IN THE COURT OF APPEALS OF IOWA

No. 0-585 / 10-0237
Filed September 9, 2010

SHAUNA SIMS,
Plaintiff-Appellee,

vs.

CARLOS RUSH,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Carlos Rush appeals from a district court ruling extending a protection order pursuant to Iowa Code section 236.5(2) (2009). **AFFIRMED.**

Jennie L. Clausen of H.J. Dane Law Office, Davenport, for appellant.

Maria K. Pauly, Davenport, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

DOYLE, J.

Carlos Rush appeals from a district court ruling extending a protection order pursuant to Iowa Code section 236.5(2) (2009). He contends the district court erred in extending the order when it made no finding that he continued to pose a threat to the safety of the victim and there was no evidence to support such a finding. We affirm.

***I. Background Facts and Proceedings*.**

Carlos Rush and Shauna Sims (formerly Shauna Rush) are the parents of M.R., born in December 2001. On January 28, 2009, an Iowa Code chapter 236 protection order was entered against Rush in favor of Sims by virtue of a consent agreement. It prohibited Rush from, among other things, threatening or harassing Sims. It did allow the parties to have contact to discuss and prepare for legal proceedings that were then pending. The consent agreement also allowed Rush to visit M.R. at school for school functions if Sims was not present.

It appears from the record that the order was the source of much dispute and conflict between the parties over the next ten months. In June, the parties agreed to modify the order to specify communications between the parties and their minor child. They also agreed that in the absence of further incidents the pending show cause proceedings would be withdrawn. The parties continued to experience ongoing controversies. Based upon allegations of multiple violations of the order, an application to show cause was filed on behalf of Sims in August. In September, an application to interpret the protective order was filed requesting a clear interpretation of the terms of the order pertaining to the nature of contact by Rush with M.R. at "school functions." The court modified the order to clarify

the disputed provisions. All pending contempt actions were then dismissed. The marriage of the parties was dissolved, but the issues covered in the protective order were not incorporated into the decree.

In November, Sims went to the county attorney's office and made a criminal complaint against Rush and his girlfriend for their alleged repeated harassment and threats. The county attorney sent a letter to Rush and his girlfriend informing them that if the conduct continued he would file criminal charges against them. Sims testified there were then no more altercations.

On January 27, 2010, Sims filed a motion to extend the protective order. A hearing was held on February 3, 2010. Sims testified she sought extension of the order because she was afraid Rush would physically harm her or verbally threaten her. She testified that Rush had abused her in the past, including holding a gun to her head six to eight months before the parties separated. She testified that Rush had called her repeatedly and, just prior to the hearing, had driven past her twice and made gestures at her when she was sitting in her car outside her attorney's office. She admitted Rush had not done anything in the last year to threaten her physical safety, but felt that without the protective order he would have "definitely" physically harmed her.

Rush testified and vehemently denied abusing and harassing Sims, and denied holding a gun to her head. He testified his phone had randomly dialed Sims. He testified he was opposed to the extension of the protective order because he asserted Sims was using the courts as a weapon to punish him and keep M.R. from him.

At the close of the hearing, the district court ruled from the bench, stating: "I do find that Mr. Rush tends to want to assert his rights throughout the order, and I'm going to extend it for another year pursuant to the provisions that are here . . . ." The court then entered an order extending the protective order for an additional year.

Rush now appeals.

II. Scope and Standards of Review.

Civil domestic abuse cases are heard in equity and therefore warrant our de novo review. Iowa. R. App. P. 6.907 (2010); *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(*g*); *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000).

III. Discussion.

Rush contends the district court erred in extending the no-contact order for an additional year pursuant to Iowa Code section 236.5(2). He argues the trial court made no finding that he continued to pose a threat to the safety of Sims and there was no evidence to support such a finding. He maintains the court based its decision solely on Sims's statements of fear at the hearing on the extension.

Section 236.5(2) provides, in relevant part:

> The court may amend or extend its order or a consent agreement at any time upon a petition filed by either party and after notice and hearing. The court may extend the order if the court, after hearing at which the defendant has the opportunity to be heard, *finds* that the defendant *continues to pose a threat to the safety of the*

> *victim* . . . . The number of extensions that can be granted by the court is not limited.

Iowa Code § 236.5(2) (emphasis added). Sims had the burden to prove by a preponderance of the evidence that Rush continued to pose a threat to her safety. *See id*. § 236.4(1); *see also* Iowa R. App. P. 6.904(3)(*f*); *Wilker*, 630 N.W.2d at 596. A preponderance of evidence supports a finding when such evidence is greater "in weight, influence, or force" than the evidence supporting a different conclusion. *Walthart v. Bd. of Dirs. of Edgewood-Colesburg Cmty. Sch. Dist.*, 694 N.W.2d 740, 744 (Iowa 2005).

A. Absence of Finding of Fact.

Rush correctly points out that the district court made no finding of fact, in either its oral ruling at the conclusion of the hearing or in its written order[1] entered the same day, that Rush continued to pose a threat to Sims, as required by section 236.5(2) for an extension of the protection order. Also, Iowa Rule of Civil Procedure 1.904(1) requires a court trying an issue of fact without a jury to find the facts in writing. Since there was no finding that Rush was a continued

[1] The court utilized Iowa Court Rule Form 4.4 (2010) ("Cancellation, Modification or Extension of Chapter 236 Order") for its order. The form states: "**THE COURT HEREBY FINDS:** It has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard. **Additional findings are set forth below.**" (Emphasis in original.) The court's form order is devoid of any additional findings.

The form further provides:

The court finds (if checked) that

[ ] Protected party requests order be dismissed
[ ] Protected party failed to appear for hearing
[ ] There is insufficient evidence
[ ] _____

The fourth line of this section of the form, where one would expect to find a court's findings that a respondent continued to pose a threat to the safety of the protected party, was left unchecked and blank by the court.

threat to Sims's safety, Rush argues the court erred in extending the protective order. We need not consider this complaint.

Rush would have been in a stronger position had he filed a motion to enlarge or amend the court's findings, pursuant to Iowa Rule of Civil Procedure 1.904(2), to draw the court's attention to the absence of findings. Because he failed to do so, we hold that he has waived the point for purposes of appeal. *See Michael v. Merchs. Mut. Bonding Co.*, 251 N.W.2d 531, 533 (Iowa 1977) (concluding a party aggrieved by the trial court's failure to make findings of fact waived error by not filing a motion enlarge the court's findings and conclusions pursuant to what is now rule 1.904(2)). We note that this is not a case like *Conklin v. Conklin*, 586 N.W.2d 703, 706-07 (Iowa 1998), where our supreme court remanded for findings after it determined the trial court failed to make the findings of fact and conclusions of law required by rule 179(b) (now rule 1.904(2)), after the appellant's motion to enlarge the trial court's findings and conclusions was denied by the trial court.

Protective orders are reviewed de novo. *Wilker*, 630 N.W.2d at 594. Under a de novo review we examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's finding of fact, but make such findings from our de novo review as we deem appropriate. *See Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968) (stating an equity case is not reversed based "upon such complaints as these" because we "draw such conclusions from our review as we deem proper"); *In re Voeltz*, 271 N.W.2d 719,

722 (Iowa 1978) (no reversal for inadequate findings). Additionally, "[w]hen a motion to enlarge or amend is not made, the appellate court 'assume[s] as fact an unstated finding that is necessary to support the judgment.'" *U.S. Cellular Corp. v. Bd. of Adjustment*, 589 N.W.2d 712, 720 (Iowa 1999) (quoting *Brichacek v. Hiskey*, 401 N.W.2d 44, 46 (Iowa 1987)). Finally, although the trial court made no specific credibility findings regarding Rush and Sims, these findings are inherent in the decision made. *See Second Injury Fund v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990) (finding credibility determination to inhere in district court ruling when order contained no specific discussion of credibility). We reject Rush's claim that the absence of a specific finding he continued to pose a threat to Sims constitutes reversible error.

***B. Evidence of Continued Threat*.**

Sims testified she continued to be afraid of Rush. She testified to an incident before the parties separated, asserting that Rush had put a gun to her head. Although she testified that Rush had not done anything in last year to threaten her physical safety, she testified he still called her and had driven past her making gestures. Rush vigorously denied the gun and driving past her incidents, but he did admit his phone had "randomly" called her.

Based upon Sims's existing fear and Rush's behaviors while the protective order was in existence, we conclude, after reviewing the entire record, Sims proved by a preponderance of the evidence, albeit minimally, that Rush continued to pose a threat to her safety. We therefore affirm the district court's extension of the protective order.

***IV. Appellate Attorney Fees and Costs*.**

Sims requests an award of appellate attorney fees. Pursuant to Iowa Code section 236.5(4), this court has the authority to award attorney fees. An award of attorney fees is not a matter of right, but is within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We decline to award attorney fees to Sims.

AFFIRMED.

Mansfield, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent. While I agree there is sufficient evidence in the record to find that Rush "continues to pose a threat to the safety" of Sims, I do not believe that it is our place, even on de novo review, to make the initial finding. *See Conklin*, 586 N.W.2d at 706-07.

Prior to extending a protective order, the statute clearly requires a finding that "the defendant continues to pose a threat to the safety of the victim." Iowa Code § 236.5(2); *see also* Iowa R. Civ. P. 1.904(1) ("The court trying an issue of fact without a jury . . . shall find the facts in writing."). The district court is aided in its busy docket with the use of many forms, including Iowa Court Rule Form 4.4 ("Cancellation, Modification or Extension of Chapter 236 Order"). However, that form fails to contain a pro forma statement that conforms to the legislature's requirement under Iowa Code section 236.5(2). Where a space appears allowing the district court to provide its own findings, the line was left blank.

The majority asserts it is the defendant's obligation to seek additional findings under Iowa Rule of Civil Procedure 1.904(2) and cites to *Conklin*, 586 N.W.2d at 706-07. However, *Conklin* involved a plaintiff being denied a protective order, and thereafter she requested additional findings, which the district court declined to do. Under Iowa Code section 236.4, it is the plaintiff's burden to prove "the allegations of domestic abuse by a preponderance of the evidence." If the evidence is insufficient or the findings are lacking, it is not the defendant's burden to seek additional findings to support the protective order.

Because no finding appears in the order or in the record, I would remand to the district court to make the necessary finding prior to our appellate review.