

2007

Martin v. Colonna : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Christian B. Bryner; Jensen Bryner Law Offices, PLLC; Attorney for Respondent/Appellee.
Patricia Abbott; Utah Legal Services, Inc.; Attorneys for Petitioner/Appellant.

Recommended Citation

Brief of Appellee, *Martin v. Colonna*, No. 20071017 (Utah Court of Appeals, 2007).
https://digitalcommons.law.byu.edu/byu_ca3/624

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

TAMRA M. MARTIN,

Petitioner and Appellant,

vs.

ANTHONY NEIL COLONNA,

Respondent and Appellee.

Case No. 20071017-CA

Priority No.

BRIEF OF THE APPELLEE, ANTHONY NEIL COLONNA

Appeal From Findings of Fact, Conclusions of Law and Dismissal of Petition for
Protective Order

In the Seventh Judicial District Court
for Carbon County, State of Utah

Honorable George M. Harmond
District Court Judge

Patricia Abbott, #9854
Utah Legal Services, Inc.
Attorneys for Petitioner/
Appellant
455 N. University Ave.,
#100
Provo, UT 84601

Christian B. Bryner, #8730
Jensen Bryner Law Offices, PLLC
Attorneys for Respondent/
Appellee
90 W. 100 N.,
Suite 3
Price, UT 84501

FILED
UTAH APPELLATE COURTS
JUL 23 2008

IN THE UTAH COURT OF APPEALS

TAMRA M. MARTIN,

Petitioner and Appellant,

vs.

ANTHONY NEIL COLONNA,

Respondent and Appellee.

Case No. 20071017-CA

Priority No.

BRIEF OF THE APPELLEE, ANTHONY NEIL COLONNA

Appeal From Findings of Fact, Conclusions of Law and Dismissal of Petition for
Protective Order

In the Seventh Judicial District Court
for Carbon County, State of Utah

Honorable George M. Harmond
District Court Judge

Patricia Abbott, #9854
Utah Legal Services, Inc.
Attorneys for Petitioner/
Appellant
455 N. University Ave.,
#100
Provo, UT 84601

Christian B. Bryner, #8730
Jensen Bryner Law Offices, PLLC
Attorneys for Respondent/
Appellee
90 W. 100 N.,
Suite 3
Price, UT 84501

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Statement of Jurisdiction	1
Statement of the Issues and Standards of Review	1
Statement of the Case	1,2
Argument	
The Court did not err in Denying Appellant's Protective Order When the Abuse Suffered by Appellee Occurred solely during the Appellee's Minority	3
Appellant is not Entitled to a Protective Order under the Second <u>Bailey</u> Alternative	4
Public Policy Does Not Favor Allowing an Adult to Apply for a Protective Order Based on Abuse Suffered as a Child at the Hands of a Parent	6
Even if the Inadvertent Contact was Deemed to be Deliberate, the Court's Findings are Sufficient to Find that Petitioner's Statements did not Constitute a Threat	6
The Trial Court did Not Fail to Make Factual Findings Regarding Material Incidents of Alleged Abuse	7
Conclusion	8
Certificate of Service	

TABLE OF AUTHORITIES

<u>Bailey v. Bayles</u> , 52 P.3d 1158 (Utah 2002)	p. 2, 3, 4, 5,
<u>Strollo v. Strollo</u> , 828 P.2d 532 (Utah Ct. App. 1992)	p. 4, 7
<u>Boniek v. Boniek</u> , 443 N.W.2d 196 (Minn. Ct. App. 1989)	p.4

IN THE UTAH COURT OF APPEALS

TAMRA M. MARTIN,
Petitioner and Appellant,

vs.

ANTHONY NEIL COLONNA,
Respondent and Appellee.

Case No. 20071017-CA

Priority No.

BRIEF OF THE APPELLEE, ANTHONY NEIL COLONNA

STATEMENT OF JURISDICTION

Appellee agrees with Appellant that this court has jurisdiction to hear this matter.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Appellee does not disagree with the standards of review set forth in Appellant's Statement of the Issues and Standards of Review, as set forth in pages one through five.

STATEMENT OF THE CASE

The following relevant written findings were made by the Court in its Findings of Fact, Conclusions of Law and Dismissal of Petition for Protective Order in this matter:

1. That the Appellant/Petitioner is the daughter of the Appellee/Respondent.
2. That the Petitioner was "physically struck" by Respondent while her

parents were married and residing together.

3. That the Petitioner and Respondent last visited with each other six years prior to the protective order hearing, when Petitioner spent a week at Respondent's house.

4. That the Petitioner had only seen Respondent twice within the six years prior to the protective order hearing, with the first being four years previous and the second occurring approximately one year later.

5. That in approximately August 2007, Respondent telephoned Petitioner's mother's house, where Petitioner was residing. Respondent was unaware that Petitioner was residing at the house. Petitioner answered the phone and spoke to Respondent, who was angry about a missing movie rental card.

6. On October 19, 2007, Petitioner was present when Respondent had Petitioner's mother served with an Order to Show Cause.

7. Petitioner filed a request for a protective order four days after her mother was served with the Order to Show Cause.

The Court further concluded that Petitioner was not a cohabitant of Respondent when the physical abuse occurred because she was a minor child of Respondent.

The Court further concluded that there is not a substantial likelihood of domestic violence between the parties which would justify the granting of a protective order.

//

//

ARGUMENT

The Court did not err in Denying Appellant's Protective Order when the abuse suffered by Appellee Occurred solely during the Appellee's Minority

Appellant argues that the Court erred in holding that Appellant is not currently a cohabitant of Appellee. However, even if the Court erred in this matter, it did not err when it held that Appellant was not a cohabitant within the meaning of Utah law when any physical abuse occurred because she was a minor child of Appellee. The plain language of the statute and public policy do not allow adults to file protective orders against a parent solely on the basis of abuse that occurred during the child's minority.

In Bailey v. Bayles, 52 P.3d 1158, 1165 (Utah 2002), the Utah Supreme Court stated "the statute provides two alternative grounds upon which a person may seek a protective order." The first alternative requires a finding that there (1) was a cohabitant who (2) was "subjected to abuse or domestic violence." Id. The second alternative requires a finding of (1) a "substantial likelihood of abuse or domestic violence" to (2) a cohabitant. Id. The Court explained as follows:

"Therefore, according to the statute, in order for Bailey to obtain a protective order, she was required to show that she was a cohabitant and either that she had been subjected to abuse or domestic violence, or that there was a substantial likelihood of immediate danger of abuse or domestic violence to her." Id.

As to the first alternative, the Bailey decision provides that there be a two-pronged analysis: first, whether the petitioner is a cohabitant, and secondly, that the petitioner either had been subjected to abuse or domestic violence while a cohabitant. Appellant

argues that a petitioner need only be a cohabitant at the time of filing the petition, and not when the abuse occurred. However, this point was clarified in footnote eight of the Bailey decision when it stated,

“The controlling fact for the purposes of the statute, therefore, is not that the abuse took place eighteen months or more prior to the filing of a petition for a protective order, but that Bailey in fact suffered abuse at some point while she was a cohabitant.” Id.

The Court went on to point out that the abuse the petitioner suffered in Bailey took place during the marriage, such that she satisfied the required of being a cohabitant at the time of the abuse. Thus, preliminary to the entry of a protective order under this alternative is a finding that the abuse occurred “at some point” during the period when the relationship was one between cohabitants. Appellant is not entitled to relief under the first prong of the test, as the Court found she was not a cohabitant at the time that the alleged abuse occurred.

Appellant is not Entitled to a Protective Order under the Second Bailey Alternative

Under the second ground for obtaining a protective order under Bailey, the court must find that at some time while the Appellant was a cohabitant, “there was a substantial likelihood of immediate danger of abuse or domestic violence to her.” Bailey at 1165. In determining whether a substantial likelihood of danger exists, the court may weigh the evidence in light of the totality of the circumstances. See Strollo v. Strollo, 828 P.2d 532, 534 (Utah Ct. App. 1992), in which this Court approvingly commented on a Minnesota case, Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989), wherein the

Minnesota Court of Appeals approved the trial court weighing the evidence in the totality of the circumstances to determine whether “sufficient evidence exists to infer a present intent to inflict fear of imminent physical harm, bodily injury, or assault within the meaning of the Domestic Abuse Act.” Boniek at 198 .

In the instant matter, the trial court’s findings are sufficiently detailed for this Court to hold that, under the totality of the circumstances, even if the parties were cohabitants there was not a substantial likelihood of immediate danger to Appellant. The Court made specific findings of the length of time that had passed between the time the petitioner resided with the respondent and the time of the alleged incident giving rise to the petition, and further made note of the incidental and benign nature of the limited contact that occurred thereafter (i.e., Appellant stopped at Appellee’s house during Sunnyside Community Days to use the restroom). The Court also made a specific finding of the fact that the protective order was filed almost immediately after Appellant’s mother was served with an Order to Show Cause by Appellee. Further, the Court did not find that there was an intent to inflict fear of imminent physical harm. Given these findings, it was not unreasonable for the trial court, when weighing the facts in the totality of the circumstances, to find that there was not a threat of future harm or, as described in Bailey, “a substantial likelihood of imminent danger of abuse or domestic violence.” Bailey v. Bayles, 52 P.3d at 1165. Thus, Appellant is not entitled to relief under the second Bailey prong.

Public Policy Does Not Favor Allowing an Adult to Apply for a Protective Order Based on Abuse Suffered as Child at the Hands of a Parent

Contrary to the assertions of Appellant, an adult who was abused as a child by a parent or some other relative is not without remedy. Once a child has reached his or her majority, he is presumed by law to be able to be sufficiently self-determining to choose his place of residence and with whom he will associate. Although an individual may have been abused while a child, that individual's rights greatly enlarge upon her emancipation at age 18, sufficiently for the legislature to presume that the individual can at that point take steps to protect himself. If that individual thereafter suffers abuse as an adult, he then has recourse to obtaining a protective order. By requiring that the abuse relevant to the issue took place while an adult cohabitant, the legislature ensures that protective orders are not granted due to faulty childhood memories or by children resentful of parental authority.

Even if the Inadvertent Contact was Deemed to be Deliberate, the Court's Findings are Sufficient to Find that Petitioner's Statements did not Constitute a Threat

In her marshaling of evidence, Appellant cites to her testimony at trial, wherein she states, "He said that he wished I weren't alive, and that I were never born, and that he could take care of that for me." (Appellant's Brief, page 25; Record, page 6). Appellant also notes that the trial court stated, "Now I have to find some intent on his part to seek her out and threaten her. . . I don't think he sought her out to threaten her. I think the contact was Inadvertent." (Appellant's Brief, page 23; Record, page 68)

Even if the trial court accepts Appellant's argument that the Inadvertent contact was not a bar to a finding of a protective order, the Inadvertent nature of the contact is a factor that the Court can consider in weighing the totality of the circumstances under Strollo, and specifically, in weighing whether the nature of the statement made by Appellee was an intentional threat. Further, other findings were made sufficient for the Court to infer that the statements were not intentional.

The Trial Court did Not Fail to Make Factual Findings Regarding Material Incidents of Alleged Abuse

Appellant claims that the trial court failed to make sufficient findings as to whether a threat was made during the phone call between Appellant and Appellee. Specifically, Appellant urges the trial court to specify whether Respondent made "an intentional threat of imminent future harm." However, Petitioner's marshaling of facts does not clearly indicate that she is entitled to a finding that an intentional threat was made. No individuals other than Appellant heard Appellee's statement made over the phone. Further, Appellant denied making any threat over the phone. Appellee did not make the phone call for the purpose of seeking out Appellant.

Finally, Appellee's alleged statement itself is open to interpretation. He did not use words indicating an intent to take action, but merely stated that he "*wished*" Appellant and not been born and that he "*could* take care of that for her." Conditional words of this nature can carry more than one meaning and do not necessarily connote a clear intention to take action or to place Appellant in reasonable fear of imminent physical harm.

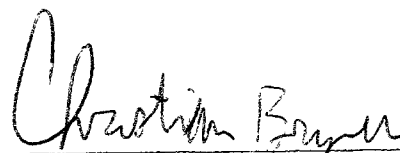
Appellant did not seek a protective order until nearly two months after the incident took place, it appears that she did not treat them as such. Given the totality of the circumstances and the lack of independent verification of the statements made, the trial court was within its rights to make no further findings beyond one that Appellee was angry during the phone call.

It is not necessary in this instance for the appellate court to look beyond the findings of the court to marshal evidence, as the findings of the court are clearly sufficient to find that in fact Petitioner did not meet her burden in showing that she suffered abuse while a cohabitant, and was not in danger of a substantial likelihood of imminent danger of abuse or domestic violence. Appellant faults the Court for failing to make findings as to allegations of past abuse occurring during the minority of the Appellant. Because these incidents took place prior to a relationship of cohabitation, they should not be considered by this Court. See footnote 8, Bailey v. Bayles, 52 P.3d at 1165.

CONCLUSION

Appellee respectfully requests that this Court affirm the decision of the trial court.

DATED this 23rd day of July, 2008

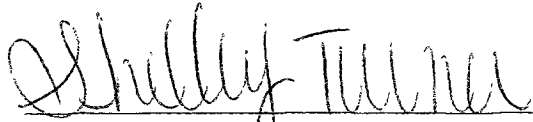


Christian B. Bryner
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of July, 2008, I served a copy of the attached Appellee's Brief upon counsel for Appellant Patricia K. Abbott, by mailing the same to her via first class mail to the following address:

Patricia Abbott
Utah Legals Services, Inc.
455 N. University Ave.
Provo, UT 84601


An employee of Christian B. Bryner