

2007

Iacavazzi v. Choi : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PETER IACAVAZZI,

Appellant,

vs.

KRISTIN CHOI,

Appellee.

Appeal No. 20070265-CA
Lower Court No.054500262

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ORAL ARGUMENT REQUESTED

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STATEMENT SHOWING JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-(3)(2)(h) U.C.A. (1953), as amended governing appeals transferred from the Supreme Court to the Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue: Did the Trial Court Err in Issuing a Permanent Protective Order?

Standard of review: The Court of Appeals will disturb an issuance of a Protective Order where there are not specific findings of facts supporting the issuance of a Protective Order.

Appeal Preservation: Appellant raised this issue in his Motion and Memorandum for a New Trial (R. 137-142) and also in the Motion and Memorandum to Modify. (R. 153-169.)

Issue: Did the Trial Court Err in Denying the Motion for a New Trial?

Standard of Review: The Court of Appeals reviews the Trial Court's decision to deny the Motion for a New Trial under an abuse of discretion standard.

Appeal Preservation: Appellant raised this issue in his Motion and Memorandum for a New Trial. (R.137-142.)

Issue: Did the Trial Court Err in Refusing to Set Aside Certain Provisions of the Protective Order?

Standard of Review: The Court of Appeals will disturb a Trial Court's ruling if there has been an error in regard to the law.

Appeal Preservation: Appellant raised this issue in his Verified Motion and Memorandum to Modify. (R.153-169.)

Issue: Did the Trial Court Err in Using the Wrong Standard of Proof in the Hearing Held February 8, 2006?

Standard of Review: The Court of Appeals will disturb a Trial Court's ruling if there has been an error in regard to the law.

Appeal Preservation: The Trial Court raised this issue in its ruling from the hearing held February 8, 2006. (R. 129.)

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS**

U.C. 30-6-1:

As used in this chapter:

(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

U.C. 30-6-2:

(1) Any cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of abuse or domestic violence, may seek an ex parte Protective Order or a Protective Order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.

U.C. 30-6-4.2:

(1) If it appears from a petition for an order for protection or a petition to modify an order for protection that domestic violence or abuse has occurred or a modification of an order for protection is required, a court may: (a) without notice, immediately issue an order for protection ex parte or modify an order for protection ex parte as it considers necessary to protect the petitioner and all parties named to be protected in the petition; or (b) upon notice, issue an order for protection or modify an order after a hearing, whether or not the respondent appears.

(2) A court may grant the following relief without notice in an order for protection or a modification issued ex parte: (e) order possession and use of an automobile and other essential personal effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings.

(10) A court may modify or vacate an order of protection or any provisions in the order after notice and hearing, except that the criminal provisions of a Protective Order may not be vacated within two years of issuance unless the petitioner: (a) is personally served with notice of the hearing as provided in Rules 4 and 5, Utah Rules of Civil Procedure, and the petitioner personally appears before the court and gives specific consent to the vacation of the criminal provisions of the Protective Order; or (b) submits a verified affidavit, stating agreement to the vacation of the criminal provisions of the Protective Order.

(11) A Protective Order may be modified without a showing of substantial and material change in circumstances.

U.C. 78-45c-204

(1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter, and if no child custody proceeding has been commenced in a court of a state having jurisdiction under Sections 78-45c-201 through 78-45c-203, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 78-45c-201 through 78-45c-203. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 78-45c-201 through 78-45c-203, a child custody determination made under this section becomes a final determination, if:

- (a) it so provides; and
- (b) this state becomes the home state of the child.

U.R.C.P. Rule 59:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to

all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment: (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial. (2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors. (3) Accident or surprise, which ordinary prudence could not have guarded against. (4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice. (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law. (7) Error in law.

STATEMENT OF CASE

Nature of the Case: Respondent, Peter Iacavazzi, and Petitioner, Kristin Choi, were married and resided in Bozeman, Montana for three years and had one child born in the marriage, Tanner, age 27 months in February of 2006. The Petitioner moved to Summit County, Utah on about the 7th of November, 2005, and on the 14th of December, 2005 obtained an Ex Parte Protective Order against the Respondent based upon allegations of an incident that occurred on the 12th of December, 2005. The Respondent denied the allegations of any domestic abuse or any threat to the Petitioner. Respondent believes that the Petitioner only sought the Protective Order to gain an advantage in the

pending divorce action that had been filed in the State of Montana wherein the parties were fighting for custody of the minor child. Respondent contests the issuance of the Ex Parte Protective Order and Permanent Protective Order. The Protective Orders both of which were denied except for vacating the civil portions of the Protective Order. Respondent filed his appeal.

Course of Proceedings: The Petitioner filed a Petition for an Ex Parte Protective Order on the 13th of December, 2006 (R. 1-14), and an Ex Parte Protective Order was issued on the 14th of December, 2005. (R. 15-20.) Respondent filed a Verified Motion to Dismiss for want of jurisdiction on the 19th of December, 2005 (R. 24-31.) A hearing was held on the 23rd of December, 2005, and an Order entered. (R. 61-68.) A Verified Motion to Vacate the Ex Parte Protective Order was filed on the 26th of January, 2006 (R. 85-102.) A hearing on the Protective Order was held on the 8th of February, 2006, and a Protective Order was issued by the Court. (R. 130-136.) Respondent filed a Motion for a New Trial or to Amend the Findings and Order and a Memorandum in support of the same on approximately the 16th of February, 2006. (R. 137-138, 139-142.) There was no response filed by the Petitioner to Respondent's Motion for a New Trial. A Verified Motion to Vacate the Protective Order was filed on April 26, 2006, along with a Notice of Lodging which contained two reports by the Summit County Attorney's Office dated April 14, 2006, and one dated April 21, 2006. (R. 151-152.) A Notice to Submit in

regard to the Motion for in court hearing and the Verified Motion to Vacate was filed approximately the 26th of April, 2006, (R. 173-174). The request for hearing on Respondent's Motion to Vacate the Protective Order and in court hearing and conference was filed on the 15th of May, 2006. (R. 175-176.) A hearing was held on the 5th of June, 2006 wherein the Court dismissed the civil aspects of the Protective Order (R. 194.) On the 13th of June, 2006, the Respondent filed a Notice to Submit his Motion to Vacate the Protective Order for the reason that the Petitioner failed to respond to the motion. (R. 197-198.) The Court failed to respond to the Notice to Submit. Respondent filed an additional Notice to Submit on the 30th of August, 2006 (R. 199-200) and a request to schedule a hearing. As of August 30, 2006, the Petitioner had failed to respond to either the Verified Motion to Vacate the Protective Order filed on the 26th of April, 2006 (R. 153-169) or Motion for a New Trial. (R. 137.) The Court failed to respond to the additional Notice to Submit. On the 16th of January, 2007, a request for a hearing was filed (R. 201), and a hearing was held on the 21st of February, 2007 before Commissioner Michelle Tack on the Motion to Vacate and the Court denied the same. (R. 208.) An objection to the Commissioner's recommendation was filed on the 26th of February, 2007 (R. 209-210). A second notice to submit for ruling was filed by Respondent on the 26th of February, 2007 in regard to Respondent's Motion for a New Trial which was filed in February 2006. (R. 211-212) (Apparently the First Notice to Submit that Respondent

filed in March of 2006 for some unknown reason did not make its way into the file.) The Court entered its Ruling and Order denying Respondent's objection, denying the Motion for a New Trial, and denying a Request for an oral argument on the 28th of February 2006. (R. 213-215.) Finally, after the Court had already entered its Ruling on Respondent's Motion without any response received from the Petitioner, the Petitioner filed a Memorandum and Opposition to the Motion for a New Trial on the 9th of March, 2007. (R. 219- 225.) The Court signed an Order prepared by counsel for the Petitioner on the 16th of March, 2007, denying the additional Motion for a New Trial (R. 231-232), although there was no additional Motion for a New Trial and the Court had already ruled on Respondent's Motion for a New Trial filed in February 2006, in its Ruling and Order on the 28th of February, 2007. Respondent filed its Notice of Appeal on the 21st of March, 2007 (R. 233-234.)

Disposition Below: The Trial Court granted the Protective Order and denied the Motion to Vacate, the Motion for a New Trial, and found that the Respondent's objections to the Commissioner's recommendation stated no basis that justifies relief. The Trial Court agreed with the Commissioner's ruling that the criminal portions of the Protective Order could not be modified without the consent of the Petitioner. The Respondent also requested in February 2006 that the Trial Court grant a new trial in this matter and the Trial Court indicated in its Ruling and Order that there was no basis to

grant a new trial and the Motion was denied.

STATEMENT OF FACTS

1. As of February 2006, the parties had been married for three years and one child was born in the marriage, Tanner, age 27 months in February 2006. (T. 22-23.)
2. The Petitioner, Kristin Choi, moved to Summit County, Utah on about the 7th of November, 2005. (T. 25-26.) Since the minor child, Tanner's, birth and prior to the Petitioner moving to Utah in November of 2007, the parties lived in Respondent's three bedroom condo in Bozeman, Montana. The Respondent still resided there in February of 2006. (T. 139-143.)
3. An incident occurred some time in June 2006 in Bozeman, Montana wherein the Petitioner alleged that the Respondent at their home and residence pushed her out of the way, and in a violent and abrupt attack knocked her off her feet, approximately three times, although the Petitioner admitted that the Respondent did not hit her on that day (T. 36.) However, on cross examination the Petitioner changed her testimony and stated that the Respondent only shoved her and pushed her out of the way. (T. 69.) Moreover, the Respondent stated in Exhibit 1 presented to the Court at the hearing on February 8, 2006, and (attached hereto an Addendum 1), "Let me reiterate with you as I did with responding officers, my husband, Peter, did not touch me. He in no way threatened me with physical violence and again he did not put his hands upon me." (T. 70.)

4. The Respondent was arrested from the incident in Bozeman, Montana in May of 2005 based on statements made at the time by the Petitioner; however, she recanted her statements in the letter written to the District Attorney (Addendum 1) and the charges against the Respondent were reduced to disorderly conduct. (T. 135- 137.)

5. Respondent denies every physically assaulting the Petitioner. (T. 133-135.) Further, the Respondent has never been arrested, except for the one incident in Bozeman, Montana in June of 2006 (T. 136.)

6. The incident upon which the Ex Parte Order was issued in December 15, 2006 occurred in Park City, Utah on approximately the 12th of December, 2006. The Petitioner alleged that she received a threatening voicemail from the Respondent (T. 45); however, the Petitioner did not present any voicemail evidence but only her recollection and stated that the voicemail said that the Respondent was coming to her work and coming to get her. The Petitioner also stated she was afraid that the Respondent would take the minor child, Tanner, on said date and therefore went to the daycare center where Tanner was. The Petitioner went to the daycare center to pick up the minor child rather than going straight to sheriff department or police to report the alleged threat. (T. 48.) The Petitioner's statement of what occurred at the daycare center (T. 49-50) varied considerably with the Respondent's version of what occurred at the daycare center. (T. 147-150.)

7. The Petitioner's statement made to the Court on the Verified Petitioner for Protective Order (R. 1-14) as well as her testimony from the hearing on February 8, 2006, also differ from the two reports of the Summit County Attorney's Office (R. 150-151) also attached to the Notice of Lodging filed 26th of April, 2006 (R. 51-52.)

8. Since February 2006, Petitioner, either personally or by and through Dinah Kennedy her mother who lives with Petitioner, contacted Dave Berry, Respondent's best friend, or Respondent directly with requests that he call Petitioner on her cell phone without repercussion. (R. 91-92, 153-169, and Exhibits.) Petitioner has directly and indirectly made numerous telephone contacts with Respondent, well over 100 times, since the February 8, 2006 hearing. (R. 91-92, 157-161, and Exhibits.)

9. In March of 2006, the minor child was in Respondent's care and Petitioner was trying to locate Respondent. When she was unable to locate him, she contacted the Montana police and reported that Respondent kidnapped the minor child and left the state of Utah in violation of the Order. Dave Berry informed Petitioner that she should not be contacting Respondent and that the Order specifically restricts Respondent from communicating with Petitioner by phone. (R. 157-161 and Exhibits.)

10. In April of 2006, Petitioner and Dinah Kennedy made a trip to Bozeman, Montana and invaded the parties' marital residence to take personal property there from, while Respondent was at home. Petitioner going to Montana, without Respondent's

knowledge, created a situation where Petitioner actually contacted Respondent to find out the whereabouts of the property. (R. 157-161 and Exhibits.)

SUMMARY OF ARGUMENT

The Respondent respectfully argues that the Trial Court failed to make specific findings and the Petitioner failed to establish either a history of abuse or threat of imminent harm; and therefore, the Protective Order should not have issued.

Further, the Respondent respectfully argues that the Trial Court abused its discretion in failing to grant the Motion for a New Trial when it appeared that the Trial Court had made an error in law in regard to exercising jurisdiction over the custody and parenting time issue. Also, the Trial Court made an error in law in issuing the Protective Order without the Petitioner meeting her burden of proof.

The Respondent respectfully argues that the Trial Court erred in failing to set aside the provisions of the Protective Order when sufficient evidence was presented that the Petitioner consented to vacating of the Protective Order through her actions and there were false representations made by the Respondent to the Court to obtain the original Protective Order.

Lastly, the Respondent respectfully argues that the Trial Court should have required the Petitioner to meet her burden by clear and convincing evidence and not just by a preponderance of the evidence.

ARGUMENT

I. Did the Trial Court Err in Issuing a Permanent Protective Order?

The Trial Court's decision to issue a permanent Protective Order was in error for the reason that the Petitioner failed to establish and present sufficient evidence to satisfy the requirements of Utah Code 30-6-2(1). According to said statute, in order for the Petitioner to obtain a Protective Order, she is required to show that she "has been subjected to abuse or domestic violence or that there was a substantial likelihood of immediate danger of abuse or domestic violence to her." The Court failed to make any specific findings in regard to any abuse, domestic violence, or imminent danger. The only findings in regard to the Court's decision from the hearing held on the 8th of February, 2006, are contained in the Court's oral ruling at said hearing. (T. 191-195.)

In *Bailey v. Bayles*, 52 P.3d 1158, Utah 2002, the Utah Supreme Court discuss the requirements of the Trial Court in making findings to establish grounds for a Protective Order under Utah Code 30-6-2(1). In the Bailey case, the Trial Court found that during the marriage that Bayles had physically abused Bailey by slapping her. The Trial Court also found that Bayles threatened Bailey during the marriage by holding a pistol to her neck and telling her he would kill her anytime he wanted. The Court found that this behavior satisfied the statutory definition of abuse and intentionally placed Bailey in fear of imminent physical harm. *Id.* 1165. However, in Bailey, the Trial Court made specific

findings in regard to a history of incident of physical abuse. In the present case, the Court made no such findings. There were allegations made by the Petitioner in regard to incidents of physical abuse which the Respondent adamantly denied. There was no evidence presented of any police reports or any prosecution, whatsoever, for any type of abuse other than the one incident that occurred in Bozeman, MT.

This Court should not make the required specific findings for the Trial Court. “The Appellate Court is entrusted with ensuring legal accuracy and uniformity, and should defer to the Trial Court on factual matters.” *Wiley v. Wiley*, 951 P.2d 226, 230-231 (Utah 1997). “It is inappropriate for an Appellate Court to disregard the Trial Court’s findings of fact and to assume the role of weighing evidence and making its own findings of fact.” *Id.* 230. (See also 5 CJS Appeal and Error, Section 710, 1993) “The Reviewing Court is confined to the facts specifically found by the Trial Court and the Reviewing Court may not make findings of facts for or against the Appellant.”

There are numerous cases decided by this Court in regard to inadequate findings by the Trial Court which justify a remand. (See *Waltons v. Waltons*, 812 P.2d 64 (Utah App. 1991), *Howell v Howell*, 806 P.2d 1209 (Utah App. 1991), *Allred v Allred*, 797 P.2d 1109 (Utah App. 1990)). The Trial Court should make the specific findings.

However, oral findings made by a Trial Court, at the close of evidence, may be sufficient to support the Court’s ruling. *Hanson v Hanson*, 736 P.2d 1055 (Utah App.

1987). In the present case, the Trial Court did make oral findings but there are not sufficient oral findings to support an issuance of a Protective Order. (T. 192-205) The Trial Court stated:

“I’m troubled by the conflict here, and yet – so I want to explain my thinking why I’m doing what I’m doing. The Protective Order standard, I think, simply requires me to weigh what the people have said about whether there’s abuse or domestic violence and whether there’s a substantial likelihood that it might continue. And that in turn, it requires me to answer the question, was there some conduct that would give one a reasonable fear of imminent injury. And so in Utah, of course, the only thing that’s been alleged is the events of December 12th, and in isolation that would, I believe, probably not qualify to get a Protective Order. I’m – even though it’s a swear word, I’m coming to get you. That can mean many things. But, of course, taken in history with other things, I do believe- and so what I’m dealing with is an Ex Parte Protective Order that was issued December 14th, and then it was extended on December 23rd, and then modified. But that portion of it has remained throughout, and I do believe, based upon the evidence I’ve heard, and the inferences I draw, and all of the testimony, that there has been sufficient evidence for me to conclude by a preponderance of the evidence – and it is very close that a Protective Order out to issue covering the basic aspects of protecting Ms. Choi.” (T. 192.)

No where in this oral finding does the Trial Court make a specific finding of any history of physical abuse. Further, the Trial Court specifically found that the event that occurred on the 12th of December, 2005, in isolation would “probably not qualify to get a Protective Order.” (T. 192.)

In the *Bailey* case (*Supra*, Footnote7), the Supreme Court stated, “In interpreting and applying section 30-6-2(1), the dissent concludes that “[u]nder the Cohabitant Abuse

Act and the Cohabitant Abuse Procedures Act, a petitioner is granted a Protective Order when her or she is in fear of imminent physical harm.” While this may be an accurate reading and interpretation of the second alternative ground for seeking a Protective Order under the statute, it ignores the plain language of the statute's first ground for seeking a Protective Order that provides that a petitioner may *alternatively* seek a Protective Order if he or she has been “subjected to abuse or domestic violence.” Respondent respectfully submits that the Petitioner failed under both alternatives. There was no specific finding of any history of abuse and the Trial Court specifically found that the incident on the 12th of December, 2005, was not sufficient to substantiate that the Petitioner was in fear of imminent physical harm. The Trial Court stated that even based upon all of the evidence that the Trial Court had heard that its decision to issue the Protective Order was “very close.” (T. 192.) If the Trial Court’s decision was very close whether to issue or not issue the Protective Order, there should have been specific findings to support the Trial Court’s decision.

II. Did the Trial Court Err in Denying the Motion for a New Trial?

A. Since the Trial Court did make an oral finding that the incident of December 12, 2005, did not qualify to create a fear of imminent physical harm; therefore, the Protective Order should not have been issued. The Petitioner’s false accusations of previous abuse was not a specific finding of the Trial Court, and therefore, Petitioner failed as to a history of abuse as well. Based on the findings, the Protective Order should not have been issued.

The Respondent filed his Motion for a New Trial or to Amend Findings and Order on the 16th of February, 2006, along with a Memorandum in Support Thereof. (R. 139.) The Petitioner failed to file any responsive pleading prior to the Court denying said Motion on the 20th of February, 2007. Respondent respectfully submits that the Trial Court erred in denying the Motion for a new trial.

As stated by the Respondent in his Memorandum in Support of his Motion for a New Trial, the Court found, “That the allegations pertaining to the Petitioner’s statement that the minor child was being abused by the Respondent during the time period from the 23rd of December, 2005 through February 8, 2006, were not true and that there were no incidents relating to any acts by the Respondent that would justify any Protective Order in regard to the same. The Court further found that the allegations relating to the incident at the daycare that occurred on the 12th of December, 2005, which was the basis for issuing the initial Ex Parte Protective Order did not rise to the level required by statute in and of itself to justify an issuance of a Protective Order.” (R. 139-140.). The Petitioner had only resided in the state of Utah for approximately one month prior to the Ex Parte Protective Order being issued in December of 2005. Montana was the home state of the minor child and as stated above, the Court found that there were no incidents that occurred in the state of Utah to justify the issuance of the Protective Order, and further that there was no basis for any issuance for a Protective Order on behalf of the minor

child. Respondent respectfully submits that the Trail Court lost jurisdiction to enter any Protective Order as related to the custody of the minor child, parenting time, and related issues. Although Utah Code 30-6-4.2(2)(f) allows the Court to grant temporary custody of the minor children of the parties under subparagraph 3(b) specify arrangements of parent time of a minor child said rights of the Court are subject to and preceded by the rights of the Courts of Montana, pursuant to the Uniform Child Custody Jurisdiction Enforcement Act, which has been incorporated both by the State of Montana and the State of Utah. Therefore, since the State of Montana is still the home state of the minor child, and also the state wherein the divorce action has been filed, and the state wherein the Petitioner had admitted jurisdiction for said divorce action, the above Court is precluded from issuing any Protective Order in regard to the custody of the minor child and parenting time and the Protective Order granted by the Court should have only addressed the issue of protection of the Petitioner. (T. 140-141.)

B. The Ex Parte Protective Order issued by the State of Utah on December 14, 2005, became ineffective upon the issuance of an Order by the State of Montana and subsequently relinquished any jurisdiction the State of Utah may have had.

On or around December 14, 2007, the Trial Court issued an Ex Parte Protective Order, which included a child custody determination regarding the minor child in this matter. The Trial Court premised the child custody determination on Utah Code §78-45c-204(1) which granted him emergency jurisdictional authority to enter the Ex Parte

Protective Order regarding the minor child. Specifically, Utah Code §78-45c-204(1) states:

A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

However, Utah Code §78-45c-204(2) specifically states that, “a child custody determination made under this section remains in effect *until* an order is obtained from a court of a state having jurisdiction” (emphasis added). The circumstance in this case mimics what is prescribed in Utah Code §78-45c-204. On or around December 15, 2007, Petitioner filed a divorce action in Montana and the court in Montana issued an Order and Warrant for the return of the minor child to the custody of Peter Iacavazzi. (R. 24-31.) The Respondent was served with the Ex Parte Protective Order on the 17th of December 2005. (R. 21.) The Respondent filed a Motion to Dismiss the Ex Parte Protective Order on the 19th of December, 2005 and the hearing was held on the 23rd of December, 2005 and the Court entered a Ruling and Order. (R. 63.) At the December 23rd hearing, the Trial Court found that it could exercise emergency jurisdiction and award custody and parent time even though the Court found that Montana was the home state of the minor child and the child had only been in Utah less than thirty days prior thereto. The Trial Court had a discussion with the Court in Montana and both judges believed that the Montana Court, as the home state of the minor child, would have

jurisdiction to determine whether it should exercise continuing jurisdiction. The Montana Court has continued to exercise jurisdiction and has never declined jurisdiction on any basis. Further, the Trial Court found that Montana has exclusive continuing jurisdiction over the minor child under U.C.C.J.E.A. until the Montana Court declined jurisdiction which it did not and has not. Further, the Montana Court never found that it was inconvenient forum. Most importantly the Trial Court in its ruling on the 23rd of December, 2005, exercised emergency jurisdiction as to the child under Utah Code 78-45c-204. The Court specifically stated in said ruling, “The Verified Petition establishes Petitioner’s residence in Utah and alleges an act in Utah that, is prudent, would justify a Protective Order. The Court also indicated that under the facts of this case, the Court could maintain the temporary custody of the child with the Petitioner.” (R. 64.) However, as stated above, the Court found after the hearing on 8th of February, 2006 that the alleged act that occurred in Utah was not sufficient to justify an issuance of a permanent Protective Order. Moreover, the Court specifically found that the allegations in regard to the minor child were not true and that there was no danger to the minor child, and therefore refused to enter any Protective Order on behalf of the minor child.

The case at hand clearly mimics Utah Code §78-45c-204. A Court within the home state of the minor child issued an order regarding custody, thus, any order

previously issued by a court in the State of Utah regarding custody becomes ineffective and preempted.

In light of the foregoing, the State of Utah could not issue any initial child custody determination under Utah Code 78-45c-201. Disregarding Utah Code §78-45c-204, a court in the State of Utah only has jurisdiction to make a child custody determination if the State of Utah is the home state of the minor child or was the home state of the minor child within six months before the commencement of an action. Utah Code 78-45c-201(1)(a). Clearly, this is not the case. The minor child resided in Montana with the parties prior to November 2005. Furthermore, the minor child never resided in the State of Utah for a six-month consecutive period prior to the action commenced by the Petitioner, Kristin Choi. Regardless of the whereabouts of the minor child at that time, the State of Utah could not have issued any child custody determination because the State of Montana had jurisdiction, by being the home state of the minor child, and did not decline jurisdiction as prescribed by Utah Code 78-45c-201(1)(b).

Furthermore, and in conclusion, on or around June 5, 2006, the Third District Court in the State of Utah issued an Order Dismissing Civil Portion of Protective Order. Therefore, there was no longer any determination of custody and this illustrates the fact that the Third District Court in the State of Utah incorrectly issued the custody portions of the Ex Parte Protective Order granted on or around December 14, 2007. The Utah

Code specifically enumerates that a custody determination will become ineffective when a court with proper jurisdiction enters an order as to the same. Thus, because the State of Montana was, at that time, the home state of minor child and no court in the State of Montana declined jurisdiction, the State of Utah never had the jurisdictional authority to continue the effectiveness of the custody portions of the Ex Parte Protective Order issued on or around December 14, 2007.

The above was argued in Respondent's Memorandum in Support of its Motion for a New Trial or to Amend the Findings and Order (R. 139); however, the Trial Court failed to give any reasons as to why it denied the Motion for a New Trial, but only indicated that there was no basis. (R.214.) Again, Respondent respectfully submits that the provisions in the Protective Order relating to custody, parenting time, and the minor child should have been vacated once the Trial Court found that there was no basis to issue a Protective Order on any act that occurred in the State of Utah.

Rule 59(a)(7) allow the Court to grant a Motion for a New Trial or to Amend the Findings and Order if there has been an error in law. As stated above, Respondent respectfully submits that the Trial Court erred in two ways. First and foremost, it should not have entered a Protective Order in regard to the custody and parenting time of the minor child as previously argued, and second, the permanent Protective Order should not have been awarded based upon allegations of what may have occurred in the State of

Montana when the Trial Court found that there were no acts in the State of Utah to justify the issuance of the Protective Order. In *Strollo v Strollo*, 828 P.2d 532 (Utah App. 1992), in reviewing a previous statute in regard to cohabitant abuse, this Court stated, “The statute clearly protects those who are reasonably in fear of physical harm resulting from past conduct coupled with present threat of future harm.” *Id* 535. However in the *Bailey* case (Supra p. 1165), this Court seemed to indicate that a party may seek a Protective Order based only upon whether or not that party has been subjected to abuse or domestic violence and need not show that the party is in fear of imminent physical harm. However, in the present case there was no finding that the Petitioner had been subjected to abuse or domestic violence, and moreover, the Trial Court found that there was no fear of imminent physical harm. Based upon the same, the Court erred in granting the Protective Order, and should have granted a New Trial.

III. Did the Trial Court Err in Refusing to Set Aside Certain Provisions of the Protective Order?

On approximately 26th of April, 2006, the Respondent filed a Verified Motion to Vacate the Protective Order or in the alternative to Modify the same. (R. 153-169.) Specifically, the Respondent requested that the Protective Order issued on the 8th of February, 2006 be dismissed upon the basis of the Petitioner’s constant and total disregard for the terms of the Protective Order. As stated in said Verified Motion to

Vacate, there were numerous incidents where the Petitioner and her mother, Dinah Kennedy, contacted the Respondent, went to Respondent's home in Bozeman, Montana, and continued to harass the Respondent. All of which indicated that there was no longer any threat of imminent harm.

It appears extremely prejudicial to allow a Protective Order to remain in effect based upon the Petitioner's allegation of fear and imminent harm when, in fact, the Petitioner obviously was not in fear of any imminent harm for the reason that she continued to contact the Respondent and even went to Respondent's home when he was there. It seems unjustified to restrain one party through a Protective Order while allowing the other party to do whatever they please in regard to contacting or harassing, either directly or indirectly. Based upon the acts of the Petitioner after the Protective Order was issued, the Court should have considered the same and vacated the Protective Order since there was no longer any basis to maintain the same.

Respondent has always contended that the only reason that the Petitioner filed for the Protective Order was to obtain an advantage in regard for her fight for custody of the minor child, Tanner. Her plan worked since the Protective Order was issued and temporary custody of the minor child was granted to the Petitioner, although it was modified to give both parties custody and to allow a 50-50 parenting time arrangement. The custody issue is still pending in the state of Montana, and a trial has not been

scheduled due to the delay in obtaining a custody evaluation.

In any event, all of the above information was presented to the Court at the time of the Verified Motion to Vacate the Protective Order, but the Court still denied the same claiming that the statute, Utah Code 30-6-4.2(10) does not allow the Court to modify the criminal portions of a Protective Order unless there is consent of the other party. Consent of the Petitioner should have been implied based upon her acts as stated in the Verified Motion even though at the hearing held on the 21st of February, 2007, before the Commissioner, the Petitioner refused to give her consent. The evidence presented to the Court in Respondent's Verified Motion established that through the Petitioner's acts, she had in fact consented to vacating the Protective Order and she was no longer in fear; therefore, the Protective Order should be vacated. *Coleman Production Credit Association v. Mahan*, 168 S.W. 2d 903, 904 (Tex.Civ.App. 1943) states that, "Implied consent is that which is manifested by signs, actions or facts, or by inaction or silence from which consent to do a thing otherwise prohibited might be implied." Additionally, "Consent inferred from one's conduct rather than from one's direct expression." *Black's Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004).

Although the Trial Court did vacate the civil portions of the Protective Order, as stated in the Order dismissing the same (R. 195-196), the two paragraphs of the criminal portion in regard to the Subaru vehicle and the firearms were not dismissed at the

February 21, 2007 hearing, again based upon the Courts interpretation of the statutory provisions of Utah Code 30-6-4.2(10).

However, the Protective Order issued by the Court (R. 130, 136) on page 3 has the following language, “This award is subject to Orders concerning the listed property in future civil proceedings.” It is apparent that this language refers to the award of the Subaru Outback as stated in paragraph 7 of the Protective Order. This language of the Protective Order seems inconsistent with the language of Utah Code 30-6-4.2(10). Taken literally, a divorce court could modify the award of the Subaru vehicle, and thus modify the Protective Order without the consent of the Petitioner. However, the Trial Court that has jurisdiction over the Protective Order, apparently, would not have the same authority. Therefore, Respondent respectfully submits that the legislative intent in drafting Utah Code 30-6-4.2(10) was to allow a two year period of protection for the Petitioner and not prevent a modification as to award of personal property. The protection for the Petitioner should not include an award of personal property for a period of two years without any modification. Respondent respectfully submits that the Court in a Protective Order action should not be involved in determining who is awarded an automobile for a two year period, and the award of personal property should be under the jurisdiction of the divorce court and something that should be capable of being modified by the Court granting the Protective Order.

IV. Did the Trial Court Err in Using the Wrong Standard of Proof in the Hearing Held February 8, 2006?

The Respondent respectfully submits that the standard of proof that a Trial Court should use at an Evidentiary Hearing in regard to the issuance of a Protective Order should be one of clear and convincing evidence. The Trial Court stated in its oral ruling, “But that portion of it has remained throughout and I do believe based upon the evidence I’ve heard and the inferences I draw and all the testimony that there has been sufficient evidence for me to conclude by a preponderance of the evidence that- and it is very close that a Protective Order ought to issue covering the basic aspects of protecting Ms. Choi.” (T. 192.)

In *Egbert v Nissan North America, Inc.*, 207 UT 64, 167 P.3d 1058, the Utah Supreme Court stated the following,

“As to standards of proof generally, the United States Supreme Court has said as follows: The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. Thus, proof beyond a reasonable doubt is the standard appropriate for criminal defendants who stand to lose liberty or life upon conviction, while a preponderance of the evidence is the level of proof required in the typical civil case where only money damages are at stake. The intermediate standard of proof – clear and convincing evidence – is appropriate when the interests at stake in a civil case are “particularly important” and “more

substantial than the mere loss of money.” For example, the United States Supreme Court has applied this standard in cases involving civil commitment, deportation, and denaturalization. We applied this standard in *Uzelac v. Thurgood (In Re Estate of S.T.T.)*, 206 UT 46, 144 P.3d 1083, where we considered the appropriate standard of proof for rebutting the “presumption that parents act in the best interests of their children” in Utah’s Grand-parent Visitation Statute. We held “that a clear and convincing standard of proof should apply to satisfy due process requirements” and explained that this was the case “[b]ecause the parental presumption deals with parental liberty interests, and accordingly should be afforded great deference by the courts.” *Id.* at 1061-1062.

Although the present case does not deal with grandparents rights or parental liberty interests, it does deal with constitutional rights and criminal penalties. The Protective Order issued against the Respondent states on page 4, “That any violation of the provisions 1-7 is a Class A Misdemeanor.” (T.133.) Paragraph 1-7 of the Protective Order not only include the protection of the Petitioner, but also the prohibition of having any weapon and the loss of the 2000 Subaru Outback. The Respondent’s right to a possession to a firearm is a constitutional right as well as his right to have his Subaru Outback. The Protective Order allows the Petitioner to keep the 2000 Subaru Outback for a period of two years even though it is not her vehicle, and she has failed to make any payments thereon. Further, the Respondent’s employment is affected by the prohibition of carrying a firearm. (R. 153-169.) The biggest threat, however, is the potential of criminal sanctions if the Respondent were to violate the Protective Order. The standard

of proof of clear and convincing evidence has also been used in cases involving civil commitment and parental rights, and Respondent respectfully submits that his rights are also, “Particularly important” and “more substantial than the mere loss of money.”

Addington v Texas, 441 US 418, 424 FN 8

The granting of a Protective Order, as in this case, affects the Respondent’s parental rights. The initial Ex Parte Protective Order issued by the Court on the 14th of December, 2005 (T. 15), granted temporary custody of Tanner Iacavazzi to the Petitioner and denied the Respondent of any visitation until the hearing. Then in the Permanent Protective Order issued on the 8th of February, 2006 (T. 130), the Court granted to the Petitioner the custody of the minor child, Tanner Iacavazzi, even though the minor child had only resided in Utah prior to the Ex Parte Protective Order being issued, and the Court had already determined that Montana was the home state of the minor child. The standard of proof for terminating parental rights is a clear and convincing standard of proof (Utah Code 78-3a-408(3)). The Ex Parte Protective Order terminates parental rights, although only for a few weeks, but nevertheless takes something away from the Respondent. Then the Permanent Protective Order, although not terminating the Respondent’s rights, does affected his parental rights. Again, the Respondent respectfully submits that the interest in a Protective Order action are, “particularly important and more substantial than the mere loss of money,” and the standard of proof

for Petitioner should be clear and convincing.

CONCLUSION

The issuance of the Permanent Protective Order should not have been issued and the Motion for a New Trial or to Amend the Findings should have been granted by the Trial Court for the following reasons:

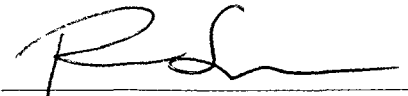
1. There were no findings of a history of abuse or domestic violence and there was no threat of imminent harm
2. The incorrect standard of proof was used by the Court.

The Court did not have jurisdiction to enter the civil portions of the protective order in regard to custody and parenting time.

The Verified Motion to Vacate the Protective Order should have been granted for the reason that the Petitioner consented through her actions justifying vacating the Protective Order.

This Court should reverse the Trial Court's granting of the Permanent Protective Order and its denial of the Motion for a New Trial and to Vacate the Protective Order.

DATED this 7 day of December, 2007.

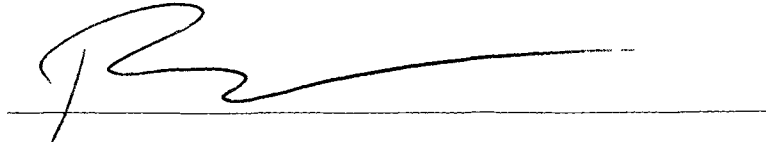


Richard S. Nemelka
Attorney for the Respondent

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing **BRIEF OF APPELLANT** this 7 day of December, 2007, postage prepaid and addressed as follows:

ASA E KELLEY
KELLEY & KELLEY LLC
859 E. 900 S. STE 201
SLC, UT 84105



ADDENDUM NO. 1

Kristin Choi-Iacavazzi
515 Michael Grove #53
Bozeman, MT 59718
406-522-0855

BOZEMAN MUNICIPAL COURT 7/27/05

2005 JUL 27 PM 5 14

FILED

BY

CLERK

Susan Wordal
Assistant City Attorney
PO Box 1230
Bozeman, MT 59718-1230

Dear Susan,

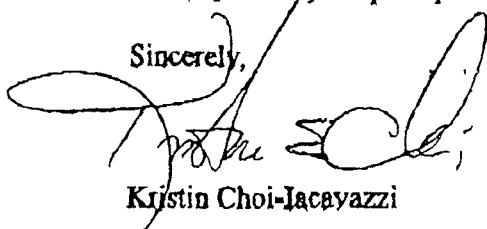
My name is Kristin Choi-Iacavazzi I am writing to you regarding case # TK-2005-03234. This case involves my husband Peter Iacavazzi. Back in June my husband and I had an argument that resulted in my calling the Bozeman P.D. Subsequently my husband was arrested and charged with Partner Family Marital Assault. Please let me reiterate with you as I did with the responding officers. My husband Peter Iacavazzi did not touch me. He in no way threatened me with physical violence and again he did not put his hands upon me.

However he was charged with Partner Family Marital Assault. He was detained for twenty four hours and released without posting bond. But the Honorable Judge Karl Seel did impose bail conditions that prohibited my husband from any contact with myself and "our" son Tanner.

I am requesting that this bail condition please be lifted. My husband and I would like the opportunity to begin reconciliation of our marriage. I think it is very important for my husband to continue having contact with our son as well. I realize that this unfortunate event has caused our family a great deal of stress and my only concern now is to help our family begin the healing and growing process.

Thank you for your prompt attention to this request.

Sincerely,



Kristin Choi-Iacavazzi

Cc Hon. Karl Seel
Bozeman Municipal Court
615 S. 16th
Law and Justice Center
Bozeman, MT 59718