

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.L.W.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
L.E.R.-W.,	:	
	:	
Appellee	:	No. 1097 WDA 2012

Appeal from the Order entered June 20, 2012,
in the Court of Common Pleas of Lawrence County,
Civil Division, at No(s): 40066/12PFA

BEFORE: PANELLA, ALLEN, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.:

Filed: March 13, 2013

T.L.W., (Appellant), appeals from the June 20, 2012 order which granted Appellee L.E.R.-W.'s request for a final Protection from Abuse (PFA) order pursuant to the Protection from Abuse Act (the Act), 23 Pa.C.S. §§ 6101-6122. We affirm.

The PFA court has aptly summarized the relevant procedural and factual background as follows.

On February 17, 2012, [Appellee] filed a [petition] in the Court of Common Pleas of Lawrence County[, Pennsylvania] against [Appellant], her ex-husband, requesting entry of an order of protection under the Act. [The petition alleged that on February 15, 2012, during his period of custody, Appellant told the parties' minor son, N.W., that he had purchased a handgun and told N.W. to inform Appellee and her paramour, B.S., that "a storm was coming." The petition further asserted that in the summer of 2011, Appellant told his cousin that he was going to "blow [Appellee's] happy brains out." **See** PFA petition, 2/17/2012.] On [February 17, 2012], upon presentation of the [petition], Lawrence County Court of Common Pleas Judge John

*Retired Senior Judge assigned to the Superior Court.

Hodge entered a [temporary PFA order], *ex parte*, granting, *inter alia*, protection to [Appellee]; awarding temporary custody of [N.W.] to [Appellee]; and prohibiting Appellant from having any contact with Appellee or [N.W.].

Appellant is a resident of Ohio. At the time the February 17[, 2012 temporary PFA order] was entered, there was an existing custody order in effect that had been issued by the Mahoning County, Ohio, Court of Common Pleas. However, pursuant to the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 23 Pa.C.S.A. §5401, *et seq.*, jurisdiction over the parties' custody proceedings was transferred to the Court of Common Pleas of Lawrence County, Pennsylvania [by order of the Mahoning County, Ohio, Court of Common Pleas on April 26, 2012.] Appellant has filed an appeal from that transfer order in the appellate court system of Ohio.

When the February 17, 2012 [temporary PFA order] was entered, a hearing on [Appellee's PFA petition] was scheduled for February 27, 2012. The record indicates that, at the time scheduled for hearing on February 27, [Appellee] appeared represented by her attorney, Susan Papa, Esq., and Appellant appeared represented by his counsel, Deborah L. Smith, Esq. According to Judge Hodge's order of February 28, 2012, there was insufficient time on the [court's] schedule on February 27 to reach the case, and, consequently, the hearing was continued until March 26, 2012. Attached to the February 28, 2012 Order is a Motion for Continuance signed by [Appellee's] counsel that indicates that the Motion [was] unopposed by Appellant's counsel. However, Judge Hodge did not use the form order at the bottom of the page on which the Motion appeared, but, instead, crafted his own Order so that he could include the additional provisions modifying the [temporary PFA order] to permit Appellant to have partial custody of [N.W.], in accordance with an alternating weekend schedule, imposing responsibility for transportation of [N.W.], and noting his awareness of a conciliation conference scheduled in the parties' custody case.

At the rescheduled hearing on March 26, 2012, the record indicates that [Appellee] and Appellant again appeared with their respective counsel. Again, the [court] lacked sufficient time on its schedule to reach the case, and the hearing was continued to June 7, 2012. In addition, Judge Hodge rescinded paragraph 1 of his February 28, 2012 Order that allowed Appellant to have

partial custody of his son. As a result, the “no contact” provisions of the [temporary PFA order] again became effective, prohibiting Appellant from having contact with [N.W.], except in the case of a medical emergency, pending the final hearing.

On May 18, 2012, Appellant’s counsel filed a Motion For Continuance of the hearing scheduled for June 7, 2012, that was unopposed by [Appellee]. Consequently, the Appellant’s continuance motion was granted; the June 7, 2012 hearing as continued; and the hearing was rescheduled for June 18, 2012.

[A h]earing on [Appellee’s] petition was held as scheduled . . . on June 18, 2012. After [the] hearing, [the PFA court] entered the Final [PFA] Order, from which Appellant has filed the present appeal.

Appellant filed a Petition to Open Record and Grant A Hearing For Reconsideration that was denied by [the PFA court’s] Oder of June 26, 2012. [On July 13, 2012, Appellant filed his *pro se* notice of appeal and his concise statement pursuant to Pa.R.A.P. 1925(b).¹]

Pursuant to Petition For Leave to Withdraw Appearance filed on July 31, 2012, Appellant’s counsel was permitted to withdraw by Judge Hodge’s Order of July 31, 2012. [The PFA court filed its 1925(a) opinion on August 9, 2012.]

PFA Court Opinion, 8/9/2012, at 1-4 (unnumbered) (citations omitted).

We note at the outset that Appellant’s brief fails to conform to the Rules of Appellate Procedure. The brief does not contain a statement of either the standard or the scope of review, nor does it contain a copy of the order in question, as required by Pa.R.A.P. 2111(a)(2). Additionally, the statement of questions involved fails to conform to the requirements of Pa.R.A.P. 2216, and is mislabeled “Order In Question.” Appellant’s Brief at 1-

¹ Appellee has not filed a brief in this matter.

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2. Despite these errors, we decline to dismiss this appeal for failure to conform to the applicable rules of court. **See *In re Ullman***, 995 A.2d 1207, 1211-12 (Pa. Super. 2010) (This Court may quash or dismiss an appeal if the appellant fails to conform to the requirements set forth in the Pennsylvania Rules of Appellate Procedure.)

However, we must address the discrepancies between the six issues raised under the heading "Order in Question" and the issues actually addressed in Appellant's brief. A careful review of the record reflects that Appellant does not argue the issues raised on pages 1 and 2 of his brief. Instead, the argument section of Appellant's brief addresses only those issues contained in his 1925(b) statement. In its 1925(a) opinion the PFA court made an attempt to address specifically those arguments contained in Appellant's 1925(b) statement. Accordingly, we will confine our review to those issues and consider waived any arguments raised for the first time in Appellant's brief. **See** Pa.R.A.P. 1925(b)(4)(vii) (issues not included in the appellant's 1925(b) statement of errors complained of on appeal, and not raised before the trial court, are deemed waived.)

Our standard of review for this matter is well-settled, "[i]n the context of a PFA order, we review the trial court's legal conclusions for an error of law or abuse of discretion." ***Stamus v. Dutcavich***, 938 A.2d 1098, 1100 (Pa. Super. 2007) (citation omitted).

Initially, we first address Appellant's claim that he was improperly served with the temporary PFA order and the notice of the hearing scheduled for March 26, 2012. Appellant's Brief at 22. A review of the record belies Appellant's argument. The record reflects that Appellant appeared, with his counsel, at the final PFA hearings scheduled on February 27, 2012 and March 26, 2012. Moreover, Pennsylvania Rule of Civil Procedure 1930.4, Service of Original Process in Domestic Relations Matters, provides that "[r]egardless of the method of service, a party who appears for the hearing or conference will be deemed to have been served." Pa.R.C.P. 1930.4(*l*). Accordingly, we find that Appellant's argument lacks merit.

We turn next to Appellant's claim that the PFA court lacked personal jurisdiction over Appellant. Appellant's Brief at 25-26. Additionally, the Act provides that plaintiff's right to relief is not affected by "the defendant's absence from this Commonwealth or the defendant's nonresidence in this Commonwealth, provided that the court has personal jurisdiction over the defendant[.]" 23 Pa.C.S. § 6103(b)(2). Under 42 Pa.C.S. § 5322(4) (relating to bases of personal jurisdiction over persons outside this Commonwealth), a court may exercise personal jurisdiction over a person who causes "harm or tortious injury by an act or omission in this Commonwealth."

Additionally, as noted above, jurisdiction over the parties' custody proceedings was transferred to the Court of Common Pleas of Lawrence

County by order of the Mahoning County, Ohio, Court of Common Pleas on April 26, 2012. The UCCJEA defines “child custody proceeding” as “a proceeding in which legal custody, physical custody or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights **and protection from domestic violence**, in which the issue may appear....” 23 Pa.C.S. § 5402. Accordingly, the PFA court’s exercise of jurisdiction was proper, and we hold that Appellant’s claim lacks merit.

Next, Appellant claims the evidence was insufficient to support the entry of a Final PFA order.

When a claim is presented on appeal that the evidence is not sufficient to support an order of protection from abuse, we review the evidence in the light most favorable to the petitioner and granting her the benefit of all reasonable inference[s], determine whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence. This Court defers to the credibility determinations of the trial court as to witnesses who appeared before it. Furthermore, the preponderance of the evidence is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence.

Thompson v. Thompson, 963 A.2d 474, 477 (Pa. Super. 2008) (quotations and citations omitted).

Instantly, Appellant claims that there were numerous discrepancies between the allegations raised by Appellee in her PFA petition and N.W.’s testimony at the final hearing. Appellant’s Brief at 18. Further, Appellant contends that the PFA court failed to credit Appellant’s testimony that no

threats of violence were ever made toward Appellee. *Id.* at 22. In this regard, the PFA court found that N.W.'s testimony was more credible than that of Appellant, and met the burden of proof by a preponderance of the evidence, warranting the issuance of a final PFA order. Specifically, the PFA court noted the following:

[N.W.] testified credibly regarding his recollection of Appellant's threatening comments, and the ensuing fear that Appellant's words and actions engendered in the child's mind. [Appellee] testified credibly regarding Appellant's past abusive actions and his threat to kill [Appellee], overheard over the telephone. Appellant's categorical denial of making any of the threats attributed to him by [N.W. and Appellee], and his complete denial and professed lack of knowledge that the acts described by [Appellee] ever occurred were less credible, and the hesitance exhibited by Appellant's witness, John Wagner, as well as his demeanor on the stand adversely affected his believability.

PFA Court Opinion, 8/9/2012, at 4 (unnumbered).

This Court must defer to the trial court's determinations regarding the credibility of witnesses at the hearing. *Thompson*, 963 A.2d at 477; *R.G. v. T.D.*, 672 A.2d 341, 342 (Pa. Super. 1996). Thus, we find that the PFA court did not abuse its discretion in finding that the evidence warranted the issuance of the final PFA order pursuant to Section 6102(a).

In his next arguments, Appellant appears to contend that

the provisions of the Final Order granting custody of [N.W.] to [Appellee] and prohibiting Appellant from having contact with [N.W. are] invalid since [N.W.] was not named as a protected party in the [Appellee's petition for protection from abuse] or in the Temporary or Final [PFA] Orders; that the Orders' custody provisions are not in the best interest of the child; and that the [PFA court] failed to recognize [Appellee's] motive to use [the

Act and the PFA court] as “an alternative to gain the advantage in a custody dispute and to supersede an existing custody order in another state . . . where [Appellant] resides.”

PFA Court Opinion, 8/9/2012, at 4 (unnumbered). **See also** Appellant’s Brief at 5-7.

The PFA court addressed Appellant’s concerns as follows.

As is frequently the case, protection from abuse and custody litigation proceed simultaneously, and there always is the possibility that one parent or the other is using the Act and its procedure to effect a prompt custody decision in that parent’s favor. In the instant case, as in all such cases, the [PFA court] was mindful of that possibility. However, a custody order had already been entered, the custody case had been transferred to Lawrence County, and a conciliation conference was scheduled.

* * *

Based on the [PFA court’s] evaluation of the witnesses’ credibility and the substance of Appellant’s threats; the fact that [Appellee’s paramour B.S., N.W., and Appellee] all live together; and the risk of harm to the household if Appellant’s threats were carried out, [the PFA court was] persuaded that [Appellee] had carried her burden of proving Appellant’s abusive contact as defined in the Act, warranting the grant of protection. Given the seriousness of the most recent threats, [N.W.’s] testimony regarding their effect [on him], the risk of harm to [N.W.], the provisions of the Act that recognize the need to address custody issues when a risk of abuse exists, and the tension and uncertainty that would occur upon renewed contact with Appellant after [N.W.] had testified in support of the Petition, it was deemed necessary to maintain restriction on contact between [N.W.] and Appellant, and to provide for a gradual resumption of partial custody.

PFA Court Opinion, 8/9/2012, at 4-5 (unnumbered).

While it is true that N.W. is not a named plaintiff on whose behalf a PFA petition was filed, it is well-settled that the PFA court may grant

protection necessary to bring about the cessation of abuse of the petitioner or minor children. This includes awarding temporary custody of or establishing temporary visitation rights with regard to minor children. 23 Pa.C.S. §6108(a)(4). "In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph, the court shall consider any risk posed by the defendant to the children as well as risk to the plaintiff." *Id.* This Court has held that

section 6108(a)(4) [of the Act] precludes a custody award, pre-existing . . . the PFA Order, from nullifying the PFA Order as its purpose is to assure the safety of a child or children above and beyond any other Orders or relationships involving the children. To hold otherwise would have the effect of emasculating the central and extraordinary feature of the PFA which is to prospectively control and prevent domestic violence.

Lawrence v. Bordner, 907 A.2d 1109, 1113-1114 (Pa. Super. 2006) (citation omitted). Accordingly, we hold that the PFA court did not abuse its discretion in modifying the existing custody order to limit Appellant's contact with N.W., particularly in light of N.W.'s decision to testify against Appellant at the final PFA hearing and the content of said testimony.² *See id.* at 1113 ("[I]t is well settled, that in any instance in which child custody is determined, the overriding concern of the court must be the best interest and welfare of the child, including the child's physical, intellectual, emotional and spiritual well-being.")

² Child was born in April of 1997 and was 15 years old at the time of the June 18, 2012 final PFA hearing.

Appellant also complains that the PFA court “improperly combined subject matter jurisdiction by. . . permitting a guardian *ad litem* to become a party to a civil proceeding.” Appellant’s Brief at 8. A review of the record reflects that Robert DiBuono, the court-appointed guardian *ad litem* for N.W., was present at the final PFA hearing. Attorney DiBuono did not question witnesses in this matter, nor did he make argument on behalf of either party. As the PFA court explained, Attorney DiBuono attended the final PFA hearing “only as an observer to get first-hand information regarding the family dynamics to assist him in his representation of [N.W.]” and to assist the parties and their counsel “in fashioning a reasonable procedure for resumption of contact between [N.W.] and Appellant” in light of N.W.’s testimony at the hearing. PFA Court Opinion, 8/9/2012, at 6 (unnumbered). Accordingly, we discern no abuse of discretion in this regard.

Appellant next argues that the PFA court erred in denying his petition for reconsideration. Appellant’s Brief at 15. In his petition, Appellant maintains that the testimony of N.W. was contradictory and unbelievable and requests the opportunity to reopen the record to allow him to present additional witnesses on his behalf. **See** Appellant’s Petition to Open Record and Grant a Hearing for Reconsideration, 6/26/2012. The PFA court denied Appellant’s petition, reasoning that Appellant had merely reiterated his argument from the final PFA hearing and “presented nothing new that

warranted reconsideration of the Final Order or a new hearing.” Trial Court Opinion, 8/9/2012, at 7. We agree. Accordingly, we hold that the PFA court did not abuse its discretion in failing to provide Appellant the opportunity to re-argue that which was previously litigated.

In his final issue, Appellant claims that counsel was ineffective for failing to file a motion to quash or dismiss the February 17, 2012 temporary PFA petition on the grounds that the PFA court lacked personal jurisdiction over Appellant. We note that there is no such right to effective assistance of counsel in civil matters, except for parental termination cases cases. ***See In re Adoption of T.M.F.***, 573 A.2d 1035 (Pa. Super. 1990) (*en banc*). Accordingly, Appellant’s claim is without merit. Additionally, as previously discussed above, Appellant’s underlying jurisdictional claim lacks merit. Thus, the PFA court did not abuse its discretion in rejecting Appellant’s argument that counsel was somehow ineffective for failing to file a baseless motion.

Order affirmed.