

NOTICE
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2017 IL App (4th) 160325-U

NO. 4-16-0325

IN THE APPELLATE COURT
OF ILLINOIS

FILED
March 15, 2017
Carla Bender
4th District Appellate
Court, IL

FOURTH DISTRICT

CARRIE L. ORWIG,)	Appeal from
Petitioner-Appellee,)	Circuit Court of
v.)	Vermilion County
TERRY BOND,)	No. 15OP391
Respondent-Appellant.)	
)	
)	Honorable
)	Mark S. Goodwin,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s order granting petitioner’s petition for a plenary order of protection against respondent was not against the manifest weight of the evidence.

¶ 2 On November 6, 2015, the trial court granted petitioner Carrie L. Orwig’s petition for a plenary order of protection against respondent, Terry Bond. On December 4, 2015, Terry filed a motion to vacate the plenary order of protection and for a rehearing. On March 23, 2016, the trial court heard arguments on Terry’s motion and denied the posttrial motion. Terry appeals, arguing the court erred in granting Carrie’s petition because he was conducting reasonable discipline by a person standing *in loco parentis*. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 18, 2015, Carrie filed a verified petition requesting an order of protection against Terry Bond. In the petition, Carrie alleged:

“Weekend of August 9, 2015: I am the natural mother of [Connor B.], date of birth [June 2007]; the child’s natural father is Gary Wayne Bond. Gary Bond resides in a nursing home in Springfield, Illinois; he became disabled after our divorce in Vermilion County Cause 09 D 216. In said divorce, I was awarded custody of our minor child and Gary Bond was granted visitation including alternate weekends.

Since Gary Bond’s accident which resulted in his disability, he has resided in a nursing home in Springfield[,] Illinois[,] and his parents, Terry Bond and Marilyn Bond, have taken the child alternate weekends to visit with Gary Bond. Gary Bond’s alternate weekend visitation was the weekend of August 9, 2015; the minor child left for visitation, and when he returned, he had bruising, abrasions, and marks on his face and on his left shoulder. The child indicated that his grandfather, Terry Bond, has slapped him four times across the face (two times on each side) and grabbed him by the shoulder and moved him from the garage at his grandfather’s house to his grandfather’s house.

I talked to Marilyn Bond, the paternal grandmother of the child; she resides with the paternal grandfather of the child, Terry Bond. She indicated that weekend she did see Terry Bond spank the child.

[Connor B.] has indicated that he is afraid of his grandfather, Terry Bond, and does not wish to have any contact with his grandfather.”

¶ 5 On November 6, 2015, the trial court held a hearing on the petition. Carrie called Terry as a witness. When asked whether he laid any hands on Connor, Terry responded, “In some fashions, yes.” However, Terry denied Connor was injured the weekend of August 9, 2015.

¶ 6 When asked why Terry felt the need to “lay hands” on Connor, Terry responded he arrived home on August 9 and found the garage door was open. Connor was lying on the floor of the garage. Terry started seeing things were out of place in the garage. He saw a liquid substance on the floor in several places and on stacks of mulch. He followed the trail of liquid and observed a container of Roundup weed killer that looked like it had been tampered with by someone. He also saw some kind of liquid substance all over his compound saw. He testified he was concerned because Connor was getting into things without permission.

¶ 7 Terry testified he confronted Connor about the mess. Connor said he was just dancing. Terry told Connor the mess in the garage would not have happened on its own. Terry denied touching him while in the garage. Connor went inside the house. Shortly thereafter, Terry went into the house and confronted Connor in Marilyn Bond’s presence. When Connor said he was just dancing, Terry accused him of lying. Terry testified he started getting angry because Connor continued to deny making the mess. According to Terry, he grabbed Connor around his neck over his right shoulder and was going to pull him down to give him a spanking. However, because he was weakened by his chemotherapy treatments, Connor was able to resist and not be spanked. Terry heard something ripping. Terry denied ever striking Connor in the face. Terry also denied touching Connor’s left shoulder.

¶ 8 Marilyn Bond testified she was in the house on the couch when Connor came inside, crying. She testified Terry came inside and spanked Connor three or four times. She denied Terry hit Connor in the face. When asked whether “Connor got whipped and whipped

good by Terry,” Marilyn responded, “I would say so.” She testified she did not see any bruising on Connor. Marilyn testified she told Carrie that Terry had “whipped” Connor. She did not recall telling Carrie that Terry “whipped him and whipped him good.” According to Marilyn, Connor was crying when Terry was whipping him. Terry put Connor over his knee to whip him. Terry later told Marilyn he behaved appropriately when he whipped Connor.

¶ 9 Marilyn testified Connor had not been back to her house since the incident in question. She was still picking Connor up in Ogden and driving him to Springfield to see Connor’s father. Connor never expressed any desire to go to Marilyn’s house. Connor had not seen Terry since the incident.

¶ 10 Yvonna Orwig testified Carrie was her daughter-in-law. She picked up Connor on August 9 at the Walmart in Urbana from Marilyn Bond. She did not notice anything unusual with Connor at first, but she later noticed both of his cheeks were very red. She asked Connor what happened to his cheek. He said his grandfather had slapped him. She testified nothing happened while Connor was in her care that would have caused the injuries to his cheek or shoulder.

¶ 11 Carrie Orwig testified she is Connor’s mother. When Connor got home on August 9, 2015, he was “very upset” and “jittery.” She had already received a call from Marilyn saying Terry had “whipped” Connor. She examined Connor and saw injuries to his back and cheek. Connor’s shirt was torn. She testified the photographs introduced into evidence accurately depicted her son’s injuries. She contacted Marilyn and asked her to keep Connor away from Terry.

¶ 12 Connor Bond testified he was eight years old. On the day in question, he was in the garage and accidentally activated a spray paint can and sprayed a line about a foot wide.

Terry, his grandfather, came out to the garage and threw him inside the house. He said he thought Terry grabbed him by the neck or shoulder. It did not hurt but his shoulder “popped.” Once inside, Connor went to Marilyn, his grandmother. Terry then came after him. Connor testified Terry threw him to the ground, slapped him two times on each cheek, called him a liar, and banged his head against the floor. Terry did not cross-examine Connor.

¶ 13 After hearing the witnesses’ testimony, the trial court found the evidence indicated Terry had struck and hurt Connor while disciplining him. The court stated it appeared the incident did impact Connor. Noting the statutory definition of “abuse,” the court found Terry was acting *in loco parentis* to Connor when the incident occurred but Terry’s actions did not constitute reasonable direction. Based on its findings, the court entered a no-contact order against Terry with regard to Connor for a period of two years.

¶ 14 On December 4, 2015, Terry filed a motion to vacate the plenary order of protection and for a rehearing pursuant to section 2-1203(a) of the Code of Civil Procedure (735 ILCS 5/2-1203(a) (West 2014)). Terry asked for a rehearing because he did not have an attorney at the first hearing to present evidence on his behalf, which affected his ability to defend himself. He did not know to subpoena an officer from the Champaign police department and an investigator from the Department of Children and Family Services (DCFS). He erroneously believed he could submit a DCFS document showing the allegation of abuse against him in this case was “unfounded.” Respondent did not cross-examine the child out of concern doing so would harm their relationship. Further, the motion stated: “The Respondent suffers from cancer and, at the time of hearing, was undergoing a 14 week chemotherapy regimen which impaired his mental capacity to competently represent himself at the hearing.” According to Terry, he was prejudiced by his lack of counsel at the November hearing.

¶ 15 On March 23, 2016, the trial court held a hearing on Terry’s motion. The court struck Terry’s motion with regard to evidence not presented at the original hearing. After hearing arguments with regard to his ruling based on the evidence presented at the November 2015 hearing, the trial court denied the remainder of Terry’s motion.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Terry argues the trial court erred in entering the order of protection against him because his actions constituted reasonable discipline of a minor child by a person acting *in loco parentis*. According to Terry, his conduct did not constitute “abuse” as defined by section 103(1) of the Illinois Domestic Violence Act (Act) (750 ILCS 60/103(1) (West 2014)), which states: “ ‘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.”

¶ 19 Section 205(a) of the Act (750 ILCS 60/205(a) (West 2014)) makes clear the standard of proof in a proceeding to acquire an order of protection is proof by a preponderance of the evidence. Where, as here, the trial court granted Carrie’s petition for an order of protection, we will only disturb the court’s decision if the decision was against the manifest weight of the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350, 860 N.E.2d 240, 245 (2006).

¶ 20 Carrie argues the trial court erred in finding Terry was a person *in loco parentis* to Connor. We need not address this issue because the trial court’s decision to grant the order of protection in this case was not against the manifest weight of the evidence presented. “A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.” *Id.* Under

this standard of review, the trial court, as the trier of fact, is given deference because it is in the best position to observe the parties and the witnesses and judge their credibility. *Id.*

¶ 21 The witnesses in this case presented sufficient evidence for the trial court to find by a preponderance of the evidence Terry's actions went beyond reasonable direction. Marilyn and Connor both testified Terry hit Connor. Granted, their testimony was inconsistent in the sense Connor said Terry slapped him twice on each side of the face and banged his head on the floor, and Marilyn said Terry smacked him on the buttocks four times. However, Marilyn did describe the encounter as a "whipping." In addition to the testimony presented, Carrie also presented two pictures showing injuries to Connor on the day in question. One of the pictures showed what appears to be a bruise on Connor's right cheek.

¶ 22 Terry cites *In re S.M.*, 309 Ill. App. 3d 702, 722 N.E.2d 1213 (2000), and *In re J.P.*, 294 Ill. App. 3d 991, 692 N.E.2d 338 (1998), for the proposition corporal punishment by a parent is not *per se* abusive and a parent has a constitutional right to discipline his child. However, as Terry recognizes, a parent's right to impose corporal punishment must be reasonably exercised. *Id.* at 1002, 692 N.E.2d at 345.

¶ 23 We note cases involving abuse are *sui generis* and must be decided on the particular facts in each case. *In re F.S.*, 347 Ill. App. 3d 55, 63, 806 N.E.2d 1087, 1093 (2004).

The facts in the cases relied on by Terry bear little similarity to the situation here.

¶ 24 In *S.M.*, the corporal punishment in question was used on an extremely rebellious teenager who displayed no respect for her parents' rules or the orders of the trial court. Further, the parents admitted using corporal punishment on the teenager. *S.M.*, 309 Ill. App. 3d at 702-05, 722 N.E.2d at 1213-15. This court even noted:

“It is clear from the record that corporal punishment was a last resort. S.M. should be a ward of the court but not for the reasons suggested by this evidence. She may very well be a juvenile delinquent (705 ILCS 405/5-101 through 5-915 (West 1998)) or a minor requiring authoritative intervention (705 ILCS 405/3-1 through 3-33 (West 1998)).” *Id.* at 706, 722 N.E.2d at 1216.

¶ 25 In *J.P.*, the mother was also very honest with the court about her use of corporal punishment. The trial court even stated, “Once again I believe mother is probably one of the most honest and sincere people that I have ever seen in this room.” *J.P.*, 294 Ill. App. 3d at 996, 692 N.E.2d at 340-41. In addition, the court found (1) the mother’s home was appropriate and the child was well cared for in the home; (2) the child was not neglected due to an injurious environment; (3) the corporal punishment imposed never rose to the level of physical abuse; (4) the child faced no substantial risk of injury; (5) the mother’s use of a wooden spoon “was not heinous or ‘terribly offensive’ ”; (6) the child was only bruised one time by the mother’s use of the wooden spoon, and this one instance did not rise to the level of excessive corporal punishment; and (7) “the one incident of a bruise, coupled with the frequency with which [the mother] resorted to the use of the wooden spoon for discipline, ‘just barely’ amounted to excessive corporal punishment.” *Id.* at 1001, 692 N.E.2d at 344. The First District agreed with the trial court’s factual findings, but disagreed the mother’s conduct amounted to excessive corporal punishment. *Id.* The appellate court noted:

“Here, Karen readily admitted to disciplining Jessica with a wooden spoon and said she began using this form of discipline when Jessica was 2 1/2 years old. However, the frequency of these spankings and the number of blows administered never were established with any exactitude. Karen spanked Jessica on the

buttocks, over her clothes. As the court determined, there was only one instance when bruising occurred on Jessica's buttocks—the isolated occasion in December 1994. Karen was so horrified when this occurred that she felt compelled to 'confess' to her ex-husband and baby-sitter. Neither of them was very concerned at the time. The father expressed no concern for six months. The babysitter said the bruise was 'very small,' about 1 to 1 1/2 inches in size, and when the bruise was visible Jessica was not in any pain.

It is significant that the babysitter witnessed the mother's form of discipline on a number of occasions. She said Karen never lashed out at Jessica in anger. Karen was generally calm and patient. More importantly, Jessica appeared happy and unaffected after being disciplined." *Id.* at 1004-05, 692 N.E.2d at 346.

¶ 26 In the case *sub judice*, unlike *J.P.* and *S.M.*, the trial court clearly did not find Terry's denial credible. As a result, the court was left to determine what happened based on the testimony of Connor and Marilyn. Based on the testimony of these two witnesses, the court could have easily concluded Terry lashed out in anger, not in an effort to discipline the child, and injured Connor. Based on the evidence in this case, the trial court's ruling is not against the manifest weight of the evidence presented.

¶ 27 III. CONCLUSION

¶ 28 The trial court's decision to grant Carrie's request for an order of protection against Terry was not against the manifest weight of the evidence in this case.

¶ 29 Affirmed.