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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0283**

In the Matter of:
Daniel Joseph Hudson and o/b/o F. G. H., petitioner,
Respondent,

vs.

Jessica Michael Hudson,
Appellant.

**Filed August 26, 2013
Reversed
Kirk, Judge**

Olmsted County District Court
File No. 55-FA-12-8644

Daniel Joseph Hudson, Rochester, Minnesota (pro se respondent)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota;
and

Diane M. Kaer, Apple Valley, Minnesota (for appellant)

Kara Obermeyer, Chatfield, Minnesota (guardian ad litem)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge;
and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

On appeal from the district court's grant of an order for protection (OFP), appellant-mother argues that (1) the district court did not have jurisdiction to issue the OFP; (2) the district court abused its discretion by granting the OFP; and (3) the district court abused its discretion by admitting the child's out-of-court statements into evidence. We conclude that the district court had jurisdiction to issue the OFP, but abused its discretion by granting the OFP. Therefore, we reverse.

FACTS

Appellant Jessica Michael Hudson (mother) and respondent Daniel Joseph Hudson (father) married in August 2003 and divorced in January 2010 in Dakota County. Mother and father have one child, F.G.H., who was born in October 2007. Mother and father lived together in Rochester during their marriage and, at the time of their divorce, father continued to live in the family home and mother lived in Hastings. Mother and father agreed that they would share legal custody of F.G.H. but that mother would receive sole physical custody. They further agreed that father would have parenting time with F.G.H. every other weekend. The district court entered judgment based on the parties' agreement. Father currently lives in Rochester with his wife and three children, and mother lives in a confidential location in Washington County.

On December 31, 2012, father filed an ex parte affidavit and petition for an OFP in Olmsted County against mother on behalf of F.G.H. In the petition, father alleged that F.G.H. arrived for parenting time with him on December 21 with a black eye and gave

him different explanations than those provided by mother for the black eye. Father alleged that it was the third time F.G.H. had a black eye. Father alleged that the second time F.G.H. had a black eye she also had a large scratch on her inner thigh. On that occasion, father took F.G.H. to the emergency room. The district court granted the ex parte OFP and appointed a guardian ad litem (GAL). On January 2, the district court filed an amended ex parte OFP to correct F.G.H.'s name on the OFP.

On January 7, 2013, the district court held an OFP hearing. Father testified that he picked up F.G.H. for his parenting time on December 21 and noticed that F.G.H. had a black eye. Father testified that he asked F.G.H. about the black eye, and F.G.H. was hesitant to tell him about it. Father asked F.G.H. three times what had happened to her eye and then sent a text message to mother asking her how F.G.H. got the black eye; mother responded that F.G.H. had fallen off a sink into a faucet. Father asked F.G.H. if that was how she had gotten the black eye, and F.G.H. said "I don't know," and then, "Yes." Father testified that F.G.H. told him that mother's boyfriend "gives her a whooping" if she does not listen to mother and that F.G.H. demonstrated how she gets a "whooping" by getting on all fours, smacking her buttocks, and making a sound of pain. Father testified that his wife took pictures of F.G.H.'s black eye.

Father's wife and her mother, F.G.H.'s step-grandmother, also testified that they talked to F.G.H. about her black eye. Father's wife testified that she questioned F.G.H. about the black eye, and F.G.H. told her that if she did not listen to mother then mother's boyfriend would use a belt to "whoop" her. She further testified that F.G.H. told her that mother's boyfriend slapped her in the head and she was afraid of him. She testified that

F.G.H. told her that on one occasion she was in mother's bedroom when mother's boyfriend tried to whoop her with a belt. Mother told her boyfriend that he could not do that to F.G.H., but he said he could if he wanted. F.G.H.'s step-grandmother testified that she asked F.G.H. about her black eye on December 22. She testified that F.G.H. told her that she ran into a wall, or that maybe she ran into a faucet.

The GAL testified that she met with father, father's wife, and F.G.H. on January 3. She testified that she asked F.G.H. if she had an "owie on [her] eye," and "[F.G.H.] said I don't know. I don't remember. She said maybe I got it at school. She said maybe my friend gave it to me." The GAL testified that she reviewed a police report regarding mother's boyfriend, R.W. According to the police report, R.W. was driving mother's car in December 2012 when he was arrested and charged with a narcotics violation. The GAL testified that she talked to mother about the police report, and mother told her she found out about the charge when she was served with the OFP. Mother said that R.W. told her that her car was at the shop. The GAL further testified that R.W. told the police that mother's address was his address. The GAL recommended that F.G.H. remain with father because F.G.H. was safe in father's home. The GAL testified that she was concerned about R.W.'s presence in mother's home.

Mother testified that she began dating R.W. in the summer of 2010, but that he never lived with her. She testified that R.W. is no longer her boyfriend. Mother testified that the black eye F.G.H. had on December 21 occurred when "[s]he was kind of foisting herself on her bathroom countertop and one elbow slipped, and she knocked her eye into the faucet knob that comes out of the sink." Mother denied that she or R.W. had ever

struck F.G.H. with a belt. Mother's attorney asked mother why F.G.H. might have said she was "whooped," and mother stated, "The only thing I can explain is that in African American culture sometimes they tickle and chase their kids, stop, or I'm going to whoop you, you know what I mean, and it's a little game." Mother stated that F.G.H. might have observed that situation happen between R.W. and his daughter or cousins. Mother testified that R.W. never struck F.G.H. and F.G.H. was never alone with R.W.

Mother further testified that she did not know about R.W.'s arrest until she was served with the OFP, and she was not with him when he was arrested. Mother admitted that she was cited with public nuisance and possession of marijuana in a motor vehicle by driver/owner in February 2012, and that she pleaded guilty to public nuisance in October 2012. Mother denied there were illegal drugs in the vehicle when she was cited.

At the end of the hearing, the district court granted father's petition for an OFP on behalf of F.G.H. against mother. The district court stated that the sole basis for the OFP was F.G.H.'s black eye. The district court explained her decision:

The child's reaction to adults [inquiring] raises a big, red flag and causes me concern for what happened to this little—little girl. She's only five, and it seems to me that if she just simply fell into something, she would have said she simply fell into something. So the reaction and trying to hide things from her dad is extremely disconcerting.

It's also based upon mother exposing this child to a questionable character. He's at that house, this [R.W.]. He's around a lot. It's just not good, and he's not going to have any contact with this child from this day forward, at least not on this order.

The district court further found that mother was not very credible and had misrepresented her history. The district court stated that it did not believe that F.G.H.’s injury was caused when she hit her face on a faucet but instead was caused by someone hitting her. The district court further stated that it did not believe mother had given F.G.H. a black eye, but that mother “exposed [her] child to somebody who did it, and [she] didn’t step up and [she] didn’t call the police on him, and [she] didn’t fix things to make a safe environment for [her] child, and that’s why this order is justified.” The district court explained that the OFP would be in effect for a period of 120 days and told the parties to schedule a hearing with a judge in Dakota County to address any custody issues.¹ The district court also ordered supervised parenting time for mother and no contact between R.W. and F.G.H. The district court filed a written OFP following the hearing. This appeal follows.

D E C I S I O N

I. The district court had jurisdiction to issue the OFP.

Mother argues that the district court lacked jurisdiction to issue the OFP because neither she nor the child reside in Olmsted County. She contends that father’s residency

¹ We note that the OFP had expired at the time of this appeal. We only decide actual controversies, and we will dismiss a case as moot if there is no justiciable controversy that allows for relief from this court. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 97 (Minn. App. 2009). However, this case is not moot because there are possible collateral consequences to mother as a result of the issuance of the OFP. *See In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999) (providing an exception to the general rule if there are “collateral consequences attach[ed] to the judgment”). Here, the district court could extend the current OFP or issue a new OFP, and there could be collateral consequences in future custody disputes between the parties. *See Pechovnik*, 765 N.W.2d at 98; Minn. Stat. § 518B.01, subds. 6a(a), 17 (2012).

in Olmsted County is irrelevant in determining jurisdiction because father is not a party to this action. This court reviews questions of jurisdiction de novo. *State v. Barrett*, 694 N.W.2d 783, 785 (Minn. 2005).

The Minnesota Domestic Abuse Act provides that an OFP may be filed “in the county of residence of either party.” Minn. Stat. § 518B.01, subd. 3 (2012). The statute does not define the term “party.” *See id.*, subd. 2 (2012) (defining some of the statute’s terms). But the statute provides that an OFP petition may be filed by “any family or household member personally or by a family or household member, a guardian . . . , or, if the court finds that it is in the best interests of the minor, by a reputable adult age 25 or older on behalf of minor family or household members.” *Id.*, subd. 4(a) (2012). The statute defines “family or household members” to include “parents and children” as well as “persons . . . who have resided together in the past.” *Id.*, subd. 2(b).

Here, father petitioned for an OFP on behalf of his minor daughter, F.G.H. As the petitioner on behalf of his daughter, father is a party to this action. *See Black’s Law Dictionary* 1232 (9th ed. 2009) (defining “party” as “[o]ne by or against whom a lawsuit is brought”). Father’s decision to file the OFP petition in Olmsted County, where he resides, complies with the Domestic Abuse Act. Moreover, even if father had filed the petition in the wrong county, a defect in venue in Minnesota is not a defect in jurisdiction. *See Claseman v. Feeney*, 211 Minn. 266, 268, 300 N.W. 818, 819 (1941) (“Since our district courts virtually constitute one court of general jurisdiction coextensive with the boundaries of the state, the fact that a civil action is brought or tried

in the wrong county is not jurisdictional.”). Accordingly, the district court had jurisdiction to issue the OFP.

II. The district court abused its discretion by granting the OFP.

Mother argues that the district court abused its discretion by granting the OFP. This court reviews a district court’s decision to grant an OFP for an abuse of discretion. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006). “A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law.” *Id.* at 927. In reviewing an OFP, this court views “the record in the light most favorable to the district court’s findings, and we will reverse those findings only if we are left with the definite and firm conviction that a mistake has been made.” *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (quotations omitted).

Certain individuals may petition for an OFP “in cases of domestic abuse.” Minn. Stat. § 518B.01, subd. 4(a). The petition must “allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.” *Id.*, subd. 4(b) (2012). “Domestic abuse” is defined as “(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,” when “committed against a family or household member by a family or household member.” *Id.*, subd. 2(a). The petitioner must demonstrate “present harm, or an intention on the part of [the responding party] to do present harm.” *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984).

Mother contends that the district court abused its discretion by granting the OFP against her because she did not commit an act of domestic abuse against F.G.H. In response, father contends that mother inflicted fear of imminent physical harm on F.G.H. by failing to stop her boyfriend from physically abusing F.G.H. Father also asserts that mother committed acts of physical abuse against F.G.H.

The district court found on the record that F.G.H. suffered a black eye while under mother's care, but the district court specifically stated that it did not believe that mother caused F.G.H.'s black eye. Instead, the district court found that mother had exhibited poor judgment by allowing her boyfriend to be around F.G.H. In its written order, the district court found that the following acts of domestic abuse occurred: "Child was injured with a black eye on left eyebrow. This happened while in mother's care. This is black eye # 3 since 2010 (post divorce). [Mother] has child exposed to [R.W.] who is a questionable character, at the very best. Her home is not safe for the child." The district court did not specify on the record or in its written order which definition of "domestic abuse" provided the basis for its finding that mother committed domestic abuse against F.G.H.

Mother argues that her exposure of F.G.H. to R.W. does not constitute "domestic abuse" under the Domestic Abuse Act. We agree. The district court did not find that mother had ever physically harmed, injured, or assaulted F.G.H. *See* Minn. Stat. § 518B.01, subd. 2(a)(1). The district court also did not find, nor were there any allegations, that mother committed terroristic threats, criminal sexual conduct, or interference with an emergency call. *See id.*, subd. 2(a)(3). Finally, the record does not

support a finding that mother's actions inflicted "fear of imminent physical harm, bodily injury, or assault" on F.G.H. *See id.*, subd. 2(a)(2); *cf. Pechovnik*, 765 N.W.2d at 99-100 (determining that the evidence was sufficient to infer appellant's present intent to inflict fear of imminent physical harm, bodily injury, or assault based on a history of assaultive behavior between appellant and respondent and several recent incidents, including appellant slapping respondent's feet and yelling at her in the middle of the night, questioning her about an appointment, yelling at her, pinning her in corners, and calling her names); *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 490 (Minn. App. 2005) (concluding that the incidents described in the OFP petition and at the hearing did not constitute domestic abuse because there was no evidence of actual physical harm, bodily injury, or assault and the district court could not infer that mother had a present intent to inflict fear of imminent bodily harm, although the incidents could constitute neglect). There is no evidence in the record to establish that mother had a history of abusing or threatening to abuse F.G.H. Contrary to father's assertion, the district court did not take judicial notice of F.G.H.'s "history of abuse." Instead, the district court stated that it took "judicial notice of the fact that there's a . . . history of *allegations* of physical abuse with regard to this child." (Emphasis added.)

Further, under current Minnesota law it is insufficient to establish "domestic abuse" under the Domestic Abuse Act by merely demonstrating that domestic abuse occurred within a family or household. *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 526 (Minn. 2012). In *Schmidt*, the Minnesota Supreme Court reversed a decision by this court that held that "the Domestic Abuse Act does not require that the family or

household member on whose behalf the OFP petition is initiated [to] have suffered domestic abuse” because the statute only requires that “domestic abuse occurred within the family or household.” *Id.* (quotation omitted). The facts in *Schmidt* are different than this case because, unlike the child in *Schmidt*, the district court here found that F.G.H. suffered physical harm. But the supreme court’s reversal of this court’s broad holding in that case is significant because it indicates that to find that “domestic abuse” occurred, as defined by the Domestic Abuse Act, the district court must find that the respondent committed domestic abuse against the petitioner, not just that domestic abuse occurred in the household.

In addition, the supreme court raised a concern in *Schmidt* that also applies in this case: that an interpretation of the Domestic Abuse Act that allows “any household or family member [to] seek an order for protection on behalf of a minor” is concerning because it “makes the statutory reach almost unlimited and is far more expansive than the overall statutory framework permits.” *Id.* at 528-29. Similarly, here, the district court’s determination that mother committed domestic abuse against F.G.H. because she allowed her boyfriend to be around F.G.H. could extend to many different situations.

We conclude that the record does not establish that mother committed “domestic abuse” against F.G.H. as defined by the Domestic Abuse Act. Therefore, the district court abused its discretion by granting the OFP against mother on behalf of F.G.H. Because of this conclusion, we do not address mother’s argument that R.W. was not a “family or household member.” In addition, we need not address mother’s argument that

the district court abused its discretion by admitting F.G.H.'s out-of-court statements into evidence.

Reversed.