

1976

Sally M. Martinez and the State of Utah, By And Through Utah State Department of Social Services v. Eugenio Max Romero : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH
* * * * *

SALLY M. MARTINEZ and the STATE OF *
UTAH, by and through Utah State
Department of Social Services, *

Plaintiffs and *
Appellants, *

No. 14573

v. *

EUGENIO MAX ROMERO, *

Defendant and *
Respondent. *

BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Concurs in appellants' statement.

DISPOSITION IN THE LOWER COURT

Concurs in appellants' statement.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the ruling of the lower court.

STATEMENT OF FACTS

Respondent concurs in appellants' statement and adds that he simply denies being father of the child.

ARGUMENT

POINT I.

APPELLANTS' SOCIAL ARGUMENT IS NOT DETERMINATIVE OF THIS CASE.

The main thrust of appellants' brief is not that the statutes are not clear. Although there is some overlap and omission in the statutes, the wording is not nebulous as regards the time limits for commencement of a paternity or support action and appellants have exceeded these. The 1975 amendment to §78-12-22 provides:

"WITHIN EIGHT YEARS. - within eight years: . . . an action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children."

The law will be argued in following points.

Appellants' real argument is a powerful social and moral argument that a child should not be bastardized and deprived of his father, and accordingly, the court should do anything it can to avoid application of the statute of limitations.

Respondent's counsel, having adopted children of his own, finds this argument goes strongly to his own conscience.

There are, however, contra arguments that must be considered.

Appellants' argument lends itself to the idea that the child's social wrongs can be redressed by having respondent named as his father.

Unfortunately, this is not entirely so.

We should distinguish benefits to the child himself from benefits to society.

Addressing ourselves first to the benefits to the child, what is a father? A family name is important but adopted children often do nicely although they know the man who raises them is not their real father, and that their real father, for whatever his reasons, didn't stand up when it was to be counted.

It might be considered that a real father is a relationship. The man who gives time, his love, himself, to the child, might be a real father. That man who is willing to act as father is more important to the child than is the man who, by accident of blood, is the true father.

The point is that a functioning relationship, rather than a legal position, is the essence of a father - child relationship.

It would be desirable if the father of an illegitimate child had the power to provide this relationship to the child. He can't except at the grace of the mother. Under Utah law, she is sole custodial parent. In Re State in the Interest of Baby Girl M, 25 U2d 101, 476 P2d 1013.

In fairness, it should be noted that in future cases, it is possible that a father might be able to claim a visiting privilege under the language of the 1975 amendment to the adoption code, §78-30-4 (3), UCA, which provides:

"(a) A person who is the father or claims to be the father of an illegitimate child may claim rights pertaining to his paternity of the child by registering with the Bureau of Vital Statistics of the Division of Health, Utah Department of Social Services, a notice of his claim of paternity of an illegitimate child and of his willingness and intent to support the child to the best of his ability."

No limitation is provided. Accordingly, should the father of an out-of-wedlock child wish to exercise parental rights, he would have to comply with §78-12-25 (2), UCA (1953):

"WITHIN FOUR YEARS. --- within four years: (2) an action for relief not otherwise provided for by law."

Applying the concept of visiting, the father - child relationship, to this case, we can conclude from the pleadings that here we have no functioning relationship, no acknowledgment of paternity, no visits and payment of money, because such would

have been plead in response to respondent's Motion for Summary Judgment, to toll the statute or estop respondent from raising

We might also assume that the mother, as she might have been able to do something to get father and child together if she wished, does not favor such a relationship in the future.

In regard to the question of "Who am I?", that a child asks, the most to be gained here is an answer along the lines of "My mother says 'X' is my father, the jury says 'X' is my father but 'X' says he isn't." Is this clearly of benefit to the child?

In sum, the human benefit to this child is speculative.

There is an advantage to the child to have a father to support it. This is not disputed. Here, though, if the mother intended to establish an existence free of welfare, and its standard of living, she could have done so long ago. Eight years on welfare indicates a chronic condition.

She could have filed this action years back to get the income from respondent, if he were proved liable, to help free her from welfare. She chose not to do so.

The only tangible advantage we really have is reimbursement of the State and its taxpayers.

This also is not disputed as being a proper and important goal, in theory.

In practice, though, in this case, where was the State's enforcement arm over the last eight years? If the mother ever named respondent as father, the action could have been brought

during her pregnancy (§78-45a-6, UCA 1965), or in any of the years since.

The results of the State's failure to act are: (1) a large lump obligation for respondent to meet if he is found to be the father; (2) loss of his factual ability through attrition of time to fairly present his defenses; (3) forfeiture without chance of recovery by the State of its first four years of payment to the mother, including the substantial medical bills that attend a birth (§78-45a-3, 1965); (4) hazarding by the State of the whole sum if the father should move to places unknown or die and time for claims run out during the period.

Statutes of limitations are cruel. It is their nature. They arbitrarily cut off existing rights that are often legitimate and important. The statutes are justified by the social need to have controversy come to an end. This is well stated at 51 AmJur 2d, Limitation of Actions, §17, page 602,

"The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend.

"Statutes of limitation are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected if the right to sue thereon exists. Statutes of limitation are designed to prevent undue delay in bringing suit on claims and suppress fraudulent and stale claims from being asserted, to the surprise of the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses."

Appellants argue in their brief that they, rather than respondent, are damaged by delay in the presentation of evidence at trial. This could be a practical point as a jury might tend against an old claim.

The real burden of delay though has to be on the defending party.

The mother can establish a prima facie case simply by testifying that respondent was the only man with whom she had sexual relations during her period of conception. Such testimony might be rebutted by defendant to some degree. This kind of evidence results in coin tosses by the trier of facts as to which party has the knack of being more convincing.

Time is the enemy of the defense because a proper defense is primarily detective work - finding data and witnesses to prove the claim is not proper. This task can become impossible as time runs, witnesses die or move, and facts become unavailable. Applied here, how does respondent now prove what he was doing on a certain day in 1967 (when conception occurred) or how does he now find witnesses who were then boyfriends of the mother?

In setting the statute of limitations at eight years, the Legislature set a time limit years greater than in most cases. Should this limitation period be too short, it is for the Legislature, as representative of the people, to consider all social, economic and legal issues, and determine what revisions should be made.

This point was recently considered by our appellate court in Shelmidine v. Jones, et al., case number 14152, filed May 20, 1976, the court saying:

"Also, it should be borne in mind that there is a definite distinction between a change in interpretation or application of a statute, which sometimes quite justifiably occurs, and attempting by judicial fiat to affect a substantial change in law as clearly expressed in statute or the constitution. When such a substantial change is necessary or desirable, our constitution has set up procedures for the change by the legislature, or of the constitution, by the amendment process."

POINT II.

PLAINTIFFS' CASE IS BARRED BY THE STATUTE OF LIMITATIONS.

The "Bastardy Act", §77-60-1 et seq., UCA 1953, should be mentioned although it is not controlling. It provides, at §77-60-15,

"No prosecution under this chapter shall be brought after four years from the birth of such child; provided, that the time the person accused shall be absent from the state shall not be computed."

As this period is limited by its terms to Bastardy Act actions, it does not seem pertinent to this case, even though in State v. Judd, 27 U2d 79, 493 P2d 604, it was held that the Bastardy Act survives as a companion alternative to proceedings under the Uniform Act on Paternity, 78-45a, UCA, the main difference between the two Acts stated as being that under the Bastardy Act, the mother alone can bring the action, while under the

Uniform Act on Paternity, it can be brought by the mother or by the public authority chargeable with support of the child.

Let us look to the other statutes.

The Uniform Act on Paternity, 78-45a, UCA, was enacted in 1965.

The Paternity Act has no statute of limitations in it, no provision stating how many years after birth of a child an action may be commenced. Instead, it has a provision stating that:

"78-45a-3. LIMITATION ON RECOVERY FROM THE FATHER.--- The father's liabilities for past education and necessary support are limited to a period of four years next preceding the commencement of an action."

This section has not been interpreted by Utah cases. By its language, its purpose seems clear. It controls the accumulation of arrearage the father has to pay by limiting the recovery period. The section fails entirely to provide for when an action may be commenced.

This omission was rectified by the Utah Legislature in 1975 when it added a new paragraph to the general eight year statute of limitations, which reads:

"78-12-22. WITHIN EIGHT YEARS.---within eight years.

"An Action to enforce any liability due or to become due for failure to provide support or maintenance for dependent children." (emphasis added)

This enactment covers any kind of case brought to enforce support.

It actually benefits the State and mother by giving them four more years than they had before in which to bring the action.

Before the amendment to §78-12-22, the Bastardy Act with its four year provision might have been controlling, in view of the language in State v. Judd, supra, that the two acts were to be reasonably correlated. If not, the mother's time of recovery was limited because, the Paternity Act being silent, the action would be governed by §78-12-26(4), UCA, which provides a three year limitation for "An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in special cases a different limitation is prescribed by the statutes of this state." (Emphasis added)

The amendment to 78-12-22 also reconciled the conflict of the limitation periods just cited with the four year arrearage stopper established in the Paternity Act.

It will be noted that the word "paternity" does not appear in §78-12-22. The word is not needed and was undoubtedly omitted by purpose so as not to interfere with determinations of heirship or other cases where a proper issue might arise involving the establishment of paternity.

A right without a remedy is no right at all, as the pragmatics of our legal history have it. §78-12-22 effectively stopping the remedy of recovery of support, it properly left open determination of paternity for those special cases where it is necessary.

POINT III.

THE FACT THAT A MINOR IS INVOLVED IN
THIS LITIGATION DOES NOT TOLL THE
STATUTE OF LIMITATIONS.

"78-12-36. EFFECTIVE DISABILITY.---if a person entitled to bring an action, other than for recovery of real property, is at the time the cause accrued, either:

"(1) under the age of majority;. . .

"The time of such disability is not a part of the time limited for commencement of the action."

Under our law, a minor is not entitled to bring an action for his own support.

In this case, the child is not even a party to the action.

"Sally M. Martinez and the State of Utah, by and through Utah State Department of Social Services,"

are plaintiffs and appellants.

As stated in the recent case, Stanton v. Stanton, Case number 14268, Utah, filed June 23, 1976, in both the main and concurring opinion, it was held that a child does not have standing before the court in matters concerning recovery of his own support. Right to the action is held by the person who has the responsibility for the support, be it mother, guardian or state agency.

As a second reason for determining that the statute of limitations is not tolled by minority of the child, it must be remembered that recovery of support from the father of an illegitimate child is entirely governed by statute and did not exist at common law. In re State of Utah in the Interest of Baby Girl M. 25 Utah 2d 101, 476 P2d 1013.

A comparable line of cases are those in which injured children are barred in their claims against cities because not timely filed even though the children remained minor at the time of filing. Greenhalgh v. Payson City, 530 P2d 799 (Utah 1975); Gallegos v. Midvale City, 27 U2d 27, 492 P2d 1335; and Hurley v. Bingham, 63 Utah 589, 228 P. 213.

In those cases, the difficulty of a municipality in assembling its evidence when a stale claim is presented was a factor, as was the factor that the parents had active control of their children and could have acted promptly for their benefit if they had chosen to.

The major factor and the one that matches the concepts in the case at bar was that a claim against a city is entirely a creation of statute, being formerly barred by sovereign immunity, except as since specifically allowed by statute.

Gallegos, supra, cited Hurley, supra,

"... as the right to any damages at all is purely statutory, it can only be availed of when there has been a reasonable effort to comply with the conditions upon which the right is conferred."

That rationale precisely parallels the instant case. First, the right to support was conferred by the Bastardy Act with its four year period of limitations. This right was broadened by the Paternity Act which omitted limitations. This omission was cured by the Legislature in its amendment of §78-12-22 setting

the eight year limit which now controls. Thus, both the right, and the limitation of the right are exclusively statutory creations, and so prevent tolling of the statute due to minority of the child.

CONCLUSION

It is grievous that the child in this case does not have a known father, but it is too late now to do much to benefit him personally. More grievous, because of its duty to protect the taxpayer and those who receive family assistance, is the failure of the State of Utah to file an action of this type promptly. Summary judgment of the trial court should be affirmed.

DATED July 29, 1976.

Respectfully submitted,

SAMUEL KING

DELIVERY CERTIFICATE

I hereby certify I delivered two copies of the foregoing Brief of Respondent to Vernon B. Romney, Utah Attorney General, and Stephen G. Schwendiman, Assistant Attorney General, attorneys for the Appellants, at 236 State Capitol Building, Salt Lake City, Utah 84114, by leaving true and correct copies at their offices on July_____, 1976.
