

2009

Jody G. Robinson v. Everett D. Robinson : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JODY G. ROBINSON, Petitioner

PETITION FOR REHEARING

vs.

Appellate Case No. 20090007

EVERETT D. ROBINSON, Respondent

District Court Nos. 084400917 and 084401994

by appeal from the Fourth Judicial District Court
of Utah County in the State of Utah

Judges Claudia Laycock and James R. Taylor
with Commissioner Thomas Patton

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UTAH APPELLATE COURTS

APR - 1 2010

I. Disposition of Appeal

This Court issued an opinion on March 18, 2010 in case no. 20090007 (the “Opinion”). The Opinion refers to an orally stated protective order (hereinafter the “Oral Order”) issued by Commissioner Patton in a hearing on Nov. 17, 2008 (the “Nov. Hearing”), and to a corresponding written protective order issued by the district court on Dec. 19, 2008 (the “Written Order”), which are collectively referred to as the “Protective Order”. The Opinion notes that Judge Taylor held a hearing on Feb. 13, 2009 (the “Feb. Hearing”) in response to the Appellant's Request to Submit for Decision (Ex. O.)

Appellant/Respondent finds that several of the views expressed by that Opinion are in error from the law, the record and what was argued, and he now states with particularity the points of law and fact overlooked by the Opinion, and maintains his prior stated requests and arguments in his Appeal Brief.

II. Argument

A. No judicial officer heard the objections of the Respondent as required by due process and Utah Code § 78B-7-106

1. A district court is required by statute to hear a respondent's objections prior to the issuance of a protective order.

The Opinion expresses the view that a respondent's objections may be heard following a protective order issued inter-partes. That is in clear conflict with Utah Code § 78B-7-106(1) and (3). Section (1) states that: "... a court may: ... (b) upon notice, issue an order for protection or modify an order after a hearing ..." Section 3 states that a court may grant "an order for protection or a modification of an order after notice and hearing". Contrast that with Utah Code § 78B-7-106(1)(a) and (2), which permit a court to issue an immediate ex-parte protective order without notice, which is to be followed by a hearing within 20 days as per Utah Code § 78B-7-107(1)(a), and may not extend longer than 180 days, by Utah Code § 78B-7-107(1)(c). Utah Code § 78B-7-106(1) and (3) are the specific provisions permitting the issuance of a permanent protective order. Thus the statute is twice explicit that if a permanent protective order is to be issued, the hearing of the respondent's objections must occur before the order issues. The statute does not give a court any alternative. Without a hearing of the Respondent, a court has no power to issue a permanent protective order.

The reason for this is readily apparent. Utah Code § 78B-7-106 (10) prohibits the vacation of the criminal portion of a protective order without a petitioner's consent until two years following issuance of the protective order. The criminal portion of a protective order may include a "stay away" order restricting a respondent's presence from his home and any place frequented by a petitioner or member of the family such as a school, church, or place of employment. That portion may also restrict him from using an

automobile and other family belongings. (See Utah Code § 78B-7-106 (5)(a) and (2)(a-e).) Thus, once a valid inter-partes protective order has issued, a respondent has limited recourse afterward to address the impropriety of the issuance of such an order, because a court cannot vacate it for two years if a petitioner does not consent.

Thus it is clear that the statute confers upon a respondent a right of to be heard prior to the issuance of any permanent protective order petitioned for. The Opinion takes the view that “any missed opportunity to object to the proposed order was remedied by the district court's willingness to address his objections after the order was entered, and any error regarding service of a proposed order was therefore harmless.” That view cannot be correct, because any addressing of the Respondent's objections after the issuance of the protective order is in direct contravention of the statute and the Respondent's right to be heard prior to the issuance of the Protective Order.

Specifically, the Written Order was clearly defective. It had been broadened by the petitioner without notice in seven significant ways (Ex. L), including modifications to the criminal portion of the Oral Order. The Respondent had not seen this order until after it had been issued. The Petitioner chose not to follow Rule 7(f)(2) of the Utah Rules of Civil Procedure, which would have given the Respondent an opportunity to review and object. The Respondent had no opportunity to object to these modifications before the written order issued, which Utah Code § 78B-7-106(1) and (3) explicitly require. The Written Order was clearly invalid, and no act of the district court could render it otherwise.

Additionally, the record shows that Judge Taylor signed the minute entry granting the Protective Order four days following the hearing before Commissioner Patton. (See Appellant's Reply Brief, pg. 10 and Ex. H.) That was not sufficient time for the Respondent to voice his objections, and much less than the 10 days provided by Rule 7(g) of the Utah Rules of Civil Procedure and by Utah Code § 78B-7-107(1)(f), provided to a respondent when a hearing is before a commissioner. In that hearing, the Commissioner stated grounds for the order that had not previously been pleaded nor argued. The Respondent did not have an opportunity to voice his objections prior to the issuance of the Protective Order by the district court, and the Protective Order is unlawful and invalid.

The statute provides no means of correcting the omission of a lack of a hearing of the Respondent's objections prior to the issuance of an order. Therefore, the only remedy the district court could have applied at the Feb. Hearing was to declare the Protective Order invalid and vacate it, with the issuance of a new protective order under a process that respected the Respondent's rights and arguments. The district court had no other remedy that could be applied, because to maintain the Protective Order would not correct the violation of the Respondent's right to be heard prior to the issuance of the order. Thus the question of whether or not the Respondent's objections were heard at the Feb. Hearing is not relevant, because there was no act that Judge Taylor could have taken while maintaining the Protective Order that could have rectified the harm and the error.

Furthermore, at the Feb. Hearing the Petitioner's only argument against the vacation of the Protective Order was that Utah Code § 30-6-4.2(10), now § 78B-7-106(10), prohibits the vacation of a protective order without a petitioner's consent until two years following issuance of such an order (R. 230 in Petitioner's Motion to Strike.) Correspondingly, it was the Petitioner's argument that "If he wishes to dispute the grounds for entry of the Protective Order, he must present his arguments to the Court of Appeals." (R. 235 in Petitioner's Memorandum.) Although the district court was not clear, it appears that it adopted the Petitioner's view and summarily dismissed the Respondent's objections for lack of authority to vacate the Protective Order. Under the Petitioner's view the Respondent's request to be heard could have no effect; no matter how valid his objections were, the court would have been powerless to remedy the issuance of prior improperly issued order for two years. Contrary to the Opinion, the failure of the district court to hear the Respondent's objections prior to the issuance of the Protective Order was certainly not harmless error.

2. The record supplied by the Appellant was sufficient to show that the district court did not consider the Respondent's objections.

Appellant has shown above that his objections to the Protective Order were not heard prior to its issuance, which rendered it fatally defective. However, regardless of whether or not that is true, the district court at no time heard the Respondent's objections.

The Opinion attempts to find within the record an event where the district court considered the Respondent's objections. The Opinion does not find that the district court heard the Respondent's objections prior to the Feb. Hearing, which is a correct view. Judge Taylor signed the minute entry for the Nov. Hearing before Commissioner Patton four days later, which was well in advance of the 10 days given to the Respondent to file an objection by Utah Code § 78B-7-107(1)(f) and URCP 7(g). Thus the district court did not offer the Respondent an opportunity to object to the Commissioner's actions in that hearing before the Protective Order issued, regardless of whether those actions constituted a grant or a recommendation. (See Appellant's reply brief, pgs. 10-12.)

As to the supposition of the Opinion that the district court addressed the Respondent's objections in the Feb. Hearing, the record shows that this could not have occurred. The Respondent filed several objections with the district court of some 32 pages (Exhibits J through M), objecting on the grounds of: 1- the lack of authority by Commissioner Patton to issue a permanent protective order (Ex. J pg. 2 and Ex. L, pg. 2), 2- the court's improper inclusion of a plea in abeyance of no contest as grounds (Ex. J pg. 3 and Ex. M pg. 10), 3- the lack of support for the Commissioner's conclusion that the Respondent had placed someone in fear of domestic violence (Ex. J pg. 4 and Ex. M pg. 13), 4- the Commissioner making himself a witness (Ex. J pg. 5 and Ex. K), 5- lack of clarity as to whether a prior temporary protective order was in existence (Ex. J pg. 5), 6- enlargement of the Written Order without a hearing (Ex. L), 7- an incorrect assessment of the credibility of the parties supporting the grounds of the Protective Order (Ex. M pg. 8),

8- that the alleged violation of an earlier protective order was incorrect (Ex. M pg. 11), 9- the overbreadth of the Protective Order (Ex. M pg. 15), 10- the lack of a fundamentally fair process where the Respondent's parental rights were implicated (Ex. M pg. 16), 11- the overbreadth of the Protective Order in being in excess of the Respondent's right not to have his parental rights restricted beyond the least restrictive means (Ex. M pg. 17), and 12- the failure of the district court to grant the Respondent a protective order.

The minute entry for the Feb. Hearing shows that it began at 10:43 and ended five minutes later at 10:48 (Ex. P.) Under the theory expressed by the Opinion, all twelve of the Respondent's objections were addressed in that time. In order for that to happen, each objection would have been addressed in an average of 25 seconds of time, assuming that nothing else was addressed. That isn't sufficient time to express why any one of these objections was denied, let alone time enough to hear argument from either of the parties.

An adequate record was provided, showing that the Respondent's objections were not heard and were summarily dismissed. The minute entry (Ex. P) shows that the district court did address the Respondent's Motion to Recuse (Ex. K), after comments from the Respondent. The minute entry also shows that the Petitioner's counsel addressed the court, which would necessarily have spoken to her separate Motion to Strike (R. 230) and her Memorandum in support (R. 233.) The minute entry also shows that the Respondent responded to that Motion to Strike, following which the court ordered that "Mr. Robinson's claims are dismissed" without reference to any objection. The court could not possibly have had time to consider and properly dispose of all twelve

of the Respondent's objections in the course of the Feb. Hearing, nor even the subset of those objections identified in the Opinion labeled 1-3.

Thus it is clear from the minute entry of the Feb. Hearing that it was impossible for the district court to have heard and addressed the Respondent's objections. This Court did not need a transcript to determine that the objections were not heard. The Appellant is in the process of preparing and submitting an audio recording and transcript of that hearing, which will confirm that the court addressed the Respondent's Motion to Recuse, the Petitioner's Motion to Strike, but not the Respondent's twelve objections above.

Furthermore, the Appellee did not claim that the district court heard the Respondent's objections at the Feb. Hearing. The only source for this supposition is from this Court, which is purely unsupported speculation. *Jolivet v. Cook* and its family of cases does not grant this Court a power to speculate as to the events that occurred at a hearing, particularly where neither the record nor the parties indicate that such an event occurred, and where the record clearly shows that it was not possible for the district court to consider the Respondent's objections given the brevity of that hearing. Furthermore, the failure of the district court to annotate the addressing of the Respondent's objections in any detail would be an irregularity in the proceedings, and thus it is improper for this Court to assume complete regularity were such an irregularity is present.

The Appellant complied with Rule (a)(11)(C) requiring the submission of “those parts of the record on appeal that are of central importance to the determination of the appeal, such as ... the transcript of the court's oral decision”. The Appellant submitted

the transcript of the portion of the Nov. Hearing containing the oral decision; there was nothing of central importance in the oral statements of the court of the Feb. Hearing beyond what was stated in the minute entry, namely that the Respondent/Appellant's claims were dismissed. Nothing more of substance to the issues presented occurred beyond what was stated in the district court's minute entry. As shown above, the Protective Order was irreparably flawed by the lack of a hearing of the Respondent's objections prior to the issuance of the order. As the Judge in the Feb. Hearing had no power to correct the order, all he could do was vacate it. That being true, it is irrelevant whether the Respondent's objections were heard at that time. The transcript of the hearing provides this Court no further useful information to determine whether or not the Respondent's objections were properly addressed, and therefore the Appellant provided a record adequate to decide upon the disposition of his claims.

3. Petition to Accept Transcript into the Record

Notwithstanding the sufficiency of the record supplied, the Appellant petitions this court under Rule 2 of the Utah Rules of Appellate Procedure to accept the audio recording and/or transcript of the Feb. Hearing into the record. Although the Appellant requested that audio recording on Mar. 18th, the district court has yet to produce it. The Appellant will provide the audio recording and/or the transcript as rapidly as possible to this court upon it's availability to the Appellant.

If memory serves, this court will see that Judge Taylor did not address the Respondent's objections, but merely dismissed them with a statement something to the effect that “you're going to have to appeal this”, and with respect to at least one of the Commissioner's acts “that is what we pay him to do.” Therefore the record will demonstrate that Judge Taylor continued to defer to Commissioner Patton's judgment, and did not independently consider the Respondent's objections. The minute entry of the Feb. Hearing is sufficiently clear that no consideration of the objections of the Respondent was had, however this record will provide a means for this Court to quickly reach the conclusion that the Respondent's objections were not considered, and directly rule on the issue of whether the Respondent/Appellant had proper consideration of his objections and dispose of this appeal in expedited fashion. It will therefore be appropriate to enter this record under Rule 2.

B. No judicial officer performed the core judicial function of hearing the controversy between the parties as required by State v. Thomas.

1. The district court improperly relied solely upon the discretion of Commissioner Patton, and no judicial review of his actions was made.

The Utah Supreme Court has held in *State v. Thomas*, 961 P.2d 299 (Utah 1998), that the power to hear and determine a controversy is a core judicial function that is

required to be performed by a judge (see Appellant's reply brief, pgs. 11 and 12.)

Furthermore, the ratification or approval of a judge is not sufficient to discharge duty of the courts to hear and determine a controversy. (*Holm v. Smilowitz*, 840 P.2d 157, 168.)

The view of the Opinion is that the Appellant claims that the presence of a bare signature of a judge, without more, shows a lack of judicial oversight. That misstates the Appellant's argument. His position is that the signature of a judge upon an entry or order does not refute a claim of a lack of judicial oversight, particularly where the record shows clear error to the extent that such oversight did not occur.

Contrary to the Opinion, the Appellant's position is supported by legal authority, including *State v. Thomas* and *Holm v. Smilowitz*. The signature of a judge upon an entry or order might carry some presumption that the judicial oversight required by *State v. Thomas* was applied by that judge. However, here it is clear from the record that the step of hearing the Respondent's objections was not undertaken by the district court. Judge Laycock signed an order broader than was specified by Commissioner Patton, and there was neither prior notice nor a hearing as required by Utah Code § 78B-7-106(3) in the modification thereof. That proves that Judge Laycock did not review nor consider the proceedings of the Nov. Hearing before Commissioner Patton, because if she had then she would have noticed the discrepancies between what was orally ordered and what appeared in the Petitioner's draft order before her. Furthermore, Judge Taylor did not allow the Respondent to voice his objections, because he signed the minute entry granting the Protective Order four days later following Commissioner Patton's act, preventing the

hearing of the Respondent's objections before the grant of the Protective Order. Judge Taylor failed to confirm that the proceedings in the district court were adequate, specifically that the Respondent had an opportunity to have his objections heard. That proves that he failed to review the case and the proceedings of the Nov. Hearing, and correspondingly failed to exercise the necessary judicial authority in the hearing of the matter. Neither of these judges could have heard the controversy as required by *State v. Thomas*, because the Respondent's objections to the protective order were not heard. That being the case, the court must have relied entirely upon the discretion of Commissioner Patton in the granting of the order, and that is an impermissible delegation of judicial power. *Holm v. Smilowitz*.

Under these circumstances, the signatures of Judges Taylor and Laycock shows only approval of the signed papers, and not that any necessary judicial oversight occurred. It is for this reason that the Appellant suggested that in the future judges should indicate that they have reviewed the record and agree in light thereof, when affixing an affirmative signature. Contrary to the Opinion, the signatures of judges upon the minute entry of the Nov. Hearing and upon the Written Order does not show that sufficient judicial oversight was applied, particularly where the district court failed to apply Utah Code § 78B-7-106(3) and failed to notice the broadening of the Protective Order without conducting the statutorily required hearing.

2. The Commissioner intended to grant, or to be caused to be granted, a permanent protective order.

The Opinion expresses the view that Commissioner Patton did not perform the judicial act of making a final order, and that what was granted by him at the Nov. Hearing was not a permanent order. That is plainly incorrect from the record. The only order that issued after the Nov. Hearing was the Written Order (Ex. I.) There was no other temporary order issued, as can easily be seen in the record. Thus, the only possible basis for the permanent Written Order was the Nov. Hearing before Commissioner Patton, with it's corresponding minute entry. If what was stated by Commissioner Patton at the Nov. Hearing is not the basis for the Written Order, then there is no basis for that order because there is no other in the record or history of the case. The Commissioner's additional act of maintaining the existing temporary order in place with modifications until service of the Written Order is not a "grant", and that does not change the clear fact from the record that it was a permanent protective order that issued from the Nov. Hearing. (Appl. Br. pgs. 23-25.)

Furthermore, Judge Taylor had an opportunity to vacate the Protective Order, if it was in error. Judge Taylor signed the minute entry for the grant at the Nov. Hearing, and Judge Taylor conducted the Feb. Hearing in which he could have addressed the propriety of the permanent protective order that issued. If the issuance of a permanent protective order was not intended by the district court, Judge Taylor was in a unique position to

know and correct this at the Feb. Hearing. Judge Taylor did not vacate the order, confirming that the issuance of a permanent protective order was intended.

As to the statement in a footnote of the Opinion concerning the preparation of a written objection by Commissioner Patton, that “the commissioner specifically told the parties that if they were unhappy with his decision, they would need to file a written objection ... indicating that the commissioner recognized that he did not have the ultimate say on the final protective order”, that does not show that he did not intend to grant a permanent protective order. It is clear from his words at the Nov. Hearing that he thought he had authority to grant a permanent protective order, subject to further corrective action by the district court. It is clear from his comments that he thought it was appropriate for him to grant the Protective Order, which could be modified or vacated later by the district court if any of the parties objected. That was apparently Judge Taylor's understanding as well, from his signing of Commissioner Patton's order in the minutes four days later. Thus, the Commissioner's comments concerning objections does not show that he was not granting a protective order, particularly where the Commissioner deliberately used the word “grant” rather than “recommendation”, contrary to the view of the Opinion.

Regardless of what the Commissioner thought, no words that he spoke could correct the lack of judicial oversight by Judge Taylor in his signing of the grant of the Protective Order in the minutes, nor the failure of the district court to allow the Respondent an opportunity to file his objections, nor the failure of the district court to

provide the Respondent notice that the Commissioner's "grant" was actually a recommendation.

III. Conclusion

The Appellant notes for the record that he was recently admitted to the Utah State Bar in February of 2010, the Bar having conducted a formal hearing concerning his fitness and character after reviewing many papers concerning his recent relations with the Appellee, including the papers of this appeal and the related actions and record of the district court. Appellant therefore signs this paper in reference to his registration number with the Bar, although he continues to represent himself in this matter.

Appellant certifies that this petition is presented in good faith and not for delay.



Everett D. Robinson
Pro Se
Utah State Bar Reg. No. 11,952

Date:

April 1, 2010

CERTIFICATE OF SERVICE

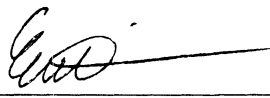
I certify that a copy of the attached Petition For Rehearing was served upon the following parties listed below by mailing it by first class mail, personal delivery, or fax to the following addresses:

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