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2015 IL App (3d) 140114-U

Order filed March 12, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

RACHEL ROCK,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellant,	)	Rock Island County, Illinois,
	)	
v.	)	Appeal No. 3-14-0114
	)	Circuit No. 13-OP-561
	)	
DAVID C. ROCK,	)	Honorable
	)	Frank R. Fuhr,
Respondent-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting respondent's motion for directed finding following petitioner's case at a plenary order of protection hearing where the petitioner presented a *prima facie* case of abuse under the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2012)).

¶ 2 Petitioner, Rachel Rock, filed a verified petition for an order of protection against respondent, David Rock. The circuit court granted Rachel an emergency order of protection on behalf of her and her children against David. The emergency order was extended several times until the hearing on the plenary order of protection was held. At the close of Rachel's

presentation of evidence, David moved for a directed finding. The court granted David's motion and denied Rachel's petition. Rachel appeals, arguing that the trial court erred in: (1) granting David's motion for directed finding because she presented a *prima facie* case of abuse under the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/101 *et seq.* (West 2012)); and (2) asserting that it had discretion to deny the petition for a plenary order of protection after a finding of abuse. We reverse and remand.

¶ 3 FACTS

¶ 4 Rachel filed a verified petition for an order of protection against David, on August 6, 2013, following an incident that occurred August 5, 2013. Rachel and David had been married since January 2, 2004. One child, A.R., was born during the marriage. Rachel had given birth to an older daughter, D.K., before the marriage. D.K. is developmentally disabled. She is unable to speak or hear, wears diapers, and generally functions at the level of a two-year-old child. The parties dispute whether David is D.K.'s father. On August 5, 2013, Rachel and David were living separately, and David had filed for divorce. A.R. was 7 years old, and D.K. was 11 years old. Both children were living with Rachel.

¶ 5 On August 6, 2013, the circuit court granted Rachel an emergency order of protection on behalf of her and her children against David. David was served with a copy of the summons and emergency order on August 6, 2013. The emergency order was extended several times until the hearing on the plenary order of protection was held on January 2, 2014.

¶ 6 At the hearing on the plenary order, Rachel testified that on August 5, 2013, at approximately 8 p.m., she drove to David's house to pick up A.R. and D.K., who had been visiting David. There was no visitation order in place at that time. When she arrived, A.R. appeared to be afraid and "almost ran" to the car. David told A.R. he would pick her up the next

day. Rachel responded that David did not have visitation the next day. David then told Rachel that he would take both children from her. David attempted to grab A.R., who pulled away, got into Rachel's car, and shut the door. Rachel locked the car. David took D.K. into his house and refused to release her to Rachel. Rachel called the police. During this time, A.R. was crying and screaming in the backseat of the car.

¶ 7 Several Rock Island police officers arrived at David's residence and told David he must release D.K. to Rachel. David refused. After the police talked to David for approximately 20 minutes, they permitted Rachel to take A.R. to her mother's house and to get copies of her divorce papers and D.K.'s birth certificate. Rachel returned to David's house with the divorce papers and D.K.'s birth certificate, which stated that Jesus Ortiz was D.K.'s father. When Rachel returned, the police had broken a window in David's house, but David still refused to turn over D.K. Rachel was crying during the incident. After approximately 2 hours and 18 minutes, David released D.K.

¶ 8 On cross-examination, Rachel testified that David had always treated D.K. as his daughter and had taken good care of her in the past "for the most part." He was not always good with the children because he often screamed and yelled and was physically abusive toward Rachel in front of A.R. Rachel may have told others that David could have been D.K.'s father or that he was the father who took care of D.K. She later testified that David knew he was not D.K.'s father. She then stated that David could be D.K.'s father but she did not believe he was. D.K. was born before Rachel and David were married when Rachel was in a relationship with Ortiz. No paternity test had been done showing that David was D.K.'s father. Neither Ortiz nor David had ever been adjudicated D.K.'s father.

¶ 9 Rachel's next witness was Austin Frankenreider, a Rock Island police officer.

Frankenreider testified that he was dispatched to a call at David's residence on August 5, 2013, at approximately 8 p.m. He believed that the call was possibly for a violation of an order of protection, but he did not check his computer to verify whether any order was in effect. When he arrived on the scene, he spoke with Rachel, who was standing outside the residence. She showed him some paperwork and said she was trying to get one of her children out of the residence. Frankenreider and other officers at the scene told David to let the child out of the house. David was initially very agitated and would not respond to the police officers. Ten to twelve officers had responded to the call by the end of the night. After approximately 2½ hours, David let the child out of the house.

¶ 10 During the incident, David screamed into the phone and paced back and forth inside the residence. Frankenreider could see the child at times. The child would come toward the window and then David would take her out of sight. Frankenreider never saw David threaten or harm the child. Rachel was very upset and concerned.

¶ 11 Rachel had no further witnesses. David's attorney moved for a directed finding, arguing that Rachel's evidence did not demonstrate abuse or harassment. David's attorney further argued that David had been a great father to D.K. and "believed in his own mind" that he was her father. Rachel's attorney argued that David had no right to have custody of D.K. because he and Rachel were unmarried when D.K. was born and he had never been adjudicated her father. When David refused to let D.K. go for 2½ hours after being told by police to release her, it caused emotional harm to both children.

¶ 12 The court asked why there had not been any visitation since the emergency order. Rachel's attorney stated that he was not sure that Rachel would get A.R. back if David was permitted to have visitation. The court then asked David if he received disability benefits.

David replied that he did because he had bipolar disorder and anxiety. The court asked if he took medication for these disorders, and David replied that he took his medication every day.

¶ 13 The court then stated:

> "[H]ere's the reality. To get an order of protection you have to allege two incidences of abuse. This petition only alleges one. It could be alleged abuse, but I still think it's not appropriate. It's ridiculous that the two of you ended up involving 10 or 11 police officers in this dispute."

¶ 14 The court asked David why he did not turn D.K. over when he was ordered to do so by the police. David replied that his attorney had given him a paper that said he had every right to keep his children and the police stole it from him and told him that he did not have any rights. The court asked David if he knew that his name was not on D.K.'s birth certificate, and David replied that he did not know. The court stated that the situation was "stupid" and "ridiculous." The court then stated that it was "ridiculous" that the parties had not worked out visitation for A.R. while the order of protection case was pending. The court asked Rachel if she thought it was in A.R.'s best interest not to have visitation with her father. Rachel replied she did not know if she would get A.R. back if David had visitation. A.R. has gone to counseling, and the incident was traumatic for her. There were problems between David and the children before the incident. The court asked Rachel why she took the children to David's house on August 5, 2013, if there were problems. Rachel replied that her lawyer advised her not to fight visitation and David would only have the children for four or five hours a day. The court asked Rachel if David had ever done anything to the children before August 5, 2013. Rachel replied that he had been verbally abusive to A.R. but not to D.K. because D.K. cannot hear.

¶ 15 The court then denied Rachel's petition. Rachel appeals.

¶ 16 ANALYSIS

¶ 17 I. Motion For Directed Finding

¶ 18 A. Standard of Review

¶ 19 On appeal, Rachel argues that the circuit court erred in granting David's motion for a directed finding and denying her petition for order of protection because she made a *prima facie* case of abuse under the Act (750 ILCS 60/101 *et seq.* (West 2012)). Under section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2012)), in cases tried without a jury, the defendant may move for a finding or judgment in his favor at the end of the plaintiff's case. If the court rules in favor of the defendant, a judgment dismissing the action shall be entered; if the court rules against the defendant, the defendant may proceed to present evidence in support of his or her defense and the motion is waived. 735 ILCS 5/2-1110 (West 2012).

¶ 20 The circuit court must apply a two-part analysis when ruling on a section 2-1110 motion. *Minch v. George*, 395 Ill. App. 3d 390, 398 (2009). First, the trial court determines as a matter of law whether the plaintiff has presented a *prima facie* case. *Id.* If the circuit court finds that the plaintiff has failed to present a *prima facie* case, the standard of review is *de novo. Id.* If the plaintiff has presented a *prima facie* case, the court moves to the second part of the analysis and considers and weighs all the evidence offered by the plaintiff, including evidence favorable to the defendant, to determine whether the *prima facie* case survives. *Id.* If the circuit court moves on to the second part of the analysis and finds no *prima facie* case remains, the standard of review is the manifest weight of the evidence standard. *Id.*

¶ 21 Initially, David argues that the proper issue on appeal is whether the testimony from Rachel's witnesses at the hearing on the plenary order of protection established abuse by a preponderance of the evidence and that we should apply the manifest weight of the evidence

standard of review to that issue. David correctly articulates the proper issue and standard of review on appeal in cases where a full hearing on a plenary order of protection is held and a court issues a ruling at the close of evidence. See 750 ILCS 60/205 (West 2012). However, in this case, the trial court denied the petition for the order of protection following David's motion for directed finding. Thus, the proper standard of review is the standard for section 2-1110 motions. Here, the court found the petition insufficient in that it had alleged only one act of abuse. Thus, it appears the court found that a *prima facie* case had not been presented. Our review is *de novo*.

¶ 22 B. Rachel Presented a *Prima Facie* Case of Abuse

¶ 23 In ruling on whether the plaintiff presented a *prima facie* case, the trial court considers whether the plaintiff presented some evidence on each of the elements of her case. *Minch*, 395 Ill. App. 3d at 398. Here, the trial court stated that Rachel had only alleged one incident of abuse and she was required to allege two in order to obtain an order of protection. However, the Act contains no such requirement. Under the Act, an order of protection shall issue if the court finds that the petitioner has been abused by a family or household member. 750 ILCS 60/214(a) (West 2012). "Family or household members" under the Act include "spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage[.]" 750 ILCS 60/103(6) (West 2012).

¶ 24 "Abuse" is defined under the Act as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation[.]" 750 ILCS 60/103(1) (West 2012). Abuse can be established in multiple ways under the Act; some actions that constitute abuse require evidence of repeated acts while others do not. See, *e.g.*, 750 ILCS 60/103(14) (West 2012) (defining physical abuse to require repeated acts of sleep deprivation but

not to require repeated acts of use of physical force, confinement, or restraint or conduct creating an immediate risk of physical harm); see also 750 ILCS 60/103(7) (West 2012) (requiring repeated instances of certain acts, *e.g.*, following petitioner in public places or telephoning petitioner's place of employment or residence, in order for a presumption to arise that said acts cause emotional distress but imposing no such requirement for other acts, *e.g.*, creating a disturbance at petitioner's place of employment or school). Since the legislature required that some actions, but not others, be repeated in order to constitute abuse under the Act, multiple incidences need only be alleged to establish abuse when repeated instances are explicitly required under the Act.

¶ 25 Rachel established a *prima facie* case of abuse under several sections of the Act that did not require multiple instances to be alleged. First, Rachel presented a *prima facie* case of harassment under section 103(7)(v) of the Act (750 ILCS 60/103(7)(v) (West 2012)). "Harassment" is defined 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(7) (West 2012). Under section 103(7)(v) of the Act (750 ILCS 60/103(7)(v) (West 2012)), "improperly concealing a minor child from petitioner" is presumed to cause emotional distress unless the presumption is rebutted by a preponderance of the evidence.

¶ 26 In this case, evidence was presented that David held D.K. in his house for approximately 2 hours and 18 minutes and refused to release her to Rachel. Said conduct was done knowingly and was not necessary to accomplish any reasonable purpose. David had not been adjudicated D.K.'s father and had no legal right to custody or visitation with her. David's concealment of Rachel's developmentally disabled child from her for over two hours would cause emotional

distress to a reasonable person. Under section 103(7)(v) of the Act, David's conduct is presumed to have caused emotional distress to Rachel. There was also evidence at the hearing that Rachel was upset and crying throughout the incident, indicating that David's conduct did in fact cause emotional distress to Rachel.

¶ 27 Rachel also established a *prima facie* case for intimidation of a dependent, a type of abuse under the Act. See 750 ILCS 60/103(1) (West 2012). Intimidation of a dependent is defined in relevant part as "subjecting a person who is dependent because of age *** to participation in or the witnessing of: *** physical confinement or restraint of another." 750 ILCS 60/103(10) (West 2012). Evidence was presented at the hearing that David tried to grab A.R., A.R. ran into the car, and A.R. saw David take D.K. into the house. A.R. was screaming and crying as she watched David take D.K. into the house. A.R. was seven years old at the time. Thus, Rachel presented evidence that A.R. was a dependent who witnessed the physical confinement of another.

¶ 28 Rachel presented a *prima facie* case of physical abuse, which is defined in relevant part as "knowing or reckless use of physical force, confinement or restraint." 750 ILCS 60/103(14)(i) (West 2012). Rachel presented evidence that David confined D.K. in his home, had no legal right to have custody of her, and refused to release her to Rachel or the police.

¶ 29 C. *Prima Facie* Case Not Negated After Weighing All Evidence

¶ 30 As Rachel presented a *prima facie* case of abuse under several sections of the Act, the trial court should have moved on to consider and weigh all the evidence she offered, including evidence favorable to David, to determine whether the *prima facie* case survived. *Minch* 395 Ill. App. 3d at 398. Rachel's evidence regarding the alleged abusive incident was uncontroverted. Although the trial court repeatedly stated that the incident was "stupid" or "ridiculous," the court

did not indicate that it disbelieved or discounted the evidence presented by Rachel. Thus, had the trial court reached the second step of the analysis, a finding that the *prima facie* case of abuse was negated would have been against the manifest weight of the evidence. Therefore, we reverse the trial court's granting of David's motion for directed finding and remand for further proceedings.

¶ 31 II. No Discretion to Deny Order of Protection After Finding of Abuse

¶ 32 Additionally, Rachel argues that the trial court erred in asserting that it had discretion to deny Rachel's petition after a finding of abuse. When ruling on David's motion for directed finding, the trial court stated, "[i]t could be alleged abuse, but I still think it's not appropriate." It is unclear whether the court was stating that it did not believe that abuse had occurred or whether it was stating that even if abuse occurred, it would not be appropriate to grant the order of protection. To the extent that it stated the latter, the trial court was in error. "If the court finds that petitioner has been abused by a family or household member *** as defined in this Act, an order of protection *** *shall* issue." (Emphasis added.) 750 ILCS 60/214(a) (West 2012). The word "shall" in a statute ordinarily imposes an imperative duty. *Lohr v. Havens*, 377 Ill. App. 3d 233, 236-37 (2007); see also *Newland v. Budget Rent-A-Car Systems, Inc.*, 319 Ill. App. 3d 453, 456 (2001) ("Courts must not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express."). Thus, if the trial court finds that Rachel has established by a preponderance of the evidence that she was abused, as defined by the Act, then an order of protection must issue; the trial court has no discretion to deny an order of protection after a finding of abuse. See *Best v. Best*, 358 Ill. App. 3d 1046, 1051 (2005), *aff'd*, 223 Ill. 2d 342 (2006) ("[T]he trial court has no special discretion under the Act when it decides whether a respondent has abused a petitioner. *** [T]he trial court's function is *** to interpret

the law, find the facts, and apply the law to the facts.").

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Rock Island County is reversed, and this cause is remanded for further proceedings consistent with this order.

¶ 35 Reversed and remanded.