parties' children" was not overly broad and tailored to prevent further abuse by respondent. Significantly, respondent's follow-up December 21 email threatened to include the contents of the December 15 email in respondent's Christmas cards. By threatening to disclose the damaging and harmful information in Christmas cards, respondent's threat went beyond petitioner's family. Respondent's escalating behavior over the year leading up the threats in the email demonstrated his unwillingness to follow the marital settlement agreement. He unilaterally decided to reduce maintenance based on his calculations without court approval, withheld petitioner's share of sale proceeds from the Indiana property, forced petitioner to incur attorney fees by having the court direct respondent to comply with the agreement, and then threatened petitioner with the email to make her capitulate to his demands and forego her legal rights. Respondent threatened petitioner with marital secrets he had kept during the course of their 30-year marriage, but only when he could coerce petitioner did respondent threaten to make these secrets public to damage and harm petitioner and her relationships. By preventing the dissemination of the email to anyone, the court curtailed respondent's ability to both directly and indirectly victimize petitioner, which is implicitly recognized in the Act. See *McCoy*, 253 Ill. App. 3d at 963. If the order of protection were limited to only petitioner and her family, then respondent would have the ability to continue to threaten petitioner that he would disclose these marital secrets to other individuals, such as friends, neighbors, and business associates. The private information that respondent chose to include as threats could be held out as the potential for abuse and harassment whenever

respondent felt dissatisfied with his continued obligations under the marital settlement agreement. Respondent made clear in his email that he felt the agreement was unfair and given his actions, it was reasonable to believe that he might not comply in the future and could resort to harassing tactics. Given respondent's actions and his continuing obligations, the trial court properly prohibited the dissemination of the contents of the December 15 email in the order of protection.

¶ 60 Further, the order of protection was limited to the information contained in the email written by respondent. Respondent's ability to discuss his marriage and petitioner in legitimate ways was not enjoined. Respondent's assertion of possible violations are not reasonable and did not concern the specific contents of the email that were prohibited. Respondent did not present any evidence that the order was limiting his free speech. His attorney's assertions of possible violations are not evidence. Respondent's ability to speak with his attorney or a therapist, among other examples, about his marriage was not restricted and respondent could seek permission from the court if necessary. Respondent failed to present any evidence that the order of protection would prevent discussion of these marital secrets in a legitimate manner.

¶ 61 Additionally, respondent cited several out-of-state cases, urging this court to find the order of protection to be overbroad. See *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135 (1996) (court found that plaintiff's right to privacy did not outweigh her former husband's right to disclose his opinions about their marriage or the tabloid's right to publish the information); *Evans v. Evans*, 162 Cal. App. 4th 1157 (2008) (court reversed injunction as overbroad and not narrowly tailored that enjoined plaintiff's former wife from publishing both

defamatory statements and confidential information about him on the internet); *In re Marriage of Candiotti*, 34 Cal. App. 4th 718 (1995) (plaintiff sought injunction to prevent former wife from disseminating personal information learned through both formal discovery and independently obtained about plaintiff's current wife, the court affirmed the former and reversed the injunction as to the latter obtained information); *In re Marriage of Meredith*, 148 Wash. App. 887 (2009) (injunction acted as prior restraint when it prevented husband from contacting any government agency regarding his former wife's immigration status as well as his right to petition the government for redress of grievances); *In re Marriage of Newell*, 192 P.3d 529 (Colo. Ct. App. 2008) (Court order barring father from voicing concerns about his minor child's care or education was not supported by findings sufficient to restrict first amendment rights); *Geske v. Marcolina*, 642 N.W.2d 62 (Minn. Ct. App. 2002) (Mother sought injunction against father after he appeared on television discussing their ongoing custody dispute and broadcast children's names and pictures, court enjoined release of pictures, but not names which were in the public domain).

¶ 62 We observe that "cases from foreign jurisdictions are not binding on this court." *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37, 58 (2005). Moreover, as discussed, Illinois courts have considered and rejected similar arguments to those raised by respondent. Further, none of these cited cases involved an order where the husband was threatening his former wife with the dissemination of marital secrets solely to intimidate her from exercising her rights under a court order. We continue to adhere to the case law in Illinois that harassing conduct is not protected under the first amendment. Accordingly, respondent's constitutional challenge fails.

¶ 63 Based on foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 64 Affirmed.

¶ 65 JUSTICE HOWSE, dissenting:

¶ 66 I respectfully dissent. I agree that respondent's threat to disclose marital secrets to third parties if petitioner failed to comply with his demands for the disposition of the dissolution of marriage case constitutes harassment. I also agree the trial court had the authority to enter an order of protection to prevent the harassment of the petitioner by the respondent. However, the trial court entered an order, which in my view, constitutes an unconstitutional prior restraint on free speech. I would remand this case for the entry of a more narrowly drafted order.

¶ 67 The harassment which took place in this case is the act of respondent threatening the petitioner with disclosure of the secrets. Instead of prohibiting the harassment of the petitioner by prohibiting the communication of threats, the trial court entered an order preventing respondent from communicating the "marital secrets" to anyone. Such a broad order prohibits respondent from explaining the possible reasons for the dissolution of the marriage to his mental health professionals or even his own family members. In my view, the disclosure of these "marital secrets" to third parties cannot possibly be construed as harassment of the petitioner as contemplated by the Illinois Domestic Violence Act (Act).

¶ 68 The disclosure of "marital secrets", whether the allegations are true or not, would no doubt cause embarrassment to petitioner. However, the prevention of embarrassment to petitioner is not one of the purposes of the Act. Here the petitioner would suffer no more harm from the disclosure than any ordinary citizen would under those circumstances, so long as

respondent is prohibited from communicating the threats to the petitioner.

¶ 69 The Illinois Constitution allows all citizens to speak freely, but also provides a remedy if that right is abused:

> "All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Ill. Const. 1970, art. I, §4.

¶ 70 Accordingly, if respondent abuses his right to speak freely, the petitioner in this case may seek recourse against him. However, the order entered in this case is overly broad for the authorized purpose of preventing the harassment of the petitioner. I would affirm the authority of the court to issue an order to prevent the harassment of the petitioner, but I would remand this case to the trial court for the entry of a more narrowly drafted order.