

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.H.

Appellant

v.

M.H.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1204 WDA 2011

Appeal from the Order July 12, 2011
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2011-4150

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

MEMORANDUM BY PANELLA, J.

Filed: February 26, 2013

Appellant, T.H. ("Husband"), appeals from the order denying his petition pursuant to the Protection From Abuse Act, entered on July 12, 2011, in the Court of Common Pleas of Washington County. After careful review, we vacate and remand.

Husband and M.H. ("Wife") have been involved in a continuing custody dispute regarding their daughter ("Daughter"). In June of 2011, Wife filed an emergency custody petition, alleging that Father had failed to comply with a custody order by refusing to return custody to Mother for the purpose of a pre-planned family vacation to San Diego. Father and his counsel failed

* Retired Senior Judge assigned to the Superior Court.

to appear for a hearing on the emergency petition, and the trial court granted the emergency relief.

Shortly thereafter, on June 20, 2011, Husband filed a petition for a PFA order, alleging that Mother had abused Daughter. On that same date, the trial court denied Husband's petition for a temporary PFA order. Husband requested a hearing on the denial, which was held on July 5, 2011. At the hearing, Husband, Wife, and the mother of Daughter's friends testified. Ultimately, the trial court denied Husband's request for a permanent PFA order, and this timely appeal followed.

On appeal, Husband raises three issues for our review:

- I. Did Appellant/father establish the minor child was being abused by a preponderance of the evidence?
- II. Did the lower court err by not allowing the testimony of the minor child in a Protection From Abuse proceeding filed by Appellant/father on her behalf?
- III. Did the lower court follow proper procedure in allowing a police report into evidence over hearsay objections?

Appellant's Brief, at 5.

We will start by addressing Husband's second issue on appeal, as it is dispositive. Husband argues that the lower court erred in precluding Daughter's testimony at the hearing. At the beginning of the hearing, the following exchange occurred between the trial court and counsel for Husband:

THE COURT: Number two, this looks like a custody matter to me so why should I have a PFA hearing instead of a custody hearing?

[Counsel]: When children are being abused by their parents, that's a PFA. That's what it's for.

THE COURT: Is that right? That's what it's for?

[Counsel]: That's my understanding of a PFA.

THE COURT: If custody has nothing to with this, we will do a consent PFA and leave the custody the same then.

[Counsel]: If a child is being abused, then the child needs to be extricated from that situation.

...

THE COURT: And his goal is to switch custody?

[Counsel]: His goal is to protect this child who constantly calls him asking for help. If you want to listen to [Daughter] and what she says and you feel she does not need help and that she has a comfort level at her house that needs to go on, then it is up to the [c]ourt to leave her there but she's here willing to talk to the [c]ourt and wanting to address the [c]ourt.

THE COURT: So we will drop what we are doing because the 14-year-old wants to talk to the [c]ourt?

[Counsel]: No. Do what the court order says and have a hearing for today. That's what we are scheduled for.

N.T., hearing, 7/5/2011, at 7-9. The trial court ultimately did not allow M.H.

to testify at the hearing:

[Counsel]: That's why I'm asking you to bring the daughter in.

THE COURT: First if you know the rules, we don't bring the daughter in in [sic] front of her parents and ask her to testify against one or the other.

[Counsel]: Then you can tell them to get out of the courtroom and we can address her. She wants to tell the [c]ourt that she's in an abusive situation.

THE COURT: That's enough out of you, [Counsel].

Id., at 12-13. At the conclusion of the hearing, Husband's counsel once again requested to present Daughter as a witness:

[Counsel]: And the best witness is the child and we'd like to have her testify.

THE COURT: So the child is going to tell you about the history of her parents?

[Counsel]: No. The child is going to tell you about her comfort zone in her mother's house and that she's not incorrigible when she's with him.

THE COURT: We aren't here to find out what her comfort zone is. If the parents can't determine how to handle her custody then I will hear it on the de novo.

[Counsel]: But it's also abuse.

THE COURT: That's what you are calling it.

[Counsel]: That's what she's calling it.

THE COURT: If it was a problem, it should have been taken care of at the time you denied returning her to her mother and you should have been up here with an emergency custody order and not a PFA. Thank you.

Id., at 59-60.

This Court has previously held that a PFA defendant has a due process right to testify and present witnesses in his own defense. *See Leshko v.*

Leshko, 833 A.2d 790 (Pa. Super. 2003). When a PFA defendant was denied the ability to testify in his own defense, we vacated the resultant PFA and remanded and directed the trial court to hold “a proper hearing.” **Id.**, at 792. We conclude that the due process right to call witnesses is, if anything, even more applicable to a PFA plaintiff or victim, who bears the burden of proving “the allegation of abuse by a preponderance of the evidence.” 23 Pa.Cons.Stat. Ann. § 6107.

The trial court opines that under the Rules of Civil Procedure, a “court may make and enforce rules and orders limiting the number of witnesses whose testimony is similar or cumulative.” Trial Court Opinion, filed 7/19/2012, at 23 (citations omitted). Furthermore, the trial court notes that it “generally does not permit children to be interrogated in open court in front of their parents...,” citing Pa.R.Civ.P., Rule 1915.1 and **Gerald G. v. Theresa G.**, 426 A.2d 157 (Pa. Super. 1981). However, neither of these authorities stand for the proposition that a willing child witness can be denied the right to testify where she has relevant, admissible knowledge. Rather, both authorities allow a trial court discretion in how to allow such testimony, providing for the possibility of questioning in chambers with only counsel present. Defense counsel offered this option to the trial court, but the trial court refused to entertain any testimony from Daughter, who was 14 at the time of the hearing. While we are sympathetic to the trial court’s goal of sparing Daughter any unnecessary trauma, denying her the

opportunity to testify at the hearing served to undermine not only fairness of the hearing, but the purposes of the PFA Act as well.

Daughter's testimony certainly appears to be relevant to the matter at hand. As noted above, Husband, as plaintiff for Daughter's benefit, was required to prove the allegation of Mother's abuse of Daughter. **See** Pa.Cons.Stat.Ann. § 6107(a). "Abuse" is defined by the Act as *inter alia*, "[p]lacing another in reasonable fear of imminent serious bodily injury." Pa.Cons.Stat.Ann. § 6102(a). Daughter, as the alleged victim of abuse, would have the most probative testimony as to, among others, the relevant issue of whether she had been placed in reasonable fear of imminent serious bodily. Denying Husband the right to call Daughter as a witness, and Daughter the right to testify, denied Husband's due process rights and seriously undermined the purposes of the PFA Act, which the legislature intended to be used to prevent domestic abuse. **See *Buchhalter v. Buchhalter***, 959 A.2d 1260 (Pa. Super. 2008).

As in ***Buchhalter***, we conclude that

it was the court's duty to determine whether [the victim] was in reasonable fear of imminent serious bodily injury. ... Moreover, merely determining that a party is not credible is not a basis in itself to exclude relevant testimony. ... Thereafter, the court is in a position to determine the credibility and weight and properly determine the reasonableness of [the victim's] alleged fear and whether she proved by a preponderance of the evidence that the present alleged incidents rose to the level of abuse as defined by the PFA Act.

Id., at 1264. Accordingly, we vacate the trial court's order, and remand for a hearing where Daughter is offered an opportunity to testify. If the trial court deems it appropriate, her testimony may be taken in the manner set forth in Pa.R.Civ.P., Rule 1915.1. Our decision to vacate and remand should in no way suggest a particular outcome to the proceeding after remand.

As we vacate and remand for a new hearing, we need not reach Husband's other issues on appeal.

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.