

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

KELLY MCINTOSH, :
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 Plaintiff :
 :
 Vs. : No. 19-1343
 :
 :
 :
 SARA E. LOCOSA, :
 :
 Defendant :

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CARBON COUNTY
PROthonOTARY

Sheryl Rentz, Esquire Counsel for Plaintiff
Carolyn Furst, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - September 26, 2019

This Memorandum Opinion is provided by the Trial Court to explain the reasoning and rationale for quashing the appeal or, alternatively denying further relief pursuant to the Protection from Abuse Act, 23 Pa.C.S. §6101 et seq. Based upon this reasoning and rationale, this Court asks the Appellate Court to quash or in the alternative, affirm its decision.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2019, the Appellant, Plaintiff herein, Kelly McIntosh (hereinafter "McIntosh") filed a petition for protection from abuse on behalf of herself and her minor daughter, H.R. (hereinafter "Child"), born August 10, 2007. This petition was filed against the Defendant, Sara E. Locosa (hereinafter

"Locosa"). Locosa is married to and resides with Child's Father, William Ruffenach (hereinafter "Ruffenach"), in North Bergen, New Jersey.¹

Shortly after filing this petition², McIntosh met with the undersigned for an *ex parte* proceeding pursuant to 23 Pa. C.S. §6107 (b)(1). At that *ex parte* proceeding, McIntosh presented testimony suggesting that the Child was in immediate and present danger of abuse at the hands of Locosa and that as a result, a temporary order was necessary. Additionally, as the Child was the subject of a custody action involving Locosa's husband, McIntosh requested temporary custody of this Child. At this *ex parte* proceeding, McIntosh testified that Locosa pushed and shoved the Child hard into a wall and that she also grabbed her by the ankles and dragged her out of bed. McIntosh also related that sometimes this conduct causes bruises. She went on further to say that the Child told her this goes on "at least twice a week, more when Sara gets angry."

As a result, a temporary order was issued by the Court granting the relief requested for the Child, but not for McIntosh

¹ Both the temporary order issued on July 1, 2019 and the final order dated August 14, 2019, erroneously listed the city as "New Bergen, New Jersey."

² In this petition, McIntosh alleged in paragraphs 12 and 13, the following:
"[] says that Sara pushes and shoves her into a wall. Also grabs her by her ankle to pull her out of bed. This happens [] said this happens twice a week more when Sara is angry."

"Sara has hit [] in the ribs on multiple occasion (sic). She has also broken her left ankle growth plate. She has also pushed and shoved her in the past."

herself. This Court also awarded temporary custody of the Child to McIntosh.³

A full evidentiary hearing was then scheduled for July 12, 2019, also before the undersigned. McIntosh, on July 10, 2019 requested and was granted a continuance on the basis that the Defendant, Locosa was not yet served with the petition and order.⁴ As a result, the hearing was rescheduled for September 13, 2019.

On July 31, 2019, a "Petition to Modify Order" was filed by Ruffenach as an interested party to the instant proceeding insofar as the temporary relief granted by the Court caused his custodial rights to the Child to be suspended. A hearing was scheduled on this petition for August 9, 2019 at 9:00 A.M. On August 6, 2019, McIntosh again filed a motion for continuance for the hearing scheduled on the Motion to Modify Order on the basis that although she had received verbal notice of the August 9, 2019 hearing from Ruffenach through the Child she did not have written notice. McIntosh also indicated that a continuance was necessary as the Child had a doctor's appointment on the same date and time and that a witness, a Dr. Caggario was also unavailable. This

³ This case presented a unique situation in that the Defendant is the spouse of the Father of the Child and the Child is the subject of a custody action between McIntosh and Ruffenach. As a result of the temporary order issued in this Protection from Abuse action, Ruffenach's custodial rights were suspended.

⁴ According to the dockets in this case, because Locosa lived in New Jersey, service was to be made on her by the Carbon County Sheriff's Office via certified mail. That mailing was signed for by Locosa's husband on July 31, 2019 according to the Sheriff's return of service.

continuance was denied by this Court.

Thereafter, through a series of written and telephonic conferences between counsel and the chambers for the undersigned, both matters were then scheduled for August 14, 2019 at 2:00 P.M.

On August 14, 2019, hearings were held to address both the underlying Petition for Protection from Abuse and the Motion to Modify Order. The sole witness called by McIntosh was the Child. The undersigned and counsel for McIntosh and Locosa questioned the Child in chambers. The Child testified that there have been times where Locosa grabs the Child by the ankle as a way of waking her up in the morning. The Child also testified that there was a time or two during a one-week period where Locosa pushed or shoved her into a wall where she may have received a scratch. She also indicated that sometimes she would hit the wall and her shoulder would hurt. She also testified on direct examination that Locosa is "always . . . hitting me or doing stuff to me." Additionally, the Child testified that sometime when she was in 4th grade, Locosa kicked her in her left ankle, causing a break in her growth plate.⁵ No other specifics of any of these events were provided.

On cross-examination, the child was asked if she was aware of the results of an investigation by the New Jersey Children and

⁵ At the time of this hearing the child was 12 years old and several years removed from the date of this incident.

Youth Office⁶ and she indicated that she was aware that the results were unfounded. In contrast to her direct testimony, she initially identified being "pushed" into a wall one time by Locosa and "nudged" on several occasions. She also defined the width of the hallway where the two parties passed as "decent sized." She then said she was pushed more often and received "little scratches."

After returning to the courtroom, counsel for McIntosh indicated to the Court that she did not have any further witnesses to call. Thereafter, counsel for Locosa made a Motion to Dismiss the Protection from Abuse Petition based on the basis that the Court granted that motion dismissing the petition effectively denying further relief to McIntosh. This had the effect of returning the custodial arrangement to the status quo that existed before the issuance of the July 1, 2019 temporary order.

On August 28, 2019, McIntosh filed a timely notice of appeal. On August 29, 2019, this Court issued an order directing her to file her concise statement of matters complained of on appeal within twenty-one (21) days. While the concise statement was not filed as of the date and filing of this Opinion, the Court did receive a copy of it from counsel. At no time, however, was this statement ever docketed of record in this case. In that statement, McIntosh alleged the following:

⁶ Known in New Jersey as "DCF" or the Department of Children and Families.

1. The Trial Court abused its discretion in finding that a final Protection from Abuse should not be entered considering the overwhelming evidence to contrary, including but not limited to the minor child's testimony that she was in fear of the Defendant.
2. The Trial Court abused its discretion in finding that a final Protection from Abuse should not be entered in light of the overwhelming evidence to contrary, that the minor child's testimony failed to be convincing despite that fact she stated over and over she was in fear of the Defendant and that her Father failed to protect her.
3. The Trial Court abused its discretion in finding that a final Protection from Abuse should not be entered in light of the overwhelming evidence to contrary, when the child stated she needed to get to her Mother to feel safe and that her Father did not protect her from his Wife.
4. The Trial Court abused its discretion in finding that a final Protection from Abuse should not be entered considering the overwhelming evidence to contrary, by not providing Mother sole physical custody of the minor child as provide by the tentative Protection from Abuse.

LEGAL DISCUSSION

In accordance with Pennsylvania Rule of Appellate Procedure
1925(b):

If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

Pa.R.A.P. 1925(b) Pursuant to subsection (2) of Pennsylvania Rule of Appellate Procedure 1925(b),

The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed.

Pa.R.A.P. 1925(b)(2). "Appellant shall file of record the Statement and concurrently shall serve the judge[,] with service upon the judge to "be in person or by mail as provided in Pa.R.A.P. 121(a)." Pa.R.A.P. 1925(b)(1) (emphasis ours).

An examination of the docket entries in this matter establishes that this Court's Order directing McIntosh to file a concise statement was docketed on August 29, 2019. Additionally, the docket entries verify that said order was mailed to counsel of record for by the Carbon County Prothonotary by way of first-class mail on August 29, 2019. The consequence of such was that McIntosh had until September 19, 2019, that being the twenty-first day following the docketing of this Court's Order directing McIntosh to file a concise statement, to file and also serve upon the Court such statement of matters complained of (emphasis ours). McIntosh

has failed to file her concise statement by September 19, 2019, or on any date thereafter.

As the Supreme Court of this Commonwealth has ruled, in order for an appellant to preserve his or her claims for appellate review, appellant must comply with a trial court's order requiring appellant to file a statement of matters complained of on appeal in a timely manner. *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005) (emphasis ours). Any issues not raised in an appellant's concise statement will be deemed waived. *Hess v. Fox Rothschild, LLP.*, 925 A.2d 798, 803 (Pa. Super. Ct. 2007). "Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases." *Kanter v. Epstein*, 866 A.2d 394, 400 n.6 (Pa. Super. Ct. 2004), *appeal denied*, 880 A.2d 1239 (Pa. 2005).

As stated previously, "any issues not raised in a 1925(b) statement will be deemed waived." *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). However, there are caveats to a finding of waiver as delineated in *Forest Highlands Community Association v. Hammer*, 879 A.2d 223 (Pa. Super. Ct. 2005). To determine that appellant has waived such issues the *Hammer* Court stated:

First, the trial court must issue a Rule 1925(b) order directing an Appellant to file a response within [twenty-one] days of the order. Second, the Rule 1925(b) order must be filed with the prothonotary. Third, the prothonotary must docket the Rule 1925(b) order and

record in the docket the date it was made. Fourth, the prothonotary shall give written notice of the entry of the order to each party's attorney of record, and it shall be recorded in the docket the giving of notice. See Pa.R.C.P. 236. If any of the procedural steps set forth above are not complied with, Appellant's failure to act in accordance with Rule 1925(b) will not result in a waiver of the issues sought to be reviewed on appeal.

Id. at 309.

In the case at bar, this Court issued an order on August 29, 2019 directing McIntosh to file a concise statement within twenty-one days from the date Prothonotary docketed said order. The order was filed, docketed, and made of record in the dockets by the Carbon County Prothonotary on August 29, 2019. The docket entries make evident that the Prothonotary provided notice of the order to counsel of record for McIntosh, via first class mail, on August 29, 2019. In view of the fact that McIntosh has failed to timely file a concise statement as prescribed by this Court's Order of August 29, 2019, McIntosh thus has not complied with said order. Consequently, this Court believes McIntosh has waived her right to appellate review.

Further, while McIntosh may have complied with the requirement that a copy of the concise statement be served on the undersigned, she has failed to file that same statement with the Prothonotary, effectively causing the official record to be devoid of the basis of her appeal and by failing to do so has resulted in the Appellate Court having to guess or question what the issues

may be before it. While the service of a copy on the undersigned had occurred and several issues raised therein, without the filing of this same concise statement, it leaves that void in the appellate process. In *Everett Cash Mutual Insurance Company v. T.H.E. Insurance Company*, 804 A.2d 31 (Pa. Super 2002), the Court stated the following:

"The filing requirement is distinct from the service requirement in that the filing requirement ensures that the Concise Statement becomes part of the certified record. See, Pa.R.A.P. 1921 ("the original papers filed in the lower court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases").

Again, we conclude that Appellant's issues are waived for failing to file a Concise Statement and for failing to ensure that the Concise Statement was made part of the certified record, "It is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal." *Hrinkevich v. Hrinkevich*, 450 Pa. Super. 405, 676 A.2d 237, 240 (1996) (citation omitted). "Under our Rules of Appellate Procedure, those documents which are not part of the 'official record' forwarded to this Court are considered to be non-existent." *D'Ardenne v. Strawbridge & Clothier, Inc.*, 712 A.2d 318, 326 (Pa. Super. 1998) (citation omitted), appeal denied, 557 Pa. 647, 734 A.2d 394 (1998). "[T]hese deficiencies may not be remedied by inclusion in a brief in the form of a reproduced record." *Id.* Similarly, these deficiencies cannot be cured by indicating that the relevant document was simply mailed to the office of the trial judge but not filed or record. Compare, *Commonwealth v. Alsop*, 799 A.2d 129, 2002 Pa. Super 146 (*en banc*) (declining to find all issues waived under *Lord* where Concise Statement was sent to trial court and inexplicably filed late, and where it was clear from the record that the trial court reviewed the Concise Statement before issuing its Rule 1925 opinion).

Accordingly, this Court respectfully recommends that the Honorable Superior Court quash Nikparvar's appeal.

Even assuming the Appellate Court does not quash this appeal for the reasons stated above, we believe this appeal should still be dismissed. 23 P.S. §6101 et. seq., otherwise known as the Protection from Abuse Act, is designed to protect victims of domestic violence. This, in certain situations, includes the protection of children from conduct perpetrated upon them by adults. Included in the relief that a court can provide is that involving custody of children as well.

The burden of proof at a final protection from abuse hearing is that of preponderance of the evidence. 23 P.S. §6107(a). Moreover, "a preponderance of the evidence standard 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." *Raker v. Raker*, 847 A.2d 720, 724 (Pa. Super. 2004). In order for a plaintiff to meet that burden, they must show that the conduct of a defendant fits into one of several categories of abuse, namely: 1) attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury or any of various listed crimes of rape and sexual assault; 2) placing another in reasonable fear of imminent serious bodily injury; 3) causing another to be falsely imprisoned; 4) physical or sexually

abusing minor children; and/or 5) knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following that person, without proper authority, under circumstances that place that person in reasonable fear of bodily injury.

The information provided by McIntosh in the petition she filed and the testimony she provided at the *ex parte* proceeding on July 1, 2019 was adequate to establish that the Child was the victim of abuse and that the Child was in need of immediate and present protection from further abuse at the hands of the Defendant. However, that information as well as the testimony provided at the *ex parte* proceeding, while consistent, was contrasted by the testimony given by the Child at the August 14, 2019 full evidentiary hearing. For instance, while McIntosh stated at the *ex parte* proceeding that Locosa would "grab [the Child] by her ankle to pull her out of bed," the Child testified that Locosa would tug on her ankle simply to wake her up in the morning. Counsel for McIntosh then asked the Child a leading question of "whether she (Locosa) ever pulled her off the bed" to which she replied "possibly, yeah, once or twice" notwithstanding an objection by Locosa's counsel, an objection which was sustained.

Additionally, McIntosh provided information that Locosa "pushed and shoved" the Child into a wall. While the Child did testify that Locosa had in fact "pushed and shoved" her in the

hallway, she also described that contact as "nudging." McIntosh also indicated to this Court both in the petition and at the *ex parte* proceeding that Locosa hit the Child in the ribs on multiple occasions yet the Child never testified that this occurred. The Child also stated that Locosa kicked her in her left ankle in 4th grade, causing it to become broken, but did not provide any testimony as to how Locosa had done that, i.e. in any intentional, knowing or reckless manner or otherwise in an attempt to physically abuse the child.

The Act's purpose "is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse." *Buchhalter v. Buchhalter*, 959 A.2d 1260, 1262 (Pa. Super. 2008). Its purpose is also to react to early signs of abuse and prevent more serious abuse from occurring; PFA order are used for "risk control." *Snyder v. Snyder*, 629 A.2d 977, 986 (Pa. Super. 1993).

The court must also assess the credibility of the person or person supplying the information for the court to consider in passing judgment upon a petition filed pursuant to the Act. Here, there is conflicting testimony between McIntosh at the *ex parte* hearing and that provided to the Court by the Child at that final hearing. As such, we can believe all, part or none of the testimony presented. If we question the credibility of that testimony and even if this Court were to accept as true the testimony of the Child, the lack of specificity and the overall impression left

with the Court leads us to believe that the conduct of Locosa does not rise to the level of proof necessary to establish that the Defendant's conduct proves abuse within any of the categories set forth in the Act, let alone whether it occurs at all.

CONCLUSION

Based upon the foregoing, this Court concludes McIntosh has waived her right to appellate review of this matter. Accordingly, this Court respectfully requests McIntosh's appeal of the August 15, 2019 Court order be **QUASHED**.

Alternatively, for the additional reasons stated herein, we ask the Appellate Court to dismiss the appeal and affirm our dismissal of the PFA petition and temporary order and denial of a final order under the Act.

BY THE COURT:



Joseph J. Matika, J.