

2006

Buck v. Robinson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KAREN JEAN BUCK, Petitioner/Appellee, vs. ROBERT DEAN ROBINSON, Respondent/Appellant.	Appellate Case No. 20060760
--	------------------------------------

BRIEF FOR APPELLANT

**APPEAL FROM A RULING BY THE HONORABLE
ERNIE W. JONES, JUDGE FOR THE SECOND
DISTRICT COURT.**

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IN THE UTAH COURT OF APPEALS

KAREN JEAN BUCK,

Petitioner/Appellee,

vs.

ROBERT DEAN ROBINSON,

Respondent/Appellant.

Case No. 20060760

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This appeal is from a Ruling entered in the Second District Court on the 5th day of July, 2006, by the Honorable Judge Ernie W. Jones. The Utah Court of Appeals has original appellate jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(h).

ISSUES PRESENTED FOR REVIEW

WHETHER the trial court erred in upholding the practice of allowing court commissioners to hold evidentiary hearings, make rulings and determine the outcome of a petition for a protective order in contested domestic matters when such practice is an unconstitutional delegation of a core judicial function.

WHETHER the trial court erred in not finding that the practice of allowing court commissioner to hold evidentiary hearings in contested domestic matters is violative of Rule 6-401(J)(2) of the Utah Code of Judicial Administration.

WHETHER the trial court erred in denying a request for an evidentiary hearing

pursuant Utah Code Ann. §30-6-4.3(1)(e) (2006).

WHETHER the trial court erred in not finding Utah Code Ann. §30-6-4.3(1)(e) (2006) unconstitutional on its face since it does not provide for a jury.

WHETHER the trial court erred in concluding that the presentation of a facial challenge was a violation of Rule 11.

STANDARD OF APPELLATE REVIEW

The standard of appellate review in the first four issues raise both statutory and constitutional interpretation which this Court will “perform without deference to the trial court’s determinations.” *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217 (Utah 2004).

The standard of appellate review of issue five also involves statutory and constitutional interpretation which this Court will “perform without deference to the trial court’s determinations.” *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State*, 94 P.3d 217 (Utah 2004). The standard of appellate review of the issue of Rule 11 violations and sanctions is “involves a three-tiered approach: (1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.” *Morse v. Packer*, 15 P.3d 1021, 1025 (Utah 2000).

PRESERVATION OF ISSUES AND PROPRIETY OF REVIEW

The aforementioned issues were preserved at the trial level. Motion, pgs 37-46.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Appellant identifies the following constitutional provisions, statutes, ordinances and rules as those “whose interpretation is determinative” within the meaning of Utah R.

App. P. 24(a)(6):

Article I, section 10 of the Utah Constitution, provides that

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Rule 6-401(2)(D-K) and (3) of the Utah Code of Judicial Administration, provides that

(D) Make recommendations to the court regarding any issue, including a recommendation for entry of final judgment, in domestic relations or spouse abuse cases at any stage of the proceedings; (E) Require counsel to file with the initial or responsive pleading, a certificate based upon the facts available at that time, stating whether there is a legal action pending or previously adjudicated in a district or juvenile court of any state regarding the minor child(ren) in the current case; (F) At the commissioner's discretion, and after notice to all parties or their counsel, conduct evidentiary hearings consistent with paragraph (3)(C) below; (G) Impose sanctions against any party who fails to comply with the commissioner's requirements of attendance or production of discovery; (H) Impose sanctions against any person who acts contemptuously under Utah Code Section 78-32-10; (I) Issue temporary or ex parte orders; (J) Conduct settlement conferences with the parties and their counsel in a domestic relations case. Issues that cannot be settled shall be certified to the district court for trial; and (K) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court. (3) *Duties of court commissioner*. Under the general supervision of the presiding judge, the court

commissioner has the following duties prior to any domestic matter being heard by the district court: (A) Review all pleadings in each case; (B) Certify those cases directly to the district court that appear to require a hearing before the district court judge; (C) Except in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court; (D) Coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties; and (E) Refer appropriate cases to mediation programs if available. (4) *Prohibitions*. (A) Commissioners shall not make final adjudications of domestic relations matters.

Utah Code Ann. §30-6-4.3(1)(e) (2006), provides that

If the hearing on the petition is heard by a commissioner, either the petitioner or respondent may file an objection within ten days of the entry of the recommended order and the assigned judge shall hold a hearing within 20 days of the filing of the objection.

Rule 11(b) of the Utah Rules of Civil Procedure, provides that

By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

STATEMENT OF THE CASE

The Appellee filed a Verified Petition for Protective Order with the Second District Court on the 9th day of February, 2006. Page 1-8. The case was assigned to Judge Ernie W. Jones. An Ex Parte Protective Order was signed at 3:45 p.m. by W. Brent West. Page

9-10. A Notice of Hearing was prepared setting the Appellee's hearing for the 27th day of February, 2006, before Commissioner Daniel W. Garner.

On the 27th day of February, 2006, the Appellant appeared pro se and objected to the issuance of a permanent protective order. A hearing was held before Commissioner Garner wherein both parties were sworn and testimony was elicited. At the conclusion of the hearing, the Commissioner prepared and signed a Protective Order. Pages, 29-35. The Protective Order was then signed, immediately thereafter, by Judge John R. Morris. *Id.* The Appellant was served with a copy of the Appellee's Protective Order and signed an Acceptance that same day.

The Appellant filed a Motion and Memorandum to Declare as Unconstitutional the Practice of Allowing Court Commissioners to Conduct Evidentiary Hearings in Contested Protective Order Matters and a Facial Challenge to the Cohabitant Abuse Act. Pages, 37-46. Contained within the Motion, was a request for an evidentiary hearing pursuant to Utah Code Ann. §30-6-4.3. *Id.* The foregoing Motion was filed within ten days of entry of the Protective Order and was timely request for evidentiary hearing pursuant to Utah Code Ann. §30-6-4.3.

The Appellee's trial counsel filed a Memorandum in Opposition on the 29th day of March, 2006. Pages, 49-54. A Notice to Submit for Decision was filed on the 24th day of May, 2006. Pages, 55-56. A Ruling and Order to Show Cause was filed and issued on the 5th day of July, 2006. Pages, 57-60. Appellant filed his Notice of Appeal on the 25th day

of July, 2006. Pages, 64-65. A hearing on the trial court's Order to Show Cause was held on the 9th day of August, 2006, and the trial court imposed sanctions against Appellant's counsel in the amount of \$100.00.

SUMMARY OF THE ARGUMENT

It has been the practice in the Second District Court, Ogden Department, to allow court commissioners to conduct evidentiary hearings on contested applications for a protective order. The commissioners hear the evidence, make rulings on admissibility, and determine credibility of the witnesses. The commissioners decided whether a protective order should be granted. If a protective order is granted, the commissioner fills out the protective order form and signs the document in open court. The protective order is then taken to a judge who then signs the protective order. No findings of fact are prepared by the commissioners to be submitted along with the protective order when it is presented to the signing judge. This practice of allowing court commissioners to conduct full evidentiary hearings, rule on admissibility of evidence, determine credibility and "recommend" the issuance of a protective order is an improper delegation of a core judicial function which is reserved to the district court judges. The mere fact that the document is then signed by a judge, and in this case, not the assigned judge, does not save this unconstitutional process. The procedure of allowing court commissioners to hear and determine contested matters is violative of Rule 6-401(2)(J) of the Utah Code of Judicial Administration.

The district court should have granted an evidentiary hearing on a timely request as

provided by statute. The district court should have to hold a de novo jury trial on the legal claims brought by the Appellant with the court deciding the equitable remedy upon facts found by a jury, which are common to both. The Cohabitant Abuse Act is unconstitutional on its face because it provides that only the “court” can preside over a “hearing”. The trial court erred in its ruling that a facial challenge was violative of Rule 11. The trial court erred in awarding sanctions for the Rule 11 violation.

ARGUMENT

THE TRIAL COURT ERRED IN UPHOLDING THE PRACTICE OF ALLOWING COURT COMMISSIONERS TO HOLD EVIDENTIARY HEARINGS, MAKE RULINGS AND DETERMINE THE OUTCOME OF A PETITION FOR A PROTECTIVE ORDER IN CONTESTED DOMESTIC MATTERS WHEN SUCH PRACTICE IS AN UNCONSTITUTIONAL DELEGATION OF A CORE JUDICIAL FUNCTION.

The Appellant contends that the procedure as adopted by the trial court and utilized in his case was unconstitutional. The evidentiary hearing held by Commissioner Garner on the 27th day of February, 2006, was in all aspects a trial of the controversy between the parties. Delegating the fact finding and determination of credibility, admissibility of evidence and relevance to a court commissioner is an unconstitutional delegation of a core judicial function. Ultimately it is a Article VIII judge who signs the protective order but in doing so, it is done without reviewing the parties testimony, or any evidence presented at the hearing. Unlike the federal magistrates, who after conducting evidentiary hearings make specific findings of fact and written recommendations, the court commissioners

simply fill out the Protective order form, make the necessary changes or modifications of the enumerated paragraphs, and present it to the district court for a judge's signature. There does not appear to be any verbal communications between the signing judge and the commissioner before the judge affixes his signature to the protective order nor are there any written findings made as to the issues presented, the rulings on admissibility, determinations of credibility or what particular facts justify the issuance of a protective order. Without any meaningful review of the evidence and testimony, the judge signing a protective order is at best a rubber stamp of the conclusions of the commissioner.

The procedure outlined above and the facts of this case are similar to those in *Holm v. Smilowitz*, 840 P.2d 157 (Utah Ct. App. 1992). In *Holm*, Margaret Holm had custody of her daughter pursuant to an Ohio Decree of Divorce. Ms. Holm filed the Ohio divorce decree in Utah, pursuant to the Utah Foreign Judgment Act, along with a motion for Utah to assume jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) and a petition to modify the divorce decree as to visitation.

Prior to a decision on the issue of the state of Utah as being the child's home state, Mr. Smilowitz was able to secure a temporary custody order granting him custody of the parties' minor child from the court in Ohio. Mr. Smilowitz traveled to Utah armed with the custody order. While Mr. Smilowitz was in Utah, Commissioner Lema issued her decision denying Ms. Holm's Motion to have the Ohio Decree domesticated and enforced in the Utah courts. Commissioner Lema in a truly bizarre act contacted the "police, and without ever

having seen the Ohio order, or the order ever having been filed in Utah, told them to enforce it. At 11:40 p.m., the police physically removed the child, screaming and vomiting, from her mother, and Smilowitz left the state with the child, now three and a half years old.” *Id.* at 159.

Holm then filed a motion for relief and was eventually granted a hearing before Judge Eves about a month later. Judge Eves four days later issued a written order denying “Holm’s motion for relief, holding that: (1) Ohio had original and continuing jurisdiction; (2) Utah declined jurisdiction after consultation with the Ohio court; (3) since the Ohio order was never filed in Utah, there was no order from which Holm was entitled to relief; and (4) Utah had no jurisdiction to enforce or prevent enforcement of the Ohio order.” *Id.*

Holm’s appealed Judge Eves’ order. Holm argued that Commissioner Lema and Judge Eves committed reversible error in “...refusing Holm a hearing before enforcing the Ohio change of custody order; and (4) permitting Commissioner Lema to perform non-delegable judicial acts.” *Id.* at 160.

In addressing the core argument that “the district court erred by permitting Commissioner Lema to perform non-delegable judicial acts...” *id.* at 165, the Court of Appeals agreed. The *Holm* Court first determined that the denial of a motion which was a final appealable order was a “core judicial function” and thus non-delegable.

Commissioner Lema exceeded her authority by attempting to exercise ultimate judicial power in: (1) deciding Holm’s motion for Utah to assume jurisdiction; (2) informing Holm’s attorney that it was her order that the Ohio

change of custody order be enforced that night; (3) ordering the police to enforce the undomesticated Ohio order; and (4) denying Holm's attorney's request for a hearing before the court with regard to the undomesticated Ohio order. Such was done without authority, and in violation of constitutional principles, and thus, constituted an unconstitutional exercise of judicial power.

In performing the acts enumerated above, Commissioner Lema not only exceeded the bounds of her authority as provided by the Judicial Council Rules of Judicial Administration, *see* Rule 6-401(6)(A), but she also assumed judicial power in violation of Article VIII, Section 1 of the Utah Constitution. Denying a motion for Utah to assume jurisdiction involves a final determination of a cause of action and is therefore clearly a judicial function. *See, e.g., McMillen*, 460 F.2d at 359; *Breaziel*, 568 N.E.2d at 1073. Such power must be exercised solely by a judge, not a commissioner.

And such error could not be cured by ratification by Judge Eves. Judge Eves did not have the authority to delegate away his judicial power to an employee in the first place. *K.C. v. State*, 771 P.2d at 778; *accord Mount*, 228 So.2d at 858; *In re Santa Cruz*, 446 P.2d at 255; *C.C.C. v. District Court for the Fourth Judicial Dist.*, 535 P.2d at 1119; *Erves*, 249 N.W.2d at 49; *Lewis*, 407 S.W.2d at 856; *see generally McMillen*, 460 F.2d at 359; *Reed*, 459 F.2d at 121. Consequently, he could not subsequently ratify that employee's illegal judicial acts as his own.

Id. at 168. The facts of this case are directly on point. Commissioner Garner presided over the controversy between the parties, as did Commissioner Lema. Commissioner Garner heard testimony, determined weight and credibility and concluded that a protective order should be granted. Commissioner Lema acted in a similar capacity and with apparent authority. Judge Morris by affixing his signature "ratified" Commissioner Garner's decision. Judge Eves, after a hearing, was guilty of similar conduct. This Court should conclude that allowing court commissioners to conduct full evidentiary hearings is an

unconstitutional delegation of a core judicial function.

ARGUMENT

THE PRACTICE OF COURT COMMISSIONERS PRESIDING OVER A CONTESTED HEARING IS IN CLEAR VIOLATION OF RULE 6- 401.

Rule 6-401(2)(J) requires domestic relations commissioners to “[c]onduct settlement conferences with the parties and their counsel in a domestic relations case. Issues that cannot be settled shall be certified to the district court for trial.” Rule 6-401(1) defines “domestic relations” cases as including spouse abuse matters. As outlined above, once the Appellant and Appellee could not settle as to the Appellee’s application for a protective order, Commissioner Garner was mandated by Rule 6-401(2)(J) to certify “to the district court for trial” the Appellee’s protective order application.

The rule authority granting a court commissioner the power to conduct an evidentiary hearing is promulgated in Rule 6-401(2)(F) which provides that “[a]t the commissioner’s discretion, and after notice to all parties or their counsel, conduct evidentiary hearings consistent with paragraph (3)(C) below...” Rule 6-401(3)(C) provides that “[e]xcept in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court..”

It is clearly within the authority for Commissioner Garner to conduct evidentiary hearings. Rule 6-401(2)(F). Before that can happen, the Commissioner must give “notice to all parties or their counsel...”, which arguably did occur, and conduct those hearings

consistent with paragraph (3)(C). However, Rule 6-401(3)(C) prohibits a commissioner from conducting an evidentiary hearing in “cases previously certified to the district court.” Since the Appellee and Appellant were unable to resolve the controversy between them, those issues which could not be settled; must be certified to the district court for trial pursuant to Rule 6-401(2)(J). Once the matter is certified to the district court, Rule 6-401(3)(C) prohibits a commissioner from conducting an evidentiary hearing.

It is conceded that within the language contained in the Cohabitant Abuse Act, specifically, Utah Code Ann. §30-6-4.3(1)(e), which provides for or suggests that court commissioners will be involved in the initial hearing process, would seem to directly or potentially conflict with Rule 6-401(2)(J). Utah Code Ann. §30-6-4.3(1)(e) provides that “If the hearing on the petition is heard by a commissioner, either the petitioner or respondent may file an objection within ten days of the entry of the recommended order and the assigned judge shall hold a hearing within 20 days of the filing of the objection.” Comparing the statutory provision to the rule, particularly in the likely context of a contested matter, appears to be a direct conflict. Clearly, the rule and the statute can be read harmoniously, only if this Court limits the involvement of the court commissioners to those protective order applications which are uncontested.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING A REQUEST FOR AN EVIDENTIARY HEARING PURSUANT UTAH CODE ANN. §30-6-4.3(1)(e) (2006).

Contained with the Motion and Memorandum filed with the trial court was a request for a hearing. Pages 37-46. The Appellant specifically requested a de novo evidentiary hearing before Judge Jones to cure the defects of allowing court commissioners to hear evidentiary hearings in contested protective order cases. Utah Code Ann. §30-6-4.3(1)(e) provides that if “the hearing on the petition is heard by a commissioner, either the petitioner or respondent may file an objection within ten days of the entry of the recommended order and the assigned judge shall hold a hearing within 20 days of the filing of the objection.” Appellant requested under the “Remedy” section that the “only possible remedy for an unconstitutional delegation of a core judicial function and a violation of Rule 6-401 is a de novo evidentiary hearing/trial before this Court.” Furthermore, the challenge to the authority of court commissioners to hearing contested protective order matters was the Appellant’s objection pursuant to the statute.

The trial court in its Ruling should have realized that if the protective order is heard before a commissioner and a timely objection and a request for a hearing is made the trial court shall grant the movant a hearing before the district court judge. The trial court in denying the motion did not provide for a hearing as is required by Utah Code Ann. §30-6-4.3(1)(e). The trial court’s failure to give the Appellant a hearing on a timely filed

objection was clear error. On remand, this Court should require that the trial court hear the matter de novo and if this Court agrees with the arguments below, the Appellant should be entitled to a jury trial on the legal issues and facts common to both the legal and equitable relief sought by the Appellee.

ARGUMENT

UTAH CODE ANN. §30-6-4.3 LIMITS ANY HEARING NOT IN FRONT OF A COURT COMMISSIONER TO BE HELD BEFORE “THE COURT” AND DOES NOT PRESERVE THE RIGHT TO A JURY TRIAL.

Utah Code Ann. §30-6-4.2(1)(b) and (3) first identify that the Petitioner and Respondent are entitled to a “hearing”. Utah Code Ann. §30-6-4.3(1) again discusses the need for a “hearing”. As identified above, Utah Code Ann. §30-6-4.5(1)(b) requires in mutual protective orders being requested that there be a “due process hearing”. The legislature’s use of the phrase “the court” in relation to the right to a hearing found in §30-6-4.3(1) has been interpreted by this Court in other statutes to mean a bench trial. In *State in the Interest of T.B.*, 933 P.2d 397 (Utah App. 1997), this Court addressed whether a parent is entitled to a trial by jury in a termination hearing. After determining that a termination proceeding did not exist at the time the constitution was adopted, this Court concluded that a parent does not have a constitutional right to a jury. This Court then looked to the language of the statute to see whether a right to jury trial was embodied within the provisions regarding termination. The Court held that all references within the statute

were to “the court”. This Court held that the “Act’s repeated references to ‘the court’ as fact-finder supports the conclusion that the legislature intended to exclude the use of juries in termination proceedings. See *In re Weinstein*, 68 Ill. App. 3d 883, 25 Ill.Dec. 322, 324, 386 N.E.2d 593, 595 (1979) (“The use of ‘the court’ by the legislature suggests that the court is to be the trier of fact in [termination] proceedings.”).” *Id.* at 399. Pursuant to *T.B.* the Cohabitant Abuse Act does not provide for a jury.

a. The Cohabitant Abuse Act was enacted after the constitution but the relief provided for, both equitable and legal, did exist at the time the constitution was enacted.

There are two avenues of constitutional protection for a civil litigant in this state, the first is the Seventh Amendment to the United States Constitution, and Article I, §10 of the Utah Constitution. The Seventh Amendment preserves the right to jury trial for “suits at common law,” where the value in controversy exceeds twenty dollars.

This entitlement extends to all suits where legal rights are involved. *Curtis v. Loether*, 415 U.S. 189, 193, 94 S. Ct. 1005, 1007, 39 L.Ed.2d 260 (1974). However, the Seventh Amendment does not apply to actions which involve only equitable rights or which traditionally arose in equity. *Granfinanciera v. Nordberg*, 492 U.S. 33, 41, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989). Although “the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,” the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those

customarily heard by courts of equity or admiralty. *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

The United States Supreme Court has utilized the following analysis in determining whether a civil action is entitled to be tried by jury. The Court wrote, “[f]irst, we compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.” *Tull v. United States*, 481 U.S. 412, 417-418 (1987) (citations omitted). The second stage of this analysis is more important than the first. *Id.* at 421.” *Granfinanciera v. Nordberg*, 492 U.S. 33, 41, 42 (1989).

An applicant for a protective order is entitled to following relief prior to a hearing pursuant to Utah Code Ann. §30-6-4.2(2):

A court may grant the following relief without notice in an order for protection or a modification issued *ex parte*:

- (a) enjoin the respondent from threatening to commit or committing domestic violence or abuse against the petitioner and any designated family or household member;
- (b) prohibit the respondent from harassing, telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;
- (c) order that the respondent is excluded from the petitioner's residence and its premises, and order the respondent to stay away from the residence, school, or place of employment of the petitioner, and the premises of any of these, or any specified place frequented by the petitioner and any designated family or household member;
- (d) upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court;
- (e) order possession and use of an automobile and other essential personal

effects, and direct the appropriate law enforcement officer to accompany the petitioner to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, automobile, and other essential personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(f) grant to the petitioner temporary custody of any minor children of the parties;

(g) order any further relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household member; and

(h) if the petition requests child support or spousal support, at the hearing on the petition order both parties to provide verification of current income, including year-to-date pay stubs or employer statements of year-to-date or other period of earnings, as specified by the court, and complete copies of tax returns from at least the most recent year.

Subparts (a) through (c) are consistent with injunctive relief which is an equitable remedy that existed at the time the federal and state constitutions were enacted. Subpart (d) could be considered a forfeiture action which clearly predates both constitutions but could be both equitable and legal depending on the remedy, be it property or money. Subpart (e) again constitutes in rem and/or replevin both of which existed prior to the adoption of the federal and this state constitutions. Subpart (f) is also equitable and existed before the constitutions were enacted. Subpart (g) which provides that the court can “order any further relief that the court considers necessary to provide for the safety and welfare of the petitioner and any designated family or household member...” appears to constitute a legal remedy, a monetary award, such as for spousal support, child support, payment of joint debts, or a division of joint financial assets. Subpart (h) is more a directive as to how the court would calculate child support and/or spousal support at the hearing as provided

by Utah Code Ann. 30-6-4.2(3). At the hearing, the court can award all of the foregoing relief and determine whether parent-time should be allowed.

It is clear from the analysis above, that at the hearing the court will be ordering both equitable and legal relief. Since the hearing will decide issues involving legal remedies the parties should be entitled to a trial by jury on the facts common to those issues. As to the equitable issues the court would make its conclusions based upon jury determined facts and order the appropriate relief. The Tenth Circuit Court in addressing the procedure when confronted by both equitable and legal claims found that “when a plaintiff brings both legal and equitable claims in the same action, the Seventh Amendment right to jury trial on the legal claims must be preserved by trying those claims first (or at least simultaneously with the equitable claims), and the jury’s findings on any common questions of fact must be applied when the court decides the equitable claims. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 556 n. 4, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).” *Colorado Visionary Academy v. Medtronic, Inc.*, 397 F.3d 867, 875 (10th Cir. 2005).

As to those claims for monetary awards, the Cohabitant Abuse Act violates the Seventh Amendment to the United States Constitution. Without repeating the foregoing analysis provision by provision, the Cohabitant Abuse Act is also violative of Article I, Section 10 of the Utah Constitution. Further supportive of the right to trial by jury in Cohabitant Abuse hearings, is Utah Code Ann. §78-21-1 which provides that “in actions for the recovery of specific real or personal property, with or without damages, or for money

claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered.”

It is conceded that the provisions for relief of §30-6-4.2(2)(a), (b), and (c) would constitute traditional equitable relief which would not be entitled to a trial by jury. Those provisions in Utah Code Ann. §30-6-4.2(d) and (e) that discuss right to possess a firearm and the awarding of personal and real property although not entitled to be tried to jury under the United States and Utah constitution, §78-21-1 would appear to provide that right. The remaining provision of (f), and (g) are entitled to trial by jury under the federal and state constitutions and by statute. It is clear that an petition for a protective order encompasses more than just injunctive relief. The money and property awards authorized by §30-6-4.3 entitled the Appellant a right to trial by jury. This Court should remand this case with instructions that the Appellant is entitled to a jury trial on the Appellee’s application for a protective order when it is heard before the trial court.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THAT THE CONSTITUTIONAL CHALLENGE TO UTAH CODE ANN. §30-6-1 VIOLATED RULE 11 OF THE UTAH RULES OF CIVIL PROCEDURE.

The challenge made by Appellant before the trial court that the procedure of allowing court commissioners to decide contested matters violated both the Utah constitution as an unlawful delegation of a core judicial proceeding and Rule 6-401 of the Code of Judicial

Administration was well grounded in the law. However, the trial court found that the facial challenge to Utah Code Ann. §30-6-1 was without a basis in law or fact or for a reasoned extension of the law.

Rule 11 provides that

an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

In his Order to Show Cause Why Sanctions Should Not be Imposed, Pages, 61-63, Judge Jones contends that since the Motion and Memorandum had previously been argued in front of Judge Baldwin, in another case, and denied, that to submit the same argument in the present case was “not warranted or supported by a nonfrivolous argument.” Judge Jones concluded that since the argument failed before Judge Baldwin, in that Judge Baldwin ruled that because protective orders are analogous to injunctions which were equitable claims they were not entitled to be tried before the jury, raising it in this case was without merit.

As argued above, the Appellant does not disagree with Judge Jones’ conclusion

regarding the injunctive portions of the protective order, it is however the Appellant's position that both Judge Baldwin and Judge Jones were wrong and that other claims for relief contained within the protective order are entitled to a jury trial under both the United States Constitution, Article I, Section 10 of the Utah Constitution and Utah Code Ann. §78-21-1. Further, as elucidated in *Colorado Visionary Academy, supra*, the facts common to both the legal claims and equitable claims would be decided by jury; the jury would determine the legal relief to be awarded; and trial court would determine any equitable remedy.

This Court will review the issue of Rule 11 violations and sanctions under a three part approach: (1) findings of fact are reviewed under the clearly erroneous standard; (2) legal conclusions are reviewed under the correction of error standard; and (3) the type and amount of sanction to be imposed is reviewed under an abuse of discretion standard.” *Morse v. Packer*, 15 P.3d 1021, 1025 (Utah 2000). This Court should find that Judge Jones erroneously found that a protective order is purely injunctive. Further that his erroneous findings led him to the improper conclusion that the Appellant was not entitled to a jury trial on the legal claims brought by the Appellee. Finally, because Judge Jones’ erred in his factual conclusions and legal ruling any sanction imposed was an abuse of discretion.

CONCLUSION AND PRECISE RELIEF REQUESTED

The trial court erred in concluding that the procedure of allowing court commissioners to hold evidentiary hearings in contested domestic cases was not an

unconstitutional delegation of a core judicial function. The trial court erred in not concluding that the foregoing procedure was also violative of Rule 6-401. The trial court should have granted the Appellant a evidentiary hearing on a timely request. The trial court erred in not concluding that Utah Code Ann. 30-6-4 fails to provide for the right to a jury trial on the legal claims made by the Appellee. The trial court erred in finding the constitutional challenge a violate of Rule 11. This Court should reverse the trial court's ruling and remand for a jury trial on the Appellee's legal claims and with instructions to that order to vacate the order of contempt and return the monies paid by the Appellant's trial counsel.

ORAL ARGUMENT REQUESTED

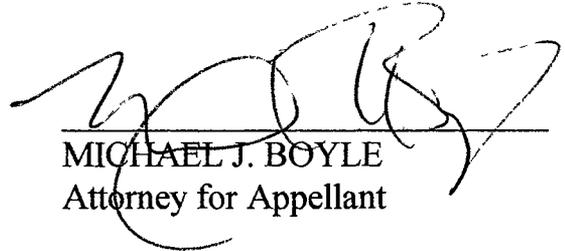
Oral argument is requested to assist this Court in defining the issues and understanding the determinative law.

RESPECTFULLY SUBMITTED this 29th day of November, 2006.


MICHAEL J. BOYLE
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief, this 29th day of November, 2006, to Jennifer Spangenberg, Esq., 893 - 24th Street, Suite 300, Ogden, Utah 84401.



MICHAEL J. BOYLE
Attorney for Appellant