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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1009**

In the Matter of:
Rachel Fonss, petitioner,
Respondent,

vs.

Rick DeMartini,
Appellant.

**Filed February 8, 2011
Affirmed
Huspeni, Judge***

Redwood County District Court
File No. 64-FA-10-25

Rachel Fonss, Lamberton, Minnesota (pro se respondent)

Rick DeMartini, Lamberton, Minnesota (pro se appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and
Huspeni, Judge.

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

UNPUBLISHED OPINION

HUSPENI, Judge

Appellant Rick DeMartini challenges the district court's grant of an order for protection (OFP) to respondent Rachel Fonss, arguing that there is insufficient evidence to support the order and that the terms of the OFP are unsupported by the findings of fact, are overly broad, and preclude him from fulfilling his corporate responsibilities. Because there was sufficient evidence to support the OFP and the terms were within the discretion of the district court, we affirm.

FACTS

DeMartini and Fonss were divorced in early January 2010. Soon after the divorce was finalized, Fonss applied for an OFP against DeMartini, who was set to be released from prison later that month. Fonss detailed numerous allegations of physical violence by DeMartini against her and said that she believed she was in great danger of more physical violence after DeMartini was released. Fonss also alleged that DeMartini had people harass her while he was incarcerated, including having them drive by her home to report her activities and to take pictures of her and her home. Finally, she stated that she was afraid for her life and that DeMartini had said that anyone who hurts him "might just disappear."

An emergency ex parte OFP was granted, and a hearing at which both parties appeared was held at the end of January. At the hearing Fonss testified to numerous incidents of domestic abuse occurring prior to DeMartini's incarceration. These incidents included DeMartini punching Fonss in the stomach, on the arm, and on the shoulder,

pushing her out of bed and causing her to hit her head on the nightstand, pushing her out of a car, throwing things at her, and making vague threats of violence. DeMartini responded to these allegations by testifying that there were no police reports or hospital records documenting any of the alleged abuse and that there were no other witnesses to testify to any alleged abuse. He also noted that, due to his size and strength, if he had hit Fonss there would have been bruises. Finally, DeMartini testified that the commercial business property of Entirely Seamless Inc., started by DeMartini and Fonss in 2003, was located closer than 500 feet from Fonss's home and the OFP, in providing that he not come within 500 feet of her residence, would prevent him from carrying out his duties as president of the corporation.

The district court, in issuing the OFP challenged on appeal, found that DeMartini had punched Fonss, threatened to harm her, and struck her. DeMartini was directed to have no contact with Fonss, to remain 500 feet from Fonss's residence, to not enter her place of employment when she is present, and to not possess firearms or ammunition for one year.

DeMartini filed a notice of appeal, a motion to proceed In Forma Pauperis (IFP), and a motion to dissolve or modify the OFP. The district court denied the motion to proceed IFP on the grounds that the action was frivolous. Subsequently, DeMartini filed an amended motion to dissolve or modify the OFP, arguing that there was insufficient evidence to support the OFP and that it prevented him from entering his place of business.

The district court held a hearing on DeMartini's motion, at which both parties testified that Entirely Seamless, Inc. was currently a defunct corporation.¹ The district court noted that the ownership of the property appeared to be in a state of flux. DeMartini nonetheless argued that he needed access to the business premises to conduct an inventory of the property and to review corporate records. In response to these expressed concerns, the district court modified the OFP to allow DeMartini an opportunity to enter the Entirely Seamless Inc. premises during a six-hour window on two consecutive days. He was not allowed to remove or alter anything on the property without written permission of the court, and Fonss was allowed to have a third party present during the time that DeMartini was on the business premises. The district court also construed the motion to dissolve the OFP as a motion to reconsider that was not properly before it and dismissed it. This appeal followed.

DECISION

I.

We first address DeMartini's claim that there was insufficient evidence to support granting an OFP under the Domestic Abuse Act. Minn. Stat. § 518B.01 (2010). A district court's decision to issue an OFP will be reversed if it lacks sufficient evidentiary support. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). Findings of fact, however, will not be set aside unless they are clearly erroneous, with due regard given to

¹ A transcript of this hearing was not provided to the court. The district court stated in its memorandum accompanying the OFP that DeMartini "engaged in offensive and contemptuous conduct towards the [district] Court" and, as a sanction, struck DeMartini's affidavit and memorandum from the record.

the district court's opportunity to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01. This court gives great deference to the district court's factual findings and reviews the evidence in the light most favorable to those findings. *Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). A reviewing court will reverse the determination of a district court only if, upon review of all of the evidence, the reviewing court is "left with the definite and firm conviction that a mistake has been made." *McIntosh*, 740 N.W.2d at 10-11 (quoting *Gjovik v. Strobe*, 401 N.W.2d 664, 667 (Minn. 1987)). "As a remedial statute, the Domestic Abuse Act receives liberal construction" in favor of the injured person. *Swenson v. Swenson*, 490 N.W.2d 668, 670 (Minn. App. 1992).

The Domestic Abuse Act authorizes the district court to issue an OFP to "restrain the abusing party from committing acts of domestic abuse." Minn. Stat. § 518B.01, subd. 6(a)(1). Domestic abuse includes "physical harm, bodily injury, or assault," and the infliction of fear of imminent harm by one family or household member against another. *Id.*, subd. 2 (a)(1)-(2). Former spouses are included in the definition of family or household member. *Id.*, subd. 2 (b)(1). To establish domestic abuse, the petitioner must show present harm, or an intention by the alleged abuser to inflict present harm. *Chosa*, 693 N.W.2d at 489. "Present intent to inflict fear of imminent physical harm, bodily injury, or assault can be inferred from the totality of the circumstances, including a history of past abusive behavior." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). Past abusive behavior, however, is not dispositive on its own to show intent to inflict physical harm. *Chosa*, 693 N.W.2d at 490; *see also Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 928 (Minn. App. 2006) (interpreting *Chosa* as only

applying to intent to inflict physical harm and not to whether there is a reasonable fear of physical harm).

In issuing the OFP after a hearing in which both parties testified, the district court found Fonss's testimony to be credible and determined that DeMartini "has punched Petitioner, threatened to harm Petitioner, and struck Petitioner."

Viewing the evidence in a light most favorable to the district court's findings, we conclude that sufficient evidence was presented to establish a history of physical violence. A history of physical violence may not be dispositive, however, on the question of whether an OFP was properly granted. Arguments regarding the stale nature of such evidence may be persuasive. *See Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984) (finding evidence of abuse from four years ago not sufficient). Although much of the evidence Fonss presented addressed abuse that occurred before DeMartini's incarceration, the district court also had evidence of a present intent to inflict fear of imminent harm from the continued harassment DeMartini engaged in from prison and from his general threat that anyone who hurts him "might just disappear." Taken as a whole, therefore, the evidence was sufficient to support issuance of the OFP.

DeMartini next alleges that the OFP lacks sufficient findings of fact, and cites *Andrasko v. Andrasko*, 443 N.W.2d. 228, 230-31 (Minn. App. 1989), to support that allegation. DeMartini's reliance on *Andrasko*, however, is misplaced. In that case, while there were allegations of past abuse, the petitioner did not allege any intent to do present harm. That is not the case here. Fonss states in her application that she believes she is "in great danger of physical violence when [DeMartini] is released" and that she is

presently afraid for her life. The district court found Fonss to be credible. It is also noteworthy that DeMartini's incarceration effectively prevented any recent opportunity to act on any threats or harassment. The district court was within its discretion to determine the reasonableness of Fonss's present fear that she might be harmed upon DeMartini's release from incarceration. The findings of fact are sufficient and are supported by evidence in the record.

II.

We next address DeMartini's argument that provisions of the OFP are excessively restrictive and conclude that this argument lacks merit. The Domestic Abuse Act defines the range of terms the district court may impose in an order for protection. Minn. Stat. § 518B.01, subd. 6. We review issues of statutory construction *de novo*. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). When construing statutes, we attempt "to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). "We construe statutes to effect their essential purpose but will not disregard a statute's clear language to pursue the spirit of the law." *Lee*, 741 N.W.2d at 123. "If the meaning of a statute is unambiguous, we interpret the statute's text according to its plain language." *Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010).

The Domestic Abuse Act sets forth several options that the district court may employ in providing relief if it grants an OFP, including the ability to exclude the abusing party from the residence of the petitioner and a reasonable area surrounding the residence, and to exclude the abusing party from the place of employment of the

petitioner. Minn. Stat. § 518B.01, subd. 6(a)(2)(3), (9). The statute also specifies that the OFP “shall be for a period not to exceed two years, except when the court determines a longer period is appropriate.” *Id.*, subd. 6(b).

The OFP crafted by the district court is clearly within its statutory authority. Provisions directing permissible contacts between DeMartini and Fonss directly parallel language in the statute. The district court also acted within its statutory authority in setting forth conditions under which DeMartini would be permitted access to the commercial property in order to inventory its contents. Whatever merit there might have been to DeMartini’s argument that he was denied access to this property and was therefore unable to perform his corporate duties is severely undermined by that company’s dire economic situation.² DeMartini was given the opportunity to access the location and inventory the contents and under these circumstances, the district court did not abuse its discretion in crafting the relief it granted.

Finally, DeMartini challenges the failure of the district court to make specific finding regarding the duration of the OFP. Again, there is no merit to this challenge. In *Braend*, this court affirmed the district court’s extension of an OFP for a period of two years, noting that Minn. Stat. § 518B.01, subd. 6(b) does not require the district court to make specific findings to extend an OFP beyond one year. 721 N.W.2d. at 928. The court in *Braend* noted that “the legislature did not require a district court to make

² The corporation is bankrupt. DeMartini has appealed the district court’s order foreclosing on the corporate building and order its sale; that matter is currently pending before this court. *Clements Lumber Inc. v. DeMartini*, A10-0855. The district court’s order distributing the remaining assets, made as part of the parties’ dissolution, is also on appeal to this court. *Fonss v. DeMartini*, A10-411.

duration-related findings to issue an OFP for a fixed period of more than one year, and we cannot read that requirement into the statute.” *Id.* Given the precedent addressing an OFP of two-year duration, we have no difficulty in concluding that a district court need not make specific findings to support an OFP within the one year authorized by the statute.

Because the evidence was sufficient and the findings adequate to support the OFP and because the terms were within the discretion of the district court, we affirm.

Affirmed.