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Recommended Citation
Reply Brief, *Corwell v. Corwell*, No. 20061088 (Utah Court of Appeals, 2006).
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IN THE UTAH COURT OF APPEALS

STACEY CORWELL (HALL), Appellee/Petitioner, vs. ROCKY CORWELL, Appellant/Respondent.	Appellate Case No. 20061088

REPLY BRIEF OF APPELLANT

Appeal from an Order Overruling Objection to Commissioner's Recommendation to Grant Protective Order entered in the Third Judicial District Court, Salt Lake County, State of Utah, Honorable Anthony Quinn.

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RULES

There are no rule provisions at issue in this case.

I. JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal pursuant to Section 78-2a-3(2)(h), Utah Code Ann. (2006).

II. STATEMENT OF THE ISSUES

1. Whether the trial court had jurisdiction under the Cohabitant Abuse Act to grant a protective order when the parties never cohabited and their marriage had been earlier annulled and declared *void ab initio*.

2. Whether the trial court erred by failing to hold a protective order hearing as required by Section 30-6-4.3 prior to issuing its Order Overruling Objection to Commissioner's Recommendation.

1. Standard of Review

The above stated issues involve questions of law, which the court reviews for correctness without deference to the trial court's determination. *Brinkerhoff v. Brinkerhoff*, 945 P.2d 113 (Utah Ct. App. 1997).

III. CONSTITUTIONAL PROVISIONS

See pages 5 and 6 herein.

IV. STATUTORY PROVISIONS

See pages 1 thru 6 herein.

V. RULES PROVISION

There are no rule provisions at issue in this case.

VI. STATEMENT OF THE CASE

This appeal is based on the grant of a Protective Order entered on May 24, 2006

upon the recommendation of Commissioner Michael S. Evens and granted that same day, which was timely objected to by appellant on June 2, 2006, which objection was subsequently overruled by the Honorable Anthony B. Quinn, pursuant to his Order Overruling Objection to Commissioner's Recommendation entered on October 30, 2006.

RELEVANT FACTS

See pages 4-6 of the Appellant's Brief.

ARGUMENT

I. A PROTECTIVE ORDER WAS INAPPROPRIATE INASMUCH AS THE PARTIES WERE NOT COHABITANTS UNDER THE COHABITANT ABUSE ACT

The trial court lacked jurisdiction to grant a protective order where the parties never resided together, and their marriage had been declared void *ab initio*. Under the Cohabitant Abuse Act ("Act"), there are several ways to be classified as a "cohabitant." Utah Code Ann. § 30-6-1(2) (2006). Hall argues, and the district court found, that Corwell was a "cohabitant" under the Act, because he "was a spouse of [Hall]." § 30-6-1(2)(a); (Appellee's Br. 4-6). However, the marriage had been annulled and had been declared void *ab initio* on March 29, 2006 (Appellant's Br. 6), which was before the protective order was granted on April 25, 2006 (R. at 6).

Section 30-1-17.1, Utah Code Ann (2002), provides for two categories of grounds for annulment. The first is "[w]hen the marriage is prohibited or void under Title 30, Chapter 1." § 30-1-17.1(1). The second allows annulment "upon grounds existing at common law." § 30-1-17.1(2). Common law allows annulment "for a fraud going to the essence of the marriage." *Haacke v. Glenn*, 814 P.2d 1157, 1158 (Utah App.

1991). In determining fraud, courts consider the facts of the particular situation and have adopted a subjective standard. *Id.*; *Costello v. Porzelt*, 116 N.J. Super. 380, 388-89 (1971) (husband failed to tell wife about his heroin addiction); *Handley v. Handley*, 179 Cal. App. 2d 742, 747 (1960) (wife secretly never intended to live with husband). Because Hall engaged in "acts of misrepresentation for the inducement to marry," and Corwell relied thereon to his detriment, the judge granted a decree of annulment, "declaring the marriage to be void *ab initio*." (R. at 33-34.)

The phrase "void *ab initio*" means "null from the beginning." Black's Law Dictionary 1604 (8th ed. 2004). Void *ab initio* is to be distinguished from "voidable" which means "[v]alid until annulled. . . . This term describes a valid act that may be voided rather than an invalid act that may be ratified." *Id.* While some marriages are void *ab initio*, others are voidable. *In Re Marriage of Kunz*, 2006 UT App 151, ¶ 33, 136 P.3d 1278. "A marriage void *ab initio* is void for all purposes and has no standing in court." *Id.* at ¶ 32 (quoting *United States v. Lutwak*, 195 F.2d 748, 753-54 (7th Cir. 1952), aff'd, 344 U.S. 604 (1953). Because the marriage between Hall and Corwell was declared void *ab initio*, it is void for all purposes and did not have legal validity at any time. In the order overruling the objection to the recommendation of the commissioner, the Judge held that "[t]he fact that they once had the status of a married couple is sufficient to confer jurisdiction under the act." (R. at 148-49.) However, at the time the protective order was issued, Hall and Corwell never had the status of a married couple because the marriage was declared void *ab initio*. Corwell cannot be deemed a "cohabitant" for

purposes of issuing a protective order because he neither "is or was a spouse of the other party" and does not meet any of the other definitions of a cohabitant in § 30-6-1(2).

Hall, citing the definitional portion of the Cohabitant Abuse Act, § 30-6-1, points to the absence of an exception for annulled parties as evidence that the legislature intended to include all parties whose marriage had been annulled. (Appellee's Br. 4-6.) However, the absence of that exception should rather be construed as incorporating the statutory grounds for annulment provision § 30-1-17.1, which section also incorporates the common law regarding annulment, § 30-1-17.1(2).

Applying the common law regarding annulment is not a "narrow and legalistic interpretation of the Act's cohabitant definition." (Appellee's Br. 7.) The Appellee cites *Keene v. Bonser*, 2005 UT App 37, 107 P.3d 693, for the proposition that terms in the cohabitant abuse context should be interpreted broadly. (Appellee's Br. 7.) It is clear that Bonser's argument was narrow and legalistic. He argued that he could not be a cohabitant under Utah Code Ann. § 30-6-1(2)(f) (2006), which defines a cohabitant as someone who "resides or has resided in the same residence," because he could not be defined as a resident for other purposes, such as to obtain a fishing license or a drivers license. *Keene*, 2005 UT App 37, ¶ 9. The analysis for determining residency for these other purposes, such as to obtain a fishing license, is far different from the residency analysis under the Act, because the state's rationales for making a residency determination are distinct. Conversely, the analysis used to determine whether a person "is or was a spouse of the other party," § 30-6-1(2)(a), should be straightforward and follow the common law regarding annulment as referenced in § 30-1-17.1(2). Following

the rationale of the common law regarding annulment in this case would be consistent with the scope of the Act, because the parties did not have the intimate or domestic relationship that the Act encompasses.

Hall also argues that "public policy dictates that the Act should extend protection to spouses who are victims of domestic violence even where there has been an annulment." (Appellee's Br. 4-6.) It is clear that the Act would still apply to the parties whose marriage had been annulled in the vast majority of circumstances. It would apply where the party "is or was living as if a spouse of the other party," Utah Code Ann. § 30-6-1(2)(b) (2006), "has one or more children in common with the other party," § 30-6-1(2)(d), "is the biological parent of the other party's unborn child," § 30-6-1(2)(e), or "resides or has resided in the same residence as the other party, § 30-6-1(2)(f). The expansive scope of the statute already includes the relationships in which domestic violence is likely to arise. The interpretation of §30-6-1(2)(b) that Hall asks this Court to make conflicts with the common law regarding annulments and violates the rules of statutory construction. *See Jerz v. Salt Lake County*, 822 P.2d 770, 773 (Utah 1991) (stating that statutes should be construed to be in harmony with each other and avoid serious conflicts). Therefore, the common law regarding annulments and § 30-1-17.1 should not be abrogated to include parties whose marriage had been declared void *ab initio* and do not meet any of the other definitions of "cohabitant" under § 30-6-1.

It is important that individuals should not be classified as "cohabitant[s]" under § 30-6-1 unless they meet the definitional requirements of that section. The facts of this case show that extending the definition of "cohabitant" to parties whose marriage had

been declared void *ab initio* and do not meet any of the other requirements would lead to a result the legislature did not intend. Judge Quinn stated that the purpose of the statute is "to provide relief for persons who are the victims of violence in intimate relationships." (R. at 148.) However, the facts leading to the granting of the protective order are not intimate or domestic in nature. The instance cited by Hall on page 8 of the Appellee's brief, that Corwell threatened to "punch her in the face" if she did not stop calling, came after Corwell and his girlfriend had received over 100 harassing and threatening telephone calls from Hall and her friends (R. at 58, Transcript of Protective Order Hearing, May 24, 2006, Page 9:8), and came at a time when Corwell was recovering from surgery and on pain medication (Appellant's Br. 5, R. at 52-53). The relationship of these parties is outside the definitional scope of "cohabitant" under the Cohabitant Abuse Act, § 30-6-1, and therefore the court lacked jurisdiction to enter a protective order.

II. CORWELL DID NOT WAIVE ANY RIGHT TO A HEARING WHEN HE FILED HIS NOTICE TO SUBMIT FOR DECISION

Corwell filed a timely objection (R. at 89), to the issuance of the protective order on June 2, 2006, accompanied by a supporting memorandum (R. at 91-96). Pursuant to § 30-6-4.3(1)(e), Utah Code Ann. (2006), the judge is required to hold a hearing within 20 days from the day the objection was filed. Judge Quinn never schedule a hearing and Appellant filed a Notice to Submit for Decision almost five months later (R. at 146).

Hall argues that Corwell waived his right to a hearing by filing a Notice to Submit for Decision and stating that "his motion objecting to the issuance of the protective order

was 'at issue and ready for decision of the Court.'" (Appellee's Br. 11.) The Notice to Submit for Decision states the following:

1. **Type of motion:** Respondent's Objection to Commissioner's Issuance of Ex parte Protective Order (Request for Oral Argument and *De Novo* Review). . . .

and,

1. **Type of motion:** Memorandum in Support of Respondent's Objection to Commissioner's Issuance of Ex parte Protective Order (Request for Oral Argument and *De Novo* Review). (R. at 146.). . . .

Pursuant to Utah R. Civ. Proc. R. 7(D), the Notice to Submit for Decision included a request for a hearing, and yet Hall argues that Corwell waived his right to a hearing. Filing a Notice to Submit for Decision does not waive the right to a hearing where the request for a hearing is stated clearly in the Notice.

The Appellee further argues that Corwell waived his right to a hearing where his arguments are characterized as legal as opposed to factual or evidentiary. There is no such limitation on the right to a hearing under Utah Code Ann. § 30-6-4.3(1)(e) (2006). Corwell was deprived of his statutory right to a hearing under § 30-6-4.3(1)(e) and was deprived of procedural due process where the court failed to conduct a hearing in a timely fashion. U.S. Const. amend. XIV, § 1; Utah Const. Art. I, § 7. If it is determined that the court had jurisdiction to issue a protective order, the case should be remanded for a hearing consistent with § 30-6-4.3(1)(e).

CONCLUSION

Corwell does not meet the definition of a "cohabitant" under § 30-6-1(2)(a), Utah Code Ann. (2006), because the marriage was declared void *ab initio* and because the other definitional provisions of § 30-6-1 are inapplicable to him. Therefore, the court did not have jurisdiction to enter a protective order under § 30-6-2. If this Court determines that the district court did have jurisdiction to issue a protective order, the case should be remanded with directions to hold a hearing because Corwell was denied his right to a hearing under § 30-6-4.3(1)(e) and did not waive his right to a hearing by filing a Notice to Submit for Decision.

RESPECTFULLY SUBMITTED this 15 day of June, 2007.

/s/
RANDY S. LUDLOW

CERTIFICATE OF MAILING

I hereby certify that on this 15 day of June, 2007, I cased to be mailed, by deposit in the United States Mail, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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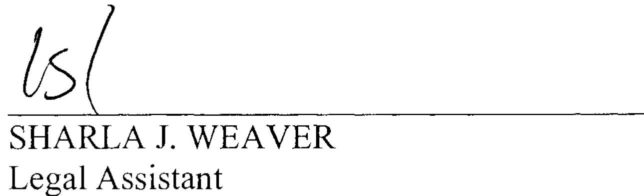

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