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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1817**

Anna Filomena Modeo-Price, for herself and on behalf of Luke & Tecla Modeo-Price,
as their parent and natural guardian, petitioner,
Respondent,

vs.

Anthony Keith Price,
Appellant.

**Filed October 3, 2011
Affirmed
Minge, Judge**

Hennepin County District Court
File No. 27-FA-10-1986

Jason R. Lawrence, Faegre & Benson LLP, Minneapolis, Minnesota (for respondent)

Anthony K. Price, Roseville, Minnesota (pro se appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges the district court's issuance of an order for protection (OFP) and denial of his motion to remove his children's guardian ad litem. Because we defer to credibility determinations of the district court, because the evidence in the record

supports the district court's findings, and because there is no evidence that the guardian ad litem failed to conduct a full investigation, we affirm.

FACTS

Appellant-father Anthony Price married respondent-mother Anna Modeo-Price in 1999. The couple have two minor children together. Beginning in 2001, the couple operated a computer-services business. In 2007, mother began working as a flight attendant. Since that time, father has continued to offer computer services to customers. Although he denies charging for services, father admits that some customers have paid him for his work.

In early March 2010, mother entered a domestic-violence shelter with the children and also served a petition for marriage dissolution on father. Shortly thereafter, mother, for herself and on behalf of her children, petitioned the district court for an OFP against father. The district court issued an ex parte temporary OFP and appointed a guardian ad litem to represent the interests of the children.¹

In July 2010, father, representing himself pro se, moved the district court to remove the children's guardian ad litem. The district court heard arguments from both parties and subsequently denied the motion; however, the district court did not clarify whether the motion was made in the marriage-dissolution file, the OFP file, or both. After denying the motion, the district court conducted a pretrial conference in the marriage-dissolution file regarding assets of the parties. Immediately following the

¹ A guardian ad litem was also appointed in the marriage-dissolution proceeding. Although the marriage-dissolution proceeding is separate from the OFP proceeding at issue here, there have been some overlapping hearings and motions.

conference, the district court held an evidentiary hearing regarding mother's petition for an OFP. Mother testified regarding domestic abuse by father, which he disputed.

On the second day of the OFP hearing, father moved under Minn. R. Civ. P. 41.02(a) to dismiss mother's petition because she allegedly introduced fraudulent evidence. The district court denied father's motion. On August 18, the district court determined that father had committed two acts of domestic abuse against mother in the presence of both children and granted mother's petition for an OFP. This appeal follows.

D E C I S I O N

I. Motion to Dismiss

The first issue is whether the district court abused its discretion by denying father's motion to dismiss under Minn. R. Civ. P. 41.02(a). Rule 41.02(a) states that the district court may "dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court." The rule's purpose is "to let the [district] court manage its docket and eliminate delays and obstructionist tactics by use of the sanction of dismissal. If a party . . . fail[s] to comply with the rules of procedure . . . the judge may dismiss the case with or without prejudice." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). The use of rule 41.02(a) is infrequent because it is a severe remedy. *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984). We review district court decisions under rule 41.02(a) for an abuse of discretion. *Id.*

Father argues that mother's petition should be dismissed because she violated Minn. R. Civ. P. 60.02, which states:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

.....

(c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

To vacate a judgment for fraud, “the moving party must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct which prevented [the moving party] from fully and fairly presenting its case.” *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 480 (Minn. App. 1987), *review denied* (Minn. July 15, 1987). The alleged misconduct must go to the ultimate issue of the case, rather than address merely a collateral issue. *Id.* at 480–81.

Father alleges that mother introduced fraudulent evidence in the form of forged invoices for his computer-services business. During the evidentiary hearing, father testified that he had not charged for services rendered since 2007. To refute and discredit father's testimony, mother introduced various invoices from 2008 and 2010 indicating father had continued to charge customers for services rendered. On redirect, father again denied charging for services rendered after 2007 and indicated the invoices were forgeries. During the second day of the evidentiary hearing, several witnesses testified on behalf of father, stating that they did not receive invoices for services rendered after 2007. These witnesses were not the customers listed on the invoices from 2008 and 2010 that had been submitted by mother and that are part of the record on appeal. The district

court determined that the allegations of fraud, even if true, “certainly would not meet the standard for dismissal.”

First, we note that father’s reliance on rule 60.02 is inappropriate. Rule 60.02 provides a remedy in cases where a party discovers that the opposing party gained a favorable judgment by using fraudulent evidence. By its definition, rule 60.02 is only applied after the district court enters judgment. Father attempted to rely on rule 60.02 before judgment, while the OFP proceedings were ongoing, and was therefore prematurely invoking that rule.

Second, we recognize that the district court has significant discretion in determining whether to dismiss an action under rule 41.02. The rule is generally only invoked when a party is not cooperating with the opposing party or the district court. *See Lampert Lumber Co.*, 405 N.W.2d at 425–26. Here, there is no evidence that mother had attempted to delay or obstruct either the district court or father. In addition, the allegedly fraudulent evidence was presented only to discredit father, not to prove that domestic abuse occurred, and was therefore only collateral to the ultimate issue in dispute.

Finally, husband did not present clear and convincing evidence that the invoices were fraudulent. As previously noted, the witnesses testifying that they did not receive invoices were not the people identified on the invoices that are part of the record. That certain customers did not receive invoices does not prove that the invoices in the record are fraudulent. Even if father had properly invoked rule 60.02, he has not presented evidence that clearly supports this fraud allegation.

Therefore, because the allegedly fraudulent evidence was not offered to prove that domestic abuse occurred and because father did not provide clear evidence of fraud, we conclude that the district court did not abuse its discretion in denying father's rule 41.02 motion.

II. Order for Protection

The second issue is whether the district court abused its discretion by granting mother's petition for an OFP against father. A district court's decision to grant an OFP under Minnesota's Domestic Abuse Act, Minn. Stat. § 518B.01 (2010), is discretionary. *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007). A district court abuses its discretion when its findings are unsupported by the evidence or based on a misapplication of law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). We view the evidence in the light most favorable to the district court's decision, and we will not reverse absent a "definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). On review, "[w]e neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder." *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). Rather, we defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

The Domestic Abuse Act authorizes a district court to issue an OFP to "restrain the abusing party from committing acts of domestic abuse." Minn. Stat. § 518B.01, subd. 6(a)(1). "Domestic abuse" is defined as any of "the following if committed against a family or household member by a family or household member: (1) physical harm, bodily

injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats, . . . criminal sexual conduct, . . . or interference with an emergency call[.]” *Id.*, subd. 2(a).

An OFP may be issued if an individual “manifests a present intention to inflict fear of imminent physical harm, bodily injury or assault,” *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989), which the district court may infer from the totality of the circumstances, *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99–100 (Minn. App. 2009). Although it is not dispositive, a party’s past abusive conduct is a relevant factor in determining whether an OFP is warranted. *Boniek*, 443 N.W.2d at 198.

Here, the district court determined that two incidents of domestic abuse occurred. The first incident occurred in July 2008, when father refused to allow the children to attend the marriage of mother’s brother in Italy. Mother testified that, on the morning of their flight to Italy, father emptied the children’s luggage, screamed at mother that the children were not going, and stated that he had burned the children’s passports. She testified further that after returning from attending the wedding alone, father became angry that she was not responsive, stopped the car on the drive home from the airport, grabbed her arm, swore at her, attempted to forcibly remove her from the car, and threw her purse onto the street. Father admitted that he threw mother’s purse onto the street but denied making any physical contact with her. He also remarked that, when he pulled the car over, he “made certain to check all [his] mirrors and look for other traffic and make sure the maneuver to stop the vehicle was done in such a manner it would be safe to everybody else on the road as well as us.” The district court determined that mother’s

testimony was more credible than father's and that that incident constituted domestic abuse.

The second incident occurred on March 10, 2010, the day before mother entered a domestic-violence shelter. Mother testified that father discovered his personal journal was missing, blamed her for taking it, locked her luggage in the family car, and refused to give her the luggage until she returned the journal. She testified further that, when she went to retrieve her luggage from the car, father pushed her against the wall and nearby furniture. Mother concluded by stating that, when she went to work, she was unable to focus and became increasingly fearful of what father would do while she was gone; consequently, she contacted father, but he responded that she was going to get hurt if she returned home and that she must return his journal before they could talk. Father admitted that he locked her luggage in the family car but denied making any physical contact with her during the incident or threatening her after the incident. Father also testified that, during the incident, he had "casual conversation" with mother, but that she was screaming and being irrational. Again, the district court found mother's testimony more credible than father's and therefore that domestic abuse had occurred.

We emphasize first that our review is limited to determining whether the evidence in the record supports the district court's findings. Absent a lack of support in the record, it is not the role of the appellate court to weigh the evidence or to alter the district court's findings, even if we would have concluded differently. *Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1059); *Vangness v. Vangness*, 607 N.W.2d 468, 474 (Minn. App. 2000). Here, mother testified that father had grabbed her arm, tried to forcibly

remove her from the car, pushed her into the wall and nearby furniture, and threatened her with harm if she returned home. The district court had to make credibility determinations. It found that mother “testified with specificity, genuine affect, and she did not minimize the role of either party in the controversy,” that father’s journal entries and testimony corroborated much of mother’s testimony, and that father was less credible because he attempted “to minimize the scenarios by making partial admissions.” After observing the witnesses’ demeanor and weighing the evidence, the district court made detailed findings. We conclude that the district court did not abuse its discretion in determining that mother’s testimony was more credible than father’s and that mother’s testimony provides sufficient support for the district court’s findings that domestic abuse occurred in July 2008 and March 2010.

Father also argues that mother falsely testified regarding a 2002 incident when father allegedly placed one of the children in a car seat and swung it wildly toward mother. The district court concluded that there was insufficient evidence to prove the incident occurred and that even if it did, it was too old to constitute a basis for a finding of current domestic abuse. Because the district court did not rely on the 2002 incident in determining whether domestic abuse occurred, we do not further address this disputed matter.

Father argues that the district court abused its discretion by not allowing him to present testimony contradicting statements mother made in her affidavit that was attached to the petition for an OFP. Apparently, father sought to testify that the couple didn’t own a desk to contradict mother’s statement in the affidavit that he pushed her into a desk. In

her testimony, mother stated that he pushed her into the wall and furniture. What mother was pushed into is largely irrelevant; the important question is whether father pushed her, and father was allowed to testify as to this. We recognize that inconsistencies in such detail may affect a witness's credibility, but how much of such testimony is useful in a proceeding is a judgment call. We conclude that the district court did not abuse its discretion in excluding father's testimony about peripheral disputed matters.

Because the evidence in the record supports the district court's findings of domestic abuse, because the district court made detailed findings regarding the credibility of the parties, and because the district court did not consider statements within mother's affidavit that were not testified to during the evidentiary hearing, we conclude that the district court did not abuse its discretion in granting mother's petition for an OFP.

III. Custody and Parenting-Time Determination

The third issue is whether the district court clearly erred in finding that the children's safety would be jeopardized by unsupervised parenting time with father. Under the Domestic Abuse Act, the district court has the authority to "establish temporary parenting time with regard to minor children of the parties on a basis which gives primary consideration to the safety of the victim and the children." Minn. Stat. § 518B.01, subd. 6(a)(4). "If the [district] court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted parenting time, the [district] court shall condition or restrict parenting time . . . or deny parenting time entirely, as needed to guard the safety of the victim and the children." *Id.* A district court's findings

of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

Here, the district court found that father was a flight risk with the children and that the risk of flight was a safety risk constituting endangerment and necessitating supervision. The district court therefore limited father to temporary supervised parenting time up to twice per week with the children. March 2010 entries in father's journal state: "I have been entertaining the idea that I must take the children + go hide until [mother] should agree to go away;" "I must sell the truck, buy the car from the neighbor next door, + leave w/ [the children] until [mother] sees fit to see a counselor;" and "I need 2500 for my plan to work—I picked up 90 today, I stopped yesterday @ a pawn shop which said 550 for some jewelry I have here. I'll be working hard on Ebay this week + posting PC service where I can. I'll make it happen." Father admitted that he wrote the journal entries. These entries indicate that father was contemplating absconding with the children. This evidence is sufficient to support the district court's finding that father was a flight risk.²

Father argues that the district court disregarded testimony indicating that he was not a danger to his children. Specifically, the children's guardian ad litem testified that she did "not feel at this time that [father is] violent or a danger to [his] children," and the

² We note that the district court also found that the children's emotional development would be endangered in his unsupervised care because father displayed highly inappropriate conduct toward others. The district court appeared to base this finding on father's conduct within the courtroom, including his evasive testimony and general demeanor. Because the district court's finding that father was a flight risk is sufficient to justify an order for supervised parenting time, we do not reach any conclusions regarding whether there is evidence in the record supporting the district court's alternate finding.

parenting-time supervisor testified that she “didn’t see any indication of fear in the children” or “sense any apprehension” in the children during supervised visits with father. The district court acknowledged the testimony of both experts but placed more weight on other factors, including father’s dismissal from a parenting program and his threats to flee with the children. In addition, the district court noted that the guardian ad litem’s testimony was based on only about one hour of parent-child observation. It is apparent that the district court did not simply disregard their testimony but instead weighed their testimony against other factors. As stated before, it is not the role of the appellate court to independently weigh the evidence or credibility of witnesses absent clear error by the district court. Because we conclude that the record does not establish that such error has occurred here, we affirm the district court’s decision to limit father to temporary supervised parenting time up to twice per week.

IV. Motion to Remove Guardian Ad Litem

The fourth issue is whether the district court abused its discretion by denying father’s motion to replace the children’s guardian ad litem. Because father listed only the marriage-dissolution file number in his motion to remove the guardian ad litem, it is unclear whether father intended the motion to apply in both that file and in this OFP file; however, because both parties have briefed the issue and because father has represented himself pro se throughout the proceedings, we will address it. *Cf.* Minn. R. Civ. App. P. 103.04 (allowing appellate courts to address questions in the interest of justice).

A guardian ad litem’s general responsibility is to “conduct an independent investigation to determine the facts relevant to the situation of the child[ren].” Minn. R.

Gen. Prac. 905.01(2). The investigation is to include reviewing relevant documents, meeting with and observing the child in the home setting, and interviewing parents and others relevant to the case. *Id.* The presiding judge may remove or suspend a guardian ad litem if the guardian fails to comply with a directive of the court, fails to comply with relevant responsibilities, has been sanctioned by a professional licensing board, or for other good cause. Minn. R. Gen. Prac. 904.02, subd. 4. The district court has broad discretion in determining whether to replace a guardian ad litem. *Weiler v. Lutz*, 501 N.W.2d 667, 672 (Minn. App. 1993), *aff'd sub nom.*, *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994).

Father argues that the guardian ad litem failed to comply with her responsibilities by not considering evidence supplied by father indicating mother was physically abusing the children. This evidence apparently consists of medical and school records, police reports, photographs, and audio and video recordings. However, none of this evidence is included in the record. In addition, during the evidentiary hearing, father did not submit any evidence indicating that mother had committed physical abuse against the children. Father's allegations of physical abuse have no basis in the record. Without this evidence, it is impossible to review whether the guardian ad litem neglected her responsibility to review all the available information.

Father argues that the guardian ad litem failed to observe the children interact with him at his residence and to facilitate his supervised parenting time. However, the record indicates that the guardian ad litem met with both parents on several occasions, observed mother interact with the children at her home, observed father interact with the children

at a park, and reviewed the psychological evaluations of both parents. In addition, the guardian ad litem twice attempted to undertake home visits at father's residence, but both visits were cancelled because of court hearings. Finally, the guardian ad litem consulted the parenting-time supervisor, the director of father's parenting program, and each child's therapist before reporting to the district court.

We conclude that the record indicates that the guardian ad litem spent substantial time conducting an independent investigation, listened to all parties involved, and advocated for the best interests of the children. On this record, we conclude that the district court did not abuse its discretion in denying father's motion to remove the guardian ad litem.

Affirmed.

Dated: