STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1904

Brenda Marie Deitering, o/b/o Donavon Bauer, petitioner,
Respondent,

vs.

Brian Lee Mulligan,
Appellant.

Filed August 31, 2010
Affirmed
Peterson, Judge

Washington County District Court
File No. 82-CV-09-3000

Brenda M. Deitering, Stillwater, Minnesota (pro se respondent)

Brian L. Mulligan, St. Paul, Minnesota (pro se appellant)

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Peterson, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Pro se appellant Brian Mulligan challenges the grant of pro se respondent-mother Brenda Deitering's petition for a harassment restraining order (HRO) on behalf of her minor son. He argues that a different judge should have heard the case, the record does

not support an HRO, and an HRO is improper because he is a guardian ad litem (GAL). We affirm.

FACTS

In 2004, appellant, then a member of the big-brother program, was assigned mother's son, then age ten, as a little brother. About three months later, for reasons that are disputed, that relationship ended. A month after that, mother allowed appellant, who was no longer a member of the big-brother program, to start seeing son again. In 2008, mother terminated the relationship because she felt it "was no longer positive" and sought an HRO to preclude appellant from contacting her and son. Also in 2008, mother, son, and mother's daughter moved from Ramsey County to Washington County. A hearing on mother's HRO petition was set in Ramsey County District Court, but mother could not attend. As a result, mother's HRO petition was dismissed, and she re-filed the petition in Washington County. After a contentious October 2008 hearing, the district court dismissed mother's second petition. At that hearing, the district court judge apparently told appellant that the parties' future disputes would be assigned to that judge's calendar.

After the October 2008 dismissal of mother's second HRO petition, appellant completed guardian-ad-litem training. By March 2009, appellant was seeing son, at least initially, without mother's knowledge. Appellant used a social-networking account to contact son, and, on at least three occasions, appellant went to son's school, identified himself as a "big brother" and a GAL, told school officials that he was there to check on son's welfare, and spent time talking with son – on at least one occasion, pulling son out of two hours of class to do so. This upset mother because son has "academic issues" and

"mental health issues." Appellant also sent letters to son and, apparently knowing that mother forbade appellant's contact with son, had at least one other person call son on his behalf. Mother called the police and changed her phone number. A police investigation showed that appellant contacted son by using the social-networking account, sending letters, making phone calls, and meeting son at school.

Mother filed a third HRO petition, seeking an HRO on behalf of herself and both her son and her daughter, and alleging that (a) appellant approached son at school after mother told appellant that she did not want him contacting son, got mother's unlisted telephone number from son, and set up a meeting with son; (b) appellant used other persons to make a phone call to son on his behalf; (c) mother was afraid that appellant was "obsessed" with son and was afraid that appellant "will eventually do something drastic"; and (d) law enforcement recommended that she obtain an HRO.

A contentious hearing on mother's third petition occurred before a different district court judge than presided at the hearing on mother's second petition. Both parties were pro se. Appellant alleged that son repeatedly contacted him, that son's incarcerated father physically abused son, and that mother neglected son by not having food in the house. Appellant admitted to having a friend call son and to going to son's school three times, telling the school staff members that he was a "big brother" and a GAL and was checking on son's "welfare," and to pulling son out of class. Appellant claimed that son is afraid of mother and foster care and, therefore, will not talk to counselors or the police about living in mother's home. Appellant also claimed that son ran away from home and appellant picked up son, but that, because of the conditions at son's home, appellant did

not return son to his home. The district court found reasonable grounds to believe that appellant had engaged in harassment and, based on this finding, issued an HRO precluding appellant from having contact with son.

D E C I S I O N

I.

Appellant argues that mother's third HRO petition should have been heard by the judge who said that the parties' future disputes would be assigned to that judge's calendar. But because the district court file does not show that appellant objected to a different judge hearing mother's third petition, the propriety of that judge hearing the third petition is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only questions that were presented to and considered by district court).

Even if this court addressed the question, reversal would not be required. A party may remove a judge from a case, either peremptorily or for prejudice, by following the procedures in Minn. R. Civ. P. 63.03. To challenge a judge's refusal to honor a notice seeking peremptory removal, a party must seek a writ of prohibition. *McClelland v. Pierce*, 376 N.W.2d 217, 219 (Minn. 1985);[1] *Zweber v. Zweber*, 435 N.W.2d 593, 594 (Minn. App. 1989), *review denied* (Minn. Mar. 29, 1989). Appellant did not follow the procedures in rule 63.03 and did not seek a writ of prohibition. Seeking, in this appeal, what

[1] The version of Minn. R. Civ. P. 63.03 in effect when *McClelland* was decided referred to a "notice to remove" as an "affidavit of prejudice."

amounts to a retroactive peremptory removal of a judge who has already decided the case does not approximate the procedures in rule 63.03.

After a hearing starts, a party may seek to remove a judge for prejudice, but doing so requires the party to affirmatively show prejudice on the part of the judge. Minn. R. Civ. P. 63.03; *Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990), *superseded by statute on other grounds*, 1986 Minn. Laws ch. 455, § 83, at 881. That showing is to be made in the first instance to the district court, not to an appellate court. *See Nachtsheim v. Wartnick*, 411 N.W.2d 882, 890-91 (Minn. App. 1987) (holding that successor judge's refusal to remove himself for alleged bias "was properly within his discretion"), *review denied* (Minn. Oct. 28, 1987). Furthermore, because the focus of mother's third HRO petition was appellant's conduct after the dismissal of her second petition, appellant's allegations regarding occurrences before that dismissal have limited relevance to whether the harassment alleged in mother's third petition occurred. Thus, appellant has not alleged, and the record does not show, the prejudice or the implied or actual bias required to preclude the new judge from hearing mother's third HRO petition.

II.

A district court may grant an HRO if, among other things, the court finds "reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3) (2008). "Harassment" includes "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." *Id.*, subd.

1(a)(1) (2008). The district court found reasonable grounds to believe that appellant engaged in harassment because appellant had "made uninvited visits to [son] by going to his school & meeting with him without [mother's] permission & against her wishes" and "has continued to have contact with [son] without the express or implied approval of [son's] guardian, including contact at his school and via telephone." The district court then ruled that "[appellant] shall have no contact with . . . [son]" and that "[appellant] shall stay away from where [son] resides."

Appellate courts review a district court's findings of fact for clear error, give due regard to a district court's credibility determinations, and will not alter a district court's decision regarding whether to grant an HRO absent an abuse of discretion. Minn. R. Civ. P. 52.01 (findings of fact and credibility determinations); *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008) (grant of HRO). The finding of appellant's uninvited visits with son "by going to his school & meeting with him without [mother's] permission & against her wishes" is supported by the record. Appellant admits that, on at least three occasions, he went to son's school, identified himself to school staff as a "big brother" and a GAL, said that he was there to check on son's welfare, and talked with son, once pulling son out of two hours of class to do so. Mother's disapproval of appellant's contact with son was unambiguous; five months earlier, she moved away from the area where appellant resided, got an unlisted phone number, and filed, unsuccessfully, a second petition for an HRO against appellant. Appellant described mother's reaction when she learned about appellant's contact with son at school and other outings, stating: "[Mother] called me up, swore, hollered, [and] threatened to kill me.

Since that time I have changed my phone number; I have changed my voice mail. I want nothing to do with her."

The district court also found that appellant "has continued to have contact with [son] without the express or implied approval of [mother], including contact at his school and via telephone." This finding is supported by appellant's admissions and by a police officer's testimony at the hearing that, when investigating mother's complaint about appellant's phone calls, appellant admitted to the officer both that he had called son and that he had a friend call son on his behalf.

On appeal, appellant does not challenge these findings. He argues that he was never accused of abuse. But a district court need not find abuse to grant an HRO; the district court is only required to find "reasonable grounds" to believe that appellant engaged in harassment, which includes "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subds. 1(a)(1), 5(a)(3). Appellant's telephone contacts and visits to son's school fit this definition.

III.

Appellant asserts that after mother's second HRO petition, he "became a guardian ad litem" and "went to [son's] school to check on his welfare and was told this was

wrong. I am a guardian ad litem."[2] On appeal, appellant argues that, under Minn. Stat. § 626.556, subd. 4 (2008), his conduct cannot be the basis for an HRO. But because appellant did not cite Minn. Stat. § 626.556, subd. 4, to the district court, his argument is not properly before this court. *Thiele*, 425 N.W.2d at 582. Even if appellant is a GAL, he has not shown that Minn. Stat. § 626.556, subd. 4, precludes an HRO here. Minn. Stat. § 626.556, subd. 4 (a)(1), states that persons "making a voluntary or mandated report under subdivision 3 [regarding mandated reports of child abuse]" are "immune from any civil or criminal liability that otherwise might result from their actions." Persons "mandated to report" possible child abuse under subdivision 3 include "a professional or a professional's delegate who is engaged in the practice of . . . social services." Minn. Stat. § 626.556, subd. 3(a)(1) (2008). "'Practice of social services,' for the purposes of subdivision 3, includes . . . provision of guardian ad litem . . . services." Minn. Stat. § 626.556, subd. 2(l) (2008). Because appellant was never appointed to be son's GAL, appellant did not provide GAL services for son, and he is not a mandated reporter regarding son under Minn. Stat. § 626.556, subd. 3(a)(1). Also, the statute provides immunity from liability associated with a "voluntary" report, but this record

[2] *See* Minn. R. Gen. Pract. 901.01 (referring to appointment of GAL to advocate for child's best interests); *see also Blacks Law Dictionary* 774 (9th ed. 2009) (defining GAL as "[a] guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 394 (2d ed. 1995) (defining GAL as "a court-appointed guardian who acts in litigation on behalf of someone under a disability, such as a minor"). Appellant does not allege, and the record does not show, that appellant has been appointed by any court to represent son or any other person.

does not show that appellant made a report under Minn. Stat. § 626.554, subd. (4)(a)(1) alleging abuse.[3]

IV.

Appellant states that son "was never called on to testify." If this is intended to be an argument that issuance of the HRO is defective because son did not testify, we reject it for four reasons. First, whether to allow a child to testify is discretionary with the district court. *State v. Manley*, 664 N.W.2d 275, 288 (Minn. 2003). Appellant did not ask to have son testify in the district court. Therefore, a challenge to the lack of son's testimony is not properly before this court. *Thiele*, 425 N.W.2d at 582. Second, appellant fails to allege any prejudice arising from the lack of son's testimony. *See Midway Ctr. Assocs. v. Midway Ctr.*, Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal appellant must show both error and prejudice). Third, appellant cites no authority requiring son to testify, and no prejudice to appellant resulting from the lack of son's testimony is obvious. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (stating that an asserted error unsupported by argument or authority is waived and will not be considered on appeal unless prejudicial error is obvious). Finally, appellant admits that, on at least three occasions, he went to

[3] Appellant also failed to enter evidence that he fit a category of persons who might be protected by Minn. Stat. § 626.556, subd. 4(b).

son's school to see him, which means that son's testimony was not necessary to prove this fact.

Affirmed.