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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0568**

In the Matter of:
Pauline Mary Welsand, petitioner,
Appellant,

vs.

Theodore Robert Welsand,
Respondent.

**Filed January 6, 2009
Affirmed
Stoneburner, Judge**

Beltrami County District Court
File No. 04FA08274

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Rana S.A. Fuller, Battered Women's Legal Advocacy Project, 1611 Park Avenue South, Suite 2, Minneapolis, MN 55404 (for amici MN Coalition for Battered Women and Battered Women's Legal Advocacy Project)

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant mother challenges the district court's denial of her petition, filed on behalf of herself and the minor children of the parties, for a domestic-abuse order for protection against respondent father. Because the district court did not display bias against appellant and did not abuse its discretion in concluding that there was insufficient evidence to support the issuance of an order for protection, we affirm.

FACTS

The marriage of appellant Pauline M. Welsand (mother) and respondent Theodore R. Welsand (father) was dissolved in June 2005. The parents have joint legal custody of the two minor children of their marriage, W.W., born October 28, 1998, and E.W., born July 28, 2000. Mother has physical custody of the children subject to father's parenting time.

Father had the children for part of their 2007 Christmas holiday from school. Mother and her sister picked up the children on January 1, 2008. On January 15, 2008, mother petitioned for an order for protection (OFP) on behalf of herself and the children. The petition asserts that (1) father choked E.W.; (2) father gave W.W. "a pill that made him feel funny"; and (3) the boys "report seeing [father] hit his new wife." The record reflects that the choking incident occurred on or about December 28, and the pill incident occurred during a separate visitation in November 2007. An emergency OFP was granted. Father's parenting time was suspended, and the matter was set for hearing on February 1, 2008.

Both parents were represented by counsel at the hearing. Mother's testimony about E.W.'s description of the choking incident and father's testimony about the incident were fairly consistent. E.W. and another boy got into a dispute over a sled. Father went outside to intervene but at some point decided that E.W. was overly agitated about the situation and told him to go back to the house to calm down. E.W. proceeded toward the sled, and father grabbed the collar of E.W.'s jacket and lifted or pulled him back toward the house. Father and his current wife did not observe marks on E.W.'s neck, and after E.W. had spent about one and one-half hours in his room, the incident was not discussed at their home. When mother picked up the children on January 1, E.W. said that his throat hurt. Mother and her sister testified that there were zipper marks on E.W.'s neck. When E.W. subsequently refused to visit father, father attempted to apologize to mother and E.W., admitting that he should not have grabbed E.W.'s jacket in that manner.

Mother introduced a letter from the visitation-exchange program supervisor with attached notes written by the children when they refused to visit father on January 25. W.W.'s note indicated that he did not feel comfortable because of what father did to E.W. E.W.'s note made no reference to the choking incident or fear of father. The supervisor's letter stated that E.W. told her "I do not want to go because the last time I went there Bob choked me," and W.W. told her "I am afraid of him ever since he choked [E.W.] and I am afraid that he will do it to me."

There was testimony about W.W.'s medication and the fact that it was not sent with him for visitation. Mother presented evidence that W.W. did not need to take the

medication during visitation. There was very little testimony about the pill that father gave W.W., except that it appeared to be Ritalin, somewhat similar to W.W.'s prescription medication. Mother took W.W. to the hospital when she learned that he had taken the pill, but there was no longer any residue of the medication in his system.

There was testimony at the hearing about ongoing problems between the parents over visitation; mother's perception that father's demands for visitation were threatening; and father's use of corporal punishment during the marriage. There was evidence that mother had previously sought an OFP that was denied and that father had obtained an order for compensatory visitation. Mother testified that she was seeking supervised visitation through the OFP. Father testified that he intended to petition the family court to address the ongoing parenting-time issues.

In closing argument, mother's counsel argued that the children fear their father after the choking incident and that an OFP should be entered. Father's counsel opened his closing argument by stating: "the Court is aware and will agree that these [OFP] hearings certainly can be an abuse of discretion and brought to frustrate . . . parenting time." Father's counsel went on to address the "choking" event in the context of the parents' ongoing parenting-time issues and argued that all of the parties' parenting issues should be addressed in family court where the dissolution was venued, rather than in the context of an OFP. Neither counsel addressed the pill incident in closing arguments.

The district court ruled from the bench, stating:

I am in agreement [with father's counsel]. I don't see abuse in this situation. I agree that the [OFP] is the most abused form of harassment in the Courts. However, I am not

claiming that this is. I am just telling you that I don't see abuse here. I see a father who was parenting his child and . . . wouldn't do again what he did by grabbing the child. But certainly grabbing a child and accidentally causing a mark on the child is not abuse. There was not enough evidence on the proposed pill

The district court stated that the parties have a lot of problems and need to go back to family court to take care of parenting-time issues. The petition for an OFP was dismissed, and this appeal followed.

DECISION

Minn. Stat. § 518B (2008) (the Domestic Abuse Act) authorizes district courts to issue an OFP to restrain an abusing party from committing acts of domestic abuse. Minn. Stat. § 518B.01, subd. 6(a) (1) (2006); *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). The decision to grant an OFP under the Domestic Abuse Act is within the district court's discretion. *Chosa*, 693 N.W.2d at 489. The denial of a petition for an OFP is reviewed for abuse of discretion. *Sweep v. Sweep*, 358 N.W.2d 451, 453 (Minn. App. 1984). "In order to establish domestic abuse, a party must show 'present harm or an intention on the part of the [alleged abuser] to do present harm.'" *Chosa*, 693 N.W.2d at 489 (citing *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. App. 1989)).

Mother argues that the district court's findings that there was insufficient evidence to support an OFP and that father was "parenting" are clearly erroneous. A district court abuses its discretion when its findings are not supported by the record or if it misapplies the law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App.

2006). We review the record in the light most favorable to the district court's findings, and we will reverse those findings only if we are "left with the definite and firm conviction that a mistake has been made." *Chosa*, 693 N.W.2d at 489. We defer to the district court's determination of witness credibility. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). "We will not reverse merely because we might have viewed the evidence differently." *Id.*

The Domestic Abuse Act defines "domestic abuse," in relevant part, as "(1) physical harm, bodily injury, or assault; [or] (2) the infliction of fear of imminent physical harm, bodily injury, or assault[.]" Minn. Stat. § 518B.01, subd. 2(a) (2006). "Physical harm," "bodily injury," and "assault" are not defined in the Domestic Abuse Act.

"Assault" is defined elsewhere as: "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2006). Despite the lack of explicit findings by the district court, it is apparent that the district court found father's testimony credible that he did not intend to cause fear of bodily harm and did not intend to inflict bodily harm on E.W. Although father intentionally grabbed E.W.'s jacket, there is no evidence in the record that father intended to create a fear of physical harm or intended to inflict harm. We therefore conclude that the district court did not clearly err by implicitly finding that father did not assault E.W.

"Physical harm" and "bodily injury" are not defined in Minnesota statutes. "Bodily harm," which appears to encompass both concepts, is defined as "physical pain

or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2006). In this case, there is no evidence that E.W. complained of pain or injury at the time of the incident, but, approximately four days after the incident, he told his mother that his throat hurt, and mother and her sister testified that there were zipper marks on E.W.’s neck. It is not clear whether the district court discredited mother’s and mother’s sister’s testimony about E.W.’s complaint of pain and the existence of a mark, or whether the finding of no domestic abuse was based on the lack of evidence of present harm, or lack of evidence of father’s intention to inflict present harm, as required by the case law, or both. In either event, we conclude that the record supports the district court’s ultimate finding that mother failed to establish domestic abuse in this case.

Mother argues that the district court’s characterization of the incident as “parenting” is a misapplication of the Domestic Abuse Act because the act does not imply a different standard for what would qualify as domestic abuse during “parenting.” But both parents presented evidence of how each disciplines the children and what each considers to be appropriate discipline for children. And the evidence is uncontroverted that the incident occurred in the context of a father attempting to redirect his child in a conflict situation with another child. The record supports the district court’s finding that father was engaged in “parenting” when the incident occurred, but that finding does not demonstrate that the district court applied an erroneous standard or otherwise misapplied the Domestic Abuse Act to the incident.

Mother also argues that by ruling from the bench and agreeing with father’s counsel that OFPs are frequently abused, the district court, if not clearly demonstrating

bias, at least created an “appearance of impropriety” from which a reasonable person could assume that the case was not decided in a fair and impartial matter. We disagree. While father’s counsel’s remarks about the misuse of OFPs and the district court’s agreement with those remarks were unnecessary and unfortunate, the district court was careful to state that it was not asserting that mother’s petition constituted an abuse of the OFP process. The district court plainly stated that it was ruling from the bench based on lack of evidence to support an OFP and not because it believed that mother was abusing the OFP process. The district court acknowledged that the parties need assistance with regard to parenting issues and advised them to return to family court to more appropriately address those issues.

Affirmed.