

DA 18-0695

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 222N

A.C., a Minor Child, by her Guardian
TANYA CHARLES, f/k/a/ TANYA
BORKHOLDER,

Plaintiff and Appellee,

v.

DENNIS BORKHOLDER,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DV-18-226
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Dustin M. Chouinard, Markette & Chouinard, P.C., Hamilton, Montana


For Appellee:

Nathan G. Wagner, Datsopoulos, MacDonald & Lind, P.C., Missoula,
Montana

Submitted on Briefs: July 31, 2019

Decided: September 17, 2019

Filed:


Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Dennis Borkholder appeals the Order of the Twenty-First Judicial District Court, Ravalli County, granting A.C.'s request, by and through her guardian, Tanya Charles (f/k/a Tanya Borkholder), for a preliminary injunction to prevent Borkholder from dissipating his assets while A.C.'s civil claim for damages against him is pending.¹ We affirm.

¶3 A.C. was born in 2001. A.C. lived with her mother, Tanya Charles, and her stepfather, Borkholder. In 2017, A.C. participated in a forensic interview at a child advocacy center during which she disclosed details of sexual abuse she suffered at the hands of Borkholder. A.C. stated that the abuse began in 2008 and continued for seven years. Following the interview, a Ravalli County Sheriff's detective contacted Charles and informed her of A.C.'s disclosures. Charles stated that she confronted Borkholder with the abuse allegations, and Borkholder admitted that he had inappropriate sexual contact with A.C. Following this confrontation, Borkholder attempted to castrate himself using a device designed to castrate animals. On May 3, 2018, the State charged Borkholder with six

¹ On May 25, 2018, A.C. filed a civil action alleging that Borkholder is liable for damages for sexual assault and battery upon her.

counts of felony incest in violation of § 45-5-507, MCA. Borkholder was arraigned and pled not guilty.²

¶4 On August 23, 2017, Charles petitioned to dissolve her marriage to Borkholder.³ In pleadings, Charles alleged Borkholder indicated that if convicted on the charges involving A.C. and sentenced to prison, Borkholder intended to turn over all of his assets to his adult children from a previous marriage. On November 21, 2017, Borkholder filed a Financial Disclosure detailing all of his assets and expenses.

¶5 On May 25, 2018, A.C., through Charles, filed a Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction. A.C. asked the District Court to enjoin Borkholder from “transferring, encumbering, or dissipating any of his assets while this action is pending.” On May 29, 2018, the District Court issued a TRO and Order to Show Cause, finding that there was a “significant risk that [A.C.] would suffer immediate and irreparable injury if [Borkholder] were able to transfer, encumber or otherwise dissipate his assets.”

¶6 On June 25, 2018, Borkholder filed a Response in Opposition to [A.C.’s] Motion for TRO and Preliminary Injunction. In the affidavit filed with his response, Borkholder attested that he never threatened to transfer or dissipate his assets to his other children. Borkholder attested that as part of his estate planning, he executed a will in 2012 that bequeathed to each of his five children a twenty percent interest in any business interest

² See *State v. Borkholder*, Cause No.: DC-18-127.

³ See *In re Marriage of Borkholder*, Cause No.: DR-17-179.

and in all business equipment. He stated that his communications with Charles before and during dissolution proceedings “related to preserving [his] business and related assets for [his] children, not asset transfers related to the claims asserted against [him] in this matter.” Borkholder also detailed the harm he believed he would suffer if the District Court granted A.C.’s injunction, including that an injunction would “severely impair or eliminate [his] ability to defend [himself] against criminal charges” and would “severely impair or eliminate [his] ability to comply with the terms of the Marital and Property Settlement Agreement”

¶7 On July 5, 2018, the District Court held a show cause hearing to address the injunctive relief requested. During the hearing, Charles testified that Borkholder told her that he executed a new will, and that “if he should pass away [A.C. and Charles] were in for a big surprise.” Charles testified that Borkholder intended to prevent A.C. and Charles from receiving any of his assets. Charles’ counsel stated that Borkholder made financial transactions in violation of the May TRO, and Charles testified that she witnessed some of Borkholder’s assets being sold.

¶8 Borkholder’s counsel argued that A.C. failed to demonstrate that a preliminary injunction was necessary. Borkholder’s counsel argued that Borkholder was bound by his obligations under the Marital and Property Settlement Agreement, and the agreement provided sufficient protection from any potential asset transfers. Further, counsel argued issues of liability had yet to be resolved and pointed out that Borkholder entered a plea of “not guilty.” The District Court rejected Borkholder’s arguments, stating, “Mr. Borkholder

has castrated himself. He's admitted he did it. Whether he pleads guilty isn't the standard I need to apply"

¶9 On September 7, 2018, Charles, in her capacity as Borkholder's former spouse, moved to intervene to modify the TRO to allow for disbursement of \$80,000 of Borkholder's assets to satisfy an obligation under the Final Decree dissolving Charles and Borkholder's marriage. Charles alleged that when she asked Borkholder to pay her the \$80,000, Borkholder refused based upon the TRO in place in the instant case.

¶10 On November 15, 2018, the District Court issued an Opinion and Order granting A.C.'s request for a preliminary injunction pursuant to § 27-19-201(2), MCA. Because the basis for the TRO and injunction was financial harm, the District Court analyzed the factors set forth in *Van Loan v. Van Loan*, 271 Mont. 176, 895 P.2d 614 (1995) and concluded that A.C. was entitled to a preliminary injunction. The District Court ordered, in relevant part, that Borkholder be "enjoined from transferring, encumbering, or otherwise dissipating any of his assets until further Order of this Court" The District Court also concluded it was without authority to order Borkholder to pay Charles but left the \$80,000 sought by Charles free from the TRO "for the sole purpose of satisfying the judgment" in the marital dissolution case.⁴ Borkholder appeals.

¶11 An order granting an injunction is immediately appealable. *Caldwell v. Sabo*, 2013 MT 240, ¶ 18, 371 Mont. 328, 308 P.3d 81. Due to the high degree of discretion vested in

⁴ The District Court took judicial notice of the judgment in the marital dissolution case, DR-17-179, and incorporated the parties' Marital and Property Settlement Agreement, which required Borkholder to pay Charles \$80,000.

district courts “to maintain the status quo,” we review the grant of a preliminary injunction for a manifest abuse of discretion. *Flora v. Clearman*, 2016 MT 290, ¶ 13, 385 Mont. 341, 384 P.3d 448 (citing *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912); *Doe v. Cmty Med. Ctr., Inc.*, 2009 MT 395, ¶ 14, 353 Mont. 378, 221 P.3d 651; *Sweet Grass Farms, Ltd. v. Board of Cty. Com’rs*, 2000 MT 147, ¶ 20, 300 Mont. 66, 2 P.3d 825. A district court manifestly abuses its discretion when it commits “obvious, evident, or unmistakable” errors. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 13, 358 Mont. 175, 243 P.3d 1123; *Doe*, ¶ 14; *Shammel*, ¶ 12.

¶12 When determining the merits of a preliminary injunction, it is not the province of either a district court, or this Court on appeal, to determine final matters that may arise during a trial on the merits. *Caldwell*, ¶ 19 (citing *Yockey v. Kearns Props. LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185; *Sweet Grass*, ¶ 38); *see also Four Rivers Seed Co. v. Circle K. Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (“[a] preliminary injunction does not resolve the merits of a case but rather prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication of its merits . . .”).

¶13 A district court may issue a preliminary injunction order in several instances, including “when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant” Section 27-19-201(2), MCA. When assessing whether to issue an injunction, a district court must balance the potential harm to the applicant seeking an injunction against the potential hardship to the enjoined party. *Four Rivers*, ¶ 12.

¶14 A plaintiff in a tort action may obtain a preliminary injunction where the plaintiff's monetary judgment may be rendered ineffectual by the actions of the defendant. *Caldwell*, ¶ 31 (citing *Van Loan*, 271 Mont. at 182, 895 P.2d at 617-18). In other words, where "it is alleged that the defendant threatens to, or is about to secret or dissipate his[] assets in order to thwart any monetary recovery by the plaintiff, thereby irreparably injuring the plaintiff," a plaintiff may seek injunctive relief. *Van Loan*, 271 Mont. at 184, 895 P.2d at 619.

¶15 In such circumstances, a district court must analyze and weigh the following elements:

- (1) the likelihood that the movant will succeed on the merits of the action;
- (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction; (3) [whether] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party . . . ; and (4) [whether] the injunction, if issued, would be adverse to the public interest.

Van Loan, 271 Mont. at 182, 895 P.2d at 617. The moving party has the burden of proving these elements. *Shammel*, ¶ 17; *Van Loan*, 271 Mont. at 182, 895 P.2d at 617.

¶16 In *Van Loan*, a father was convicted of incest for molesting and abusing his adopted children for eleven years. *Van Loan*, 271 Mont. at 178, 895 P.2d at 615. One of the children filed suit against the father, seeking compensatory and punitive damages. *Van Loan*, 271 Mont. at 178, 895 P.2d at 615. The child filed an application for a preliminary injunction and requested a TRO, asking that the father be prohibited from disbursing his assets. *Van Loan*, 271 Mont. at 178, 895 P.2d at 615. This Court concluded the child presented evidence to support the claim there was an actual threat to the child's ability to collect the full damages that may be awarded to him. *Van Loan*, 271 Mont. at 181-82, 895

P.2d at 617. This Court analyzed and emphasized: (1) the fact the father had admitted liability as evidence the child would likely succeed on the merits of his claim; (2) if the father disbursed his assets, a judgment against him would be worthless and the child would suffer irreparable injuries; (3) the threatened injury to the child outweighed any damage the injunction may cause the father, primarily because the father was incarcerated at the time, and the father did not identify any damage he would suffer as a result of the preliminary injunction; and (4) based on the foregoing judgment, the injunction would not be adverse to public interest. *Van Loan*, 271 Mont. at 183, 895 P.2d at 618.

¶17 Here, the District Court applied the factors from *Van Loan*, and concluded that: (1) A.C. will likely be successful on the merits of this case; (2) Borkholder's assets could likely be dissipated, consumed, or transferred by him while this matter was pending—leaving A.C. with no source of recovery for her injuries; (3) the potential of leaving A.C. with no source of recovery far outweighed any potential damage to Borkholder; and (4) preserving assets for recovery by an alleged victim in A.C.'s position was not adverse to any public interest.

¶18 Borkholder argues that the District Court erred when it concluded that A.C. was entitled to a preliminary injunction under § 27-19-201(2), MCA, and when it concluded A.C. met her burden required to establish an injunction was necessary under *Van Loan*. Borkholder further argues that unlike the father in *Van Loan*, he has not admitted civil liability, he pled not guilty to the pending criminal charges, and he has articulated damages resulting from the injunction, which are obvious and uncontested. Borkholder argues the injunction negatively impacts his ability to pay for the necessities of life, and that he is

unable to access his assets for paying attorney fees and expenses to adequately protect his rights in the pending criminal matter. Borkholder contends the denial of his ability to legitimately access his estate and resources is adverse to public interest and violates his due process rights under the United States and Montana Constitutions. We disagree.

¶19 The injunctive relief A.C. requested pertained to a monetary judgment that could be rendered ineffectual by Borkholder's actions. Accordingly, the District Court properly analyzed the facts of the case under the *Van Loan* framework. See *Caldwell*, ¶ 31; *Van Loan*, 271 Mont. at 181-83, 895 P.2d at 617-18; § 27-19-201(2), MCA. The District Court concluded that there was high probability that absent a preliminary injunction explicitly preventing Borkholder from dissipating or consuming assets, any future money judgment in favor of A.C. would be ineffectual. See *Van Loan*, 271 Mont. at 183, 895 P.2d at 618. The District Court balanced the potential harm to A.C. against the potential harm to Borkholder, see *Four Rivers*, ¶ 12, and determined the preliminary injunction was a necessary restriction to prevent Borkholder from transferring or dissipating certain assets that could result in A.C. being deprived of the opportunity to receive compensation for harm suffered, see *Van Loan*, 271 Mont. at 184-85, 895 P.2d at 619. From the record before us, we cannot conclude the District Court committed "obvious, evident, or unmistakable" errors. See *Sandrocks*, ¶ 13; *Doe*, ¶ 14; *Shammel*, ¶ 12. Accordingly, the District Court did not manifestly abuse its discretion when it granted A.C.'s request for a preliminary injunction. See *Caldwell*, ¶ 18; *Doe*, ¶ 14.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH

/S/ DIRK M. SANDEFUR

/S/ JIM RICE

/S/ INGRID GUSTAFSON