

STATE OF MICHIGAN
COURT OF APPEALS

TBG,

Petitioner-Appellee,

v

CJJ,

Respondent-Appellant.

UNPUBLISHED

May 21, 2020

No. 349228

Clinton Circuit Court

LC No. 2019-028736-PH

Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

A party seeking a personal protection order (PPO) under MCL 600.2950a(1) bears the burden of proving the existence of statutory grounds for issuing the PPO. And to issue the PPO, the court must find the necessary elements satisfied. Here, the trial court could not discern “what the truth is,” but declined to terminate an ex parte PPO because it was “concerned about the level of animosity that’s going on.” We cannot review these “findings” to determine if the court properly determined that petitioner met her burden. We vacate the trial court’s order denying respondent’s motion to terminate the PPO, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Petitioner and respondent are connected because they each have a child with the same man—MG. MG and respondent ended their relationship in 2015, around the time of their daughter’s birth. MG began dating petitioner in 2015; they are now married and have a son. The relationship of this triad has been acrimonious from the beginning.

Petitioner and respondent accuse each other of harassment and other misdeeds. Respondent twice unsuccessfully sought PPOs against petitioner in 2016. On April 25, 2019, petitioner sought an ex parte PPO against respondent, citing a list of complaints dating back to

2015.¹ Petitioner accused respondent of using family, friends, and fake Facebook accounts to contact petitioner and MG after they blocked her calls, circulating a sex tape of herself and MG, spreading false rumors that respondent and MG were having an affair, violently “charging at” petitioner during parenting time exchanges, following petitioner and MG home, and threatening petitioner’s family and friends.

The circuit court signed the order the following day. Respondent filed a motion to terminate the ex parte PPO. Respondent denied the allegations raised by petitioner and cited a string of her own complaints. Respondent alleged that petitioner was controlling and jealous and did not want MG to coparent his child with respondent. Petitioner only sought the current PPO, respondent contended, because she discovered that MG was secretly communicating with respondent in an attempt to parent his daughter.

At the May 2019 hearing on respondent’s motion to terminate the PPO, the court reminded petitioner that it remained her duty to establish the necessity of the PPO. Petitioner testified to a history of unwanted communications from respondent beginning in 2015. Petitioner claimed that when she blocked respondent’s phone number and blocked her on social media, respondent contacted petitioner’s sister and members of MG’s family to slander petitioner and to claim that respondent and MG were having an affair. Petitioner further asserted that respondent convinced a mutual friend to tell respondent where petitioner and MG lived and to give her information about petitioner’s and MG’s son. However, petitioner did not present any of these middlemen to verify her version of events. Petitioner also testified that respondent used fake social media accounts to attempt to contact her.

Respondent, on the other hand, testified that she had not communicated with petitioner on Facebook or Instagram “since maybe 2016, last 2017,” and had never created a fake account. She explained that she never followed petitioner and MG home after a parenting time exchange; rather, petitioner and MG moved near respondent’s home causing their route to be the same. Respondent admitted that she was still in contact with MG’s family, because his relatives chose to keep her and her child with MG in their lives.

The trial court denied respondent’s motion to terminate petitioner’s ex parte PPO, ruling:

I don’t know what the truth is but things are not adding up for me and I - - I am concerned about the level of animosity that’s going on. And I can’t figure out how you knew where they lived. You have had to be blocked on all social media, and there is no need for you to talk to her or contact her anyway, but in the past you have contacted her, you’ve contacted her family, you’ve contacted his family. And you have to understand you can’t let other people do what you’re not allowed to do, so if you’re having third parties or endorsing third parties doing the same thing

¹ MG also secured an ex parte PPO against respondent. He did not appear at the hearing on respondent’s motion to terminate his PPO and the court therefore vacated the ex parte order. By absenting himself, MG avoided testifying to corroborate or refute the testimony of his wife and ex-girlfriend.

you can't do that. I am going to keep the PPO involving her in place [Emphasis added.]

II. ANALYSIS

Respondent challenges the trial court's denial of her motion to terminate the PPO. "The burden of proof in obtaining the PPO, as well as the burden of justifying continuance of the order, is on the applicant for the restraining order." *Pickering v Pickering*, 253 Mich App 694, 701; 659 NW2d 649 (2002), citing *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999); MCR 3.310(B)(5).

Because a PPO is an injunctive order, a trial court's decision whether to rescind a PPO is reviewed for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* "A trial court necessarily abuses its discretion when it makes an error of law." *Pirgu v United Services Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). The trial court's findings of fact are reviewed for clear error. *Hayford*, 279 Mich App at 325. A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). [*Berryman v Mackey*, 327 Mich App 711, 717-718; 935 NW2d 94 (2019).]

MCL 600.2950a(1) sets forth the criteria under which a trial court may issue a nondomestic PPO, in relevant part, as follows:

Except as provided in subsections (27), (28), and (30), by commencing an independent action to obtain relief under this section, . . . an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under [MCL 750.411h, MCL 750.411i, or MCL 750.411s]. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in [MCL 750.411h or MCL 750.411i], or conduct that is prohibited under [MCL 750.411s]. Relief may be sought and granted under this subsection whether or not the individual to be restrained or enjoined has been charged or convicted under . . . MCL 750.411h, 750.411i, and 750.411s[] for the alleged violation.

MCL 750.411h proscribes "stalking." " 'Stalking' means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). MCL 750.411s(1) provides:

A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:

(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.

(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

MCL 750.411i proscribes “aggravated stalking” and is not at issue in this case.

Here, the trial court determined to continue the PPO without resolving the credibility dispute between the parties, without making sufficient findings of fact on the record, and based on hearsay.

The parties gave conflicting testimony and directly contradicted each other’s allegations. In order to resolve this matter and determine the propriety of the PPO, the court was required to adjudge one side more credible than the other. Had the trial court done so, we would be required to defer to that assessment. See *Pickering*, 253 Mich App at 702. But the trial court did not resolve the credibility dispute; the court stated, “I don’t know what the truth is.” If the court could not gauge the truth, it could not conclude that the PPO was properly entered.

The court also failed to make findings of fact supporting the entry of a PPO. The court cited its “concern[] about the level of animosity that’s going on.” But animosity does not equate with a “willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 750.411h(1)(d). And while the court could not “figure out how [respondent] knew where [petitioner and MG] lived,” the court did not find that respondent used her knowledge of petitioner’s address to engage in activity that amounted to stalking.

The court found that petitioner had blocked respondent on social media but that respondent had contacted petitioner and her sister in the past. The court further found that respondent had “no need . . . to talk to [petitioner] or contact her anyway.” This did not amount to a violation of MCL 750.411s. A person might not have a “need” to contact someone, but that does not mean that the communication was made to cause petitioner, or a reasonable person, to “feel terrorized, frightened, intimidated, threatened, harassed, or molested” or “to suffer emotional distress.” MCL 750.411s. Petitioner alleged that respondent had created fake Facebook profiles in an attempt to contact petitioner after she had been blocked on social media. This might amount to repetitive unconsented contact. However, petitioner presented no evidence tracing the false accounts back to respondent. And the trial court did not resolve the parties’ contradictory testimony in that regard.

Given the trial court's lack of record findings supporting the entry of a PPO under the statutes, we must vacate the order denying respondent's motion to terminate the PPO and remand to allow the trial court to make reviewable findings. As the record now stands, it appears that both petitioner and respondent presented a slew of unsupported allegations and accusations. They both claim to have witnesses that can support their allegations and recounted hearsay accounts of these witnesses' observations. However, neither attempted to present these witnesses to the court or even to provide affidavits. Moreover, both parties describe various events that should have evidence in support, for example the circulation of a sex tape and police contacts during parenting time exchanges. The failure to present any evidence in support should be considered when weighing the credibility of the accounts.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly