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Keene v. Bonser : Reply Brief

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

REPLY BRIEF FOR APPELLANT
ASHLEY J. BONSER

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

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ARGUMENT

Appellee (hereinafter “Keene”) makes two arguments, neither of which respond to Appellant’s (hereinafter “Bonser’s”) opening brief, but which illustrate the fundamental difference in the parties’ understanding of the Cohabitant Abuse Act (hereinafter “Act”). Bonser understands that the Act is limited to those who are “cohabitants” (as defined in the act itself) who engage in various acts which are criminal, independently from the Act. Keene’s view is more expansive. In her view the Act’s application is dependent upon the type of activity engaged in by the parties, rather than whether the parties meet the statutory definition of cohabitant. Keene’s arguments will be dealt with in the order presented.

POINT I

KEENE ERRS WHEN SHE ARGUES “*THE COURT SHOULD AFFIRM THE ORDER ... [because] ... THE GROUNDS FOR REVIEW ARE SO INSUBSTANTIAL AS NOT TO MERIT FURTHER PROCEEDING.*”

Keene reargues, almost verbatim, the argument she previously made to this court in her motion for summary disposition that “[t]he appellate court should affirm the order which is a subject of the review by this court on the basis that the grounds for review are so insubstantial as not to merit further proceeding.” Keene deleted the word “appellate” from the heading and focused solely on the parties conduct, while ignoring entirely the issue of whether the parties were “cohabitants” under the statutory definition. Keene seems to argue that the definition of “cohabitant” should be broadly construed because the protections of the act will be otherwise “eroded.”

Clearly the Utah legislature could have chosen to define the term “Cohabitant” more broadly to encompass those who frequently engage in intimate relations, but do not live in a common abode or meet the “hyper-technical” traditional definitions of residing in a common residence. The legislature did not do so. When the legislature defined the term “cohabitant” in terms requiring a common residence, it clearly meant to indicate that to attain the status of being a cohabitant, one must intend to permanently live in a common abode or home one with the other. In other words if a police officer asked where you live, the truthful response would be in that common abode. And as will be discussed below, this Court should not expand traditional notions of residence in this

case. In any case, Bonser's claim that he was not a cohabitant under the statutory definition is not so insubstantial as to warrant dismissal.

POINT II

KEENE ERRS WHEN SHE ARGUES THAT "*THE TRIAL COURT MADE SUFFICIENT FINDINGS AS TO THE ISSUE OF WHETHER THE RESPONDENT WAS A COHABITANT.*"

In making that second argument Keene utterly fails to set forth what findings the trial court did make and where those findings could be found. While it is perhaps not her burden to do so, those findings are vague at best and Keene again focuses on the findings of violence. But those acts are "domestic violence" only if committed by a cohabitant. Keene gives only one citation to any authority in her second argument, *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989). *Reid* deals with the evidentiary basis for findings that were actually made, not the failure to state a factual finding itself. Here the lower court simply made no findings on the issue of cohabitation. Thus it is impossible to tell if nonexistent findings were clearly erroneous.

Keene argues, as she did in the court below, that the statute should be broadly interpreted to include persons in her situation and that the protections of the statute would be eroded by any narrower construction. Keene completely fails to provide this court with analysis or authority to support her bare assertion. Generally, statutes are interpreted according to their plain meaning, with courts supplying nothing save interpretation of vague provisions. 75 Am. Jur. 2d 393, *Statutes*, §196 (1974).

Well-settled rules of statutory interpretation instruct us that [w]hen interpreting a statute, this court looks first to the statute's plain language to determine the Legislature's intent and purpose.

Hansen v. Eyre,, 2003 UT App 274, ¶ 7.

Bonser believes that the definition found in Utah Code Ann. §30-6-1(2)(a - f) (1993) is specific, narrowly drawn, clear and unambiguous. An emancipated person or one who is 16 years of age or more may be a cohabitant if they fall within one of the six categories of the definition, but if they don't, they simply are not cohabitants. Those categories are not broad, but specific. The legislative enactment itself leaves no doubt as to the intended coverage. The first five categories involve marriage, children and blood relationships, but the last is dependent upon residence. The lower court had no difficulty eliminating the first five categories because clearly the relationship between Bonser and Keene did not fall within any of those categories.

With respect to the last category the lower court concluded that the parties were “residing or had resided in the same residence, residence being her house trailer with a bedroom and a bed.” Transcript 91, Appendix B, Appellant’s Opening Brief. Notwithstanding Keene’s claim in her brief, the Trial Court, did not make any findings other than that ultimate conclusion set forth above. However, the Court did state “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.” (Transcript 90, Appendix B, Appellant’s Opening Brief.) The trial court’s statement indicates that it

impermissibly added to the definition of cohabitant in its interpretation. In short the lower court ruled that if there is some abuse, the parties must be cohabitants, because Keene should be entitled to a protective order.

The Court of Appeals recently held that

In considering the plain language of a statute, courts " 'presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.' We consider other methods of statutory construction only when a statute is ambiguous.

State v. Germonto, 2003 UT App 217, ¶7, 73 P.3d 978, (Utah App. 2003) citing *Arredondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶12, 24 P.3d 928 (additional citations omitted).

Unfortunately, the Trial Court did not explicitly state that the statutory definition was ambiguous or otherwise provide the basis for its ruling. Judge Anderson simply did not elaborate on why the plain meaning of the words should be expanded, he just did so.

It cannot be seriously questioned that the legislature was well acquainted with the meanings of "residence" and "residing in." Both concepts involve an intentional act of making one's abode in a particular place and the intention to make that place one's permanent home, thus the Trial Court's departure from traditional rules of statutory construction is a mystery.

It is undisputed that Keene had a residence in Manilla, Utah, to wit: her house trailer with bedroom and a bed; however, it is likewise clear that the Trial Court was persuaded that Bonser never intended to make Utah his residence. The Trial Court found that it was not necessary for Bonser to make Utah his residence. Transcript 91, lines 1-2,

Appendix B, Appellant's Opening Brief. But how else could he reside with Keene, who did make Manilla, Utah her residence? What the evidence shows is that Bonser was, at best, a frequent overnight visitor in Ms. Keene's residence, but did not intend to make her residence his residence. That is absolutely not the same thing as saying that the parties shared a common residence.

In this case, Bonser was a cohabitant only if he was a resident of the same residence as Keene. If Bonser was not a resident there, the Cohabitant Abuse Act did not apply. Keene could ask the State of Utah to prosecute Bonser for any criminal behavior and Keene herself could seek equitable relief through a restraining order, a peace bond or some other legal or equitable remedy; however, she could not seek a Protective Order under the Cohabitant Abuse Act unless Bonser resided in her residence. 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. There is no explanation of how that could be possible and the appellate court is left to simply speculate.

Keene argues: If the Court adopts Appellant's narrow scope of legal residency, the statute will be diluted and protections eroded. The courts will be limited in issuing protective orders in areas such as Manilla, Utah where persons travel back and forth

across state lines. A person could avoid a finding of cohabitation based upon a claim that they are of legal residence in another state or location. Appellee's Brief p. 15.

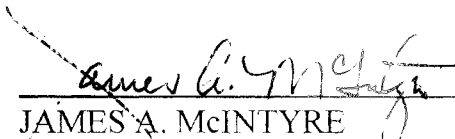
With respect to cohabitant protective orders Keene is exactly right, and rightly so! The courts are limited. It is the legislature that defines statutory terms. The legislature defined the term "cohabitant." It used the words "residence" and "residing in" in making its definition and those terms have well established meanings. If one is not a cohabitant under the statutory definition, then one is not entitled to a protective order under the Act. Other remedies notwithstanding, the Protective Order must be denied unless both parties were cohabitants.

CONCLUSION

Appellant respectfully requests that this Court reverse the decision of the trial court and dismiss Appellee's petition for a protective order.

DATED this 23rd day of June, 2004.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of June, 2004, I caused a true and correct copy of the foregoing Reply Brief of the Appellant to be mailed by first class mail to the following:

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A handwritten signature in black ink, appearing to be "Robert L. [unclear]", written over a horizontal line.