

2007

Martin v. Colonna : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMRA M. MARTIN,

Petitioner and Appellant,

vs.

ANTHONY NEIL COLONNA,

Respondent and Appellee.

Case No. 20071017-CA

REPLY BRIEF OF THE APPELLANT, TAMRA M. MARTIN

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

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Priority No.

APPELLANT'S REPLY BRIEF

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TRIAL COURT AND ENTER A PROTECTIVE ORDER BECAUSE THE PARTIES WERE COHABITANTS AT THE TIME PETITIONER FILED.

In his response, the Respondent concedes that the trial court erred in finding that the parties are not currently cohabitants. The Respondent seems to assert that the trial court's finding that the parties were not cohabitants is harmless error. Petitioner disagrees that finding that the parties are not currently cohabitants is harmless error: the Petitioner had standing to file a protective order against her father; the trial court made a finding that she had been abused; and the trial court should have entered the protective order on those bases. Therefore, the Petitioner requests that this Court reverse the trial court and enter a permanent protective order.

Respondent seems to state that the finding that the parties are not currently cohabitants is harmless error. He states that the trial court correctly dismissed the request for protective order because much of the abuse took place while Ms. Martin was a minor child living with the Respondent. He alleges that abuse to a child living with a parent does not qualify a Petitioner for a protective order because a minor child is statutorily exempted from the legislative definition of “cohabitant” pursuant to Utah Code Ann. § 78B-7-102 (3) (2008), and, pursuant to footnote 8 of Bailey v. Bayles, 52 P.3d 1158, 1165 (Utah 2002), only abuse occurring while the parties were cohabitants should be considered.

This interpretation is contradicted by the plain language of Utah Code Ann. § 78B-7-103 (2008), which states:

(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 . . .

The statute requires only a finding that the parties are cohabitants at the time of filing to grant standing in a protective order action. There is no statutory requirement that the parties must have been cohabitants at all times when domestic violence occurred in order for the domestic violence to be a basis for issuance of a protective order.

This case is markedly different from the circumstances to which the Court referred in footnote 8 of the Bailey decision. In that case, the court considered whether abuse or domestic violence occurred while the Bailey parties were cohabitants. The Bailey parties were both adults divorcing after a long marriage. A protective order filed by an adult

child against a parent is very different. Children are statutorily exempted from filing for a protective order against a parent while they are minors. In every other respect, a child is clearly a “cohabitant” of a parent with whom he or she resides. Ms. Martin resided in the same household with her father until her parents separated and divorced. The Court found that Mr. Colonna physically abused Ms. Martin while she was living with him. (Findings of Fact, Conclusions of Law and Dism. of Pet. for Protective Order at 1).

II. IT IS NECESSARY TO GOOD PUBLIC POLICY FOR THE COURT TO CONSIDER ABUSE COMMITTED AGAINST MS. MARTIN AS A CHILD.

It would be against public policy to bar Ms. Martin from seeking a protective order based on childhood abuse because the abuse occurred before she qualified as a cohabitant. The legislature did not grant a child standing to file for an adult protective order because the legislature provided that a child may be protected against an abuser if someone files a child protective order on his or her behalf in juvenile court. A child may not file his or her own child protective order in juvenile court, and despite many instances of serious abuse, no one filed to protect Ms. Martin against her father while she was a child. At age nineteen, Ms. Martin sought protection from the courts. Prior to age eighteen, Ms. Martin had neither standing to file a child protective order for herself nor standing to file an adult protective order. To bar Ms. Martin from relying on childhood abuse as a basis for entry of an adult protective order would also violate Ms. Martin’s rights to equal protection under the laws. It would place her in danger by barring the court from considering serious abuse occurring prior to her majority.

III. IN ORDER TO LOOK AT THE “TOTALITY OF THE CIRCUMSTANCES,” THE COURT MUST CONSIDER PAST CONDUCT OF THE PARTIES.

In his response brief, the Respondent cites this Court’s approval of language from Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989) to support the proposition that the trial court must weigh the evidence in the “totality of the circumstances” to determine whether entry of a protective order is warranted. Id.

The Petitioner agrees with this analysis. However, examining the totality of the circumstances also involves looking at past abuse. The Boniek decision states, “Past abusive behavior, although not dispositive, is a factor in determining cause for protection.” Id.

The trial court made a finding that “Petitioner was physically struck by the respondent while her parents were married and residing together.” (Findings of Fact, Conclusions of Law and Dism. of Pet. for Protective Order at 1). It is not possible for the court to properly analyze the Petitioner’s case without considering abuse to her as a minor child.

The Respondent argues that the trial court’s findings were sufficiently detailed to allow the court to find that given the “totality of the circumstances,” there was not a substantial likelihood of imminent danger to the Petitioner. (Response Brief at 5). The Petitioner disagrees that this Court need make a finding that the Petitioner must be in imminent danger. The Bailey case provides that “. . . a petitioner may *alternatively* seek a protective order if he or she has been ‘subjected to abuse or domestic violence.’” 52 P.3d at 1165, n.7 (emphasis in original).

Petitioner submits that the trial court's findings were sufficient to conclude that she had been subjected to abuse or domestic violence. Petitioner also submitted evidence to the trial court that the Respondent had recently threatened her life over the phone, which shows a substantial likelihood of imminent danger to the Petitioner. The trial court made no findings as to whether the threat occurred, finding only that the phone call occurred, and that the Respondent was "angry." (Findings of Fact, Conclusions of Law and Dism. of Pet. for Protective Order at 1). In the alternative, if this Court determines that the past abuse to the Petitioner is not enough of itself to grant the protective order, this court should remand the case to the trial court, directing the court to make a finding on the material point of whether the Respondent told the Petitioner that he "wished [she] weren't alive, and that [she] was never born, and that he could take care of that for [her]," as she alleges. (R. at 47).

Conclusion

The Petitioner/Appellant respectfully requests that this Court find that as a cohabitant of the Respondent and a victim of past abuse, she is entitled to the entry of a protective order, pursuant to Utah Code Ann. § 78B-7-103(1) (2008). In the alternative, she requests that this Court reverse the decision and remand it to the trial court to make additional findings as necessary.

DATED, this 5th day of September, 2008.

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CERTIFICATE OF SERVICE

I certify that on this 5th day of September, 2008, I served a copy of the attached Appellant's Reply Brief upon Christian B. Bryner, counsel for the Respondent/Appellee by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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