1977

Edwena Nielsen and State of Utah v. Steven Hansen : Brief of Appellants

Utah Supreme Court

Vernon B. Romney; Stephen G. Schwendiman; Attorneys for Appellants;
Alan D. Frandsen; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWENA NIELSEN and the STATE OF UTAH, by and through the Utah State Department of Social Services,	)	
Plaintiffs and Appellants,	)	Case No. 14628
vs.	)	
STEVEN HANSEN,	)	
Defendant and Respondent.	)	

BRIEF OF APPELLANTS

Appeal from an Order of Dismissal of the Third Judicial District Court in and for Salt Lake County, the Honorable Bryant H. Croft, presiding.

VERNON B. ROMNEY
Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Appellants

ALAN D. FRANDSEN
353 East 4th South
Salt Lake City, Utah 84111

Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWENA NIELSEN and the STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Plaintiffs and Appellants,

- v -

STEVEN HANSEN,

Defendant and Respondent.

No. 14628

BRIEF OF APPELLANTS

Appeal from an Order of Dismissal in the District Court of Salt Lake County, Honorable Bryant H. Croft Presiding.

VERNON B. ROMNEY
Utah Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Appellants

Alan D. Frandsen
353 East Fourth South
Salt Lake City, Utah

Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

Table of Contents Cont.

STATUTES CITED

Table of Contents Cont.

AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

EDWENA NIELSEN and the STATE OF UTAH, by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,	)	
Plaintiffs and Appellants,	)	No. 14628
- v -	)	
STEVEN HANSEN,	)	
Defendant and Respondent.	)	

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Appellants, State of Utah and Edwena Nielsen, appeal from an order rendered against appellants in the District Court of the Third Judicial District, Salt Lake County, State of Utah, granting respondent's Motion to Dismiss and thereby barring any action to establish paternity and support due co-plaintiff's minor child.

DISPOSITION IN THE LOWER COURT

Following the filing of defendant's amended answer, the court dismissed the action based on defendant's claim that the statute of limitations had run. The court held that the action was controlled by Utah Code Annotated 78-12-22.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's order holding that establishment of paternity and liability to support does not exist unless the action is commenced within eight years and request that this case be remanded and the complaint reinstated

so as to permit the processes of the court action to take place.

STATEMENT OF FACTS

The co-plaintiff, Edwena Nielsen, gave birth to a child out of wedlock on August 6, 1964. On February 2, 1965, the defendant, Steven Hansen, signed an "ACKNOWLEDGMENT OF PATERNITY AND SUPPORT AGREEMENT;" but because said acknowledgment was never presented to the court for judicial approval, no order of paternity exists. At no time did the defendant provide for support of the child. Soon after the acknowledgment was signed, plaintiff, in reliance thereon, went off public assistance. Co-plaintiff Nielsen subsisted on her own resources until 1975, when, because of defendant's neglect and other circumstances, she was again forced to rely upon public assistance from July through October of that same year.

On November 10, 1975, plaintiffs filed a complaint against defendant alleging the failure of the defendant to support Steven Hansen Junior as required by Utah Code Annotated 78-45-3 and defendant's willful refusal to reimburse the State of Utah under Utah Code Annotated 78-45-9 for assistance rendered co-plaintiff. The State of Utah sought judgment against defendant for support and maintenance of his dependent.

In defendant's answer of December 11, 1975, both paternity and duty to support were denied. Following defendant's amended answer of April 26, 1976, the lower court granted defendant's motion to dismiss based upon the statute of limitations found in Utah Code Annotated 78-12-22.

ARGUMENT

POINT I

A FATHER OWES THE SAME DUTY OF SUPPORT TO BOTH LEGITIMATE AND ILLEGITIMATE CHILDREN.

At common law a bastard was said to be "filius nullius," the child of nobody, or "filius populi," the child of the people. In essence, the illegitimate child had no father known to the law. "Illegitimacy was considered disgraceful, and a bastard was disqualified from certain offices." 10 Am. Jur. 2d 848-849. Most states have since mitigated more or less the rigors of the common law and conferred upon illegitimate children rights which that law previously denied.

In Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968), the court held that the words "child or children" in a wrongful death statute meant that the death action was for the benefit of decedent's wife, husband, "child or children" which included illegitimate as well as legitimate children of deceased parents:

"The reason for this trend is clear. Society is becoming progressively more aware that children deserve proper care, comfort and protection even if they are illegitimate. The burden of illegitimacy in purely social relationships should be enough, without society adding unnecessarily to the burden with legal implications having to do with the care, health, and welfare of children."

Utah law is clearly in line with the modern trend which recognizes that all children need and deserve proper care. Under Utah Code Annotated 78-45(a)(1) of the "Uniform Act on Paternity," the father is liable " . . . to the same extent as the father of a child born in wedlock . . . for the education". . . and "necessary support . . . of the child." In further clarifying the exact meaning of the above cited statute, one must turn to the companion statutes to understand the intent of the law. Utah Code Annotated 78-45-3 states: "Every man shall support his wife and his child."(Emphasis added.) "Child," as defined under Section 78-45-2(4), "means a son or daughter under the age of twenty-one years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means."(Emphasis added.)

Even before the enactment of the above quoted statutes, this court has long recognized the absolute nature of the father's support duty: a father has "a positive duty to support his minor child." Jenkins v. Jenkins, 153 P.2d 262, 107 U. 239 (1944). In Rockwood v. Rockwood, 236 P. 457, 65 U. 261 (1925), this court stated that "the duty of the father to support his children, if he is able to do so, is imposed in this state by positive statute. It would be his duty in any event if there were no statute upon

the subject." In a more recent case, Rees v. Archibald, 6 Utah 2d 264, 311 P.2d 788 (1957), this court said:

> "This court has invariably emphasized the father's obligation to support his children based upon the elementary principle that the law imposes upon those who bring children into the world the duty to care for and support them during their minority and dependency." (Emphasis added.)

Given the continuing nature of a father's duty of support and the legislative grant of equal rights to education and necessary support to all children (78-45a-1, supra) it is doubtful that the legislature intended that the rights of the illegitimate child to such support should forever be barred merely because an action has not been brought within eight years as held by the lower court. The right of the illegitimate child to be supported by its father as opposed to that of the legitimate child would hardly be the same if abrogable by a statute of limitations which runs during the child's minority and bars an action to establish paternity and enforce the support duty.

POINT II

TO BAR A PATERNITY ACTION BY A CHILD, PARENT, OR PUBLIC AGENCY DURING THE CHILD'S MINORITY IS A DENIAL OF EQUAL PROTECTION OF THE LAWS AND OF THE RIGHTS AN ILLEGITIMATE CHILD HAS FOR SUPPORT.

Children born out of wedlock have the same rights to support, education, and necessities as those born through legitimate channels. The laws of the State of Utah recognize

all children whether legitimate or not as equals. To buy the position of the lower court does away with this recognition of "equality" and once again places on a child "after eight years" the stigma of the early common law of being "filius nullius" if an action has not been brought in that time period. To take such a position removes from society the progress made in the recognition of rights and becomes overt-rank discrimination against a child who had no say in its conception, birth, or early life. Much too often, a young child does not know the legal, moral, societal implications until several years beyond what the court has held is the time for the action to commence.

The United States Supreme Court entertained questions on the rights of illegitimate children as compared to those of legitimate children in Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973), and drew the following conclusion:

> " . . . Once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such essential right to a child simply because /the/ natural father has not married /the/ mother, and such denial is a denial of equal protection."

What are these "judicially enforceable" rights? First of all, the duty of support was discussed in point one of this brief. Rees v. Archibald, supra, specifically spells

out this duty as does Utah Code Annotated 78-45a-1 and 78-45-1, et seq. Further, the Colorado Supreme Court said as stated in Garvin v. Garvin, 108 Colo. 415, 118 P.2d 768 (1941): "The primary liability of the father to his minor child always exists during minority." (Emphasis added.)

Need the "judicially enforceable" rights under Utah law be any clearer to fall under the mandate of Gomez? No. There must be equality in the application of the right to support. The lower court in the case at bar feels otherwise. The obvious inequality is seen in this case. If the child in question had been born of a marriage with a "known" father, that child would be able to call upon that father for needs and support through its entire minority. However, under the logic of the lower court, if the parent, guardian, public agency, or child does not bring an action within eight years, the child is forever barred from claiming any familial relationship to one he could call father.

What the lower court in effect has done is say that an illegitimate child has an equal right to its father's support only where suit has been brought on its behalf within an eight-year period, whereas the legitimate child's right to support extends through its entire minority regardless of any attempt to bring suit to enforce the support obligation.

The defendant based his motion to dismiss on the fact that "an essential purpose of the statute of limitations is to avoid putting a defending party in an untenable position. Here, the defendant claims the benefit of the statutes because it is, as a practical matter, impossible for him to adequately prove a defense." Although there may be problems in defense, the Supreme Court has nonetheless held in Gomez, supra, that once the right of support has been granted "there is no constitutionally sufficient justification for denying such essential right. . . . " Such a denial constitutes a "denial of equal protection."

There is no indication that the legislature intended that there be any exception to the general rule of support. Further, mere problems of evidence would hardly justify discrimination between children when dealing with their essential right to support. Policy aside, it is the plaintiff who has the burden of proof and whose task will become increasingly difficult with the passage of time. Defendant's apprehension in regard to evidence is not sufficient reason for denying children the right of support from their natural fathers--not to mention the interests of the state and its taxpayers.

If the rights of legitimate and illegitimate children are to be equal, an illegitimate must at all times

during its minority be granted the right to prove paternity either by iself or through its mother or agency charged with its care. Otherwise, the illegitimate child's right to support depends solely on the diligence of its mother or guardian, whose failure to act would, at an early age, reduce him to the status of welfare recipient and deny him forever the right to enjoy the economic benefits and social rights belonging to its legitimate counterparts.

That a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally is firmly supported by case law. A state may not, for example, create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968). Nor may illegitimate children be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S. Ct. 1400 (1972). Where, as in the instant case, a continuing right to support has been created for all children, a complete bar to action resulting from failure to prove paternity within eight years discriminates unfairly against illegitimates. As stated by the court in New Jersey Welfare Rights

Organization v. Cahill, 411 U.S. 622, 93 S. Ct. 1700 (1973):

> " . . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing."

Thus, this court should not make it more difficult for illegitimate children to live in our society than it already is. Very few children know the significance of what this controversy centers around at the age of eight. Therefore, not only should this court protect the rights of the illegitimate child who had no control over its circumstances but should permit the person or agency broad lee-way to use the available laws for the benefit of the child. Ofttimes, the mother of an illegitimate child becomes incensed at the fact that she has become pregnant and despises the natural father for many years. Should this fact be a bar to the mother bringing an action when she realizes there is some material and psychological benefit to the child? To say so would deny to such children a sacred right of parentage and would discriminate against them because of something they had no control over.

POINT III

UTAH CODE ANNOTATED 78-12-22 IS NO BAR TO BRINGING PATERNITY ACTIONS, BUT IS MEANT TO BE A STATUTE OF LIMITATION FOR ENFORCEMENT OF ESTABLISHED COURT ORDERS OF SUPPORT.

The lower court, in its final order, based the dismissal on the belief that Utah Code Annotated 78-12-22 (as amended) controlled paternity actions. The pertinent language is as follows:

> "--Within eight years:
>
> An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.
>
> An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children." (Emphasis added.)

The purpose of the above statute, as seen by the appellants, is not to completely bar the bringing of a paternity action to "establish familial relationships" but limits only an obligor's liability for support up to eight years after a sum certain has been ordered or decreed. The statute must be read in light of the intent of the law--to allow support for dependents. The language "liability due or to become due" was added in 1975 to codify the position this court took in Seely v. Park, 532 P.2d 684 (Utah, 1975). In that case, the mother was awarded custody of a minor child and defendant was ordered to pay $40 per month for its support. The defendant failed to abide by the support order and a subsequent action to enforce the order was initiated by the woman. His arrearage was $5,800 for twelve years and one month. Although no action was brought

within eight years, this court did not hold that the child had lost all right to enforcement of that liability upon the amount which was due or to become due; instead, the court held that defendant's liability on the arrearage was limited to arrearages accumulated within a period of eight years--i.e., $3,840 (96 x $40).

The court in Seely, Id., quoted Simmons v. Simmons, 105 Utah 574, 144 P.2d 528 (1943), as follows:

> "When a judgment is rendered, payable in installments, the statute begins to run against the judgment from the time fixed for the payment of each installment for the part then payable." (Emphasis added.)

The above language demonstrates that the application of Utah Code Annotated 78-12-22 is limited to actions brought to enforce judgments, orders, or decrees of the court that fix sum certain amounts for support. Failure to bring an action on this liability due or to become due does not totally eliminate a minor's right to receive support payments from its father. Instead, it serves to limit the liability due to an eight year period. Thus, a minor would not be barred from bringing an action beyond the eight year period but would be barred from collecting the amounts due beyond the statutory limitation.

Appellants are quick to point out, however, that the eight year statute does not control support obligations in paternity matters. The Uniform Paternity Act has specific provision for limitation of reimbursement of necessary

expenses before the date paternity is established. The eight year statute of limitation on liability would not begin to run until the liability is fixed by court order. Until then, the shorter statute of four years preceding the action controls. Utah Code Annotated 78-45a-3 states:

> "--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." (Emphasis added.)

It would seem only logical from the above language that actions for support can be brought beyond the four years "next preceding" the commencement of the action. Otherwise, the phraseology would be meaningless. The same applies to Utah Code Annotated 78-12-22. That language limits only the amounts due on sums certain. Since the Paternity Act controls the collection of necessities, limiting it to four years, the thrust of both statutes is to leave entirely alone the matter of "when" a paternity action can be brought.

The opinion of the lower court which denies the natural mother, public agency obligated to provide its care, and the child itself to bring actions after an eight year period has gone by does not align itself with Utah law which provides that support goes until age 21. The Maine Supreme Court had a similar situation before it in Harding v. Skolfield, 125 Me. 438, 134 A. 567 (1926). There, a paternity suit was filed when the illegitimate child was 13 years

old. The court held the suit to be timely and said the statute of limitations was no bar to the action because such an obligation is a continuing one and is not over in the number of years claimed under the statute of limitations.

This court should take cognizance from the above case. Just like the period of liability for support--8 years--is a shifting time period, so is the period for establishing paternity. In the State of Utah, that period goes to 21. Whether the moving party is the child, the woman or the public agency makes no difference. The entire purpose of either of the aforementioned parties bringing an action is to establish a familial relationship for the child and have the father of the child support it as do the fathers of children born legitimately. By prohibiting one of the above named persons to establish paternity for the benefit of the child, it is totally inconsistent with the intent and meaning of the law. To permit the action secures for the child social security benefits of the father, industrial compensation, inheritance, etc. To deny this is a judicial decree declaring that the child "SHALL ALWAYS REMAIN A BASTARD."

POINT IV

ACTIONS TO ESTABLISH PATERNITY ARE NOT CONTROLLED BY EXISTING STATUTES OF LIMITATIONS. THE ACT ITSELF WAS PURPOSELY SILENT THEREON, AND IT WAS, THEREFORE, ERROR FOR THE LOWER COURT TO HOLD THAT THE ACTION WAS SO CONTROLLED.

Despite the continuing nature of a father's support obligation, the defendant argued in his amended answer that "[A]n essential purpose of the statute of limitations is to avoid putting a defending party in an untenable position." He further argued that because no statute of limitations is found in the body of the Uniform Paternity Act, the four year bastardy limitation was applicable. With this, the defendent makes two false assumptions. First, he falsely assumes that the civil action to establish paternity is governed by any statute of limitations. Secondly, he falsely assumes that the limitation under the bastardy statute applies to the Uniform Act.

Although defendant does have a legitimate concern regarding his defense, the mere passage of years goes to the weight of the evidence and must, as in most cases, be resolved by judge and jury. Obviously, the longer a plaintiff's delay, the more difficult his burden of proof will become. As stated by the court in Ortega v. Portales, 134 Colo. 537, 307 P.2d 193 (1957):

> "The infant child cannot be deprived of its right to continued parental care and support by failure on the part of any person to act within a limited time following its birth. The lapse of time may add to the difficulties of proof concerning the essential facts upon which liability may depend, but this does not mean that the pertinent facts cannot be judicially determined."

In regard to defendant's first false assumption, the role of Utah Code Annotated 78-12-22 has already been discussed. As indicated in that discussion and alluded to here, the Uniform Act on Paternity contains no specific limitation period. Had the state

legislature intended to place a time limitation upon the bringing of such an action, it would have specifically so provided. Since the primary purpose of a paternity proceeding is to secure the support and education of the child rather than to punish the father, it only follows that the legislative intent was to ensure that the child would have the right to support during its entire minority. This has long been recognized in Utah case law. This court said, in Rockwood v. Rockwood, supra:

> "The duty of the father to support his children . . . is imposed in this state by positive statute. It would be his duty in any event if there were no statute upon the subject."

And, in Rees v. Archibald, supra:

> "This court has invariably emphasized the father's obligation to support his children based upon the elementary principle that the law imposes upon those who bring children into the world the duty to care for and support them during their minority and dependency."

In Rees, Id., this court held that a divorce decree did not affect the defendant's responsibility for his son's support and the expenses of care given him. In arriving at this holding, the court chose that rule of law which gave " . . . primary consideration to the rights and needs of the children." Thus, Utah law appears to follow the rule that the obligation of a father to support his child, legitimate or illegitimate, is continuing and terminates only when the child reaches its majority under a provision of the divorce decree or paternity order, or 21 years under Utah Code Annotated 78-45-1, et seq., if the decrees or orders are silent or if there are no orders. To apply a statute of limitations not specifically provided for by the legislature to paternity actions would permit putative fathers to

escape his continuing obligation to support "his" child if his child it "is."

10 Am. Jur. Trials 678-679 discusses the bastardy statutes and the evolution of the fact that the Uniform Act on Paternity had no limitations. In that discussion is found a definitive statement regarding the lack of a statute of limitations under the Uniform Paternity Act:

> "The original bastardy statutes, creating a new cause of action, usually established a specific and quite short period of time within which the action could be brought. In most cases the running of the statute started with the birth of the child, and the action by the mother had to be brought within a period of from one to three years. Some statutes stipulated that an action could be brought by the local agency when the child was or was likely to become a public charge. If there was any limitation on the bringing of such action, the statute usually did not begin to run until the child did become a public charge.
>
> Usually the statute was tolled by written acknowledgment of paternity or by the furnishing of support. The written acknowledgment must have been unequivocal and the payment of support reasonably regular, not merely sporadic.
>
> Many if not all of the state laws continue to reflect such provisions. However, as the views of society in respect to the responsibility of the father changed, and after statutes were enacted making it a crime for the father wilfully to fail to support an illegitimate child, the theory evolved that each day's failure to support constituted a new crime; thus, for all practical purposes the statute would never run.
>
> This view is also reflected in some of the modern paternity statutes. The Uniform Paternity Act has no limitations on bringing the action, but recovery can be had only for the necessary support supplied during the four years next preceding the commencement of the action." (Emphasis added.)

Thus, for something so important, basic, and sacred as the establishment of paternity, none of the existing "general" statutes do or can apply. The act itself, as indicated in Am. Jur. Trials, Id., specifically deleted the limitation because the drafters of that law recognized this inherent right of the illegitimate.

This more enlightened view which comports with the policy of Utah law giving " . . . primary consideration to the rights and needs of the children" has long been applied in other jurisdictions. In State of Alabama v. Hunter, 67 Ala. 81 (1880), a bastardy proceeding wherein no specific statutory limitation had been prescribed in the bastardy statute itself, the court stated:

> "We can see good reasons why no statute of limitations was prescribed to bar such proceedings. They are chiefly intended for the public indemnity, and to coerce the putative father to support and maintain the unfortunate child."

In State v. Cordrey, 49 Del. 281, 114 A.2d 805 (1955), the father was charged with failure to support his illegitimate child. The court recognized non-support as a continuing crime:

> " . . . The defendant in this case is charged with non-support which the law recognizes as a continuing crime. In crimes of this nature, the statute does not begin to run from the occurrence of the initial act, which may in itself embody all the elements of the crime, but from the occurrence of the most recent act. The duty to support the child is a contin uing duty and the failure to support it is a continuing offense, and the parent will be subject to prosecution at any time during the continuance of the wilful neglect to support the child as provided by the statute."

A more recent case, State v. Christensen, 19 Ariz. App. 479, 508 P.2d 366 (1973), held that a one year statute of limitations on actions on liability created by statute did not bar an action by the mother against the alleged father which was brought two years after the child's birth to determine paternity and compel support. The Arizona court followed the policy enunciated in State v. Nerini, 61 Ariz. 503, 151 P.2d 983 (1944), where, after observing that the bastardy article did not contain sections limiting the time in which the proceedings might be instituted, the court commented:

> "The statute is entirely free from any bar of this kind, and indeed there should not be, for the obligation of a father to support his child, whether legitimate or illegitimate, is a continuing duty against which limitation will not run during the time the child needs such care and support. We cannot conceive that the legislature ever intended to limit the time in which such proceedings could be instituted and prosecuted."

And, in State v. Johnson, 216 Minn. 427, 13 N.W.2d 26 (1944):

> "The rule that the statute of limitations does not run until the liability has ceased to continue rests upon the principle that where the obligation is continuing in nature the breach or violation of duty continues so long as the obligation continues, and that the cause of action or penalty, as the case may be, must be deemed to be continually accruing during the entire time the obligation and the breach thereof continue."

Regarding the second false assumption, not as much need be said. Utah Code Annotated 77-60-15 is a limitation of bastardy proceedings to 4 years. It says:

> "No prosecution under this Chapter [Bastardy] shall be brought after four years from the birth of such child . . . " (Emphasis and Brackets added.)

The defendant himself in his Motion to Dismiss (R. 5) states: "This provision is limited to the chapter on bastardy."

If the legislature had meant for the four year statute to apply to the Uniform Paternity Act, it would have so indicated. Furthermore, the more recent act, a Uniform Act, would not likely be circumscribed by a state bastardy statute originally passed in 1911. Also, Section 78-45a-3 would be rendered meaningless if the four year statute were to govern. The language "commencement of an action" with a liability limitation of four years thereon strongly implies that more than one action could be brought--this being so, application of the four-year statute would be incongruous.

Surely, if the legislature and the authors of the Uniform Paternity Act had wanted to limit the time within which paternity could be established either by the act itself or through use of the Bastardy Act, they would have so provided. A matter of such importance would not have been deleted without a good reason--that reason being that the basic rights of all children and the duty of fathers to provide for their support should not be subject to arbitrary, unjust limitations which would bar the child from exercising its rights to parental establishment.

POINT V

IF ANY STATUTE OF LIMITATIONS IS FOUND TO CONTROL, SAID LIMITATION IS TOLLED DURING THE CHILD'S MINORITY AND AN ACTION BROUGHT DURING THE MINORITY OF THE CHILD IS PROPER.

Should this court find that the eight year (or any other length) statute of limitation controls paternity actions, such limitations do not bar the bringing of the action during the child's minority. Whether the mother, child, or public agency charged with the child's support initiates and brings the action does not matter. The "real" party in interest in all of the above situations is only one person--the child.

Utah Code Annotated 78-12-36(b)(1) makes it clear that the limitation period does not run during minority. The pertinent language is as follows:

> "If a person entitled to bring an action . . . is at the time the cause of action accrued under the age of majority the time of such disability is not a part of the time limited for the commencement of the action." (Emphasis added.)

The present action fits this category exactly. The child was eight years and two days old when the ac tion was filed. The child has 10 years remaining for its minority. Pursuant to the above statute, the limitation of time is tolled until majority is reached. However, in analysis of the foregoing, it is called to the court's attention that Utah Code Annotated 78-45a-2 allows the mother, public agency, or child to bring the action in its own name, or together. In connection therewith, the child has a right to bring the action and, thus, by the language of 78-12-36(b)(1), the period is tolled.

The argument undoubtedly will be raised that the suit is brought in the name of the state and the mother and not that of the child. Therefore, since neither the state nor the mother are in their minority, the statute of limitations should run. Appellants would like

to respond to this in the following manner:

If this court agrees with the above provision, the mother could petition the court to be appointed guardian-ad-litem. In essence, she is doing now in her own name the same thing she would do as a "guardian-ad-litem," which is to pursue the interests of the child. Further, as indicated previously, the "real" party, no matter whose name appears on the title of the action, is the "child" and not the mother or the State of Utah. Of course, the State would benefit financially because of the fact that an established paternity would permit collection of support from the natural father when the child is on welfare. However, the greater benefit derived directly by the child greatly outweighs the few dollars collected for welfare reimbursement.

The California Supreme Court, in Van Buskirk v. Todd, 269 Cal. App. 2d 680, 75 Cal. Rptr. 280 (1969), followed appellant's position, above. In that case, the mother of an illegitimate child initiated an action to determine paternity through a bastardy action. The court held that a bastardy action should be considered from the standpoint of the child as the real party in interest, and that the statute of limitations in the paternity phase of such an action is tolled at all times from the birth of the child until his majority, or until an action for paternity is brought on his behalf. The court also stated that the tolling of the statute during the minority of the child in question was not terminated by the bringing of an earlier paternity-support action which was voluntarily dismissed by

the child's representative. The court analogized the instant case to one in which a guardian ad litem voluntarily discontinues an action brought on behalf of an infant, and where the general rule is that the rights of the infant are not prejudiced thereby, and that he may still take advantage of his disability, the action not being barred until the lapse of the statutory period after he becomes of age.

Further, the same court reiterated its position in 1971 when it decided Perez v. Singh, 21 Cal. App. 3d 870, 97 Cal. Rptr. 920 (1971). An attempt to have the paternity action defeated by laches was there encountered by the court. The court said that in an action to establish the paternity of an illegitimate child and to obtain support for that child, brought by the mother on behalf of the child, the child is the real party in interest, and the statute of limitations on the paternity aspect of the case is tolled during the minority of the child. The court stated that the obligation of a father to support his child, whether legitimate or illegitimate, is a continuing duty against which th e statute of limitations does not run during the time that the child needs such support. The court felt that the result would be no different if the complaint was indeed considered to raise equitable issues, since the action would be brought on the child's behalf, all benefits derived from it would belong to the child, and therefore laches could not be imputed to the child during its minority.

Appellants contend that the two preceding California cases present the law this court should follow. Since the right to support does belong to the child and could, under the lower court ruling, forever be lost through no fault of his own at the age of eight years, the action should be considered from the standpoint of the child as the real party in interest. Where, as in the instant case, the person is affected by a recognized legal disability and a continuing duty of support exists, the interests of the child and society must not be limited by an arbitrary imposition of statutory limitation during a child's minority.

Imposition of a statute of limitations would not only be prejudicial to the child as the real party in interest, but would also impose an unfair burden on the State of Utah and its taxpayers. In the instant case, all contact between the state and the co-plaintiff ceased following the "ACKNOWLEDGMENT OF PATERNITY AND SUPPORT AGREEMENT." Since the state acted promptly on the matter of paternity and support after plaintiff again went on assistance, the state should not be bound by the statutory limitation. The state should not be barred from establishing paternit and seeking reimbursement for support rendered merely because a woman does not go on public assistance until the statutory limitation has passed.

CONCLUSION

The interests of illegitimate children should be of great concern of this court. In a day and age where more

illegitimacy occurs, the natural fathers who indiscriminately feel sex is a play toy should be required to support those children they bring into the world. To prohibit this from taking place, the taxpayers of this state will be called upon to support more and more children "whose fathers can hide behind the technical cloak of the law."

It is appellants' position that the lower court must be reversed and the complaint reinstated so as to allow discovery processes to take place to determine the actual paternity of the child. There is nothing more basic to our society than to have that right.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

Attorneys for Appellant