

2009

# Jody G. Robinson v. Everett D. Robinson : Brief of Appellant

Utah Court of Appeals

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Everett D. Robinson; Appellant Pro Se.

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**IN THE UTAH COURT OF APPEALS**

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JODY G. ROBINSON, Petitioner

vs.

EVERETT D. ROBINSON, Respondent

**APPEAL BRIEF OF THE APPELLANT**

Appellate Case No. 20090007

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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FILED  
UTAH APPELLATE COURTS

JUL 20 2009

## I. List Of All Parties

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On the Compact Disc are:

- A copy of this Brief in PDF Format
- A copy of the Addendum in PDF Format
- The files submitted on a Compact Disc filed with the Respondent's submission of  
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<i>In re J.B.</i> , 2002 UT App 268, ¶ 7, 53 P.3d 968 . . . . .	6, 7
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<i>Strollo v. Strollo</i> , 828 P.2d 532 . . . . .	40
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#### **IV. Jurisdictional Statement**

This Court has jurisdiction by Utah Code §78A-4-103(2)(h).

#### **V. Statement of Issues & Standard of Review**

1. Does due process require that a respondent against whom is issued a written protective order have an opportunity for review and objection?

Standard of Review: "Constitutional issues, including that of due process, are questions of law which we review for correctness." *In re K.M.*, 965 P.2d 576, 578 (Utah Ct. App. 1998). "Whether a parent has been afforded adequate due process is a question of law, reviewed for correctness." *In re J.B.*, 2002 UT App 268, ¶ 7, 53 P.3d 968.

Preservation of Review: Appellant raised this issue in his paper entitled "Respondent's Objections to the Protective Order Filed December 19<sup>th</sup>, 2008 and Request to Vacate" (Ex. L).

2. Does due process require that a respondent have notice that an order apparently issued by a court commissioner is actually a recommendation under Rule 6-401 of the Utah Judicial Council Rules of Judicial Administration?

Standard of Review: "Constitutional issues, including that of due process, are questions of law which we review for correctness." *In re K.M.*, 965 P.2d 576, 578 (Utah Ct. App. 1998). "Whether a parent has been afforded adequate due process is a question of law, reviewed for correctness." *In re J.B.*, 2002 UT App 268, ¶ 7, 53 P.3d 968.

Preservation of Review: Appellant raised this issue in his paper entitled "Respondent's Objections to the Protective Order Filed December 19<sup>th</sup>, 2008 and Request to Vacate" (Ex. L pg. 3 and Ex. M pg. 1).

3. Is it not proper to vacate a permanent protective order issued improperly under the limited authority of a court commissioner without judicial oversight?

Standard of review: A reversal of a denial of a motion to vacate an order or judgment under Rule 60(b) requires a showing of abuse of discretion by the trial court. (*Holm v. Smilowitz*, 840 P.2d 157, 160 (Utah 1992)). "However, when the denial of such a motion rests on an underlying jurisdictional determination ... it 'becomes a question of law upon which we do not defer to the district court.'" *Id.* "A trial court's interpretation of a rule in

the Utah Code of Judicial Administration presents a question of law reviewed for correctness." *N.A.R., Inc. v. Walker*, 2001 UT 98.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. J pgs. 2-3 and Ex. L pg. 3).

4. Do the provisions of Utah Code § 62A-4a-201(1)(a) requiring a fundamentally fair process and Utah Code § 62A-4a-201(1)(b) requiring the least restrictive means or alternatives available apply to the granting of a protective order where parental interests are involved or affected?

Standard of review: Statutory interpretation questions are questions of law reviewed for correctness "The proper interpretation and application of a statute is a question of law which we review for correctness, affording no deference to the district court's legal conclusion[s]." *Ellison v. Stam*, 2006 UT App 150, ¶ 16, 136 P.3d 1242.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. M pgs. 16-17).

5. Does the existence of a plea in abeyance against a charge of domestic violence in a protective order matter constitute grounds that domestic violence has occurred, where the plea is that of nolo contendere?

Standard of Review: "The question of whether evidence is admissible can be either a question of discretion, [reviewed under an] abuse of discretion [standard], or a question of law, which we review for correctness." *State v. Martin*, 2002 UT 34, ¶ 29, 44 P.3d 805.

See also *D.A. v. State of Utah*, 2002 UT 127.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. J pgs. 3-4 and Ex. M pgs. 10-11).

6. Did the District Court correctly interpret the protective order that issued on June 11, 2008 in finding that the Respondent violated a provision granting the Petitioner "use, control and possession" subject to the Respondent's "non-interfering use"?

Standard of Review: A court's interpretation of its own order is reviewed for clear abuse of discretion and we afford the district court great deference. *Uintah Basin Medical Center v. Hardy*, 2008 UT 15.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. M pgs. 11-13).

7. In a protective order matter, can substantial evidence of a petitioner's initiation of domestic violence in which a respondent responded in self-defense be dismissed on the basis of a commissioner's observation of the respondent's demeanor, an alleged incorrect interpretation of an earlier protective order, or the entry of a plea in abeyance?

Standard of Review: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Utah R. Civ. P. 52(a). Findings of fact ". . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987).

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. M pgs. 13-14).

8. Can a protective order be issued under Utah Code § 78B-7-103 that restricts a respondent more than what is reasonably needed for a petitioner's protection, and more particularly where parental rights are involved under Utah Code § 62A-4a-201(1)(b)?

Standard of review: Statutory interpretation questions are questions of law reviewed for correctness "The proper interpretation and application of a statute is a question of law which we review for correctness, affording no deference to the district court's legal conclusion[s]." *Ellison v. Stam*, 2006 UT App 150, ¶ 16, 136 P.3d 1242.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. M pgs. 13-14).

9. Did the District Court err in not granting a respondent's petition for protective order, where a petition under Utah Code § 78B-7-103 was filed, and the respondent could show that the petitioner had engaged in domestic violence against the respondent that was not in self-defense in the face of Utah Code § 78B-7-108 prohibiting mutual protective orders under some circumstances?

Standard of review: Statutory interpretation questions are questions of law reviewed for correctness "The proper interpretation and application of a statute is a question of law

which we review for correctness, affording no deference to the district court's legal conclusion[s]." *Ellison v. Stam*, 2006 UT App 150, ¶ 16, 136 P.3d 1242.

Preservation of Review: This issue was before the trial court when it dismissed the Respondent's motions to vacate protective orders (Ex. M pg. 18).

## VI. Statutory Provisions

Utah Code § 62A-4a-201(1) . . . . .	20, 28, 43, 46
Utah Code § 77-36-1(4) . . . . .	35
Utah Code § 78A-4-103(2)(h) . . . . .	6
Utah Code § 78B-7-102(1) . . . . .	34
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Rule 410 of the Utah Rules of Evidence . . . . .	19, 29, 30, 46
Rule 605 of the Utah Rules of Evidence . . . . .	35

The text of the above appears in Appendix I of the Addendum.

## VII. Statement of Case

On April 22, 2008 the Petitioner (the "Wife") filed a Request for Temporary Protective Order against the Respondent (the "Husband") in the Fourth Judicial District Court in Utah County (the "District Court") (R. 1 and Exhibit "A"), which resulted in the issuance of an ex-parte protective order (R. 11) the following day on April 23 in case number 084400917. In response, on May 8 the Husband filed a submission of evidence (R. 25 and Exhibit "B") including a Statement in Refutation of the Wife's account (R.27 and page three of Exhibit "B"), a voluntary statement filed with the American Fork Police department describing a bruise on his arm (R. 40 and page 16 of Exhibit "B"), pictures of that bruise (R. 41 and page 17 of Exhibit "B"), and a copy of a statement made to the Utah State Bar recounting several domestic violence events (R. 45 and page 21 of Exhibit "B").

In a hearing on May 13, 2008 and pursuant to a stipulation between the Husband and Wife, Commissioner Thomas Patton subsequently modified the existing ex-parte protective order and extended that protective order until a hearing scheduled for September 22, 2008 (R. 58). A written form of that temporary protective order was issued by Commissioner Patton on June 11, 2008 (the "First Protective Order") (R. 99 and Exhibit "C").

On September 2, 2008 the Wife filed a second Request for Temporary Protective Order against the Husband (Exhibit "D"; this paper does not seem to be in the record), which resulted in the issuance of another ex-parte protective order on Sept. 4th in case number 084401994 (also not in the record), scheduled to be heard at the hearing on Sept. 22nd simultaneously with the First Protective Order. On Sept. 18, the Husband provided a second Statement and Arguments (R. 110 and Exhibit "E") with a Submission of Evidence including four audio recordings, pictures of the interior of the Husband and Wife's home, and transcripts of one of the recordings in full and one in part (Exhibit "F"; also not in the record). The same day the Husband also filed a Petition for Protective Order against the Wife (R. 123 and Exhibit "G"), relying on evidence that he had provided to that date. That matter was continued for a hearing on October 6<sup>th</sup>, which resulted in the modification of a protective order by Commissioner Patton that included language binding both parties, and the matter was then scheduled for review in a hearing on November 17th.

At the hearing on November 17th, Commissioner Patton orally issued a protective order without a termination date and with broad provisions, relying on nothing in the pleadings with specificity, but rather on the grounds that the Husband placed the Wife in fear of immediate domestic violence in the form of invasions of her personal space, an alleged violation of the First Protective Order, and on the grounds that the Husband's rebuttal and statements were unreliable for reasons that included his demeanor in the courtroom, as

recorded in a minute order signed by the Commissioner and Judge James R. Taylor (R. 141 and Exhibit "H"), from which this appeal is taken. (A transcription of that hearing appears in the record at pages 183-184 and pages two and three of Exhibit "M".) The Wife filed a form permanent protective order with the court on December 19th (the "Second Protective Order") (R. 176 and Exhibit "I"). The Second Protective Order was signed by Commissioner Patton and Judge Claudia Laycock that same day. The Husband was served with a copy of the executed Protective Order on December 30th, whereupon he noticed that it contained numerous discrepancies from the oral order specified at the Nov. 17th hearing.

The Husband filed his objections in a Motion to Vacate Protective Orders dated Dec. 30 (R. 158 and Exhibit "J"), a Request for Recusal dated Dec. 30 (R. 155 and Exhibit "K"), a paper entitled Respondent's Objections to the Protective Order Filed December 19th, 2008 and Request to Vacate dated Dec. 31 (R. 172 and Exhibit "L"), and a paper entitled Respondent's Objections to the Protective Orders Issued November 17th and December 19th, 2008 and Motion to Vacate Protective Orders dated Jan. 8 (R. 182 and Exhibit "M"). On Jan. 23, the Husband filed a Motion for Default Judgment (R. 172 and Exhibit "N") and a Request to Submit for Decision (R. 217 and Exhibit "O") for all of the motions filed since the Second Protective Order issued. In a hearing held on Feb. 13, all of the Husband's pending motions and his Petition for Protective Order were summarily dismissed without explanation by Judge Taylor (R. 234 and Exhibit "P").

This Court should be aware that jurisdiction as to custody of the Husband and Wife's three children is presently with the Fourth District Juvenile Court in Utah County in a child protective supervision matter.

### **VIII. Statement of Facts**

On April 1, 2008 the Husband and Wife had an argument that became physical. The Wife called the police. The investigation resulted in a charge of domestic violence against the Husband. (Ex. B, pgs 3-4(1-2).) On April 25, 2008 the Husband entered a plea in abeyance agreement with a plea of no contest against that charge (Ex. J, pg. 9). The Husband's account is that he did not inform the police in their investigation as to the Wife's domestic violence because he was sensitive that she was breast-feeding the youngest of three children, was the primary caretaker of them, and has Multiple Sclerosis. (Ex. E pgs. 7-8.) Because the Husband did not at that time provide the police information of the Wife's domestic violence, she was not charged.

Throughout the course of this case, the Husband and Wife have made allegations of domestic violence against each other. A summary of the allegations and evidence of the Husband and Wife appears in the record (Ex. M pgs. 4-8). These allegations are now briefly summarized for convenience of the reader.

The Husband made several allegations of the Wife's domestic violence, supported by evidence including an audio recording containing the Wife's admitting statements (Ex. F, transcript), which stand un rebutted. (1) In the April 1, 2008 incident, the Husband alleges that the Wife initiated a physical attack on him by attempting to choke and bite him (Ex. B pg. 4(2)). The Husband submitted an audio recording on which the Wife admitted to attempting to bite the Husband (Ex. G pg. 3), and he also submitted photographs of a bruise on his upper arm (Ex. B pg. 17). (2) The Husband alleges that in March of 2008 the Wife straddled herself over him and beat him with her fists (Ex. B pg. 11(9)). In the audio recording, the Wife admitted to straddling the husband (Ex. G pg. 3), which was also stated in the Wife's petition for protective order (Ex. A pg. 6). (3) The Husband alleges that in the summer of 2008 the Wife struck him with her knee as his back was turned. In the audio recording, the Wife admitted to assaulting the Husband on this occasion (Ex. G pgs. 2-3).

The Husband made further allegations of the Wife's domestic violence, which include attempting to batter a door open while the Husband was standing behind, blocking his exit from a room on Aug. 16th, 2008 (unlawful detention), shaking an infant, using threats of sleeping outside in the winter as child discipline, striking a child on the head with a hairbrush, and at least four other incidents of the Wife pushing the Husband,

striking him with her hand, or pressing her chest against his while “getting in his face”.

These allegations stand un rebutted (Ex. G pgs. 2-4).

The Wife's allegations are that the Husband: (1) committed unspecified “domestic violence/abuse (including mental, emotional, and some physical forms of abuse) throughout many of the almost ten years we have been married” (Ex. A pg. 3) (Ex. D pg. 2), (2) on April 1, 2008 threatened, shoved, hit the Wife on her arm and leg, and threw the contents of a beverage cup at her (Ex. A pg. 3), (3) pushed her several times in exiting the “kids' bedroom” (Ex. A pg. 3), (4) engaged in unspecified “Mental, emotional, and physical abuse (that) has become more frequent and severe in the past 6 months” (Ex. A pg. 4), (5) pushed the Wife off of him as she was straddling him, and afterward twisted her arm and hit her back and chest (Ex. A pg. 5), (6) engaged in “Multiple times of abuse throughout our marriage with a dramatic increase in the frequency and severity over the past six months” (Ex. A pg. 6), (7) engaged in “intense abuse” on August 17, 2008 (Ex. D pgs. 2-3), (8) taunting the Wife to hit him so he could call the police (Ex. D pg. 4), (9) engaged in unspecified abuse while a witness was on the telephone (Ex. D pg. 5), (10) engaged in “yelling and screaming at the top of his lungs” and a “barrage” in front of his children (Ex. D pg. 5), and (11) engaged in “continual” past abuse investigated by the police (Ex. D pg. 5). The Husband rebutted these allegations by denying these, showing that acts he took were acts against the Wife's attacks in self-defense, or showing that these were not domestic violence (Ex. B pgs. 3-11(1-9)) (Ex. E pgs. 1-13).

## **IX. Summary of Arguments**

The Protective Order that issued on December 19, 2008 to the Wife against the husband is improper for several reasons. First, the Husband was denied due process in that he was not granted an opportunity to object to that order, where it had been broadened by the Wife beyond what was ordered at the hearing from which it originated on November 11, 2008. Second, the order was issued by a court commissioner with a mere ratification by a judge; as the order was broadened, it must be that insufficient judicial oversight was engaged in the issuance thereof. This is a violation of Rule 6-401 of the Utah Judicial Council Rules of Judicial Administration and the performance of a non-delegable judicial act by an appointed commissioner. Furthermore, the process undertaken by the Commissioner and the District court was not fundamentally fair, as required by Utah Code § 62A-4a-201(1)(a) when parental rights are involved. Judge Taylor summarily dismissed the Husband's motions to vacate that Protective Order and his objections thereto. Finally, that Protective Order was granted on insufficient grounds, because it relied on: (1) a plea of nolo contendere made in abeyance in violation of Rule 410 of the Utah Rules of Evidence, (2) an incorrect interpretation of an earlier protective order between the Husband and Wife for which the Husband was found to have violated, and (3) an erroneous finding that the Husband had placed the Wife in fear of domestic violence, for a purported invasion of her "personal space" and relying on a finding that the Husband's rebuttal was less credible than the Wife's allegations in the face of

significant documentary evidence of domestic violence by the Wife supplied by the husband.

That Protective Order was further too broad. Utah Code § 78B-7-106(3) authorizes “an order for protection”, the provisions of which must serve to reasonably protect a Petitioner from a substantial and definite harm. The Husband showed that each time when a physical confrontation had occurred, he acted in self-defense or the Wife initiated the physicality; therefore restricting the Husband does not prevent future incidents of violence between them. The provisions regarding contact, guns, property, children do not serve to protect the Wife, because it has not been shown that the Husband engaged in or was likely to engage in any form of abuse or domestic violence for which those provisions would protect the Wife.

Finally, the Husband petitioned for a protective order against the Wife. The District Court erroneously dismissed that petition under Utah Code § 78B-7-108 without the required due process hearing. The Husband showed that the Wife's assaults were made in other than self-defense, and the Husband is entitled to a protective order under Utah Code § 78B-7-103.

## X. Argument

### A. The Protective Order that issued to the Wife was improper

#### 1. The Respondent was denied due process by the district court.

##### a. The Second Protective Order was more broad than ordered at its originating hearing by the Commissioner, and the Husband was given no opportunity to review or object.

Although the Appellant objects on additional grounds, he specifically appeals to the issuance of the Second Protective Order on the grounds that it was issued with enlarged scope without affording him an opportunity to review and object (Ex. L). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Furthermore, Utah Code § 78B-7-106(3) authorizes a modification of a protective order only "after notice and a hearing". Rule 7(f)(2) of the Utah Rules of Civil Procedure provides a procedure whereupon a paper to be issued by a court is served upon the other parties for an opportunity to object. However, the proposed paper in conformance of the order of the court was not served on the Husband. The Husband had not seen nor was he served with a draft copy of the Second Protective Order before it was signed by Commissioner Patton and Judge Laycock.

As stated in the Respondent's Objections filed Dec. 31st, 2008 (Ex. L pg. 2), the Husband objected to seven specific enlargements or discrepancies in the Wife's favor, including a property order with respect to the couple's home, a lack of telephone visitation between the Husband and his children, a lack of an exception to contact the Wife for mediation, and a new and vague order to "provide support to family". The Husband requested that the Second Protective Order be vacated on those grounds in his Motion for Default Judgment (Ex. N).

The Husband had no opportunity to be heard to challenge these differences, which are significant curtailments of the Husband's rights. For this reason alone the Husband is entitled to have the Second Protective Order vacated or dismissed.

b. The Commissioner had no authority to issue the Second Protective Order. Rule 6-401 of the Utah Judicial Council Rules of Judicial Administration (UJCRJA) states that:

Court commissioners shall have the following authority: ...

(2)(D) Make recommendations to the court regarding any issue, including a recommendation for entry of final judgment, in domestic relations or spouse abuse cases at any stage of the proceedings; ...

(2)(I) Issue temporary or ex parte orders; ...

(4) Prohibitions.

(4)(A) Commissioners shall not make final adjudications of domestic relations matters.

This Court has ruled that commissioners may not perform non-delegable judicial acts; these must be performed by a Judge (*Holm v. Smilowitz*, 840 P.2D 157, 165.) “Just as a legislator could not authorize someone else to sit in his or her place and vote on legislation, neither can a judge appoint another person to sit in his or her place and conduct trials, make final orders or judgments, or otherwise exercise ultimate judicial power.” (id, p. 166.) Such an error cannot be cured by ratification of a judge. (id, p. 167.)

During the November 17, 2008 hearing, Commissioner Patton stated that “Finding that her version of the facts are credible, and his are not, I'm granting your client a protective order”, following which the Commissioner proceeded to state the content of the Permanent Protective Order (Ex. M pg. 3 fourth full paragraph). This is further confirmed in the Minutes of the District Court dated Nov. 17, 2008, with the entry “the Court grants the Protective Order.” (Ex. H pgs. 2&4.)

For this Order “granted”, no date for its termination was stated at the hearing. The difference between a temporary order and a permanent order is that a temporary order includes a date on which its provisions expire, while a permanent protective order includes no such date and is of potentially indefinite duration. No hearing was set by the

Commissioner to review the protective order granted, and no date was included on which that order expired. It was therefore by definition a permanent protective order.

The Commissioner stated that he was granting a protective order, and not making a recommendation to the Court under UJCRJA 6-401(2)(D). The Commissioner has only the authority to grant temporary or ex parte protective orders under UJCRJA 6-401(2)(I). Not being subject to further review, the granting of a permanent protective order would be a final adjudication prohibited by UJCRJA 6-401(4)(A) when issued by the Commissioner. Furthermore, there is nothing on the record to show that someone other than Commissioner Patton made the final adjudication for the Second Protective Order, which would be required if the District Court were to comply with UJCRJA 6-401(4)(A).

One might be tempted to interpret the signature of Judge Taylor on the minute entry (Ex. H) or the signature of Judge Laycock on the Second Protective Order (Ex. I) as a final adjudication of a commissioner's recommendation. If one were to do that, one might also look to Utah Code § 78B-7-107(1)(f) to dismiss the Husband's objections as not being filed within ten days of the Nov. 17th hearing. Such an argument would be misplaced.

First, the Husband was entitled to believe the Commissioner's plain language, and even if Judges Taylor and Laycock interpreted the proceeding of Nov. 17 as a “recommendation”, the Husband was not given proper notice so he could make an

objection pursuant to that section. In *Buck v. Robinson*, 2008 UT App 28 that was considered an important factor. In that case, the Court noted that the commissioner in that case used “a preprinted form” and “checked the applicable sections and signed following the words “Recommended by.”” There was no indication here that the commissioner's order was a recommendation to the District Court.

Second, the Husband made his objections in a timely fashion in papers filed Dec. 31 and Jan. 8 from service on Dec. 30 (Exhibits L and M) upon receiving the Second Protective Order bearing Judge Laycock's signature, which was the first notice that he had that the Commissioner's “grant” could have been merely a recommendation. Utah Code § 78B-7-107(1)(f) uses the word “may”, which specifies that exceptions to the 10 day period may be waived, for example in circumstances such as these. Furthermore, the Husband requested waiver of that deadline under several grounds in his Objections dated Jan. 8.

Furthermore, the presence of Judge Laycock's signature on the Second Protective order does not cure the defect in authorization, because there was apparently no judicial review of that “recommendation”. All that appears in the record of such a review is that signature. If a judge were to simply sign a recommendation of a commissioner without exercising some judicial oversight, that would have the effect of giving the commissioner judicial authority, which is not permitted.

As stated above, the Second Protective Order contained several important enlargements and discrepancies, which clearly and strongly shows that Judge Laycock did not compare nor read the proceedings of the Nov. 17th hearing from which that Order resulted. There was therefore a lack of judicial oversight in the issuance of the Second Protective Order, and the signing of the Second Protective Order by Judge Laycock was merely a ratification of the Commissioner's order.

Although the Appellant knows of no rule requiring that a statement or other proof of judicial oversight be entered into the record, Appellant suggests that imposing such a requirement on the courts would not be unduly burdensome and would avoid such uncertainty in the future. A simple statement in the record by the executing judge to the effect that "I have reviewed the record and agree with the Commissioner's recommendation" would suffice.

Because the Second Protective Order issued at the November 17th hearing was of indefinite duration and because it was issued by a commissioner lacking authority to issue a permanent protective order, it is unlawful and void. The "recommendation" of a commissioner must be identified as such to give a respondent an opportunity to reply. Some judicial oversight must occur to the actions of a district court performed by a commissioner.

c. The process of the District Court was not fundamentally fair as required by Utah Code § 62A-4a-201(1)(a) when parental interests are involved.

The District Court violated Utah Code § 62A-4a-201(1)(a), which did not afford him a fundamentally fair process, nor did the District Court have sufficient evidence as required by the statute required to overcome the heightened protection of the Husband's parental interests. In the Second Protective Order, the Wife was granted temporary protective custody with visitation for the Husband subject to supervision as directed by a particular counselor (Ex. I pg. 3). That affected the Husband's parental rights, and a fundamentally fair process is required.

The Husband was entitled to a review by a judge of the Commissioner's findings, but that was not afforded him. It is not apparent from the record that Judges Laycock or Taylor considered any of the Husband's arguments or submitted evidence; rather it is apparent that Judge Laycock did not review the Second Protective Order for consistency with the Commissioner's order (Ex. L). Judge Taylor summarily dismissed the Husband's objections (Ex. P). Simply to rely upon the statement of the Commissioner and the honesty and care of the Petitioner in issuing a protective order affecting custody is not fundamentally fair, particularly where the errors noted within this brief are present.

2. The grounds for the Protective Order are insufficient.

The Husband requested vacation of the Second Protective Order and preceding ones in his motions entitled “Respondent's Objections to the Protective Order Filed December 19th, 2008 and Request to Vacate dated Dec. 31” (Ex. L) and “Respondent's Objections to the Protective Orders Issued November 17th and December 19th, 2008 and Motion to Vacate Protective Orders” (Ex. M) on grounds as stated below. In a hearing held on Feb. 13 considering these motions, all of the Husband's motions were summarily dismissed without explanation by Judge Taylor (Ex. P), which was an abuse of discretion as will be shown below.

Utah Code § 78B-7-103(1) requires that if the Court issues a protective order, it must be supported on grounds that domestic violence or abuse has occurred, or that there is a substantial likelihood of such. The grounds stated by Commissioner Patton for the issuance of the Second Protective Order and subsequently challenged by the Husband in his motions were (1) the entry of a plea in abeyance by the Husband to a criminal charge of domestic violence, (2) an alleged violation of the First Protective Order, and (3) a finding that the Husband placed the Wife in fear of immediate abuse or domestic violence, relying on a determination that the the Wife's account was credible and the Husband's was not credible, but referring to no facts or events or accounts thereof. (Ex. M pgs. 2-3) (Ex. H) None of these grounds withstands scrutiny.

a. Plea in abeyance. The finding that domestic violence had occurred as to the Husband was premised on the fact that he had entered a plea in abeyance to a charge of domestic violence (Ex. M pg. 2 in the transcription). However, there are two possible pleas: guilty and no contest. Having determined only of the existence of a plea in abeyance, the Commissioner could not tell whether or not the Husband had pled guilty. Rule 410 of the Utah Rules of Evidence states: “Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: ... (2) a plea of nolo contendere;” with certain exceptions that are not applicable here. Rule 410 bars admission of a plea of nolo contendere against a defendant to prove the charge for which the plea is entered. (*D.A. v. State of Utah*, 2002 UT 127, paras. 34 & 35.) What the District Court did not identify is that the plea entered in the plea in abeyance agreement referred to was “no contest” for all charges, which Husband demonstrated to the District Court (Ex. J pg. 9). The District Court had merely the knowledge of the existence of a plea in abeyance agreement, which does not prove “that domestic violence or abuse has occurred” as required by Utah Code § 78B-7-103(1). The existence of a plea in abeyance agreement merely shows that the Husband preferred to accept its terms rather than take the case to trial, which in this case meant going to counseling and paying a fine as opposed to bearing the expense, exposure, risk and stress of a trial for himself and his family. This ground for the issuance of the protective order is therefore faulty, both

because the existence of a plea in abeyance alone does not support the entry of a protective order, and because the existence of the plea in abeyance could not be used to determine the credibility of Husband's statements by Rule 410.

b. The alleged violation of the First Protective Order. Commissioner Patton found a violation of the First Protective Order, on the basis that the Husband was present at the parties home without the Wife's permission (Ex. M pg. 3 second and third full paragraphs), relying on a provision of that order that stated "Petitioner is awarded use, control and possession of the parties' home ... The Respondent shall not interfere with Petitioner's use of said property, but is not prohibited from a non interfering use. The intent of this provision is to allow the Respondent to continue to care for the parties' property, participate in family events at the home and other circumstances as mutually agreed upon by the parties." (Ex. C pg. 3) It is necessary to interpret the First Protective Order to see if it was actually violated.

In his ruling, Commissioner Patton interpreted this as "he cannot interfere with her use, control and possession ... because that's what she was granted", meaning that it was the Wife's right to entirely direct the use, control and possession of the house without regard to the Husband's wishes. If that was the correct interpretation, the Order would have simply stated that, and no further language would be necessary in the provision and

mutual agreement would be required for the Husband to be present in the house.

However, there is further language limiting that grant to the Wife.

The provision also states that the Husband “is not prohibited from a non interfering use.”

That language diminishes the award of use, control and possession to permit the Husband to use the house. That leaves the questions: (1) was mutual agreement absolutely required as interpreted by the Commissioner and (2) what kinds of non-interfering uses could the Husband make of the home without mutual agreement?

The question of whether mutual agreement is required can be answered by turning to the language of the provision of the First Order, which states that “The *intent* of this provision is to allow the Respondent to continue to care for the parties' property, participate in family events at the home and other circumstances *as mutually agreed upon by the parties.*” However, that language fails to resolve the question of whether the clause concerning mutual agreement applies only to “other circumstances” or to all circumstances on which the Husband might have wished to use the house.

That question can be answered by turning to the fifth provision of the First Protective Order, which states “The Petitioner shall have temporary custody of the minor children previously listed. As the Respondent is not presently ordered to “stay away” from the parties' home, his parent-time with the children shall be while he is at the home seeing to

the property's maintenance, family events and as otherwise agreed upon by the parties'.” (Ex. C pg. 4) That language states that the Husband's “parent-time with the children shall be while he is at the home ...” If mutual agreement were required for the Husband to use the home, the Wife could have excluded the Husband from parent-time at will, which was not the intention in the issuance of that protective order. Because provision five of the First Protective Order is in conflict with the Commissioner's interpretation, that interpretation is therefore clearly erroneous and his ruling that the Husband violated that provision an abuse of discretion.

Therefore, the language respecting “mutual agreement” must only apply to the “other circumstances” referred to in provision three. Returning to that language: “The intent of this provision is to allow the Respondent to continue to care for the parties' property, participate in family events at the home and other circumstances as mutually agreed upon by the parties.” That language is not restrictive, it is permissive. The Husband was allowed to be at the home for certain non-interfering uses, including but not limited to caring for the property, participating in family events and participating in parent-time. It is not necessary interpret what a non-interfering use is, because the Wife only alleged that the Husband was present at the house against her wishes, and not that he interfered with her rights to use, control and possess the home. At no time did the Husband prevent the Wife from using or possessing the home, and her rights to control the home were subject to the Husband's rights to non-interfering uses, including using the property as necessary

for maintenance, participation in family events and for parent-time with the children. The Wife was not granted full control of the home, and therefore the Husband did not violate the First Protective Order as found by the Commissioner.

c. The finding that the Husband placed the Wife in fear of immediate domestic violence.

Other than an alleged invasion by the Husband of the Wife's personal space (Ex. M pg. 2 last paragraph), the Commissioner did not point to an event that showed “fear of immediate abuse or domestic violence”, or the intimidation “into believing the other person is about to be a victim of domestic violence”. And, indeed, he could not, because there was no such allegation made by the Wife that withstands scrutiny. The Wife never stated that she was in fear of abuse or domestic violence, immediate or otherwise.

However, even if the Wife's statements were interpreted in a way that found such a fear to be present, the Husband provided a full rebuttal.

The Commissioner's reasoning of this fear was that because the Husband had invaded the Wife's personal space, abuse or domestic violence was likely as required by Utah Code § 78B-7-103. That is simply not a credible argument. Abuse is defined in § 78B-7-102 of the Utah Code as causing or attempting to cause physical harm or placing in reasonable fear of imminent physical harm of a cohabitant. Even if a cohabitant raised his voice or stood too close to his spouse, it is not reasonable for that spouse to believe that physical harm is imminent, nor is it reasonable to believe that the cohabitant is going to commit

any offense of domestic violence under § 77-36-1(4) of the Utah Code. People invade others' personal space and raise their voices in ordinary life frequently, and yet when that occurs those others do not expect to be assaulted or abused.

Furthermore, Commissioner Patton stated that the Husband's rebuttal of the Wife's allegations of domestic violence by intimidation were insufficient, if that rebuttal was credible (Ex. M pg. 3 first paragraph). Therefore this finding depends on a finding that the Wife's account was credible and the Husband's account was not. The Commissioner relied upon the Husband's plea in abeyance, his alleged “wrongful” interpretation of the First Protective Order and his demeanor in the courtroom to discount his account (Ex. M pg. 3 fourth full paragraph), while ignoring significant evidence before him that the Husband was much more credible than the Wife's mere allegations.

As stated above, the consideration of a plea in abeyance as evidence is not permitted, where the plea is “no contest.” But even if it were permitted, the existence of a plea in abeyance, or even a guilty plea or judgment of domestic violence, shows nothing about the veracity, credibility or truthfulness of the statements made by a respondent in a protective order matter. The Commissioner's inclusion of this evidence was in error as applied to credibility.

Again, the interpretation of the prior First Protective Order by the Commissioner as used against the Husband was in error, as argued above. However, even if the Husband incorrectly interpreted such language, that does not bear upon his credibility.

Furthermore, the demeanor of the Husband in the courtroom is not relevant to credibility. Suppose a respondent were belligerent and disrespectful in the courtroom: even that would not bear upon the credibility of his statements. Additionally, the consideration of such evidence is not permitted under Rule 605 of the Utah Rules of Evidence, as there was no opportunity to cross-examine the Commissioner as a witness.

In his determination, Commissioner Patton disregarded evidence submitted by the Husband on the basis that the Husband's account was not credible (Ex. M pg. 3 fourth full paragraph). This evidence proved that the Wife assaulted the Husband on three occasions, as admitted by her in an audio recording made with her knowledge and submitted to the District Court, a transcript of which appears in Exhibit F. This recording included an admission of the Wife's instigation of domestic violence by attempt to choke and bite the Husband (Ex. G pg. 3) in the event that resulted in the First Protective Order, which was also supported by submission of a copy of a police report and photographs of a bruise resulting from the Wife's biting attack (Ex. B pgs. 16-17). This recording also included an admission of an assault by the Wife by striking the Husband with her knee while his back was turned (Ex. G pgs. 2-3). This recording also included a partial

admission of the Wife straddling the Husband while he was asleep and beating him with her fists (Ex. B pg. 11(9)).

The Husband demonstrated that the Wife's statements to the District Court showed a pattern of deliberate exaggerations and omissions in an attempt to avoid culpability and to impugn the Husband. The Wife filed requests for protective orders on April 22nd and Sept. 2nd, 2008, which contained at least several inconsistencies between the two that show that she was not being candid and truthful. For example, the Wife alleged in April that the Husband threatened her with his firearms, which was removed in her allegations filed in September (Ex. E pg 4).

Other of the Wife's allegations were proven to be false or exaggerated. In a first example, in her Request of April 22 (Ex. A pg. 5) is an account of a "straddling" incident, where the Wife admitted to straddling herself on top of the Husband, who "pushed" her off of him. The Wife claimed that the Husband twisted her arm and hit her back and chest, and that she "ached everywhere and had difficulty breathing". At the same time, the Wife admitted that the Husband wanted to take her to the emergency room, which could have led to the discovery of a domestic violence incident. In the Husband's rebuttal and his account to the Utah State Bar, he states that he was "awakened by my wife sitting on top of my lower abdomen beating my chest and neck with her fists" (Ex. B pg. 9(7)), which stands un rebutted. The Husband's account of this event was confirmed in a recording to

the District Court, by statements made by the Wife in that recording (Ex. M pg. 9).

Although the Wife claimed that she “didn't want to wake the kids up to go sit in the ER”, the more likely explanation is that she knew she was guilty of domestic violence and did not want that to be discovered.

Other inconsistencies are noted in Husband's Statement of May 8, stating the Wife's omissions of the initiation of the altercation of 4/1/2008 with an attempt to choke and bite the Husband (Ex. B pg. 6(4) and 16) and a distortion of an account of the Wife attempting to withdraw hundreds of dollars to ostensibly purchase baby food (Ex. B pg. 7(5) and bank statement). Likewise, the Husband rebutted the Wife's allegations of being “constantly badgered, belittled, criticized, etc.” on August 17, 2008 with the submission of recordings (Ex. E pg. 7).

In contrast, the Husband's statements have remained consistent throughout this case.

Where errors have been discovered, they have been promptly corrected. The Husband has provided more information to the District Court than the Wife did concerning the surrounding circumstances and the actions of both parties, including ones that are detrimental to his position. Furthermore, the Husband has provided statements to the District Court that were also supplied to the Utah State Bar (Ex. B pg. 5-6,10(3-4,8)) (Ex. E pg. 8); a false statement could result not only in contempt but also denial of a law license. Furthermore, the Husband is a registered patent agent before the U.S. Patent and

Trademark Office and has a duty of candor that extends beyond matters before that agency. The Husband is therefore motivated to provide candid and truthful information, lest he become subject to contempt, denial of a license to practice law and cancellation of a license to represent clients before the Patent Office. The Wife has no such obligations of truthfulness and candor, beyond what her oath required her to make in her requests for protective orders.

In determining the credibility of the parties, Commissioner Patton had much better evidence to rely upon than the mere existence of a plea in abeyance, an interpretation of a vague provision of a protective order, and a brief assessment of the Husband's demeanor in a hearing. That better evidence included the admitting words of the Wife made in recordings, photographs, police reports and bank statements supporting the Husband's accounts. This evidence is far more reliable than what the Commissioner considered, his determination that the Wife was more credible than the Husband is clearly erroneous, and the exclusion of his statements and submitted evidence based on such a finding of incredibility is an abuse of discretion.

3. Even if there were sufficient grounds for a protective order, the protective order that issued was overbroad.

The Husband objected to and requested vacation of the Second Protective Order and preceding ones on the grounds that they were overbroad (Ex. M pgs. 15-17).

Utah Code § 78B-7-106(3) is the statute enabling a court to issue a permanent protective order, which authorizes “an order for protection”. Thus, by the statute's very language, the order must serve to protect a Petitioner from a substantial and definite potential harm of abuse or domestic violence for the protection of herself and the named children. In order to obtain a protective order, the Petitioner must show that she has an imminent fear of physical harm, or a present fear of future abuse. (*Bailey v. Bayles*, 2001 UT App 34 quoting *Strollo v. Strollo*, 828 P2d 532.) A protective order is intended to remedy that potential harm or abuse.

The order as orally issued at the hearing or as issued in the Second Protective Order goes far beyond what the Wife would need for her protection, even if all she alleged were true and stood un rebutted. The Husband has shown that in each case where a physical confrontation has occurred, the Husband acted in self-defense or the Wife initiated the physicality. The Wife can avoid being the subject of physical confrontations with the Husband simply by not initiating physical confrontation. If the Husband has been made

the victim of domestic violence, of which there is significant evidence noted above, the Husband's actions made in reasonable self-defense cannot show his responsibility nor a likelihood of future abuse or domestic violence. Holding the victim responsible would be unjust. There has been no showing that the Husband has a pattern of domestic violence, and there has been no showing that the Husband is likely to commit abuse or domestic violence in the future. That being true, each order of the Second Protective Order therefore must necessarily fail to serve to protect the Wife from the Husband's alleged but unproven potential actions to physically harm or abuse her.

However, even if there were some likelihood shown that domestic violence or abuse would occur, individual orders in the Second Protective Order (Ex. I) cannot be shown to protect the Wife against the Husband's likely acts. The no contact order is excessive, as there has been shown no likelihood that the Wife is likely to be subjected to abuse and domestic violence through contact with the Husband. The only offense there could occur through a threat of abuse or domestic violence, but there is nothing to show that the Husband has ever made such a threat or is likely to do so. The no contact order therefore provides no protection to the Wife against a substantial and likely harm.

As to the order respecting guns, there is no evidence that the Husband ever used or threatened to use a gun or any weapon against anyone, let alone the Wife. Indeed, the order issued in December states that "The Court finds that your use or possession of a

weapon poses a serious threat of harm to the Petitioner.” There is nothing in or out of the record that shows such a threat of harm to anyone.

As to the property orders, there is no evidence that the Husband has ever evicted or threatened to evict the Wife from the house, or prevent the use of her the car or the personal belongings. There is no evidence to show that such interference is likely.

Likewise, the Husband has never interfered with the utilities, and there is nothing in the record to indicate such a threat.

There is nothing in or out of the record to indicate that the children have been subjected to harm by the Husband, other than potential emotional harm by their presence in the home during physical confrontations and arguing. Indeed, the Husband has alleged that the Wife has engaged in child abuse, which allegation stands unrebutted. Thus the granting of custody to the Wife was to place the children under the control of the abusive party, if the evidence of record is seriously considered.

Likewise, there is no indication that the Husband has or will abandon the Wife with respect to support. Indeed, the Husband had supported the Wife and their children throughout and there is no likelihood of abandonment that can be shown.

The Second Protective Order that issued went far beyond an “order for protection”, especially with respect to the Husband's parental rights. Specifically, the District Court violated Utah Code § 62A-4a-201(1)(b) which requires that any order, including a protective order, “may not exceed the least restrictive means or alternatives available” in protecting the Wife and children. The District Court issued a protective order that restricts the Husband's ability to care for and spend time with his children. He has not been adjudicated to be an unfit parent. The court may not exceed the least restrictive means to a respondent's parental rights to protect a petitioner's exposure to abuse and domestic violence. Here, the Wife has been shown to have instigated all physical confrontations between the she and the Husband. There is no reliable and credible evidence to show that the Husband's involvement in the family causes abuse or domestic violence, and there is no need to exclude him from the home or his children. The District Court could less interfere with Husband's parental rights by issuing a protective order against the Wife, or even issuing a protective order against the Husband that contains a personal conduct order but not a no contact or stay away order. The protective orders issued by the Court are therefore unlawful in violation of Utah Code § 62A-4a-201(1)(b).

Any protective order issued, including the individual provisions thereof, must serve to protect a petitioner from a substantial and definite potential harm of abuse or domestic violence for the protection of herself and any involved children, and may not exceed the

least restrictive means as to a respondent's parental rights. The Second Protective Order goes far beyond what the Wife would need for her protection, and cannot stand.

**B. The Husband's request for protective order should be considered and granted.**

Pursuant to Utah Code § 78B-7-103, the Husband filed a Petition for Protective Order on September 18, 2008 (Ex. G), relying upon significant evidence then submitted. Within that Petition the Husband showed with substantial and uncontroverted evidence that he was entitled to a protective order against the Wife. The Husband made a showing to the District Court that the Wife engaged in a multiplicity of domestic violence events necessary under Utah Code § 78B-7-103, which showing was supported by strong evidence including recorded admissions of the Wife knowingly made by her, as shown above. To not grant the Husband a protective order under these circumstances is inexplicable, and at least an abuse of discretion.

In dismissal of the Husband's Petition for Protective Order, Commissioner Patton referred to Utah Code § 30-6-4.5 (78B-7-108 was intended) which prohibits mutual protective orders without a showing at a due process hearing of domestic violence or abuse by both parties not committed in self defense. The Commissioner stated that "I do not find that this is one of those instances where mutual protective orders are warranted." That was an abuse of discretion. The Husband submitted a petition for a protective order under

Utah Code § 78B-7-103, and was entitled to a due process hearing to show that the Wife committed domestic violence that was not in self defense. By ruling that § 78B-7-108 applied while not granting a such a hearing, the Court improperly discarded the arguments, evidence and petition for protective order of the Husband, which he was entitled to have considered.

## **XI. Conclusion**

Appellant requests that this Court find that:

1. The Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant was done without an opportunity for his review, broadened from what was ordered orally in the hearing of November 17, 2008 from which it originated, and was issued in violation of the Respondent's due process rights.
2. The Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant was issued substantially by a court commissioner in violation of Rule 6-401(4)(A) of the Utah Judicial Council Rules of Judicial Administration, and that insufficient judicial oversight was exercised in the issuance of that Order.
3. The Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant affected his parental rights, and that the process in issuing that Order violated Utah Code § 62A-4a-201(1)(a) at least because: (1) the District Court abused its discretion in disregarding evidence and arguments submitted by him, (2) he was not afforded an opportunity to object to the contents of the Order before it was issued, (3) insufficient judicial oversight was applied, and (4) the District Court summarily refused to vacate the order in light of the defects presented by the Respondent.

4. The grounds for the Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant were insufficient, because (1) the existence of a plea in abeyance may not be applied under Rule 410 of the Utah Rules of Evidence, where the plea is nolo contendere, (2) the District Court misconstrued the Ex-Parte Protective Order issued June 11, 2008 in finding that the Respondent had violated it, and (3) the District Court's finding that the Respondent had invaded the Petitioner's personal space does not show a substantial likelihood that domestic violence or abuse will occur as required by Utah Code § 78B-7-103.

5. Even if a protective order was warranted, the District Court overstepped its authority under Utah Code § 78B-7-106 in the issuance of the Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant, because it contained orders restricting the Respondent while offering the Petitioner no protection from a substantial and definite potential harm of abuse or domestic violence.

6. That the Respondent/Appellant met his burden of a showing of domestic violence required by Utah Code § 78B-7-103 in his Petition for Protective Order of September 18, 2008, with a showing that the Petitioner had initiated domestic violence against the Respondent, which was not in self-defense.

7. That the Respondent/Appellant is entitled to a protective order against the petitioner.

The Appellant hereby requests:

1. The proposed findings above be determined to be correct, with changes according to the discretion of this Court.
2. The vacation of the Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant, or an equivalent order to the District Court, if any of the proposed findings 1, 2, 3, 4 or 5 are correct.
3. An order to the District Court to amend the Permanent Protective Order executed on Dec. 19, 2008 against the Respondent/Appellant, removing all of orders 2, 4, 5, 6, 7, 8, 10, and 12 as being in excess of what is needed for the Petitioner's protection, should this court find the vacation of that Order to be inappropriate.
4. An order to the District Court reversing and remanding the dismissal of the Husband's Petition for Protective Order.



Everett D. Robinson  
Pro Se

Date:

July 20, 2009

CERTIFICATE OF SERVICE

I certify that a copy of the attached Appeal Brief of the Appellant, with its Addendum, 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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