

IN THE COURT OF APPEALS OF IOWA

No. 2-339 / 11-1380
Filed May 23, 2012

MITZI McELREE,
Plaintiff-Appellant,

vs.

RICHARD McELREE,
Defendant-Appellee.

Appeal from the Iowa District Court for Washington County, Joel D. Yates,
Judge.

Mitzi McElree appeals the denial of her request for a protective order.

REVERSED AND REMANDED.

Charles Pierce of Iowa Legal Aid, Iowa City, for appellant.

Richard McElree, Cedar Rapids, pro se.

Amber Markham of Iowa Coalition Against Domestic Violence, Des
Moines, attorney for amicus curiae.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Mitzi McElree appeals from the district court's dismissal of her petition for relief from domestic abuse. Because of the lack of findings and conclusions in the trial court's dismissal order, and the state of the record, we reverse and remand.

I. Background Facts & Proceedings.

On July 18, 2011, Mitzi McElree filed a pro se petition for relief from domestic abuse against her husband, Richard McElree, whom she asserted had "physically abused me" and "threatened me and I fear for my physical safety."¹ She also asserted she had "repeatedly been abused an[d] assaulted by Rich from 1991 till 2008 when he went to prison for assaulting me and holding our 3 children hostage." Mitzi asked for temporary and permanent protective orders, temporary custody of the children, and temporary financial support.

The district court denied her request for a temporary protective order, but scheduled a hearing for July 29, 2011, at which both Mitzi and Richard appeared without counsel. At the hearing Mitzi stated, "I am pursuing a divorce and just repeatedly am getting—I'm getting badgered every time I turn around, and there is a history of domestic violence for about 15 years, and he was just released from prison for holding the children hostage and for assaulting me." She submitted several exhibits, which were admitted without objection.² One exhibit

¹ Mitzi used the form petition available for pro se litigants available at www.iowacourts.gov/Representing_Yourself/Domestic_Violence/Protecting_Yourself/index.asp, checking the applicable responses and filling in additional information.

² These exhibits, though admitted by the court, were not retained by the clerk of court, but were released to the petitioner upon dismissal of the case. We have been provided copies of some of the exhibits in the appendix.

is a July 14, 2011 letter addressed to the Linn County Sheriff from Dr. Ann Metzger, Mitzi's physician, which stated:

I am concerned about Mitzi's protection since her husband previously was released on December 20, 2010. I'm concerned that he has been at her home and is calling her quite frequently. I feel she needs a restraining order as soon as possible. I want to bring this to your attention that I'm very concerned about patient's welfare.

Another exhibit contained several pages of Facebook wall entries that appear to be an exchange between Mitzi and two other women. When asked if she had anything else she wanted to tell the court, Mitzi responded, "No. The only thing I'm concerned about is just the history, and I just—I don't want it repeating itself."

For his part, Richard offered no demonstrative evidence but stated,

Well, seeing that nothing has occurred that would warrant this, I don't see why it's fair to I or my children to have a protective order in place. I do understand my history and my past, and if you pass judgment on that, I understand, but since I've been released I haven't done anything that I believe would warrant this.

The district court ruled from the bench stating,

Ms. McElree, I want you to listen carefully to what I'm going to tell you here. I'm going to cut to the chase, and then I'll explain my reasoning and rationale for this. I'm going to deny your petition just the same as Judge Gamon did. Judge Gamon gave you a pretty fair warning in her order that you had not established a prima facie case under Iowa Code chapter 236, and the evidence you presented here today does not change my opinion from what Judge Gamon decided. You basically have to, under 236—And what I would say is, for future reference, it may bode well for you to seek the advice of legal counsel prior to filing something of this nature, because it seems to me abundantly clear that you did not—and I'm not being critical of you, because I understand you're not any attorney—but I believe you don't have working understanding of Iowa Code chapter 236. Basically you have to establish that domestic abuse has occurred and that currently the defendant is a threat to you.

From the—both the petition and from the exhibits, I cannot determine that domestic abuse has occurred, if ever, but certainly

not in any recent time, and I cannot therefore find as we sit here today that the defendant is a threat to you. So for those reasons, I'm going to dismiss the petition, and I'm not going to be granting a protective order. And I would just encourage you to think about the possibility of consulting with an attorney prior to filing the next one of these, should that become necessary. And with that we'll close the record.

A written "Order re Dismissal" was filed that same date, which provides in part: "Based upon the exhibits and evidence received at the hearing as well as a review of the court file, this court also finds that the record does not show a prima facie case of domestic abuse and that the Petition should be dismissed."

Mitzi appears to have taken the court's advice to obtain counsel to heart as counsel filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), seeking enlarged findings of facts, amended conclusions, and modified judgment. Counsel argued domestic abuse had been criminally adjudicated by proof beyond a reasonable doubt, Mitzi had shown unwanted contact, and a protective order should issue.

On August 19, 2011, the district court entered a ruling on the motion to enlarge and amend. The court noted it had "carefully reviewed the Plaintiff's exhibits, which had nothing to do with domestic abuse." The court then "question[ed] the ability to amend or enlarge a dismissal order," but assuming it could do so, concluded the petitioner "failed to meet her burden of proof."

Mitzi now appeals, contending the district court improperly dismissed her petition. An amicus curiae brief was been filed by the Iowa Coalition Against Domestic Violence in support of Mitzi's appeal. Richard has filed no brief with this court.

II. Scope and Standard of Review.

We review civil domestic abuse cases tried in equity de novo. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). The party alleging domestic abuse bears the burden of proving abuse by a preponderance of the evidence. Iowa Code § 236.4(1) (2011). We give weight to the fact findings of the district court when considering the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(g).

III. Discussion.

The district court was essentially correct in informing Mitzi, “Basically you have to establish that domestic abuse has occurred and that currently the defendant is a threat to you.” See *Wilker*, 630 N.W.2d at 596 (noting the person seeking a protective order must prove the occurrence of domestic abuse by the preponderance of the evidence); see also Iowa Code § 236.3(2) (“If the factual basis for the alleged domestic abuse is contested, the court shall issue a protective order based upon a finding of domestic abuse by a preponderance of the evidence.”).

Here, Mitzi told the court she was in the process of divorcing Richard, who had been imprisoned for assaulting her and holding their children hostage. Richard did not deny he committed domestic abuse assault. Consequently, domestic abuse was not contested. The district court apparently believed a recent act of abuse was required, but our supreme court has stated, “Iowa Code chapter 236 has no provision that requires a petition to be filed within a specific time after an alleged assault.” *Smith v. Smith*, 513 N.W.2d 728, 731 (Iowa 1994).

“Upon a finding that the defendant has engaged in domestic abuse . . . [t]he court may grant a protective order” ordering that “the defendant stay away from the plaintiff’s residence, school, or place of employment”; and “awarding . . . temporary custody of or establishing temporary visitation rights with regard to children under eighteen.” Iowa Code § 236.5(1)(b); see generally *Bartsch v. Bartsch*, 636 N.W.2d 3, 10 (Iowa 2001) (noting a protective order “does not attempt to impose a personal judgment against the defendant”; but “merely order[s] the defendant to ‘stay away from the protected party’ and not assault or communicate with her”). In *Smith*, a case involving a pre-answer motion to dismiss, our supreme court stated:

[A]n elapse of time between an alleged assault and the filing of the petition may have a bearing on what specific relief a court might grant. But such an issue would be a factual one that *could not be the basis for a motion to dismiss*. The issue would necessarily have to be resolved at a subsequent hearing.

513 N.W.2d at 731 (emphasis added). We note however, that before the court may enter a temporary order, good cause must be shown, and “present danger of domestic abuse to the plaintiff” constitutes good cause. Iowa Code § 236.4(2). A final domestic abuse protective order, Iowa Supreme Court Form 4.2, which is to be used for entry of a protective order following adjudication of domestic abuse, requires the court to find by a preponderance of the evidence: (1) personal service of a copy of the petition and any temporary protective order with notice of the hearing was served upon the respondent; (2) domestic abuse was

committed by the respondent upon the protected party; and (3) the respondent represents a credible threat to the physical safety of the protected party.³

Here, the court did not make any findings of fact or conclusions of law as to whether Richard was currently a threat to Mitzi. Mitzi asserted as much in her petition in indicating the “[d]efendant has threatened me and I fear for my safety.” At the hearing Mitzi stated she was “getting badgered every time I turn around”; stated she was being prescribed medications for anxiety; and presented a letter from her physician who stated she was concerned for Mitzi’s safety.

The record in this case also gives us cause for concern. We observe the transcript fails to reflect if the witnesses were sworn-in, and it appears neither was offered cross-examination. We acknowledge the reluctance of trial courts to provide any guidance to litigants during a hearing because of the court’s strong sense of duty to remain neutral and impartial. However, it is not uncommon for pro se parties to fail to understand their initial pleading does not serve to meet their burden of proof at a hearing on the merits. It is also not uncommon for a pro se party who is asked, “Do you have any witnesses or evidence?”—as occurred in this case—to not be aware that they may serve as a witness on their own behalf. Some limited guidance at the outset of a hearing to both parties avoids the circumstances we now face, and can be done without entering the “fray,” without providing any tactical advantage to either party, or the court losing its impartiality.

³ Iowa Code section 236.5 provides that if the court finds “that the defendant has engaged in domestic abuse,” the “court may order” professional counseling or the “court may grant a protective order or approve a consent agreement.” Iowa Code § 236.5(1), (2).

Here, because of the state of the record, where we cannot determine what statements of the parties constituted sworn testimony, if any, and the lack of findings and conclusions, we reverse and remand to give the district court an opportunity to make the necessary findings of fact and conclusions of law. See *Conklin v. Conklin*, 586 N.W.2d 703, 706-07 (Iowa 1998) (“Although our review is de novo, we rely on the trial court’s assessment of the witnesses’ credibility. Here, we have no trial court factual findings from which we can determine [if any sworn testimony was given and if so,] which witnesses the trial court found most believable. Therefore, we reverse the trial court’s order and remand for a ruling that complies with rule [1.904(a)].” (citations omitted)).

REVERSED AND REMANDED.