

NOTICE
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2014 IL App (5th) 130577-U

NO. 5-13-0577

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

CHRISTINE M. PRINCE,

Petitioner-Appellee,

v.

KENNETH K. MADSEN,

Respondent-Appellant.

) Appeal from the
) Circuit Court of
) Madison County.
)
) No. 13-OP-513
)
) Honorable
) Ben L. Beyers II,
) Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court's entry of a plenary order of protection does not constitute an abuse of discretion, the order must be affirmed.
- ¶ 2 Respondent appeals from the trial court's plenary order of protection entered by the court on September 5, 2013, by which the court ordered respondent to stay 500 feet away from his minor son for a period of one year.
- ¶ 3 Petitioner and respondent have a teenage son together. They were never married. Petitioner and respondent live separately. We do not have the record of proceedings between the parties in the family court division of Madison County circuit court, but from references made in the respondent's brief on appeal (the petitioner did not file a brief on

appeal) and in the transcripts of the hearing in this case, we understand that the history between the two has been litigious. That history consists of numerous orders of protection, related criminal charges, and custody issues. The majority of the orders of protection involved their minor child.

¶ 4 The events at issue occurred on May 17, 2013, at respondent's home, after respondent's son completed a task of mowing his father's lawn and went back into the home. Respondent wanted to see something that was in his son's pocket. Respondent claimed that the "something" was marijuana and related paraphernalia. Respondent's son claimed that his father wanted his cell phone. The son refused his father's request. Altercations occurred.

¶ 5 Petitioner alleged the following in her verified petition for an order of protection on behalf of herself and her son:

"On May 17, 2013, [the child] was at [the father's] house cutting the grass. [Child] missed a spot, and [the father] became very angry. They had been arguing all morning. [Father] had also been filming [the child]. At some point, [the father] went after [the child], and got on top of [the child] and tried to get him to give him his phone. He started choking [the child] and trying to get the phone. [Child] ran through the kitchen with [the father] following him. [Father] then stated, 'I'm going to fucking shoot you.' [Father] later followed [the child] into the bathroom and pushed [the child] on the ground, punching him in the nose. He then proceeded to grab [the child's] testicles and attempt[ed] to get his phone away from him."

¶ 6 At the hearing, the minor child testified consistent with the allegations in the petition for an order of protection. He also testified that he was afraid of his father and believed that his father could have shot him because he has anger problems.

¶ 7 Respondent testified to a different version of the events of May 17, 2013. Respondent's attorney advised the court that the school removed respondent's son from school due to possession of marijuana. His son admitted this in testimony at the hearing, but claimed that the drugs actually belonged to the respondent. Respondent claims that his son mowed the grass on May 17, 2013, but before he had completed the task, he went to a refrigerator and took out a soda. He told the court that his son did not deserve the soda because he had not completed mowing the grass. Respondent testified that his son took the soda anyway and went into his bedroom, locking the door. His son exited the bedroom apparently to get another soda, and respondent claimed that he could smell marijuana. He said that he could see a bag in one of his son's pants pockets and something in another pocket that he suspected was a marijuana pipe. Respondent testified that he felt a pipe in his son's pocket. Respondent and his son struggled over the item in his pocket. His son broke away, returned to the bedroom, locked the door again, and called petitioner. He exited the bedroom again, and respondent got into another altercation with his son—this time in the bathroom. After the incident, respondent testified that his son stayed outside of the home until his counselor arrived two hours later for a prescheduled session.

¶ 8 The counselor, Kimberly Myers, was called to testify at the hearing, but essentially provided no testimony of substance about the events of May 17, 2013. She

testified that when she arrived at respondent's home for the counseling session with his son, respondent met her outside the house to tell her that there had been an altercation. Myers testified that when she arrived, respondent's son was in the basement of the home. She observed a couple of scratches on the face of respondent's son.

¶ 9 Petitioner introduced two photographs into evidence. Respondent's son took both photos shortly after the May 17, 2013, altercations with his father. One photo depicts a red mark on the boy's neck. The second photo depicts the boy's tearful face with a bloodied nose.

¶ 10 At the conclusion of the hearing, the trial court made the following statements and rulings:

"This is a, obviously a very, very contentious case. There is a lot of animosity between the parties. I am kind of new on this case, this case has a long and lengthy history, as everybody here knows.

To me it honestly is kind of sad. It's sad that the family is not able to come together on—it appears, just based on the allegations here, are very serious. It appears on almost anything the family had issues with.

And you have a 14 year old boy that—getting the feeling here, I feel like he loves both of his parents. I do. But there are serious allegations. And I think that, obviously bad things happened that day that nobody would want. I don't think Mr. Madsen intended, going into that day, to hurt the child. I don't think Miss Prince would have expected that sort of behavior. So clearly things happened and escalated very quickly and got to a point that it probably shouldn't have gotten.

I understand there's a felony case still pending, I know there's bail bond conditions there. So really no matter what I do here, that's not going to allow Mr. Madsen into the younger Mr. Madsen's life while his bail bond conditions are still pending ***.

*** I think that the Petitioner here has met her burden of proof here in this case, that an Order of Protection is probably warranted, plenary.

* * *

*** [M]y thought at this point is that we kind of need a time out and a cooling off period for everybody. ***

* * *

But I think for today's order, the plenary order of protection is going to issue. I'm going to issue it for a year today, as opposed to two years, which I might normally do. Because I think—after a year we can always extend it. We can get rid of it, we can do whatever on motion of the parties."

¶ 11 The trial court issued its plenary order of protection on September 5, 2013, setting a termination date of September 4, 2014.

¶ 12 Respondent filed a motion for relief after judgment in which respondent argued, in part, that the trial court erred in finding that his actions on May 17, 2013, constituted abuse, claiming that his actions constituted reasonable direction of his son. The trial court denied respondent's motion on November 7, 2013. In this order, the trial court stated, "All evidence and testimony was considered and this Court ruled accordingly after full hearing, on the record, in which both parties participated."

¶ 13 Respondent appeals and asks us to vacate the plenary order of protection. He first argues that the trial court did not base its decision upon the evidence presented at the hearing, and that the judgment order was contrary to the manifest weight of the evidence. The second issue he raises involves his claim that the trial court misapplied the domestic violence statute and applied an improper burden of proof.

¶ 14 Trial courts can enter protective orders against a person who abuses a child in his care. 750 ILCS 60/214(a) (West 2012). The Illinois Domestic Violence Act of 1986 defines "abuse" as follows:

" 'Abuse' means physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis." 750 ILCS 60/103(a) (West 2012).

¶ 15 On appeal, we review a trial court's order of protection entered upon a finding of abuse established by a preponderance of the evidence, using the manifest weight of the evidence standard. *Best v. Best*, 223 Ill. 2d 342, 349-50, 860 N.E.2d 240, 244-45 (2006). A finding is only considered to be contrary to the manifest weight of the evidence "if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence." *Id.* at 350, 860 N.E.2d at 245 (citing *In re D.F.*, 201 Ill. 2d 476, 498, 777 N.E.2d 930, 942-43 (2002)). With the manifest weight standard, we must give the trial court's ruling deference because the trial court had the opportunity to observe the conduct and demeanor of parties and witnesses. *Id.* (citing *In re D.F.*, 201 Ill. 2d at 498-99, 777 N.E.2d at 943). "A reviewing court will not substitute its judgment for

that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.* at 350-51, 860 N.E.2d at 245 (citing *In re D.F.*, 201 Ill. 2d at 499, 777 N.E.2d at 943).

¶ 16 Respondent contends that the trial court based its ruling in part on external legal cases—the numerous orders of protection between the parties as well as the felony case against respondent that resulted from the altercations on that day. He cites to no part of the hearing transcript or the written order in which we can find that the trial court considered these other legal matters as substantive evidence supporting the allegations of abuse on May 17, 2013, when entering the order of protection. While the trial court referenced the numerous legal filings between the parties and involving their child, there is no indication that the court's ruling stemmed from this history. The court noted that the parties have a contentious history, and the judge commented that he found this history to be sad. In setting the duration of the plenary order of protection at one year, the court noted that what the court was ordering was something that respondent was already complying with due to the pending felony case and his bail requirements. Again, there is no indication that the trial court based its order of protection on these past or pending legal disputes. Therefore, we find that this allegation is unfounded.

¶ 17 Respondent alternatively argues that his intention in taking action against his son was reasonable, and therefore the court's order was erroneous. He cites no authority for the proposition that "reasonable" intentions and any actions resulting from the "reasonable" intentions have any bearing on the matter of whether an order of protection can issue. He contends that in light of his son's recent issues with marijuana at school,

coupled with the smell of marijuana coming from his bedroom, it was reasonable to ask his son to empty his pockets and, upon his son's refusal to do so, to check his pockets. He argues that the escalation of the incident was because his son was resistant.

¶ 18 In support of this reasonableness argument, respondent directs us to the transcript of the hearing and to a transcript of a prior hearing with a different judge. He asks us to consider courtroom conduct exhibited by petitioner and their son as evidence that respondent's actions in the altercation of May 17, 2013, were reasonable. We find this argument to be problematic for two reasons. First, courtroom behavior in a different matter before a different judge, and not a part of the record before the second judge, is irrelevant. Second, this trial judge witnessed the alleged "behavior" cited by respondent. Despite these alleged conduct issues, the trial court concluded that petitioner had established the right to the requested plenary order of protection. We will not substitute our judgment for the trial court judge who had the opportunity to observe the son when he testified in court. The judge also observed the respondent when he testified. The testimony of respondent and his son both involved witness credibility. Ultimately, the trial court resolved the credibility issues and found that petitioner established her case. *Best*, 223 Ill. 2d at 350, 860 N.E.2d at 245 (citing *In re D.F.*, 201 Ill. 2d at 499, 777 N.E.2d at 943). We find no basis in this "courtroom behavior" argument to conclude that the respondent's altercation with his son was reasonable, and that therefore the trial court abused its discretion.

¶ 19 Respondent also contends that he used no corporal form of punishment with his son that day. Alternatively, he argues that if he did use corporal punishment, the

punishment was not "excessive." In Illinois, courts have determined that corporal punishment is excessive if the child is injured, the individual imposed the punishment for no reason, the punishment was excessive in light of the circumstances, and medical or expert testimony was presented. *In re S.M.*, 309 Ill. App. 3d 702, 706, 722 N.E.2d 1213, 1216 (2000). In *In re S.M.*, the mother and stepfather used a belt to punish their 13-year-old daughter. *Id.* at 705-06, 722 N.E.2d at 1216. The trial court found the corporal punishment to be excessive constituting abuse, but the appellate court disagreed given the context of the punishment, stating that the punishment was not excessive and was administered in a caring and concerned manner. *Id.* at 706, 722 N.E.2d at 1216.

¶ 20 From this argument, we believe that respondent contends that either because there was no corporal punishment or because any corporal punishment he administered was not excessive, his behavior was reasonable. Respondent again claims that "the seriousness of the encounter was in the control of the child."

¶ 21 From the testimony of both respondent and his son, the argument escalated and continued over the course of that afternoon. Photos entered into evidence, taken contemporaneous with the aftermath of the altercations, reflect a marking on the son's neck and a bloody nose. Regardless of the divergent testimony of respondent and his son, the photos are consistent with aspects of the son's testimony. Based upon the evidence and testimony from the hearing, the trial judge found support for entry of the plenary order of protection. In light of the testimony and evidence at the hearing, we cannot equate choking and punching a child in the nose with the belt whipping that the appellate court determined was concerned and caring punishment in *In re S.M.* We find

that the actions taken by respondent against his son were excessive and unreasonable. We also do not find that respondent's "reasonable behavior" argument established that the court's order of protection constituted an abuse of discretion.

¶ 22 Respondent next argues that the trial court did not take into consideration the exception to the "abuse" definition for reasonable direction of a child. He cites to *Radke v. Radke*, 349 Ill. App. 3d 264, 812 N.E.2d 9 (2004), for the proposition that a physical altercation between a parent and a child requires a special analysis, which respondent claims this court did not conduct. In *Radke v. Radke*, the trial court entered a plenary order of protection restraining the father from abusing, harassing, or intimidating his daughter. *Id.* at 264, 812 N.E.2d at 10. The mother had custody of the child. *Id.* at 265, 812 N.E.2d at 10. During a visitation day, the daughter told her father that she wanted to return home. *Id.* The daughter claimed that he ripped the phone from the wall so that she could not contact her mother. *Id.* The father acknowledged that he did unplug a device that allowed all home phones to reach an outside line. *Id.* The daughter also alleged other specific physical abuse on this date. *Id.* The mother and her daughter made a complaint with the police, but the police found no marks or bruises on the girl's body. *Id.*, 812 N.E.2d at 11. Although the court noted that a parent could use reasonable direction with his child, the court determined that denying access to a telephone to contact the other parent amounted to harassment. *Id.* at 267, 812 N.E.2d at 12. The trial court entered a two-year plenary order of protection. *Id.*

¶ 23 The appellate court noted that the situation was "ripe for conflict" in light of the father's threat to call the police to enforce this particular visitation before his daughter

even arrived at his home. *Id.* at 268, 812 N.E.2d at 12. The appellate court found that the father's decision to unplug the phones in the home was a "reasonable direction" of his daughter in light of his claims that she had cursed at and kicked her father in the groin before the phones were unplugged. *Id.* Contrary to respondent's claim, the appellate court does not state that the reasonable direction exception requires special analysis. The mother cited a case involving a husband and wife in support of the trial court's order, and the trial court distinguished that case on the differences between adult and child abuse cases. The court stated, "Conduct between spouses does not, of course, fall within the statutory exception for reasonable direction of a child." *Id.*, 812 N.E.2d at 13.

¶ 24 While the trial court made no specific mention of "reasonable direction" of a child in either the verbal comments at the conclusion of the hearing or its November 7, 2013, order denying respondent's motion for relief, the court indicates that all evidence and testimony was considered before ruling. The court found that the evidence supported entry of the plenary order of protection. Nothing in the Illinois Domestic Violence Act of 1986 requires the trial judge to make specific statements discounting an exception to the abuse rule. Respondent cites to no authority mandating this type of statement in a final order. The court simply balanced the testimony and after assessing credibility of the witnesses determined that the plenary order of protection should issue. We find no basis to conclude that the trial court misapplied the law.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 26 Affirmed.