# STATE OF MICHIGAN

# COURT OF APPEALS

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| HEATHER BLUE,<br><br>Petitioner-Appellee, | UNPUBLISHED<br>December 18, 2018 |
| v | No. 341657<br>Lapeer Circuit Court<br>Family Division |
| SUZANNE SHENKUS,<br><br>Respondent-Appellant. | LC No. 2017-051385-PH |

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Respondent appeals as of right an order denying her motion to terminate a personal protection order (PPO) against her that had been granted to petitioner, her neighbor. We affirm.

Petitioner asserted that respondent had engaged in many instances of aggressive and vulgar behavior towards her and her family. A prior petition to obtain a PPO against respondent was dismissed after petitioner and her family failed to appear for a hearing. The petition at issue, however, was granted and expired on May 3, 2018.[1] Respondent moved to have it terminated on the grounds that the petition did not allege any actions taken by respondent specifically against petitioner and that the trial court improperly took judicial notice of the prior proceeding when it granted the PPO. The trial court denied respondent's motion to terminate the PPO.

On appeal, respondent first argues that the trial court improperly denied her motion to terminate the PPO because petitioner did not allege in her petition for a PPO that respondent took any action toward her. We disagree.

This Court reviews a trial court's decision to issue a PPO for an abuse of discretion because it is an injunctive order. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). An abuse of discretion occurs when the court's decision falls outside the range of principled outcomes. *Id*. Questions of statutory interpretation are reviewed de novo. *Id*. "The

[1] Although the PPO in this case expired on May 3, 2018, that fact alone does render this case moot. See *TM v MZ*, 501 Mich 312, 319; 916 NW2d 473 (2018).

interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012).

When a party seeks an ex parte PPO, "the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO." *Pobursky v Gee*, 249 Mich App 44, 46; 640 NW2d 597 (2001) (quotation marks and citation omitted). Petitioner stated that she filed the petition on behalf of her family, which the trial court acknowledged, but she did not file the petition as a "next friend" to her children. MCR 3.703(F), which governs the procedure for commencing a PPO action as a minor, states:

> (1) If the petitioner is a minor or a legally incapacitated individual, the petitioner shall proceed through a next friend. The petitioner shall certify that the next friend is not disqualified by statute and that the next friend is an adult.
>
> (2) Unless the court determines appointment is necessary, the next friend may act on behalf of the minor or legally incapacitated person without appointment. However, the court shall appoint a next friend if the minor is less than 14 years of age. The next friend is not responsible for the costs of the action.

The words of a court rule are accorded their plain and ordinary meaning. *Lamkin*, 295 Mich App at 709 (citation omitted). Pursuant to MCR 3.703(F)(2), a next friend must be appointed to minors under the age of 14 who petition for a PPO. Most if not all of petitioner's children were under the age of 14 when the petition was filed but petitioner failed to file the petition as their next friend. Because a party who chooses to proceed *in propria persona* is held to the same standards as members of the bar, *Totman v Royal Oak Sch Dist*, 135 Mich App 121, 126; 352 NW2d 364 (1984), petitioner's failure to file the petition as her children's next friend means that the petition should be analyzed to determine if petitioner properly alleged any actions that respondent took against her specifically.

The burden of persuasion in a hearing on a motion to rescind an ex parte PPO is on the party who petitioned for the PPO. *Pickering v Pickering*, 253 Mich App 694, 696; 659 NW2d 649 (2002). When determining whether a PPO has been properly issued, the trial court "is not limited to the four corners of the petition itself; rather, it must consider the testimony, documents, and other evidence proffered to determine whether a respondent engaged in harassing conduct." *Lamkin*, 295 Mich App at 711. Furthermore, "[n]othing in the statute or court rule suggests that the circuit court is limited to considering the incidents alleged in the PPO petition" and "our court rules specifically *require* the circuit court to go beyond the PPO petition and either interview the petitioner or provide an evidentiary hearing." *Id*.

The fact that the petition itself lacked any allegation of respondent taking action against petitioner individually is not dispositive. The trial court held an evidentiary hearing but declined

petitioner's offer of evidence and instead took judicial notice of facts from the prior proceeding.[2] Petitioner offered extensive evidence in support of her claims, including 23 police reports (two more years of police reports were unavailable from the police department), six notarized witness statements, photographs, video recordings (from the police department and her own) and audio recordings of respondent's behavior, but the trial court declined her offer of proof as unnecessary. Because the trial court is not limited to the four corners of the petition itself, it could properly consider other facts, such as the facts it judicially noticed. See *id*. However, the specific facts of which the trial court took judicial notice are not in the trial court record in this case.

And respondent has not furnished this Court with the record from the prior proceeding. Respondent also never requested the trial court to explicitly state which facts it found persuasive enough to issue the PPO. But in both the petition and at the evidentiary hearing petitioner made general allegations of actions taken by respondent specifically against petitioner. While these general allegations, strictly speaking, may not be sufficient for a trial court to grant a PPO on their own, the trial court did not appear to rest its decision on these general allegations but instead on facts from the prior proceeding. Because a trial court can base its decision to grant a PPO on facts outside of the petition itself, and respondent failed to develop the lower court record for appellate purposes, we cannot conclude that the court abused its discretion when it issued the PPO.

Next, respondent argues that the trial court erred when it took judicial notice of facts from the prior proceeding. We disagree.

"Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The trial court took judicial notice of facts from a prior proceeding, and respondent failed to object. Thus, this issue is unpreserved and an unpreserved issue is reviewed for plain error that affected substantial rights. See *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014); *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

It is well established that "a court may take judicial notice of its own files and records[.]" *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Respondent notes that a trial court's ability to take judicial notice of its own files and records is limited by MRE 201(b), which states that judicial notice may only be taken of facts that are "not subject to reasonable dispute" because they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Respondent argues that the trial court's action of taking judicial notice of facts from the prior proceeding violates MRE 201(b)(2) because the trial

[2] As discussed below, the trial court did not err when it took judicial notice of facts from the prior proceeding.

court could only take judicial notice of the existence of prior filings rather than their contents. Respondent cites no authority supporting this proposition, however, and "[t]his Court will not search for authority to sustain or reject a party's position." *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995).

Respondent's argument also fails because the facts the trial court took judicial notice of were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" if respondent had ordered the transcript of the prior proceeding and reviewed the lower court file in that case. Notably, respondent was a party to the prior proceeding, and therefore, had firsthand knowledge of the facts from the prior proceeding. Similarly, the trial court judge in this case is the same judge who presided over the prior proceeding.

Further, respondent has made no showing that the trial court's judicial notice in this case prejudiced her, and nothing in the trial court record indicates that the trial court prevented respondent from having an opportunity to be heard on the issue of its judicial notice in this case. In fact, petitioner offered to produce substantial evidence, including 23 police reports (two more years of police reports were unavailable from the police department), six notarized witness statements, photographs, video recordings (from the police department and her own) and audio recordings of respondent's behavior, but the trial court viewed this as unnecessary and declined her offer to produce the evidence. The trial court did not explain its reasoning for denying petitioner's offer of evidence but later in the evidentiary hearing stated that it remembered the first petition for PPO and that it had found the testimony from petitioner's family "compelling" at that time. Thus, respondent has failed to establish plain error requiring reversal as a consequence of the trial court's act of taking judicial notice of the prior proceedings before it.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron