

2016

Peter S. Linker, Appellee, v. Erica J. Linker, Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PETER S. LINKER,
Appellee,
v.

ERICA J. LINKER,
Appellant.

District Court No. 150902246
Court of Appeals No.: 20150920-CA

BRIEF OF APPELLANT

ON APPEAL FROM A FINDING OF CONTEMPT
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

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FILED
UTAH APPELLATE COURTS

JUN 29 2016

ORAL ARGUMENTS AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
JURISDICTION	1
STATEMENT OF THE ISSUES, STANDARD OF REVIEW AND PRESERVATION OF THE ISSUES.....	1
DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	11
A. June 25, 2015, TRO Hearing	11
B. September 10, 2015 OSC Hearing	15
SUMMARY OF THE ARGUMENT	17
ARGUMENT	21
I. ERICA WAS DEPRIVED OF DUE PROCESS DUE TO THE INSUFFICIENT NOTICE OF THE OSC HEARING HELD ON SEPTEMBER 10, 2015	21
II. THE DISTRICT COURT’S AWARD OF ATTORNEY FEES WAS ORDERED WITHOUT NOTICE, LACKED EVIDENTIARY SUPPORT, AND CONSTITUTES AN EXCESSIVE AWARD	28
III. UTAH LAW IS AMBIGUOUS AS TO THE PROCEDURE OF OSC PROCEEDINGS	33
IV. PETER OBTAINED EXCESSIVE RELIEF WHEN THE DISTRICT COURT ORDERED \$210,000 IN CASH ONLY BAIL, WHICH FAR EXCEEDS PETER’S MAXIMUM ENTITLEMENT AS AN EQUITABLE HEIR TO GWENDOLYN’S ESTATE	37
V. THE ELEMENTS OF CONTEMPT ARE NOT PRESENT IN THIS CASE DUE TO ERRONEOUS PRELIMINARY INJUNCTION ENTERED EARLIER IN THIS CASE	41
CONCLUSION.....	47
CERTIFICATE OF COMPLAINT WITH UT. R. APP. P. 24(f)(1)(C)	48
CERTIFICATE OF MAILING	48

ATTACHED ADDENDA:

Addendum “A” *Warrant and Order of Commitment* filed September 21, 2015 (the “Judgment”)

Addendum “B” Controlling Constitutional and Statutory Provisions

TABLE OF AUTHORITIES

<u>Caselaw:</u>	<u>Page</u>
<i>Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.</i> , 709 P.2d 330, 336 (Utah 1985)	31
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)	21,22
<i>Bloom v. Illinois</i> , 391 U.S. 194, 208, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968)	22
<i>Coleman v. Coleman</i> , 664 P.2d 1155, 1156–1157 (Utah 1983)	22,26,43,46
<i>Cooke v. U.S.</i> , 267 U.S. 517, 45 S.Ct. 390, 391, 69 L.Ed. 767 (1925)	22,23
<i>D'Aston v. D'Aston</i> , 790 P.2d 590, 592 (Utah App. 1990)	16,35,37
<i>Dairy Product Services, Inc. v. City of Wellsville</i> , 2000 UT 81, 13 P.3d 851	21,26
<i>Dansie v. Dansie</i> , 1999 UT App. 92, 977 P.2d 539	1
<i>Dixie State Bank v. Bracken</i> , 764 P.2d 985, 990 (Utah 1988)	29
<i>EDSA/Cloward, LLC v. Klibanoff</i> , 2008 UT App. 284, ¶ 17, 192 P.3d 296	29,32
<i>Foreman v. Foreman</i> , 176 P.2d 144, 150 (Utah 1946)	29,32,38
<i>Gardiner v. York</i> , 2010 UT App 108, 233 P.3d 500	22,26
<i>Goggin v. Goggin</i> , 2013 UT 16, 299 P.3d 1079	30,32
<i>GTE Corp. v. Williams</i> , 731 F.2d 676 (10 th Cir. 1984)	41,43
<i>Heideman v. South Salt Lake City</i> , 348 F.3d 1182 (10 th Cir. 2003)	41,43
<i>Holden v. Hardy</i> , 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898)	21,26
<i>Holladay Towne Center, LLC v. Brown Family Holdings, LC</i> , 2008 UT App. 420, 198 P.3d 990	30,32
<i>Hunsaker v. Kersh</i> , 1999 UT 106, 991 P.2d 67	41,43
<i>In re Cannatella</i> , 2006 UT App. 89, 132 P.3d 684	22,26,28
<i>JP Morgan Chase Bank, NA v. Wright</i> , 2015 UT App. 301, 365 P.3d 708	2
<i>Khan v. Khan</i> , 921 P.2d 466, 468 (Utah App. 1996)	17
<i>Matter of Estate v. Quinn</i> , 830 P.2d 282, 290 (Utah App. 1992)	42,44
<i>McKeon v. Crump</i> , 2002 UT App. 258, 53 P.3d 494	37,39
<i>Pacific Frontier v. Pleasant Grove City</i> , 414 F.3d 1221, 1231 (10 th Cir. 2005)	45
<i>Palmer v. Hayes</i> , 892 P.2d 1059, 1061-1062 (Utah App. 1995)	37
<i>Powers v. Taylor</i> , 378 P.2d 519 (Utah, 1963)	42,45
<i>Randall v. Brigham</i> , 7 Wall. 523, 540 (19 L. Ed. 285)	23
<i>Salt Lake City v. Dormon-Ligh</i> , 912 P.2d 452, 455 (Utah App. 1996)	43,46
<i>Sauyers v. FMA Leasing Co.</i> , 722 P.2d 773, 774 (Utah 1986)	31
<i>State in Interest of D.B.</i> , 2012 UT 65, 289 P.3d 459	2
<i>State v. Orr</i> , 2005 UT 92, 127 P.3d 1213	21
<i>State v. Palmer</i> , 2008 UT App. 206, 189 P.3d 69	2
<i>State v. Terrazas</i> , 2014 UT App. 229, 336 P.3d 594	21,22,26
<i>System Concepts, Inc. v. Dixon</i> , 669 P.2d 421, 424 (Utah 1983)	42,44
<i>Taylor v. Hayes</i> , 418 U.S. 488, 500, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974)	22
<i>TruGreen Companies, L.L.C. v. Mower Brothers, Inc.</i> , 2008 UT 81, 199 P.3d 929	30,31,32
<i>Von Hake v. Thomas</i> , 759 P.2d 1162, 1172 (Utah, 1988)	19,42,43,45,46
<i>Zagg, Inc. v. Harmer</i> , 2015 UT App. 52, 345 P.3d 1273	41,44
 <u>Rules, Statutes and Constitutions</u>	
U.S. CONST. AMEND. XIV	37
UTAH CODE ANN. § 78A-4-103(2)(j)	1
UTAH CODE ANN. § 78B-6-301(1)(5)	19,42,45

TABLE OF AUTHORITIES (Continued)

Rules, Statutes and Constitutions (Continued)

UTAH CODE ANN. §78B-6-302(2).....	33
UTAH CODE ANN. §78B-6-303	33
UTAH CODE ANN. §78B-6-311(1).....	29,32,38,39
UT. CONST. ART. I § 7.....	17,21,25,37
UT. R. APP. P. 24(a)(6).....	3
UTAH R. APP. P. 24(f)(1)(A).....	48
UT. R. CIV. P. 5(a)(1).....	33,35
UT. R. CIV. P. 5(b)(1).....	33,35
UT. R. CIV. P. 5(b)(2).....	33,34,36
UT. R. CIV. P. 7(d)(1).....	34
UT. R. CIV. P. 52(a).....	41,44
UT. R. CIV. P. 65A	5,42,44
UT. R. CIV. P. 65(A)(e)	41
UT. R. CIV. P. 73(a)&(b).....	29,31,32
UT. R. CIV. P. 101(b)	34,37
UT. JUD. ADMIN. R. 10-1-501	37
UT. JUD. ADMIN. R. 10-1-501(3)(F)	34
UT. JUD. ADMIN. R. 10-1-501(4).....	34
UT. JUD. ADMIN. R. 10-1-602	37
UT. JUD. ADMIN. R. 10-1-602(3)(F)	34
UT. JUD. ADMIN. R. 10-1-602(4).....	34

JURISDICTION

This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(j). This appeal is taken from the *Warrant and Order of Commitment* filed September 21, 2015 (the “**Judgment**”), by the Third Judicial District Court, Salt Lake County, State of Utah. *See*, Addendum “A.” This appeal includes interlocutory orders entered September 10, 2015, during the contempt hearing respecting Erica Linker (“**Erica**”), to wit: *Order to Release Funds*, releasing the remaining trust balance to Mr. Peterman for fees/costs; *Order*, allowing access to Erica’s personal storage unit containing items from the estate; and *Civil Bench Warrant*, ordering Erica’s arrest and setting her bond at \$210,000.

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ISSUES

ISSUE I: *Did the trial court appropriately determine Erica was in willful violation of district court orders when its orders were either predicated upon erroneous determinations or fully complied with?*

STANDARD OF REVIEW: *Dansie v. Dansie* states that, “[a]n order relating to contempt of court is a matter that rests within the sound discretion of the trial court. ... ‘In the absence of any action [by the trial court] which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of ... discretion,’ we will not overturn the trial court’s order.” *Ibid.*, 1999 UT App. 92, ¶ 6, 977 P.2d 539 (internal citations omitted).

PRESERVATION: Erica filed a written objection to Peter Linker’s (“**Peter**”) OSC. R00473-00474. Counsel for Erica appeared and opposed the OSC, objecting to entry of any finding of contempt. R01010.

ISSUE II: *Did the district court properly award attorney fees in the amount of \$11,000 from the Chase Bank Trust account in Erica’s name for Peter’s current and ongoing legal fees and costs, including the future cost to hire an expert witness, doing so without*

notice to Erica and lacking in evidentiary support, particularly since there was no finding of bad faith on Erica's part?

STANDARD OF REVIEW: “Generally the grant or denial of attorney fees is left to the district court’s sound discretion. However, to the extent that the [court’s ruling] depends upon an interpretation of the applicable statute, the district court’s determination about what the law requires is reviewed for correctness.” *JP Morgan Chase Bank, NA v. Wright*, 2015 UT App. 301, ¶ 15, 365 P.3d 708 (citations omitted).

PRESERVATION: This issue is not required to be preserved. *See, State in Interest of D.B.*, 2012 UT 65, ¶ 34, 289 P.3d 459 (“The general preservation rule ‘does not apply, however, when the alleged error first arises in the lower court’s final order or judgment and thus, leaves no opportunity for the party to object below or to bring issues to the attention of the trial court.’”(citations omitted)).

ISSUE III: *Did the trial court violate Erica’s right to Due Process by failing to afford her the necessary time to object and personally appear at hearing, to confront witnesses against her, and otherwise present evidence in her defense before the finding of criminal contempt entered against her?*

STANDARD OF APPELLATE REVIEW: “Constitutional issues are questions of law that we review for correctness.” *State v. Palmer*, 2008 UT App. 206, ¶ 6, 189 P.3d 69 (citations omitted).

PRESERVATION: Erica’s counsel appeared on September 10, 2015, and argued Erica had not been served with the OSC, depriving her of sufficient notice to prepare/present a defense. R01010. The district court moved forward on the OSC, R01009, although the court believed the hearing had been set (but also not noticed) for temporary

orders, R01015, depriving Erica of the ability to appear in the OSC proceedings and/or prepare her defense thereto and violating Erica's right to Due Process.

CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to UT. R. APP. P. 24(a)(6), the controlling constitutional provisions, statutes and rules are set out verbatim in the arguments below and attached as Attachment "B."

STATEMENT OF THE CASE

Peter and Erica Linker are the surviving children of Alfred and Gwendolyn Linker (respectively, "Alfred" and "Gwendolyn"). Alfred died in November of 2005 and Gwendolyn died in October of 2013. This case centers upon the estate documents created and executed by Gwendolyn.

Before her death, Gwendolyn executed estate documents creating The Gwendolyn Linker Trust Agreement (the "Trust"). R00149-00160. There were three (3) amendments to the Trust, the last of which (hereinafter, the "Third Amendment") appointed Erica as the personal representative of the Trust upon Gwendolyn's death. R00168-00171. The Third Amendment gave specific instructions regarding calculation of Peter and Erica's inheritances and provided compensation to Erica as trustee and an employee:

The trustee shall also calculate all advancements made to her children individually including interest accrued or applicable. Upon final calculation of the total trust estate, the Trustee shall divide the trust estate so that each child's share is equal taking into account all of the advancements. Upon such division the Trustee shall distribute to each child his or her share outright and free of trust...Peter has received male jewelry and camera equipment, Erica has received female jewelry, and the Van as gifts before my death. These will be considered equal bequests. At this time, Peter S. Linker has received \$210,000.00 (taxes paid) more than Erica has received, as advancement in cash. If any further amounts are discovered or given, this number may be adjusted by the Trustee.

R00169. Gwendolyn's estate documents specifically forbade Peter from being trustee due to his prior misconduct associated with Alfred's estate. *Id.*

Gwendolyn executed instructions and statements in 2013 (collectively, the "Instructions") which directed the trustee pay \$50,000 to Erica from the Merrill Lynch account to match an amount Peter already received after Alfred's death. R00284. The remaining \$40,000 from that account was directed to be used for Erica's personal expenses. *Id.* Further, "[e]xpenses for Erica and Tim will be paid for by the Trust, plus medical and dental bills and Vet care for the dogs until the house is sold and my affairs are dealt with." *Id.* The Instructions authorized compensation for Erica and Tim for their full-time, 24-hour care of Gwendolyn, plus six-months' severance and two (2) weeks paid vacation per year that Erica was unable to take, in addition to Erica's position as trustee. *Id.* Erica later testified she and Tim cared for Gwendolyn around the clock for approximately one (1) year. *See*, R00931.

Gwendolyn explicitly stated that Peter did not have her permission to act as the agent under the Power of Attorney other than to sign taxes and transfer her stocks into the Merrill Lynch account, because Peter had effectuated unauthorized use of Gwendolyn's credit, made unauthorized changes in designations on insurance or stocks, made unauthorized transfers of funds from Gwendolyn's accounts, taken out unauthorized loans in Gwendolyn's name, sold her property or vehicles without authorization, and "take[n] stocks, bonds, or any other assets of mine or my husbands' estates." R00286. Gwendolyn forbid Peter from taking out loans, selling property or vehicles, or taking stocks, bonds, or running up margins in stock accounts, or controlling any other assets belonging to Gwendolyn and

her husband. *Id.* This statement specifically dictates, “[m]y daughter [Erica] does not have to prove in a court of law how much money my son [Peter] received. I trust her to be fair and determine this ***without any interference*** from any State or Federal Government entity.” *Id.* (emphasis added). Gwendolyn executed a *Nomination of Guardian by an Adult*, appointing Erica as her guardian in the event of Gwendolyn’s incapacitation. R00287.

In 2014, Peter filed suit attempting to probate Gwendolyn’s outdated will appointing him as personal representative of her estate; however, this contradicted the Third Amendment and Gwendolyn’s Instructions. *See*, Utah District Court Case No. 143901031.

On April 6, 2015, Peter filed the *Complaint* alleging Erica and had abused her position of fiduciary duty by living on funds from the Trust. R00001-00019. Peter alleged entitlement to his inheritance and demanded distribution, requesting an accounting of the estate and that Erica be removed as trustee under injunctive relief. R00005.

Erica filed an *Answer* on April 26, 015, R00052-00068, and subsequent counter-claim (the “**Counter-Claim**”) on May 26, 2015, R00094-00116, denying Peter’s allegations and alleging Peter had stolen funds from their parents, but called the unauthorized actions “advancements” to his inheritance. R00095-00101. Erica alleged duress, conversion, interference with inheritance, unjust enrichment, reformation, and requested an accounting from Peter as the trustee of Alfred’s estate. R00115.

On June 16, 2015, Peter moved for an injunction against Erica arguing elements of UT. R. CIV. P. 65A. R00133-00136. A temporary restraining order entered June 17, 2015, (the “**June 17 TRO**”). R00222-00225. The June 17 TRO restrained Erica from selling, dissipating, encumbering, disposing of, or taking any other action that adversely affects the

value of any Trust asset, ordering Erica to provide an accounting from July 16, 2012, to present, and ordered her to return or disgorge (1) all funds removed from any financial account Gwendolyn or the Trust had an interest in as of October 31, 2013 (i.e. retroactively for almost two years); (2) the proceeds of the sale of the residence; (3) all personal property removed from the property, and (4) any other funds that are the result of the sale or disposition of any Trust assets, which should be returned to an account located at American United Credit Union. *Id.* Although Gwendolyn's estate documents specifically indicated that Erica had full trustee power and forbade state or governmental interference with her decisions, including providing proof to a court to support those decisions, the court's June 17 TRO sought to undo all of Erica's decisions as trustee under temporary orders requested by Peter. Gwendolyn herself (in written documentation prior to her death) recognized Peter had extorted funds from both parents' accounts and maintained substantial offsets that likely would cancel out *any* inheritance from the Trust. Nonetheless, the June 17 TRO went retroactive for two (2) years to Gwendolyn's death, in contradiction to her own articulated desires for her estate.

Opposing the June 17 TRO, Erica argued the case did not meet the elements of Rule 65A, requesting injunction against Peter. R00228-00245;00238-00240. Erica requested that Peter be restrained from coming within a mile of her person and property and that he not disturb any of her personal funds or the Trust funds. R00243-00244. Erica attached Gwendolyn's pertinent estate documents and Instructions in support. R00248-00305.

The June 17 TRO was heard June 25, 2015. R00306-00307. As articulated more particularly below, the trial court orally usurped the June 17 TRO and indicated it was not

entering orders seizing Erica's personal accounts or anything Gwendolyn transferred to Erica prior to her death. Erica as trustee had previously paid herself for her care of Gwendolyn, her role as trustee, the amount she was entitled to from the Meryl Lynch account, and her inheritance after dividing the remaining Trust funds between her and Peter (subtracting \$210,000 from Peter's inheritance according to Gwendolyn's stated desire). At the time of this hearing, the money was Erica's personal funds and located in her personal accounts, which also contained Erica's funds from the sale of her own condo, her employment, and other sources.

On June 26, 2015, to clarify any confusion in the district court's oral ruling as to which accounts Erica could access, Erica filed her *Verified Clarification*, clarifying the two (2) accounts at Chase Bank—one personal and one Trust. R00308-00311. Erica indicated the court's oral order was that the injunction only affected the Trust accounts with Trust assets, not Erica's personal accounts. R00310-00311. Because the trial court did not intend to seize or freeze Erica's personal accounts, Erica indicated she withdrew funds from her personal account at Chase Bank, but did not touch the funds remaining in the Trust account. *Id.* Erica provided the Trust account number ended in -0335, stating she had not made any withdrawals from it since the oral decision. *Id.*

On July 6, 2015, Peter filed the proposed preliminary injunction with a notice to submit. R00336-00339. On July 7, 2015, the district court entered the *Preliminary Injunction* (the “**Preliminary Injunction**”), expanding its oral decision by freezing all Wells Fargo “bank accounts titled jointly or solely in the name of Erica J. Linker and/or the Gwendolyn Linker Trust and/or any accounts on which Erica J. Linker is a signer or authorized user” as

well as the Chase Bank “accounts titled jointly or solely in the name of Erica J. Linker and/or the Gwendolyn Linker Trust and/or any accounts on which Erica J. Linker is a signer or authorized user”. R00363-00366. The Preliminary Injunction further froze the storage units located at U-haul and A-1 and ordered Erica to provide a full accounting of the Trust to Peter by August 30, 2015. R00364.

On September 2, 2015, Peter filed his *Ex Parte Motion and Memorandum for Temporary Restraining Order and Preliminary Injunction* (“**Ex Parte Motion**”), arguing Erica violated the Preliminary Injunction by transferring \$491,000 to her Mountain America Credit Union (“**MACU**”) account from her personal Chase account prior to entry of the Preliminary Injunction, although it was unaffected by the oral decision. R00428-00435. Peter relied on grounds raised at the June 25, 2015 hearing by reference. R00429. Peter provided statements from Erica’s Chase Bank accounts. R00431-00435. However, these accounts referenced by Peter ended in -5520 and -6292 and were personally titled in Erica’s name, not the Trust. *Id.*

On September 2, 2015, the *Ex Parte Temporary Restraining Order* entered, freezing \$471,237.62 in Erica’s personal MACU account and ordering MACU to immediately advise Mr. Peterman (Peter’s attorney) as to the status of these wired funds. R00439-00440. The court froze all of Erica’s personal assets from other sources, such as the sale of her own condo and funds received prior to Gwendolyn’s death.

Gwendolyn’s Instructions state that Peter is entitled to only *half* of any post-mortem Trust funds, with offsets totaling a minimum of \$210,000 by Gwendolyn’s own determination and stated written desires. Even if the entire \$471,237.62 was Trust funds, which it was not, Peter would only be entitled to a *maximum* amount of \$25,618.81 of the

\$471,237.62 that was frozen under simple calculation from Gwendolyn's executed documents (half minus \$210,000). Nonetheless, the entire amount was frozen.

The same day, the district court entered an additional *Ex Parte Temporary Restraining Order* (collectively, the "**Ex Parte TROs**"), ordering any community bank accounts in Erica's name, jointly or solely, and/or any accounts under the Trust, to be frozen. R00450-00451. The wired funds in the amount of \$471,237.62 were also frozen in "any Community Bank accounts to which the funds were initially wired on June 26, 2015". R00451. "Community Bank" was also ordered to immediately advise Mr. Peterman as to the status of these wired funds and their location, if possible. *Id.* The Ex Parte TROs remain blank as to any hearing date or time. *See*, R00439-00440; 00450-00451.

Relying on the Ex Parte TRO's, Community Bank in Oregon filed an interpleader action naming Erica and Peter as the defendants and depositing \$262,199.33 into the Circuit Court of the State of Oregon for the County of Baker from Erica's bank account(s) at that bank (the "**Oregon Case**"). R00500-00502. This amount represented all contents of Erica's bank accounts deposited with the Oregon court, including Erica's personal employment income.

On September 8, 2015, the court clerk filed the *Notice of Order to Show Cause*, although no OSC had been issued.¹ R00456. Directly after, Peter filed his *Verified Motion for Order to Show Cause* (the "**OSC Motion**"), alleging Erica was in violation of the Preliminary Injunction by withdrawing \$491,000 from her personal Chase Bank account before the

¹ This hearing was intended to be a hearing on the Ex Parte TRO's. The Minutes for this hearing indicates in the caption it is minutes for a temporary restraining order hearing. R00492. Further, the district court indicated this was the case at hearing. R01009-01010.

written injunction entered. R00460-00461. Peter alleged Erica had transferred \$471,237.62 to her personal MACU account, then to her personal account at Community Bank in Pendleton, Oregon. R00461. Peter requested Erica be found in contempt of the Preliminary Injunction, seeking an indeterminate amount of attorneys' fees for the filing of the OSC Motion, as well as Erica's incarceration to compel her locate and redeposit the funds back into the Chase account(s). R00461-00462.

On September 9, 2015, at 3:54 p.m., the district court entered the *Order to Show Cause* (the "OSC"), which directed Erica to appear and show cause the very next day on September 10, 2015, at 3:00 p.m.. R00468-00469. Erica resided in Oregon. The OSC states, "[y]ou must attend. If you do not attend, you might be held in contempt for court and the relief requested might be granted. You have the right to be represented by a lawyer." R00469. Further, "[b]ring with you any evidence that you want the court to consider and be prepared to argue your position to the Court." *Id.*

Erica's attorney received the OSC Motion and OSC via the electronic filing system and filed an *Objection* the morning of the hearing on September 10, 2015, noting Erica had not been served and requesting a continuance to prepare her defense (the "Objection"). R00473-00474. The district court instead entered several orders, to wit: *Order*, authorizing Peter's inspection of storage units at A-1 Access and U-Haul and preventing Erica from accessing the units after the inspection although they contained her personal property (R0488-00489); a *Bench Warrant* and a subsequent *Warrant and Order of Commitment* (filed September 21), ordering Erica's arrest with bail set at \$210,000.00 and requiring her personal appearance on November 5, 2015 (R00490-00491;R00524-00525); and the *Order to Release*

Funds, ordering Chase Bank—absent any presentation of accounting of such fees/costs—to release \$11,000.00 directly to Peter’s attorney for Peter’s legal fees based on Erica’s lack of personal appearance for the OSC and what the court found to be a waiver of her defense (R00486-00487). Erica thereafter timely appealed. R00838-00839.

STATEMENT OF THE FACTS

A. June 25, 2015, TRO Hearing.

The parties appeared for hearing to argue the June 17th TRO. R00858-01005. Peter’s attorney requested the hearing proceed by proffer and argument; however, Erica’s counsel indicated it was more properly evidentiary since the TRO should not issue at all. R00864-00865. Erica was the only witness called.

Erica testified Gwendolyn died on October 31, 2013, and Erica was aware of the Trust. R00872. Erica testified the assets at that time were the house and possibly other assets, but legal issues with the assets required resolution. R00872-00873.

Gwendolyn had a Merrill Lynch account Gwendolyn closed before her death. R00874-00875. Gwendolyn instructed Erica to take \$50,000 for herself and put \$40,000 into an account for upkeep of the house, which Erica did. *Id.* All of these funds were initially put in accounts in Erica’s name because there was no trust account set up at that time; however, the funds were in separate accounts to keep them separate. R00875-00876.

The house was sold three (3) weeks prior to the hearing for approximately \$550,000 after fees. R00877. Erica understood that as the trustee she had an obligation to the Trust to account for its assets. R00878. It was a cash sale that closed in under a week. *Id.* Within a

month of listing the property at \$750,000, the cash only offer of \$550,000 came in and she accepted it. R00883.

Erica testified she was the trustee, and Gwendolyn gave Erica the right to make decisions regarding the Trust and to administer it. R00889-00890. Erica agreed the Third Amendment contained a \$210,000 offset to be charged against Peter's share of the estate and the remainder would be split after consideration of advancements. R00891-00894.

Erica had not yet been formally appointed as the personal representative of Gwendolyn's estate, although Gwendolyn's paperwork appointed her as such. R00903-00904. Erica had been appointed as the trustee on July 16, 2012, and had not provided the court or Peter with a formal accounting of the trust assets because Peter filed this case. R00908-10.

The Merrill Lynch statement indicated the account was cashed out on October 31, 2013. R00920. In July of 2013, Gwendolyn authorized Erica to withdraw from the Merrill Lynch account; however, Erica cashed the Merrill Lynch check after Gwendolyn died. R00921-00922. Erica attempted to open a trust account during Gwendolyn's life; however, Gwendolyn's driver's license had expired so they could not. R00923. Erica deposited the Merrill Lynch account into two (2) separate personal accounts to keep them separate. R00923-00924. Erica used her own funds on the Trust subject to reimbursement. *Id.*

The American United account was Gwendolyn's with Erica's name on it, and became Erica's upon Gwendolyn's death. R00925. Funds were withdrawn after Gwendolyn's death. R00928. Erica testified, "...it got spent either for my use, as my mother intended, or for the trust use, as my mother intended, to maintain the house." R00929. Erica spent a year-and-a-

half dealing with the Trust, trying to sell the home, and paying for lawyers. R00930. Erica spent \$30,000 in attorneys' fees. *Id.* Erica could make a full accounting of what happened to the \$90,000 from the Merrill Lynch account. *Id.*

Erica quit her job as a neurological nurse at the Intermountain Medical Center in 2012 to care for Gwendolyn. R00931. She lived on her own savings and the proceeds from the sale of her condo in January of 2015. R00931-00932. Erica paid her condo mortgage with money received from Gwendolyn to pay her expenses. R00933.

Erica testified deposits into her personal account between January and June of 2015 were from payments owed from the Trust, which she transferred from the Trust account at Wells Fargo. R00934. Erica had not paid payroll taxes because if an inheritance they will not be taxed as wages. R00934-00935. Erica had not been paying herself monthly, but only took what was needed. R00935.

Erica did not know the balance on the Wells Fargo account, but spent a large sum on attorneys from it. R00936-00937. As trustee, Erica maintained the property, removed six (6) dumpsters full of garbage from the home, and cared for Gwendolyn without assistance. R00937. Erica kept a log of her hours worked. *Id.* Erica as trustee paid herself for the previous hours she worked. R00938. Erica's boyfriend had done a large amount of work maintaining Gwendolyn's yard for four (4) years and aiding Erica in caring for Gwendolyn—particularly at night—and was paid \$22,000. R00938-00939. *Id.* Erica did not know where her boyfriend deposited the money. R00940.

Erica had personal and Trust accounts at Chase Bank, but did not know the exact balances. R00940. There was more than \$450,000 in those accounts. *Id.* Erica had a personal

account at MACU. R00940-00941. The proceeds from the sale of her condo were in the MACU account. R00941. She also had an account at America United Credit Union (“AUCU”). R00942. Erica spent \$25,000 of her personal savings to live on while caring for Gwendolyn. R00944.

Some personal property from the home was sold in an estate sale in June of 2014. R00951-00952. The remaining property was located in a storage unit. R00952. Erica felt Peter was stalking her and felt unsafe providing the location of the storage unit, particularly since he now knew the locations of funds in banks. *Id.* Erica maintained certain things Peter indicated he wanted to later determine how to distribute them. *Id.* Erica’s personal storage unit was located at U-haul on 33rd South under her name. R00953-00954. The court assured Erica that Peter would not access the storage unit with the property from the home. R00955. Erica testified that storage unit was located at A-1 storage on 3300 South under her name. *Id.*

Erica intended to make a full accounting of the estate, including all advancements taken by Peter and Erica. R00963-00964. Some of the advancements dated back to 1996. R00964. Erica needed to separate what Gwendolyn spent as the trustee from what Erica spent as successor trustee. R00965. A forensic accountant was needed due to Peter’s extortion to be charged against his inheritance. *Id.* Erica required money from the Trust to fund these services, and could not accomplish this until the trust had liquid funds, which it now had. *Id.* Erica followed Gwendolyn’s instructions to the best of her abilities. R00966.

The trial court inquired why Erica could not have paid for the accounting out of the Merrill Lynch account (\$90,000) and Erica explained Gwendolyn directed \$50,000 for Erica to live on and \$40,000 to maintain the home. R00968. The \$40,000 was used to pay the

house taxes, the large water bill, and repairs until the home sold. *Id.* Regardless, Erica's counsel argued the accounting was a trial issue. *Id.*

Erica would be unable to defend against Peter if the accounts were frozen. R00971-00972. Erica would prove at trial that Peter had been given over \$500,000 in advances. R00973. The trial court stated it did not know if Peter had received his share at that point, ordering the Wells Fargo and the Chase account be seized. *Id.* The trial court stated as follows:

So what I'm going to order is that we seize the Wells Fargo and the Chase account. The other ones you've said are your personal money. We're leaving those alone. We will not be seizing those, just the ones that have the money that was your mothers and the proceeds from the sale of the house.

...

I'm also going to ask that we – that you submit an order about these things, just Wells Fargo and Chase. Mountain America, American United, T. Rowe Price are her money that she's either earned or that her mother gave her before her death. I'm not seizing the things that he was given before her death, so I'm not seizing the things that you were given before her death either.

R00999-01000. The trial court also froze both storage units. *Id.*

B. September 10, 2015, OSC Hearing.

The district court had read Ms. Lang's objection and noted the hearing was set for a Ex Parte TROs, but the clerk's email indicated the hearing was for an OSC. R01010. The district court had set a very short hearing to simply set the TROs for hearing. R01009. The district court noted Ms. Lang's objection; however, Peter's counsel stated they were present on the OSC. R01010-01011.

Peter argued no requirement existed in the UTAH RULES OF PROCEDURE, particularly Rule 4, that an OSC provide a certain amount of notice to the opposing party to appear and

defend. R01011. Peter argued Erica was served electronically, proper pursuant to *D'Aston v. D'Aston*, 790 P.2d 590, 592 (Utah App. 1990). *Id.* Peter argued service of an OSC on Erica's attorney was sufficient since she was represented in an ongoing case. *Id.* Peter argued Erica had sufficient notice of the hearing one day prior, and had not appeared. *Id.*

Counsel objected to the OSC repeatedly stating that the contents of the OSC could not be addressed without preparation. R01012. Peter argued Erica was prepared because counsel filed her objection. R01013. Peter argued urgency on the OSC because "...now we're missing another \$200,000 out of the Oregon bank." R01013.

Erica's counsel argued the hearing was to continue the OSC. R01014. Peter requested the case move forward on the OSC despite Erica's request for 14 days to prepare to defend against it. R01014. The district court moved forward on the OSC. R01015. Erica's counsel continuously argued Erica was not prepared since she was not currently living in Utah, and was provided insufficient and unreasonable notice of only 24 hours to defend against it. R01015- 01018, 01021. Upon the court's denial of continuance, Erica's counsel refused to participate in the hearing and departed the courtroom.

In Erica and her counsel's absence, Peter requested one month for a hearing on the Bench Warrant because it would take time to serve her out of state. R01030-01031. The district court indicated it held the hearing quickly based on the disappearance of the funds from the accounts. R01031.

After signing the Bench Warrant and setting bail in the amount of \$210,000, Peter asked an was granted the ability to address additional "tangential" matters never noticed to Erica or her counsel and outside their presence to defend against them. R01033. Counsel for

Peter had incurred fees in bringing the OSC, but did not provide any accounting for those fees, nonetheless requesting the remaining \$11,000 in the Chase Bank Trust account be awarded to him for present and ongoing legal expenses and to hire a forensic expert. R01033-01034. The district court granted this request without requiring any accounting of fees or expenditures.

Without any notification to Erica or her counsel and in their absence, Peter's counsel further sought access to the storage units alluding to the idea that Erica may have tampered with their contents. R01034. Peter argued the storage units were interrelated to the OSC and asked for access, although one of the units contained Erica's personal property. R01034-01035. The district court granted this request, indicating it sounded like an appropriate investigation to support Peter's case. R01035. The district court further released the Chase Bank account funds for the payment of Peter's unproven attorney's fees. *Id.*

SUMMARY OF THE ARGUMENT

Certain minimal procedural protections in OSC proceedings are guaranteed by the Fourteenth Amendment's Due Process Clause. *Khan v. Khan*, 921 P.2d 466, 468 (Utah App. 1996). A defendant charged with indirect contempt must be advised of the allegations, provided assistance of counsel, be able to confront witnesses, and have the right to offer testimony on their behalf. *Id.* The OSC herein did not provide Erica adequate notice serving only her counsel electronically 24 hours prior to the hearing, depriving Erica of the ability to have effective assistance in defending the OSC, the ability to confront the witnesses, or the right to offer testimony. UT. CONST. ART. I § 7. It was unreasonable to expect Erica to personally appear on less than 24 hours' notice when she resides and is employed in Oregon.

Her attorney requested a reasonable continuance of 14 days; however, Peter relied on the absence of procedural rules governing OSCs in arguing Erica received sufficient notice to seek the Bench Warrant for her arrest on failure to appear.

Besides holding Erica in contempt and issuing an arrest warrant for Erica to be incarcerated for two (2) months awaiting a hearing, Erica was subjected to seizure of her personal storage units for Peter's inspection, and an excessive award to Peter for attorney fees from the Trust funds (\$11,000) for not only the OSC matters, but also future fees and expenses to support Peter in challenging Erica's position and decisions as trustee of the Trust. No evidentiary or legal support for such an award exists in the record, but the district court's actions effectively hampered Erica's ability to defend the Trust and her own actions by freezing all of the Trust funds and Erica's personal accounts.

All of this has been accomplished in favor of Peter, who extorted an excessive amount of funds from his parents' accounts under abuse of power of attorney to the extent that Gwendolyn specifically directed that at least \$210,000 be deducted from his one-half inheritance, that Peter not be allowed to have access to any of the accounts, and providing authority to Erica to make determinations without court intervention. Yet, the trial court ignored the decedent's express wishes, has frozen an excessive amount of over \$471,000 (to which Peter is entitled to very little, if any) in personal assets of Erica, has ordered reversal of all of Erica's decisions as trustee over the Trust under temporary orders without sufficient proof, and has provided Peter funding for his side of the case in contravention to Gwendolyn's desires, while depriving Erica of access to any funding for hers although Erica's position protects the Trust and Gwendolyn's wishes. The harshest order found Erica

in contempt on all claims raised by Peter and ordered her to be incarcerated until hearing on November 5, nearly two (2) months later, unless she paid \$210,000 *after* her bank accounts have been seized and frozen. Summarily, the September 10 hearing violated Erica's right to Due Process in every respect and any resulting orders therefrom require reversal.

Similarly, due to this ambiguity existing in Utah law respecting OSCs, this Court should adopt the rules in Fifth and Sixth District Courts that govern them. There are no rules nor codified Utah law that mandates timely notice of OSCs, despite that freedoms respecting liberty and property are often at stake in those proceedings. In reliance upon the absence of such governing rules, Peter argued Erica received proper notice of 24 hours, with no personal service outside the State of Utah, and the district court felt it had authority to hear the OSC. This procedural ambiguity violates litigants' rights to Due Process requiring adoption of provisions similar to the Fifth and Sixth District Courts for OSC proceedings, to wit: personal service of the motion, OSC, and notice of hearing upon the opposing party similar to the service of a summons and complaint, and a hearing not held sooner than five (5) days from the date of service. *See*, UT. JUD. ADMIN. R. 10-1-501(4); -602(4).

Moreover, the entire OSC proceedings were based on the Preliminary Injunction, which itself was erroneous and contradicted the prior oral determination, rendering it unenforceable prior to its entry in the docket. "[D]isobedience of any lawful judgment, order or process of the court" is an act or omission that constitutes contempt of court. UTAH CODE ANN. § 78B-6-301(1)(5). Proof of contempt must show the person knew what was required, had the ability to comply, and intentionally failed or refused to do so. *Von Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah, 1988). The oral determination for the Preliminary

Injunction did not clearly indicate to Erica what was prohibited of her by failing to include specific account numbers to be seized and where the court indicated it did not intend to seize her personal accounts or funds; thus, Peter could not enforce it against her in contempt proceedings.

Importantly, the district court has seized far more than that which Peter has pleaded for or is entitled. Peter has alleged he is entitled to equal disbursement from the Trust estate, which must be offset by at least \$210,000 pursuant to the Instructions. Peter has not challenged the viability of Gwendolyn's Instructions. However, the district court ordered Erica's bail to be cash only for \$210,000, awarded Peter \$11,000 for the payment of legal fees, and another approximately \$260,000 has been seized and deposited with the Oregon Court. This far exceeds Peter's maximum entitlement to the Trust estate as it has presently been valued in temporary proceedings. The only asset in the estate at the time of Gwendolyn's death was the house, which sales proceeds were \$550,000, entitling Peter to a maximum amount of approximately \$65,000 (\$550,000 divided by two, minus \$210,000); however, from the total wire transfer of approximately \$471,000 being traced by these proceedings (which included funds transferred prior to Gwendolyn's death and Erica's personal funds from sale of her condo and other sources), Peter's maximum amount hovers around \$25,000 by simple calculation. As Erica testified, however, she can show that Peter's offsets far exceed the \$210,000 articulated by Gwendolyn's Instructions, nullifying Peter's entitlement to *any* funds from the Trust. The district court's actions were an abuse of discretion in temporary proceedings and its findings of contempt therefrom in seizing all of Erica's personal assets far exceed the maximum amount Peter could obtain, subjecting Erica

to a lengthy incarceration under oral orders that were contradicted in written form, and awarding Trust funds to Peter for unproven attorney's fees. Accordingly, the Judgment and any other adverse order as a result of the September 10 hearing should be reversed.

ARGUMENT

I. ERICA WAS DEPRIVED OF DUE PROCESS DUE TO THE INSUFFICIENT NOTICE OF THE OSC HEARING HELD ON SEPTEMBER 10, 2015.

“No person shall be deprived of life, liberty or property, without due process of law.” UTAH CONST. ART. 1, § 7. The United States Supreme Court has long defined “due process of law” as “...a conformity with natural and inherent principles of justice, and forbid that one man’s property, or right to property, shall be taken for the benefit of another ... without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.” *Holden v. Hardy*, 169 U.S. 366, 387, 18 S.Ct. 383, 390-391, 42 L.Ed. 780 (1898). The Utah Supreme Court has held that, “[t]he minimum requirements [of Due Process] are adequate notice and an opportunity to be heard in a meaningful manner.” *Dairy Product Services, Inc. v. City of Wellsville*, 2000 UT 81, ¶ 49, 13 P.3d 851 (internal quotation marks and citations omitted).

“Due process is flexible and calls for the procedural protections that the given situation demands.” *State v. Terrazas*, 2014 UT App. 229, ¶ 17, 336 P.3d 594 (citation and internal quotation marks omitted). “What constitutes due process, however, depends upon ... ‘the nature of the individual interest affected, the extent to which it is affected, ... [and] the existence of alternative means for effectuating the purpose.’ ” *State v. Orr*, 2005 UT 92, ¶ 11, 127 P.3d 1213 (alteration in original)(quoting *Bearden v. Georgia*, 461 U.S. 660, 666–67, 103

S.Ct. 2064, 76 L.Ed.2d 221 (1983)). “If a defendant has an ‘opportunity to present evidence and argument on [an] issue before decision,’ then he has had an opportunity to be heard in a meaningful way.” *Terrazas* at ¶ 17.

An OSC is an order from the court directed to a defendant to show cause why they should not be held in contempt for willful disobedience of a court’s prior order, with the burden on a defendant to present evidence regarding the three contempt elements. *Coleman v. Coleman*, 664 P.2d 1155, 1156–1157 (Utah 1983) (per curiam). In *Gardiner v. York*, this Court indicated that, “[f]or the accused contemnor facing a jail sentence, his liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.” *Ibid.*, 2010 UT App 108, ¶ 46, 233 P.3d 500, citing *Taylor v. Hayes*, 418 U.S. 488, 500, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) (internal quotation marks omitted); see also *Bloom v. Illinois*, 391 U.S. 194, 208, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (procedural protections are fundamental to our system of justice, and respect for judges and courts are not entitled to more considerations than these interests of the individual). Thus, “[t]o satisfy an essential requisite of procedural due process, a hearing must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet.” *In re Cannatella*, 2006 UT App. 89, ¶ 3, 132 P.3d 684 (citation omitted).

In *Cooke v. U.S.*, Cooke wrote a letter to the judge presiding over a trial involving Cooke’s client. *Ibid.*, 267 U.S. 517, 45 S.Ct. 390, 391, 69 L.Ed. 767 (1925). Cooke requested the judge recuse himself. *Id.* Eleven days later, the judge issued an attachment and ordered Cooke and his client to appear and show cause why they should not be punished for contempt. *Id.*, 45 S.Ct. at 391. Cooke appeared, only receiving notice of the attachment that

morning, requesting time to prepare and present witnesses for their defense. *Id.* The judge refused the continuance, finding Cooke in contempt. *Id.* However, the Court recognized the matter was one of indirect contempt outside the courtroom, analyzing it as follows:

When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not important. The court, in *Randall v. Brigham*, 7 Wall. 523, 540 (19 L. Ed. 285), in speaking of what was necessary in proceedings against an attorney at law for malpractice, said:

‘All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.’

...

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

Id., 264 U.S. at 534, 536-537, 45 S.Ct. at 394-395 (citations omitted). *Cooke* found the proceeding to not be conducted under these principles, faulting the lower court for refusing to allow defendant to consult counsel, prepare his defense and call witnesses. *Id.*, 264 U.S. at 537, 45 S.Ct. at 397. The lower court believed the evidence foreclosed argument; however, the Supreme Court found that “the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed...” *Id.* It found that “the court cannot exclude evidence in mitigation. It is a proper part of the defense.” *Id.* The Supreme Court

determined that, although the court had not provided Cooke the chance to call witnesses or make a full statement, it made findings nonetheless about Cooke's perceived actions towards contempt. *Id.* The lower court had considered the facts in aggravation of the contempt, while providing no opportunity to the contemnors to meet or explain them before the sentence. *Id.* The Supreme Court found that "the procedure pursued was unfair and oppressive to the petitioner." *Id.* Although it noted the authority and dignity of the court in its power of contempt, it warned that "care is needed to avoid arbitrary or oppressive conclusions." *Id.*, 264 U.S. at 538-539, 45 S.Ct. at 395-396. The matter was accordingly reversed. *Id.*, 264 U.S. at 540, 45 S.Ct. at 396.

On September 2, 2015, Peter moved for the Ex Parte TROs, alleging Erica violated the written Preliminary Injunction. R00428-00435. The district court granted the Ex Parte Motion; however, they were blank as to any hearing date and never became permanent restraining orders. R00439-00440; 00450-00451. The hearing was apparently docketed for September 10, 2015 (*see*, R00492); however, it became a hearing on Peter's OSC. *See*, R00468; R00458. Peter's motion for OSC alleged Erica's contempt of the June 25 TRO, requested attorney fees for the OSC, and requested sanctions against Erica and an order compelling Erica to identify the location of the funds. R00460-00462.

Peter moved for OSC on September 8, 2015, with the OSC entered on September 9 for a hearing on September 10, 2015. R00460-00461; R00456. Erica was required to appear in under 24 hours to defend allegations deprive her of liberty and property. Erica resides in Oregon and could not personally attend.

Confusion was apparent at the September 10, 2015, hearing, with the court believing it was there to set the TROs for hearing, Erica's counsel objecting to it being an OSC hearing, and Peter requesting to move forward on the OSC. R01009-01011. Peter argued Erica was served electronically through counsel, meeting UT. R. CIV. P. 4 and allowing a hearing on less than five (5) days' notice. R01011-01013. Peter argued urgency based on Erica's withdrawal; however, the OSC was not sought on an emergency or expedited basis and was based on actions for which he had notice several months earlier by Erica's court filing. R01013. The court heard the OSC and denied continuance. R01015. Erica's counsel thereafter refused to participate and departed. Peter requested a month for hearing on the Bench Warrant for Erica's arrest, stating it would take time to serve her. R01030-01031. The court cited disappearance of funds as reason for expediting the hearing. R01031; R01010.

The court signed the Bench Warrant and set bail at \$210,000. Peter asked and was granted the ability to address other matters not noticed. R01033. Peter requested and was granted the \$11,000 remaining in the Trust Chase Bank account for his unproven attorney fees incurred in the OSC, to hire a forensic accountant, and for Peter's ongoing legal expenses. R01033-01034. Peter was granted access to Erica's personal storage unit and another with estate assets contrary to the Preliminary Injunction. R01034. Peter acknowledged he had not noticed Erica on the matter, but argued it was sufficiently interrelated to the OSC. R01034-01035.

Erica has been deprived of liberty and property without Due Process. UTAH CONST. ART. 1, § 7. Erica's property has been taken for Peter's benefit, who does not aver or maintain a claim to the amount seized, and without providing her a reasonable opportunity

to be heard. *Holden*, 169 U.S. at 387, 18 S.Ct., 390-391. Due Process demands fairness, which was not granted to Erica. *Dairy Product* at ¶ 49; *Terrazas* at ¶17. Erica was required to receive, at minimum, adequate notice of the OSC and the opportunity to be heard in a meaningful manner. *Id.* This is clear not only from the record, but also Utah law.

The Ex Parte TROs noticed no hearing. The OSC noticed September 10th; however, there was confusion whether the hearing was for the OSC or the Ex Parte TROs. The district court thought it was a TRO scheduling hearing; however, Peter requested the OSC be heard and the court agreed. It then became an evidentiary or determinative hearing respecting Erica's rights. Such transformation did not give Erica meaningful time to prepare her defense and present evidence to controvert Peter's contempt claims. *Coleman* at 1156-1157. The OSC thus failed to meet the minimum requirements of Due Process. *Gardiner* at ¶ 45.

The court and Peter failed to afford Erica orderly process to present vital information in mitigation of the indirect contempt claims. *Id.* at ¶ 46. The egregious result of this deprivation was a warrant for Erica's arrest, bail set at \$210,000.00—although the district court had already frozen all of Erica's accounts providing Peter with double (or more) redress—seizure of the contents of the Trust Chase Bank account for Peter's legal fees, and access to Erica's personal property in storage. Accordingly, Erica's valuable liberty and property were not given due consideration depriving Erica of the meaningful ability to appear and defend herself. *Id.* Erica has been subjected to serious criminal and civil punishment without fundamental Due Process. *Cannatella* at ¶3.

This matter is akin to *Cooke*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925). Whether Erica actually engaged in contemptuous conduct is inapplicable to whether she was afforded Due Process for indirect contempt. Erica maintained the right to reasonable opportunity to present her defense by witnesses and argument, but was deprived due to Peter's insufficient notice. *Id.*, 267 U.S. at 536-537, 45 S.Ct. at 395. The September 10 hearing was therefore oppressive and unfair. *Id.*

Erica's right to call witnesses to give testimony relevant to either the issue of complete exculpation or in mitigation of the penalty imposed was not afforded to her. *Id.* The manner in which this case was conducted violated Due Process. *Id.* The district court determined to move forward on the OSC on urgency of disappearing funds—a transfer of which it was aware months earlier by Erica's own notice informing the parties and court; nonetheless, the court refused Erica the ability to meaningfully consult counsel, prepare her defense, and call witnesses. *Id.*, 264 U.S. at 537, 45 S.Ct. at 397.

Similar to *Cooke*, the court proceeded on the theory that the disappearance of funds foreclosed evidence or argument. *Id.*, 264 U.S. at 538-539, 45 S.Ct. at 395-396. Gwendolyn's stated intent was for Erica to administer her estate without judicial interference further requiring the court to hear evidence in mitigation or exculpation of Erica's actions. *Id.* Erica's Clarification alerted the parties of possible ambiguity in the district court's oral pronouncement and informed them of the withdrawal; however, the Preliminary Injunction then altered that oral pronouncement significantly. Erica had a viable defense to Peter's contempt allegations. *See, id.* The court's decision only considered Peter's aggravating facts for contempt, granting unproven and speculative attorney fees, costs, and the seizure of the

storage units that had never been noticed. *Id.* No opportunity was given to Erica to present mitigating evidence, particularly against Peter's unnoticed "tangential" claims, resulting in an unfair and oppressive procedure prejudicing Erica's rights. *Id.* The court mistakenly favored its power, authority and dignity in contempt proceedings over Erica's fundamental rights.

The court intended to vindicate itself in issuing its severe orders, but no Due Process was afforded to Erica to defend herself. Peter used the Ex Parte TROs, although never finalized, to cause Community Bank to interplead and deposit the entire contents of Erica's personal bank accounts with the Oregon court. By requiring \$210,000 cash only bail, the court would receive the remainder of the \$472,199.33 originally in Erica's personal bank accounts in June of 2015. Peter has been afforded every remedy requested based on the erroneous Preliminary Injunction, argued more particularly *post*. The lack of Due Process afforded to Erica requires the reversal of the Judgment and the other erroneous orders entered as a result of the district court finding Erica in contempt.

The hearing was not scheduled in a manner that would give Erica sufficient time in order to do defend her positions against Peter's allegations and unaverred requests. *See, Cannatella* at ¶13. Due to this lack of procedural protection, Erica's right to Due Process has been violated and her ability to defend herself against Peter's claims on September 10 was not afforded to her. Accordingly, the orders resulting from the September 10 hearing should be reversed.

II. THE DISTRICT COURT'S AWARD OF ATTORNEY FEES WAS ORDERED WITHOUT NOTICE, LACKED EVIDENTIARY SUPPORT, AND CONSTITUTES AN EXCESSIVE AWARD.

Respecting damages to the aggrieved party in a contempt proceeding, Utah law states as follows:

If an actual loss or injury to a party in an action or special proceeding is caused by the contempt, the court, in lieu of or in addition to the fine or imprisonment imposed for the contempt, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify and satisfy the aggrieved party's costs and expenses. The court may order that any bail posted by the person proceeded against be used to satisfy all or part of the money ordered to be paid to the aggrieved party. The order and the acceptance of money under it is a bar to an action by the aggrieved party for the loss and injury.

UTAH CODE ANN. §78B-6-311(1). "Any actual loss suffered by the party aggrieved may be recovered if caused by the party through his contemptuous acts." *Foreman v. Foreman*, 176 P.2d 144, 150 (Utah 1946).

Applicable rules state as follows concerning attorney fees:

- (a) When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony...
- (b) An affidavit supporting a request for or augmentation of attorney fees shall set forth:
 - (b)(1) the basis for the award;
 - (b)(2) a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work;
 - (b)(3) factors showing the reasonableness of the fees;
 - (b)(4) the amount of attorney fees previously awarded; ...

UT. R. CIV. P. 73(a)&(b). This Court has held as follows concerning attorney fee affidavits:

An adequate affidavit will generally answer four questions:

1. What legal work was actually performed?

2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

EDSA/Cloward, LLC v. Klibanoff, 2008 UT App. 284, ¶ 17, 192 P.3d 296, *citing Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988) (footnotes omitted).

In the matter of *Holladay Towne Center, LLC v. Brown Family Holdings, LC*, this Court determined that, “[a]lthough the Browns’ affidavit generally listed a number of services provided by their attorneys and identified each attorney’s hourly rate, there was no breakdown as to which attorney performed which services, the hours spent on each service, or even the total number of hours expended on the litigation.” *Ibid.*, 2008 UT App. 420, ¶ 21, 198 P.3d 990. This Court accordingly reversed the order determining the amount of the fee and cost award due to this failure. *Id.*

“Thus, a court’s authority to impose an award of fees as a sanction against a party who has been obstructive or contemptuous is derived from several statutes and common law doctrines.” *Goggin v. Goggin*, 2013 UT 16, ¶ 36, 299 P.3d 1079. “But none of those statutes or doctrines permit the amount of the award to exceed the amount of fees, costs, or injury that the other party **actually** incurred.” *Id.* (emphasis added). “Specifically, the amount of fees and costs awarded under the Contempt Statute cannot exceed the amount of ‘actual loss or injury’ suffered by the other party.” *Id.*

The Utah Supreme Court has stated, “[w]e have held that ‘[w]hile the standard for determining the amount of damages is not so exacting as the standard for proving the fact of damages, there still must be evidence that rises above speculation and provides a reasonable,

even though not necessarily precise, estimate of damages.” *TruGreen Companies, L.L.C. v. Mower Brothers, Inc.*, 2008 UT 81, ¶ 15, 199 P.3d 929, *citing Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985). “Plaintiff, of course, has the burden to produce a sufficient evidentiary basis to establish the fact of damages and to permit the trier of fact to determine with reasonable certainty the amount of lost ... profits.” *Id. citing Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 774 (Utah 1986).

During the September 10 hearing, Peter’s counsel asked to address “tangential” matters, which the district court agreed to hear absent notice to Erica and her counsel. R01033. Peter requested release of the \$11,000 remaining in the Chase Bank Trust account for his attorney fees in the OSC and for ongoing legal expenses. R01033-1034. The court stated attorney fees was “not going to end.” R01035. It entered the *Order to Release Funds*, ordering Chase Bank to release \$11,000 directly to Peter’s counsel for Peter’s legal fees. R00486-00487.

Peter never presented an affidavit of legal fees or otherwise justified his expenses. *Truman* at ¶31. This violated Erica’s Due Process rights absent notice and an opportunity to be heard, but additionally infringed on Erica’s ongoing position as trustee of the Trust account from which the funds were removed. No order has ever removed Erica as trustee, even temporarily, and Gwendolyn’s Instructions give her exclusive authority over the Trust without judicial interference. Without adequate notice, Erica was unable to object to the award as unreasonable and unjustified. Further, it was unconscionable to award Peter present or future attorney fees when the statute governing such an award is limited to actual damages in bringing the OSC. UT. R. CIV. P. 73(a)&(b).

Peter was limited to his actual loss or injury caused by Erica's alleged contempt. UTAH CODE ANN. §78B-6-311(1). However, Peter did not present an accounting, but instead requested and was given a blank check for his current and ongoing legal expenses, which far exceeds any actual loss suffered by Peter. *Foreman* at 150. No evidence of his *actual* loss or damage was ever presented as required by UT. R. CIV. P. 73(a). Peter presented no reasonably detailed description of the time spent and work performed, the hourly rates, or factors evidencing reasonableness. UT. R. CIV. P. 73(b). Peter presented no evidence as to (1) the legal work actually performed; (2) whether it was reasonably necessary to prosecute; (3) whether the billing rate was consistent with customary rates; or (4) whether circumstances that required consideration of additional factors. *EDSA* at ¶17.

In cases where a party fails to properly specify or justify the fees, this Court has reversed the award. *See, Holladay* at ¶21. While the district court may have had the authority to award Peter fees, it was not permitted to award excessive fees or costs outside finding actual injury Peter incurred in bringing the OSC. *Goggin* at ¶36. The speculative award of \$11,000 for Peter's current and ongoing and future legal expenses and to hire an expert witness is therefore in clear violation of UTAH CODE ANN. § 78B-6-311(1), UT. R. CIV. P. 73(b), and controlling caselaw. *See, TruGreen* at ¶15. Peter wholly failed to produce a sufficient evidentiary basis to establish entitlement to this award. *Id.* As a result, the award of \$11,000 is unreasonable pursuant to UTAH CODE ANN. § 78B-6-311(1) and unjustified in the record pursuant to UT. R. CIV. P. 73(b).

The attorney fees award was unreasonable and unjustified, insufficiently noticed for hearing, legally insufficient as granted absent contract or controlling legal provision (UT. R.

CIV. P. 73(a)), and unsupported by the evidence. The *Order to Release Funds* should therefore be reversed.

III. UTAH LAW IS AMBIGUOUS AS TO THE PROCEDURE OF OSC PROCEEDINGS.

“When the contempt is not committed in the immediate view and presence of the court or judge, an affidavit or statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt.” UTAH CODE ANN. §78B-6-302(2). “If the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer.” UTAH CODE ANN. §78B-6-303.

UT. R. CIV. P. 5(a)(1) states as follows regarding pleadings that must be served in an action:

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

- (a)(1)(A) a judgment;
- (a)(1)(B) an order that states it must be served;
- (a)(1)(C) a pleading after the original complaint;
- (a)(1)(D) a paper relating to disclosure or discovery;
- (a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and
- (a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

“If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party.” UT. R. CIV. P. 5(b)(1). “If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received.” UT. R. CIV. P.

5(b)(2). “Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.” *Id.*

“A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed.” UT. R. CIV. P. 7(d)(1). However, other than the procedure for family law contained in UT. R. CIV. P. 101(b), these motions for OSC are usually submitted *ex parte* and the claimed contemnor responds instead to the court on the OSC issued on such motion rather than in the time frame dictated in Rule 7(d)(1).

In Fifth and Sixth District Court, a motion for an OSC, supporting papers, and notice of hearing must be personally served just as a summons and a complaint would be served and the hearing may not be held sooner than five (5) days from the date of service, unless irreparable injury and other circumstances exist to expedite the hearing. UT. JUD. ADMIN. R. 10-1-501(4) and -602(4). Additionally, that initial hearing will determine whether a full evidentiary hearing is necessary. UT. JUD. ADMIN. R. 10-1-501(3)(F) and -602(3)(F). This case originates from Third District Court, which does not have local rules set out in the judicial administration rules governing motions for an OSC specific to its district.

Peter filed the OSC Motion after the clerk set the September 10th hearing on the OSC. R00458; 00460-00465. The OSC entered September 9, 2015, at 3:54 p.m. R00468. Ms. Lang filed an Objection, requesting a continuance in order to prepare Erica’s defense to the OSC. R00473-00474. When the hearing commenced, the court noted the hearing was to set the TRO; however, the clerk’s email noticed it for OSC. R01010. Relying on the absence of set rules governing OSCs, Peter argued there was no requirement that a person be given any specific amount of notice on an OSC prior to the hearing. R01011. Peter argued Erica was

properly served electronically pursuant to *D'Aston v. D'Aston*, 790 P.2d 590, 592 (Utah App. 1990). *Id.* Peter argued service on a party's attorney for an OSC is sufficient if they are represented. *Id.* Thus, Peter argued Erica had notice of the hearing and did not appear. *Id.*

Ms. Lang argued the hearing was to continue the OSC since it could not be argued on such short notice. R01012-14. Peter argued Erica was properly noticed enough to file for continuance, and the OSC needed to be heard because \$200,000 was missing. R01013. R01014. Peter requested the court deny continuance and move forward on the OSC, which it did. R01014-15. Ms. Lang stated Erica was not prepared to defend on 24 hours notice, and Erica was not in Utah to be able to attend. R01015- 01018, 01021. The court nonetheless found Erica in contempt and issued a bench warrant for her arrest with \$210,000 set for bail.

Utah law is ambiguous on procedure for service and notice of OSC proceedings, with Peter's counsel conceding it was "one of those ambiguous things" in the Rules (similar to supplemental orders). R01028. Erica argued that, since there are no specific Third District Court rules governing service or notice of the Motion for OSC, OSC and notice of hearing, Peter took advantage of the absence of such rules in obtaining a full evidentiary hearing on the OSC on less than 24 hours' notice, depriving Erica of Due Process as argued more thoroughly *supra*.

Pursuant to Rule 5, the Motion for OSC and OSC were required to be served upon Erica, which was served on Ms. Lang via the electronic filing system. UT. R. CIV. P. 5(a)(1)&(b)(1). Further, the method of service to Ms. Lang was promptly received; however, there was insufficient time for Erica to personally appear or prepare any defense at all in the

time allotted, which is presumably why Fifth and Sixth District have formulated their own set of rules governing OSCs. UT. R. CIV. P. 5(b)(2).

The court expedited the hearing because money was disappearing quickly; however, Erica was fully transparent to the parties and court in the Clarification months earlier, even attempting to clarify the oral decision by providing the account numbers for her personal accounts versus the Trust accounts. Erica indicated she had withdrawn from her Chase Bank account, noting that the court had only orally ordered seizure of the Trust account and not her personal accounts. Only on entry of the Preliminary Injunction in the docket in July did Erica's personal accounts become seized. Erica had a viable defense as to Peter's allegations of contempt on September 10; however, the procedure in obtaining the OSC in this case prevented her from presenting that defense in the form of witnesses, evidence, and argument.

There is an uncoded standard of practice of service and notice for OSCs among Utah attorneys. Most abide the process created by the Fifth and Sixth District Courts in either requesting opposing attorneys accept service or having a party served personally pursuant to Rule 4, particularly since OSCs are contempt proceedings and thus, freedoms respecting liberty and property are at stake. Further, evidence in mitigation on contempt allegations is usually maintained by the person, not the attorney, leaving an attorney without the ability to confer with the client and defend the facts on too little notice.

The first hearing on an OSC is generally used to determine whether a full evidentiary hearing is needed and to allow the parties to negotiate a settlement to resolve the motion. However, Peter and the court held the evidentiary hearing at this first hearing without

allowing Erica to properly prepare a defense, providing less than 24 hours' notice of the allegations against her.

While Peter cited to *D'Aston v. D'Aston*, 790 P.2d 590, 592 (Utah App. 1990) as grounds that service was proper through Ms. Lang, this is a family law case implicating UT. R. CIV. P. 101; however, such rule does not apply to the current type of civil proceedings. Regardless, Peter's counsel used the absence of specific OSC procedure to obtain expedited and detrimental orders against Erica in violation of her Due Process rights.

This Court should adopt the procedure articulated by the Fifth and Sixth District Courts and require that an OSC, with its accompanying pleadings, be served pursuant to Rule 4, unless the opposing attorney accepts service. The hearing should not be sooner than five (5) days from the date of service. Further, the first hearing should determine whether an evidentiary hearing is warranted. UT. JUD. ADMIN. R. 10-1-501, -602. This Court should reverse the lower court's orders as departing from standard practice when it choose to move forward on the OSC on to little notice and depriving Erica of her meaningful opportunity to be heard, thereby violating Erica's Due Process rights. U.S. CONST. AMEND. XIV; UT. CONST. ART. 1, § 7.

IV. PETER OBTAINED EXCESSIVE RELIEF WHEN THE DISTRICT COURT ORDERED \$210,000 IN CASH ONLY BAIL, WHICH FAR EXCEEDS PETER'S MAXIMUM ENTITLEMENT AS AN EQUITABLE HEIR TO GWENDOLYN'S ESTATE.

The election of remedies doctrine is to prevent double redress for a single wrong. *McKeon v. Crump*, 2002 UT App. 258, ¶ 12, 53 P.3d 494 *citing* *Palmer v. Hayes*, 892 P.2d 1059, 1061-1062 (Utah App.1995). Utah law states as follows:

If an actual loss or injury to a party in an action or special proceeding is caused by the contempt, the court, in lieu of or in addition to the fine or imprisonment imposed for the contempt, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify and satisfy the aggrieved party's costs and expenses. The court may order that any bail posted by the person proceeded against be used to satisfy all or part of the money ordered to be paid to the aggrieved party. The order and the acceptance of money under it is a bar to an action by the aggrieved party for the loss and injury.

UTAH CODE ANN. § 78B-6-311(1). "Any actual loss suffered by the party aggrieved may be recovered if caused by the party through his contemptuous acts." *Foreman v. Foreman*, 176 P.2d 144, 150 (Utah 1946).

In his *Complaint*, Peter alleged he was entitled to Trust assets as an equal beneficiary to Erica. R00002. Gwendolyn's Instructions dictated Peter's inheritance required a minimum of \$210,000 offset for money he had already extorted previously. Erica testified the home sold for approximately \$550,000, which was the only asset in the Trust. R00872-00873; 00877. On July 7, 2015, the district court entered the Preliminary Injunction, seizing the contents of the Wells Fargo and Chase Bank accounts titled in either Erica's name or the Trust. R00363-00366.

At the September 10, 2015, hearing, Peter requested a bench warrant for Erica for failing to personally appear, which was granted. R01028-01029. For cash bail, Peter proposed \$210,000.00, to which the district court stated, "[s]ounds to me like that's an amount maybe [Erica] could post." R01029. This was the amount claimed to be "missing" from Erica's personal accounts seized in Oregon. Peter asked for and was granted the \$11,000 remaining in the Trust account for payment of his attorney fees, to hire a forensic expert and for Peter's ongoing attorney fees in prosecuting his action against the Trust and

Erica. R01033-4. The district court granted the request because it found attorney fees were “not going to end.” R01035.

The court has afforded Peter excessive relief where he is likely not entitled to relief at all, but definitively far less than the amount seized from Erica’s financial accounts and the bail amount of \$210,000. Peter has alleged only that he is an equal heir to Gwendolyn’s estate; however, his equitable share is offset by \$210,000 pursuant to Gwendolyn’s Instructions. Erica testified the home was the only asset and sold for \$550,000. *See*, R00877. Thus, without deducting Erica and Tim’s pay for caring for Gwendolyn and other fees/costs of the estate, Peter’s half of \$550,000 would equal \$275,000. When Gwendolyn’s required offset of \$210,000 is applied, Peter is entitled to *a maximum of \$65,000*, but likely much less than this sum given the other obligations of the Trust prior to calculation and distribution of inheritance.

Accordingly, seizing over \$260,000 from Erica’s personal accounts and setting Erica’s contempt bail at an additional \$210,000 far exceeds Peter’s maximum entitlement as an heir to Gwendolyn’s estate pursuant to her Instructions. This process provides Peter more than double redress for the amount subject to his inheritance—Peter’s actual loss or injury from the actions he alleged against Erica. *McKeon* at ¶ 12. Peter has thus far obtained relief in excess of his *Complaint*, through duplicate avenues of relief. *Id.* The trial court has seized an amount—or set bail to recompense the amounts—totaling over seven (7) times the absolute maximum that Peter can obtain in the bare calculations contained in Gwendolyn’s Instructions, and has done so under temporary orders.

This was done without evidence of “actual loss or injury” to Peter. UTAH CODE ANN. § 78B-6-311(1). The amount seized through the Oregon courts under the expired TRO never made permanent significantly covered the maximum amount Peter could obtain as his inheritance. The Utah court then provided double (or more) redress by ordering a bail amount presumed to try and seize *all* of the funds transferred by Erica, regardless if they were personal funds, those from the sale of her condo, or those transferred to her by Gwendolyn prior to her death. Peter never evidenced any “actual loss or injury” particularly maintaining little to no entitlement to the Trust funds. His actions, improperly sanctioned by the court below, have left Erica insufficient means to defend the Trust and herself. Peter could not recover anything other than his own actual losses or injuries with a nexus to the alleged contemptuous act, and he presented no evidence towards those at the hearing. *Foreman* at 150. The court was concerned about money disappearing, but took extreme measures in temporary orders without looking to see what actual injury or loss was evident. Its determination was thus erroneous.

The Ex Parte TRO evidenced to the Oregon Bank that there was a dispute between Erica and Peter of the funds in her account. R00500-00501. Thus, the Oregon Bank deposited the funds with the court in Oregon in the amount of \$262,199.33, which was the total amount in Erica’s account. R00501. This was sufficient to cover Peter’s averred inheritance even without his offset dictated by Gwendolyn of \$210,000; however, the court then also ordered an excessive bail amount allowing Peter to abuse the system to render Erica without means to defend the Trust or herself. Accordingly, the Judgment must be reversed.

V. THE ELEMENTS OF CONTEMPT ARE NOT PRESENT IN THIS CASE DUE TO ERRONEOUS PRELIMINARY INJUNCTION ENTERED EARLIER IN THIS CASE.

“A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule.” *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984)(citation omitted). Further, “[i]n determining whether a preliminary injunction is warranted, a court must be guided by normal equitable principles and must weigh the practicalities of the situation.” *Id.* (citations omitted). As an extraordinary remedy, “it should not be issued unless the movant’s right to relief is ‘clear and unequivocal.’” *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citation omitted). It is “an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.” *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (citation omitted). “Injunctive relief is fundamentally preventive in nature, and an injunction serves to ‘preserve the status quo pending the outcome of the case.’” *Zagg, Inc. v. Harmer*, 2015 UT App. 52, ¶ 8, 345 P.3d 1273 (citation omitted).

UT. R. CIV. P. 52(a) states in pertinent part that, “...in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.” A preliminary injunction is required to make findings regarding the elements of Rule 65A, which are whether irreparable harm exists, threatened injury outweighs injury to restrained party, the order would be adverse to public interest, and the applicant will prevail on the merits of the underlying action. UT. R. CIV. P. 65(A)(e).

In *System Concepts, Inc. v. Dixon*, the Utah Supreme Court analyzed Rule 65A under an alleged breach of an employment contractual covenant not to compete. *Ibid.* 669 P.2d 421, 424 (Utah 1983). Therein, the district court denied issuance concluding the preliminary injunction would prohibit Dixon from any employment in her industry, creating a great hardship for Dixon. *Id.* at 429. However, *Dixon* determined there was no evidence to support the finding, nor findings to support the conclusion. *Id.* The Rule 65A standards were not addressed at all in the findings, and therefore the trial court's judgment was clearly against the weight of the evidence. *Id.*

In *Matter of Estate v. Quinn*, this Court found the absence of findings left the Court "none to confident" in the trial court's determination to dismiss the estate's original personal representative for wasting assets on unnecessary legal fees, then award those to the attorneys who generated them. *Ibid.*, 830 P.2d 282, 290 (Utah App. 1992). Similarly, in the matter of *Powers v. Taylor*, a district court made certain oral findings on the record; however, no written findings were made. *Ibid.*, 378 P.2d 519 (Utah, 1963). When the recitals from the resulting order were inconsistent with the express declarations by the court, that judgment was vacated. *Id.*

"[D]isobedience of any lawful judgment, order or process of the court" is an act or omission that constitutes contempt. UTAH CODE ANN. §78B-6-301(1)(5).

As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so. ... These three elements must be proven beyond a reasonable doubt in a criminal contempt proceeding, ..., and by clear and convincing evidence in a civil contempt proceeding. ...

Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988)(internal citations omitted). The defendant bears the burden of proof on these elements. The movant bears the burden of these elements to obtain an OSC; however, the defendant bears the burden once an OSC is issued. *Coleman v. Coleman*, 664 P.2d 1155, 1156-1157 (Utah 1983).

In *Salt Lake City v. Dormon-Ligh*, this Court stated as follows:

For the court to hold one in contempt of an order, that order must be clearly understood to be an order. To be enforced, an order must be sufficiently specific and definite as to leave no reasonable basis for doubt regarding its meaning. ... Moreover, the order need not be in writing, but it must be objectively understandable as an order from which sanctions may accrue for disobedience. Such was not the case here. Therefore, the State could not be sanctioned for disobeying the Commissioner's request.

Ibid., 912 P.2d 452, 455 (Utah App. 1996)(internal citation omitted).

The Preliminary Injunction herein, which contains only orders, was treated as rule rather than an exception, particularly where no findings or conclusions were rendered supporting such. *GTE Corp.* at 678. The trial court was not correctly guided by equitable principles in expanding the Preliminary Injunction to include Erica's personal accounts. *Id.* The changes from the oral decision and the written Preliminary Injunction failed to weigh the practicalities of the situation and properly place Erica on notice of what was expected of her. *Id.*

The Preliminary Injunction issued in error because Peter's ability to seize Erica's personal funds was not clear and equivocal. *Heideman* at 1188. The Preliminary Injunction exceeded its purpose in only being an anticipatory remedy to prevent a threatened wrong or to compel the cessation of a continuing one. *Hunsaker* at ¶ 8. The Preliminary Injunction is fundamentally preventive in nature and is intended to preserve the status quo pending the

outcome of this case. *Zagg* at ¶ 8. The status quo was not to even temporarily intrude upon Erica's decisions as trustee, particularly given Gwendolyn's Instructions forbidding court interference. Instead, the Preliminary Injunction was used to seize funds beyond Peter's claim to inheritance by wholly ignoring Gwendolyn's estate documents, Instructions, and Statement.

The district court stated it was unsure on June 25 whether Peter had received his share from advancements. R00971-00972. It thus did not seize the advancements prior to Gwendolyn's death. R00999-01000. Thus, Peter received his inheritance by extorting the funds prior to Gwendolyn's death, but has seized Erica's through temporary proceedings herein because she did not require payment as trustee, employee or heir prior to Gwendolyn's death. Erica has acted in good faith and has been transparent, filing the Clarification indicating she had withdrawn from her personal Chase Bank account based on her interpretation of the court's oral order—the only order governing her at that time. The parties were on notice of Erica's withdrawal for two (2) months before Peter moved for OSC.

The Preliminary Injunction constitutes an abuse of the court's discretion because it was clearly rendered against the weight of the evidence on June 25. *Dixon* at 425. The district court's about-face from seizing only accounts with Trust funds on June 25 to seizing all accounts in Erica's name pursuant to the Preliminary Injunction was arbitrary, capricious, whimsical, or manifestly unreasonable. *See, e.g., Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005).

The Preliminary Injunction was required to have findings and conclusions on the grounds for determining to seize all of Erica's personal financial accounts in an amount in excess of Peter's claimed inheritance under the estate documents. UT. R. CIV. P. 52(a). Moreover, the Preliminary Injunction is devoid of addressing any elements required by Rule 65A. The Preliminary Injunction contains no findings or conclusions at all. *See*, R00363-00364. It only contains orders. *See, id.* Accordingly, the Preliminary Injunction herein is worse than that analyzed in *Dixon. Ibid.* at 429. The Preliminary Injunction is clearly against the weight of the evidence presented on June 25, particularly where it seized more than it orally determined. *See, id.*

Further, the Preliminary Injunction was clearly ambiguous because the oral decision seizing Trust accounts found that Peter failed to establish injunctive relief over anything more than those. Absent detailed findings, it is unclear how the trial court determined to seize Erica's specific personal financial accounts. *Quinn* at 290. There is no evidentiary basis for the trial court's action to exceed its oral pronouncement. *Id.* The recitals contained in the Preliminary Injunction are inconsistent with the court's oral ruling and are insufficient, without more specific evidence to support it, to support the Preliminary Injunction. *Powers* at 519.

Erica cannot be held in contempt for violating the Preliminary Injunction prior to its entry when it deviated from the oral pronouncement that governed her actions. She could not disobey ambiguous orders. UTAH CODE ANN. § 78B-6-301(1)(5). Peter was required to demonstrate Erica knew she was not allowed to withdraw from her own personal bank account, had the ability to comply, and intentionally failed or refused to do so. *Von Hake* at

1172. Peter was required to prove these elements beyond a reasonable doubt in the criminal contempt proceeding against Erica when he pursued OSC in September of 2015. *Id*; *see also*, *Coleman* at 1156-1157. He did not and thus the OSC erroneously issued.

The seizure of Erica's personal bank accounts was not clear at the June 25 hearing, the oral order under which Erica's actions were taken the next day. *Dormon-Ligh* at 455. Accordingly, for Peter to have enforced the Preliminary Injunction against Erica, Peter was required to have proven Erica was not allowed to touch her personal accounts on June 26, which he cannot do. *Id*. The seizure of Erica's personal accounts in an order that does not include specific bank account numbers is not sufficiently specific and definite, leaving a reasonable basis to doubt the order and its meaning, particularly before it was entered. *Id*.

The June 17 TRO was finalized by the oral decision rendered on June 25, and later memorialized in altered form in the written Preliminary Injunction. Erica understood the oral ruling (*see*, Clarification) to not affect her personal accounts, even if they were at the same bank as the Trust accounts; however, this changed upon entry of the Preliminary Injunction, which entry occurred *after* she acted on the oral ruling. She cannot be held in contempt of the written decision when it had not been entered, particularly where the oral decision differed as to seizing her personal accounts. *Id*. Erica cannot be sanctioned for failure to comply with the Preliminary Injunction on actions preceding its entry. *Id*.

Moreover, Gwendolyn's estate documents, Instructions, and Statement have been ignored by the district court. Gwendolyn's Instructions dictate Peter's share of inheritance would be offset by advancements of at least \$210,000, but possibly more if Erica discovered additional "advancements." However, coincidentally this figure is exactly the amount the

district court ordered as Erica's cash-only bail. All of Erica's financial accounts are frozen—including her account at MACU where the proceeds of the sale of her condo were deposited, and the funds contained in Oregon Community Bank, which contained personal funds from her employment—and deposited with the Oregon court. This contradicts Gwendolyn's express desires that Erica not be required to prove Peter's advancements in court and that there be no court interference. R00286.

Accordingly, Erica has suffered severe prejudice. The district court has clearly acted in an arbitrary and capricious manner, which constitutes an abuse of discretion. Therefore, the orders constituting Erica's contempt should be reversed inasmuch as Peter cannot prove beyond a reasonable doubt that Erica knowingly committed contempt of either the oral decision or the Preliminary Injunction.

CONCLUSION

WHEREFORE, based upon the foregoing, this Court is respectfully requested to reverse the Judgment and other erroneous interlocutory orders entered by the district court and remand with appropriate instructions.

27nd
DATED this 1st day of June, 2016.

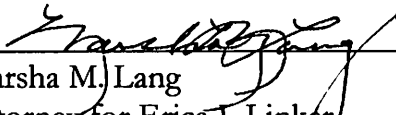
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[Signature]
Marsha M. Lang
Attorney for Erica J. Linker

CERTIFICATE OF COMPLIANCE WITH UTAH R. APP. P. 24(f)(1)(C)

Counsel hereby certifies the *Brief of Appellant* complies with the type-volume limitation: 13990 words are contained herein, in compliance with UTAH R. APP. P. 24(f)(1)(A) and was determined by the word processing system used to prepare *Brief of Appellant*.

DATED this 22nd day of June, 2016.

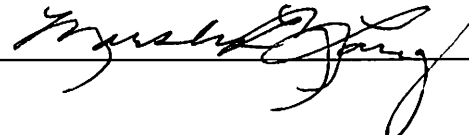


Marsha M. Lang
Attorney for Erica J. Linker

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Brief of Appellant* with attachments, on this 22nd day of June, 2016, to the following:

Joshua K. Peterman
COHNE KINGHORN, P.C.
Attorney for Peter S. Linker
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111



Addendum “A”

Warrant and Order of Commitment filed September 21, 2015
(the “Judgment”)

The Order of Court is stated below:

Dated: September 21, 2015

01:04:00 PM

/s/ KATIE BERNARDS-
GOODMAN
District Court Judge



Joshua K. Peterman (Bar No. 10248)
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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PETER S. LINKER,

Plaintiff,

WARRANT AND ORDER OF
COMMITMENT

v.

Civil No. 150902246

ERICA J. LINKER, individually, and as
trustee of the Gwendolyn Linker Trust
Agreement,

Judge: Katie Bernards-Goodman

Defendant.

On September 10, 2015, this Court entered an Order wherein Defendant Erica J. Linker was found to be in willful violation of this Court's orders. Based upon this order, it is hereby ORDERED that Erica J. Linker be and hereby is committed to the Salt Lake County Jail, to remain there until November 5, 2015 at which time she is to be brought before me at the Third Judicial District Court, 450 S. State St., Salt Lake City, Utah on November 5, 2015 at 3:00 p.m. Defendant Erica J. Linker may only be released earlier than this date upon posting of a CASH ONLY BAIL in the amount of Two Hundred and Ten Thousand dollars (\$210,000.00).

00524

NOW, THEREFORE, I COMMAND YOU, any Peace Officer, or the Sheriff of Salt Lake County, or the Sheriff of any County wherein Defendant Erica J. Linker may be found, that you take the body of said Defendant and safely keep her in close custody in the jail of the above-named county until her cash bail is posted or she is brought before me at the aforementioned date and time. The above sentence is the order of this Court and this shall be sufficient warrant for its execution.

– Court's Signature and Date Appear at Top of First Page of this Document –

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of September 2015, a true and correct copy of the foregoing Order of Commitment was electronically filed with the Court, which sent notification of such filing to the following:

Marsha M. Lang
Marsha McQuarrie Lang, P.C.
2020 South 1300 East, Suite D
Salt Lake City, UT 84105

/s/ Joshua K. Peterman
Joshua K. Peterman

Addendum “B”

Controlling Constitutional and Statutory Provisions

CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS

- A. U.S. CONST. §8 states in part that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
- B. UTAH CONST. ART. I, § 7 states, “[n]o person shall be deprived of life, liberty or property, without due process of law.”
- C. UTAH CONST. ART. 1, § 9 states in part that, “[e]xcessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted.”
- D. UTAH CODE ANN. § 78B-6-301(5) states in pertinent part that, “[t]he following acts or omissions in respect to a court or its proceedings are contempts of the authority of the court: ... disobedience of any lawful judgment, order or process of the court[.]”
- E. UTAH CODE ANN. § 78B-6-302(2) states, “[w]hen the contempt is not committed in the immediate view and presence of the court or judge, an affidavit or statement of the facts by a judicial officer shall be presented to the court or judge of the facts constituting the contempt.”
- F. UTAH CODE ANN. § 78B-6-303 states as follows:

If the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer. If there is no previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted. A warrant of commitment may not be issued without a previous attachment to answer, or a notice or order to show cause.
- G. UTAH CODE ANN. § 78B-6-310 states, “[t]he court shall determine whether the person proceeded against is guilty of the contempt charged. If the court finds the

person is guilty of the contempt, the court may impose a fine not exceeding \$1,000, order the person incarcerated in the county jail not exceeding 30 days, or both.”

H. UTAH CODE ANN. § 78B-6-311(1) states as follows in pertinent part:

If an actual loss or injury to a party in an action or special proceeding is caused by the contempt, the court, in lieu of or in addition to the fine or imprisonment imposed for the contempt, may order the person proceeded against to pay the party aggrieved a sum of money sufficient to indemnify and satisfy the aggrieved party's costs and expenses.

I. UTAH R. CIV. P. 73(a) states, “[w]hen attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony...”