2013 IL App (1st) 122971-U

FOURTH DIVISION
December 19, 2013

No. 1-12-2971

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HOLLY R. GARLAND,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Cook County.
	)	
v.	)	No. 12 OP 30374
	)	
SIDNEY R. MILLER,	)	The Honorable
	)	John D. Tourtelot,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in entering a plenary order of protection where respondent was a "family or household member" for purposes of the Illinois Domestic Violence Act. Respondent failed to show any error based on lack of jurisdiction or alleged violations of the Act. Respondent failed to show that the plenary order was against the manifest weight of the evidence. The judgment of the circuit court is affirmed.

¶ 2 Petitioner Holly Garland (Holly) was granted an emergency order of protection and a plenary order of protection against respondent Sidney Miller. As described below, Miller seeks modification of the plenary order and remand to the circuit court of Cook County; alternatively, he requests that the order be vacated in its entirety.

¶ 3 For the reasons stated herein—including Miller's failure to provide a transcript, bystander's report or agreed statement of facts with respect to the relevant proceedings—we

affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 On June 6, 2012, Holly filed a *pro se* petition for order of protection (the petition) pursuant to the Illinois Domestic Violence Act of 1986, 750 ILCS 60/101, *et seq*. (West 2010) (the IDVA). In the petition, she alleged that she and Miller both resided at 1627 Bow Trail in Wheeling, Illinois; she checked a box on the form describing their relationship as "[s]haring or formerly sharing a common dwelling." She sought protection for both herself and her mother, Faye Garland (Faye); Holly was 58 years old and Faye was 82 years old as of the time of the petition. Holly included the following description of the "incident(s) of abuse" in the petition:

> "@ app. 7:30 am this morning, 6/6/12, Respondent was verbally threatening & abusive violent (shouting obscenities) to both my 82 yr old mother (who has both colon cancer & early onset Alzheimers) as well as verbally violent & abusive to our health care aide. Respondent then ignored my many calls this morning, finally responded by call to a text msg I sent to find out what happened w/ my mother & aide – & Respondent was violently screaming to me on the phone & then hung up on me. Health care aide as well as myself are in fear for our physical safety as Respondent's actions/speech have been increasingly violent for last two weeks, Respondent has warned me "not to make him angry" and Respondent admits to owning several guns (however I do not know if he's in possession of them at my house – but he does have locked metal box which may/may not contain guns[ )]."

Holly's handwritten description of the incidents also includes the following: "long standing health care aide now threatening to quit as she also fears for her safety" and "he's agitating my mom *** and, I am not sleeping for fear of him as well." Holly requested that the court enter an order of protection with various remedies, including granting her exclusive possession of the Wheeling residence and ordering Miller to stay away from her and Faye. Holly also sought exclusive

possession of her dog, named "Brandeis," and her bird, named "Sandra Day OConnor."

¶ 6 On June 6, 2012, the court entered an emergency order of protection (the emergency order) protecting Holly and Faye, as well as Brandeis and Sandra Day OConnor. The order provided that it remained in effect until 11:59 p.m. on June 26, 2012, and set a hearing for 1:30 p.m. on that date. On the evening of June 6, 2012, a Wheeling police officer served a "short form notification" of the order on Miller.

¶ 7 Miller filed a *pro se* notice of appearance on June 12, 2012. Less than an hour before the scheduled time of the June 26 hearing, Miller filed a ten-page unnotarized "Affidavit." In the "Affidavit," he explained how in "late March / early April," Holly "offered her townhouse as shelter" for Miller if he was evicted from his home; she also offered food and use of her automobile and ordered a mobile phone for Miller's use. Miller went to Holly's townhouse on May 4, 2012. The "Affidavit" also detailed various conversations Miller had one-on-one with Faye, Holly and Holly's son, and described the allegedly "strained" relationship between Holly and Faye. It referenced an action allegedly commenced by Holly in 2011 in the probate division of the circuit court of Cook County to "become guardian over Faye's person and estate" and noted that "Holly told Respondent that Faye continues to resist Holly's appointment as guardian."

¶ 8 The "Affidavit" also related certain events on June 6, 2012, the date Holly sought the order of protection, including an incident where the health care aide, Loletha, "began to shout at Respondent" about walking on a wet floor and later events such as Miller not answering Holly's repeated calls because he was on public transportation. Miller also stated, among other things, that Holly's "allegations as to other June 6 conversations are erroneous and false" and that her allegation that he admitted owning guns was "without support."

¶ 9 After a hearing on June 26, 2012 (the plenary hearing), the court entered a plenary order of protection (the plenary order) that granted essentially the same relief as set forth in the emergency order, including the grant of exclusive possession of the Wheeling residence to Holly

and the requirement that Miller "stay away" from Holly and Faye. The plenary order provides that it will be in effect through June 24, 2014. Each page of the plenary order is stamped, "Respondent served in open court."

¶ 10 On July 26, 2012, Miller filed a "Motion to Reconsider and Vacate." In the motion, Miller stated that the court granted him leave to examine Holly during the June 26 hearing. Miller then set forth in the motion what his examination of Holly allegedly disclosed. He noted that prior to the plenary hearing, he filed his "Affidavit," which, according to Miller, the court "held to be hearsay." The motion further alleged that Holly "was unable to furnish any evidence beyond her own testimony to prove any of her Petition's allegations" and that neither Faye nor the health care aide were present at the plenary hearing.

¶ 11 On September 4, 2012, after a hearing, the circuit court denied the reconsideration motion. Miller filed his *pro se* appeal. This court entered an order taking the case for consideration on the record and Miller's brief only, due to Holly's failure to file an appellate brief within the time prescribed by Illinois Supreme Court Rule 343(a) (eff. July 1, 2008).

¶ 12 ANALYSIS

¶ 13 Miller raises three arguments on appeal. First, he contends that because he was not a "household member" within the meaning of the IDVA, the circuit court lacked jurisdiction. Second, Miller claims that the evidence showed that Holly and Faye were not abused and thus this court should reverse the circuit court's plenary order under the "manifest weight of the evidence" standard. Third, he alleges that the proceedings in the circuit court, including the *ex parte* emergency hearing, violated multiple provisions of the IDVA.

¶ 14 Miller also alleges that Faye died between the entry of the plenary order and the hearing on his reconsideration motion. He contends that we "must modify the [plenary order] for the subsequent death of protected party Faye Garland" and "then remand the matter for review of the [emergency order] in light of circuit court procedural error in issuing the [emergency order]." He

further contends that, "[a]lternatively, this Court has grounds for vacatur of the [plenary order] as improperly issued."

¶ 15 Household Member

¶ 16 Miller contends that "the Record is without sufficient findings to establish that [he] is a household member" within the meaning of the IDVA, and therefore the circuit court lacked jurisdiction and the emergency and plenary orders are void. Miller asserts that Holly's offer of "shelter" was "understood to be temporary until such time as [Miller] could obtain alternative shelter and income to support himself elsewhere." Miller thus claims that he was an "occupant, but not a member of the household in the Garland residence."

¶ 17 We conclude that Miller has failed to provide a sufficient basis for us to review the circuit court's findings. He asserts that "the record furnishes no evidence establishing a family relationship of marriage or blood between Respondent and Holly or Faye" or "an intimate relationship between Respondent and either of those ladies at any time," and therefore "finding [him] as a 'household member' is not appropriate within the sense that existing DVA law applies that term." However, the record does not include any report of proceedings in accordance with Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Although Miller represents that no court reporter was present at the plenary hearing, he could have prepared a bystander's report or an agreed statement of facts in accordance with Rule 323. In their absence, we do not know what evidence was presented or what arguments were made before the circuit court regarding the nature of the relationship between Miller and the Garlands.

¶ 18 The Illinois Supreme Court has "long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record." *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). " 'An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding.' " *Id.*, quoting *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). In the

absence of an adequate record preserving the claimed error, we must "presume the circuit court's order had a sufficient factual basis and that it conforms with the law." *Id.* Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Given that Miller has failed to provide an adequate report or record of the proceedings in the circuit court, we must assume that each of the circuit court's orders had a sufficient factual basis and conformed with applicable law.

¶ 19 Miller also asserts that "Illinois precedent gives no indication that the Act is intended to apply to every relationship among persons who share a common dwelling." To the extent that Miller's argument may be considered an issue of statutory interpretation, our review is *de novo. Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 6 (2009).

¶ 20 Miller's contention turns on the proper interpretation of the IDVA provisions regarding "family or household members." Section 201(a) of the IDVA sets forth the persons protected by the act, including "any person abused by a family or household member." 750 ILCS 60/201(a)(i) (West 2010). The term "family or household members" is defined in Section 103(6) of the IDVA to include "persons who share or formerly shared a common dwelling." 750 ILCS 60/103(6) (West 2010). While the definition also includes "persons who have or have had a dating or engagement relationship," section 103(6) provides that "neither a casual acquaintanceship nor ordinary fraternization between 2 individuals in business or social contexts shall be deemed to constitute a dating relationship." Citing the language about "persons who share or formerly shared a common dwelling" and the sentence regarding casual acquaintanceships and ordinary fraternization not constituting a dating relationship, Miller contends that "Clause 1 and 2, taken together, imply that the Act *is not* intended and does not apply to *all* persons sharing (occupying) a dwelling." (Emphasis in original.) Miller also contends that the final sentence of the definition—"In the case of a high-risk adult with disabilities, 'family or household members' includes any person who has the responsibility for a high-risk adult as a result of a family

relationship or who has assumed responsibility for all or a portion of the care of a high-risk adult with disabilities voluntarily, or by express or implied contract, or by court order" (750 ILCS 60/103(6))—narrows the "inclusiveness" of the "persons who share or formerly shared a common dwelling" language. He asserts that this final sentence "excludes persons not with duties to a high-risk adult as in this matter's circumstances."

¶ 21 The best indicator of legislative intent is the statutory language, given its plain and ordinary meaning. *Landis*, 235 Ill. 2d at 6-7. "Where the language in the statute is clear and unambiguous, this court will apply the statute as written without resort to extrinsic aids of statutory construction." *Id.* A plain reading of the statute does not support Miller's interpretation. The statutory definition provides that "persons who share or formerly shared a common dwelling" are included in the definition of "family or household members." 750 ILCS 60/103(6). The sentence regarding casual acquaintanceships and ordinary fraternization not constituting a dating relationship does not limit or modify the "common dwelling" language. Also, the sentence regarding high-risk adults expands, not restricts, the scope of the definition of "family or household members." We need not engage in an exploration of the "concepts of guest, occupant, tenant, and visitor," as is urged by Miller, where, as here, the statute is clear.

¶ 22 Furthermore, the cases cited by respondent are inapposite. Miller cites *Glater v. Fabianich*, 252 Ill. App. 3d 372 (1993) for the proposition that the IDVA applies to "relationships by marriage and blood and to lesser but intimate relationships." The respondent in *Glater* argued that he did not formerly share a common dwelling with the petitioner. *Id.* at 375. Unlike the *Glater* respondent, Miller does not appear to contest that he lived in Holly's house from May 4, 2012 through the date of emergency order, June 6, 2012. For example, in his "Affidavit," he stated that he was a "tenant at 1627 Bow Trail from May 4 to June 6, 2012." Instead, Miller attempts to make a distinction between his status as an "occupant" versus "a member of the household in the Garland residence." The statute does not make such a

distinction. Miller also cites *Alison C. v. Westcott*, 343 Ill. App. 3d 648 (2003), for the proposition that the IDVA was "created to prevent abuse between persons in an intimate or other serious relationship; for example, a 'dating relationship' in the context of a serious courtship." The *Alison C.* court concluded that the legislature intended a "dating relationship" to mean a "relationship that was more serious and intimate than casual" (*id.* at 653); the court did not address the statutory language regarding persons sharing a common dwelling and thus is not relevant to our analysis herein. We conclude that the circuit court had jurisdiction over Miller as a "household member" pursuant to Sections 103(6) and 201(a) of the IDVA.

¶ 23 Evidence Supporting the Plenary Order

¶ 24 Miller frames his second issue on appeal as whether "the Plenary Order subject to modification or vacatur by the manifest weight of the evidence." Section 214(a) of the IDVA provides that, once the trial court finds that the petitioner has been abused, "an order of protection *** *shall issue*," provided that the petitioner satisfies other specified requirements of the IDVA. 750 ILCS 60/214(a) (West 2010) (Emphasis added). Section 205(a) of the IDVA "provides that proceedings to obtain an order of protection are civil in nature and governed by a preponderance of the evidence standard." *Best v. Best*, 223 Ill. 2d 342, 348 (2006); 750 ILCS 60/205(a) (West 2010). As the Illinois Supreme Court has stated,

> "Together, then, sections 205(a) and 214(a) establish two things: (1) whether the petitioner had been abused is the central issue in order-of-protection proceedings, and (2) whether the petitioner has been abused is an issue of fact that must be proven by a preponderance of the evidence. *** 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*, 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." *Id.* at 350.

¶ 25 Contending on appeal that "[t]he result of Respondent's examination is within the record," Miller cites his own reconsideration motion, which included a summary of Holly's alleged testimony during the plenary hearing. He then claims, without citation, that his examination "shows that Petitioner's allegations were discredited." As noted above, any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Given that we do not know what evidence was presented or what arguments were made at the plenary hearing or during the hearing on Miller's reconsideration motion, we must presume that the plenary order had a sufficient factual basis and conformed with the law. Miller has failed to show that the entry of the order was against the manifest weight of the evidence.

¶ 26 Alleged Violations of the IDVA

¶ 27 Miller contends that "the circuit court's proceedings violate several requirements" of the IDVA. Specifically, Miller asserts that the court failed to comply with sections of the IDVA addressing (i) findings in *ex parte* proceedings, (ii) hearsay exception requirements, and (iii) waiver of privilege.

¶ 28 *Required Findings*

¶ 29 Miller asserts that "[u]nder sub-section (b)(5) of section 60/217, the circuit court is required to give its findings for entering remedies *ex parte*, but failed to do so." Section 217 of the IDVA addresses emergency orders of protection. 750 ILCS 60/217 (West 2010). Simply put, there is no subsection (b)(5) in Section 217, and we are thus unable to address Miller's argument.

¶ 30 *Hearsay Exception*

¶ 31 Miller contends that under Section 213.1 of the IDVA, "a statement shall not be admitted under the hearsay exception unless prior notice is given sufficiently in advance to allow the opposing party to meet the statement." He claims that Holly's "allegations as to the effect of [his] alleged abuse on Faye and the health care aide are absent any prior notice," and thus he was

"deprived of due process to meet and respond to those allegations." Section 213.1 provides, in part, that "[i]n an action for an order of protection on behalf of a high-risk adult with disabilities, a finding of lack of capacity to testify shall not render inadmissible any statement as long as the reliability of the statement is ensured by circumstances bringing it within the scope of a hearsay exception." 750 ILCS 60/213.1 (West 2010). The IDVA defines "[h]igh-risk adult with disabilities" as "a person aged 18 or over whose physical or mental disability impairs his or her ability to seek or obtain protection from abuse, neglect, or exploitation." 750 ILCS 60/103(8) (West 2010).

¶ 32 Miller has not provided a sufficient record of the circuit court's proceedings for this court to assess whether there was any violation of Section 213.1. Although we note the allegation in the petition that Faye has "early onset Alzheimers" and was 82 years old, we do not know if the court made any findings regarding whether Faye was a "high-risk adult with disabilities" for purposes of the IDVA or regarding her capacity to testify. While not dispositive of this issue, we also observe that Holly's petition for order of protection did not list Faye as "an adult who cannot file a petition because of age, health, disability, or inaccessibility on his/her own behalf."[1]

¶ 33 Citing *People ex rel. Minteer v. Kozin*, 297 Ill. App. 3d 1038 (1998), Miller also contends that the "circuit court erred by determining that petitioner had established prima facie case [*sic*] through evidence she presented at *ex parte* EOP hearing [*sic*]." In *Minteer*, the appellate court held that evidence presented during the *ex parte* emergency hearing "should not have been considered to relieve petitioner of her burden of proving by a preponderance of the evidence that respondent had abused her." *Minteer*, 297 Ill. App. 3d at 1042. "Instead," the appellate court concluded, "the court should have considered only the evidence presented at the later hearing, where both parties were present, before determining whether petitioner met her burden of

[1]Section 201 of the IDVA provides, in part, that "any petition properly filed under this Act may seek protection for any additional persons protected by this Act." 750 ILCS 60/201(b) (West 2010).

proving by a preponderance of the evidence that respondent had abused her." *Id.* Again, we cannot assess whether the court relied on evidence presented prior to the plenary hearing due to the inadequate record. Compelled to resolve any doubts arising from such incompleteness against Miller (*Foutch*, 99 Ill. 2d at 392), we conclude that he has failed to show any error based on a violation of Section 213.1 of the IDVA.

¶ 34 *Waiver of Privilege*

¶ 35 Miller contends that "[u]nder 213.2 ***, Faye was without guardian and compelled to act for herself or through her attorney. At all times, Holly acted for Faye – perhaps without her knowledge." Miller continues, "[a]s Petitioner for Faye, Holly acted to waive notice of the EOP hearing under 60/217, depriving the circuit court of evidence at that hearing through Respondent's testimony." Section 213.2 provides that "[w]hen the subject of any proceeding under this Act is a high-risk adult with disabilities for whom no guardian has been appointed, no party other than the high-risk adult or the attorney for the high-risk adult shall be entitled to invoke or waive a common law or statutory privilege on behalf of the high-risk adult which results in the exclusion of evidence." 750 ILCS 60/213.2 (West 2010).

¶ 36 We do not know whether (a) Faye was considered a "high-risk adult with disabilities" for purposes of the IDVA; (b) any guardian was appointed or Faye was represented by counsel; or (c) any other party invoked or waived a privilege on behalf of Faye. If such invocation or waiver occurred, we do not know whether it resulted in the exclusion of evidence. We are compelled to construe any deficiency in the record against Miller (*Foutch*, 99 Ill. 2d at 392), and thus conclude that he has failed to show that there was any error based on a violation of Section 213.2.

¶ 37 Faye Garland's Death

¶ 38 In his appellate brief, Miller states that, during the hearing on his motion to reconsider, Holly "announced that Faye Garland deceased on August 31 and that she was appearing in the midst of her religious mourning period." Miller asserts that "[n]otwithstanding that admission,

the Court failed to order amendment of the [plenary order] or to make a finding *instant* [*sic*] as to cessation of the [plenary order] as to Faye Garland." Miller contends on appeal that this court "must modify" the plenary order "for the subsequent death of protected party Faye Garland ***." He cites no support for this proposition.

¶ 39 Even assuming *arguendo* that Miller is correct regarding Faye's death, we need not expend judicial resources to modify an order of protection that clearly would not be in effect *vis-a-vis* a deceased protected person.

¶ 40 CONCLUSION

¶ 41 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 42 Affirmed.