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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1209**

In the Matter of:
Harry Reynolds, Anoka County Adult Protection,
o/b/o Marianne Pavlovski, petitioner,
Respondent,

vs.

Reimund George Pavlov,
Appellant.

**Filed April 2, 2012
Affirmed in part, reversed in part, and remanded
Johnson, Chief Judge**

Anoka County District Court
File No. 02-FA-11-731

Anthony C. Palumbo, Anoka County Attorney, Janice M. Allen, Assistant County Attorney, Anoka, Minnesota (for respondent)

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Considered and decided by Johnson, Chief Judge; Hudson, Judge; and Huspeni,
Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

An Anoka County official petitioned the district court for an order for protection on behalf of an elderly woman, Marianne Pavlovski, to prevent domestic abuse by her adult son, Reimund George Pavlov. The district court granted the petition and issued an order for protection with a duration of ten years. We conclude that the district court did not err by granting the petition and issuing an order but that the district court erred by setting the duration of the order at ten years without considering certain relevant factors. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Pavlovski is an 82-year-old widowed woman. In 2011, she resided at the White Pine assisted-living facility in the city of Blaine. In January 2011, the Adult Protection Division of the Anoka County Community Social Services Department received a report that Pavlov, Pavlovski's 58-year-old son, had mistreated her.

In April 2011, Harry Reynolds, the director of the Adult Protection Division, petitioned the Anoka County District Court, on behalf of Pavlovski, for an order for protection (OFP) against Pavlov. In an affidavit, Reynolds stated that Pavlov subjected Pavlovski to recurring verbal abuse between July 2010 and February 2011 and that Pavlov once engaged in physical abuse by pushing Pavlovski to the floor. Reynolds's affidavit also stated that Pavlov used a power of attorney inappropriately and detrimentally to control Pavlovski's finances, to cancel her personal-care services, and to manage her medications. Reynolds's affidavit further stated that Pavlov had caused

Pavlovski to experience fear and emotional damage and had exacerbated her anxiety and depression.

The district court conducted a court trial in early May 2011. The county called six witnesses. Reynolds testified in his role as director of the Adult Protection Division. Teri Sanford, a house manager at the assisted-living facility, testified that, on several occasions, she witnessed Pavlov scream and swear at Pavlovski, sometimes while waving his fists in her face and demanding that she respond to him with only “yes” or “no” answers. Cortney Marshall, a care coordinator at a medical clinic, testified about an incident she witnessed in which Pavlov treated Pavlovski roughly by shoving her into the passenger seat of his pick-up truck and quickly removing her neck brace by “tearing” it off. Catherine Martin, a certified nurse practitioner, testified that Pavlovski stated to her during a mental-health examination that she fears Pavlov.

Both Pavlov and Pavlovski testified in opposition to the petition. Pavlov admitted that he occasionally used rough language with Pavlovski, but he testified that he never physically harmed her or threatened to physically harm her. He also denied shoving her into his pick-up truck in an inappropriate manner. Pavlovski testified that she does not fear Pavlov and never has feared him and that he never has hit or threatened her. Pavlovski testified that she did not want an OFP to be imposed against Pavlov.

In late May 2011, the district court issued a thorough ten-page order with findings of fact and conclusions of law. The district court found that Pavlov inflicted “repeated and persistent verbal and emotional abuse” on Pavlovski, that Pavlov had gestured angrily at Pavlovski and subjected her to angry, persistent questioning, and that Pavlov

had shoved Pavlovski into a pick-up truck and roughly removed her neck brace. The district court also found that Pavlov had pushed Pavlovski to the floor on one occasion, but the court noted that this act occurred on an unknown date and was of limited significance. The district court further found that Pavlovski fears Pavlov and often is in a general state of anxiety due to Pavlov's behavior. The district court supported this finding by referencing Martin's testimony that Pavlovski wept after Martin inquired whether she feels safe with Pavlov.

The district court explained its rejection of Pavlovski's testimony. The district court noted that Pavlov communicated with Pavlovski during her testimony by "giving her non-verbal cues, by shaking his head up or down, indicating to her how she should answer questions." For this reason, the district court found that Pavlovski's testimony was not as credible as the statements she "made to her health care provider during a medical appointment, in which she indicated she was fearful of" Pavlov. The district court did not make any express findings about Pavlov's credibility, although the district court noted that Pavlov "was unable to control his demeanor and behavior in the Courtroom" and "frequently turned around and stared, for extended periods, at Petitioner's witnesses."

In light of its findings of historical fact, the district court found that Pavlov engaged in acts of domestic abuse against Pavlovski, as defined by Minn. Stat. § 518B.01, subd. 2(a) (2010). The district court granted the county's petition and issued an OFP that forbids Pavlov from having contact with Pavlovski for ten years unless the visit is supervised by someone on the staff of the White Pine assisted-living facility.

In August 2011, the district court issued an amended order, which clarifies that all telephone contact between Pavlov and Pavlovski must be supervised. The amended order also accounts for the fact that Pavlovski had moved, after trial, to an assisted-living facility in the state of Texas. The amended order notes that the White Pine assisted-living facility refused to renew Pavlovski's lease because of Pavlov's behavior toward its staff and because of concerns about its ability to ensure Pavlovski's well-being. The district court therefore ordered that contact between Pavlov and Pavlovski be supervised by a member of the staff of the Texas assisted-living facility. Pavlov appeals.

D E C I S I O N

I. Issuance of OFP

Pavlov first argues that the district court erred by finding that he committed domestic abuse against Pavlovski and by granting the petition and issuing an OFP. In reviewing the issuance of an OFP, we apply a clearly erroneous standard of review to a district court's findings of fact. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). We do not reconcile conflicting evidence or decide issues of witness credibility because those issues "are exclusively the province of the factfinder." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (quotation omitted). If a district court finds that domestic abuse has occurred, the court has discretion to issue an OFP. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Pechovnik*, 765 N.W.2d at 98 (quotation omitted).

To obtain an OFP under chapter 518B of the Minnesota Statutes, a petitioner must allege and prove the existence of domestic abuse. Minn. Stat. § 518B.01, subd. 4(b); *see also Pechovnik*, 765 N.W.2d at 98. The term “domestic abuse” is defined by statute to mean,

if committed against a family or household member by a family or household member:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats . . . ; criminal sexual conduct . . . ; or interference with an emergency call

Minn. Stat. § 518B.01, subd. 2(a). In light of this statutory language, “[a]n overt physical act is not necessary to support the issuance of an OFP.” *Pechovnik*, 765 N.W.2d at 99.

In this case, the district court found that Pavlov engaged in domestic abuse, primarily by inflicting fear of imminent physical harm, bodily injury, or assault. The district court based this finding on the testimony of Martin, Marshall, and Sanford, which is summarized above. The district court’s findings of fact are inconsistent with the testimony of Pavlov and Pavlovski, but the district court implicitly found Pavlov’s testimony to be not credible and discounted Pavlovski’s testimony because it contradicted her earlier statements to medical professionals and because Pavlov attempted to influence her testimony through non-verbal cues. We give great deference to a district court’s determination of witness credibility. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Pechovnik*, 765 N.W.2d at 99; *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009).

Pavlov cites *Kass v. Kass*, 355 N.W.2d 335 (Minn. App. 1984), in support of his argument that the pushing incident does not justify the finding that he intended to cause physical harm. In *Kass*, a woman sought an OFP against her former husband based on a single recent non-physical incident and multiple incidents of physical harm that had occurred four or more years earlier. *Id.* at 336-37. The district court issued an OFP, in part because of the prior episodes of physical abuse. *Id.* at 337. But this court reversed, holding that “‘domestic abuse’ under the Minnesota Domestic Abuse Act requires either a showing of present harm, or an intention on the part of appellant to do present harm.” *Id.* Pavlov compares this case to *Kass* because, in each case, there was a finding of a physical act at an unknown date in the past. But his argument fails for two reasons. First, physical violence is not necessary for a finding of domestic abuse. *Pechovnik*, 765 N.W.2d at 99. Second, the district court did not rely heavily on the incident in which Pavlov pushed Pavlovski to the floor. The district court explained that the pushing incident “is of less concern to this Court than the repeated and persistent verbal and emotional abuse [Pavlov] has inflicted upon Mrs. Pavlovski.”

Pavlov also relies on *Kass* to support his argument that the evidentiary record does not support the finding that he intended to inflict fear on Pavlovski. But an intent to inflict fear may be “inferred from the totality of the circumstances, including a history of past abusive behavior.” *Id.* The testimony of Marshall and Sanford, who witnessed Pavlov’s interactions with Pavlovski, allowed the district court to infer that Pavlov had the requisite intent. This evidence is sufficient to support the district court’s finding of intent to cause fear.

Thus, the district court did not clearly err in its findings of historical fact or its ultimate finding that domestic abuse occurred. In light of the evidentiary record as a whole, the district court did not abuse its discretion by issuing an OFP.

II. Duration of OFP

Pavlov also argues that the district court erred by issuing an OFP of ten years' duration. When reviewing the duration of an OFP, we apply a *de novo* standard of review to issues of law and an abuse-of-discretion standard of review to the district court's assessment of the evidentiary record and its selection of the term of the OFP. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27, 928 (Minn. App. 2006).

The Domestic Abuse Act generally provides that an OFP shall be in effect for no more than two years, subject to an exception: "Any relief granted by the order for protection shall be for a period not to exceed two years, except when the court determines a longer period is appropriate." Minn. Stat. § 518B.01, subd. 6(b). A district court is not required to make specific findings supporting an exception to the statute's presumptive period of time. *Braend*, 721 N.W.2d at 928.¹ In this case, however, the district court identified several reasons for imposing an OFP of ten years' duration. The district court stated that a ten-year duration "is appropriate due to the vulnerability of Mrs. Pavlovski[;] . . . the nature, aggressiveness and frequency of [Pavlov's] verbal attacks upon Mrs. Pavlovski; Mrs. Pavlovski's inability to protect herself from [Pavlov]; and

¹At the time of our opinion in *Braend*, the Domestic Abuse Act prescribed a period of one year. Minn. Stat. § 518B.01, subd. 6(b) (2004). The legislature subsequently amended the statute to prescribe a period of two years. 2008 Minn. Laws ch. 316, § 1, at 1216.

Mrs. Pavlovski's mental health diagnosis, including depression and anxiety, which make her more vulnerable to [Pavlov]." The district court considered appropriate factors, and its reasons for selecting a ten-year term are based on facts borne out by the evidentiary record. But Pavlov's argument also requires us to consider whether a ten-year term is within the outer boundaries of a district court's discretion in light of the legal framework.

Our review of the rather unusual facts and circumstances of this case gives rise to three concerns. Our first concern is that the legislature may not have intended or foreseen a ten-year term in a case in which there is no documented history of domestic abuse. The statute allows an OFP to be extended beyond the initial period if a person previously has violated an OFP or has engaged in stalking. Minn. Stat. § 518B.01, subd. 6a(a). And a new OFP may be set at a duration of as much as 50 years if the person to be restrained previously has violated an OFP two or more times or if the petitioner previously has obtained two or more OFPs against the person. *Id.*, subd. 6a(b). The statute does not provide guidance concerning how a district court should select a term between two and fifty years in duration. But the statutory scheme plainly indicates that repetitious conduct is a significant factor in determining the duration of an OFP.

Consistent with the statutory scheme, the Minnesota appellate courts never have approved an OFP that is longer than the statute's presumed duration upon the first determination that a person engaged in domestic abuse. In every case involving an OFP that is longer than the statute's presumed duration, the restrained person previously had been subjected to an OFP. For example, in *Braend*, a woman sought and obtained an OFP of prolonged duration against her husband. 721 N.W.2d at 926-28. The district

court justified the prolonged duration by noting that the woman had obtained “several previous OFPs” against her husband and that the husband had engaged in “continuing acts of abuse and intimidation.” *Id.* at 928. Similarly, in *Rew ex. rel. T.C.B. v. Bergstrom*, ___ N.W.2d ___, 2011 WL 6757422 (Minn. App. Dec. 27, 2011), *review granted* (Minn. Mar. 20, 2012), this court affirmed a prolonged extension of an OFP against a person who had had three previous OFPs, had been convicted three times of violating an OFP, and had a 13-year history of physically abusing the woman who sought the OFP. *Id.* at *1-2, 12. And today in *Ekman v. Miller*, ___ N.W.2d ___ (Minn. App. Apr. 2, 2012) (No. A11-1169), we are affirming a district court’s prolonged extension of an OFP because a person had repeatedly violated a prior OFP and had engaged in stalking. *Id.* at ___. We are unable to find any opinion of the Minnesota appellate courts, either published or unpublished, in which a person who had not previously been restrained by an OFP was subjected to an OFP for longer than the statute’s presumed period.

Our second concern is that Pavlovski, who now is 82 years old and living in an assisted-living facility, likely will not survive the ten-year OFP.² The OFP will significantly alter the parent-child relationship because it permits Pavlov to have contact with Pavlovski only if he is supervised by a member of the staff of Pavlovski’s assisted-living facility. But there is no indication in the order or in the evidentiary record of the

²Our general sense of this possibility is confirmed by the federal government’s statistics, which indicate that, at the time of trial, a woman such as Pavlovski, who was born in September 1929, would have had, on average, an additional life expectancy of 8.6 years. See U.S. Social Security Administration, *Life Expectancy Calculator*, (Mar. 16, 2012), <http://www.socialsecurity.gov/OACT/population/longevity.html>.

extent of the assisted-living facility's willingness to supervise such contacts. Furthermore, the district court's orders do not contemplate increased contact if and when Pavlovski approaches the end of her life, which naturally is a time of special meaning for families and, one would hope, a time when physical or psychological harm is less likely to occur. At oral argument, counsel for the county suggested that Pavlov could, at such a time, move to modify the OFP to permit a greater degree of contact. *See* Minn. Stat. § 518B.01, subd. 11(b) (2010). But end-of-life situations can arise quickly and end suddenly, which means that even an emergency request could be futile. In these circumstances, a ten-year OFP may effectively terminate the parent-child relationship. The Domestic Abuse Act does not expressly provide for permanent relief. As noted above, it provides for nearly permanent relief only if a person repeatedly has violated an OFP or been subject to an OFP. *See* Minn. Stat. § 518B.01, subd. 6a(b). The OFP in this case may work a result that was not contemplated by the legislature, at least not on these facts.

Moreover, a ten-year OFP may threaten constitutionally protected liberty interests. *Cf. Lehr v. Robertson*, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991 (1983) (reviewing cases holding that “the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection”); *SooHoo v. Johnson*, 731 N.W.2d 815, 819-25 (Minn. 2007) (holding that third-party visitation statute unconstitutionally interfered with custodial parent's right to care, custody, and control of child) (citing *Troxel v. Granville*, 530 U.S. 57, 70, 120 S. Ct. 2054, 2062 (2000)). A district court may alleviate these concerns by allowing a restrained person to show that the original terms of the OFP

no longer are warranted. *See Rew*, 2011 WL 6757422, at *15-16 (reasoning that 50-year OFP did not violate constitutional right to due process in part because restrained person could “eliminate the no-contact provision as to his children and regain his parenting time by completing individual therapy”). The OFP in this case does not include such a provision, nor does it appear that the district court considered but rejected such a provision.

Our third concern is that the district court departed from the statute’s presumed two-year period *sua sponte*. The county’s petition did not request an OFP of more than two years’ duration. At oral argument in this court, the county’s counsel stated that the district court selected a ten-year term on its own initiative. Thus, it appears that, at the time of the evidentiary hearing, Pavlov had not received any specific notice of the possibility that he might be subjected to an OFP of more than two years’ duration, and the district court did not have the benefit of evidence or argument from either party concerning the merits of a ten-year term.

For these reasons, we conclude that, given the unique circumstances of this case, the district court erred in setting the duration of the OFP at ten years, without any qualifications or exceptions. Pavlovski had not previously obtained an OFP against Pavlov. The conduct on which the OFP was based was primarily non-physical. As a practical matter, the OFP likely will prevent Pavlov and Pavlovski from resuming a parent-child relationship during the remainder of their lifetimes. Pavlov has no opportunity to reduce or eliminate the no-contact prohibition during its ten-year term.

And although Pavlov had counsel, he did not have a reason to present evidence or argument to the district court concerning the ten-year duration of the OFP.

In sum, we affirm the issuance of the OFP but reverse with respect to its duration. We remand the case to the district court for further proceedings not inconsistent with this opinion. On remand, the district court should consider (1) whether the term of the OFP should remain at ten years, (2) whether the restrictions of the OFP may be reduced or eliminated if Pavlov were to demonstrate changes in his attitude and behavior, and (3) whether the OFP may allow for increased contact in an end-of-life scenario, which may require an inquiry into the extent to which the Texas assisted-living facility is willing to supervise visits between Pavlov and Pavlovski.

Affirmed in part, reversed in part, and remanded.