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FILED

March 25, 2021

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN COURT OF APPEALS

A20-1425

Ann Marie Holland,

Respondent,

ORDER OPINION

vs.

Neng Por Yang,

Appellant.

Scott County District Court
File No. 70-CV-09-27229

Considered and decided by Segal, Chief Judge; Jesson, Judge; and Smith, Tracy M.,
Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. In 2010, we affirmed a district court's 2009 grant to respondent Ann Marie Holland of a 50-year harassment restraining order (HRO) against appellant Neng Por Yang. *Holland v. Yang*, No. A09-2321, 2010 WL 3119485 (Minn. App. Aug. 10, 2010), *review denied* (Minn. Sept. 21, 2010).

2. In December 2019, Yang moved the district court to vacate that HRO, the district court denied that motion, and Yang took this appeal.

3. On this appeal, Yang appears to challenge a separate HRO granted in 2007 to Holland. That HRO had a term of two years and expired in 2009. The matter is thus moot. *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015) (stating a matter is moot if "a decision on the merits is no longer necessary or an award of effective relief is no longer

possible"). In addition, the 2007 HRO was granted in a separate district court file that is not before us in this appeal.

4. Yang also appears to challenge the district court's grant, and our affirmance of the grant, of the 50-year HRO. Any challenge, in this appeal, to the grant or our prior affirmance of the grant of the 50-year HRO is a request that we reconsider our decision in case No. A09-2321. "No petition for rehearing shall be allowed in the Court of Appeals." Minn. R. Civ. App. P. 140.01. Thus, any challenge in the current appeal to grant or the affirmance of the grant of the 50-year HRO is not properly before this court in this appeal.

5. A district court "may vacate or modify" an HRO if the party seeking relief proves that "there has been a material change in circumstances and that the reasons upon which the district court relied in granting the HRO no longer apply and are unlikely to occur." Minn. Stat. § 609.748, subd. 5(d) (2020). Generally, a statute's use of "may" confers discretion on the district court regarding the matter to be decided. *See, e.g., In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 327 (Minn. 2020) (addressing "may" in a statute); compare Minn. Stat. § 645.44, subd. 15 (2020) (stating "[m]ay' is permissive"), with Minn. Stat. § 645.44, subd. 16 (2020) (stating "[s]hall' is mandatory"). Thus, satisfying the burden in Minn. Stat. § 609.748, subd. 5(d), does not entitle the moving party to vacation or modification of the HRO; it merely confers on the district court the discretion to resolve the motion in the manner the district court deems fit based on the relevant circumstances.

6. Yang's affidavit supporting his motion does not specify any "material change in circumstances" regarding Holland's continued need for protection, and identifies no

reason to believe that the reasons for granting the HRO no longer apply. Additionally, the district court noted that (a) Yang's harassment of Holland was "serious and pervasive," (b) "[Yang's] harassment falls at the far end of the most serious cases," and (c) Yang did not provide "any proof that he has successfully addressed the underlying reasons for his conduct, including proof of mental health treatment and/or medication compliance."

7. These findings are amply supported by the record in this case, *see Yang, 2010 WL 3119485, at *1-2*, and by the stunning amount of dubious litigation Yang has initiated in state and federal courts. We note that Yang's litigation has produced multiple rulings that he is a frivolous litigant, and that much of Yang's litigation was tied, directly or indirectly, to his pursuit of Holland. Additionally, Yang's assertions that he "sees a mental health psychologist when he can" and that he "takes Tylenol for his emotional stresses" do not adequately address the district court's medical concerns. We discern nothing in Yang's motion to vacate the HRO, or in his supporting affidavit, that indicates there has been any material change or reduction in the need for the HRO.

8. Finally, in balancing the impact on Holland of vacating the HRO against the impact on Yang of leaving the HRO in place, the district court noted that (a) Holland "deserves, at the very least, the small peace of mind of knowing that an HRO, subject to penalty of criminal prosecution, will continue to require that [Yang] have no contact with her"; and (b) "any alleged negative employment consequences for [Yang] by the continued existence of the HRO are substantially outweighed by the benefits to [Holland] in allowing the HRO to remain in place." On this record, and especially in light of the lack of any indication that Yang's attitudes toward both Holland and the proper use of litigation have

changed, we cannot conclude that the district court abused its discretion in balancing these considerations as it did.

9. Because we affirm the merits of the district court's decision to deny Yang's motion to vacate the 50-year HRO, we need not address the district court's ruling regarding the inadequacy of Yang's service of his motion.

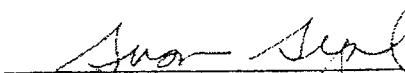
IT IS HEREBY ORDERED:

1. The district court's order denying Yang's motion to vacate or modify the 50-year HRO is affirmed.

2. Pursuant to Minn. R. Civ. App. P. 136.01, subd. 1(c), this order opinion is nonprecedential, except as law of the case, res judicata, or collateral estoppel.

Dated: 3/25/21

BY THE COURT



Chief Judge Susan L. Segal

STATE OF MINNESOTA
COUNTY OF SCOTT

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Ann Marie Holland,

Petitioner,

v.

ORDER AND MEMORANDUM

Court File No. 70CV09-27229

Neng Por Yang,

Respondent.

The above-entitled matter came before the Honorable Judge Michael D. Wentzell on February 5, 2020, at 9:00 a.m., in Scott County District Court. Petitioner did not appear. David Shamla, Esq., appeared for and with Respondent. The matter was taken under advisement following the hearing.

This Court, having reviewed the relevant documents, heard arguments, and being duly advised, now makes the following:

ORDER

1. Respondent's motion to vacate the harassment restraining order herein is DENIED. The attached memorandum is incorporated herein.

IT IS SO ORDERED.

Dated: _____

Wentzell, Michael

Michael Wentzell 2020.03.03
09:09:53 -06'00'

Michael D. Wentzell
Judge of District Court

MEMORANDUM

On December 16, 2009, the District Court of Scott County issued a 50 year harassment restraining order (HRO) against Respondent. Respondent appealed this matter to the Court of Appeals. The Minnesota Court of Appeals affirmed the issuance of the HRO in an opinion filed August 10, 2010. Respondent filed a Petition for Further Review with the Minnesota Supreme Court. The Minnesota Supreme Court denied review on September 21, 2010. Respondent thereafter requested the Chief Judge of the First Judicial District to assign a permanent and different judge to preside over the HRO file. Respondent also sought permission to file a motion to vacate judgment. Those requests were denied on April 26, 2011.

Respondent's actions underlying the issuance of the HRO are serious and concerning. The facts supporting the issuance of the HRO are recited in detail in the Court of Appeals' opinion. *See Holland v. Yang*, No. A09-2321, 2010 WL 3119485 (Minn. Ct. App. 2010) (unpublished).

On December 2, 2019, Respondent filed this motion to vacate the HRO. In conjunction with his motion, Respondent's counsel filed an affidavit indicating that after a diligent search, he was unable to locate the address of Petitioner and sought an order for service by publication. This request did not include any mention of the fact that Minnesota statutes specifically require Respondent's motion to be served by personal service. Court records indicate that counsel's affidavit and the proposed order were placed in the signing bin and approved by a Scott County District Court Judge, without any specific acknowledgement of the statutory requirement for personal service.

Analysis

Under Minnesota law, if the court issues an HRO for a duration of 50 years:

[T]he respondent named in the restraining order may request to have the restraining order vacated or modified if the order has been in effect for at least five years and the respondent has not violated the order.

Application for relief under this paragraph must be made in the county in which the restraining order was issued. Upon receipt of the request, the court shall set a hearing date. Personal service must be made upon the petitioner named in the restraining order not less than 30 days before the date of the hearing. At the hearing, the respondent named in the restraining order has the burden of proving by a preponderance of the evidence that there has been a material change in circumstances and that the reasons upon which the court relied in granting the restraining order no longer apply and are unlikely to occur. If the court finds that the respondent named in the restraining order has met the burden of proof,

the court may vacate or modify the order. If the court finds that the respondent named in the restraining order has not met the burden of proof, the court shall deny the request and no request may be made to vacate or modify the restraining order until five years have elapsed from the date of denial. An order vacated or modified under this paragraph must be personally served on the petitioner named in the restraining order.

Minn. Stat. § 609.748, subd. 5(d) (emphasis added).

Service

The statute requires that “[p]ersonal service must be made upon the petitioner named in the restraining order not less than 30 days before the date of the hearing.” Minn. Stat. § 609.748, subd. 5(d). There is no exception allowing published notice for Respondent’s motion. An exception allowing service by publication exists under certain circumstances for petitions for HROs. See Minn. Stat. § 609.748, subd. 3(b). The fact that no such exception is listed for the type of motion Respondent has filed suggests the legislature specifically intended that no such exception exist. The Scott County District Court’s order allowing service by publication is inconsistent with the express language of the statute. Because personal service was not made, Respondent’s motion was not properly served.

The Merits of Respondent’s Motion

Despite the improper service, the Court will, however, address the merits of Respondent’s motion. It appears that Respondent has abided by the terms of the HRO, and he should be commended for that. The fact that he followed a lawful order of the court, however, does not, in itself, constitute a material change in circumstances, nor does it establish that the reasons for granting the HRO no longer apply and are not likely to reoccur. Respondent’s harassment of Petitioner was serious and pervasive. Further, Respondent did not provide this Court with any proof that he has successfully addressed the underlying reasons for his conduct, including proof of mental health treatment and/or medication compliance.

But even if he had provided such proof, it is still not appropriate to vacate the HRO. The statute states that the court “may” vacate the HRO if the Respondent meets his burden of proof. The term “may” is permissive. Minn. Stat. § 645.44, subd. 15. On the continuum of harassment cases, Respondent’s harassment falls at the far end of the most serious cases. Petitioner deserves, at the very least, the small piece of mind of knowing that an HRO, subject to penalty of criminal prosecution, will continue to require that Respondent have no contact with her.

It appears that Respondent is gainfully employed. The Court is sympathetic to Respondent's claim that this HRO makes it difficult for Respondent to advance at his place of employment or secure other employment in his field. But Respondent's affidavit is devoid of any detail regarding what opportunities Respondent has missed out on and how the HRO negatively impacts his employment prospects. Respectfully, any alleged negative employment consequences for Respondent by the continued existence of the HRO are substantially outweighed by the benefits to Petitioner in allowing the HRO to remain in place.

M.D.W.

FILED

June 15, 2021

STATE OF MINNESOTA

**OFFICE OF
APPELLATE COURTS**

IN SUPREME COURT

A20-1425

Ann Marie Holland,

Respondent,

vs.

Neng Por Yang,

Petitioner.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Neng Por Yang for further review be,

and the same is, denied.

Dated: June 15, 2021

BY THE COURT:



Lorie S. Gildea
Chief Justice