This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2140

Nancy Kathryn Darling and o/b/o six named minor children, petitioner,
Respondent,

vs.

Kenneth Scott Koeneman,
Appellant.

Filed August 22, 2011
Affirmed
Ross, Judge

Washington County District Court
File No. 82-CV-10-3100

Elizabeth A. Clysdale, Collins, Buckley, Sauntry& Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

John P. Guzik, Guzik Law Office, P.A., Roseville, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

U N P U B L I S H E D   O P I N I O N

ROSS, Judge

Dr. Nancy Darling successfully petitioned the district court to issue a harassment restraining order against her estranged husband, Dr. Kenneth Koeneman, on behalf of herself and six of their children. Her petition alleged that within months of Koeneman's

being ordered to have no contact with her or the children outside of supervised parenting time, he showed up at her residence, followed her on the street, blocked her driveway, appeared at the children's afterschool activities, and repeatedly telephoned her house and her cellular telephone. On appeal, Koeneman challenges the harassment restraining order, arguing that some of the district court's findings are unsupported or based on evidence not properly before it and that none of his contact was "harassing" because it did not have a substantial adverse effect on Darling's or the children's safety, security, or privacy. Although some of the district court's findings appear to be erroneous, other sufficient, well-supported findings lead us to affirm its conclusion that Koeneman harassed Darling and the children and that it was within its discretion to issue the harassment restraining order.

FACTS

Doctors Kenneth Koeneman and Nancy Darling met in medical school, married in 1991, and legally separated in 2007. They had seven children (including two sets of twins), six of whom remain minors. As part of their dissolution proceeding, the district court issued an order in December 2008 granting temporary joint legal and physical custody of the children and limiting the parties' contact with each other. Fifteen months later, for reasons unclear in the record before this court, the district court amended that order, granting sole legal and physical custody of the children to Darling and requiring that Koeneman's twice-per-week parenting time be supervised. The amended order also stated, "[Koeneman] is not allowed to participate in any child related activity beyond the confines of the supervised parenting time until such time as it is overtly approved for him

to do so." It added, "All communication between the parties shall be done exclusively through Our Family Wizard and . . . the parenting consultant shall be granted . . . access to all those exchanges."

About one month after the issuance of the no-contact order, Koeneman began repeatedly contacting Darling and the children. On April 28, 2010, Koeneman went to the children's play practice and asked them questions. On April 29 he called Darling asking her to have sex with him. He made dozens of other calls to her house and cellular telephone. On May 2 Koeneman approached the youngest child, who sat in Darling's car, and asked if he wanted to "stay with daddy." On May 4 Koeneman went to one of the children's baseball practices. Darling saw him there and later alleged, based on what she learned from her child, that he "talked to the coach . . . [and] swore at the kids." On May 14 Koeneman followed Darling from her work to her house. A week later, he blocked her driveway with his car. On May 22 Koeneman went to Darling's house uninvited to drop off equipment. He rang the doorbell and placed items on her stoop. He also damaged Darling's property on one of these occasions by driving off of her driveway and leaving tire tracks in her yard. He repeatedly made visits to the children's baseball practices, plays and play practices, and church events.

On May 24, 2010, Darling applied for a harassment restraining order (HRO) against Koeneman on behalf of herself and six children under Minnesota Statutes section 609.748, subdivision 4 (2008). The district court granted a temporary HRO prohibiting all contact between Koeneman and Darling and between Koeneman and the children. In September 2010, the district court held an evidentiary hearing on the HRO motion as was

required by Minnesota Statutes section 609.748, subdivision 4(c). Darling testified. Koeneman did not testify, but he submitted an affidavit refuting the acts alleged by Darling. He maintained that Darling had also been making telephone calls to him. He admitted to following Darling in her car, but he claimed that he did so to ask her a question, which he decided not to ask. He denied that the driveway incident happened "in the recent past" and asserted that it happened five years before.

The district court concluded that it had reasonable grounds to believe that Koeneman harassed Darling and the children. It found that he followed Darling, made dozens of unwanted calls to her, showed up at her home, and damaged her property. It also found that he showed up uninvited at the children's activities in violation of the no-participation-in-child-related-activities order, tried to take one or more of the children on two occasions, and swore at the coach and children at a baseball practice. It then issued the HRO.

Koeneman appeals.

D E C I S I O N

Koeneman contests the district court's issuance of the HRO. We review the issuance of an HRO for abuse of discretion, and we review the district court's findings supporting the order for clear error. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). Whether the facts as found by the district court meet the statutory definition of harassment is a question of law reviewed de novo. *Id.*

If a person is being harassed, she may seek an HRO from the district court. Minn. Stat. § 609.748, subd. 2 (2008). And a parent may seek an HRO on behalf of her child if

the child is a victim of harassment. *Id.* A district court may issue the HRO if reasonable grounds exist showing that the actor has engaged in harassment. *Id.*, subd. 5(a)(3) (2008). Darling did not allege physical or sexual harassment. "Harassment" that is not physical or sexual is defined as "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another." *Id.*, subd. 1(a)(1) (2008).

Koeneman argues that some of the district court findings are unsupported or based on evidence not properly before it. He also argues that none of his conduct was "harassing" because it did not have a substantial adverse effect on Darling or the children's safety, security, or privacy. His arguments do not persuade us to reverse.

We first address Koeneman's challenge to the district court's fact findings, which we will rely on unless they are clearly erroneous, giving due regard to the district court's credibility determinations. *See Peterson*, 755 N.W.2d at 761. We will not hold findings of fact to be clearly erroneous unless our review of the record leaves us with the definite and firm conviction that the district court was mistaken. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Koeneman challenges the district court's finding that he attempted to take one child "out" of the car and "take the children" from a play practice. This finding is not supported by the record. Darling testified that Koeneman talked to their five-year old son from outside the car while the son was inside and asked the son if he wanted to "stay with daddy." She admitted that Koeneman never tried to unhook the boy from his car seat. Darling also testified that Koeneman showed up at the children's play practice, but she

said that he came, asked questions, and left. No testimony suggests that he tried to take the children with him.

Koeneman also challenges the finding that he "participated" in the children's activities in violation of the parties' dissolution order, which states, "[Koeneman] is not allowed to participate in any child related activity beyond the confines of the supervised parenting time until such time as it is overtly approved for him to do so." The order did not define "participate." Koeneman presents a dictionary definition of the word "participate," which is "to take part," and claims that he did not "take part" in the baseball games and practices or play practices. Koeneman's argument has merit. It might be that the district court intended to prohibit Koeneman from even *attending* the children's events, not only from *participating* in them. But it did not use the broader term and so its finding that Koeneman violated the no-participation order by merely attending functions is not supported on this record.

Although we hold that these findings are not sufficiently supported with evidence, we will leave the order intact if the remaining findings still support it. *See* Minn. R. Civ. P. 61 ("[N]o error or defect in any ruling or order . . . is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."). Koeneman makes other challenges to the district court's findings, but they are less convincing.

Koeneman challenges the finding that he blocked the driveway with his car. Although Darling did not immediately remember this event, she then testified that she

remembered it and that it happened on a Friday night when she arrived home from work. We defer to the district court's credibility determinations. *Peterson*, 755 N.W.2d at 761.

Koeneman contests the district court's reliance on his surprise appearance at the September festival because it occurred after the issuance of the May 24 temporary HRO. The HRO statute does not limit the hearing evidence to those acts that occurred before the district court issued the temporary restraining order. It directs the district court to decide only whether "reasonable grounds" exist to issue a permanent order. Minn. Stat. § 609.748, subd. 5(a)(3). Harassment that occurred after the temporary order may bear on that issue.

We turn to Koeneman's argument that the district court's findings do not support its conclusion that his actions were harassment. The harassment statute requires (1) proof of subjective harassing intent or "objectively unreasonable" conduct on the part of the harasser and (2) proof of a substantial adverse effect on the person subject to the harassing conduct's safety, security, or privacy, or an "objectively reasonable" belief of such an effect. *Peterson*, 755 N.W.2d at 764; Minn. Stat. § 609.748, subd. 1(a)(1); *see Kush v. Mathison*, 683 N.W.2d 841, 845 (Minn. App. 2004) (noting that harasser's intent can be viewed subjectively), *review denied* (Minn. Sept. 29, 2004).

Neither the district court nor Darling have cited any specific evidence tending to prove that Koeneman specifically intended to harass Darling when he showed up at the children's events, dropped equipment off at her house, followed her car, and called her repeatedly. But the intent element can be met if Koeneman's conduct may be characterized accurately as objectively unreasonable. *Peterson*, 755 N.W.2d at 764. We

conclude that Koeneman's repeated contacts with Darling and the children, especially given the no-contact order, were objectively unreasonable. In a matter of two months, Koeneman appeared at seven of the children's activities, made dozens of telephone calls to Darling's home and cellular telephone, followed Darling for several miles, blocked her driveway, and twice more went to her house, one time leaving tire tracks in the yard. Even discounting the unsupported findings, the many uninvited and unwanted contacts made by a party who has been ordered to have restricted or no contact constitutes objectively unreasonable behavior.

And evidence in the record indicates that Koeneman's conduct actually affected Darling and her children's safety, security, or privacy. Darling testified that she felt "unsafe" while Koeneman was following her on the street. She also said "it is unnerving" to have him appear in places where she does not expect him. She said the phone calls were "harassing." She also testified that, although the children did not feel "unsafe" by their father showing up at their play practice, they were "upset" by it. She also said that one of their sons was "upset and . . . irritated" that Koeneman "made a scene" at his baseball practice. We do not think conclusory claims of *feeling* unsafe or *feeling* harassed are a valid substitute for evidence demonstrating actual safety or security risks or an objectively reasonable basis to have the concerns. But being repeatedly followed by Koeneman's car does create an objectively reasonable basis for Darling's safety concern. And sufficient evidence supports a finding that Darling and her children's privacy was also adversely affected by Koeneman's repeated contact. An adverse effect on privacy includes interference in one's activities. *See* Black's Law Dictionary 1315 (9th ed. 2009)

(defining “privacy” as “[t]he condition or state of being free from . . . interference with one’s acts”). By frequently and repeatedly contacting the members of his estranged family in the face of a prohibition against most contact, Koeneman interfered with their privacy.

We repeat that we ultimately must decide only whether the district court abused its discretion in issuing the HRO. We are not asked whether we would have issued the HRO, and we recognize that reasons exist against issuing it. We hold that the non-erroneous district court findings support the conclusion that Koeneman’s conduct was objectively unreasonable and that it reasonably affected at least Darling and her children’s privacy. We therefore hold that the district court did not abuse its discretion by issuing the HRO.

Affirmed.