STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1085

Julie Marie Latham, petitioner,
Respondent,

vs.

Steven Robert Latham,
Appellant.

Filed March 5, 2012
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19AV-CV-11-633

Paula Smoot Ogg, Timothy O'Brien, Minneapolis, Minnesota; and

Nadia Wood, St. Paul, Minnesota (for respondent)

Michelle L. MacDonald, MacDonald Law Firm, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Randall, Judge.*

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

CONNOLLY, Judge

Appellant seeks review of an order granting respondent's ex parte application for a temporary harassment restraining order, a harassment restraining order, and an order

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

rejecting appellant's challenge to the constitutionality of Minn. Stat. § 609.748 (2010). Because we conclude that the temporary harassment restraining order is not reviewable, that the district court did not abuse its discretion in issuing the harassment restraining order, and that the constitutionality challenge was not properly before the district court, we affirm.

FACTS

Appellant Steven Latham and respondent Julie Latham are former spouses. Their marriage was dissolved by a judgment and decree dated June 3, 2010. The judgment and decree awarded the parties joint legal and joint physical custody of their children. On February 22, 2011 respondent sought, and was granted, a temporary harassment restraining order (TRO) pursuant to Minn. Stat. § 609.748, subd. 4. In her petition, respondent alleged that appellant followed, pursued, or stalked her, made uninvited visits and harassing phone calls, frightened her with threatening behavior, broke into and entered her residence, and stole property from her.

On March 1, 2011, appellant filed a motion to dismiss the TRO on the ground that there was no harassment and that the parties needed to communicate and have contact almost daily due to their joint custody arrangement. One day before the hearing, on April 17, 2011, in a motion in limine, appellant also challenged the constitutionality of Minn. Stat. § 609.748, subd. 4. That same day, appellant sent notice to the Attorney General, pursuant to Minn. R. Civ. P. 5A, that he was challenging the statute's constitutionality.

After the evidentiary hearing on April 18, 2011, the district court granted a harassment restraining order (HRO) to respondent, effective until April 18, 2012.[1] The grounds for the HRO were that appellant followed, pursued, or stalked respondent at the office of the children's orthodontist and at parenting-time exchanges, that appellant made harassing phone calls to respondent by multiple repeat calls without leaving a message, that appellant frightened respondent with threatening behavior by yelling and using angry expressions during parenting-time exchanges, and that appellant called respondent's family members to accuse her of various matters. On May 12, 2011, the district court issued a separate order denying appellant's constitutional challenge to Minn. Stat. § 609.748. This appeal follows.

D E C I S I O N

This court uses an abuse-of-discretion standard to review a restraining order issued under Minn. Stat. § 609.748. *Witchell v. Witchell*, 606 N.W.2d 730, 731-32 (Minn. App. 2000). We give due regard to the district court's opportunity to judge the credibility of witnesses and will not set aside findings of fact unless clearly erroneous. Minn. R. Civ. P. 52.01; *Davidson v. Webb*, 535 N.W.2d 822, 824 (Minn. App. 1995). However, this court will reverse the issuance of a restraining order if it is not supported by sufficient evidence. *Kush v. Mathison*, 683 N.W.2d 841, 844 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

[1] The judge specifically declined to consider the affidavits of either party, instead relying solely on the testimony presented on April 18, 2011. Therefore, this court will not consider the affidavits as part of the record. *See* Minn. R. Civ. P. 43.05; *Braith v. Fischer*, 632 N.W.2d 716, 722-23 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

The district court may issue an ex parte TRO where the petitioner alleges "an immediate and present danger of harassment," provided that it "finds reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 4(a), (b). The ex parte TRO is effective until a hearing is held on the issuance of a restraining order. *Id.*, subd. 4(c). After a hearing, a court may issue a restraining order effective for no longer than two years if it "finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." *Id.*, subd. 5(3). A person who violates a restraining order is subject to criminal penalties. *Id.*, subd. 6(a)-(d).

I. Temporary Harassment Restraining Order

Appellant first argues that the district court abused its discretion by issuing an ex parte TRO against him because respondent failed to establish an immediate and present danger of harassment. *See Id.*, subd. 4(a) (stating that the court may issue a temporary restraining order in a case alleging harassment under subdivision 1(a)(1), provided the petition "further allege[s] an immediate and present danger of harassment"). He argues that, as a matter of law, there was no immediate and present danger of harassment or substantial adverse effect on respondent's safety, security, or privacy.

Ex parte orders are not final, and thus, are not appealable. *Chapman v. Dorsey*, 230 Minn. 279, 287, 41 N.W.2d 438, 443 (1950). However, the appellate courts may review "any order affecting the order from which the appeal is taken." Minn. R. Civ. App. P. 103.04. The appellate court may also "review any other matter as the interest of justice may require." *Id.* Generally, an appeal of an order is moot if an event occurs that

makes effective relief impossible or a decision on the merits unnecessary. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). We therefore decline to review the February 22 TRO because it was temporary and did not adjudicate all of the claims, rights, and liabilities of the parties and because the order is now moot due to the subsequent evidentiary hearing that took place on April 18, 2011.

II. Harassment Restraining Order

Appellant argues that the district court abused its discretion in issuing the April 19 HRO because the court's findings were insufficient to support the conclusion that harassment had occurred. Harassment 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, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subd. 1(a)(1). Inappropriate or argumentative statements alone are not considered harassment. *Kush*, 683 N.W.2d at 844. A district court may issue an HRO "if the court finds reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 4(a).

"The determination of what constitutes an adequate factual basis for a harassment order is left to the discretion of the district courts." *Kush*, 683 N.W.2d at 846. "The determination of whether certain conduct constitutes harassment may be judged from both an objective standard, when assessing the effect the conduct has on the typical victim, and a subjective standard, to the extent the court may determine the harasser's

intent." *Id.* at 845. Here, the record contains evidence that supports the district court's determination that appellant's conduct objectively constituted harassment.

The record supports the district court's finding that appellant stalked or followed respondent to their daughter's orthodontist appointment. Appellant called one of the children to find out where respondent was, and then went to the orthodontist's office, not to participate in his daughter's appointment, but to confront respondent in the waiting room. The record also supports the district court's finding that appellant made harassing telephone calls to respondent and to her family members. Despite respondent's requests that appellant contact her via e-mail or voicemails, appellant made repeated calls to respondent's cellphone, home phone, and work phone without leaving messages. When he spoke with respondent's mother on the phone, he yelled at her, accused respondent of being an alcoholic, and accused both respondent and her mother of being liars. Moreover, the record reflects that appellant yelled at and frightened respondent during parenting-time exchanges, holding her car door open to prevent her from leaving. The district court did not abuse its discretion in concluding that these repeated incidents were objectively unreasonable and had a substantially adverse effect on respondent's safety, security, or privacy.

Appellant also argues that the district court abused its discretion by "adopting verbatim conclusory findings found on preprinted check-off-the-box forms without making its own particularized findings with specific facts and circumstances warranting immediate danger of harassment pursuant to the definition contained in Minn. Stat. § 609.748." The district court must make specific findings as to allegations of

harassment before it may issue a restraining order. *See Mechtel v. Mechtel*, 528 N.W.2d 916, 920-21 (Minn. App. 1995). Findings are required in order "to permit meaningful review upon appeal and it is therefore necessary that trial courts find facts and state conclusions clearly and specifically." *Crowley Co. v. Metro. Airports Comm'n*, 394 N.W.2d 542, 545 (Minn. App. 1986) (quotation omitted).

The cases cited by appellant in support of his argument that using preprinted forms is an abuse of discretion are distinguishable. *Lundell v. Coop. Power Ass'n* "discourages"—in a footnote—district courts from adopting proposed findings of fact and conclusions of law submitted by a *party* verbatim. 707 N.W.2d 376, 380 n.1 (Minn. 2006). *Dukes v. State* says that it is "preferable for a court to independently develop its own findings" in reference to the submission of proposed findings by a *party*. 621 N.W.2d 246, 258 (Minn. 2001). Neither case absolutely bars the use of preprinted forms. And, in this case, the findings were not submitted by a party, but were contained in a preprinted court form. Moreover, the court's findings went beyond checking off boxes on the form. The court not only checked off boxes, but also wrote in descriptions of specific incidents of conduct that fit each category. Thus, the district court did not abuse its discretion by making its findings on a preprinted form.

Appellant also alleges that the district court committed reversible error in filling out the April 19 HRO because it did not check off the box stating "[t]here are reasonable grounds to believe that Respondent(s) has engaged in harassment of Petitioner(s) . . . by committing the following acts." While it is true that the district court did not check this box, this failure appears to have been a clerical mistake because the court went on to

check boxes delineating the specific acts that constituted harassment. Minn. R. Civ. P. 60.01 and 61 provide that such clerical mistakes are harmless error and are correctable by the court on its own motion or by a motion of the party at any time. Thus, the failure of the court to check the box did not constitute reversible error. *See Vogt v. Vogt*, 455 N.W.2d 471, 474 (Minn. 1990) (stating, in the context of a domestic abuse order for protection, that a district court "implicitly found (by issuance of the protective order) probable cause of physical abuse").

Appellant next alleges that the district court abused its discretion by providing that parenting exchanges be made through third parties. He argues that, in issuing the final harassment/no contact order and preventing appellant from contacting respondent, the district court impermissibly modified the divorce decree and violated his procedural and substantive due-process rights.

However, the district court sent a letter to both parties on June 7, 2011 clarifying the HRO and stating that "'[a]rrangements for' parenting time exchanges will have to be made through third parties." This changed the district court's initial instruction that the exchanges be made through third parties and provided instead that only *arrangements* for exchanges, and not the exchanges themselves, must be made through a third party. Because the order did not establish or terminate a legal relationship between appellant and his children, the district court did not abuse its discretion in providing that arrangements for parenting exchanges be made through a third party. *See Beardsley v. Garcia*, 731 N.W.2d 843, 847 (Minn. App. 2007) (differentiating between a temporary grant of parenting time in conjunction with a domestic-abuse order for protection and a

parenting-time order because the temporary order was not permanent and did not establish or terminate a legal relationship), *aff'd*, 753 N.W.2d 735 (Minn. 2008).

III. Failure to Dismiss Petition for a Harassment Restraining Order

Appellant argues that the district court erred by failing to dismiss respondent's petition for an HRO because appellant claims that, at the time, both parties were subject to an HRO pursuant to their marital dissolution. Minn. Stat. § 518.091 (1)(a) (2010) requires a party seeking a marital dissolution to provide notice to the other party that "[n]either party may harass the other party." "Upon service of the summons, the restraining provisions contained in the notice apply by operation of law upon both parties until modified by further order of the court or dismissal of the proceeding, unless more than one year has passed since the last document was filed with the court." *Id.*, subd. 1(b). Appellant argues that because this HRO was already in effect, there was no need for an additional HRO and the court abused its discretion by conducting another proceeding for respondent to obtain a different HRO.

We initially note that no party to a dissolution proceeding has a right to harass the other party to that proceeding. *See Baker v. Baker*, 494 N.W.2d 282, 287 n.6 (Minn. 1992) (noting, in the context of an order for protection, that a party "has no right to commit acts of domestic abuse, of course"). Therefore, it is questionable whether the "restraining order" precluding the parties to a dissolution proceeding from harassing each other is a restraining order in the same sense as a harassment restraining order or order for protection which, in addition to forbidding harassment or abuse, limits or conditions a party's exercise of actual rights. Moreover, the temporary HRO contained in the

summons expires when the court enters the judgment and divorce decree in the dissolution proceeding. To hold otherwise would lead to the absurd result of temporary, functionally ex parte HROs contained in a dissolution petition remaining in effect against parties indefinitely, until the court issued an order expressly canceling them. In ascertaining legislative intent, courts presume that the legislature does not intend results that are "absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17 (2010). Thus, the temporary HRO contained in the summons expired on June 3, 2010, the day the family court entered the Divorce Judgment and Decree in the marital dissolution proceeding, approximately eight months prior to respondent's request for a new temporary HRO.

IV. Burden of Proof

Appellant argues that the district court erred because it placed the burden of proof on appellant rather than respondent and did not apply the correct burden of proof under Minn. Stat. § 609.748. Appellant argues that respondent bore the burden of proof and, because Minn. Stat. § 609.748 is quasi-criminal in nature, the clear and convincing standard applied.

Identifying the applicable burden and standard of proof presents questions of law, which this court reviews de novo. *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008). The statute governing restraining orders, Minn. Stat. § 609.748, does not specify which party bears the burden of proof. However, "[t]he general rule is that the burden of proof rests on the party seeking to benefit from a statutory provision." *Id.* Here, respondent sought to obtain a restraining order under the statute, so the burden of proof was upon her as the

petitioner. Appellant's contention that the district court improperly placed the burden of proof upon appellant is not supported by the record. During the hearing, the district court explicitly stated the correct burden of proof: "the burden of proof remains on the petitioner to establish the claims." Therefore, appellant has failed to show that the district court erred by improperly placing the burden on appellant.

Appellant next argues that the district court erred by applying the wrong standard of proof. First, there is no evidence in the record to indicate what standard of proof the district court applied. It would appear that the district court applied the standard provided for in the statute. Minn. Stat. § 609.748, subd. 5(a)(3) states that the court may grant a restraining order if "the court finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." Appellant contends that "reasonable grounds" is the wrong standard for courts to apply in harassment/no contact cases and that this standard violates due process. Appellant argues that, because the statute is quasi-criminal, the district court should have applied the clear and convincing standard.

Courts employ three basic standards of proof: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. *Carrillo v. Fabian*, 701 N.W.2d 763, 774 (Minn. 2005). "[C]ivil cases typically use the preponderance of the evidence standard because society has a 'minimal concern' with the outcome of private suits." *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808 (1979)). Criminal cases typically use the beyond a reasonable doubt standard because of the defendant's strong interests and because the likelihood of an erroneous judgment must be minimized.

Id. Finally, the intermediate clear and convincing standard is often used in "[c]ivil cases involving allegations of fraud or other quasi-criminal wrongdoing" because the defendant's interests are more substantial than in a typical civil case. *Id.*

Minn. Stat. § 609.748 has been determined to be quasi-criminal in nature. *Dunham v. Roer*, 708 N.W.2d 552, 567-68 (Minn. App. 2006). While the Supreme Court in *Addington* advised that the clear and convincing standard of proof applies in some cases involving quasi-criminal wrongdoing, the Minnesota Supreme Court has interpreted *Addington* as giving leeway to the individual states. *See State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788, 793 (Minn. 1993) (stating that the language in *Addington* regarding the clear and convincing standard "appears to mean that the standard of proof in a fraud [or other quasi-criminal wrongdoing] case does not need to be higher than preponderance of evidence, although the individual states are free to use a higher standard depending upon the views of their legislatures and common law traditions").

Generally, "the legislature has the power to determine the standard of proof in a statutorily created cause of action." *Id.* at 790. Where the legislature does not provide a standard of proof, this silence reflects a "signal that the legislature intended the preponderance of the evidence standard" to apply. *Id.* The Minnesota legislature has not identified the standard of proof to be used in HRO cases. Therefore, the preponderance-of-the-evidence standard applies.

Setting a higher standard of proof for HROs would be against public policy. The standard of proof serves to allocate the risk of error between the litigants and indicates the relative importance attached to the ultimate decision. *Addington*, 441 U.S. at 423, 99

S. Ct. at 1808. In the case of HROs, the public has a strong interest in protecting harassment victims from further threats and intimidation. Because the evidence in many cases is limited to the testimony of the victim and the alleged harasser, a higher standard of proof would make it more difficult for those already vulnerable to prove their case and obtain the relief they need. There is no evidence in the record that the district court applied the wrong standard of proof, and we reject appellant's argument that the clear and convincing standard applies to HRO cases.

V. Constitutionality of Minn. Stat. § 609.748

Finally, appellant maintains that the district court erred in finding that Minn. Stat. § 609.748 is not unconstitutional. He argues that the statute is unconstitutional because the prohibition of contact (1) violates his due-process rights; (2) violates the warrant clause; (3) violates his Fifth Amendment right against self-incrimination; and (4) contravenes the first amendment.[2]

The constitutional challenge was not raised below until appellant brought a motion in limine the day before the hearing, in violation of Minn. R. Civ. P. 6.04, which requires motions to be "served no later than five days before the time specified for the hearing." Nor was notice provided to the Attorney General until the day before the evidentiary hearing. This notice was insufficient under Minn. R. Civ. P. 5A, which requires notice of a constitutional challenge to be sent in time to "afford the Attorney General an

[2] In her brief, respondent asked that this court exercise its inherent power to impose sanctions on appellant's counsel because appellant's counsel raised constitutional arguments for the first time on appeal. Motions by the parties for attorney fees and sanctions will be addressed by separate order, and we decline to address appellant's request here.

opportunity to intervene." The Attorney General did not in fact respond to appellant's counsel, declining to intervene, until the day after the evidentiary hearing had taken place. At the hearing, the district court specifically stated that it would not address appellant's motion in limine, and the constitutionality issue was not discussed or argued by either side to the district court.

Therefore, the constitutionality issue was not properly raised or litigated in the district court, despite the district court's May 12, 2011 order denying appellant's constitutional challenges to Minn. Stat. § 609.748. *See State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (declining to address the issue "because the question . . . was neither adequately briefed nor litigated"). This court will generally not review constitutional questions for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Accordingly, we decline to review the constitutionality of Minn. Stat. § 609.748 because the issue was not properly before the district court.

Affirmed.