## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

M.S.,

*Appellant-Petitioner,*

v.

B.J.,

*Appellee-Respondent.*

July 31, 2023

Court of Appeals Case No. 23A-PO-559

Appeal from the Lake Superior Court

The Honorable Kristina C. Kantar, Judge

Trial Court Cause No. 45D04-2301-PO-109

**Memorandum Decision by Judge Tavitas**
Judges Bailey and Kenworthy concur.

**Tavitas, Judge.**

## Case Summary

[1] M.S. appeals the trial court's denial of her petition for an order for protection against B.J. M.S. argues that the trial court erred by denying her petition. We, however, cannot say the trial court erred. Accordingly, we affirm.

## Issue

[2] M.S. raises one issue, which we restate as whether the trial court erred by denying M.S.'s petition for an order for protection.

## Facts

[3] M.S. and B.J. were in a relationship for over twenty years. According to M.S., B.J. was sometimes physically abusive during their relationship. M.S.'s last physical contact with B.J. was in July 2021. According to M.S., they had been drinking and riding B.J.'s motorcycle. When B.J. pulled up to M.S.'s home, M.S. fell off the motorcycle onto the ground. B.J. screamed at her, called her "horrible names," and left. Tr. Vol. II p. 11. Since July 2021, B.J. has not been to M.S.'s place of employment or residence and has not posted on social media about her.

[4] On January 17, 2023, B.J. left three voicemail messages for M.S. during a seven-minute period. The first message stated: "(Indiscernible) -- get f**ked and die. You're an a*****e. You're an arrogant son -- (indiscernible)." *Id.* at 9. The second message provided: "Here's my message, get f**ked and die. You're an a*****e. You're an arrogant son of a (indiscernible)." *Id.* at 10. The third message stated:

> Here's my message, I never loved you any way, but I helped you f**king get where you're at today. I got you a f**king job, I got you -- I helped get you loan to get your property, and you're arrogant to me. I hope you f**k -- f**k you and f**king die. I can only hope in my life that I could run into you and spit in your f**king old face. You are a piece of s**t, a loser, a f**king user. Get f**ked and die. I will check obituaries, when you're dead, I'm f**king happy because you are nothing but a piece of s**t. You arrogant, f**king c**t. F**k you. F**k you. You f**king old w***e. F**k you.

*Id.* at 9-10.

[5] On January 26, 2023, M.S. filed a petition for an order for protection against B.J. M.S. alleged that: (1) she was the victim of domestic or family violence, stalking, and repeated acts of harassment; (2) she was dating or had dated B.J. and she had been engaged in a sexual relationship with B.J.; and (3) B.J. attempted to cause physical harm to M.S., threatened to cause physical harm to M.S., placed M.S. in fear of physical harm, committed stalking against M.S., and committed repeated acts of harassment against M.S. In support of the allegations, M.S. detailed the three voicemails from B.J. on January 17, 2023; the incident in July 2021; and various incidents of physical assault beginning in 2001. M.S. alleged that her last physical contact with B.J. was in the summer of 2021.

[6] The trial court held a hearing on the petition on February 13, 2023. M.S. testified that she did not provoke the January 17, 2023 voicemails and that, before the voicemails, she had not spoken to B.J. in over a year. On cross-

examination, however, evidence was presented that M.S. texted and called B.J. several times, including on January 1, 2023. M.S. claimed that she intended to call someone else and accidentally called B.J.

[7] After M.S. presented evidence, B.J. moved for "summary denial" of the petition. Tr. Vol. II p. 69. B.J. argued that M.S. did not meet her burden for the issuance of an order for protection. The trial court agreed and found that M.S. failed to meet her burden. The trial court then issued a written order denying M.S.'s petition and found: "[M.S.] has not shown, by a preponderance of the evidence, that domestic or family violence, stalking or harassment has occurred sufficient to justify the issuance of an Order for Protection." Appellant's App. Vol. II p. 6. M.S. now appeals.

## Discussion and Decision

[8] M.S. appeals the trial court's denial of her petition for an order for protection. The parties disagree regarding the standard of review here. M.S. argues that the standard of review is de novo. We conclude, however, that the proper standard of review is the more onerous standard employed in appeals from negative judgments, as set forth in *Costello v. Zollman*, 51 N.E.3d 361, 365-67 (Ind. Ct. App. 2016), *trans. denied*.

[9] "Generally, a trial court has discretion to grant protective relief according to the terms of the [Indiana Civil Protection Order Act ("CPOA")]." *Costello*, 51 N.E.3d at 367 (quoting *A.N. v. K.G.*, 10 N.E.3d 1270, 1271 (Ind. Ct. App. 2014)). "To obtain an order of protection under the [CPOA], the petitioner

must establish by a preponderance of the evidence at least one of the allegations in the petition." *Id.* In assessing the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. *Id.* We consider only the evidence of probative value and reasonable inferences that support the judgment. *Id.*

[10] Where the trial court **grants** a petition for an order for protection, the trial court must enter special findings of fact and conclusions thereon. *Id.* at 365 (emphasis added). Where, however, the trial court **denies** the petition, findings are not required and the petitioner appeals from "a negative judgment." *Id.* (emphasis added). "When the appeal is from a negative judgment, we will reverse only if we are convinced that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the trial court." *Id.*

[11] The CPOA's purpose "is to protect and keep safe 'all victims of domestic or family violence in a fair, prompt, and effective manner' and prevent such violence in the future." *S.D. v. G.D.*, 211 N.E.3d 494, 497 (Ind. 2023) (quoting Ind. Code § 34-26-5-1). Indiana Code Section 34-26-5-2 provides:

> (a) A person who is or has been a victim of domestic or family violence may file a petition for an order for protection against a:

> (1) family or household member who commits an act of domestic or family violence[1]; or
>
> (2) person who has committed stalking[2] under IC 35-45-10-5 or a sex offense under IC 35-42-4 against the petitioner.
>
> (b) A person who is or has been subjected to harassment[3] may file a petition for an order for protection against a person who has committed repeated acts of harassment against the petitioner.

A "family or household member" includes an individual that the petitioner "is dating or has dated" or "is engaged or was engaged in a sexual relationship

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[1] "Domestic or family violence" means:

> [E]xcept for an act of self-defense, the occurrence of at least one (1) of the following acts committed by a family or household member:
>
> (1) Attempting to cause, threatening to cause, or causing physical harm to another family or household member.
>
> (2) Placing a family or household member in fear of physical harm.
>
> (3) Causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress.
>
> (4) Abusing (as described in IC 35-46-3-0.5), torturing (as described in IC 35-46-3-0.5), mutilating (as described in IC 35-46-3-0.5), or killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member.
>
> For purposes of IC 34-26-5, domestic and family violence also includes stalking (as defined in IC 35-45-10-1) or a sex offense under IC 35-42-4, whether or not the stalking or sex offense is committed by a family or household member.

I.C. § 34-6-2-34.5.

[2] Stalking is "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened." I.C. § 35-45-10-1.

[3] "Harassment" means: "[C]onduct directed toward a victim that includes, but is not limited to, repeated or continuing impermissible contact: (1) that would cause a reasonable person to suffer emotional distress; and (2) that actually causes the victim to suffer emotional distress." I.C. § 34-6-2-51.5(a).

with . . . ." I.C. § 34-6-2-44.8. "[I]f the court finds the petitioner has met their burden, it must issue a protective order and 'grant relief necessary to' end the violence or threat of violence." *S.D.*, 211 N.E.3d at 498 (quoting I.C. § 34-26-5-9(h)).

[12] Indiana Code Section 34-26-5-9(h), however, provides: "A finding that domestic or family violence or harassment has occurred sufficient to justify the issuance of an order under this section means that a respondent represents a credible threat to the safety of a petitioner or a member of a petitioner's household." Our Supreme Court has emphasized that, "[t]o obtain a protective order, the petitioner must show the respondent 'represents'—present tense—'a credible threat to the safety of a petitioner or a member of a petitioner's household.'" *S.H. v. D.W.*, 139 N.E.3d 214, 219 (Ind. 2020) (quoting I.C. 34-26-5-9(f) (*see now* § -9(h)). "Thus, the respondent must pose a threat to a protected person's safety when the petitioner seeks relief." *Id.* "By focusing on the parties' present situation, the Act not only allows courts to intervene as the parties' circumstances warrant, but also contemplates that the parties' relationship can change over time." *Id.*

[13] "In addition to focusing on the parties' present situation, the Act requires that the threat posed by the respondent be viewed objectively." *Id.* at 220. "Not only must there be a present threat, but the threat must be credible—meaning plausible or believable." *Id.* "Thus, the petitioner must prove, by a preponderance of the evidence, that there are reasonable grounds to believe that

the respondent presently intends to harm the petitioner or the petitioner's family." *Id.*

[14] Here, M.S. failed to demonstrate that B.J. presently represents a credible threat to M.S.'s safety. M.S. and B.J. were in a relationship for over twenty years, but the relationship ended in July 2021. Since July 2021, M.S. has not had physical contact with B.J.; B.J. has not gone to M.S.'s place of employment or residence; and B.J. has not posted on social media about M.S. During her direct testimony, M.S. claimed that she did nothing to provoke the January 17, 2023 voicemails from B.J.; but on cross-examination, M.S. admitted to texting and calling B.J. on several occasions in 2022 and on January 1, 2023. The trial court apparently concluded that the January 17, 2023 voicemails did not demonstrate that B.J. presented a credible threat to M.S.'s safety.

[15] Our Supreme Court recently noted that, "[i]n close cases—such as the one before us today—when the evidence could lead a court to grant or deny a petition, . . . 'the trial court is the one to make that call.'" *S.D.*, 211 N.E.3d at 498. "Indeed, our trial courts are far better than appellate courts 'at weighing evidence and assessing witness credibility.'" *Id.* (quoting *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017)). "[T]his is particularly true in protective order cases, where our trial judges see and hear the parties interact as they relay details about intensely personal, traumatic events." *Id.* Under these circumstances, we are not convinced that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the trial court." *Costello*, 51 N.E.3d at 365.

## Conclusion

[16] We cannot say the trial court erred by denying M.S.'s petition for an order for protection. Accordingly, we affirm.

[17] Affirmed.

Bailey, J., and Kenworthy, J., concur.