STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0117

In re the Matter of:
Tamara Lynn Kriesel, petitioner,
Respondent,

vs.

Michael James Rossman,
Appellant.

Filed September 25, 2017
Reversed and remanded
Ross, Judge
Concurring specially, Connolly, Judge

Isanti County District Court
File No. 30-FA-16-274

Jennifer M. Nixon, Law Office of Jennifer Nixon, PLLC, Maple Grove, Minnesota (for respondent)

Peggy L. Stevens, Peggy L. Stevens Law Office, North St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Toussaint, Judge.*

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

U N P U B L I S H E D O P I N I O N

ROSS, Judge

The district court issued an order for protection prohibiting Michael Rossman from contacting Tamara Kriesel for two years based on Kriesel's ex parte affidavit alleging that Rossman abused her. The order informed Rossman that the district court scheduled a hearing, required Rossman to "appear personally and respond to the petition," and promised Rossman that the court "will decide at that time whether to grant the relief requested in the Petition for an Order for Protection." But during the hearing, the district court did not offer Rossman an opportunity to respond to the petition generally, leading the parties to answer particulars about only some of the relief that Kriesel's petition requested. The district court issued a new order for protection without addressing whether Rossman engaged in any alleged abuse or whether his conduct justified an order for protection. On appeal, Rossman argues that the district court violated his due process right to a meaningful hearing and that it granted the order without sufficient evidence. Because the district court denied Rossman the opportunity to respond to the allegations, we reverse and remand for the district court to conduct a hearing at which Rossman may challenge the basis for Kriesel's petition and any aspects of the relief sought.

FACTS

In September 2016, Tamara Kriesel petitioned the district court for an order for protection against Michael Rossman on behalf of herself, her daughters, and the son she shares with Rossman. Kriesel included an affidavit alleging that Rossman had yelled at her, clutched her nose between his knuckles and pulled her, and threw her phone aside after

she threatened to call the police. She said that this conduct was recurring since December 2015, that "minor physical" abuse occurred weekly and escalated over time, that her daughters witnessed many of the incidents, and that Rossman's behavior worsened when he drank.

Kriesel requested the following relief that her petition indicated "does not require a hearing":

- Issue an ex parte order for protection;
- Restrain Rossman from causing harm or fear of immediate physical harm;
- Order Rossman to have no contact with her, her daughters, or their son;
- Exclude Rossman from her address;
- Order Rossman to continue insurance coverage.

She also requested the following relief "that requires a hearing":

- Grant her temporary custody of the children;
- Order financial support;
- Order Rossman to attend counseling, treatment, or other social services;
- Provide supervised parenting time for Rossman.

The district court granted the ex parte order for protection effective for two years. The order was comprised of a form with some boxes checked and some unchecked. Among others, the boxes with the following text were checked:

> [T]he Court FINDS:
> 1. The petition alleges an immediate danger of domestic abuse.
> . . . .
> 6. A hearing is required to address the relief requested in the petition.
> . . . .
> Based upon these findings, IT IS ORDERED:
> 1.A. A hearing will be held . . . on 10/3/16 at 1:30 p.m. The Court will decide at that time whether to grant the relief requested in the Petition for an Order for Protection.
> . . . .

2. Respondent shall appear personally and respond to the petition.

Immediately between boxes 1A and 2 was box 1B, which the district court did *not* check. That unchecked box states, "A hearing will not be held unless requested by Respondent." The order goes on with its "Notice to Respondent" in bold type, declaring, "You have a right to a hearing. You must request it by completing and returning the attached [request form]." And the order concludes with the following "Notice to Both Parties":

> If a hearing is scheduled, be prepared on the scheduled date. You may be asked to testify at that time . . . . You should bring any available documentation, such as police reports (certified copies), hospital and doctor reports, pictures, witnesses, or other items. You may not be able to use written reports, affidavits, or statements from persons who are not at the hearing as witnesses.

The parties appeared without legal counsel for the ordered hearing. The judge who presided over the hearing was not the same judge who considered the ex parte petition and issued the consequent order. The district court began the hearing by stating, "[W]e are here because Judge Brosnahan had reserved certain items for the Court to resolve." Kriesel indicated that she was confused and asked to introduce evidence supporting her allegations of abuse. The district court answered, "You probably can but I want to go over the items that you're asking for."

The judge began asking Kriesel questions focused on those aspects of her relief request which, according to the previous order (and the controlling statute), "require[] a hearing." Kriesel indicated that she wanted Rossman to undergo a mental-health evaluation because she believed he had been unfaithful to her. The district court then asked Rossman,

"[I]s there anything you would like to say?" Rossman began to deny Kriesel's allegations of infidelity. But the district court stopped him, apparently addressing both parties, saying,

> Actually, sir, for what the Court has to be involved in here that, other than the fact that you have indicated, ma'am, that you believe he should have some . . . evaluation, I'm not sure it's relevant as it relates to the parenting time of your sole child together, so I don't think that's something we're going to go into.

The district court resumed its discussion about the ancillary relief, then it clarified some of the relief granted in the ex parte order. The discussion included the following exchange between the district court and Rossman:

> The Court: You have a question, sir?
> Rossman: I do. In this Order of Protection whatever Tammi has stated in here it's okay for me to come to the house to gather belongings and stuff as long as I bring somebody with?
> . . . .
> The Court: Well, I'm not sure because I haven't had a chance to look at Judge Brosnahan's order but what did it spell out for him taking his items out?
> Rossman: I have it right here. It says email's okay for contact, it says --
> The Court: We're expanding that, now you can call.
> Rossman: Yup, I'm just reading what she wrote in here if you don't mind.
> The Court: Yeah.
> Rossman: He can see his son or gather belongings if I bring someone else with me.
> The Court: Okay.
> . . . .
> Rossman: So is this stating that I can -- I basically can't stay at my house and that I have to come to --
> The Court: That's correct, sir.
> Rossman: -- and I have to come to collect things with somebody else?
> The Court: That is correct.

Kriesel reminded the district court that she had evidence she wanted to submit to support her abuse allegations, but the district court did not receive the evidence. Nor did it invite Rossman to respond to the abuse allegations or to otherwise address the alleged need for an order for protection. The district court asked for "other evidence" from Kriesel but then restricted her answer:

> The Court: [W]hat other evidence do you want to submit to the Court? The Court's already given you -- Judge Brosnahan's already give[n] you a two-year order.
> Kriesel: I just wanted to have it on file somewhere, that's all I was looking for. . . . It was a last minute decision to file the OFP and I didn't have a chance to complete everything that I should have completed so I want it noted on the record.
> The Court: It is noted. The point is you've gotten an order.
> Kriesel: Yes.
> The Court: And so I think at this point that if you would like to file it you can certainly file it later. We'll make sure a copy is available for you, sir, but that's not going to change this order.
> Kriesel: Yes, I understand.
> The Court: Do you have any other questions, sir?
> Rossman: Not at this time.

The district court ended the hearing. It issued an "Order for Protection Following Hearing," reaffirming all of the ex parte relief previously granted and adding the requested ancillary relief. The order also prohibited Rossman from possessing firearms. But the order never actually finds that Rossman engaged in conduct that warrants an order for protection.

Rossman moved to vacate or modify the order under Minnesota Statutes section 518B.01, subdivision 11 (2016). He argued that the facts did not support the order, that his firearm rights should not have been restricted, and that the district court denied him due process by depriving him of a "full hearing." The district court denied Rossman's motion,

finding that he "was on notice that he had a right to a hearing" and that at the hearing he "could have indicated his desire to be heard on the merits or [he could have] agreed to the issuance of an order for protection without a finding of abuse."

Rossman appeals.

D E C I S I O N

Rossman asks us to reverse because the district court violated his right to due process by denying him a meaningful hearing. He also contends that the district court granted the order on insufficient evidence and that it improperly denied his motion to vacate or amend the order for protection. We need only address Rossman's due process argument, which prevails.

Kriesel maintains that, as a threshold matter, we should reject all of Rossman's arguments because they essentially challenge the ex parte order, which was replaced and which Rossman has not appealed. But the ex parte order includes the statutory requirement that "an ex parte order for protection shall be effective for a fixed period set by the court . . . *or until modified* or vacated by the court pursuant to a hearing." Minn. Stat. § 518B.01, subd. 7(c) (2016) (emphasis added). The post-hearing order modified and replaced the ex parte order. Rossman is not currently subject to both the ex parte order and the post-hearing order; he is subject to, and challenges, only the post-hearing order. We now address his challenge.

The circumstances support Rossman's argument that the district court deprived him of his right to an adequate hearing. Whether Rossman received an adequate hearing is a

legal question we review de novo. *See Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995).

Minnesota's Domestic Abuse Act allows a person to seek an order for protection by alleging the existence of domestic abuse. Minn. Stat. § 518B.01, subd. 4 (2016). The district court may order certain relief ex parte and without a hearing when a petitioner alleges an immediate and present danger of domestic abuse. *Id.*, subd. 7(a). But when a petitioner seeks certain additional relief (like some of the relief Kriesel's petition sought) after the initial ex parte order, a hearing must be held within seven days. *Id.*, subds. 5(c), 7(e). This is why the district court ordered the hearing in this case; although neither party expressly requested a hearing, the statute requires one because of the nature of Kriesel's requested relief. The question is, what type of hearing should have occurred?

Rossman contends that the hearing required by the statute is a "full hearing," meaning that he should have been allowed an evidentiary hearing to challenge the merits of Kriesel's domestic-abuse allegations. Kriesel argues that the hearing contemplated by the statute need only address the requested ancillary relief, not the threshold issue of whether an order for protection is justified, because Rossman never requested a hearing to contest the basic justification for an order for protection. The parties' disagreement about whether the statute envisions a "full hearing" is fueled in part by the legislature's removal of all previous references to "full hearing" from the act. *See* 1995 Minn. Laws ch. 142 § 5, at 404; 2002 Minn. Laws ch. 304 § 7, at 442; *Oberg v. Bradley*, 868 N.W.2d 62, 65 (Minn. App. 2015). The statute in its current form provides a respondent a "hearing" when requested, without the adjective "full." Minn. Stat. § 518B.01, subd. 7(c).

Kriesel would have us infer that, by removing the adjective "full," the legislature intentionally limited the scope of hearings following an ex parte order, even when a petitioner requests a hearing, unless the respondent also affirmatively demands a full hearing to challenge the bases for an order for protection. By contrast, Rossman would have us treat the term "hearing" as an evidentiary hearing on all the issues necessary for an order for protection, without regard to whether a respondent has demanded a "full" hearing. We decide this case without attempting to completely explore the statutory dispute because, under either theory, Rossman did not receive fair process. That is, if Kriesel's theory of the law is correct and a respondent is entitled to a full hearing on all issues only if he requests one, then the district court's ex parte order misled Rossman to believe that he did not need to request a full hearing to receive one. On the other hand, if Rossman's theory of the law is correct and a respondent is entitled to a full hearing on all issues, then the district court's tightly restricted hearing never gave Rossman the chance to challenge Kriesel's claimed bases for an order for protection. Either way, the problem lies in the difference between the broad promise in the ex parte order for an evidentiary hearing on all the issues and the sharply restricted hearing actually administered.

Whatever procedure the statute requires the district court to administer before issuing an order for protection, the district court's ex parte form order promised a broad hearing at which Rossman could challenge the petition entirely. It promised that he could challenge Kriesel's general request for an order for protection and also any of the specific relief that she sought. The order expressly announced a hearing where Rossman was required to appear, where he could "respond to the petition," where the parties and court

could "address the relief requested in the petition," where the court would "decide . . . whether to grant the relief requested in the Petition," and where Rossman "may be asked to testify" and present and face evidence of all kinds, including evidence apparently related to the underlying abuse allegation, such as live-witness testimony, police reports, and hospital records.

Kriesel offers two arguments why Rossman was not entitled to this expansive sort of hearing on all issues. Neither argument persuades us.

Kriesel argues first that Rossman was not entitled to a hearing on the entire petition because the order (tracking the statute) expressly declares that he is entitled to challenge Kriesel's allegations only if he requests a hearing. We believe that the confusing ex parte order would induce Rossman's failure to request a hearing, regardless of whether he was statutorily entitled to the broad hearing contemplated in the order. The order ambiguously declared both that Rossman "must request [a hearing] by completing and returning the attached [request form]" if he wanted a hearing and that a hearing had been scheduled "to address the relief requested in the petition." A reasonable person would not likely suppose that he must request a hearing after the court informs him that it has already ordered a hearing. One is even less likely to suppose that he needs to request a hearing when, as here, the district court checked box 1A ("A hearing will be held . . . on 10/3/16 at 1:30 p.m.") and left *unchecked* box 1B ("A hearing will not be held unless requested by Respondent."). To an ordinary reader, *not* checking box 1B implies that a respondent is *not* required to request a hearing before receiving one.

Kriesel implies that Rossman should have known that, based on the statute, the district court meant something less than what it stated broadly in its order about Rossman's opportunity at the hearing to "respond to the petition" and to address "whether to grant the relief requested in the Petition." It is true that our courts generally hold pro se parties to the same standards as attorneys. *Beardsley v. Garcia*, 731 N.W.2d 843, 850 (Minn. App. 2007), *aff'd*, 753 N.W.2d 735. But a reasonable respondent, represented or not, would not disregard the district court's order of a full hearing on all issues on the notion that the statute entitles him to a hearing on fewer issues.

Kriesel argues second that, even if Rossman is correct that the statute does not require him to request a hearing in order to challenge the underlying basis for the order for protection at the scheduled hearing, we should reject his appeal because he failed to actually challenge Kriesel's allegations of abuse during the hearing. She echoes the district court, which denied Rossman's post-hearing motion on the explanation that Rossman "could have indicated his desire to be heard on the merits" at the hearing. The explanation is not consistent with our review of the hearing.

Our review of the hearing transcript informs us that the district court did not place either party under oath to testify, and it did not invite either to present any nontestimonial evidence about the underlying allegations of the petition. It instead directed the hearing in a manner that never indicated that Rossman could raise any challenge to the petition itself. The district court channeled the discussion to circumstances that bore only on the ancillary relief that Kriesel sought. It never asked Rossman (or Kriesel) to address the petition or its factual or legal bases. It even interrupted Kriesel and prevented her from offering evidence

supporting her abuse allegations, deeming the issue resolved. The district court asked the parties questions to clarify the restrictions of the ex parte order and inquired about Rossman's compliance with them. But it never asked Rossman broadly whether he had any other issue to raise. We see no moment during the hearing when a litigant would reasonably suppose he had the opportunity to "respond to the petition" generally. We see no occasion when Rossman could address any aspect of relief other than those ancillary aspects about which the district court questioned the parties specifically.

We recognize that the judge who presided at the hearing was not the same judge who issued the ex parte order calling for the hearing. And we recognize that, for reasons the record does not reveal, the judge conducted the hearing without having read the ex parte order and without knowing its details. We also recognize that neither judge originated the confusing form. Under the unusual circumstances, we can infer that the district court was operating under the impression that the ex parte order had described a hearing limited only to those ancillary matters for which the statute mandates a hearing. The district court essentially promised Rossman an evidentiary hearing at which he could fully respond to Kriesel's petition, and this is not the hearing Rossman received.

We reverse the district court's order, reestablish the ex parte order, and remand for the district court to conduct a hearing at which Rossman may respond with argument and evidence addressing the petition and the of the relief it requests. Because we reverse and remand to allow for due process, we do not address Rossman's other arguments.

Reversed and remanded.

CONNOLLY, Judge (concurring specially)

Under the unique and special circumstances of this case, I agree with the majority that appellant-father should be afforded a hearing to challenge the basis for an order for protection (OFP). I write separately for two reasons.

First, I do not wish to suggest that Minn. Stat. § 518B.01 (2016) provides for an automatic right to a hearing on an OFP when neither party requests one. It does not. Indeed, that is why the order stated in its notice to appellant-father: "You have a right to a hearing. You *must request it* by completing and returning the attached [request form]." (Emphasis added).

This is where the confusion occurred. Neither pro se party here requested a hearing on the basis for the OFP, but, in the petition, respondent-mother also sought other types of relief, namely custody and financial support, and a hearing on those types of relief is mandatory. *See* Minn. Stat. § 518B.01, subd. 7(e) (mandating a hearing for certain types of relief). I agree with the majority that the format of the order is confusing when it states that the district court "will decide at that time [i.e., at the hearing] whether to grant the relief requested in the Petition for an [OFP]." Parties to an OFP petition might conclude that they could contest the underlying allegations of domestic abuse during a hearing on other types of relief requested in the petition, even though the order also states that parties wanting to contest underlying allegations of domestic abuse must request a hearing.

This confusion leads to my second reason for writing separately. I believe the language in the form orders used by our courts in these cases should be modified to address the situation where, as here, neither party requests a hearing on the basis for the OFP but a

hearing is mandated for other types of relief sought in the petition. The order should make it clear that, unless a hearing on the basis for an OFP has been requested, a hearing mandated for another type of relief will be limited to that relief. That way, situations like this one will not be repeated.