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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1876**

Mary Michelle Zavoral,
on behalf of K.Z.Z., petitioner,
Respondent,

vs.

Timothy Lashon Wilson,
Appellant,

and

Sara Zavoral, intervenor,
Appellant.

**Filed June 2, 2009
Affirmed as modified
Peterson, Judge**

Hennepin County District Court
File No. 27-FA-08-4093

Mary M. Zavoral, 4200 45th Avenue North, #106, Robbinsdale, MN 55422 (pro se respondent)

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Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a second amended order for protection, appellants argue that the district court lacked subject-matter jurisdiction over the original petition and erred by not vacating the original order for protection. We affirm as modified.

FACTS

Respondent Mary Zavoral (grandmother) is the mother of appellant Sara Zavoral (mother), who is the mother of K.Z.Z. On June 25, 2008, grandmother filed a petition for an order for protection (OFP) against appellant Timothy Wilson, who is not the father of K.Z.Z. but had been living with mother for six years. At the time of the petition, K.Z.Z. was five years old. In her petition, grandmother claimed that K.Z.Z. told her that Wilson had sexually abused him in a number of ways, and she described a number of odd behaviors on the part of K.Z.Z. that she believed indicated that he had been abused. Grandmother acknowledged in her petition that she had filed a previous petition for an OFP in 2007 in Ramsey County, which she claimed was dismissed “because I believed my daughter’s dad saying that there would be no further assaults against my grandson [K.Z.Z.]”

On July 8, 2008, a hearing on grandmother’s June 25 petition was held before a referee in Hennepin County District Court. Grandmother testified that she had been temporarily taking care of K.Z.Z. for about a month and a half. Grandmother also

testified that she had taken K.Z.Z. for an interview at CornerHouse¹ regarding the alleged abuse. Later testimony revealed that, during the CornerHouse interview, K.Z.Z. had related no allegations of sexual abuse, although he did describe some physical abuse by Wilson. With respect to the petition for an OFP that she filed in Ramsey County in 2007, grandmother testified that she dismissed it “because [K.Z.Z.’s grandfather] John was telling me that he would make sure that no more further harm would happen to [K.Z.Z.]”

K.Z.Z.’s guardian ad litem (GAL) testified at the hearing that she was concerned about taking K.Z.Z. away from mother based on allegations of abuse that the CornerHouse interview had shown to be unfounded. She testified that, although K.Z.Z. had stated that Wilson spanked him with a belt, the family was receiving services and that she believed that mother would be capable of protecting K.Z.Z. from Wilson. She also expressed concern about the fact that grandmother had had three sex offenders in her home at various times. Mother was not allowed to make an argument to the court or to cross-examine a witness, but Wilson was given an opportunity to do so. Mother was briefly questioned by the court, but the referee specifically acknowledged that she was not a party to the action.

On July 10, 2008, the district court signed an OFP, in which it found grandmother’s testimony regarding K.Z.Z.’s description of certain acts of sexual abuse to be credible. It also found that grandmother was not motivated by a desire to keep K.Z.Z.

¹ Cornerhouse is a non-profit organization in partnership with the Hennepin County Attorney’s office that assesses suspected child abuse to coordinate forensic interview services. About CornerHouse, <http://www.cornerhousemn.org/about.html> (last visited May 14, 2009).

from his mother and expressed awareness that grandmother had previously filed a petition against Wilson and dismissed it. The court ordered Wilson to not commit any acts of domestic abuse against K.Z.Z. and granted grandmother temporary sole physical custody of K.Z.Z., subject to every-other-weekend parenting time for mother.

On September 16, 2008, mother and Wilson filed a motion asking the court to vacate the OFP and return custody of K.Z.Z. to mother. They also asked, in the alternative, that the court allow mother to intervene as of right under Minn. R. Civ. P. 24.01. In an affidavit attached to this motion, mother claimed, among other things, that grandmother had dismissed her previous petition for an OFP only after finding out that the district court was not able to grant grandmother custody of K.Z.Z. The motion included a transcript from the July 13, 2007, hearing on grandmother's earlier petition in Ramsey County. The transcript indicates that grandmother initially acknowledged that she was asking for an order for protection, and later, the following exchange occurred:

THE COURT: When you issue an order for protection then the law allows me to do a number of things in addition to protecting the child, it says that I can give custody to a party who's parent of the child, I can order child support, if the people are married I can order spousal maintenance, I can say who stays in the home. But if neither of you are the biological or legal parent of this child, that request can't be made in this court, it has to be made in Family Court or in Child Protection, and Child Protection has declined to go forward.

Okay. So nothing that that's what I can do . . . do you still want to have a trial on the issue of domestic abuse?

[GRANDMOTHER]: Not at this point, no.

Appellants argued that this transcript contradicts grandmother's claim in her current petition and in her testimony at the July 8, 2008, hearing that she dismissed her 2007 Ramsey County petition because she thought that mother's father would protect K.Z.Z.

At the September 30, 2007, hearing on appellants' motion to vacate the OFP and return custody of K.Z.Z. to mother, appellants' attorney argued that the district court lacked subject-matter jurisdiction over grandmother's OFP petition because mother was not a party to the proceeding and the district court could not order a change in custody when the child's parent was not a party. The district court refused to vacate the OFP for lack of subject-matter jurisdiction, but it allowed mother to intervene with no objection from grandmother. However, mother was not given an opportunity to argue or present evidence regarding custody issues.

The same day, the district court signed an amended OFP, which prohibited Wilson from committing any acts of domestic abuse against K.Z.Z., prohibited mother from allowing Wilson to have any unsupervised contact with K.Z.Z., and required mother and Wilson to participate with Polk County Social Services. The amended OFP also ordered that custody of K.Z.Z. be immediately transferred to mother. A second amended OFP was signed on October 1, 2008, to correct a clerical error in the previous order. This appeal followed.

DECISION

I.

“Subject-matter jurisdiction is a court's power to hear and determine cases that are presented to the court.” *State v. Losh*, 755 N.W.2d 736, 739 (Minn. 2008). “The

existence of subject matter jurisdiction is a question of law, which this court reviews de novo.” *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

The Domestic Abuse Act allows a “reputable adult” to bring a petition for an OFP on behalf of a minor. Minn. Stat. § 518B.01, subd. 4(a) (2008). The statute provides that

[a]n application for relief under this section may be filed in the court having jurisdiction over dissolution actions, in the county of residence of either party, in the county in which a pending or completed family court proceeding involving the parties or their minor children was brought, or in the county in which the alleged domestic abuse occurred. There are no residency requirements that apply to a petition for an order for protection.

Id., subd. 3 (2008). The statute also authorizes the court to grant a wide variety of relief, including the authority to “award temporary custody or establish temporary parenting time with regard to *minor children of the parties* on a basis which gives primary consideration to the safety of the victim and the children.” *Id.*, subd. 6(a)(4) (2008) (emphasis added).

Appellants argue that the district court lacked subject-matter jurisdiction over grandmother’s petition for an OFP because the statute only allows the court to award temporary custody regarding a minor child “of the parties,” and mother was not a party to the action. Appellants also cite *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 450 (Minn. App. 2000), for the proposition that a parent has a due-process right to participate as a party in a legal proceeding involving the custody of her child.

There is no dispute that mother was not a party to the proceeding when the district court initially issued the OFP. But that did not deprive the district court of subject-matter jurisdiction. The provision in Minn. Stat. § 518B.01, subd. 6(a)(4), that allows the court to award custody “with regard to minor children of the parties” relates to the court’s authority to grant particular relief, not the court’s authority to hear the case. However, although the district court had subject-matter jurisdiction, it exceeded its authority by granting grandmother temporary custody of K.Z.Z. in the original OFP and by placing constraints on mother’s custody of K.Z.Z. in the second amended OFP without providing another evidentiary hearing. *Cf. Moore v. Moore*, 734 N.W.2d 285, 288 n.1 (Minn. app. 2007) (noting that “courts and parties often use concepts and language associated with ‘jurisdiction’ imprecisely to refer to, among other things, nonjurisdictional claims-processing rules or nonjurisdictional limits on a court’s authority to address a question”), *review denied* (Minn. Sept. 18, 2007).

This court addressed a similar issue in *Halverson*. In that case, the appellant-mother’s live-in boyfriend was alleged to have abused her child. *Halvorson*, 617 N.W.2d at 449. The child’s father filed a petition for an OFP against the boyfriend but did not include the mother as a party. *Id.* The district court denied the mother’s request to intervene, and this court held that “[t]he failure to grant a parent an opportunity to be heard on custody issues is a denial of equal protection and due process.” *Id.* at 450-51. This court reversed and remanded “to allow the district court to reconsider the order for protection in light of appellant’s arguments and evidence.” *Id.* at 452.

Here, the second amended OFP states: “This case came for evidentiary hearing before Referee David L. Piper on September 30, 2008.” But the September 30, 2008, hearing was only a hearing on the motion to vacate, not an evidentiary hearing on the custody issue. The district court allowed mother to intervene but did not give her an opportunity to present arguments and evidence regarding the custody issue, as required under *Halverson*. Nevertheless, the second amended OFP prohibits mother from allowing K.Z.Z. to have any unsupervised contact with Wilson and states that “[mother] and/or Timothy Wilson’s failure to cooperate with the [GAL] or with Polk County Social Services may result in the IMMEDIATE suspension of [mother’s] custodial rights.” Because the district court did not grant mother an evidentiary hearing before imposing this provision that could result in the suspension of mother’s custodial rights, we conclude that the provision addressing the suspension of mother’s custodial rights may not be included in the second amended OFP. Therefore, we modify the second amended OFP by striking paragraph 13 of the order.

II.

A court may grant a party relief from an order based on “[f]raud . . . , misrepresentation, or other misconduct of an adverse party.” Minn. R. Civ. P. 60.02(c). “Vacating an order is a matter vested in a trial court’s discretion and will not be overturned absent a clear abuse of that discretion.” *Johnson v. Hunter*, 447 N.W.2d 871, 873 (Minn. 1989). “Whether a party has committed fraud or misconduct is within the district court’s discretion as the fact finder and evaluator of the weight and credibility of the evidence.” *Turner v. Suggs*, 653 N.W.2d 458, 465 (Minn. App. 2002). The alleged

fraud or misrepresentation “must not be collateral to, and must affect the ultimate issue(s) of, the case.” *Id.* at 466.

Appellants argue that grandmother’s fraudulent misrepresentations so clearly established her lack of credibility that the district court abused its discretion by not vacating the original OFP. Appellants are correct that the original OFP was based, in part, on grandmother’s representations in both her petition and her testimony that she dismissed her 2007 petition because she thought that mother’s father would protect K.Z.Z. In the original OFP, the district court found credible grandmother’s testimony that “she dropped her [2007] case after her husband/former husband assured her that [K.Z.Z.] would always be protected.” However, the transcript of the hearing on the 2007 petition indicates that grandmother dismissed the petition after the district court told her that it could not give her custody of K.Z.Z., which contradicts her current petition and testimony.

But this contradiction did not require the district court to vacate the original OFP because the contradiction did not go directly to the ultimate issue, which was whether Wilson committed acts of domestic abuse against K.Z.Z. The Domestic Abuse Act allows a petition for an OFP in cases of “domestic abuse.” Minn. Stat. § 518B.01, subd. 4 (2008). “Domestic abuse” includes “physical harm, bodily injury, or assault,” “the infliction of fear of imminent physical harm, bodily injury, or assault,” and making terroristic threats, engaging in criminal sexual conduct, and interfering with an emergency call. Minn. Stat. § 518B.01, subd. 2 (2008). The fact that grandmother’s current petition and testimony are not supported by the transcript of the 2007 hearing

goes only to grandmother's credibility as a witness, not to whether Wilson committed acts of domestic abuse.

Grandmother testified at the hearing about K.Z.Z.'s alleged descriptions of sexual abuse, and the GAL testified that in his Cornerhouse interview, K.Z.Z. described some physical abuse by Wilson. Although the contradictions regarding the dismissal of the 2007 petition call grandmother's credibility into question, it is the province of the district court to make credibility determinations. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (stating that when reviewing an OFP for sufficiency of the evidence, "we view the evidence in the light most favorable to the decision" and "neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder"). Accordingly, we conclude that the district court did not abuse its discretion by refusing to vacate the OFP.

Affirmed as modified.