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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1775**

In the Matter of: Jerry Dean Hicks  
on behalf of Mackensie Hicks, Macie Hicks and Leland Hicks,  
minor children, petitioner,  
Respondent,

vs.

Kit Beyer,  
Appellant,  
Jennifer Sue DeRaad,  
Respondent Below.

**Filed June 11, 2012  
Reversed  
Stauber, Judge**

Olmsted County District Court  
File No. 55FA115140

Jerry Dean Hicks, Stewartville, Minnesota (pro se respondent)

Harvey N. Jones, Harvey N. Jones, P.A., Hastings, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and  
Rodenberg, Judge.

**UNPUBLISHED OPINION**

**STAUBER**, Judge

On appeal from the district court's grant of an order for protection (OFP),  
appellant argues that the evidence was insufficient to support the issuance of the OFP.

Because we conclude that the district court's finding of domestic abuse was not supported by the record, we reverse.

## FACTS

In July 2011, respondent Jerry Dean Hicks filed an affidavit and petition for an OFP on behalf of his three minor children against the children's mother, Jennifer Sue DeRaad, and her boyfriend, appellant Kit Beyer. Respondent and DeRaad are the parents of all three children, but they were never married. DeRaad has custody of the children, and a formal custody order has never been in place between respondent and DeRaad. In his affidavit, respondent alleged the following:

My four yr old son and his sisters told me [appellant] has been spanking and yelling at my son to the point of where he is scared to go home. On July 23rd approx. 2 am [respondent's son] woke up screaming and crying and urinated on himself and when asked what was wrong stated he had a bad dream about [appellant] spanking and yelling at him. [DeRaad] showed up July 24th to pick kids up with bruised arm and bruised eye.

Respondent stated that he was seeking relief because his "son is afraid to go home and all the kids have expressed that they don't want to be there and that is odd for them to say so something isn't right there." The district court issued an emergency ex parte OFP.

At the OFP hearing, respondent testified that his son continued to wake up scared in the night, the children did not want to go home because they were scared, and that he wanted the children to remain in his custody and for child protection to investigate.

DeRaad testified that her children were not in danger in her home and she never left them unattended. She stated that she moved in with appellant "to bring [the children]

to a better home, to a safer place, not just to make it worse for them. [Appellant] has never touched them children.” She stated that she “brought them out of an abusive relationship with [respondent].” DeRaad further testified that respondent had previously filed at least one OFP petition against her in another county.

Appellant testified that he “never laid a hand on the children.” He stated that he “talk[s] sternly to them when they’re getting into things they don’t need to or—They’re kids, you know.” Appellant alleged that respondent filed the petition to “retaliat[e] for not getting his way with the oldest daughter living with him.” He testified that respondent called DeRaad and told her that he would “drop the whole thing” if she allowed his oldest daughter to live with him.

The district court found that there was no basis for issuing an OFP against DeRaad and on behalf of two of the children, and dismissed them from the petition. But the district court issued an OFP against appellant on behalf of respondent’s son based on the following findings:

Acts of domestic abuse have occurred, including the following assaultive and threatening conduct by [appellant] toward [respondent’s] minor [son] as outlined in [respondent’s] affidavit, including the following: repeated acts of yelling and spanking, the latter of which resulted in bruising on the child; the child also urinated on himself out of fear of having continued contact with [appellant].

The district court ordered appellant not to “commit any acts of domestic abuse against” the child or have any contact with the child.<sup>1</sup>

Appellant moved to modify the OFP, requesting that the district court amend its findings to state that acts of domestic abuse did not occur and dismiss the OFP. The district court denied the motion. This appeal follows.

## D E C I S I O N

It is within the district court’s discretion to grant an OFP under the Domestic Abuse Act, Minn. Stat. §§ 518B.01-.02 (2010). *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). The district court abuses its discretion if it makes findings not supported by the record or misapplies the law. *Id.* When reviewing the district court’s decision to grant an OFP, this court applies a clearly erroneous standard of review to the district court’s findings of fact. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). This court will only reverse the district court’s findings if it is “left with the definite and firm conviction that a mistake has been made.” *Pechovnik*, 765 N.W.2d at 99 (quotation omitted). This court does not reconcile conflicting evidence or decide issues of witness credibility because those issues “are exclusively the province of the factfinder.” *Id.* (quotation omitted).

A petitioner seeking an OFP must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b). “Domestic abuse” is defined as “(1) physical harm, bodily injury,

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<sup>1</sup> The OFP stated that it was effective for six months and at the time of this appeal the OFP had expired. But because appellant has established that he will suffer collateral consequences as a result of the OFP, his appeal is not moot and we consider the merits of his appeal.

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” if it is “committed against a family or household member by a family or household member.” *Id.*, subd. 2(a). The petitioner must demonstrate “present harm, or an intention on the part of [the responding party] to do present harm.” *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984).

Appellant argues that the district court’s finding that he committed domestic abuse by yelling and spanking respondent’s son is unsupported by the record. We agree. The district court based its finding solely on the statements respondent made in the OFP petition, all of which were hearsay statements that respondent’s children made to respondent. Respondent did not submit any additional evidence to support those hearsay statements. In addition, there is nothing in the record to support the district court’s finding that respondent’s son suffered bruising as a result of appellant spanking him. The only reference to bruising in the record is respondent’s allegation in the petition that “[DeRaad] showed up July 24th to pick kids up with bruised arm and bruised eye.” But this allegation refers to DeRaad’s bruising, not bruising on respondent’s son, and there is no other evidence in the record to support a finding that respondent’s son had bruises. Thus, we conclude that the district court’s finding that appellant committed acts of spanking that resulted in bruising on the child is not supported by the record.

Appellant also contends that there is no evidence in the record that appellant intended to cause respondent’s son to fear imminent physical harm. We agree. The district court found that the child “urinated on himself out of fear of having continued

contact” with appellant but did not explicitly find that appellant inflicted fear of imminent physical harm or bodily injury on the child. The district court based this finding solely on hearsay statements set forth in the petition and there is no other evidence in the record to support that finding. Thus, we conclude that this finding is not supported by the record.

The district court’s finding that appellant committed domestic abuse against respondent’s minor son is not supported by the record. Therefore, we conclude that the district court abused its discretion by granting respondent’s petition for an OFP.

**Reversed.**