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Turner v. Turner Amicus Brief Dckt. 39975

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RITA J. TURNER,)
Petitioner-Respondent,)
)
vs.)
)
ROBERT A. TURNER,)
Respondent-Appellant.)
)
_____)

Docket No. 39975-2012

**BRIEF OF IDAHO COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE AS
AMICUS CURIAE**

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

The Honorable Robert J. Elgee, District Judge
The Honorable R. Ted Israel, Magistrate Judge

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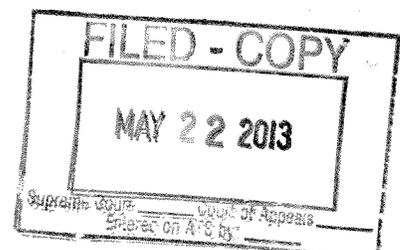


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INTEREST OF AMICUS CURIAE

The Idaho Coalition Against Sexual & Domestic Violence (“Idaho Coalition”) is a statewide, nonprofit agency with 77 member organizations, including the 26 community-based and tribal domestic violence programs within the State of Idaho. The Idaho Coalition’s mission is to engage voices to create change in the prevention, intervention, and response to domestic violence, dating violence, stalking, and sexual assault. The Idaho Coalition provides limited direct legal assistance for teenage and young adult victims of dating violence, sexual assault, and stalking and facilitates state-level committees that are dedicated to enhancing safety for individuals who have experienced domestic violence, improving accountability of offenders, and finding broader system outcomes. This case raises questions that are essential to the effective implementation of the Domestic Violence Crime Prevention Act, the safety of victims of domestic violence, and offender accountability. The resolution of the portion of this case addressing the appropriate standard of evidence for domestic violence civil protection orders is of significant concern to the Idaho Coalition and its members throughout the State of Idaho because it may appreciably decrease legal protection for survivors of domestic violence.

STATEMENT OF THE CASE

This case involves an appeal by the Respondent, Robert A. Turner (hereinafter “Robert” or “Respondent”), from a domestic violence civil protection order entered by Magistrate Judge R. Ted Israel and affirmed by District Judge Robert J. Elgee. The issue on appeal in which the Idaho Coalition has an interest in is whether Ellibee v. Ellibee, 121 Idaho 501, 826 P.2d 462

(1992), should be distinguished or overturned and a higher clear and convincing evidence standard put in place for domestic violence civil protection order cases.

The procedural background of the case is that on August 4, 2011, the Petitioner, Rita Turner (hereinafter “Rita”), filed a petition for a domestic violence civil protection order in Blaine County, Idaho. (Appellant’s Br. 1; Resp’t Br. 1.) The court issued an ex parte temporary order on August 4th and a hearing on the order was set for August 16, 2011. (Resp’t Br. 1; R. 44.) After a continuance, an evidentiary hearing was held on September 7, 2011, at which time the court found cause existed and entered a 90-day civil protection order. (R. at 19.) Robert filed an appeal with the District Court, which affirmed the lower court. (R. at 80-82.) Robert then filed an appeal with this Court requesting, in part, that the Court determine “[w]hether the holding of Ellibee v. Ellibee, 121 Idaho 501, 503, 826 P.2d 462, 464 (1992), should be distinguished or overturned resulting in the application of a ‘clear and convincing evidence’ standard in domestic violence protection order cases.” (Appellant Br. 7.) In his appeal to this Court, Robert makes the following arguments for increasing the standard of proof from the preponderance of the evidence standard to the clear and convincing standard: 1) since Ellibee was decided, the Domestic Violence Crime Prevention Act has been amended to allow longer civil protection orders; and 2) after the decision in Ellibee, Congress passed federal law that placed restrictions on domestic violence offenders’ rights to bear arms. (Appellants Br. 9.) Robert alleges that given these two changes, the civil protection order issued against him “effects significant restrictions upon liberty interests protected by the Fourteenth Amendment to the United States Constitution.” (Appellant’s Br. 9.) By order of the Court, on May 17, 2013, the

Idaho Coalition Against Sexual & Domestic Violence was granted leave to appear by brief as amicus curiae.

ARGUMENT

I. The clear and convincing standard of evidence for domestic violence civil protection order cases should not be adopted; the evidentiary standard in these cases should remain the preponderance of the evidence.

The standard of proof in domestic violence civil protection order cases should remain as preponderance of the evidence because statutory amendments enacted after the Ellibee decision do not create liberty interests that are outweighed by a victims' right to safety. Federal firearm restrictions resulting from the issuance of a civil protection order are only a temporary modification of Respondent's rights and do not amount to a permanent abolishment to bear arms. Domestic violence victims' right to safety, combined with issues of public policy, outweigh the temporary restriction on civil the protection order respondents' liberty interests and support the continuance of current evidentiary standard.

1. There have not been significant changes in the duration of domestic violence civil protection orders since Ellibee was decided that would necessitate a higher evidentiary standard and the Idaho Legislature had the option of creating a statutorily mandated higher standard post-Ellibee and did not do so.

As a general rule, in the absence of a statutory mandate or other special conditions, the preponderance of the evidence standard controls in civil cases. Ebert v. Newton, 97 Idaho 418, 419, 546 P.2d 64, 65 (1976) (plaintiff bears burden of proving all elements of a cause of action by a preponderance of the evidence.). If a statute states the standard of evidence for a certain

action, the statute controls. See Idaho County Nursing Home v. Idaho Dept. of Health & Welfare, 120 Idaho 933, 938, 821 P.2d 988, 993 (1991).

The Idaho Domestic Violence Crime Prevention Act, Idaho Code §§ 39-6301 *et seq.* was enacted in 1988. In the Act's Statement of Purpose, the legislature expressed that its reasoning for the Act was "to address domestic violence as a serious crime against society and to assure victims of domestic violence the protection from abuse which the law and those that enforce the law can provide." The legislature went on to state that "it is the intent of the legislature to expand the ability of the courts to assist victims by providing a legal means for victims of domestic violence to seek protection orders to prevent such further incidents of abuse.... The provisions of this chapter are to be construed liberally to promote these purposes." I.C. § 39-6302.

Under the code in effect when Ellibee was decided in 1992, domestic violence civil protection orders could be issued for a period not to exceed three months "upon a showing that there is immediate and present dating of domestic violence to the petition." I.C. § 39-6306. The statute did not indicate a specific evidentiary standard; rather, it left the standard up to the court's discretion. At that time, the statute governing the issuance of civil protection orders also allowed the court, upon motion and upon good cause shown, to renew orders for additional terms not to exceed one (1) year each. I.C. § 39-6306(5). There was no limit on the amount of times a court could renew an order, and a civil protection order could in effect become permanent if continually renewed prior to expiration.

The Idaho legislature amended Idaho Code section 39-6306 three times after the Ellibee decision: in 1995, 2000, and 2006. The amendment in 2006 increased the *potential* length of the initial civil protection order from three months to one year and amended the renewal provision to allow orders, “upon motion and good cause shown, to continue for an appropriate time period as directed by the court or be made permanent if the requirements of this chapter are met.” I.C. §39-6306(1), (5). The amendment did not change the length of time an order could be effective; rather, it removed the substantial barrier that was faced by victims of domestic violence, which required them to come into court and encounter their abuser repeatedly in order to renew a civil protection order. Prior to the 2006 amendments, civil protection orders could in effect, be permanent. Now, and prior to the 2006 amendments, domestic violence civil protection orders are initially issued as temporary orders, but can be renewed upon motion and good cause, following a hearing. A statutory amendment that increases in the potential length of an initial and renewed order should not require an increased evidentiary standard because civil protection orders could always be renewed indefinitely, even prior to Ellibee.

Furthermore, post-Ellibee, and while making other amendments to Idaho Code section 39-6306, the Idaho legislature had the option of creating a statutorily mandated clear and convincing burden of proof. Even after amending this section of the Domestic Violence Crime Prevention Act three times, the legislature chose not to increase the burden of proof for petitioners. In absence of a statutory amendment that imposes a higher evidentiary standard than this Court has already assigned to civil protection order cases, Robert has failed to make a compelling argument for why this Court should increase the standard. He has not shown how

the 2006 amendments meaningfully negate his liberty interests or outweigh the critical need for a “speedy procedural means for victims to obtain relief.” Ellibee. 121 Idaho at 506, 826 P.2d at 466. In this case, as in Ellibee, the protection order at issue only temporarily modified Respondent’s rights based on a finding, grounded in due process, that he presented an immediate risk.

Because there have not been significant changes in the length of time civil protection orders may be in place and Robert has not shown how his liberty interests are meaningfully restricted based on the post-Ellibee amendments. Further the legislature has not expressed intent to create a higher burden of proof under the Domestic Violence Crime Prevention Act. I.C. § 39-6301 et seq. Therefore, this Court should maintain a preponderance of the evidence standard in domestic violence civil protection order cases.

2. **The federal firearm restrictions for domestic violence offenders, as they apply to this case, do not necessitate a higher standard of proof because the federal law only temporarily modify a Respondent’s right while civil a protection order is in effect.**

The United States Congress has deemed the prevention of future violence against victims of domestic violence an especially compelling interest. This is demonstrated by the federal bans on firearm possession created in 1994 by the Violence Against Women Act. 18 U.S.C. § 922(g)(8). Firearm restrictions for domestic violence abusers were enacted because access to firearms greatly increases the risk of intimate partner homicide. The risk of homicide in abusive relationships is up to five times greater when the abuser has access to firearms as compared to those abusive relationships where there is no access to firearms. Jacquelyn C. Campbell et al.,

Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study, 93(7) Am. J. Public Health 1089, 1090-92 (2003). In Idaho in 2012, four of the six domestic violence-related homicides of women were committed by use of a firearm. Idaho Coalition Against Sexual & Domestic Violence, Idaho Domestic Violence Homicides 2001-2012 (2013), idvsa.org/wp-content/uploads/2013/01/Idaho-Domestic-Violence-Fatalities.pdf. Additionally, data shows that perpetrators of domestic violence who possess firearms generally inflict more severe abuse on their intimate partners than those who do not. Campbell, supra.

The Violence Against Women Act, in part, made it unlawful for those subject to qualifying stalking and domestic violence restraining orders to possess any firearm or ammunition. 18 U.S.C. §922(g)(8). For an order to invoke federal firearm restrictions it must meet the following conditions: 1) be “issued after a hearing of which [the restrained party] received actual notice, and at which such person has an opportunity to participate”; 2) “restrain[] such person from harassing, stalking, or threatening an intimate partner of such person ... or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner ...”; and 3) find “that such person represents a credible threat to the physical safety of such intimate partner...; or by its terms explicitly prohibit[] the use, attempted use, or threatened use of physical force against such intimate partner ... that would reasonably be expected to cause bodily injury....” Id.

By its terms, this law only applies when a qualifying civil protection order is in effect: it only restrains those who are *subject* to a qualifying order. Similar to Ellibee, where the respondent’s child custody rights had been temporarily modified via a domestic violence civil

protection order, in the case at hand and in all civil protection order cases, Respondent's rights to possess and transport firearms and ammunitions are only temporarily modified while the protection order is in effect. Furthermore, modification of rights only takes place after a full hearing on the order with specific findings of future risk, ensuring appropriate due process.

Because of the increased risk in domestic violence relationships, society, through its lawmaking representatives, has determined that the potential safety risk to victims of domestic violence outweighs the right domestic violence abusers to possess firearms. However, federal firearm restrictions did not terminate Robert's right to possess firearms long-term without appropriate due process; the restrictions were temporary and only applied when the qualifying civil protection order was in effect. Robert fails to clarify why his right to possess firearms during the period the civil protection order is in effect outweighs Rita's right to safety in a way that necessitates this Court overruling or distinguishing its finding in Ellibee.

3. A clear and convincing standard is contrary to public policy interests nationwide that ensure safety for victims of domestic violence.

As outlined above, the Idaho legislature and Congress have weighed the interests of victims of domestic violence against the liberty interests of those subject to domestic violence civil protection orders. Both the Idaho Legislature and Congress have found that the immediate protection of victims of domestic violence is imperative and have created laws that enhance those protections. Furthermore, this Court has already found that the "protection of victims of domestic violence is of primary concern" and that when looking at the rights of competing

interests in civil protection order cases, “[t]he greater risk of error actually falls on the alleged victim of abuse who is requesting immediate relief.” *Ellibee*, 121 Idaho at 505, 826 P.2d at 466.

Additionally, while many states allow civil protection orders to be permanent, there is only one state in the Nation, Maryland, which requires a clear and convincing standard for civil protection orders by statute or known case law. Md. Code Ann. Fam. Law § 4-506(c) (“if the judge finds by clear and convincing evidence that the alleged abuse has occurred ... the judge may grant a final protective order.”); but see e.g., Alaska Stat. § 18.66.100(b), N.Y. Fam. Ct. Act § 812(1) as interpreted by *Quintana v. Quintana*, 237 A.D.2d 130, 130, 654 N.Y.S.2d 27, 27 (1st Dept., 1997) (“Family Court’s findings of harassment and attempted assault are supported by a preponderance of the evidence....”), N.D. Cent. Code § 14-07.1-02(4) as interpreted by *Ficklin v. Ficklin*, 2006 ND 40, ¶ 12, 710 N.W.2d 387, 390 (2006) (“The party seeking the protective order must prove actual or imminent domestic violence by a preponderance of the evidence.”), Or. Rev. Stat. § 107.710(2), *Bailey v. Bayles*, 18 P.3d 1129, 1130-31 (Utah Ct. App. 2001) (“The trial court ... concluded by a preponderance of the evidence that Bayles had ‘been stalking Bailey....’”), and Wash Rev. Code § 26.50.060(3)(shifting the burden to the respondent for renewals; “The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence.”).

Domestic violence civil protection orders are an essential component of a domestic violence victim’s toolkit for survival. They are available without filing another civil action or without law enforcement intervention. They are also the most comprehensive type of order of protection available to domestic violence victims in Idaho. Annie Pelletier Kerrick, see

Protections Available to Victims of Domestic Violence: No Contact Orders, Civil Protection Orders, and Other Options, The Advocate, August 2011, at 32 (civil protection orders may include temporary custody of minor children; restraint from committing acts of domestic violence or contacting the petitioner; annoying, disturbing the peace of, or contacting the petitioner, exclusion from a shared dwelling; order to participate in treatment or counseling; and *any other relief* the court deems necessary.). Civil protection orders provide victims of domestic violence a sense of well-being and, in many cases, protect against future incidences of abuse. Nat'l Inst. Of Just., U.S. Dep't of Just., Research Preview: Civil Protection Orders: Victim's Views on Effectiveness, 1 (1998), available at <http://www.ncjrs.gov/pdffiles/fs000191.pdf>. Finally, civil protection orders "provide victims with an alternative to the criminal justice system and to shelters that require that they leave their homes, pets, and belongings." Kerrick at 32. Civil protection orders were created to ensure an immediate solution to a public health and criminal justice crisis. States have found again and again that domestic violence civil protection orders are instrumental in preventing future violence against adults and children and that a preponderance of the evidence standard is essential. Ala. Code. § 30-5-6(a); Alaska Stat. § 18.66.100(b); Ark. Code Ann. § 9-15-206(a), see Collins v. Collins, 347 Ark. 240, 245, 61 S.W.3d 818, 822 (2001) ("the quantum of proof generally required in civil cases is that of preponderance of the evidence."); Del. Code Ann. Titl. 10, §§ 1044 & 1045; D.C. Code § 16-1005(c-1) (when awarding temporary custody of minors and visitation rights); Ga. Code Ann. § 19-13-3(c); 725 Ill. Comp. Stat. Ann. 5/112A-6(a); Ind. Code Ann. § 34-26-5-9(f); Kan. Stat. Ann. § 60-3106(a); Ky. Rev. Stat. Ann. § 403.750(1); Me. Rev. Stat. Ann. Tit. 19-A, § 4006(1);

Mass. Gen. Laws ch. 209A as interpreted by Frizado v. Frizado, 420 Mass. 592, 595, 651 N.E.2d 1206, 1210 (1995) (“Although it is not expressly stated in G.L. c. 209A, it follows from custom and practice in civil cases that a G.L. c. 209A plaintiff must make a case for relief by a preponderance of the evidence. The circumstances of a G.L. c. 209A hearing do not require a higher burden of proof.”); Miss. Code Ann. § 93-21-11(1); Mo. Rev. Stat. § 455.040(1); N.H. Code. R. § 173-B:5(I); N.J. Stat. Ann. § 2C:25-29(a); N.Y. Fam. Ct. Act § 812(1) as interpreted by Quintana, 237 A.D.2d at 130, 654 N.Y.S.2d at 27; N.D. Cent. Code § 14-07.1-02(4) as interpreted by Ficklin, 2006 ND 40, ¶ 12, 710 N.W.2d at 390; Or. Rev. Stat. § 107.710(2); 23 Pa. Stat. Ann. § 6107(a); S.C. Code Ann. § 20-4-50(a); S.D. Codified Laws § 25-10-5; Tenn. Code Ann. § 36-3-605(b); Bailey v. Bayles, 18 P.3d 1129, 1130-31 (Utah Ct. App. 2001); Vt. Stat. Ann. Tit. 15, § 1103(b); and W. Va. Code § 48-27-501(a). In the case at hand, Robert has failed to present any argument that the clear will of the people and the courts, in Idaho and nationally, should be contradicted by requiring victims of domestic violence to meet a clear and convincing evidence standard.

CONCLUSION

Federal and state case law as well as public policy mandate that the standard of proof in domestic violence civil protection order cases remain a preponderance of the evidence. Robert has failed to present legal authority, nor has he presented evidence, to justify that his liberty interest has been affected in a way that would necessitate this Court to overrule or distinguish this case from Ellibee. Robert has incorrectly interpreted federal firearm law stating that his

right to bear arms is permanently altered by the issues of a civil protection order against him. His right has only been temporarily modified by the order. Finally, it would be against public policy to require victims of domestic violence to meet a higher evidentiary standard than that required in the majority of civil cases in cases involving civil protection orders.

Dated this 21st day of May, 2013, at Boise, Idaho.

IDAHO COALITION AGAINST SEXUAL
& DOMESTIC VIOLENCE

A handwritten signature in cursive script that reads "Annie Kerrick". The signature is written in dark ink and is positioned above a horizontal line.

Annie Kerrick
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

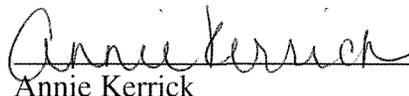
I hereby certify that on May 22, 2013, I caused to be served a true copy of the foregoing Brief of the Idaho Coalition Against Sexual & Domestic Violence as Amicus Curiae by the method indicated below, and addressed to each of the following:

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