

DA 23-0390

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 27

CAMILLE L. FRITZLER,

Petitioner and Appellee,

v.

ALDA IDA BIGHORN,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DR 23-177
Honorable Jessica T. Fehr, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin Gerstner, Gerstner Adam Law PLLC, Billings, Montana

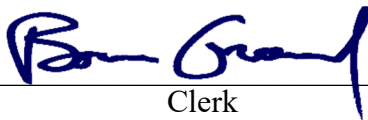
For Appellee:

Marzha L. Fritzler, Attorney at Law, Billings, Montana

Submitted on Briefs: January 10, 2024

Decided: February 13, 2024

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Alda Bighorn (Bighorn) appeals from the June 30, 2023 Order issued by the Thirteenth Judicial District Court, Yellowstone County, that affirmed the Municipal Court’s January 3, 2023, imposition of a permanent order of protection against Bighorn, prohibiting her from having contact with her grandchild, unless supervised.

¶2 We restate the issue on appeal as follows:

Did the Municipal Court have sufficient evidence to enter a permanent order of protection against Bighorn?

¶3 We reverse and remand to the Municipal Court for action consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Bighorn is the paternal grandmother of L.D.F.S. Camille Fritzler (Fritzler) is L.D.F.S.’s mother. On October 14, 2022, Fritzler filed a petition for a temporary order of protection against Bighorn. In the sworn petition, Fritzler alleged Bighorn took L.D.F.S. to a family gathering. Fritzler alleges that, thereafter, some of Bighorn’s family members told her that Bighorn was actively seeking narcotics while L.D.F.S was with her, and that Bighorn transported L.D.F.S. while intoxicated. The family members also allegedly told Fritzler that Bighorn planned to take L.D.F.S. to Poplar, MT to enroll her with the Fort Peck Native Tribe so that she could seek custody over L.D.F.S. Fritzler’s sworn petition described one other incident where Bighorn was staying with Fritzler and verbally yelled at Fritzler until Fritzler asked Bighorn to leave. As a result of the allegations in the petition,

the Municipal Court issued a temporary order of protection against Bighorn and set a hearing to determine whether a permanent order of protection should issue.

¶5 At the hearing on January 3, 2023, none of Fritzler’s witnesses showed up to testify and corroborate her allegations. Fritzler did not provide any additional evidence or exhibits to support her petition allegations. Nonetheless, the court granted a permanent order of protection against Bighorn for one year, ending on January 3, 2024. The permanent order of protection precluded Bighorn from having contact with Fritzler and L.D.F.S., required Bighorn to complete a chemical dependency evaluation and its recommendations, and ordered Bighorn to have “visitation with L.D.F.S. 1 time weekly at the expense of [Bighorn] to be arranged through [Fritzler’s] Attorney.” The Municipal Court discussed how, under Montana law, Bighorn did not have any custodial rights as a grandparent, and therefore she would only be allowed supervised visitation with L.D.F.S. The Municipal Court based this decision in part on the fact that L.D.F.S.’s father, Bighorn’s son, was only allowed supervised visitation with L.D.F.S. at the time.

¶6 Bighorn appealed the decision to the District Court. The District Court affirmed the Municipal Court, reasoning “Fritzler’s Sworn Petition is rife with allegations of severe drug use and related fear for her safety, and that of her child” and “[t]he documented allegations are extremely concerning and . . . it is in the best interest of L.D.F.S. for her to be removed from Bighorn’s presence.” Thus, based only on Fritzler’s allegations contained in her original petition, the District Court found the Municipal Court did not abuse its discretion in granting the permanent order of protection. Bighorn appeals.

STANDARD OF REVIEW

¶7 We review a district court’s decision on an appeal from a municipal court as if the appeal was originally filed in this Court. *City of Helena v. Broadwater*, 2014 MT 185, ¶ 8, 375 Mont. 450, 329 P.3d 589. “This Court will not overturn a [] court’s decision to continue, amend, or make permanent an order of protection absent an abuse of discretion.” *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631. An abuse of discretion occurs when the court acts arbitrarily without the employment of conscientious judgment, or exceeds the bounds of reason and results in a substantial injustice. *Boushie*, ¶ 8.

DISCUSSION

¶8 *Did the Municipal Court have sufficient evidence to enter a permanent order of protection against Bighorn?*

¶9 Bighorn argues the Municipal Court abused its discretion by granting the permanent order of protection without any testimony or exhibits presented in support of Fritzler’s allegations. Bighorn asserts that orders of protection have dire, life-altering effects and should not be issued unless the respondent committed one of the itemized offenses in § 40-15-102, MCA. For example, Bighorn asserts that a person who previously had a restraining order issued precluding contact with a child may not be able to serve in volunteer positions involving children, the order will appear in background checks, and must be listed on some job applications. Thus, even though the order of protection may expire—as this one did on January 3, 2024—Bighorn asserts it has lasting effects. Thus, she asserts the decision of the Municipal Court should be reversed and the order of

protection it issued on January 3, 2023—which has now expired—should be vacated and rescinded.

¶10 Fritzler argues the Municipal Court did not abuse its discretion because it found good cause to make the temporary order of protection permanent. Fritzler asserts the permanent order of protection safeguards L.D.F.S.’s best interests and safety by limiting visitation with Bighorn to once a week and requiring her to undergo a chemical dependency evaluation. According to Fritzler, the serious nature of the documented allegations makes the permanent order of protection reasonable.

¶11 Under § 40-15-201(1), MCA, a petitioner may seek a temporary order of protection by filing a sworn petition that states the petitioner is in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in § 40-15-102, MCA, has a relationship to the respondent if required by § 40-15-102, MCA, and is in danger of harm if the court does not issue a temporary order of protection immediately. Based on review of the sworn petition alone, a court may issue a temporary order of protection and must then conduct a hearing to “determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.” Section 40-15-202(1), MCA. When making a temporary order of protection permanent, a court must determine whether, “to avoid further injury or harm, the petitioner needs permanent protection” by considering “the respondent’s history of violence, the severity of the offense at issue, and the evidence presented at the hearing.” Section 40-15-204(1), MCA. The evidence presented at the hearing must be substantial and credible, not merely hearsay speculation, to issue a permanent order of protection. *See Bock v. Smith*, 2005 MT 40, ¶ 30, 326 Mont. 123, 107

P.3d 488 (“Smith presented substantial credible evidence detailing a ‘history of violence,’ . . . [g]iven this evidence we conclude that the District Court did not abuse its discretion in making the order of protection permanent.”).

¶12 Here, at the hearing, Fritzler submitted no evidence in support of the allegations in her sworn petition for an order of protection. Those allegations were not based on her direct knowledge but were comprised primarily of hearsay statements from Bighorn’s relatives who allegedly told Fritzler that Bighorn was seeking narcotics and transporting L.D.F.S. while under the influence. Those relatives did not show up to the hearing to testify and corroborate the allegations. Fritzler did not have any personal knowledge of the allegations, nor did she present any additional direct evidence to show that she and L.D.F.S. were in danger of injury or harm or that either was the victim of one of the offenses listed in § 40-15-102, MCA, committed by Bighorn. While such allegations may be sufficient to support issuing a temporary order of protection, they are not sufficient to issue a permanent order of protection without additional admission of substantial, credible evidence supporting the allegations. As such, we find the Municipal Court abused its discretion by issuing the permanent order of protection without any substantial, credible evidence supporting Fritzler’s initial allegations or demonstrating why permanent protection was needed.

¶13 Further, we note it is improper for a court to issue a visitation order for a grandparent or other third party in an order of protection proceeding. The statutes governing issuance of temporary and permanent orders of protection do not provide a means for a court to order grandparent visitation. Here, there was no basis for the Municipal Court to order any

visitation for Bighorn with L.D.F.S.¹ Bighorn was not entitled to visitation with L.D.F.S. without having first properly established grandparent visitation. The proper way to establish grandparent visitation is by filing a petition under § 40-9-102(1), MCA, (“[T]he district court may grant to a grandparent of a child reasonable rights to contact with the child” through filing a petition for grandparent-grandchild contact) and then meeting the statutory criteria for such under Title 40, Ch. 9, MCA. Such, had not occurred prior to the order of protection proceedings herein, and the court’s ordering any grandparent visitation for Bighorn was legal error.

CONCLUSION

¶14 The Municipal Court abused its discretion by issuing a permanent order of protection based on hearsay allegations contained in Fritzler’s sworn petition for a temporary order of protection. Issuance of a permanent order of protection without substantial, credible evidence to support those allegations was an abuse of discretion. Additionally, the court erred in ordering grandparent visitation in its permanent order of protection. Grandparent visitation may only be properly established under the provisions of Title 40, Ch. 9, MCA.

¶15 Accordingly, we reverse and remand to the Municipal Court to vacate and rescind the January 3, 2023, permanent order of protection against Bighorn.

/S/ INGRID GUSTAFSON

¹ There also was no basis for ordering Bighorn to complete a chemical dependency evaluation and its recommendations in an Order of Protection proceeding.

We concur:

/S/ MIKE McGRATH

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER