



THE FAMILY COURT OF THE STATE OF DELAWARE

R----- P----) **FILE NO.: CN08-05089**
Petitioner,)
)
vs.) **CPI NO.: 18-26835 (PFA)**
)
J----- D-----)
Respondent.)

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vs.) **CPI NO.: 18-26835 (PFA)**
)
R----- P----)
Respondent.)

ORDER REGARDING REVIEW OF COMMISSIONER'S ORDERS

Before the Court is a Request for Review of a Commissioner’s Order (“ROCO”) filed on November 1, 2018 by R----- P---- (“Mother”) objecting to the Commissioner’s decision in her Order of October 10, 2018 to deny Mother’s Petition for Order of Protection from Abuse (“PFA”) of September 7, 2018 filed on behalf of her daughter, A-----. In her ROCO, Mother presented several arguments. First, that the Commissioner erred in considering whether child abuse had occurred rather than whether domestic violence had occurred. Second, that the Commissioner’s decision runs counter to the purpose of the PFA statute and is not supported by the evidence because, among others, the Commissioner should have given more weight to A-----’s reported out of court statements rather than her in-court interview. Fourth, the Commissioner failed to “maintain objectivity” during the proceeding. J----- D----- (“Father”) filed a Response to Mother’s ROCO on November 13, 2018.

Also before the Court is a ROCO filed on November 16, 2018 by Father objecting to the Commissioner's decision in her Order of October 25, 2018 to deny Father's request for an award of attorney's fees and court costs related to defending against Mother's Petition for Order of Protection from Abuse. In his ROCO, he argued that an award of attorney's fees was warranted because Mother acted in bad faith in litigating her PFA Petition for three-and-a-half hours on October 10, 2018. Mother filed a Response to Father's ROCO on November 26, 2018.

During an October 10, 2018 hearing on Mother's PFA Petition, the Court heard testimony from Officer Guy DeBonaventura, maternal grandfather R----- P-----, maternal grandmother K----- P-----, Mother, DFS worker Neesa Seely, Father and father's girlfriend T--- B---. The Court also separately interviewed A----- (then seven years old) and her older brother, Z----- (then ten years old). Of this testimony, only Father, A----- and Z----- reported being witnesses to an incident that occurred on August 29, 2018 in Father's home wherein, according to Mother's Petition, Father "placed both hands around A-----'s neck and hurt her." Following the hearing, the Commissioner wrote in her October 10, 2018 Order that "the Court cannot find that [Mother] proved by a preponderance of the evidence that child abuse occurred at Father's last visit with his children on August 29, 2018." Thereafter, by separate Order of October 25, 2018, the Commissioner denied, without providing a written explanation for her decision, Father's request for an award of attorney's fees.

Standard of Review

A party may seek a ROCO pursuant to 10 *Del. C.* § 915(d)(1), which provides:

Any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a judge of the Court by filing and serving written objections to such order, as provided by the rules of the Court, within 30 days from the date of a Commissioner's order. A judge of the Court shall make a *de novo* determination of those portions of the Commissioner's order to which objection is made. A judge of the Court may accept, reject, or modify in whole or in part the Order of the Commissioner. The Judge may also receive further evidence or recommit the matter to the Commissioner with instruction.

Case law further explains what is meant by a *de novo* determination:

Therefore, in the *de novo* determination, the Court will make an independent review of the record and decide whether to accept, reject or modify in whole or in part the Commissioner's Order. In a *de novo* determination, the Judge considers (1) testimony presented at the Commissioner's hearing (if hearing is held), (2) the findings of fact and recommendations of the Commissioner, and (3) the specific written objections filed by the objecting party.¹

Discussion

A. *The Commissioner used the correct standard in finding that there was insufficient evidence to support a finding of child abuse*

The Commissioner found insufficient evidence of “child abuse” during the PFA hearing of October 10, 2018 and therefore denied Mother’s PFA Petition. Pursuant to 10 *Del. C.* § 1043(e), “[i]f the Court finds by a preponderance of the evidence that the alleged domestic violence has occurred [...], the Court shall grant any appropriate relief.” Pursuant to 10 *Del. C.* § 1041(2), “domestic violence” is defined as “abuse perpetrated by 1 member against another member of [certain] protected classes.” Pursuant to 10 *Del. C.* § 1041(1)(f), “abuse” includes “child abuse.” In Mother’s Petition, the only allegation was that on August 29, 2018, Father inappropriately put his hands on A-----, a child. Additionally, during the hearing, Mother’s attorney confirmed that the only section of the PFA statute at issue in the proceeding was whether “child abuse” had occurred, as reflected in the following interaction between the Commissioner and Mother’s attorney, as reflected on page 26 of the trial transcript.

Mother’s Attorney: But the PFA statue was intended to protect people from being in any way harmed by violence.

Commissioner: Child abuse.

Mother’s Attorney: Yes.

Commissioner: That’s the section we’re talking about. Child abuse.

Mother’s Attorney: Yes.

Commissioner: And I cannot find based on what [A-----] told me today, that there is a preponderance of the evidence that child abuse occurred.

¹C.A. v. C.A., No. CN06-04047, 2007 WL 4793921, at *1 (Del. Fam. Ct. Apr. 3, 2007) (citing *D.K.B. v. State*, No. 0308003909, 2003 WL 23269499, at *1 (Del. Fam. Ct. Dec. 18, 2003).

Therefore, the Court finds that the Commissioner did not err in deciding to deny Mother's Petition based on insufficient evidence of "child abuse," as child abuse was the only type of abuse under 10 *Del. C.* § 1041(1) that was before the Court to consider.²

B. The Commissioner did not err in reaching her decision to deny Mother's PFA Petition.

First, to the Court's knowledge, this is the first PFA petition that anyone has filed on behalf of the children. Furthermore, the Petition only cites to one specific incident of alleged domestic violence arising from August 29, 2018. Therefore, the Court cannot find that, in denying the Petition, the Commissioner failed to ensure A-----'s future safety.

Second, the Court gives deference to the Commissioner in her conclusion that the children sounded coached in their statements to her during the in-court interviews. Although this Judge had the opportunity to listen to the audio recording of both A----- and Z-----, this Judge did not have the opportunity to observe the children's non-verbal communication. Based on the recording, the Court finds that it was permissible that the Commissioner concluded, as reflected on page 22 of the transcript, "there has been some coaching here, whether it's intentional or not, or whether they've overheard mom." Even if there was no coaching, the Court does not find that there is enough evidence to conclude that the Commissioner erred in her decision to deny Mother's Petition.

Third, although the Commissioner declared, early in the hearing, that A-----'s in court statement was the best evidence, the Court is not clear that the Commissioner ultimately put more weight on A-----'s in-court statement in reaching the Commissioner's conclusion. If she did, the Court believes that it was in the Commissioner's discretion to give more weight to what A----- and Z----- told her in their in-court interviews than to testimony of what the children reportedly told other people about the incident in the days after August 29, 2018.

Fourth, the Court is unclear why the Commissioner needed to consider the emotional impact on Z----- when he was not a reported petitioner in the case and how Mother's attorney knows that the Commissioner failed to consider that fact in reaching her final conclusion.

² The Commissioner also noted at the conclusion of the PFA hearing, as reflected on page 188 of the trial transcript that she could not "find that Petitioner proved that Father put his hands around A-----'s throat causing her pain or alarm." This description appears to invoke abuse as set out in 10 *Del. C.* § 1041(1)(d) "[e]ngaging in a course of alarming or distressing conduct."

Fifth, it is unclear to the Court, based on the Commissioner's closing statements, which witnesses the Commissioner found to be more or less credible and how any witness's credibility individually factored in to her conclusion to deny the PFA Petition.

Therefore, the Court finds that the Commissioner did not err in deciding to deny Mother's Petition based on insufficient evidence. Without the benefit of conclusive visual evidence or reports of any bruising, this case essentially came down to A-----'s perception of what happened as reflected in her statements to the Court and different witnesses. Based on the evidence presented, it was permissible for the Commissioner to conclude as she did.

C. The Commissioner did not impermissibly prejudge the case before Mother had a chance to fully present her evidence.

After hearing from the reporting police officer, A-----, Z-----, and from Father's attorney about what would likely be Father's testimony, but before Mother had a chance to present her entire case in chief, the Commissioner stated the following to Mother's attorney, as reflected on page 27 of the trial transcript:

Commissioner: I'm just letting you know right now. I'm going to let you present your case. But I'm going to give them an opportunity for attorney's fees if this doesn't go your way. Because we're going to spend the next three or four hours litigating this case.

Then, after hearing testimony from A-----'s maternal grandfather and maternal grandmother about what A----- disclosed to them the day after the reported incident, the Commissioner softened her position when she stated the following, as reflected on page 64 of the trial transcript.

Commissioner: So let's just keep going and, you know, I'll make a decision at the end once I hear all the evidence.

Therefore, based on the Court's reading of the transcript, the Court finds that the Commissioner did not impermissibly inform the parties that she had made a decision on the case before Mother had a chance to fully present her evidence. Rather, the Commissioner informed Mother's attorney that Mother had not met her burden based on the testimony of her only two eyewitnesses and that if Mother's other witnesses provided no stronger evidence, the Commissioner might consider awarding counsel fees against Mother for deciding to continue to litigate the case *if* the case did not result in a finding of domestic violence.

D. *The Commissioner did not err in denying Father's request for an award of attorney's fees.*

Delaware Supreme Court case precedent sets out that “the Family Court may assess fees [in Protection from Abuse cases] where the prevailing party demonstrates that the losing party engaged in bad faith.” *L.T. v. E.T.*, CN13-02364, 2014 WL 4203444, at *3 (Del. Fam. Ct. 2014) (citing *L.B.R. v. R.F.K.*, 2003 WL 22476199, at *1 (Del. 2003)). The Commissioner made her position clear that Mother had not yet met her burden based on the evidence of the children, as reflected on page 25 of the trial transcript, and suggested that absent corroborating evidence Petitioner's case had not yet been established:

Commissioner: I've got 50 percent. All I've got is A-----'s word right now. Whether she said it 20 million times or she said it a million times, I've only got 50 percent and you need to get over that. You need to get over the preponderance of the evidence. And the best evidence is what she told me here today.

Whether at this point it could have been argued to have been wise, there is insufficient evidence that Wife's decision to further litigate this matter was motivated by bad faith. The Court agrees with Mother's Attorney's argument in her Response to Father's ROCO that the *L.T.* case is distinct from these facts. In *L.T.*, the Court assessed the petitioner with half of the respondent's attorney's fees by focusing on the fact of the petitioner's “vague allegations, repetitive filing, and continued insistence of re-litigating issues which were already heard and dismissed.” 2014 WL 4203444, at *4. Whereas here, A-----'s allegations were clear, but the Commissioner found that this did not rise to the level of child abuse. Furthermore, this was Mother's first PFA filing related to this incident. Finally, the Court does not find that Mother's attorney acted in bad faith by choosing to continue to litigate this matter for what evidentially consumed almost three hours after the Commissioner heard from the children. It is reasonable to conclude that Mother, in good faith, believed that the Commissioner would be persuaded by the testimony of others if they reported that A----- described the incident to them using different language than A----- used with the Commissioner, such as, but not limited to, that Father “choked” her or that he had restricted her breathing. Furthermore, the Court further distinguishes this case from *L.T.* in that this case does not exemplify a “litigation posture of excessively pursuing issues of little or no merit.” *Id.*

Therefore, the Court finds that the Commissioner did not err in denying Father's request for an award of attorney's fees. It was within her reasonable discretion to do so.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

The Commissioner's Orders of October 10, 2018 and October 25, 2018 are both **AFFIRMED.**

IT IS SO ORDERED this 11th day of February, 2019

/s/ ROBERT BURTON COONIN, Judge

Cc: Commissioner
Counsel via email
Date emailed: _____

RBC/plr