

STATE OF MICHIGAN
COURT OF APPEALS

B. Q., by Next Friend LINDSAY ADAMS,
Petitioner-Appellee,

UNPUBLISHED
June 19, 2018

v

No. 341514
Ingham Circuit Court
LC No. 17-003693-PJ

F. S.,

Respondent-Appellant.

Before: MURRAY, C.J., and HOEKSTRA and GADOLA, JJ.

PER CURIAM.

Respondent¹ appeals as of right the trial court’s order denying his motion to terminate a personal protection order (PPO) issued ex parte at the request of petitioner. We reverse the order denying respondent’s motion to terminate the PPO and remand for further proceedings.

On October 27, 2017, petitioner, then 12 years old, filed a petition seeking a PPO against respondent, her 14-year-old stepbrother. The petition alleged that respondent had touched petitioner “in a sexual manner over several occasions in the last 6 months” and that she was “uncomfortable and scared to be near [respondent] or at/near his residence.” The petition was filed through Lindsay Adams, petitioner’s mother and next friend, after the Ingham County Sheriff’s Office notified Ms. Adams that petitioner had filed a police report. The trial court issued an ex parte PPO on the basis of these allegations.

Respondent moved to terminate the PPO, and the trial court held a hearing on November 22, 2017. Petitioner did not appear at the hearing, and Ms. Adams instead testified regarding the allegations set forth in the petition. The following exchange occurred between the trial court and Ms. Adams:

Q. Tell me why you asked the court to issue a personal protection order for your daughter.

¹ Because petitioner and respondent are minors, we decline to identify them by name.

A. Because on October 20th of this year I was contacted by the Ingham County Sheriff's Office that my daughter . . . had reported she was sexually –

* * *

Q. Okay. All right. And you indicated in your petition that there was an unconsented touching; is that correct?

A. Yes.

Q. And it was sexual in nature?

A. Yes.

Q. All right. That's a sufficient basis for the court to have granted an ex parte personal protection order.

The trial court then turned to respondent's motion to terminate the PPO. Though respondent appeared at the hearing, he did not testify or offer other evidence contradicting petitioner's allegations. However, respondent's counsel elicited testimony from Ms. Adams that she never personally observed any inappropriate contact between respondent and petitioner, that there was no physical evidence that might substantiate the allegations, and that her testimony was entirely based on information shared with her by petitioner. Further, Ms. Adams admitted that she voluntarily decided not to bring petitioner to the hearing, as she was unaware that her testimony was necessary.

Respondent argued that, because petitioner failed to present any admissible, nonhearsay evidence substantiating her allegations, she failed to carry the burden of persuasion and that termination of the PPO was therefore appropriate:

Mr. Grabel [defense counsel]: Well, the burden of persuasion, your honor, even though it's our motion, is on the petitioner.

The Court. I already made a finding that she had sufficient cause for the court to have issued a personal protection order.

* * *

Mr. Grabel: I would ask to adjourn this. I would like to call [Ms. Adams'] daughter as a witness.

The Court: That's denied. Anything else?

Mr. Grabel: Okay. My understanding, your honor, and I'll defer to the court, is the ex parte motion was based on evidence obviously in the petition that would be inadmissible but certainly was used to justify an ex parte motion, but I heard no admissible evidence during this hearing that would substantiate the allegations based in the petition.

So, therefore, I don't believe there's been any evidence – The Rules of Evidence still apply. The fact that she repeated that again, your honor, I've done several PPO's –

The trial court denied respondent's motion, concluding that reasonable cause supported continuation of the PPO in light of the allegations made in the petition and in Ms. Adams' testimony, which remained unrefuted during the hearing.

On appeal, respondent contends that the trial court erred by rejecting his argument that petitioner failed to offer admissible evidence justifying continuation of the PPO, thereby placing the burden of persuasion on him. We agree. A PPO is an injunctive order, and a trial court's determination whether to grant injunctive relief is reviewed for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002); see also *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). “An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes.” *Hayford*, 279 Mich App at 325. However, determining which party properly bears the burden of proof is a question of law that this Court reviews de novo. *Pickering*, 253 Mich App at 697.

Under MCL 600.2950(4), a court shall issue a PPO if it “determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit” one or more of the violent or harassing acts enumerated in subsection (1) of the statute. In determining whether reasonable cause exists, “[t]he trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts.” *Hayford*, 279 Mich App at 326; see also MCL 600.2950(4). If a petitioner seeks an ex parte PPO, she must additionally demonstrate that the delay required to effectuate notice will result in “immediate and irreparable injury, loss, or damage,” or that the notice itself will “precipitate adverse action before a personal protection order can be issued.” MCR 3.705(A)(2); MCL 600.2950(12). Within fourteen days after being served with an ex parte PPO, a respondent may file a motion to terminate the PPO and request a hearing. MCR 3.707(A)(1)(b).

This Court previously determined which party bears the burden of proof in the context of a motion to terminate a PPO in *Pickering*, 253 Mich App at 697-700. The burden of proof is comprised of two distinct concepts – the burden of persuasion and the burden of going forward with the evidence. *Id.* at 698. In *Pickering*, this Court held that the petitioner bears the burden of persuasion and, accordingly, must justify continuation of the order. *Id.* at 696; see also *Kampf v Kampf*, 237 Mich App 377, 386; 603 NW2d 295 (1999) (“[T]he burden of proof naturally falls on the petitioner . . . because the court must make a positive finding of prohibited behavior by the respondent before issuing a PPO.”). A petitioner may meet the burden of justifying continuation when she presents evidence demonstrating “reasonable cause to believe that respondent caused petitioner a reasonable apprehension of violence.” *Pickering*, 253 Mich App at 701. Further, the Court declined to hold that it was improper for the trial court to have placed the burden of going forward with the evidence on the respondent, so long as the burden of persuasion remained with the petitioner. *Id.* at 699-700, 700 n 1; see also *Widmayer v Leonard*, 422 Mich 280, 290; 373 NW2d 538 (1985) (noting that while the “burden of going forward with the evidence” can shift during a trial, the burden of persuasion “generally remains with the plaintiff”). Nonetheless, the Court noted that “it would be more appropriate in these hearings to

have the petitioner . . . also be the party to first come forward with evidence.” *Pickering*, 253 Mich App at 700 n 1.

During the hearing regarding respondent’s motion to terminate the PPO, petitioner did not personally appear and relied exclusively on the testimony of Ms. Adams, who admittedly had no personal knowledge of any events giving rise to the issuance of the ex parte PPO. Indeed, Ms. Adams conceded that her testimony was premised on information relayed to her by petitioner and by Ingham County police officers. Courts are bound to apply the rules of evidence absent a statutory exception, MRE 1101(a), and proceedings concerning PPOs are not included in the list of exceptions enumerated in MRE 1101(b). Therefore, the rules of evidence apply here. Because Ms. Adams’ testimony was premised not on her own personal knowledge, but rather on out-of-court statements offered “to prove the truth of the matter asserted,” it constitutes hearsay under MRE 801(c) and was therefore inadmissible under MRE 802 in the absence of an applicable exception.

Because petitioner failed to offer any admissible evidence justifying continuation of the PPO, she consequently failed to meet the burden of persuasion. By denying respondent’s motion to terminate the PPO based on its finding that respondent had not refuted petitioner’s unsupported allegations, the trial court improperly shifted the burden of persuasion to respondent. See *Pickering*, 253 Mich App at 699-700. Under these circumstances, we conclude that the trial court abused its discretion in denying respondent’s motion to terminate the PPO.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Michael F. Gadola