2012 IL App (2d) 120526-U
No. 2-12-0526
Order filed August 22, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DIANNE AKERS,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,	)	
	)	
and	)	No. 11-D-817
	)	
WILLIAM AKERS,	)	Honorable
	)	Kevin T. Busch,
Respondent-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: The trial court did not err in granting petitioner's petition for exclusive possession of the marital residence.

¶ 1 Petitioner, Dianne Akers, and respondent, William Akers, filed counter-petitions for dissolution of their marriage. Petitioner subsequently petitioned for exclusive possession of the marital residence, and the trial court granted the petition. Respondent appeals, arguing that the trial court erred in considering evidence of the parties' second residence. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The parties were married in 1993, and two children were born to the couple: Thomas (born February 5, 1995) and Veronika (August 3, 1997). On June 8, 2011, petitioner filed a petition for dissolution of the parties' marriage, and, on July 19, 2011, respondent filed a counter-petition for dissolution. At the time of the filing of their petitions, both parties resided at 739 Dow Avenue in Geneva. Petitioner, age 52, worked as head of product control for BP Amoco and earned a substantial income, and respondent, age 49, was unemployed.

¶ 4 In a subsequent joint parenting agreement and order, the court ordered joint custody of the children, designating petitioner as the primary residential parent and granting respondent "reasonable and liberal" visitation.

¶ 5 On April 12, 2012, petitioner petitioned under section 701 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/701 (West 2012)) for exclusive possession of the marital residence. She alleged that, in May 2011, the parties purchased a second residence for respondent and had agreed that respondent would use the home as his residence and that petitioner could continue to reside in the marital residence with the minor children. Petitioner alleged that, once she rejected respondent's $8,000 maintenance demand, he stated that he would not leave the marital residence and he continued to "randomly enter" it unannounced, without notice to petitioner, and without her consent. She alleged that respondent stayed several nights and that, while in the marital residence, respondent exhibited unpredictable and aggressive behavior that intimidated petitioner. As an example, petitioner stated that respondent sporadically followed her throughout the home and insisted on having irrational and manipulative conversations. She also alleged that respondent drank "large" quantities of alcohol while at the residence and that his "regular heavy drinking" produced an uncomfortable environment for her and the children. Petitioner also stated

that the strain of respondent's behavior has affected her physical health; that his unannounced visits and irrational behavior negatively disrupted her and the children's emotional health; and that, contrary to respondent's claims that he desired to remain in the marital residence to assist in parenting the children, he had already agreed (pursuant to the joint parenting agreement) that petitioner be the residential parent.

¶ 6 Respondent denied the allegations and alleged that the children required his care while petitioner traveled out of the country for work.

¶ 7 On May 3, 2012, a hearing was held on petitioner's petition. During petitioner's opening statement, respondent's counsel objected to petitioner's discussion of the parties' purchase of a second residence. Respondent's counsel argued that the second residence was not relevant and was not a proper consideration under section 701 of the Act, which addresses only whether a spouse's continued residency jeopardizes the physical and mental well-being of the other spouse and/or children. The trial court overruled the objection, (mistakenly) noting that the statute required it to consider the inconvenience to the other party and other living arrangements.

¶ 8 Petitioner testified that the parties' children, ages 17 and 14, reside with her in the marital residence. Over respondent's (standing) objection that it was irrelevant and not a proper consideration under the statute, petitioner testified that she owns the marital residence in Geneva and a second residence in South Elgin. The parties purchased the second residence in May 2011. After petitioner told respondent that she wanted to proceed with the divorce, respondent presented her with a home in which he was interested. They agreed that, if the marriage was dissolved, respondent would live in the second residence. Respondent did not move into the house after closing, but, in December 2011 or January 2012, he began moving his belongings into the home. Beginning in

January 2012, he stayed at the home two to three times per week and would go there during the day. According to petitioner, after she filed her petition for exclusive possession in April 2012, respondent ceased spending the night at the second residence, with one exception for an athletic event.

¶ 9 Addressing respondent's behavior, petitioner testified that she finds it very stressful, intimidating, and bullying. She stated that it has been ongoing. For example, in December 2011, petitioner was home alone, eating dinner. Respondent came and sat at the table and started speaking about their divorce proceedings and saying that petitioner was a liar, specifying things about which she was allegedly lying. "It was very aggressive, very chaotic." Petitioner felt fearful, bullied, and upset. She stated:

> "So I did ask [respondent] to please stop. I said he and I debating these facts was not going to be fruitful, to please leave me alone. And he would not. He kept persisting, coming back and—you know, I tried to move around the house, he'd come back and still little snippets of you're lying about this, you're lying about that."

According to petitioner, the foregoing conduct occurred once or twice every two weeks. She stated that the most disconcerting aspect of respondent's behavior was its unpredictability. Petitioner did not "know what I'm coming home to when I walk in the house." She has difficulty sleeping; the behavior has impacted her emotional stability and is distracting.

¶ 10 Petitioner further testified that respondent drinks alcohol almost daily and that this makes her fearful because respondent becomes aggressive. Respondent's behavior changes when he is intoxicated, becoming very animated, and, when angry, he can become threatening. Addressing the children, petitioner stated the stress has impacted them in that "they will cringe and fold up when

they hear [respondent] and I engaging and withdraw." Petitioner believes that she can care for the children without respondent's help and that her physical and mental health would improve if the two were separated.

¶ 11 On cross-examination, petitioner denied that she went to a hospital for any alleged physical injuries and has no doctor reports documenting any alleged injuries. She did not contact police regarding any physical injuries. Addressing her emotional health, she stated that she see began seeing a psychiatrist (Dr. Summers) in September 2011, about eight months before she filed her petition. The children are not seeing a psychiatrist.

¶ 12 Petitioner further testified that, at the marital residence, she sleeps in the master bedroom and respondent sleeps in the guest bedroom. Her petition for exclusive possession, filed on April 12, 2012, sought a hearing *instanter*; however, on that date, petitioner was in London, England for business.

¶ 13 At the conclusion of petitioner's presentation of her petition, respondent moved for a directed finding, arguing that petitioner provided insufficient evidence that her or the children's physical or mental well-being had been jeopardized by respondent's occupancy in the marital residence. As to the children, respondent argued that the cringing to which petitioner had testified was insufficient and that both parties had participated in the arguments. As to petitioner's well-being, respondent argued that the December 2011 argument about which she testified was isolated and insufficient to support a petition for exclusive possession. He further argued that her remaining allegations were not sufficiently specific.

¶ 14 The trial court denied respondent's motion. After a recess, respondent's counsel informed the court that respondent would not call any witnesses and would rest. Following arguments, the

trial court granted petitioner's petition, ordering respondent to vacate the marital residence within 24 hours. The court noted that it was previously mistaken when it suggested that the statute requires that the court balance the hardships. Addressing the second residence, the court found that it was relevant to the consideration whether respondent's decision to remain in the martial residence corroborated petitioner's complaints and tended to show his motive to harass petitioner. The court further found that petitioner's unrebutted testimony was that respondent aggressively confronted petitioner, bullied her, called her a liar, intimidated her, and caused her stress to the point that she had to seek psychological treatment. Accordingly, the court determined that petitioner had met her burden of proof to show that both her and the children's physical and mental well-being were jeopardized by respondent's continued residency in the marital residence. Respondent timely filed his notice of interlocutory appeal. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010) (appeal from interlocutory order granting an injunction).

¶ 15 II. ANALYSIS

¶ 16 Respondent argues that the trial court erred in granting petitioner's petition for exclusive possession of the marital residence. Specifically, he claims that the court erred in three respects: (1) admitting evidence of the second residence; (2) denying his motion for a directed finding; and (3) finding that the evidence was sufficient to establish a right to exclusive possession of the marital residence. For the following reasons, we reject these claims.

¶ 17 Section 701 of the Act provides:

> "Marital residence—Order granting possession to spouse. Where there is on file a verified complaint or verified petition seeking temporary eviction from the marital residence, the court may, during the pendency of the proceeding, *only in cases where the physical or*

> *mental well being of either spouse or their children is jeopardized by occupancy of the marital residence by both spouses*, and only upon due notice and full hearing, unless waived by the court on good cause shown, enter orders of injunction, mandatory or restraining, granting the exclusive possession of the marital residence to either spouse, by eviction from, or restoration of, the marital residence, until the final determination of the cause. No such order shall in any manner affect any estate in homestead property of either party." (Emphasis added.) 750 ILCS 5/701 (West 2010).

¶ 18 A. Evidentiary Ruling

¶ 19 Respondent argues first that the trial court erred in admitting evidence of the parties' second residence. We review evidentiary rulings for an abuse of discretion. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 44. A trial court abuses its discretion where no reasonable person would take the view adopted by the court. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010).

¶ 20 Respondent complains that, notwithstanding the trial court's attempt to correct its initial mistaken reading of the statute, it erroneously (and heavily) relied on irrelevant evidence and respondent was prejudiced as a result. We disagree.

¶ 21 In announcing its findings, the court acknowledged its prior misreading of the statute, wherein the court balanced the hardship to the parties, which, unlike section 701 of the Act, is permissible under section 214(b)(2) of the Illinois Domestic Violence Act of 1986 (750 ILCS 60/214(b)(2) (West 2010)). However, the court noted that it found that the purchase of the second residence was relevant to the consideration of whether respondent's decision to remain in the marital residence corroborated petitioner's complaints and tended to show that he intended to harass petitioner.

¶ 22 We cannot conclude that the court's ruling constituted an abuse of its discretion. It was not unreasonable for the court to reason that the purchase of the second residence and whether or not respondent spent time at the residence were relevant to the consideration of petitioner's and the children's physical and mental well-being. See *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 57 (2000) (evidence must be relevant to be admissible at a trial). Petitioner's unrebutted testimony was that respondent began moving into the second residence in December 2011 and January 2012 and that, by January, he stayed at the home two to three times per week and spent time there during the day. She further testified that, after she filed her petition in April 2012 and with one exception, respondent ceased staying at the second residence. Evidence is relevant when it has a tendency to prove a fact in controversy or render a matter in issue more or less probable. *In re A. W.*, 231 Ill. 2d 241, 256 (2008). Petitioner's testimony concerning the second residence corroborated her allegations concerning her and her children's well-being (by suggesting that respondent returned to the marital residence to harass petitioner). Accordingly, its admission was not an abuse of discretion.

¶ 23 B. Motion for Directed Finding

¶ 24 Next, respondent argues that the trial court erred in denying his motion for a directed finding. In cases tried without a jury, the defendant may move for a directed finding in his or her favor at the close of the plaintiff's case. 735 ILCS 5/2-1110 (West 2010). In ruling on a motion for a directed finding, the trial court must engage in a two-step analysis. *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 246 (1987). First, the court must determine as a matter of law whether the plaintiff has presented a *prima facie* case. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 39. A plaintiff presents a *prima facie* case where he or she presents some evidence on each element essential to the cause of action. *Minch v. George*,

395 Ill. App. 3d 390, 398 (2009). Second, if the plaintiff has presented some evidence on each element, the court then must consider and weigh the totality of the evidence presented, including evidence that is favorable to the defendant. *Law Offices of Colleen M. McLaughlin*, 2011 IL App (1st) 101849, ¶ 39. A trial court's denial of a motion for a directed finding should not be reversed unless it is against the manifest weight of the evidence. *Id.* at ¶¶ 39-41. A decision is against the manifest weight of the evidence if the opposite conclusion is clearly apparent. *Gorski v. Board of Fire & Police Commissioners of the City of Woodstock*, 2011 IL App (2d) 100808, ¶ 34.

¶ 25 Respondent argues that petitioner did not testify as to any physical abuse that she or the children sustained and that she did not testify that she contacted the police about respondent's actions. As to the parties' mental well-being, respondent contends that the only evidence with respect to the parties' children was petitioner's testimony that they would cringe when petitioner and respondent argue. He asserts that cringing does not constitute emotional distress. As to petitioner's well-being, he argues that she testified as to only one specific incident, in December 2011 (about five months before she filed her petition), where she had an argument with respondent. Respondent also argues that petitioner's complaints about her sleep and concentration issues are typical of someone going through a divorce. He also asserts that the fact that petitioner first sought psychiatric treatment about eight months before she filed her petition shows that she sought treatment for reasons unrelated to the allegations in her petition. Respondent also contends that petitioner was insufficiently specific in her allegations concerning respondent's alcohol consumption.

¶ 26 We conclude that petitioner presented sufficient evidence to establish a *prima facie* case for exclusive possession and that the trial court's denial of respondent's motion for a directed finding was not against the manifest weight of the evidence. Although petitioner's testimony concerning

the children was not abundantly specific, her testimony concerning her own well being was sufficient to support the court's ruling. See 750 ILCS 5/701 (West 2010) ("only in cases where the physical or mental well being of either spouse *or* their children is jeopardized by occupancy of the marital residence by both spouses"). (Emphasis added.) Petitioner testified that she felt fearful, bullied, and upset by respondent's presence in the marital residence and that she had difficulty sleeping. We reject respondent's argument that petitioner's testimony addressed only one incident involving an argument and that this was insufficient to warrant the relief she requested. In addressing the December 2011 incident, petitioner testified that the incident involved conduct that occurred once or twice every two weeks. Thus, contrary to respondent's assertion, it was not isolated. As to respondent's assertion that petitioner's sleep and concentration issues are typical of someone involved in divorce proceedings, this is not well-taken because petitioner also testified that she felt fearful and bullied. The trial court could reasonably have found that this was an atypical reaction that impacted petitioner's mental or physical well-being. As to respondent's complaint that petitioner sought psychiatric treatment eight months before she filed her petition and that this shows that she sought treatment for reasons unrelated to the allegations, there is no support for respondent's implied assertion that the trial court placed inordinate weight on this fact and we cannot conclude that this renders incredible petitioner's essential assertions. Finally, we note that, although respondent cross-examined petitioner, he himself did not testify or present any other evidence. Accordingly, we find no error with the trial court's consideration and weighing of the totality of the evidence at the close of petitioner's case.

¶ 27 Respondent's reliance on *In re Marriage of Lima*, 265 Ill. App. 3d 753 (1994), is misplaced. In *Lima*, the appellate court reversed the trial court's order granting the wife exclusive possession

of the marital residence. *Id.* at 757-58. The parties in that case were married for 20 years. Three years before she filed her petition, the wife became an insulin-dependent diabetic and testified that stress caused diabetic reactions; she had five such reactions per week during the three months preceding the hearing on her petition. The wife also testified that, three to four years before the parties filed their dissolution petitions and before she filed her petition for exclusive possession, her husband had sexual intercourse with her without her consent; this was the last time the couple had intercourse. The wife felt "used" and "bad." The husband continued to live in the house after the incident; the wife prepared the meals; they watched television together; and the wife did the husband's laundry. The husband moved out of the marital residence about one year before the petition for exclusive possession. Finally, when asked if, at a temporary restraining order hearing, she had testified that she did not care if the husband was in the house, she replied in the affirmative. The *Lima* court held that the trial court's judgment was against the manifest weight of the evidence because: (1) the one incident of intercourse did not support a finding that the wife's physical or mental well-being was jeopardized; (2) the wife's diabetes and reactions did not support such a finding; and (3) there was no evidence of any future jeopardy to the wife. *Id.*

¶ 28 We find *Lima* distinguishable. In *Lima*, the sexual encounter occurred three or four *years* before the parties' dissolutions petitions and the wife's petition for exclusive possession. Here, in contrast, petitioner's unrebutted testimony was that respondent's acts that jeopardized her physical and mental well-being were contemporaneous and ongoing. Further, in *Lima*, the wife acknowledged that she did not care if the husband was in the house, whereas, here, petitioner's unrebutted testimony was that respondent's behavior impacted her emotional stability, was bullying,

and upsetting. She also felt fearful. Petitioner stated that her physical and mental health would improve if the couple were separated.

¶ 29 We disagree with respondent's assertion that *Lima* instructs that consideration of a second residence is improper. In *Lima*, unlike here, there were no allegations of ongoing harassment or the use of a second home and a move therefrom and a move back into the marital home as a means of carrying out any harassment; therefore, the *Lima* court did not need to consider the second residence or the husband's actions with respect thereto.

¶ 30 We further find that *In re Marriage of Levinson*, 2012 IL App (1st) 112567, upon which respondent also relies, does not support his position. In *Levinson*, the wife petitioned for exclusive possession of the marital residence, arguing that the tension level between the couple and the husband's unpredictable behavior had jeopardized her's and the children's (ages three and five, with the five-year-old having sensory processing disorder and dyspraxia) physical and mental well-being. She also alleged that the temporary "birdnesting" parenting arrangement, whereby each party occupied the marital residence during his or her parenting time but vacated the residence during the other's parenting time,[1] caused the children confusion and lack of stability. A court-appointed evaluator determined that the children were attached primarily to their mother, that the children required a consistent and predictable schedule (considering their particular emotional sensitivities), and recommended that few changes be made until the parents were living in separate residences. He also opined that neither the parties nor the children were endangered or in jeopardy. The evaluator also disagreed with the wife's allegations that the visitation schedule seriously endangered

[1]Apparently, the wife had exclusive use of the home at all times except during the husband's parenting time.

or jeopardized the children's mental and emotional well-being. The wife testified that the children were more aggressive with each other following visitation with their father and that the visitation arrangement was stressful for her because she is anxious about sharing the home and has no privacy. The trial court granted the wife's petition.

¶ 31 Finding *Lima* instructive, the appellate court reversed, holding that the fact that the wife experienced stress by sharing the marital residence with the husband and the fact that the children experienced stress and confusion due to the lack of stability as to the visitation arrangement were insufficient under section 701 of the Act to support an order for exclusive possession and that the trial court's order was against the manifest weight of the evidence. *Id.* at ¶¶37, 43-44.

¶ 32 We conclude that *Levinson* is distinguishable because the allegations in that case were that the wife and children experienced stress and confusion by the shared-residence and visitation arrangements, which the *Levinson* court determined did not constitute jeopardy under the statute. Here, in contrast, petitioner's allegations are of a more serious or threatening nature than only stress or confusion. She testified that she felt fearful and bullied and alleged that respondent utilized the second residence to harass her. Furthermore, in this case, there was no "birdnesting" arrangement; rather, the parties had joint custody of the children, petitioner was the primary residential parent, and they agreed that respondent would reside (and presumably parent) in the second residence.

¶ 33 In sum, the trial court did not err in denying respondent's motion for a directed finding.

¶ 34 C. Sufficiency of Evidence

¶ 35 Respondent's final argument is that the trial court's granting of petitioner's petition for exclusive possession was against the manifest weight of the evidence. Because respondent presented no evidence after the close of petitioner's case, we reject this argument for the same reasons we

rejected his claim concerning the court's ruling on his motion for a directed finding. Respondent primarily relies on *Lima* and *Levinson*, a reliance we again find misplaced for the reasons stated above. Respondent also argues that petitioner did not sufficiently support her claim that respondent's harassment was ongoing, a claim that we noted above is unsupported by the evidence, where petitioner testified that respondent's behavior in December 2011 was ongoing and occurred once or twice every two weeks. The trial court is in a superior position to observe the demeanor of the witnesses, determine and weigh their credibility, and resolve any conflicts in their testimony. *In re Marriage of Rosen*, 126 Ill. App. 3d 766, 774 (1984). We cannot conclude that the trial court's granting of petitioner's petition was against the manifest weight of the evidence.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 38 Affirmed.