

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JENNIFER BARKER,
Appellee,

v.

THOMAS MICHAEL BARKER,
Appellant.

No. 2 CA-CV 2015-0178
Filed March 25, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Gila County
No. DO201500206
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Jennifer Barker, Payson
In Propria Persona

Joseph E. Collins, Payson
Counsel for Appellant

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

MILLER, Judge:

¶1 Thomas Michael Barker appeals from the trial court’s order modifying and affirming an order of protection against him as to his son and stepson, also restricting his access to firearms. He contends he did not have sufficient notice that his right to possess a firearm was at issue at the protection order hearing, and that the trial court erred by restricting his ability to possess a firearm and allowing only supervised visitation with his son. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court’s decision. *Savord v. Morton*, 235 Ariz. 256, ¶ 10, 330 P.3d 1013, 1016 (App. 2014). In March of 2015, Thomas shoved his then-thirteen-year-old stepson, B.C., against a kitchen counter and choked him. In the months that followed, Thomas told a counselor and his wife, Jennifer, that he had a “split personality” that told him to kill himself, and he repeatedly sent Jennifer several text messages threatening to take his own life. On one occasion, Jennifer left their toddler son, T.B., with Thomas and his parents, who eventually took T.B. to a police station for his own safety after Thomas threatened to leave with him and talked about committing suicide.

¶3 In June 2015, Jennifer sought an order of protection, which was granted. The order allowed no contact with Jennifer, B.C., or T.B., except by mail, and prevented Thomas from possessing firearms. Thomas requested a hearing on the order. At the hearing, Thomas, Jennifer, Thomas’s father, and Jennifer’s father were sworn and questioned. The trial court affirmed the order with a modification to allow supervised contact with T.B. Thomas timely

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appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and (A)(5)(b); *see also* Ariz. R. Protective Order P. 42.

Notice

¶4 Thomas first argues his right to due process was violated because he did not have sufficient notice that his access to firearms was at issue in the hearing. Due process requires that a deprivation of life, liberty, or property requires notice, reasonably calculated, to apprise interested parties and afford them the opportunity to object. *See Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). “We review this constitutional claim de novo.” *In re Estate of Snure*, 234 Ariz. 203, ¶ 5, 320 P.3d 316, 317 (App. 2014).

¶5 Thomas appears to argue he lacked notice because the factual allegations listed on the petition for order of protection did not include any reference to guns, and because his wife testified at the hearing that she would not have made a request about the firearms if a court clerk had not suggested it. However, the petition filed by his wife included a request that the court order Thomas “NOT to possess firearms or ammunition,” and the order itself stated Thomas was a “credible threat” pursuant to A.R.S. § 13-3602(G)(4), and “shall not possess, receive, or purchase firearms and shall surrender same.” Indeed, Thomas sought the hearing to contest the firearms restriction. Thomas had notice “reasonably calculated” to apprise him of the action against him and afford him an opportunity to present his objections. *See Armstrong*, 380 U.S. at 550.

Firearms Restriction

¶6 Thomas next contends the trial court erred by affirming the original order’s prohibition on possession of firearms. We review a trial court’s order granting an order of protection for a clear abuse of discretion. *Mahar v. Acuna*, 230 Ariz. 530, ¶ 14, 287 P.3d 824, 828 (App. 2012). A court abuses its discretion when it commits an error of law or when the record is “devoid of competent evidence to support the decision.” *Id.*, quoting *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009).

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¶7 When issuing an order of protection, a trial court may restrict firearms possession “[i]f the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons.” A.R.S. § 13-3602(G)(4). The Arizona Rules of Protective Order Procedure require a trial court ask the plaintiff about the defendant’s access to firearms to determine whether the defendant poses a credible threat “to the physical safety of the plaintiff or other protected persons.” Ariz. R. Protective Order P. 23(i)(1)¹; see *Savord*, 235 Ariz. 256, ¶¶ 20-23, 330 P.3d at 1017 (quashing order affirming protective order restricting guns where court did not inquire about use of or access to weapons).

¶8 Thomas argues there was no evidence to support a finding he was a “credible threat” to Jennifer because “[t]he record is devoid of any evidence that [Thomas] threatened or used force against [Jennifer].” We note first that the threat need not be directed at Jennifer, because her two sons were also listed in the order of protection. See A.R.S. § 13-3602(G)(4) (allowing firearms restriction if defendant poses credible threat to physical safety of “plaintiff or other specifically designated persons”). Additionally, Thomas admitted at the hearing he had an altercation with his stepson. He also acknowledged that he voluntarily surrendered his firearms to the Snowflake Police Department “when [he] was feeling depressed” about the incident. The trial judge asked Jennifer if access to weapons posed a threat to her or her children, and she answered:

[I]t poses a threat to himself. So, potentially, it could pose a threat to us as well I suppose. He [h]as never – aimed any of that at us except for that incident in Frank’s. To me that’s a sign of progression, and so I can’t honestly say, no, I don’t think the weapons are going to be an issue.

¹We cite to the current version of the Arizona Rules of Protective Order Procedure, which were renumbered effective January 1, 2016. The text of the cited portions was not substantively amended.

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Although Thomas contends Jennifer's answer was too equivocal to support the trial court's decision, such an argument asks us to reweigh the evidence, which we will not do. *Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. Competent evidence supports the court's decision to affirm the firearms restriction based on the credible threat posed by Thomas; therefore, the court did not err by extending the firearms restriction.²

Supervised Visitation

¶9 Thomas argues there was insufficient evidence to support the trial court's decision to allow only supervised visitation with his son, T.B. We review the court's decision for an abuse of discretion. *Mahar*, 230 Ariz. 530, ¶ 14, 287 P.3d at 828.

¶10 The Arizona Rules of Protective Order Procedure provide that the defendant's child may not be included in a protective order unless there is reasonable cause to believe "physical harm may result or has resulted to the child, or . . . the alleged acts of domestic violence involved the child." Ariz. R. Protective Order P. 5(b). Thomas argues there was no evidence of potential or actual physical harm with regard to T.B. For support, he relies on his own testimony that he would never harm T.B., and Jennifer's statement that T.B. had never been hurt.

¶11 Although there was no evidence T.B. had ever been physically harmed, there was competent evidence that T.B. may be physically harmed in the future. *Id.* Jennifer's petition and testimony referred to an incident in which T.B. was with Thomas and his parents at a campsite, and Thomas threatened to leave on foot, with the baby, in hot weather. Jennifer also testified that she added T.B. to the order because she was worried about what could happen if T.B. was in Thomas's care when "something sets off an episode." Again, we will not reweigh the evidence on appeal. *Hurd*,

²Thomas also appears to argue there is no evidence he was a threat because he did not have access to his firearms. It is unclear how this supports his claim that he should be allowed to have access to his firearms.

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223 Ariz. 48, ¶ 16, 219 P.3d at 262. The trial court did not abuse its discretion by affirming and modifying the protective order as to T.B.

Disposition

¶12 For the foregoing reasons, we affirm the trial court's order.