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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0296**

In the Matter of:
Leah Maria O’Neil, petitioner,
Respondent,

vs.

Marty Michael O’Neil,
Appellant.

**Filed October 21, 2013
Affirmed
Johnson, Chief Judge**

Wright County District Court
File No. 86-FA-13-445

Timothy A. O’Brien, O’Brien Law Firm, P.C., Minneapolis, Minnesota; and Paula Smoot Ogg, Ogg Law Office, Minneapolis, Minnesota (for appellant)

Stephen J. Berg, Johnson, Larson, Peterson & Halvorson, P.A., Buffalo, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Leah Maria O’Neil petitioned the district court for an order for protection from her estranged husband, Marty Michael O’Neil. The district court granted the petition and issued an order. Marty O’Neil argues that the evidence is insufficient to support the district court’s finding of domestic abuse because the incidents on which the order is based are too remote in time. We conclude that the district court did not err by finding that Marty O’Neil committed domestic abuse, as that term is defined by statute and the applicable caselaw. Therefore, we affirm.

FACTS

The parties were married in July 2010 and lived together in the city of Buffalo until Marty O’Neil moved out of the marital homestead in November 2012. Leah O’Neil petitioned for an order for protection (OFP) on January 24, 2013. In support of her petition, she alleged in a sworn statement that Marty O’Neil had physically and emotionally abused her, both before and during the marriage. She stated, “I live in constant fear that he will return and violently assault me as he has done many, many times before and during our marriage.” As an example, she described an incident in May 2012 in which Marty O’Neil screamed at her and grabbed a pan of fish that she was frying because she was frying it too slowly. She testified that she feared he would assault her with the pan of hot oil, so she fled the house and called a co-worker to pick her up. She also stated that she prepared her last will and testament in December 2012 and gave it to a female friend for safekeeping. She further stated that she decided to seek

protection from further abuse after seeking therapy and counseling. She alleged seven specific incidents of abuse that occurred between December 2009 and May 2012, and she stated that she suspected Marty O'Neil of entering her home (the marital homestead) on January 22, 2013 and taking personal property that he previously had requested.

The district court conducted an evidentiary hearing on January 30, 2013. Leah O'Neil testified that domestic abuse "was a way of life" and that the abuse was "ongoing." She provided specifics concerning some of the incidents alleged in the petition. For example, she testified that, on one occasion, Marty O'Neil shoved her, threw her down stairs, slammed her onto the concrete floor, and twisted her face and neck in front of his children as they yelled for him to stop. Leah O'Neil sought medical treatment for injuries she sustained in that incident. She testified generally that Marty O'Neil engaged in abusive conduct up until the time he moved out: "There were honeymoon phases" when it would stop, but there was "always a shove up against a wall or a warning or . . . a grab around the throat or some shoving." She also testified that she is so fearful of Marty O'Neil that she placed telephone numbers for law enforcement on her speed dial. She further testified that she believes he entered her home on January 22, 2013, and took two tool boxes, which he previously had requested.

In response, Marty O'Neil's father testified that Marty could not be responsible for the removal of the tool boxes because he spent the entire evening at his parents' home, where he had been living since November 2012. Marty O'Neil attended the hearing but did not testify. Marty O'Neil's attorney cross-examined Leah O'Neil as to whether she petitioned for an OFP in response to the divorce papers that Marty O'Neil had served on

her 10 days earlier and whether she was seeking to obtain a financial advantage. Leah O'Neil denied the suggestion and stated that she only wants her husband "to stay away from [her]."

The district court granted the petition and issued a two-year OFP. The district court found that Marty O'Neil engaged in acts of domestic abuse when he "choked, hit, shoved, [and] slammed [Leah O'Neil] to the floor" and that Leah O'Neil "is reasonably in fear of physical harm." The district court rejected the argument that Leah O'Neil filed the petition for purposes of gaining an advantage in the dissolution action. The district court reasoned that the suspicion that Marty O'Neil had taken tool boxes from her home "wasn't necessarily proved" but nonetheless "triggered the immediate fear of potential bodily harm in the future."

Marty O'Neil appeals.

DECISION

Marty O'Neil argues that the district court erred by issuing the OFP because the evidence is insufficient to support the finding that he committed domestic abuse. Specifically, he contends that the evidence of prior incidents of abuse was too stale by the time of the issuance of the OFP. He notes that the most recent incident involving physical assault occurred in February 2012, eleven months before the petition, and the most recent non-physical assault occurred in May 2012, eight months before the petition.

To obtain an OFP under chapter 518B of the Minnesota Statutes, a petitioner must allege and prove the existence of domestic abuse. Minn. Stat. § 518B.01, subd. 4(b) (2012). The term "domestic abuse" is defined by statute as follows:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats . . . ; criminal sexual conduct . . . ; or interference with an emergency call

Id. § 518B.01, subd. 2(a).

In reviewing the issuance of an OFP, we apply a clearly erroneous standard of review to a district court’s findings of fact. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). We do not attempt to reconcile conflicting evidence or to decide issues of witness credibility because those issues “are exclusively the province of the factfinder.” *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (quotation omitted). If a district court finds that domestic abuse has occurred, the court has discretion to issue an OFP. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). “A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law.” *Pechovnik*, 765 N.W.2d at 98 (quotation omitted).

In this case, the district court relied on the second prong of the statutory definition of domestic abuse. The district court found that Leah O’Neil “is reasonably in fear of physical harm” from Marty O’Neil because he previously engaged in acts of domestic abuse when he “choked, hit, shoved, [and] slammed [Leah O’Neil] to the floor.” For purposes of this appeal, Marty O’Neil does not dispute the prior incidents of domestic abuse but, rather, contends that those incidents are not recent enough to cause Leah O’Neil to be in fear of physical harm at the time she petitioned for the OFP.

Marty O’Neil relies heavily on this court’s opinion in *Kass v. Kass*, 355 N.W.2d 335 (Minn. App. 1984). The petitioner in *Kass* sought an OFP against her former husband based primarily on incidents of physical harm that had occurred four or more years earlier. *Id.* at 336-37. The district court issued an OFP, but this court reversed, holding that “‘domestic abuse’ under the Minnesota Domestic Abuse Act . . . require[s] either a showing of present harm, or *an intention on the part of appellant to do present harm.*” *Id.* at 337 (emphasis added); *see also Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986) (reversing issuance of OFP based on incidents occurring two years before petition).

Marty O’Neil’s argument has some logical force but ultimately fails. The caselaw does not provide that an incident of domestic abuse occurring eight months or eleven months prior to a petition for an OFP is, as a matter of law, too remote in time to support the issuance of an OFP. Collectively, *Kass* and *Bjergum* would support an argument that incidents of domestic abuse occurring more than two years earlier are too stale to support an OFP. But the incidents in this case were considerably more recent.

More importantly, the caselaw provides that an intent to inflict fear may be “inferred from the totality of the circumstances, including a history of past abusive behavior.” *Pechovnik*, 765 N.W.2d at 99. In this case, the totality of the circumstances reveals a relatively severe pattern of domestic abuse that reasonably could cause a person to be fearful of future abuse. Some of the prior incidents resulted in physical injuries that required medical treatment. The most recent incident, in May 2012, caused Leah O’Neil to be so fearful that she fled the home and sought refuge with a co-worker until the

following day. Leah O'Neil testified that the abuse was persistent, having occurred both before and throughout the marriage. Also, it appears that Leah O'Neil's delay in petitioning for an OFP was attributable to fear, which she overcame after counseling and therapy. In addition, Leah O'Neil filed the petition shortly after Marty O'Neil commenced dissolution proceedings because she expected that she might encounter him in the course of dissolution proceedings. In light of the previous incidents and the other circumstances to which Leah O'Neil testified, the district court did not clearly err by finding that Leah O'Neil was reasonably in "fear of imminent physical harm, bodily injury, or assault," Minn. Stat. § 518B.01, subd. 2(a)(2), and, thus, that Marty O'Neil had "an intention . . . to do present harm," *Kass*, 355 N.W.2d at 337.

Marty O'Neil also contends that the district court erred by relying on the January 22, 2013 removal of the tool boxes from Leah O'Neil's home as a reason for issuing the OFP. The district court did not find that Marty O'Neil was the person who took the tool boxes. But the district court did find that the incident was a "triggering event," which "indicate[d] . . . that there is a fear of imminent bodily harm based on past acts." In essence, the district court reasoned that Marty O'Neil was responsible for Leah O'Neil's fear regardless whether he actually took the tool boxes. The district court's reasoning is consistent with the totality-of-the-circumstances approach prescribed by *Pechovnik*. The record supports the finding that Marty O'Neil previously had engaged in conduct that reflected "an intention . . . to do present harm." *Kass*, 355 N.W.2d at 337. The record also supports the finding that Leah O'Neil remained aware of Marty O'Neil's prior conduct and fearful that he might engage in harmful conduct in the future. Even if

we assume that Marty O'Neil did not take the tool boxes on January 22, 2013, he is not absolved of the prior conduct that is primarily responsible for instilling the fear that Leah O'Neil experienced on January 22, 2013.

In sum, the totality of the circumstances supports the district court's finding that domestic abuse occurred, and the district court did not abuse its discretion by issuing a two-year OFP to protect Leah O'Neil from additional domestic abuse.

Affirmed.