IN THE COURT OF APPEALS OF IOWA

No. 0-988 / 10-1174
Filed April 27, 2011

GLENDA R. LOVRIEN,
Petitioner-Appellant,

vs.

DISTRICT COURT FOR BUTLER COUNTY,
Respondent-Appellee.

Certiorari from the Iowa District Court for Butler County, Christopher C. Foy, Judge.

Glenda Lovrien asserts the district court did not properly apply the law in its denial of her application for waiver of conciliation counseling, and therefore the ruling should be reversed. **WRIT SUSTAINED.**

Amber L. Markham of Iowa Coalition Against Domestic Violence, Des Moines, and Karen Thalacker of Gallagher, Langlas, & Gallagher, P.C., Waverly, for appellant.

John J. Hines of Dutton, Braun, Staack, Hellman, P.L.C., Waterloo, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

In this case, we are called to determine if conciliation services in a dissolution action are mandated, or whether a waiver should have been granted. Glenda Lovrien was granted certiorari review from a district court ruling denying her application for waiver of conciliation counseling. She asserts the district court erred in finding that a single incident of domestic abuse did not constitute a "history of domestic abuse" for purposes of waiving conciliation counseling pursuant to Iowa Code section 598.16(7) (2009). We sustain the writ.

I. Background Facts and Proceedings

A petition for dissolution of marriage was filed by Glenda on February 5, 2010, stating "that counseling would not help preserve the marriage." In Keith Lovrien's answer he requested "marital counseling be ordered by the court." On June 3, Glenda filed an application for waiver of counseling pursuant to Iowa Code section 598.16(7), citing "a history of domestic abuse," which included the issuance of a protective order and Keith's criminal conviction for simple assault, both stemming from the same March 25, 2009 incident. On June 9, Keith filed a resistance to Glenda's request for waiver. On June 15, the district court denied Glenda's request for waiver and entered an order appointing a conciliator. Glenda filed an application for reconsideration on June 17, which Keith resisted. On June 28, the district court denied Glenda's application for reconsideration. Glenda filed a petition for a writ of certiorari on July 15 with the supreme court, which was granted on August 5.

II. Standard of Review

"Certiorari is an action at law to test the legality of an action taken by a court or tribunal acting in a judicial or quasi-judicial capacity." *Petersen v. Harrison Cnty. Bd. of Supervisors*, 580 N.W.2d 790, 793 (Iowa 1998). "A writ of certiorari shall only be granted . . . where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401. In an original certiorari proceeding, our review is for errors at law. *State Pub. Defender v. Iowa Dist. Ct. for Black Hawk Cnty.*, 633 N.W.2d 280, 281–82 (Iowa 2001). "Illegality exists when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law." *State Pub. Defender v. Iowa Dist. Ct. for Polk Cnty.*, 721 N.W.2d 570, 572 (Iowa 2006).

III. Conciliation Counseling

Glenda asserts the district court erred in finding that a single incident of domestic abuse did not constitute a "history of domestic abuse" for purposes of seeking a waiver of conciliation counseling pursuant to Iowa Code section 598.16(7). Keith claims that "a history of domestic abuse" cannot be established by one single incident, and the order appointing a conciliator was proper.

The district court's order appointing a conciliator found,

> The only incident of domestic abuse between the parties of which the Court is aware took place back in March 2009. Following this incident, a protective order under Iowa Code chapter 236 was issued in favor of Petitioner and Respondent pled guilty to and was sentenced for simple assault. Petitioner has not alleged that Respondent violated this protective order in any way. It is the opinion of the Court that a single altercation does not constitute a history of domestic abuse under Iowa Code section 598.16(7). The request of Petitioner to waive conciliation will be denied.

Iowa Code section 598.16(7) states:

> Upon application, the court shall grant a waiver from the requirements of [conciliation efforts] if a party demonstrates that a history of domestic abuse, as defined in section 236.2, exists.[1] In determining whether a history of domestic abuse exists, the court's consideration shall include, but is not limited to, commencement of an action pursuant to section 236.3, the issuance of a protective order against a party or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of a party in contempt pursuant to section 664A.7, the response of a peace officer to the scene of alleged domestic abuse or the arrest of a party following response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.

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[1] Iowa Code section 236.2(2) defines domestic abuse as:

> [C]ommitting assault as defined in section 708.1 under any of the following circumstances:
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> a. The assault is between family or household members who resided together at the time of the assault.
>
> b. The assault is between separated spouses or persons divorced from each other and not residing together at the time of the assault.
>
> c. The assault is between persons who are parents of the same minor child, regardless of whether they have been married or have lived together at any time.
>
> d. The assault is between persons who have been family or household members residing together within the past year and are not residing together at the time of the assault.
>
> e. (1) The assault is between persons who are in an intimate relationship or have been in an intimate relationship and have had contact within the past year of the assault. In determining whether persons are or have been in an intimate relationship, the court may consider the following nonexclusive list of factors:
>
> (a) The duration of the relationship.
>
> (b) The frequency of interaction.
>
> (c) Whether the relationship has been terminated.
>
> (d) The nature of the relationship, characterized by either party's expectation of sexual or romantic involvement.
>
> (2) A person may be involved in an intimate relationship with more than one person at a time.

Glenda argues that a "history" can be construed as a single incident.[2] In *In re Marriage of Ford*, 563 N.W.2d 629, our supreme court discussed the effect of a history of domestic abuse under Iowa Code section 598.41. It explained there was "evidence of domestic abuse as contemplated in section 598.41" and "[e]ach of those incidents is evidence of domestic abuse and established a rebuttable presumption against the awarding of joint custody." *Ford*, 563 N.W.2d at 632. A history of domestic abuse creates a rebuttable presumption, with the next consideration being "whether the presumption is sufficient to preclude the awarding of joint custody." *Id.*

Our supreme court also examined a case where a mother asserted one incident of domestic abuse established a history of domestic abuse under section 598.41. *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). It found that a "history of domestic abuse" is not necessarily established by a single documented incident, nor does more than one minor incident automatically establish a history of domestic abuse. *Id.* Ultimately, the court determined the

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[2] Glenda filed an application to reconsider the order appointing a conciliator, in which she requested the district court reconsider its finding that one instance of abuse is not a history. She further argued that there had been multiple instances of domestic abuse and in support, attached her application for the protective order, which listed other instances of domestic abuse perpetrated by Keith, including incidents of abuse involving her children. She requested the application be set for a hearing. The district court denied her application without a hearing.

On appeal, Glenda alternatively argues that if more than one instance of abuse is required to establish a "history," the district court erred in finding there was only one instance of abuse and refers to her application to reconsider. We note that while the instances of domestic abuse were not adjudicated, they may be indicative of past conduct. *See In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997) (listing examples of domestic abuse that were not adjudicated, but came in through testimony and were reflected in the record). Keith offered no credible evidence that the incidents of abuse alleged by Glenda did not occur, and on appeal did not respond to this argument. Nevertheless, because we find Glenda prevails on her primary argument, we do not need to address the motion to reconsider.

proper procedure was "to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers." *Id.* However, in that case even if a history of domestic abuse existed, the presumption created by section 598.41 against awarding joint legal custody had been rebutted.

We glean no requirement that multiple incidences of domestic abuse must be demonstrated to satisfy the statutory language of a "history" of domestic abuse set forth in Iowa Code section 598.16(7). *See* Iowa Code § 598.16(7) (giving guidance to the court that a history of domestic abuse can be found in a variety of scenarios); *see also In re Marriage of Stein*, 153 S.W.3d 485, 489 (Tex. App. 2004) ("[A]lthough a single act of violence or abuse may not constitute a pattern, it can amount to a history of physical abuse."). Rather, the language of the statute sets forth several alternative ways in which a "history" of domestic abuse can be demonstrated. Iowa Code § 598.16(7). Each is listed in the disjunctive, with no indication that more than one demonstration of abuse is necessary to prove a "history" of domestic abuse. *Id.* In the above discussed cases, the supreme court did not find one incident of domestic abuse can never establish a history of domestic abuse. Rather, the court indicated that one incident may be a history, but that the circumstances of the incident must be weighed in determining so.[3] We hold that as used in Iowa Code section 598.16(7), a "history" of domestic abuse may be proven by a single incident, such that the court shall grant a waiver from the requirements of conciliation.

[3] History is defined as "an established record." Merriam-Webster's Collegiate Dictionary 590 (11th ed. 2008).

Under the circumstances presented in this case, we find the single incident of domestic abuse committed by Keith upon Glenda, which led to a protective order and criminal conviction, was sufficient evidence to find a "history of domestic abuse" under Iowa Code section 598.16(7). Consequently, the district court did not properly apply the law, and should have waived otherwise mandated conciliation services. *See* Iowa Code § 598.16(7). We sustain the writ.

WRIT SUSTAINED.