

**CERTIFIED FOR PUBLICATION**  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE

RUBALEE BOOKOUT,

Plaintiff and Respondent,

v.

OVE NIELSEN,

Defendant and Appellant.

G037727

(Super. Ct. No. 06FL001052)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas H. Schulte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ove Nielsen, in pro. per.; and Merritt McKeon for Defendant and Appellant.

Law Office of Paul D. Stucki and Paul D. Stucki for Plaintiff and Respondent.

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INTRODUCTION

Ove Nielsen appeals from a protective order issued against him under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Elder Abuse Act). (All further statutory references are to the Welfare and

Institutions Code, unless otherwise noted.) In a case of first impression, we hold: (1) protective orders issued under the Elder Abuse Act are reviewed for abuse of discretion, and the factual findings underpinning such protective orders are reviewed for substantial evidence; (2) protective orders under the Elder Abuse Act require proof by a preponderance of the evidence of a past act or acts of elder abuse; (3) in this case, there was substantial evidence of Nielsen's past acts toward Rubalee Bookout, which constituted abusive, threatening, and harassing behavior resulting in mental suffering; and (4) the trial court did not abuse its discretion in issuing the protective order. Nielsen's argument that Bookout's request for a protective order was an abuse of process was never raised in the trial court, and is not properly before us on appeal. We affirm the protective order.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY

Seventy-eight-year-old Bookout met 70-year-old Nielsen in December 2005. At the time, Nielsen was living on a boat in Dana Point and storing his personal property in someone else's garage. He told Bookout he was looking for a room to rent, and Bookout agreed to rent a room to him in her mobile home in San Juan Capistrano for \$300 a month starting in January 2006. After two months, Bookout stopped charging him rent in exchange for performing work and repairs on the mobile home and surrounding property. In April, Bookout and Nielsen moved into a residence together in Laguna Woods. They took title to the residence in joint tenancy, although Bookout paid the full purchase price of \$155,000. Bookout testified Nielsen's name was listed on the title only because his monthly income was used to meet Laguna Woods's income requirements.

Bookout filed a civil action against Nielsen on July 20, 2006, seeking to quiet title to the Laguna Woods residence and for fraud, financial elder abuse, breach of an oral agreement, declaratory relief, and constructive trust.

On July 26, 2006, Bookout filed a petition for a protective order under section 15657.03 of the Elder Abuse Act, seeking to have Nielsen excluded from the Laguna Woods residence. In the petition, Bookout declared: “The person to be restrained is a cohabitant/acquaintance of [Bookout] who is currently on title to a stock cooperative in Leisure World as a joint tenant, due to his deceit, undue influence and fraud upon [Bookout]. [Nielsen] paid no part of the purchase price and has paid no rent. After learning of his true intentions, [Bookout] has asked him to leave and return title of the co-op to her, but he has and continues to refuse. In addition to the financial abuse in having his name put on title, [Nielsen] continues to provoke, intimidate and cause emotional and mental pain and suffering on [Bookout]. (1) [Nielsen] has and continues to threaten [Bookout] that she should ‘give up’ the fight over the property as she is weak and will suffer a stroke and would die from his provocations; (2) [Nielsen] has also engaged in various and numerous random acts of provocation, including intentionally locking [Bookout] out of her Property; (3) calling the police alleging that [Bookout] threatened him with a barbecue fork; (4) placing large packing boxes in the living quarters for no reason other than to provoke [Bookout]; (5) placing his personal belongings in places reserved by [Bookout] and to [Bookout]’s exclusion; (6) placing light bulbs behind sofa pillows; (7) putting screws into and rigging kitchen cabinets such that a special tool is required to open the cabinets, depriving [Bookout] access; and (8) continually trying to tape record anything said by [Bookout] without her consent or permission. . . . [Nielsen] has focused bright lights on [Bookout]’s bedroom door, and any time she comes out is taking pictures of her. [Nielsen]’s continued [harass]ment, provocation, intimidation and infliction of mental emotional suffering is harmful to [Bookout]’s health and well being and has precluded her from her own residence purchased with her own money.”

A temporary restraining order was granted requiring Nielsen to move out of the Laguna Woods residence and preventing Nielsen from directly or indirectly

contacting Bookout until the hearing on the section 15657.03 protective order. In his response to Bookout's petition, Nielsen argued Bookout had no right to relief under the Elder Abuse Act, and had not met her burden of proof under the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.) (DVPA). In a declaration submitted with his response, Nielsen denied intentionally locking Bookout out of the residence. Nielsen declared, "I have never assaulted or threatened to assault [Bookout], and I have never committed any physical or emotional harm against her." Nielsen's declaration did not refute any of the other allegations in Bookout's petition.

The trial court conducted a hearing at which both parties testified.<sup>1</sup> We summarize their testimony as follows.

Even before Bookout and Nielsen moved to Laguna Woods, there had been problems between them. Bookout testified she asked Nielsen to leave her mobile home after he began "shaking his fists" in her face and telling her to find a new house. She later asked him to move back in.

The problems continued after Bookout and Nielsen moved to Laguna Woods. Nielsen moved Bookout's personal property into a storage facility and demanded \$25,000 to tell her where the storage unit was located. Nielsen admittedly screwed a number of kitchen cabinets closed, although he claimed it was to prevent Bookout from emptying his things out of them. Nielsen also admitted carrying around a tape recorder and trying to record Bookout; she claimed he tried to provoke her into saying something incriminating. Nielsen placed lightbulbs under a cushion on the couch, took Bookout's things out of her room and placed them in the living room, and locked Bookout out of the house when she took her dog for a walk. Bookout testified Nielsen asked her, "why don't you quit? . . . I'm going to provoke you until you die. You're dead." Although Bookout called the police several times saying Nielsen threatened her

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<sup>1</sup> The statute permits the court to issue the protective order based solely on written affidavits. (§ 15657.03, subd. (c).)

or caused her emotional distress or physical harm, Bookout said the police told her they could not assist her because Nielsen was listed as a joint owner of the property.

After Bookout filed the civil action, Nielsen held a bright light in his hand, and took pictures of Bookout as she came out of her bedroom. Nielsen claimed he was taking pictures of the mess Bookout had made of the residence, not of her.

At the conclusion of the hearing, the trial court stated: “If I don’t have an elder abuse case, I’m going to have one within a month. They are going to be in and are going to get in a physical fight. They hate one another. They can’t stand one another’s guts anymore. [¶] If we have them living in the same house, locking up cabinets, keeping things from one another. Locking one another out of the unit when the one’s out taking the dog for a walk. That kind of thing. We can’t have elderly people going through that kind of stress in their lives. . . . [¶] So certainly I have two elderly people, both of them at risk living in this environment. This is a bloody war. How would you like to be 80 years old living like that? [¶] . . . [¶] . . . That is elder abuse.”

The trial court issued a protective order on August 18, 2006, prohibiting Nielsen from: (1) residing in or returning to the Laguna Woods residence; (2) coming within 100 yards of Bookout or the Laguna Woods residence; (3) abusing, intimidating, molesting, attacking, striking, stalking, sexually assaulting, battering, harassing, destroying the personal property of, or disturbing the peace of Bookout; and (4) telephoning or directly or indirectly contacting Bookout. In its minute order, the court found, “acts of elder abuse have occurred between the parties and that [Nielsen] is the perpetrator, [Bookout] is the victim and that the violence did not occur in self-defense.” Nielsen timely appealed from the protective order.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PROTECTIVE ORDER.

I.

*STANDARD OF REVIEW*

The Elder Abuse Act does not specify the standard of review to apply when reviewing protective orders granted under section 15657.03. That statute includes the following language: “An order may be issued under this section, with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if an affidavit shows, *to the satisfaction of the court*, reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult.” (§ 15657.03, subd. (c), italics added.) The “to the satisfaction of the court” language is identical to language in the DVPA.<sup>2</sup> In *Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077, 1079, the appellate court concluded issuance or failure to issue a protective order under the DVPA is reviewed for abuse of discretion. A protective order under the DVPA is also reviewed to determine whether the trial court’s findings are supported by substantial evidence. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823.) Similarly, injunctions issued under Code of Civil Procedure sections 527.6 and 527.8, which prohibit civil harassment, are reviewed to determine whether the necessary factual findings are supported by substantial evidence. (*USS-Posco Industries v. Edwards* (2003) 111 Cal.App.4th 436, 444; *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

In our interpretation of the Elder Abuse Act, and in consideration of analogous statutory language and cases interpreting that language, we hold the issuance of a protective order under the Elder Abuse Act is reviewed for abuse of direction, and

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<sup>2</sup> “An order may be issued under this part, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit or, if necessary, an affidavit and any additional information provided to the court pursuant to [Family Code] Section 6306, shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.” (Fam. Code, § 6300.)

the factual findings necessary to support such a protective order are reviewed under the substantial evidence test.

We resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31.) Declarations favoring the prevailing party's contentions are deemed to establish the facts stated in the declarations, as well as all facts which may reasonably be inferred from the declarations; if there is a substantial conflict in the facts included in the competing declarations, the trial court's determination of the controverted facts will not be disturbed on appeal. (*Bolkiah v. Superior Court* (1999) 74 Cal.App.4th 984, 1000.)

In this case, the trial court stated on the record that it was making its findings by clear and convincing evidence. Section 15657.03 does not require findings to be made by clear and convincing evidence; therefore, a preponderance of the evidence is sufficient. (Evid. Code, § 115.)<sup>3</sup> In considering whether the trial court's findings are supported by substantial evidence, we review the record as if the court had made its findings based on a preponderance of the evidence standard.

In reviewing the issuance of a restraining order, we will only find an abuse of discretion when the trial court exceeds the bounds of reason or disregards the uncontradicted evidence. The party challenging the issuance of the order bears the burden of showing of an abuse of discretion by the trial court. (*Biosense Webster, Inc. v.*

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<sup>3</sup> Section 15657 permits the recovery of attorney fees and costs and eliminates the limitations on damages imposed by Code of Civil Procedure section 377.34 if physical abuse or neglect of an elder is "proven by clear and convincing evidence." Our conclusion that the correct standard of proof under section 15657.03, subdivision (c) is by a preponderance of the evidence is reinforced by comparing the language of section 15657 and 15657.03, subdivision (c). When the Legislature specifies the clear and convincing evidence standard of proof applies in one statute, and omits such a standard from another statute in the same chapter and article, we presume the Legislature did not intend the clear and convincing evidence standard to apply in the latter statute. (*In re Manolito L.* (2001) 90 Cal.App.4th 753, 761-762.)

*Superior Court* (2006) 135 Cal.App.4th 827, 834; see *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

## II.

### *SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FACTUAL FINDINGS.*

Subdivision (c) of section 15657.03 permits a trial court to issue a protective order “for the purpose of preventing a recurrence of abuse, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder.”

An “elder” is defined as a California resident, age 65 years or older. (§ 15610.27.) “Abuse of an elder” is defined as “[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.” (§ 15610.07, subd. (a).) “Financial abuse” occurs when someone “[t]akes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.” (§ 15610.30, subd. (a)(1).) “Mental suffering” is defined as “fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, [or] harassment . . . .” (§ 15610.53.)

At the time these incidents occurred, Bookout was a 78-year-old California resident, and therefore qualifies for protection as an elder under the Elder Abuse Act. (§ 15610.27.) Bookout’s verified petition and her testimony at the hearing contain substantial evidence of Nielsen’s past acts toward her, which can fairly be characterized as abusive, threatening and harassing behavior resulting in mental suffering and emotional harm. (§ 15610.07, subd. (a).) Evidence showed those acts included Nielsen shaking his fists at Bookout; threatening to provoke her until she suffered a stroke and died; attempting to tape-record anything she said without her consent; locking her out of the residence; interfering with her access to her personal property, whether by secreting it



in a locked storage facility, screwing cabinets closed, or removing her property; and forcing her to remain in her bedroom with the use of bright lights and cameras.

Nielsen's sworn written statement and testimony at the hearing contradicted some of Bookout's testimony, blamed her for the problems they faced, or provided innocent explanations for his actions. It was for the trial court to weigh the evidence and consider the demeanor and credibility of the witnesses. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 182.)

### III.

#### *NIELSEN'S CLAIM FOR ABUSE OF PROCESS IS NOT BEFORE US ON APPEAL.*

Nielsen argues the restraining order is frivolous given that he and Bookout are engaged in a legal battle to determine their respective rights to the property and that Bookout just wanted him out of the house. It is not necessary to address the merits of this argument because Nielsen did not raise his abuse of process claim before the trial court; he therefore waived his right to raise it on appeal. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117; *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *Steele v. Totah* (1986) 180 Cal.App.3d 545, 551-553.)

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.