

2019 WL 4894037

Unpublished Disposition

Only the Westlaw citation is currently available.

NOTE: THIS OPINION WILL NOT APPEAR IN A
PRINTED VOLUME. THE DISPOSITION WILL
APPEAR IN THE REPORTER.

Appeals Court of Massachusetts.

S.G.

v.

J.L.

18-P-1289

Entered: October 3, 2019.

By the Court (Kinder, Sacks & Shin, JJ.⁶)

MEMORANDUM AND ORDER PURSUANT TO
RULE 1:28

*1 The plaintiff mother appeals from an order modifying and extending an abuse prevention order issued pursuant to *G. L. c. 209A, § 3*, claiming that the judge abused his discretion when he vacated provisions in the original order that awarded custody of the children to the plaintiff and prohibited the defendant father from contacting the children. The plaintiff also claims that extending the abuse prevention order for two years, rather than making it permanent as she requested, was an abuse of discretion. We vacate so much of the extension order as modified the custody and no contact provisions regarding the children. Otherwise, we affirm.

Background. The plaintiff and the defendant were married in 1999 and divorced in 2012. They have four children whose ages ranged from eleven to seventeen at the time of the hearing. Pursuant to the divorce judgment, the children live with the plaintiff. The divorce judgment further provided that “[the defendant] shall have reasonable visitation with the minor children at such time [as] he is physically able.”¹

On March 28, 2015, the plaintiff applied for an abuse prevention order against the defendant pursuant to *G. L. c.*

209A. The plaintiff’s supporting affidavit stated, in summary, that the defendant had sustained a **brain injury**, that he possessed firearms, that he had been harassing the plaintiff with requests for sex, and that the plaintiff feared that the defendant would try to hurt her or take one of the children. After a hearing attended by both parties, an abuse prevention order entered awarding sole custody of the children to the plaintiff and prohibiting the defendant from contacting the plaintiff or the children either directly or indirectly. The defendant was also ordered to surrender any firearms. The abuse prevention order was extended at the plaintiff’s request after hearings on March 31, 2015; March 25, 2016; April 4, 2017; and June 6, 2017. This appeal concerns a subsequent request to make the abuse prevention order permanent, which was heard on June 18, 2018.

In a supplemental affidavit submitted in support of the plaintiff’s application for a permanent abuse prevention order, the plaintiff stated:

“The children are afraid of [the defendant]. The [Department of Children and Families (DCF)] records show that, and they continue to act afraid of [the defendant]. My daughters didn’t march with the school band in the Memorial Day parade this year because the marching route passes [the defendant’s] house. Last year, one of my daughters did march and saw [the defendant]. Afterwards, she called me sobbing and asking if he was going to come after her. My son quit his job after seeing [the defendant] parked outside the store.”

The plaintiff testified to these events at the hearing on June 18, 2018. She also stated in her affidavit that the defendant had exposed her children to pornography. This claim was supported, in part, by DCF records that refer to a letter from one of the children stating that the defendant had “exposed him to pornography, condoms, lube, and sex toys,” causing the child to feel uncomfortable. Finally, the plaintiff testified that the defendant aggressively confronted her at a Probate and Family Court hearing in June 2017, stating, “I don’t care if there’s a restraining order. I’m in a wheelchair, just arrest me. She’s a fucking liar.”²

*2 The defendant did not testify at the hearing except in response to questions from the judge regarding his injuries and the completion of a batterer’s program. His counsel argued that there had been no violation of the existing order, that the defendant had a solid relationship with his children, and that the existing order should be vacated.

At the close of the hearing the judge took the matter under advisement. Later that day, he issued an order extending the terms of the abuse prevention order regarding the plaintiff for two years. However, as to the children, he modified the existing order by vacating the provision that awarded custody of the children to the plaintiff, and the provision that prohibited the defendant from contacting the children. The modification was entered on the Trial Court's abuse prevention order form. The judge made no findings of fact and offered no explanation.

Discussion. We review the extension of an abuse prevention order for abuse of discretion. See [Crenshaw v. Macklin](#), 430 Mass. 633, 636 (2000). "The standard for obtaining an extension of an abuse prevention order is the same as for an initial order -- 'most commonly, the plaintiff will need to show a reasonable fear of imminent serious physical harm at the time that relief ... is sought.'" [MacDonald v. Caruso](#), 467 Mass. 382, 386 (2014), quoting [Iamele v. Asselin](#), 444 Mass. 734, 735 (2005). Additionally, that fear must be objectively reasonable. See [Smith v. Jones](#), 75 Mass. App. Ct. 540, 543 (2009). "It is the totality of the conditions that exist at the time that the plaintiff seeks the extension, viewed in the light of the initial abuse prevention order, that govern." [Iamele](#), *supra* at 741.

Here, although the children did not testify, there was un rebutted evidence that they remained fearful of the defendant. The plaintiff testified that the children had declined to participate in school activities in light of their concerns that those activities might put them in contact with the defendant. One of the children quit a job for the same reason. Although the judge made no findings of fact and did not explain his reasoning, we assume that he credited the plaintiff's testimony because he extended the order as to her and extended another part of the order requiring the defendant to stay away from the schools that

the children attend. The defendant offered no evidence to rebut the plaintiff's assertion that the children continued to have a reasonable fear of imminent serious physical harm. Considering the totality of these circumstances, and in the absence of any finding that the plaintiff's testimony was not credible, it was an abuse of discretion to modify the order regarding custody and no contact with the children.³

The plaintiff also argues that the judge abused his discretion in failing to make the abuse prevention order permanent. We are not persuaded. "[A]t a renewal hearing, a judge's discretion is broad: [the judge] may permit the existing order to expire without renewal; [the judge] may issue a permanent order; or [the judge] may issue an order of shorter duration of 'any time reasonably necessary' to protect the abused person." [Crenshaw](#), 430 Mass. at 635. Based on the totality of the circumstances, we cannot reasonably say that a two-year extension of the abuse prevention order as to the plaintiff does not adequately protect her.⁴

***3 Conclusion.** For all of these reasons, we vacate so much of the judge's order entered on June 18, 2018, as modified the provisions for custody of, and no contact with, the children. Accordingly, paragraphs six and seven of the original abuse prevention order are reinstated and will remain in effect until the expiration of the current order on June 17, 2020. As so modified, the order is affirmed.⁵

So ordered.

All Citations

Slip Copy, 2019 WL 4894037 (Table)

Footnotes

⁶ The panelists are listed in order of seniority.

¹ The defendant was in a car accident in 2012, which resulted in the amputation of both of his legs.

² There was argument at the hearing regarding the defendant's access to firearms. The original order required the defendant to surrender all firearms, and it appears undisputed that at least one firearm was surrendered, although there is some uncertainty about the whereabouts of another. In any event, the provision requiring the surrender of all firearms was not modified and remains in effect. Accordingly, we need not address it.

³ The plaintiff suggests, based on comments the judge made during the hearing, that he improperly considered the defendant's visitation rights when he modified the order. If so, that was an abuse of discretion. See [Moreno v. Naranjo](#), 465 Mass. 1001, 1002 (2013) (visitation rights not appropriate consideration in 209A extension hearing).

⁴ It is error to refuse a permanent order on the basis of personal philosophy. See [Loneragan-Gillen v. Gillen](#), 57 Mass.

[App. Ct. 746, 748-749 \(2003\)](#). The plaintiff contends the judge was motivated by personal philosophy in this case as evidenced by his statement, “I have a problem entering a permanent order ... on any type of case.” While that argument is not without force, on the record before us, we cannot say that a two-year extension of the order was an abuse of the judge’s considerable discretion. We are confident that the judge will be mindful of Lonergan-Gillen in evaluating any future request for a permanent order.

- 5 In light of our decision vacating the modification of the order regarding custody of, and no contact with, the children, we need not address the plaintiff’s due process claim.