J-A27017-13
J-A27018-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MOHAMMED RIZK, JR. Appellant v. FAWZIAH M. BARGHOUTT Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 898 MDA 2012

Appeal from the Order Entered on May 9, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No.: 2012-CV-02709 AB

MOHAMMED RIZK, JR. Appellant v. FAWZIAH M. BARGHOUTT Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 914 MDA 2012

Appeal from the Order Entered on May 9, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No.: 2012-CV-02096 AB

BEFORE: BENDER, P.J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, J. **FILED APRIL 14, 2014**

Mohammed Rizk, Jr. (Husband), appeals *pro se* from two orders entered on May 9, 2012, dismissing his petitions seeking protection from

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*Former Justice specially assigned to the Superior Court.

abuse (PFA) under the Protection From Abuse Act (PFAA), 23 Pa.C.S. §§ 6101-6122. In those petitions, Husband sought PFA orders on behalf of his minor children, a two-year-old daughter (Daughter) and a six-year-old son (Son), from their mother, Fawziah M. Barghoutt (Wife).[1] After careful review, we vacate the order entered at 898 MDA 2012, and affirm the order entered at 914 MDA 2012.

The factual and procedural history of this case is extremely complex, mainly because both Husband and Wife have filed PFA petitions against one another, as well as various appeals from orders entered as a result thereof. For ease of disposition, we will discuss only the facts and history pertinent to Husband's instant appeals.

On March 12, 2012, Husband filed a temporary PFA petition against Wife alleging, *inter alia*, that Son reported "that Wife had burned him with a candle, disciplined him by putting hot pepper in his mouth, and pinched him with metal pins when he was four years old." Trial Court Opinion (TCO), 9/4/12, at 1-2. Because Husband's assertions involved incidents that allegedly "occurred two years prior[,]" the court denied his request for a temporary PFA order. ***Id.*** at 4. However, a hearing was scheduled for

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[1] Because Husband presented nearly identical claims in both appeals, we have consolidated the cases.

March 21, 2012. At that proceeding, the PFA court continued the case until April 25, 2012.

On April 2, 2012, Husband observed that Daughter had bruising under her eye and took her and Son to the hospital. Later that night, Husband sought and received an emergency PFA petition against Wife in the Dauphin County Night Court. Because that petition was set to expire at the end of that same day, ***see*** 23 Pa.C.S. § 6110(b), Husband filed a temporary PFA petition with the trial court. Therein, he asserted the same claims as presented in his March 12, 2012 petition, and also added that "Wife had caused … [Daughter] to have a black eye and injured … [S]on's back by pushing them down on the sidewalk." TCO at 2. The court again denied Husband's request for a temporary PFA order, but issued notice that a hearing on Husband's second PFA petition would be held in conjunction with the hearing on his first petition on April 25, 2012.

At that proceeding, Courtney McCann, a case worker with Dauphin County Children & Youth (DCCY), testified

> that there had been a thorough investigation of both Wife's allegations against Husband and of Husband's similar allegations against Wife. Ms. McCann reported that she had initiated contact with the family after Wife filed her PFA [petition against Husband] on February 6, 2012, and had been prepared to close the matter as unfounded until Husband filed his two PFAs in March [and April].
>
> Ms. McCann reported that she had personally interviewed … [Son] formally at least twice, and informally a number of other times. Ms. McCann had observed … [Daughter's] black eye prior to the start of Husband's period of custody and had already inquired into the cause. After Husband took the children to the

> hospital that weekend and raised allegations of recent abuse, the matter was referred to a [Child Protective Services] caseworker, who then interviewed … [Son], as did a worker from the Children's Resource Center and a police detective from Steelton. Ms. McCann reported that, although … [Son] confirmed that Wife placed hot pepper in his mouth as a form of discipline, the agency was prepared to close the case as the allegations of abuse were deemed unfounded.

TCO at 2-3 (citations to the record omitted). Based on Ms. McCann's testimony, the trial court "declined to subject [Son] to an additional interview." ***Id.*** at 3. At the close of the PFA hearing, the court stated that it was denying Husband's two petitions PFA petitions. ***Id.*** at 27. The court entered formal orders in this vein on May 9, 2012.

Husband filed timely motions for reconsideration, which the court denied. Husband then filed timely notices of appeal in both cases, as well as timely concise statements of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, Husband raises the following issues for our review:

1. Did the trial court err by denying/dismissing [the PFA petitions] without making any finding that any abuse took place?

2. Did the trial court err by denying [Husband's] motion[s] for reconsideration?

3. Did the trial court err by refusing to hear testimony from witnesses and review evidence that may have affected the outcome of the case?

4. Did the trial court err and abused [*sic*] its discretion for not acting in the best interest and welfare of the minor child?

5. Did the trial court err and abused [*sic*] its discretion for not continuing the [emergency] order of protection granted by the Dauphin County Night Court?

Husband's Brief at 11 (unnumbered pages).[2]

Before addressing Husband's claims, we note that his brief does not comport with the Pennsylvania Rules of Appellate Procedure. Namely, while Husband sets forth five issues in his "Statement of Questions Presented," the "Argument" portion of his brief is divided into eight sections asserting several issues not raised in, or suggested by, Husband's "Statement of Questions Presented." Moreover, within those eight subdivisions, Husband jumps from one argument to another (and back again) in a random and confusing manner.[3]

Nevertheless, Husband's brief is clear enough for us to discern that he is raising the following issues for our review (which we have reordered for ease of disposition): (1) the court failed to conduct the final PFA hearing within the ten days as required by the PFAA; (2) the court erred by denying Husband's PFA petitions without setting forth its findings of fact or credibility

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[2] All citations to Husband's brief refer to the brief filed at 914 MDA 2012.

[3] Husband also raises several new issues in his reply briefs. We deem these assertions waived. ***See Commonwealth v. Wharton***, 811 A.2d 978, 990 (Pa. 2002) (finding claim waived where it was raised for first time in a reply brief) (citing ***Commonwealth v. Basemore***, 744 A.2d 717, 726-27 (Pa. 2000) ("A reply brief … is an inappropriate means for presenting a new and substantively different issue than that addressed in the original brief.")).

determinations; (3) the court incorrectly concluded that Wife's putting hot pepper in Son's mouth for disciplinary purposes did not constitute "abuse" under the PFAA; (4) the court erred by not permitting Husband or Son to testify at the PFA hearing; (5) the court improperly failed to consider the best interests of the children in denying Husband's PFA petitions; (6) the court incorrectly denied Husband's motions for reconsideration despite Husband's proffering new evidence of Wife's abusive conduct. We will overlook Husband's briefing errors and examine these arguments in turn. ***See Commonwealth v. Lyons***, 833 A.2d 245, 251-52 (Pa. Super. 2003) (choosing to overlook substantial briefing errors where the *pro se* appellant's arguments could be reasonably discerned). In doing so, we note that "[w]e review the propriety of a PFA order for an abuse of discretion or an error of law." ***Ferko-Fox v. Fox***, 68 A.3d 917, 920 (Pa. Super. 2013) (citation omitted).

First, Husband claims that the court erred by not conducting the PFA hearing within ten days of the date on which he filed his two petitions.[4] Appellant cites section 6107(a) of the PFAA, which states that "[w]ithin ten business days of the filing of a petition under this chapter, a hearing shall be

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[4] We note that Husband did not raise this issue in his Rule 1925(b) statement. However, Husband's argument challenges the jurisdiction of the trial court to rule on his PFA petitions; consequently, this claim cannot be waived. ***See Commonwealth v. Jones***, 929 A.2d 205, 208 (Pa. 2007) (finding the appellant could not waive claim "because it sounded in subject matter jurisdiction, an issue not susceptible to waiver") (citation omitted).

held before the court, at which the plaintiff must prove the allegation of abuse by a preponderance of the evidence." 23 Pa.C.S. § 6107(a). This Court has held that "the term 'shall' used in section 6107 imposes a mandatory limitations period within which hearings must be conducted." ***Heard v. Heard***, 614 A.2d 255, 257 (Pa. Super. 1992). Indeed, "[i]f a hearing is not held [within this 10-day period], a trial court lacks jurisdiction to grant relief to the filing party." ***P.E.S. v. K.L.***, 720 A.2d 487, 489 (Pa. Super. 1998).

Here, in regard to Husband's first PFA petition filed on March 12, 2012 (case 914 MDA 2012), the court conducted a hearing on March 21, 2012, well within the requisite 10 business days. At that proceeding, the court was informed that Wife needed an Arabic interpreter, and that the interpreter would not be available until April 25, 2012. N.T., 3/21/12, at 2-3. Consequently, the court continued the hearing until that date. We ascertain no abuse of discretion in the court's decision. ***See Ferko-Fox***, 68 A.3d at 926 ("[T]rial courts have discretion to continue evidentiary hearings regarding final PFA orders and enter appropriate temporary *ex parte* orders to cover the intervening time.") (citing 23 Pa.C.S. § 6107(c)).

However, in regard to Husband's second PFA petition filed on April 2, 2012 (case 898 MDA 2012), we are compelled to agree with Husband that the court failed to conduct a timely final hearing. On the date that petition was filed, the court issued a "Notice of Hearing and Order" denying the temporary petition and scheduling the hearing for April 25, 2012. Clearly,

the scheduled hearing date was outside the 10-day period required by the PFAA. We assume the court scheduled the hearing for that date in order to combine Husband's two PFA petitions, and because the Arabic interpreter needed by Wife was not available until that date. Nevertheless, we are constrained to agree with Husband that there are no recognized exceptions to the 10-day rule of subsection 6107(a).[5] ***See*** Husband's Brief at 23. Accordingly, the court did not have jurisdiction to rule on Husband's April 2, 2012 petition or enter the order denying it. Therefore, we vacate the court's May 9, 2012 order in case 898 MDA 2012. Based on this disposition, we need only review the issues raised by Husband in his appeal at 914 MDA 2012.

Husband next contends that the trial court erred by denying his PFA petition "without making any findings of fact or, indeed, any credibility determinations concerning whether abuse occurred." Appellant's Brief at 16 (pages unnumbered). This issue was not raised in Husband's Rule 1925(b) statement. ***See*** Husband's Rule 1925(b) Statement, 5/30/12, at 1-4. Consequently, it is waived. Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included

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[5] We note that this Court recently reached the same conclusion in a case involving these same parties, ***Barghoutt v. Rizk***, No. 882, 1616, 1617 MDA 2012, unpublished memorandum (Pa. Super. filed March 25, 2014) (involving Husband's consolidated appeals from several orders stemming from the court's granting of Wife's petition for a PFA order against Husband).

in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.").

Nevertheless, even had Husband preserved this issue, we would conclude it is meritless. Husband asserts that the court was required to proffer at least "general findings" under Pa.R.C.P. 1038 (stating "[t]he decision of the trial judge may consist of general findings as to all parties but shall dispose of all claims for relief"). However, as Wife points out, in ***Weir v. Weir***, 631 A.2d 650 (Pa. Super. 1993), this Court expressly held that "neither Rule 1038 nor any other provision regulating PFAA proceedings mandates that a specific finding of abuse be set forth in the trial court's decision." ***Id.*** at 655. Furthermore, in this case the court found that *no* abuse occurred; certainly, if ***Weir*** holds that no specific findings are required where the court determines that abuse occurred, there is no requirement of specific findings where the court wholly rejects the allegations of abuse. Consequently, even had Appellant preserved this issue, we would deem it meritless.

Husband also avers that the court erroneously concluded that Wife's conduct of putting hot pepper in Son's mouth for disciplinary purposes did not did not constitute "abuse" under the PFAA. The PFAA defines "abuse" as follows:

> **"Abuse."** The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

> (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
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> (2) Placing another in reasonable fear of imminent serious bodily injury.
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> (3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).
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> (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
>
> (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S. § 6102.

Husband contends that Wife's act of putting hot pepper in Son's mouth constitutes "abuse" under subsection 6102(1). ***See*** Husband's Brief at 16 (stating "[t]he court erred because the definition of 'abuse' in the PFAA … does not limit abuse to serious physical injury to [the] child, but rather include[s] … bodily injury caused intentionally, knowingly, or recklessly"). However, Ms. McCann testified that when she asked Son if Wife's putting pepper in his mouth hurt or made him cry, Son "said that it wasn't hot enough and he enjoyed the taste of it." N.T., 4/25/12, at 13-14. From this record, we ascertain no abuse of discretion in the court's conclusion that

Husband failed to prove that Wife caused, or attempted to cause, bodily injury to Son.

Husband next asserts that the court erred by not permitting him or his Son to testify at the PFA hearing. Wife responds by contending that Husband waived this claim by failing to object. We agree. Our law is clear that

> [i]n order to preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. Failure to timely object to a basic and fundamental error will result in waiver of that issue. On appeal the Superior Court will not consider a claim which was not called to the trial court's attention at a time when any error committed could have been corrected. In this jurisdiction ... one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.

Thompson v. Thompson, 963 A.2d 474, 475-476 (Pa. Super. 2008) (citation omitted).

In the present case, when Husband indicated at the PFA hearing that he wanted to call Son to the stand, the court stated, "No," to which Appellant's counsel simply replied, "Alright." N.T., 4/25/12, at 15. The court then explained why it would not permit Son to testify, emphasizing Ms. McCann's testimony that Son had "been interviewed too many times," and stating that it declined "to further traumatize [Son] by interviewing him on this situation." ***Id.*** Appellant's counsel proffered no objection.

Shortly thereafter, Husband's counsel asked if the court "want[ed] to hear the account from [Husband] with regard to why he believes the children are … in a dangerous situation as is outlined in his petition[.]" ***Id.*** When the court questioned whether Husband's testimony would constitute hearsay, Wife's attorney answered by stating, "That's correct. It's all hearsay. It's all been reported to [Husband] by the child." ***Id.*** Again, Husband's counsel did not object, and the court moved on to other issues. ***Id.***

It is apparent from the record that Husband at no point objected to the court's decisions to exclude his and Son's testimony. Accordingly, his challenges to those evidentiary determinations are waived. ***Thompson***, 963 A.2d at 475-476.

In his next claim, Husband contends that the court erred by failing to consider the best interests of the child. Husband has waived this issue by failing to raise it in his Rule 1925(b) statement. ***See*** Husband's Rule 1925(b) Statement, 5/30/12, at 1-4; Pa.R.A.P. 1925(b)(4)(vii). However, even if Husband had not waived this claim, we would conclude that it is meritless. Husband argues that "[a] court must consider the best interests of the child before denying a PFA defendant all contact with the child." Husband's Brief at 21 (citing ***Shandra v. Williams***, 819 A.2d 87 (Pa. Super. 2003)).

We fail to see the applicability of ***Shandra*** to the instant case. In ***Shandra***, we stated "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." ***Id.*** at 91 (emphasis added). Here, the court did not make any determination regarding the custody of the children and, contrary to Husband's claim, it certainly did not deny "all contact with the child" to either Husband or Wife. Husband's Brief at 21. Therefore, the court was not required to assess the best interests of Daughter and Son.

In Husband's final issue, he argues that the court improperly denied his motion for reconsideration of its order denying his PFA petition because his motion presented after-discovered evidence warranting a new PFA hearing. Before reviewing Husband's specific assertions, we note that:

> To warrant relief, after-discovered evidence must meet a four-prong test: (1) the evidence could not have been obtained before the conclusion of the trial by reasonable diligence; (2) the evidence is not merely corroborative or cumulative; (3) the evidence will not be used solely for purposes of impeachment; and (4) the evidence is of such a nature and character that a different outcome is likely.

Commonwealth v. Choice, 830 A.2d 1005, 1008 (Pa. Super. 2003) (citation omitted). Furthermore, "[a] motion for reconsideration is addressed to the sound discretion of the trial court…." ***Moore v. Moore***, 634 A.2d 163, 166 (Pa. 1993).

In his brief, Husband states that he proffered the following "new evidence" in his motion for reconsideration: 1) proof that Ms. McCann developed a friendship with Wife and, therefore, was biased in her favor, 2)

a letter from DCCY to Wife stating that it received an anonymous report of inappropriate conduct by Wife towards the children, and 3) evidence that Son developed a disease called encopresis due to Wife's abuse.[6]

Our review of Husband's motion for reconsideration convinces us that these claims do not warrant relief. First, Husband did not describe what proof he had of Ms. McCann's alleged bias in favor of wife. ***See*** Husband's Motion for Reconsideration, 5/2/12, at 2 (unnumbered pages). Moreover, Husband claimed that he first raised concerns about Ms. McCann's ostensible bias to DCCY "[o]n or about March 2012[.]" ***Id.*** Accordingly, Husband could have raised this issue at the April 25, 2012 hearing.

Similarly, in the motion, Husband asserted that "on or about March 10, 2008[,]" DCCY sent the letter to Wife stating that it received an anonymous report of improper treatment of the children. ***Id.*** at 3. Husband did not explain why this evidence could not have been discovered prior to the April 25, 2012 hearing had he exercised due diligence. The same is true for Husband's claim that Son developed a disease because of Wife's abuse. In his motion for reconsideration, Husband did not state when he discovered

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[6] Husband also argues that he presented "new evidence" that 1) in March of 2012, he requested Ms. McCann be removed from this case, 2) that he suggested the court permit Son to testify via video conference, and 3) that he "expressed and reaffirmed the children['s] fear of their mother." Husband's Brief at 24-25. We fail to see how any of these claims constitute "new evidence" that could not have been raised during the April 25, 2012 hearing.

Son's disease, or explain why he could not have presented this evidence at the PFA hearing. Accordingly, we ascertain no error or abuse of discretion in the court's decision to deny Husband's motion for reconsideration.

In sum, we are constrained to agree with Husband that the trial court did not have jurisdiction to enter the order denying his PFA petition at 898 MDA 2012. Consequently, we vacate that order. However, in regard to Husband's appeal at 914 MDA 2012, his issues are either waived or meritless. Accordingly, we affirm the court's order denying his PFA petition in that case.[7]

Order at 898 MDA 2012 vacated, order at 914 MDA 2012 affirmed. Jurisdiction relinquished.

Judge Wecht files a concurring memorandum.

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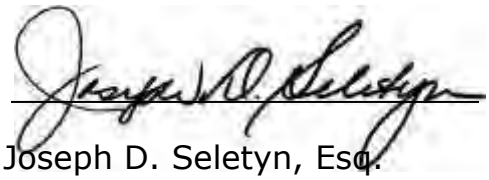
[7] On July 24, 2012, Wife filed motions to quash in both of the above-captioned appeals, arguing that this Court should quash because Husband failed to file timely Rule 1925(b) statements. Our review of the certified record indicates that Husband's Rule 1925(b) statements were timely in both appeals. Therefore, we deny both of Wife's motions to quash.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014