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Keene v. Bonser : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ANDREA N. KEENE,

Petitioner/Appellee,

vs.

ASHLEY J. BONSER,

Respondent/Appellant.

BRIEF of the APPELLANT

Case No. 20030841-CA

OPENING BRIEF FOR APPELLANT
ASHLEY J. BONSER

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
DAGGETT COUNTY, JUDGE JOHN R. ANDERSON

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal by virtue of the pour over order of the Utah Supreme Court and may have had jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(h).

STATEMENT OF THE ISSUES

Appellant asserts the following issues on appeal:

- a. Issue: Whether the trial court's findings of fact were sufficient to support the legal conclusion that Appellant "resided in the same residence" as Appellee, and, thus, a "cohabitant" under the Cohabitant Abuse Act.
Determinative law: Utah Code Ann. §§ 30-6-1 *et seq.* (Cohabitant Abuse Act); Utah R. Civ. P. 52.
Standard of review: Whether the trial court's findings of fact are sufficient to support its decision is reviewed under a clearly erroneous standard:
"[T]he court must set forth the reasons for its decision in enough detail for the reviewing court to determine whether they are clearly erroneous."
Lysenko v. Sawaya, 1999 UT App 31 ¶ 9, 973 P2d 445, 448 (*aff'd* 2000 UT 56).
- b. Issue: Whether there was sufficient evidence to support factual findings to support a conclusion that Appellant resided in the same residence as Appellee and was, therefore, a cohabitant under the Cohabitant Abuse Act.

Determinative law: Utah Code Ann. § 30-6-1 et seq. (Cohabitant Abuse Act); Utah R. Civ. P. 52(a);

Standard of review: Whether the findings of fact are supported by the evidence is reviewed under the clear error standard. Findings will be upheld unless the finding is against the clear weight of the evidence, or the appellate court reaches “a firm conviction that a mistake has been made.”

ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 255 (Utah App.1997). The party asserting the lack of evidentiary support must marshal the evidence supporting the finding and demonstrate that it is insufficient. *Id*; *Pasker, Gould, Ames & Weaver, Inc. v. Morse*, 887 P.2d 872 (Utah App. 1994).

- c. Issue: Whether, under the Cohabitant Abuse Act, the trial court was correct in its legal conclusion that Appellant “resided in the same residence” as Appellee.

Determinative law: Utah Code Ann. §§ 30-6-1 et seq.

Standard of Review: Whether the trial court correctly interpreted the statutory language in reaching its legal conclusion is a question of law, which is reviewed on appeal for correctness. *Cox v. Krammer*, 2003 UT App 264, 76 P.3d 184.

DETERMINATIVE STATUTES

Utah Code Ann. § 30-6-1 (Supp. 2003)

As used in this chapter:

- (1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.
- (2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:
 - (a) is or was a spouse of the other party;
 - (b) is or was living as if a spouse of the other party;
 - (c) is related by blood or marriage to the other party;
 - (d) has one or more children in common with the other party;
 - (e) is the biological parent of the other party's unborn child; or
 - (f) resides or has resided in the same residence as the other party.

(Remainder of text is set forth in Appendix "A.")

Utah Code Ann. § 30-6-2 (Supp. 2003)

- (1) Any cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.
- (2) A petition for a protective order may be filed under this chapter regardless of whether an action for divorce between the parties is pending.
- (3) A petition seeking a protective order may not be withdrawn without approval of the court.

STATEMENT OF THE CASE

Nature of the case.

This is an appeal from the issuance of a protective order by the Eighth Judicial District Court in and for Daggett County, Manila Department, State of Utah. The trial court was asked to decide, *inter alia*, whether Appellant, who is a resident of Mountain View, Wyoming, resided in the same residence as Appellee, who resided in Manila, Utah.

Course of proceedings

On June 4, 2003, the Eighth Judicial District Court in and for Daggett County, Manila Department, State of Utah, issued an *ex parte* Protective Order. The order directed that it be served in Mountain View, Wyoming. By arrangement with counsel, the Respondent came to Utah and presented himself to the Daggett County Sheriff's office and was served. An evidentiary hearing was held on September 5, 2003.

Disposition at trial

Following the evidentiary hearing, the trial court announced its ruling from the bench, finding that Appellant and Appellee resided in the same residence in Manila, Utah. The trial court found that "domestic violence or abuse" had occurred and issued a Protective Order under Utah's Cohabitant Abuse Act, Utah Code Ann. §§ 30-6-1 *et seq.* (sometimes referred to as the "Act").

STATEMENT OF RELEVANT FACTS

1. The parties to this case are: (1) Appellant, Ashely J. Bonser, who was Respondent

below and is hereafter referred to as “Bonser” and (2) Appellee, Andrea N. Keene, who was Petitioner below and is hereafter referred to as “Keene.” Record on Appeal p. 1 (hereafter “R.O.A.”)

2. Appellee Keene is a resident of Manilla, Utah. (R.O.A. p. 6.)
3. On June 4, 2003, Keene swore out a petition for a protective order under the Act, alleging that Keene and Bonser “have resided in the same residence.” (R. O. A. 6-13.)
4. Keene’s petition alleged incidents of domestic violence happened on May 31, 2003 in Manilla, Utah. (R. O. A. 7-8.)
5. Keene’s petition on its face alleged that Appellant Bonser should be served with the *ex parte* protective order in Mountain View Wyoming. (R.O.A. 13.) The *Ex Parte* Protective Order commands that it be served in Mountain View, Wyoming. (R.O.A. 18 .)
6. On September 5, 2003, the Honorable John R. Anderson held a Protective Order hearing at which the following facts were adduced.
 - a. Bonser was born and raised in Mountain View, Wyoming. (Transcript p. 42, ll. 9 - 24, p. 51, l. 25)
 - b. Prior to the events alleged, Bonser worked for a Wyoming Health and Safety, later called BSI, out of Mountain View, Wyoming. (Transcript p. 6, ll. 1-9, p. 54, ll. 3-7)

- c. Bonser received his mail in Mountain View, Wyoming. (Transcript p. 57, l. 25, p. 58, ll. 1-2)
- d. Bonser expressly disavowed any intention to reside at Andrea Keene's residence. (Transcript p. 57, ll. 1-17) .
- e. Bonser kept his property in Mountain View, Wyoming. (Transcript p. 58 ll. 1 - 10)
- f. Respondent and five witnesses testified that Bonser had been a resident of Mountain View Wyoming since birth and had never resided in Manilla, Utah. (Transcript p.42, l.7; p.43, l.9; p.47, l.17; p.48, l. 5; p.49. ll.4-11; p.50, ll. 4 -22; & p.51, l.23 - p.58, l.10.)
- g. Bonser is an avid fisherman and frequently goes fishing on Flaming Gorge Reservoir while "putting in" out of Manilla, Utah. (Transcript p. 48. ll. 7-13)
- h. Bonser met Keene who was working as a waitress at a restaurant in Manilla, Utah and they became intimately involved from March 2003 through May 2003. (Transcript p. 3. ll. 5-25; p. 4 ll. 1 - 17)
- i. Bonser would spend the night at Keene's trailer most of the nights when he had gone fishing on Flaming Gorge, but only when Keene was also present. (Transcript p. 72, ll. 9-14)
- j. Keene testified that Bonser was a frequent overnight visitor in her residence

located at #10 Scott's trailer Park, Manilla, Utah during the months of March, April and May 2003. (Transcript p. 3-4)

- k. Keene also testified that Bonser left his boat and fishing clothes stored at her home during those months (Transcript p. 4, l. 23-24, p. 5, l. 3) and that he gave her a clothes dryer, a TV, a DVD player and a vacuum cleaner which she has retained. (Transcript p. 5, l. 10-12)
 - l. Keene admitted that Bonser did not receive his mail at her residence (Transcript p. 28, ll. 10-11), that he worked for BSI services, Mountain View, Wyoming (Transcript p. 6, l. 3; R.O.A. 92), that he received no bills at her home (Transcript p. 28, l. 19-21) and that he only gave her \$90.00 for food as a "one time deal" (Transcript p. 30, ll. 4-5.)
7. Following the close of evidence and the argument of counsel Judge Anderson made his ruling which is reproduced in its entirety in Appendix "B".

SUMMARY OF THE ARGUMENT

Bonser, who is a legal resident of the state of Wyoming, had an intimate relation with Keene from late March 2003 through May 31, 2003. Keene is a legal resident of Utah, residing in Manila, Utah. Although they disputed the frequency of such visits, Bonser sometimes stayed overnight at Keene's house. Under the Cohabitant Abuse Act, a Protective Order can be issued only against a cohabitant as defined in that act. In this case, Bonser was a cohabitant only if he resided in the same residence with Keene. If

Bonser was not a resident there, the Cohabitant Abuse Act did not apply and Keene's remedy was for equitable relief through restraining order or other remedy. A common residence, however, may not be in two different states, or it is simply not the "same residence." The trial court, however, found that Keene had her residence in Manilla, Utah. Then it interpreted the statute to allow Bonser to choose to not make Utah his residence, yet still reside with Keene, who did reside in Utah.

The trial court, however, failed to make appropriate factual findings to support its legal conclusion that Bonser had a common residence with Keene. Utah R. Civ. P. 52 requires specific findings of fact. The trial court's decision never stated the findings necessary under Rule 52. While under limited circumstances appellate courts may imply findings of fact, this requires that there are not a matrix of alternative factual findings available and clear evidence that the trial court actually considered and necessarily made the necessary findings. That is not this case. There were disputed facts, and several possible factual determinations. Consequently, findings cannot be implied, and the findings needed to support the conclusion that Bonser was a resident in Manila, Utah are lacking.

Moreover, the evidence was insufficient to support those necessary findings of fact. Utah case law sets forth a variety of factors to determine residency and in a variety of contexts. After marshaling all the evidence in support to findings the court should have made, virtually none of it evidences the facts necessary to conclude Bonser resided

in the same residence with Keene in Manilla, Utah. That is perhaps why the trial court's findings of fact were sparse or nonexistent.

Finally, the trial court erred when it concluded that Bonser had a residence in Manila, Utah, which he shared with Keene. That legal conclusion was based on the trial court's incorrect determination that the statutory definition of residence had to be "broad" to "cover folks who are entitled to protective orders." Because that was its stated basis, the trial court's logic was circular and result-oriented. The conclusion was further flawed because the statute is not broad, but specific, and the trial court ignored or misinterpreted Utah law delineating what is required to show residency.

ARGUMENT

I. The Trial Court Failed to Make the Necessary Factual Findings to Support its Legal Conclusion That Bonser Resided in the Same Residence as Keener (and was, Therefore a Cohabitant Under the Act).

The Actual Findings are Inadequate.

The law in Utah has long been that "[i]t is necessary that the conclusions of law find support in, and arise out of, the findings of fact." *Needham v. First Nat. Bank*, 85 P.2d 785 at 787, 96 Utah 432 (Utah 1938){citations omitted}; Utah R. Civ. P. 52. On the issue of whether Bonser resided in the same residence with Keene and was therefore was a cohabitant under the Act, the trial court announced its ruling without specific findings of fact whatsoever. It ruled as follows:

The issue of jurisdiction that Mr. McIntyre has raised deals with - I think the Court would interpret that as a broad definition to cover folks who are

entitled to protective orders that have resided or are residing in the same residence. I interpret that as meaning not that Mr. Bonser chose to make Utah his residence. For the purposes of a statute in the definition, I'm going to find that we have jurisdiction. Mr. Bonser and Ms. Keene were residing or had resided in the same residence, residence being her house trailer with a bedroom and a bed. That's pretty clear I think under the statute.

(Transcript pp. 90 - 91.)

The trial court also made an oblique reference to Keene's lack of credibility, stating "[i]f we had believed her testimony, I probably wouldn't have done that . . ." *Id.* p. 92. This apparently refers to the court's decision regarding firearms, but the record is not clear whether it reflect the court's opinion on her credibility in other areas. The trial court made no other findings and gave no clear indication of what might have been in the "mind of the court" when it concluded residency existed. *See id.* p.p. 90 -92.

That ruling is simply inadequate for its purposes.

Rule 52(a) requires that a trial court find facts specially in all actions tried upon the facts without a jury. Such findings of fact must clearly indicate the "mind of the court," and must resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon. Furthermore, failure of a trial court to enter adequate findings requires the judgment to be vacated.

Parks v. Zions First Nat. Bank, 673 P.2d 590 at 601 (Utah 1983). Here, however, the trial court did not address the issues of material fact on the residency issue. Its findings of fact are simply insufficient to support its conclusion that the parties resided together in the same residences.

Although, as noted below, Bonser believes the evidence Keene presented did not

address the necessary indicia of residence, the trial court made no findings on the indicia Keene did raise. For instance, although there was evidence on some matters, the trial court did not make any finding that Bonser ever regularly stayed overnight with Keene, nor did the trial court make a finding that Bonser left any of his clothing or other possessions at Keene's residence when he was not there. Nor did it indicate any tie between those facts and his residency status.

On other indicia, the trial court did not find that Bonser received any mail at Keene's residence, worked out of there, voted there, had family there or otherwise had any objective indicia of residence. It did however, implicitly find that it was somehow not necessary for Mr. Bonser to give up Wyoming residence to reside with Ms. Keene at her residence in Utah.

By deciding that it should broadly interpret the definition of "cohabitant" "to cover folks who are entitled to protective orders," and then leaping to the conclusion that Bonser and Keene had resided together, the trial court used circular reasoning to bootstrap itself into issuing a protective order. *See* transcript at p.90, l.23-24. Certainly if the trial court had determined that it was necessary to protect Keene, there were many less intrusive remedies available to Keene and Judge Anderson (e.g. restraining orders or peace bonds). The trial court failed to set forth sufficient reasons for its decision so that it could be reviewed on appeal.

Implied Findings are not Warranted.

Under certain circumstances an appellate court may imply findings when the record shows the trial court necessarily made a finding that it failed to state. But those circumstances are limited. To imply such missing findings of fact, “there must be clear evidence that the court ‘actually considered’ and ‘necessarily’ made its findings” *Miller v. Martineau & Co., C.P.A.*, 1999 UT App. 216 ¶ 46, 983 P.2d 1107, 1116 - 1117 (quoting *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah App.1993)). Missing findings of fact will not be implied “where there is a ‘matrix of possible factual findings.’” *Miller*, 1999 UT App. 216 ¶ 46 (quoting *Adams v. Board of Review*, 821 P.2d 1, 6 (Utah App.1991)).

Here there was just such a matrix of possible findings because Keene’s evidence regarding indicia of residence was disputed. Much of Bonser’s was not. The factual disputes centered around how much time Bonser spent at Keene’s trailer, what items he kept there, and what Bonser’s intent was regarding residency. On this last item, it was undisputed that Bonser never intended to make Manila, Utah or Keene’s trailer his residence. Transcript p. 57.

On that first issue of time spent, Keene testified that Bonser stayed at her trailer on a regular basis - 6 to 7 nights per week, except when Bonser was working. Transcript p. 5. Judge Anderson had remarked, however, that on at least some issue, Keene’s testimony was less than credible. *Id.* p. 92. Moreover, Bonser testified as to his work schedule and his diary. His testimony showed that he was out on jobs for large blocks of

time from late March though mid May of 2003. Under the circumstances it was impossible that he stayed at the trailer for significant periods of time. He testified that over a two month period, his stays at Keene's trailer were basically weekends. *See* Transcript p.p. 53-56. The longest he ever stayed there was four days, when he was sick. *Id.* p. 56. Other witnesses testified that Bonser only stayed there a few times (Transcript p. 42); that he lived with his parents in Mountain View, Wyoming (*id.* p. 50) and that Bonser spent mostly weekends at Keene's trailer. *Id.*

Likewise, there was conflicting testimony regarding what things were kept by Bonser at Keene's trailer. Keene testified that he kept all sorts of items there and that he had his own drawer. *Id.* p. 5. Yet Bonser testified that he did not keep much, and that what he did keep was in a travel bag or on a chair. *Id.* p. 56. On cross examination, Keene had admitted that the clothing that was there was very limited: one or two sweatshirts; a pair of shoes; one pair of socks; a tee shirt and a pair of shorts. *Id.* p. 27. Likewise, she had admitted that Bonser did not receive mail or bills there. *Id.* p. 28.

Thus, just based on these issues there potentially different factual findings. Accordingly, what was in the mind of the trial court cannot be implied. Notably Bonser was very clear, and it was uncontroverted, that he never intended to give up his Wyoming residency. The trial court seemed satisfied that he had not done so, but apparently did not consider it relevant. (Transcript p. 90 -91)

II. The Evidence at Trial was not Sufficient to Support the Findings of Fact the Trial Court Should Have Made.

“[T]o obtain a protective order, [Keene] was required to show that she was a cohabitant.” *Bailey v. Bayles*, 2002 UT 58, ¶24 52 P.3d 1158. Although there are several alternative definitions, all but one were inapplicable: Bonser and Keen were never married, legally or at common law; they are not related by blood, and have no children in common - born or expected. Thus, the only definition of “cohabitant” to apply is “a person who is 16 years or older who . . . resides or has resided in the same residence as the other party.” Utah Code Ann. § 30-6-1 (2)(f) (2003). That is the definition Keene chose, it was her burden to establish, and the one the trial court “found”.

Findings will be overturned if they are against the clear weight of the evidence, or the appellate court reaches “a firm conviction that a mistake has been made.” *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct.App.1997). Bonser is required to marshal all the evidence in support of the finding and then demonstrate why it is legally insufficient. *Id.* In this case, however, the findings of fact were scant at best. Thus, here he must focus on findings the trial court *should* have addressed, but did not.

The legislature has statutorily defined the word “cohabitant” as it relates to the Cohabitant Abuse Act.. Utah Code Ann. §30-6-1 (1998). Courts are generally required to apply the plain meaning of statutes as defined by the legislature. Here cohabitant is defined in terms of residence - that is “has resided in the same residence.”

When one focuses on the phrase “residing in the same residence” the plain meaning of the statute becomes clearer, as do the necessary factual inquiries. A resident

is something more than a mere inhabitant. *Mesa Development Co. v Sandy City Corp.*, 948 P.2d 366, 369 (Utah App. 1997). In *Travelers/Aetna Ins. Co. v. Wilson*, 2002 UT App 221, 51 P.3d 1288, this Court adopted the dictionary definition as helpful in determining the meaning of the phrase “residing in,” stating:

Webster's Third International Dictionary defines "reside" and "residing" as "to dwell permanently or continuously," "have a settled abode for a time," and "have one's residence or domicile." Webster's Third New International Dictionary 1931 (1986). In addition, Webster's defines "resident" as "dwelling or having an abode for a continued length of time."

Travelers, 2002 UT App 221 ¶ 13, 51 P.3d 1288. The Court went on to note that:

[r]elevant factors include voting, owning property, paying taxes, having family in the area, maintaining a mailing address, being born or raised in the area, working or operating a business, and having children attend school in the forum. In addition, one retains his residence or domicile until he acquires a new one.

Travelers at ¶14 {citations omitted}.

Utah Courts have noted that a resident is distinguished from a mere temporary or transient visitor in the context of insurance policies. *Government Employees Ins. Co. v. Dennis*, 645 P.2d 672, 676 (Utah 1982). Property ownership of itself does not make one a resident. *Mesa Development Co., Inc. v. Sandy City Corp.*, 948 P.2d 366 (Utah App. 1997). Notably voting is one of the indicia of residency. Simple abode in Utah does not establish residency for voting. Indeed, statute sets forth numerous requirements under which one could stay in Utah for even extended time periods and yet *never* be a resident. Basically one must reside in Utah with the intention to continue permanent or indefinite

residence. Utah Code Ann. § 20A-2-105(2) (2002). Simple presence will not establish residency in Utah. *Id.* § 105(4)(c). Even in the context of alimony termination, a *continuous* stay of two months and ten days did not constitute “residency” or cohabitation - even if intimate relations are involved. *Knuteson v. Knuteson*, 619 P.2d 1387 (Utah 1980). In *Knuteson*, the Utah Supreme Court noted reliance on the dictionary definition of “reside” which is “[t]o dwell permanently or for a length of time; to have a settled abode for a time.” *Knuteson*, 619 P.2d 1387, 1389 (quoting Webster’s New Twentieth Century Dictionary, 2nd Edition).

At trial, Keene’s evidentiary focus was very limited. She presented no evidence regarding what Bonser’s intent was regarding residence, or settlement, or permanency. Nor did she present evidence about voting, owning property, taxes, having family in the area, maintaining a mailing address, operation of a business or employment, or Bonser’s abandonment of his residence in Wyoming.

She did, however, present evidence regarding what items Bonser kept at her trailer and how often he stayed there. As noted above, there were significant disputes on some of these matters. Nonetheless, in the light most favorable to Keene, her evidence was as follows: Bonser met Keene sometime about February 2003. Towards the end of March Bonser began staying overnight at Keene’s about two to three times per week. Transcript p. 4. Some time about the beginning of April he left his boat there (awaiting repairs) and then some fishing and work clothes. Transcript p.p. 4 -5. By the end of April, more of

Bonser's effects were there, including some tools, fishing gear, and personal effects such as a toothbrush and shampoo. *Id.* Bonser stayed there overnight as much as six to seven times a week "unless he was out of town with work." *Id.* She did not state how much he was out of town and other evidence established that he was out of town a lot. Keene knew that Bonser worked for BSI Services, although she did not know what that stood for or exactly what he did. Transcript p.p. 6, 29. At some point Bonser had a key. In short, she established that Bonser used her trailer to some extent and stayed there overnight. But even viewing the evidence in the light most favorable to her, significant questions remain as to exactly how often Bonser stayed there. The evidence presented does not establish that it was Bonser's residence or that he resided there.

Given that Keene had the burden of proof and was represented by private counsel and knew that she must prove Bonser resided in the same residence with her, what is remarkable is what was not presented. There was no evidence that Bonser contributed anything to rent, utilities, repairs or maintenance of the residence. There was no evidence that Bonser did any chores around Keene's home. There was no evidence that Bonser ever went there unless Keene was either there or expected to be there shortly.

There was evidence that Bonser worked in and from an operations base in Wyoming, received his mail in Wyoming, had been born and raised in Wyoming. He maintained his Wyoming hunting and fishing privileges by maintaining a residence in Wyoming. His family lived in Wyoming and they and his friends testified that Bonser

lived with his father. Transcript p.p. 42, 47, 49 and 50. There was evidence that he had no intention of giving up his Wyoming residence.

Under all the definitions and common meanings of the term “residence” the trial court would have had to also make findings regarding such things as intent, receipt of mail or mailing address, length or duration of stay, frequency of stay, permanence of abode, abandonment of his previous residence, voting, presence of family, work or business, voting, paying taxes, etc. The evidence presented, however, gave the trial court little evidence from which it could have pronounced factual findings on these issues that would have supported concluding Bonser was a resident. To a large extent, the evidence concerning these other issues all militate in favor of Bonser’s residence being Mountain View, Wyoming and not Manila, Utah. His stays in Keene’s trailer were relatively limited. There was no evidence that he voted in Manila and the evidence presented would have precluded him even being a voter there had he tried. Nor could he have registered a vehicle in Utah as a resident. Utah Code Ann. §41-1a-202(b)(i) (1994). In sum, the evidence was insufficient to conclude that Keene’s trailer was ever Bonser’s residence. Bonser’s involvement with Ms. Keene falls more in the category of his being a transient or temporary visitor.

III. The Trial Court Erred in Concluding That Bonser was a Cohabitant.

“Before a protective order may issue, a court must first conclude that the parties to the protective order are cohabitants.” *State v. Hardy*, 2002 UT App 244, ¶17, 54 P.3d

645, 649. As noted above, that is a legal determination that Bonser was a person who had “resided in the same residence” with Keene. Utah Code Ann. § 30-6-1(2) (f) (Supp. 2003) (portions omitted). On that issue the court set forth its ruling as follows:

The issue of jurisdiction that Mr. McIntyre has raised deals with - I think the Court would interpret that as a broad definition to cover folks who are entitled to protective orders that have resided or are residing in the same residence. I interpret that as meaning not that Mr. Bonser chose to make Utah his residence. For purposes of a statute in the definition, I going to find that we have jurisdiction. Mr. Bonser and Ms. Keene were residing in or had resided in the same residence, residence being her house trailer with a bedroom and a bed. That’s pretty clear I think under the statute.

Transcript p.p. 90 -91. Nothing more in the trial court’s ruling addresses the issue. *See id.* p.p. 90-92. As noted, the ruling is circular and bootstraps itself to the conclusion - going something like “if violence occurred, Keene needs a protective order and, therefore, we broadly construe the statute so that Bonser is a cohabitant.”

But the definition of cohabitant here is not broad. It is very specific, delineating specific categories of people who are cohabitants and, accordingly, covered by the Act. Those persons are set forth in Utah Code Ann. § 30-6-1(2) (a) through (f). Although other remedies may lie for persons not defined, the Cohabitant Abuse Act does not apply to them.

Judge Anderson gave little indication why or how he found that Bonser resided in Keene’s residence. The only clue is that he found that Keene’s residence consisted of a house trailer with a bedroom and a bed. Because of the trial court’s apparent focus on the bedroom, it may be that Judge Anderson concluded the exercise of intimate relations,

which often relates to cohabitation, was a triggering component in the Cohabitant Abuse statute.

With all deference to Judge Anderson, the statute does not support that interpretation. The common law might have. But statutory definition of cohabitant at issue here is not one which deals with parties who are or have had intimate relations. Those were delineated in subsections (a) through (e), that is: spouses, living as if spouses, related by marriage, and children in common - whether actual or expected. Utah Code Ann. § 30-6-1(2) (a) through (e). The definition at issue here was specifically defined only in terms of residency. When a term is statutorily defined, “we look to that definition for guidance when interpreting the statute rather than revert to the “ordinary and accepted meaning” of the term.” *Grynberg v. Questar Pipeline Co.*, 2003 UT 8 ¶ 30, 70 P.3d 1, 8 (citation omitted). Thus, while term “cohabitant” often carries connotations of intimate relations, the definition at issue here appears to cover the situation where parties share a residence without the necessity of proof of intimate relations, *e.g.* a renter in one’s home, a roommate, *etc.*

Moreover, in other contexts, the word “cohabitation” has a long history of interpretation in Utah. Prior to statehood the word was the subject of a great amount of juridical discourse as a result of the passage of the Edmunds Act. *See U.S. v. Cannon*, 7 P. 369, 4 Utah 122 (Utah Terr. 1885), *et al.*¹ Those cases involved prosecutions for

¹ *U.S. v. Eldredge*, 14 P. 42 (Utah Terr. 1887); *U.S. v. Clark*, 14 P. 288 (Utah Terr. 1887); *U.S. v. Smith*, 14 P. 291 (Utah Terr. 1887); *U.S. v. Peay*, 14 P. 342 (Utah Terr. 1887); *U.S.*

unlawful cohabitation where it was not possible to prove that the parties were engaging in intimate relations. For well over a century, Utah Courts have often construed cohabitation at common law as being independent of intimate relationships. And since statehood the word has continued to evolve. “To some extent, the meaning of the term [cohabitation] depends upon the context in which it is used.” *Haddow v. Haddow*, 707 P.2d 669 at 671 (Utah 1985); *Hill v. Hill*, 968 P.2d 866 (Utah App. 1998).

It may be that the trial court misconstrued the meaning of “cohabitant” based on misperceptions as to the common law, or how that term should be applied under the Cohabitant Abuse Act. Given the language of the ruling, however, it is clear that the trial court did not focus on the concept of a common residence dictated by the statute.

CONCLUSION

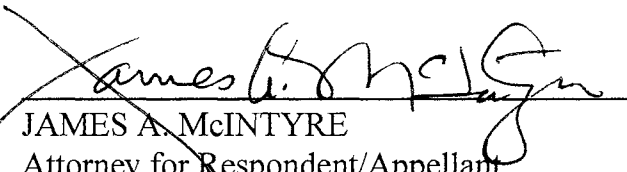
The trial court failed to make the findings of fact necessary to support its legal conclusion that Appellant Ashley Bonser resided in the same residence with Appellee Andrea Keene. Normally, this would necessitate a remand for further findings. However, when one looks at the evidence that was presented, it was insufficient to support findings that would support the conclusion that Bonser did reside with Keene in the same residence. Finally, the trial court misconstrued the definition of cohabitant in

v. Kirkwood, 13 P. 234 (Utah Terr. 1887); *U.S. v. Bassett*, 13 P. 237 (Utah Terr. 1887); *U.S. v. Eldredge*, 13 P. 673 (Utah Terr. 1887); *U.S. v. Groesbeck*, 11 P. 542 (Utah Terr. 1886); *U.S. v. White*, 11 P. 570 (Utah Terr. 1886); *U.S. v. Bromley*, 11 P. 619 (Utah Terr. 1886); *U.S. v. Snow*, 9 P. 501 (Utah Terr. 1886); *U.S. v. Simpson*, 7 P. 257 (Utah Terr. 1885); *U.S. v. Musser*, 7 P. 389 (Utah Terr. 1885).

this matter. Remand would be futile and the matter should be reversed.

DATED this 25th day of March, 2004.

McINTYRE & GOLDEN LLP


JAMES A. McINTYRE
Attorney for Respondent/Appellant

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CERTIFICATE OF SERVICE

I certify that on the 24 day of March, 2004, I caused a true and correct copy of the foregoing Appellant's Opening Brief to be mailed by first class mail to the following:

Randall Gaither
Attorney at Law
159 West 300 South Broadway, #105
Salt Lake City, Utah 84101

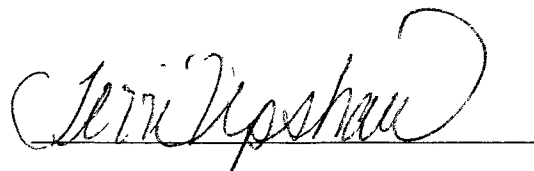
A handwritten signature in cursive script, appearing to read "Kevin Koshau", is written over a horizontal line.

Exhibit A

Citation/Title
 JT Code § 30-6-1, Definitions.

Utah Code § 30-6-1

UTAH CODE, 1953
WEST'S UTAH CODE
TITLE 30. HUSBAND AND WIFE
CHAPTER 6. COHABITANT ABUSE ACT

Current through End of 2003 1st Sp. Sess.

§ 30-6-1. Definitions.

As used in this chapter:

(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

(2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

- (a) is or was a spouse of the other party;
- (b) is or was living as if a spouse of the other party;
- (c) is related by blood or marriage to the other party;
- (d) has one or more children in common with the other party;
- (e) is the biological parent of the other party's unborn child; or
- (f) resides or has resided in the same residence as the other party.

(3) Notwithstanding Subsection (2), "cohabitant" does not include:

- (a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
- (b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Court clerk" means a district court clerk.

(5) "Domestic violence" means the same as that term is defined in Section 77-36-1.

(6) "Ex parte protective order" means an order issued without notice to the defendant in accordance with this chapter.

(7) "Foreign protective order" means a protective order issued by another state, territory, or possession of the United States, tribal lands of the United States, the Commonwealth of Puerto Rico, or the District of Columbia which shall be given full faith and credit in Utah, if the protective order is similar to a protective order issued in compliance with Title 30, Chapter 6, Cohabitant Abuse Act, or Title 77, Chapter 36, Cohabitant Abuse Procedures Act, and includes the following requirements:

- (a) the requirements of due process were met by the issuing court, including subject matter and personal jurisdiction;

JT Code § 30-6-1, Definitions.

(b) the respondent received reasonable notice; and

(c) the respondent had an opportunity for a hearing regarding the protective order.

(8) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.

***10320** (9) "Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications.

(10) "Protective order" means an order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner and respondent have been given notice in accordance with this chapter.

Amended by Laws 1993, c. 137; Laws 1995, c. 300, § 2, eff. July 1, 1995; Laws 1996, c. 244, § 2, eff. April 29, 1996; Laws 1997, c. 303, § 1, eff. May 5, 1997; Laws 1998, c. 282, § 12, eff. May 4, 1998; Laws 2000, c. 170, § 1, eff. May 1, 2000; Laws 2001, c. 9, § 51, eff. April 30, 2001; Laws 2003, c. 68, § 1, eff. May 5, 2003.

Search this disc for cases citing this section.

Exhibit B

IN THE EIGHTH DISTRICT COURT IN AND FOR DAGGETT COUNTY
MANILA DEPARTMENT, STATE OF UTAH

ANDREA N. KEENE,	:	Case No. 034800003
	:	
Petitioner,	:	
	:	
v	:	
	:	
ASHLEY J. BONSER,	:	
	:	
Respondent.	:	

HEARING ON PROTECTIVE ORDER SEPTEMBER 5, 2003

BEFORE

HONORABLE JOHN R. ANDERSON

CAROLYN ERICKSON, CSR
Certified Court Transcriber
FILED
Utah Court of Appeals 1775 East Ellen Way
Sandy, Utah 84092
JAN 28 2004 801-523-1186

NOV - 3 2003

Paulette Stagg
Clerk of the Court

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1 finds a protective orders but disorderly conduct, not related
2 to domestic violence. If the Court would review that
3 particular portion of the code, if (inaudible) that that does
4 not trigger the prohibition (inaudible), if the Court is
5 inclined to issue any sort of a protective order.

6 Equally, it is not appropriate to issue the
7 protective order because we don't think these people were co-
8 habitants. Mr. Bonser was a resident of Wyoming and has
9 constantly been a resident of Wyoming and all of his relatives,
10 friends have testified that he's always resided in Wyoming and
11 that basically precludes him from having resided in the same
12 residence as Mr. Keene and that, in and of it itself, is
13 sufficient for the Court not to find him to be a co-habitant
14 and therefore not subject to the (inaudible). Thank you.

15 THE COURT: Thank you. Bear with me for a few
16 minutes and let me examine my notes and look at these exhibits
17 and I'll come back out and give you the ruling.

18 (Whereupon a recess was taken)

19 THE COURT: Thank you. Please be seated.

20 First thing I guess I should address, again, this is
21 Andrea Keene v. Ashley Bonser, protective order hearing. The
22 issue of jurisdiction that Mr. McIntyre has raised deals with -
23 I think the Court would interpret that as a broad definition to
24 cover folks who are entitled to protective orders that have
25 resided or are residing in the same residence. I interpret

1 that as meaning not that Mr. Bonser chose to make Utah his
2 residence. For purposes of a statute in the definition, I'm
3 going to find that we have jurisdiction. Mr. Bonser and Ms.
4 Keene were residing or had resided in the same residence,
5 residence being her house trailer with a bedroom and a bed.
6 That's pretty clear I think under the statute.

7 The second thing I need to address is whether there
8 has been a case justifying the issuance of a permanent order.
9 It seems to me that burden has been met by a preponderance of
10 the evidence. From the testimony that was given by Ashley
11 Bonser, he was agitated, he was excited, he was mad, he broke
12 his fishing pole, he hit his truck and more importantly to me
13 he had many opportunities to leave. He kept going back into
14 the house to settle her down. That's the problem. That's the
15 problem. Why didn't he just leave? She said/he said. He said
16 his hands may have slipped up to her neck. Well, they probably
17 did. I find that they did. The exhibit demonstrates that. So
18 I'm going to make the order permanent. And let me say this, I
19 have heard probably 200 or 300 of these cases and I've never
20 taken anybody's guns away from them in the order but I'm going
21 to do that in this case. Mr. Bonser by his own testimony, in
22 an agitated state, said he threw rounds into that shotgun.
23 That's crazy. And I think it warrants me taking his guns away
24 and the sheriff should be instructed to collect those guns and
25 hold them until further disposition in the other case at least.

If we had believed her testimony, I probably wouldn't have done that although it wouldn't make sense for him to come in the house with a loaded rifle and badger his way in, but for him to throw rounds in a shotgun in that state of mind they were in is, in my mind, a very scary thing so that's my ruling and those are my reasons and I have taken the liberty to fill out the permanent protective order. I'll have my bailiff make copies. Everybody can take their copy before they leave and I'll be in recess. I appreciate the way the case was tried.

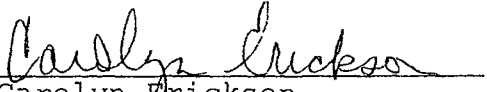
(Whereupon the hearing was concluded)

-C-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge John R. Anderson was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 8th day of October, 2003 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

