

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DIANE SNELL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Petitioner-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-134
DOUGLAS D. SNELL	:	
	:	
Respondent-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Common Pleas Court of Richland County, Case No. 2009CPO1371

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 14, 2010

APPEARANCES:

For Petitioner-Appellee

For Respondent-Appellant

DOUG SNELL PRO SE
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Gwin, P.J.

{¶1} Respondent-appellant Douglas D. Snell appeals a judgment of the Court of Common Pleas of Richland County, Ohio, which issued a domestic violence civil protection order against him to protect Petitioner-appellee Diane Lee Snell. The pro se appellant assigns eleven errors to the trial court, which his brief labels alphabetically, but which this court will number:

{¶2} “I. THE COURT BELOW, ERRED AS A MATTER OF LAW OR ABUSE OF DISCRETION BY GRANTING A CIVIL PROTECTION ORDER UNDER ORC 3113.31 WHICH THE PETITION DID NOT REQUEST A COURT ORDER.

{¶3} “II. THE COURT BELOW, ERRED AS A MATTER OF LAW OR ABUSE OF DISCRETION BE GRANTING A CIVIL PROTECTION ORDER UNDER ORC 3113.31 FOR WHICH THE PETITION DID NOT MEET THE REQUIREMENT OF ORC 3113.31.

{¶4} “III. THE COURT BELOW, ERRED AS A MATTER OF LAW BY FINDING THAT THE RESPONDENT ‘HAS ENGAGED IN A CONTINUOUS PATTERN OF COMMUNICATION AND CONTACT, DESPITE BEING TOLD TO STAY AWAY AND NOT CONTACT THE PETITIONER, AND MAKING ‘VEILED THREATS’ DESCRIBING THE PETITIONER AS ‘EVIL’ AND THAT HE WAS ONE OF ‘GOD’S SOLDERS’, AND THAT ‘BAD THINGS WERE GOING TO HAPPEN TO HER.’ CAUSING THE PETITIONER TO BE AFRAID OF THE RESPONDENT’, WAS A PLAIN ERROR NOT SUPPORTED BY THE TESTIMONY, EVIDENCE OR FACTS, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{15} “IV. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN RULING TO OVERRULE THE RESPONDENT’S MOTION TO DISMISS BASED ON THE PETITIONER’S AND THE RESPONDENT’S PRIOR AGREEMENT ACTING TO BAR THE LOWER COURT GRANTING AN ORDER SUCH AS ISSUE (S) BY THE LOWER COURT.

{16} “V. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN CONCLUSIONS OF LAW UPON FINDING OF DOMESTIC VIOLENCE COMMITTED BY THE RESPONDENT AGAINST THE PETITIONER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{17} “VI. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN CONCLUSION OF LAW BY FINDING THAT THE PETITIONER IS IN DANGER OF DOMESTIC VIOLENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{18} “VII. THE LOWER COURT BELOW ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN CONCLUSIONS OF LAW BY FINDING THE ‘PETITIONER HAD PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT HAS ATTEMPTED TO CAUSE OR RECKLESSLY CAUSED THE PETITIONER BODILY INJURY, AND/OR PLACED PETITIONER BY THREAT OF FORCE IN FEAR OF IMMINENT SERIOUS PHYSICAL HARM OR COMMITTING A VIOLATION OF SECTION 2903.211 OR 2911.211 OF THE REVISED CODE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{19} “VIII. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN CONCLUSIONS OF LAW '10 THAT THE

PROTECTED PERSON IS IN DANGER OF OR HAS BEEN A VICTIM OF DOMESTIC VIOLENCE, AS DEFINED BY O.R.C. 3113.31 (a), COMMITTED BY THE RESPONDENT, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AGAINST THE LAW.

{¶10} “IX. THE LOWER COURT BELOW, ERRED AS MATTER OF LAW OR BY ABUSE OF DISCRETION IN CONCLUSIONS OF LAW THAT ‘2 THE FOLLOWING ORDERS ARE EQUITABLE, FAIR, AND NECESSARY TO BRING ABOUT THE CESSATION OR PREVENTION OF DOMESTIC VIOLENCE AGAINST THE FAMILY OR HOUSEHOLD MEMBER NAMED IN THE PETITION’ WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AGAINST THE LAW, AGAINST THE BINDING AGREEMENT BETWEEN THE PARTIES, AND AGAINST THE RIGHTS OF THE FAMILY. AND HAVING ISSUED AN ORDER THAT FORBIDS THE RESPONDENT FROM CARRYING A FIREARM FOR FIVE YEARS, DENYING HIM HIS SECOND AMENDMENT RIGHTS AND ABILITY TO DEFENDANT HIMSELF IS NOT FAIR OR EQUITABLE, ESPECIALLY SINCE THERE IS NO PROVEN DOMESTIC VIOLENCE NOR DOES THE PETITIONER LIVE WITH THE RESPONDENT.

{¶11} “X. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW OR BY ABUSE OF DISCRETION IN ISSUING AN ORDER IN VIOLATION OF THE PETITIONER’S AND RESPONDENT’S MUTUALLY AGREED TO, SIGNED AND BINDING AGREEMENT WHICH IS LEGALLY BINDING ON BOTH PARTIES AND THE LOWER COURT; THE LOWER COURT ERRED AGAINST THE SUBSTANTIAL

RIGHTS OF THE RESPONDENT AND THE STATUTES OF FRAUD LAW AND OTHER LAWS OF THE STATE.

{¶12} “XI. THE LOWER COURT BELOW, ERRED AS A MATTER OF LAW, AS IT HAD AN INSTANCE AND/OR A PATTERN OF BIAS AND PREJUDICE AGAINST THE RESPONDENT, OR FOR THE PETITIONER, WHICH MADE THE ACTIONS OF THE LOWER COURT NEITHER FAIR OR EQUITABLE AND VIOLATED THE SUBSTANTIAL RIGHTS OF THE RESPONDENT.”

{¶13} The record indicates appellee filed her petition for a domestic violence civil protection order on October 7, 2009. The court issued an ex parte civil protection order on the same day. Prior to the final hearing, appellant filed three motions to dismiss. On October 23, 2009, the court conducted a full hearing, and entered a domestic violence civil protection order effective until October 7, 2014. The order directed appellant to not abuse appellee by harming, attempting to harm, threatening, following, stalking, harassing, forcing sexual relations upon, or committing sexually oriented offenses against her. The order prohibited appellant from entering or interfering with her residence, school, business, place of employment, or child-care provider including the buildings, grounds, and parking areas of the locations. The court order directed appellant to stay away from appellee and not be present within 500 feet of her, and if he accidentally comes into contact with her, he must depart immediately. The order includes encounters on public and private roads, highways, and thoroughfares. The order prohibited appellant from initiating or having any contact with appellee at her residence, business, place of employment, school, daycare center, or child-care provider, including but not limited to by telephone, fax, e-mail, voicemail, deliver service,

writings, or communications by any other means in person or through another person. The order directed appellant to not remove, damage, hide or dispose of any property or pets owned by appellee, and not to encourage or cause any other person to do any act prohibited by the order. The order prohibited appellant from possessing, using, carrying, or obtaining any deadly weapon, and ordered him to turn over all deadly weapons in his possession to the law enforcement agency that served him with the order.

{¶14} The civil protection order made appellee legal custodian and residential parent of the parties' four children, and granted appellant parenting time in accordance with the court's local rules. Finally, the order directed law enforcement agencies to assist the appellant in gaining physical custody of the children if necessary, and to obtain any items of clothing or personal items belonging to the her or the children. The court did not name the children as protected parties in the final order.

{¶15} In support of the order, the court made findings of fact and conclusions of law. The court found appellant has engaged in a continuous pattern of communication and contacts, despite being told to stay away and not contact appellee, and found appellant made "veiled threats" against her. The court found appellant informed appellee she is evil, that he was one of God's solders and that bad things were going to happen to her. These threats caused appellant to be afraid of the appellant. The court declined to include the children as protective parties, finding there was insufficient evidence to warrant it, and because representatives of the Richland County Children's Services indicated they had talked to each of the children.

{¶16} The court found by a preponderance of the evidence that appellee is in danger of or has been a victim of domestic violence, committed by appellant, and the orders are equitable, fair, and necessary to bring out a cessation or prevention of the domestic violence against her.

{¶17} At the hearing on the civil protection petition, both parties appeared pro se. Appellee testified she was married to appellant but separated. Appellee testified a series of events had caused her to seek a court order. She stated appellant had sent their daughter a very disturbing sexually explicit text message which demonstrated his mental state is becoming more and more questionable and unstable. She testified appellant had threatened her, telling her in text messages that she was evil and God would humiliate her. Appellee testified she had filed police reports against him for harassment and verbally abused her and the children.

{¶18} Both appellant and appellee have contacted Richland County Children's Services about the other's behavior.

{¶19} Appellant testified he had erroneously sent the text message to their daughter, but he had intended to send it to his brother. He testified one of the children had been in juvenile court for delinquency during the time she lived with appellee.

{¶20} Appellee called witnesses on his behalf to testify he had acted appropriately and as a good parent with the children. The parties' daughter testified she and her mother had argued, including on at least one occasion becoming physical, and appellant had to intervene.

{¶21} Appellant presented the court with the copy of an agreement the parties had entered into purporting to supersede any court action except a mutually agreed-

upon dissolution, and agreeing to refrain from bringing any other kind of legal action between the parties in the courts or any other agency. The agreement also dealt with certain aspects of the marital and separate property in the event the parties agreed to dissolve their marriage. Appellant's motions to dismiss were based in part upon the agreement.

{¶22} The petitioner bears the burden of proof in an action for a civil protection order, to demonstrate by the preponderance of the evidence the petitioner and/ or the petitioner's family or household members are in danger of domestic violence. *Felton v. Felton* (1997), 79 Ohio St. 3d 34, paragraph 2 of the syllabus.

{¶23} R.C. 3113.31 defines domestic violence as the occurrence of one or more acts of attempting to cause or recklessly causing bodily injury, or by placing another person by the threat of force in fear of imminent serious physical harm. The decision whether to grant a civil protection order is within a trial court's discretion, and an appellate court may not reverse the decision absent an abuse of discretion. *Olenik v. Huff*, Ashland App. No. 02-COA-058, 2003-Ohio-4621, at paragraph 21. The Supreme Court has repeatedly defined the term abuse of discretion as the decision is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140.

{¶24} When an appellant argues a finding of domestic violence, upon which a civil protection is based, is against the manifest weight of the evidence, we must determine whether the court's decision is supported by sufficient, competent and credible evidence. A judgment which is supported by competent and credible evidence going to all the essential elements of the case will not be reversed by a reviewing court

as against the manifest weight of the evidence. *C.E. Morris v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 578, syllabus by the court. We must give deference to the findings of the trial court because the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and to weigh the credibility of the testimony. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St. 3d 77, 80, 461 N.E. 2d 1273.

{¶25} Appellant's assignments of error raise slightly different variations of some central arguments. We will group the assignments of error together as appropriate.

IV & X

{¶26} In his fourth assignment of error, appellant argues the court should have dismissed the petition because it was superseded by the parties' post-nuptial agreement. In his tenth assignment of error, appellant argues because the parties had entered into the post-nuptial agreement, the court was without power to enter the civil protection order.

{¶27} The trial court declined to enforce the agreement, finding it was "ludicrous" to argue a prior agreement would bar a party from relief from domestic violence.

{¶28} The question of the enforceability of a contract is a question of law, which we review de novo, and do not give deference to the trial court's decision. *Akron v. Frazier* (2001), 142 Ohio App. 3d 718, 721, 756 N.E. 2d, 1258. An unconscionable provision is clearly unenforceable. *Williams v. Aetna Finance Company*, 83 Ohio St.3d 464, 1998 -Ohio- 294, 700 N.E.2d 859. The doctrine of unconscionability of contract consists of two separate concepts: (1) "substantive unconscionability," which involves unreasonable contract terms, and (2) "procedural unconscionability," under which no

voluntary meeting of the minds was possible in light of individualized circumstances surrounding each party to a contract. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App. 3d 826, 834, 621 N.E. 2d 1294. Procedural unconscionability requires a court to consider factors such as the relative bargaining position of the contracting parties, which party drafted the contract, and whether under the particular circumstances surrounding the entering into the contract, there was a meeting of the minds. Substantive unconscionability addresses the contract terms themselves, and whether the terms are reasonable. *Id.*

{¶29} Appellee testified she entered into the contract in a good faith effort to work out their problems civilly when the parties reconciled after a previous situation.

{¶30} A contract which curtails a party's rights and violates public policy is unenforceable. Public policy is a concept of common sense and common conscience, concerning the state's interest in matters of public morals, health, safety, welfare, and the like. *Eagle v. Fred Martin Motor Company*, 157 Ohio App. 3d 150, 2004-Ohio-829, 809 N.E. 2d 1161 at paragraph 64, citations deleted. As the trial court stated, a contract cannot prevent a person from seeking protection from a potentially violent situation.

{¶31} We find the contract entered into by the parties is unenforceable to the extent it purports to prevent appellee from seeking a civil protection order or other relief from domestic violence. For this reason, we find the court did not err in overruling the motions to dismiss and entering the civil protection domestic violence protection order.

{¶32} The fourth and tenth assignments of error are overruled.

IX

{¶33} In his ninth assignment of error, appellant argues the trial court's order preventing him from possessing a firearm for five years is unfair and inequitable, and violates his second amendment rights.

{¶34} In *Woolum v. Woolum* (1999), 131 Ohio App. 3d 818, 723 N.E. 2d 1135, the 12th District Court of Appeals found because Section 922 (g)(8) Title 18, U.S. Code provides it is unlawful for any person to possess any firearm or ammunition when the person is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner. The Court of Appeals found if a party is subject to such an order, then a trial court does not abuse its discretion in requiring a respondent to surrender his firearms. *Woolum* at 1138-1139. See also, *Prostejovsky v. Prostejovsky*, Ashland App. No. 06-COA-033, 2007-Ohio-5743, at paragraph 5.

{¶35} A trial court can include a prohibition about firearms in an order if it finds, after a full hearing, that the order is equitable, fair, and necessary to bring about a cessation or prevention of domestic violence. Even if it does not specifically order restrictions on a respondent's possession of firearms, federal law prohibits it.

{¶36} The ninth assignment of error is overruled.

I, II, III, V, VI, VII, VIII, and XI

{¶37} The remainder of appellant's assignments of error asserts the trial court abused its discretion and erred as a matter of law in finding appellee had proven all the essential elements of her petition by preponderance of the evidence.

{¶38} Appellant asserts the court was incorrect in finding he had engaged in a continuous pattern of communication in contact, and in finding appellee was a victim of

or in danger of being a victim of domestic violence. He argues appellee did not prove appellant had attempted to cause or had recklessly caused her bodily injury, or placed her in fear of imminent serious physical harm by threat of force.

{¶39} Appellant also argues appellee did not request the court to enter these orders in her petition. He asserts the court should not have included the children in the ex parte civil protection order.

{¶40} Appellee's petition for civil protection order requested the court to include all the children as protected parties, and requested an ex parte order. The statute permits the court to enter an ex parte order, which is a temporary order to protect the petitioners until the matter can be brought before the court for a full hearing. The court refused to include the children in the final order, and the only issue the final order addresses concerning the children is the question of visitation. The court ordered visitation pursuant to its local rule, and we find no error therein.

{¶41} The petition asked the court to direct appellant not to abuse appellee, not to interfere in the residence to require appellant to seek counseling, and to refrain from approaching or contacting her. Thus, appellant is incorrect in asserting the petition did not request the court to take any action against him. After the court's jurisdiction is invoked by the petition, the court can fashion an order as it deems necessary to protect the person or persons named in the protection order.

{¶42} The record indicates appellee testified because of various actions appellant had taken and communications he had made, he had caused her a lot of emotional and mental anguish. Appellee testified appellant is controlling, obsessive, and relentless, and his unstable behavior and recent actions made her believe there is great potential

for something tragic to happen. Appellee testified appellant would never leave her alone, and she was in great fear he would harm her or the children.

{¶43} As we noted supra, the trial court is the finder of fact, and had responsibility to determine the credibility of the witnesses. We find there is sufficient, competent and credible evidence before the trial court, acting as the trier of fact, to determine appellee is in danger of or has been the victim of domestic violence and its orders were equitable, fair, and necessary to bring about a cessation or prevention of domestic violence against her.

{¶44} The remaining assignments of error are each overruled.

{¶45} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

