

**IN THE COURT OF APPEALS OF IOWA**

No. 2-778 / 12-0289  
Filed September 19, 2012

**REBECCA JANE KIERSCH,**  
Plaintiff-Appellee,

**vs.**

**SCOTT HUNTER KIERSCH,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Nancy A. Baumgartner, Judge.

Scott Hunter Kiersch appeals a civil domestic abuse protective order issued in favor of his spouse, Rebecca Jane Kiersch. **REVERSED AND REMANDED.**

Natalie H. Cronk of Law Offices of Natalie H. Cronk, Iowa City, for appellant.

Rebecca Kiersch, Iowa City, pro se.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

**EISENHAUER, C.J.**

Scott Hunter Kiersch appeals a civil domestic abuse protective order issued in favor of his wife, Rebecca Jane Kiersch. He contends the district court's finding he committed domestic abuse assault is unsupported by a preponderance of the evidence. Scott argues there was insufficient evidence he performed an act "intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." See Iowa Code §§ 236.2(2), 708.1(2) (2011). On our de novo review of the record, we agree.

Rebecca's petition for relief from domestic abuse alleged Scott sent the following messages to her:

1. "Text saying guess what's going to happen next."
2. "Text saying to tell my recently deceased father Happy New Year. Concerned me that he was going to make it where I would be able to see my dad in heaven."

At a hearing on the petition, Rebecca testified she received the two text messages from Scott and did not feel immediately threatened. She testified Scott had never touched her or threatened to assault her, other than these text messages. Rebecca stated she only felt threatened when people influenced her after she told them about the text messages. The parties are in the middle of an acrimonious dissolution of marriage proceeding.

The court entered a protective order, finding: "[T]hose two texts . . . in the context of what's going on between the two of you do constitute a threat with the apparent ability to carry out the act."

Assuming the text messages are viewed as threatening, we conclude there is insufficient evidence of assault because Rebecca did not establish an “act which is intended to place another fear of immediate physical contact” coupled with Scott’s “apparent ability to execute the act.” *Id.* § 708.1(2). For this reason, we find insufficient evidence to support the assault element of domestic abuse assault. We reverse and remand for dismissal of the protective order.

**REVERSED AND REMANDED.**