

2000

# Karly Madsen v. The Estate of Kory Pasquin : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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KARLY MADSEN,

**APPELLANT'S BRIEF**

Petitioner and appellee,

vs.

(In the Matter of the  
Estate of Kory Pasquin)

THE ESTATE OF  
KORY PASQUIN,

Respondent and appellant.

Appeal No. 20000979-SC  
Argument Priority 15  
(Oral Argument Requested)

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APPEAL FROM AMENDED FINAL JUDGMENT AND PRIOR  
INTERLOCUTORY ORDER AWARDING ATTORNEY'S FEES  
GRANTED BY THE HONORABLE LESLIE A. LEWIS  
THIRD DISTRICT COURT  
SALT LAKE COUNTY

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CLERK OF THE COURT

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## STATEMENT OF JURISDICTION

The probate court entered an Amended Final Judgment on September 26, 2000. Notice of Appeal was filed October 17, 2000.

## ISSUES PRESENTED FOR REVIEW

### ISSUE ONE

**There is no statutory basis for the award of attorney's fees under the Utah Uniform Probate Code, and the award should be reversed.**

**STANDARD OF REVIEW:** This matter of statutory construction presents an issue of law which the appellate court considers *de novo*. The appellate court gives no deference to the trial court on such a question of law, but is free to reappraise the trial court's legal conclusions. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991). The appellate court reviews the trial court's legal conclusions for correctness. Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991).

**WHERE ISSUE PRESERVED IN THE PROBATE COURT:** On February 4, 1997, the personal representative filed "The Estate's Objection to and Disallowance of Request for Costs and for Attorney's Fees" arguing that the Utah Uniform Probate Code contains no provision for an award of attorney's fees in a proceeding to determine an heir, and that only costs can be claimed. (R. 664)

### ISSUE TWO

**The probate court failed to enter findings of fact to support the large award of attorney's fees, and the case should be remanded for entry of findings of fact sufficient to facilitate review on appeal.**

**STANDARD OF REVIEW:** The threshold question of whether the trial court's findings of fact in support of an attorney's fee award are sufficiently detailed to facilitate appellate review is a question of law as to which the appellate court gives no deference to the trial court. The absence of such adequate findings of fact that are sufficiently detailed "precludes appellate

review of the evidentiary basis underlying the trial court's decision and requires remand for more detailed findings by the trial court." Matter of the Estate of Quinn, 830 P.2d 282 (Utah App. 1992).

**WHERE ISSUE PRESERVED IN THE PROBATE COURT:** On February 1, 1997, the estate filed "The Estate's Objection to Two Proposed Orders" in which the personal representative argued that the \$41,212.50 attorney's fee claim "appears excessive, was not raised at trial, and there is no showing that Mr. Steffensen's client's are liable to him for the fees." (R. 656)

#### **DETERMINATIVE STATUTORY PROVISIONS**

UCA Sec. 75-2-109 (1992) [Addendum]

UCA Sec. 75-2-114 (1998) [Addendum]

UCA Sec 78-45a (1994) [Addendum]

UCA Sec 78-45a (1997) [Addendum]

#### **STATEMENT OF THE CASE**

Kristie Madsen filed a petition to have her daughter Karly Madsen declared to be an heir. Later Karly Madsen appeared on her own behalf.

The matter was finally settled through stipulated court-ordered DNA testing, with all parties accepting the results. The probate court awarded Karly Madsen \$41,212.50 in attorney's fees over the estate's objection that the award was without statutory basis and that the award was excessive.

#### **FACTS**

1. Kory Pasquin died on October 26, 1996, at the age of 28 years, while domiciled in Salt Lake County. (R.1)

2. As of the date of his death, only one child, Tori Lynn Pasquin, was listed in the official birth records as his child. No other children were listed in any official birth record or other official record as his children. (R.2)

3. Candance M. Souter, the mother of Tori Lynn Pasquin, was appointed personal representative of The Estate of Kory Pasquin by the Hon. Tyrone E. Medley, Salt Lake County Probate Judge, on March 4, 1997. (R.8)

4. On April 21, 1997, one Kristie Madsen, the mother of Karly Yvette Madsen, filed a petition claiming that Kristie Madsen had "a property right in or a claim against the decedent's estate individually and on behalf of her minor child, who is also decedent's minor child." (R.11)

5. On May 12, 1997, the personal representative filed a response to that petition and filed official birth certificates showing that Kory Pasquin was listed as the father on the birth certificate of Tori Lynn Pasquin dated February 10, 1994, but was not listed as the father in the birth certificate of Karly Yvette Madsen dated February 5, 1996. (R.23, 27, and 29)

6. On May 14, 1997, the Hon. Tyrone E. Medley heard the petition and referred it to the trial calendar of the Hon. Leslie Lewis. (R.38)

7. On January 16, 1998, the attorneys who had previously filed the mother Kristie Madsen when she filed the subject petition dated April 21, 1997, filed a "Petitioner's Trial Brief" in which they asserted that the minor child Karly Yvette Madsen was now the petitioner and that they were her attorneys. In that trial brief, said attorneys conceded that "(t)he sole factual issue at trial is whether Karly Yvette Madsen is Kory Pasquin's child." (R. 440) They further conceded that "(t)he petitioner, Karly Madsen, bears the initial burden of proof in establishing that Kory Pasquin is her father. The standard of proof in making that determination is 'by clear and convincing proof.' U.C.A. Section 75-2-109(2)(b)." (R. 440) They further conceded that "(g)enetic test evidence must be based on a proper evidentiary foundation showing that appropriate procedures were established and routinely followed

to assure reliability in the performance of the tests, chain of custody, etc." (R. 444) (underlined emphasis appears in original trial brief as filed). On that same date, they also filed a "Petitioner's Motion in Limine" in which they indicated they intended to introduce the results of some non-court-ordered DNA testing that had been conducted prior to Kory Pasquin's death. (R.411)

8. On January 26, 1998, the personal representative filed a response to said motion in limine within her "Consolidated Response to Pending Trial and Discovery Motions" in which she argued "(s)ince children born out of wedlock had no right to inherit under the common law, any right of a child born out of wedlock to inherit from the father is a statutory creation and applicable statutory procedure must be followed. The applicable procedure is found at UCA Sec. 78-45a-10 (July 1, 1997) That procedure requires a party to file a motion and obtain a court order prior to genetic testing." (R. 501)

9. Rather than seeking and obtaining a court-ordered DNA test, petitioner Karly Madsen elected to proceed with non-court-ordered DNA test, results arguing in a filing dated January 30, 1998, that "(a) genetic test was in fact performed in March of 1996 involving the decedent, Karly Madsen, and her mother, Kristie Madsen. If the appropriate tests for admissibility can be met . . . the genetic test will be admissible." (R. 511)

10. Based on Karly Madsen's stated intent to proceed with non-court-ordered DNA test results rather than seeking and obtaining a court-ordered DNA test, the personal representative gave notice that if Karly Madsen elected to proceed with the non-court-ordered DNA test results rather than obtaining a court-ordered DNA test, the personal representative would oppose an award of attorney's fees. "The personal representative has both the right and the duty to put (Karly Madsen's counsel) to his proof . . . . Instead



of simply obtaining a DNA test in the manner mandated by statute (Karly Madsen's counsel) has done everything he can to get around and avoid the statute." (Memorandum of the Estate in Opposition to Karly Madsen's Motion for Attorney's Fees, February 6, 1998) (R. 527)

11. On November 18, 1998, the Hon. Leslie A. Lewis entered an order providing that "the admissibility of non-court ordered . . . genetic test results that Petitioner Karly Madsen seeks to admit into evidence in the trial of this matter, will be governed by the normal and usual tests for the admissibility of such evidence . . . (R. 603)

12. At the trial of this case, petitioner failed to call any foundation outpatient laboratory witness who could testify that he or she drew blood from the late Kory Pasquin for purposes of establishing a chain of custody of evidence. Instead, the petitioner called a testing laboratory physician who had received a blood sample from an outpatient laboratory over whom he had no supervisory responsibility, who testified "I'm not a legal expert, but my understanding of the chain of custody requirements are so that you can trust the evidence. And this comes particularly in a court ordered test where you want to make sure that a sample has been in proper custody the entire time. For instance, in a criminal investigation, if a sample was found at a crime scene, that the sample could be accounted for from the time the police officer or detective picked it up to the time it eventually got tested by the forensic laboratory. In normal medical testing we don't trace a blood sample through as carefully as we do when it is a court ordered test." (T. 253, emphasis added) When this testing physician was asked whether "at the time this '96 test was performed there was no court order that a test be done?" he responded "That's correct." (T. 307)

13. When counsel for petitioner began referring to the non-court-ordered DNA test results without first calling any foundation witness from the outpatient laboratory who could testify that he or she drew blood from the late Kory Pasquin and then forwarded them to the testing laboratory (for purposes of establishing a chain of custody of evidence) (and prior to the admission of those test results into evidence), counsel for the personal representative objected, and the court secured a commitment from counsel for petitioner that he would tie it up later. However, counsel for petitioner failed to call such a foundation witness from the outpatient laboratory, and the physician who had performed the test testified (as to such a potential "tie-up" witness) "I am not their direct supervisor, and my supervisory power, or whatever, is only that of a contractor. I mean, somebody who is buying services from the outpatient laboratory and that they're providing those for us." At that point, counsel for the personal representative again objected: "Your Honor, briefly, with all due respect to (counsel for petitioner) I didn't see anyone on his witness list that would be able to tie this up later and so I am a little concerned about having this witness read something that is not going to be tied up later." At that point, a bench conference was held at the conclusion of which counsel for petitioner moves to another subject (T. 263)

14. Even though counsel for Karly Madsen failed to call a foundation witness from the outpatient laboratory to testify that he or she drew blood from the late Kory Pasquin (for purposes of establishing a chain of custody of evidence), the trial court allowed the DNA test results into evidence without such a foundation witness, over the estate's objection. (T. 272) The trial jury decided the factual issue of whether Karly Yvette Madsen is Kory Pasquin's child and heir in favor of paternity and heirship. (R. 636).

15. Even though Karly Madsen had identified the question of "whether Karly Yvette Madsen is Kory Pasquin's child" as the "sole factual issue at trial" and even though there was no finding at the trial that the number of heirs was limited to two heirs, Karly Madsen mailed a proposed "Final Judgement" on January 22, 1999, providing that Karly Madsen was "entitled to one-half of the Kory Pasquin's intestate estate" together with attorney's fees and costs, interest on such attorney's fees and costs, plus petitioner's attorney's fees and costs in "collecting" the said judgment. (R. 678) On January 26, 1998, Karly Madsen's counsel filed an affidavit claiming attorney's fees in the sum of \$41,212.50.

16. The estate filed a timely objection on February 1, 1999, pointing out that "(w)hether or not Karly Madsen is entitled to one-half of the estate turns on whether any more claimants come forward claiming to have had a child fathered by the late Kory Pasquin. That issue was not resolved at trial and no ruling was made a trial limiting the late Kory Pasquin's children to two." The estate also indicated in the same filing that it opposed the claim of attorney's fees as excessive and without legal basis and would file a separate paper objecting to and disallowing the attorney's fee claim. (R. 656).

17. Three-days later, on February 4, 1999, the estate timely filed "The Estate's Objection to and Disallowance of Request for Costs and for Attorney's Fees" in which the estate argued that the Utah Uniform Probate Code contains no provision for an award of attorney's fees in a proceeding to determine an heir, and that only costs can be claimed. (R. 664)

18. Said "Final Judgement" was entered on March 2, 1999, over the estate's objection, providing that Karly Madsen was "entitled to one-half of

the Kory Pasquin's intestate estate" together with attorney's fees and costs, interest on such attorney's fees and costs, plus petitioner's attorney's fees and costs in "collecting" the said judgment. (R. 678)

19. The estate filed a notice of appeal on March 31, 1999. (R. 686)

20. On April 29, 1999, Sheri Marion, the natural mother of Kody Jon Marion, filed a "Petition for Determination of Additional Heirs and Demand for Notice" asserting that her child was a third child and heir. (R. 695)

21. On May 19, 1999, Karly Madsen filed an "Objection to Determination of Additional Heirs and Objection to the Entry of Any Order Determining Kody Jon Marion to be an Additional Heir of Kory Pasquin and His Estate" in which Karly Madsen argued that the court had "entered a Final Judgment on Karly Madsen's claim of paternity wherein the Court decreed that Karly Madsen is an heir of the Decedent's estate and accordingly is entitled to one-half of the Decedent's Estate (with the other one-half going to Tory Lynn Pasquin)." (R. 708)

22. On May 25, 1999, the estate filed an objection to the petition of Sheri Marion based on a lack of subject matter jurisdiction, since the case was on appeal of a final order. "The estate timely objected to that final order in the trial court on the ground that there might be other heirs. The Marion petition so claims. An appeal of the final order was timely taken by the estate. The estate will urge reversal on appeal based, *inter alia*, on that same ground." (R. 711). On August 11, 1999, the trial court declined to exercise jurisdiction, writing in a minute entry that "it is decided that until the Court of Appeals has the final order on the case, this court will not take further action." (R. 797) On August 24, 1999, the trial court entered an order awarding attorney's fees in the sum of \$41,212.50 to Karly Madsen. (R. 803)

23. On January 3, 2000, counsel for the personal representative, counsel for Karly Madsen, and counsel for Sheri Marion filed a stipulation prepared by counsel for Sheri Marion and signed by all of them. (R. 809).

24. On January 3, 2000, counsel for the personal representative, counsel for Karly Madsen, and counsel for Sheri Marion filed a joint motion for court-ordered DNA testing. (R. 811)

25. On January 11, 2000, Judge Leslie A. Lewis signed an order for court-ordered DNA testing. (R. 813)

26. On March 16, 2000, the estate filed a motion to dismiss the appeal "without prejudice". Karly Madsen responded with a memorandum on March 31, 2000, that the appeal should be dismissed "with prejudice". The estate filed a reply on April 4, 2000, that the appeal should be dismissed "without prejudice" on the ground, *inter alia*, that the "Final Judgement" entered on March 2, 1999, was interlocutory in nature, even though it was styled as a "Final Judgement" on its face. The Supreme Court granted the motion to dismiss the appeal "without prejudice" on April 18, 2000. (R. 820)

27. On June 15, 2000, upon receiving the results of the DNA testing ordered by the court on January 11, 2000, the estate filed "Estate of Kory Pasquin's Notice of DNA Test Results and Recognition of Heirs" in which the estate gave notice that said court ordered DNA testing had established that Karly Madsen and Kody Marion were children of the late Kory Pasquin and that Sheri Marion is the child of and that based on this DNA test as to Karly Madsen and Kody Marion and "public records of live births" as to Tory Pasquin, that Tory Pasquin, Kody Marion, and Karly Madsen are children and heirs of the late Kory Pasquin." (R. 842)

28. On June 28, 2000, the Hon. Leslie A. Lewis entered an order providing that "(p)ursuant to the stipulation of the parties on file herein and the notice filed by the estate on June 15, 2000, recognizing three (3) persons as heirs, the court, being sufficiently advised" all prior orders awarding half of the estate to Karly Madsen were stricken and "there being an unresolved issue of law" over attorney's fees, no such award is made "at this time without prejudice to the right to raise and fully brief the issue." ( R. 860)

29. On July 27, 2000, Judge Leslie A. Lewis made a minute entry order vacating her order of June 28, 2000. (R. 937).

30. On September 26, 2000, Judge Leslie A. Lewis entered an "Amended Final Judgment". (R. 971). On October 17, 2000, the estate timely filed a notice of appeal of the amended final judgment entered on September 26, 2000, "and all prior attorneys' fee and cost orders". (R. 860)

### **SUMMARY OF ARGUMENT**

- There is no statutory basis for the attorney's fee award below.
- The case should be remanded for failure to make findings of fact.

### **ARGUMENT**

#### **POINT ONE**

**There is no statutory basis for the award of attorney's fees under the Utah Uniform Probate Code, and the award should be reversed.**

Kristie Madsen filed her petition to have her daughter Karly Madsen determined to be an heir on April 21, 1997. The applicable probate code provision effective on that date appeared at UCA 75-2-109 (1992), a copy of which is annexed hereto. That provision provided that paternity must be established by clear and convincing evidence, but it did not contain any provision for attorney's fees, nor did it contain any reference to the Uniform

Act on Paternity appearing at Chapter 45a of Title 78 (1994) of the Utah Code. The trial of Kristie Madsen's petition was scheduled for January 26, 1998. Trial preparation was done with an eye on that date, including, but not limited trial subpoena service and return of service by the estate. (R. 489)

Ten calendar days before that trial date, on January 16, 1998, the pretrial was held. ( R. 487) Due to a conflict in the court's calendar, the court ordered the trial continued for four months to May 26, 1998. The court entered and mailed an order (R. 486) on January 20, 1998, continuing the trial to May 26, 1998. As the parties had already prepared for trial and pretried the case on January 16, 1998, the judge ruled "(n)o further pretrial is needed." (R. 487) Between January 16, 1998, and May 22, 1998, motion, discovery, and other issues were addressed. ((R. 487 through R. 575)

On May 22, 1998, a scheduling conference was held in which the court continued the May 26, 1998, trial date to September 1, 1998. (R. 576)

There were no further court filings after May 22, 1998, through July 1, 1998. Effective July 1, 1998, the Utah Uniform Probate code was amended.

The new applicable probate code provision effective on that date appeared at UCA 75-2-114 (1998), a copy of which is annexed hereto.

That new applicable provision also did not contain any provision for attorney's fees, but it did contain a reference to the Uniform Act on Paternity. appearing at Chapter 45a of Title 78 (1997) of the Utah Code. Thus, from the time that Kristie Madsen filed her petition on April 21, 1997 (R. 11), until the law was changed effective July 1, 1998, there was no basis in the Utah Uniform Probate Code for an attorney's fee award. There was no basis for an award after that date unless the court construes the reference from the Utah Uniform Probate Code to the Uniform Act on Paternity to incorporate an

attorney's fee provision by reference. This presents an issue of first impression in Utah. Furthermore, the petition filed by Kristie Madsen on April 21, 1997, did not pray for attorney's fees. Interestingly, Kristie Madsen continued to participate in this probate until August 14, 1997, the last date on which she filed something on behalf of her daughter. (R. 74). Without explanation, on August 27, 1997, her attorney, David W. Steffensen, caused a paper to be filed in which he indicated he was counsel for both Kristie Madsen and Karly Madsen. (R. 82). Then, on August 29, 1997, again without explanation to the court or to the personal representative, David W. Steffensen began signing papers as attorney for Karly Madsen only. (R. 84).

On January 16, 1998, Karly Madsen filed a motion for attorney's fees pursuant to UCA Sec. 78-45a-5(4). (R. 404) As set forth above, the applicable Utah Uniform Probate Code provision then in effect contained no reference to the Uniform Act on Paternity at Chapter 45a of Title 78.

Accordingly, none of the attorney's fees incurred by Kristie Madsen from April 21, 1997, through August 14, 1997, should be awarded to Karly Madsen. None of Karly Madsen's attorney's fees incurred by her between August 14, 1997, and July 1, 1998, should be awarded to her because there was no statutory basis for same in effect during that period of time or in effect when she filed her motion for attorney's fees on January 16, 1998.

As far as attorney's fees incurred by Karly Madsen from and after July 1, 1998, the court should rule that the reference in the Utah Uniform Probate Code to the Uniform Act on Paternity should not be construed to incorporate a fee-shifting provision by reference, since, on a matter of such importance, the legislature would have placed the fee-shifting provision in the applicable portion of the Utah Uniform Probate Code itself had it intended to do this.



If the court construes a fee-shifting provision by reference, then no award of attorney's fees should be made, because no motion for attorney's fees was filed after the change in the law on July 1, 1998, provided a basis.

For any and all of the foregoing reasons, the attorney fee award should be reversed as having no basis in law or in the record. If the court construes a fee-shifting provision by reference and also concludes that Karly Madsen is entitled to a fee award under this record, no fees should be awarded for fees incurred prior to July 1, 1998, the date the law changed. If the court decides the change in law was retroactive, no fees should be awarded for fees incurred during the period of time prior to the date Kristie Madsen filed her motion for attorney's on January 16, 1998, the date of the pretrial conference.

This is significant, since trial preparation was already so complete on January 16, 1998, that the probate court ruled that no further pretrial was needed, and since this was the date on which the estate first received notice by court filing that Karly Madsen was seeking attorney's fees.

The fee award of \$41,212.50 should be reversed and remanded for entry by the trial court of an award consistent with the appellate court's rulings on the law, and in any event, the fee award of \$41,212.50 should be reversed and remanded for entry by the trial court of findings of fact that are sufficient to facilitate appellate review of the reasonableness of the fee.

## **POINT TWO**

**The probate court failed to enter findings of fact to support the large award of attorney's fees, and the case should be remanded for entry of findings of fact sufficient to facilitate review on appeal.**

The threshold question of whether the trial court's findings of fact in support of an attorney's fee award are sufficiently detailed and include

enough subsidiary facts to facilitate appellate review is a question of law as to which the appellate court gives no deference to the trial court. In resolving a dispute over an attorney's fee award, the trial court should have made and entered findings that are sufficiently detailed and that include enough subsidiary facts to disclose to the appellate court the manner in which the trial court applied the following four-step process: 1) Determination of "exactly" what legal work the petitioning attorney performed both in terms of the nature of the work and the time spent in its performance; 2) Determination of "how much of that work was reasonably necessary" to adequately conclude the representation; 3) Determination of the reasonableness of the hourly rate charged; and 4) Finally, after a "preliminary fee" has been established by applying the first three steps, the court should then apply the various criteria that are set forth in Rule of Professional Conduct 1.5 - Fees. The absence of adequate findings of fact that are sufficiently detailed and that include enough subsidiary facts to disclose to the appellate court the steps by which the trial court applied, analyzed, and then resolved each one of these four requirements "precludes appellate review of the evidentiary basis underlying the trial court's decision and requires remand for more detailed findings by the trial court." Matter of the Estate of Quinn, 830 P.2d 282 (Utah App. 1992).

The award of \$41,212.50 appears excessive on its face and the estate objected to it as appearing excessive. Yet, the trial court entered no findings of fact supporting such a large fee award. This leaves both the personal representative and the appellate court unable to evaluate whether the award is reasonable. A remand for more detailed findings of fact will allow the personal representative to evaluate those findings in order to determine

whether or not she should seek further appellate review, and, if so, to pursue such further appellate review in a manner that is consistent with her fiduciary duties and in a manner reasonably calculated to benefit the estate.

It appears that preparing for and trying a paternity claim where one already has a DNA test in-hand should cost no more than \$5,000, not \$41,212.50. This high award occurred when the court awarded fees that were not incurred in pursuing the heirship claim, but were incurred in filings by Karly Madsen and Kristie Madsen pertaining to estate administration, not heirship, which were never litigated to a conclusion. There was no statutory basis for awarding these non-heirship fees, or, in the alternative, since they were never litigated to a conclusion, there was no factual and legal basis for designation of a prevailing party to whom attorney's fees could be awarded.

As set forth above, there were a number of filings related to estate administration initiated by Karly Madsen and Kristie Madsen as to which no court determination was ever made. There were other matters related to heirs as to which Karly Madsen initially prevailed but later did not prevail (such as her insistence that she was entitled to half of the estate). A fee award under a statute should only be awarded for those matters litigated to a conclusion via judicial decision in which the party claiming the award ultimately prevailed.

Attorney's fees incurred or expended on matters which were not concluded by a judicial determination should not be awarded under a fee-shifting statute. Buckhannon Board and Care Home v. West Virginia, No. 99-1848 (U.S. Supreme Court, May 30, 2001). "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" (Rehnquist, C.J.) "One does not prevail in a suit that is never

determined." (Scalia, J., concurring.) These principles are especially applicable in this case, where the prolix filings by Karly Madsen and Kristie Madsen related to estate administration rather than Karly Madsen's status as an heir never resulted in a judicial determination and where most of the heirship issues were ultimately settled rather than judicially decided. Further, the "Final Judgement" which provided the basis for the award of \$41,212.50 erroneously provided that Karly Madsen was entitled to one-half of the estate, even though no determination had been made that there were only two heirs.

The court later entered an "Amended Final Judgement" that recognized three heirs and did not foreclose the possibility of even more children to be recognized as additional heirs in the future. Yet, the trial court applied "law of the case" to reinstate the earlier \$41,212.50 that it had vacated, even though there had been this subsequent change and Karly Madsen no longer prevailed on that point. Based on this change in the operative facts, the doctrine of "law of the case" should not have been applied and the court should either have modified the \$41,212.50 or entered findings of fact justifying the absence of modification in light of the change in facts.

As set forth Matter of the Estate of Quinn, 830 P.2d 282 (Utah App. 1992), the reasonableness of the fee must be weighed against the overall amount involved, pursuant to Rule of Professional Conduct 1.5 - Fees.

While the personal representative has been successful in defending the estate against lawsuits and claims in which third parties either claimed ownership of a significant portion of estate property or asserted personal injury claims arising out of the boating accident at Lake Powell in which Kory Pasquin was killed, the personal representative has, so far, been unable to get this \$41,212.50 attorney's fee award reversed, and it is so large that it

now predominates this entire probate. Absent a finding by the trial court of the value of the property left by Kory Pasquin, no measure can be made of the reasonableness of that \$41,212.50 fee claim against the amount involved.

This raises another matter in which the trial court's failure to enter findings of fact and conclusions of law thwarts evaluation of the award by the personal representative and appellate review. The personal representative must distribute estate assets in the following order under UCA Sec. 75-3-805:

- (a) reasonable funeral expenses;
- (b) costs and expenses of administration;
- (c) debts and taxes with preference under federal law;
- (d) medical and hospital expenses of the last illness;
- (e) debts and taxes with preference under the laws of this state;
- (f) all other claims;

(g) a pro rata distribution of the remainder to the three heirs identified so far plus any additional children of Kory Pasquin who may be identified.

The absence of detailed findings of fact and conclusions of law creates confusion as to whether the \$41,212.50 is to be paid under (f) ahead of the distribution to the heirs or is, instead, to be paid in conjunction with a pro rata distribution to the heirs under (g), since it is going to an heir and since it is being awarded in connection with a determination of that heir's heirship.

The \$41,212.50 should be reversed and remanded for entry of detailed findings of fact and conclusions of law indicating whether the fee award, if any, is to be paid by the personal representative under (f) or under (g).

There has also been no finding (or any showing on which to base such a finding) that if the \$41,212.50 is not awarded against the estate assets, then Karly Madsen's attorneys will take this out of her share of the estate to satisfy

their claim against her for attorney's fees or that she will otherwise be liable to them for the \$41,212.50. This is significant, since actual liability on the part of the client and an actual expectation by the attorney that he or she will collect from the client serves as a healthy check and balance against incurring excessive fees. Such a check and balance is not present if the attorney is taking the case on a flier with an expectation that he will not be paid unless he can get an attorney's fee award from the other side. In that case, neither the attorney nor the client have an incentive to keep the fees reasonable.

Once the matter is remanded to the trial court and that court makes detailed findings of fact, it is possible that the trial court will use that exercise to weed-out all of Karly Madsen and Kristie Madsen's fees for litigation they initiated related to estate administration (which they never concluded and as to which there is not even a colorable statutory basis for a fee award) from fees that relate to determination of heirship. The heirship fees should not amount to all that much. There were already DNA test results on file at the University of Utah that related to Kory Pasquin. When the University of Utah's counsel resisted Kristie Madsen's subpoena *duces tecum* to get those test results, the personal representative joined with Kristie Madsen in a joint motion for an order for their release to counsel for both sides. (R. 84)

Once those records were released, it appeared that there were flaws that made them less than "clear and convincing" and a legal issue arose as to whether non-court-ordered DNA test results were entitled to the deference granted under UCA Sec. 75-2-114 (1998) where the standard of proof is clear and convincing evidence, when, pursuant to UCA Sec. 78-45a-6.5 (1997), such deference should be given only where a preponderance standard is being applied. Via filings with the court related to that issue, the personal

representative encouraged Kristie Madsen to get a second court-ordered DNA test rather than relying on the non-court-ordered test results. As was her tactical and strategic right, she elected to proceed with the non-court-ordered test results. (She knew that those results indicated paternity and she did not know what a new court-ordered DNA test would say. Also, it would likely be a little less expensive to simply subpoena a foundation witness from the outpatient laboratory to give an evidentiary foundation for the existing test results rather than opening Kory Pasquin's grave and obtaining a court-ordered test. Also, the opening of Kory Pasquin's grave to obtain a court-ordered test would probably upset the family, something that the personal representative was also sensitive to and happy to avoid if at all feasible.)

At that point, it was a rather simple matter for Karly Madsen to simply secure a trial date and subpoena a foundation witness. Inexplicably, no such witness was subpoenaed, further reducing legal fees over what they would have been had one been subpoenaed. None of this was novel, complex, or time-consuming, and could all have been easily done for well-under \$5,000.

When the "Final Judgement" erroneously awarded one-half of the estate to Karly Madsen, and when Karly Madsen resisted efforts to correct that obvious error (and the probate judge also failed to honor the estate's objection and correct the obvious error), it was reasonable and prudent for the estate to duly appeal that final judgment. Karly Madsen finally conceded that point, and so she is not entitled to that portion of the \$41,212.50 expended in securing that erroneous order. As long as there was going to be an appeal, there was also a good faith basis to appeal the decision to give the kind of deference to a non-court-ordered test that is reserved in the statute for a court-ordered test and to appeal the decision by the trial judge to initially indicate

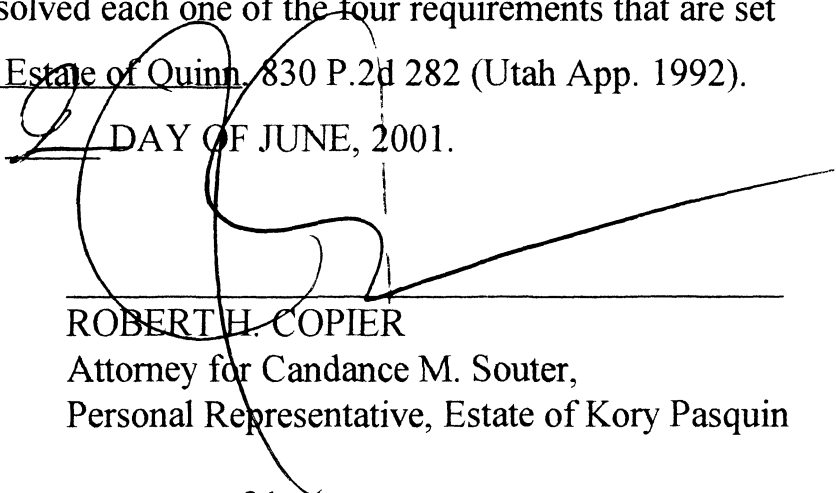
he was going to require a foundation witness from the outpatient lab and to then decide against that requirement when Karly Madsen couldn't produce one. Of all of the issues, only the issue over the \$41,212.50 remains, since Karly Madsen finally abandoned her efforts to hang-on to half of the estate and also stipulated to court-ordered DNA testing which could be done utilizing Kody Marion's DNA and the DNA already at the University of Utah belonging to Kory Pasquin. This would not only determine the issue of Kody Marion's paternity, but, in the even that it found paternity as to him, it would also moot all of the lingering factual and evidentiary issues surrounding the non-court-ordered DNA test. It did just that and those issues were settled.

In light of all of this, detailed trial court findings of fact are needed.

### **CONCLUSION**

A reversal of the \$41,212.50 attorney's fee award as having no basis in statute will leave that much more property for the minor children who are the heirs. To the extent that the appellate court concludes it has a basis in statute, the fee award should be reversed and remanded for the entry of findings of fact that are sufficiently detailed and that include enough subsidiary facts to disclose to the appellate court the steps by which the probate court applied, analyzed, and then resolved each one of the four requirements that are set forth in Matter of the Estate of Quinn, 830 P.2d 282 (Utah App. 1992).

DATED THIS 22 DAY OF JUNE, 2001.

  
\_\_\_\_\_  
ROBERT H. COPIER  
Attorney for Candance M. Souter,  
Personal Representative, Estate of Kory Pasquin



# **Addendum**

UCA Sec. 75-2-109 (1992)

UCA Sec. 75-2-114 (1998)

UCA Sec 78-45a (1994)

UCA Sec 78-45a (1997)

### 75-2-107. Kindred of half blood.

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

**History:** C. 1953, 75-2-107, enacted by L. 1975, ch. 150, § 3.

#### NOTES TO DECISIONS

##### "Of the blood."

Phrase "of the blood" under former succession statute included the half blood as well as the whole blood, and excluded only those who had none of the blood of the ancestor from whom the estate came; where a mother died leaving children as the issue of two marriages,

and had taken by inheritance property belonging to a deceased son, such property was properly distributed among his half brothers and sisters and their descendants, as well as brothers and sisters of the whole blood. *Gardner's Estate v. Gardner*, 42 Utah 40, 129 P. 360 (1912).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 23 Am. Jur. 2d Descent and Distribution § 54.

**C.J.S.** — 26A C.J.S. Descent and Distribution § 36.

**A.L.R.** — Descent and distribution: rights of

inheritance as between kindred of whole and half blood, 47 A.L.R.4th 561.

**Key Numbers.** — Descent and Distribution ⇐ 35.

### 75-2-108. Afterborn heirs.

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

**History:** C. 1953, 75-2-108, enacted by L. 1975, ch. 150, § 3.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 23 Am. Jur. 2d Descent and Distribution §§ 94 to 96.

**C.J.S.** — 26A C.J.S. Descent and Distribution § 29.

**A.L.R.** — Pretermitted heir statutes: what

constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable, 83 A.L.R.4th 779.

**Key Numbers.** — Descent and Distribution ⇐ 27.

### 75-2-109. Meaning of child and related terms.

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) An adopted person is the child of an adopting parent and not of the natural or previously-adopting parents except that adoption of a child by the spouse of a natural or previously-adopting parent has no effect on the relationship between the child and that natural or previously-adopting parent.

(2) In cases not covered by Subsection (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(a) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(b) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subsection is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

**History:** C. 1953, 75-2-109, enacted by L. 1975, ch. 150, § 3; 1977, ch. 194, § 5; 1992, ch. 30, § 153.

**Amendment Notes.** — The 1992 amendment, effective April 27, 1992, revised the subsection designations by deleting "(1)" from the beginning and substituting number designations for lower-case letters and made other stylistic changes throughout the section.

**Editorial Board Comment.** — The defini-

tion of "child" and "parent" in § 75-1-201 incorporates the meanings established by this section, thus extending them for all purposes of the Code. See § 75-2-803 for the definition of "spouse" for purposes of intestate succession.

**Cross-References.** — Filing notice of claim of paternity, § 78-30-4.8.

Marriage in belief that former spouse was dead or divorced, issue legitimate, § 30-1-3.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.

Acknowledgment by father.

Adopted children.

Burden of proof.

Conflict of laws.

Issue of illegitimate.

Right of illegitimate to inherit.

#### Constitutionality.

This section, which permits a mother to inherit from her illegitimate child under all circumstances but requires a father to meet additional criteria by demonstrating that he has openly treated the child as his own and has not refused to support the child before he may inherit, does not violate constitutional due process and equal rights provisions. *Scheller v. Pessetto*, 783 P.2d 70 (Utah Ct. App. 1989).

#### Acknowledgment by father.

What acts amounted to acknowledgment contemplated by former statute permitting inheritance by illegitimates if acknowledged by father depended upon facts and circumstances of each particular case. *Rohwer v. District Court*, 41 Utah 279, 125 P. 671 (1912); *Harrison v. Harker*, 44 Utah 541, 142 P. 716 (1914).

#### Adopted children.

Under former succession statute, "issue" was held not to include adopted children with result that they could not inherit through their adoptive parents. In *re Harrington's Estate*, 96 Utah 252, 85 P.2d 630, 120 A.L.R. 830 (1938). However, in a subsequent case under the same statute the court, without referring to the Har-

rington case, held that an adopted child could inherit in a dual capacity, that is from both natural and adopting parents. In *re Benner's Estate*, 109 Utah 172, 166 P.2d 257 (1946). In a still later case, the court declined to overrule *Harrington* and held that adopted children did not inherit from their adoptive parents' relatives. In *re Smith's Estate*, 7 Utah 2d 405, 326 P.2d 400 (1958).

Inter vivos trust, created in 1956, naming issue of settlor's two sons as beneficiaries, did not include an adopted son since an adopted child could not inherit from parents of his adoptive parents; and the settlor, by using the term "issue," indicated that he did not intend to include adopted children as beneficiaries. *Makoff v. Makoff*, 528 P.2d 797 (Utah 1974) (decided under former Probate Code).

#### Burden of proof.

Illegitimate child claiming as heir under former acknowledgment statute had burden of proving natural parentage and unambiguous acknowledgment by deceased. In *re Roberts' Estate*, 69 Utah 548, 256 P. 1068 (1927); In *re Newell's Estate*, 78 Utah 463, 5 P.2d 230 (1931).

#### Conflict of laws.

Under former Probate Code, issue of illegitimate child whose domicile was in Illinois and who under Illinois law could not inherit property from father's line due to lack of later marriage between mother and father could not inherit from father's relative in Utah despite fact that had the domicile of the purported heirs been Utah, the issue would have taken under Utah law; if the law of the domicile found a

enacted by Laws 1975, ch. 150, § 3, relating to dower and curtesy abolished, and enacts the present section, effective July 1, 1998.

### **75-2-114. Parent and child relationship.**

(1) Except as provided in Subsections (2) and (3), for purposes of intestate succession by, through, or from a person, an individual is the child of the individual's natural parents, regardless of their marital status. The parent and child relationship may be established as provided in Sections 78-45a-7, 78-45a-10, and Title 78, Chapter 45a, Uniform Act on Paternity.

(2) An adopted individual is the child of the adopting parent or parents and not of the natural parents, but adoption of a child by the spouse of either natural parent has no effect on:

(a) the relationship between the child and that natural parent; or

(b) the right of the child or a descendant of the child to inherit from or through the other natural parent.

(3) Inheritance from or through a child by either natural parent or his kindred is precluded unless that natural parent has openly treated the child as his, and has not refused to support the child.

**History:** C. 1953, 75-2-114, enacted by L. 1998, ch. 39, § 22.

**Repeals and Reenactments.** — Laws 1998, ch. 39, § 22 repeals former § 75-2-114, as

enacted by Laws 1983, ch. 226, § 1, relating to person related to decedent through two lines of relationship, and enacts the present section effective July 1, 1998.

## **PART 2**

### **ELECTIVE SHARE OF SURVIVING SPOUSE**

#### **75-2-201. Definitions.**

As used in this part:

(1) "Decedent's nonprobate transfers to others," as used in sections other than Section 75-2-205, means the amounts that are included in the augmented estate under Section 75-2-205.

(2) "Fractional interest in property held in joint tenancy with the right of survivorship," whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

(3) "Marriage," as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

(4) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that the person possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is considered to have a beneficial interest in the property.

(5) "Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

(6) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent

person shall mail a copy of the affidavit and a copy of the pleading or stipulation to the Office of the Attorney General, Child Support Division.

(iii) If notice is not given in accordance with this subsection, the office is not bound by any decision, judgment, agreement, or compromise rendered in the action.

(c) If IV-D services have been or are being provided, that person shall join the office as a party to the action, or mail or deliver a written request to the Office of the Attorney General, Child Support Division asking the office to join as a party to the action. A copy of that request, along with proof of service, shall be filed with the court. The office shall be represented as provided in Subsection (1)(b).

(3) Neither the attorney general nor the county attorney represents or has an attorney-client relationship with the obligee or the obligor in carrying out the duties under this chapter.

**History:** L. 1957, ch. 110, § 9; 1975, ch. 96, § 23; 1977, ch. 145, § 11; 1982, ch. 63, § 2; 1989, ch. 62, § 23; 1990, ch. 183, § 59; 1994, ch. 140, § 15; 1995, ch. 258, § 15.

**Amendment Notes.** — The 1994 amendment, effective May 2, 1994, rewrote Subsection (2)(a) which read “A person may not commence any action or file a pleading to establish or modify a support obligation or to recover support due or owing, whether under this chapter or any other applicable statute, without filing an affidavit with the court at the time the action is commenced or the pleading is filed stating whether public assistance has been or is being provided on behalf of a dependent child of the person commencing the action or filing the pleading”; added the designation for Subsection (2)(b) and the second sentence in the subsection; redesignated former Subsection (2)(b) as Subsection (2)(c) and added the language be-

ginning “or mail or deliver” at the end of the first sentence and inserted the second sentence therein; deleted former Subsection (3) which read “As used in this section ‘office’ means the Office of Recovery Services within the Department of Human Services”; and added Subsection (3).

The 1995 amendment, effective May 1, 1995, substituted “child support services have been or are being provided under Part IV of the Social Security Act, 42 U.S.C., Section 601 et seq.” for “public assistance has been or is being provided” in Subsection (2)(b)(i) and (2)(b)(ii); added “of the Attorney General, Child Support Division” at the end of Subsection (2)(b)(ii) and in Subsection (2)(c); added Subsection (2)(b)(iii); substituted “IV-D services have been or are” for “public assistance has been or is” in Subsection (2)(c); and made numerous stylistic changes.

## CHAPTER 45a

### UNIFORM ACT ON PATERNITY

Section		Section	
78-45a-2.	Determination of paternity — Effect — Enforcement.	78-45a-7.	Authority for genetic testing.
78-45a-5.	Remedies.	78-45a-10.	Effect of genetic test results.
		78-45a-10.5.	Visitation rights of father.

#### 78-45a-1. Obligations of the father.

##### NOTES TO DECISIONS

##### Action for reimbursement.

##### — Collateral estoppel.

The trial court properly denied mother’s request for reimbursement of past child support under the doctrine of equitable estoppel, finding that she had made statements and took actions that led the father to conclude that she

wanted nothing to do with him and didn’t want his support, that it was reasonable for the father to rely on her statements and actions, and that, in reliance on her statements and actions, the father had married and incurred additional expenses. *State, Dep’t of Human Servs. ex rel. Parker v. Irizarry*, 262 Utah Adv. Rep. 21 (Utah Ct. App. 1995).

## **45a-2. Determination of paternity — Effect — Enforcement.**

) Paternity may be determined upon:

(a) the petition of the mother, child, putative father, or the public authority chargeable by law with the support of the child; or

(b) a voluntary declaration of paternity executed in accordance with Chapter 45e, Voluntary Declaration of Paternity Act.

) If paternity has been determined or has been acknowledged according to laws of this state or any other state, the liabilities of the father may be reced in the same or other proceedings by:

(a) the mother, child, or the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses; and

(b) other persons including private agencies to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses.

**History:** L. 1965, ch. 158, § 2; 1990, ch. 23; 1994, ch. 127, § 2.

**Amendment Notes.** — The 1994 amendment effective May 2, 1994, designated the sentence as Subsection (1), adding Subsec-

tion (1)(b), and designated the second sentence as Subsection (2), making related stylistic changes and inserting "or any other state" in the introductory language

## **5a-5. Remedies.**

The district court has jurisdiction of an action to establish paternity. All lies for enforcement of judgments for expenses of pregnancy and confine- for a wife or for education, necessary support, or funeral expenses for nate children shall apply. The court has continuing jurisdiction to modify oke a judgment for future education and necessary support. All remedies Title 77, Chapter 31, Uniform Reciprocal Enforcement of Support Act, ailable for enforcement of duties of support under this act.

a) The obligee may enforce his right of support against the obligor and e Department of Human Services may proceed on behalf of the obligee in its own behalf, pursuant to the provisions of Title 62A, Chapter 11, enforce that right of support against the obligor.

(b) The provisions of Title 62A, Chapter 11, apply in all actions by the partment.

c) Whenever the department commences an action under this chapter, shall be the duty of the attorney general or the county attorney of the inty where the obligee resides to represent the department. Neither the orney general nor the county attorney represents or has an attorney- ent relationship with the obligee or the obligor, in carrying out his ponsibilities under this chapter.

he court may enter an order awarding costs, attorney fees, and witness the manner prescribed by Section 30-3-3 upon a judgment or acknowl- it of paternity.

he provisions of Rule 55, Utah Rules of Civil Procedure, apply to ty actions commenced under this chapter.

**History:** L. 1965, ch. 158, § 5; 1975, ch. 96, 0, ch. 183, § 60; 1992, ch. 160, § 2; 137, § 16; 1994, ch. 140, § 16.

**Amendment Notes.** — The 1992 amend-

ment, effective July 1, 1992, in Subsection (1), divided the former first sentence into two sentences, substituted "action to establish pater- nity" for "action under this act" at the end of the

present first sentence, and added the title and chapter citation to the reference in the last sentence; in Subsection (2), substituted the reference to Title 62A, Chapter 11 for "Chapter 45b of this title" in the first and second sentences; designated the former last sentence of Subsection (2) as Subsection (3) and substituted "the department commences an action under this act" for "a court action is commenced by the state Department of Human Services" in that subsection; and made stylistic changes throughout the section.

The 1993 amendment, effective May 3, 1993, deleted the (3) designation formerly before the present last sentence in Subsection (2) and added present Subsection (3).

The 1994 amendment, effective May 2, 1994, subdivided Subsection (2); substituted "chapter" for "act" in the first sentence and added the second sentence in Subsection (2)(c); added Subsection (4); and made stylistic changes.

**Meaning of "this act."** — The phrase "this act" in Subsection (1) refers to Laws 1965, c. 158, which enacted §§ 78-45a-1 to 78-45a-17.

### 78-45a-7. Authority for genetic testing.

(1) Upon motion of any party to the action, made at a time so as not to delay the proceedings unduly, the court shall order the mother, the child, and the alleged father to submit to genetic testing.

(2) The court may, upon its own initiative or upon request made by or on behalf of any person whose blood is involved, order the mother, the child, and the alleged father to submit to genetic testing.

(3) If any party refuses to submit to those tests, the court may resolve the question of paternity against that party, or may enforce its order if the rights of others and the interests of justice so require.

**History:** L. 1965, ch. 158, § 7; 1992, ch. 160, § 3.

**Amendment Notes.** — The 1992 amendment, effective July 1, 1992, added the subsection designations; divided the former first sen-

tence into two sentences, reversing their order and substituting "genetic testing" for "blood tests" in both subsections and "request" for "suggestion" in Subsection (2); and made stylistic changes throughout the section.

### 78-45a-10. Effect of genetic test results.

(1) If the court finds that the conclusions of all experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.

(2) If the experts conclude that the genetic tests show the possibility of the alleged father's paternity, admission of that evidence is within the discretion of the court.

(3) (a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 100.

(b) A presumption under this subsection may be rebutted in an appropriate action only by clear and convincing evidence.

(4) (a) Except as provided in Subsection (b), the court may receive testimony and genetic test results from genetic testing experts and others involved in conducting the genetic tests in the form of an affidavit.

(b) If any party objects to the court's receipt of the testimony or test results in affidavit form, that party may file a written objection with the court. The objection shall be filed within 30 days after service of the written test results on that party. Failure to timely file an objection under this subsection constitutes a waiver of that objection.

**History:** L. 1965, ch. 158, § 10; 1992, ch. 160, § 4.

**Amendment Notes.** — The 1992 amendment, effective July 1, 1992, designated the former first and third sentences as Subsections

(1) and (2), respectively; deleted the former second sentence which read: "If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence"; substituted "genetic tests" for "blood

ests," deleted "depending upon the infrequency of the blood type" from the end, and made a stylistic change in Subsection (2); and added Subsections (3) and (4).

### 8-45a-10.5. Visitation rights of father.

(1) If the court determines that the alleged father is the father, it may upon its own motion or upon motion of the father, order visitation rights in accordance with Sections 30-3-32 through 30-3-37 as it considers appropriate under the circumstances.

(2) Visitation rights may not be granted to a father if the child has been subsequently adopted.

**History:** C. 1953, 78-45a-10.5, enacted by 1994, ch. 29, § 1.

came effective on May 2, 1994, pursuant to Utah Const., Art. VI, Sec. 25.

**Effective Dates.** — Laws 1994, ch. 29 be-

## CHAPTER 45c

# UNIFORM CHILD CUSTODY JURISDICTION

Section		Section	
5c-8.	Misconduct of petitioner as basis for refusing jurisdiction — Notice to another jurisdiction — Ordering petitioner to appear in other court or to return child — Awarding costs.	78-45c-15.	Filing foreign decree — Effect — Enforcement — Award of expenses.

### 45c-1. Purposes — Construction.

#### NOTES TO DECISIONS

ited in Crump v. Crump, 821 P.2d 1172 (Utah Ct. App. 1991).

#### COLLATERAL REFERENCES

**U.R.** — Home state jurisdiction of court § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 A.L.R.5th 1.

### 45c-2. Definitions.

#### NOTES TO DECISIONS

ANALYSIS	
ly proceeding.	parental rights in, and obligations to, child was not custody issue under this chapter. T.B. v. M.M.J., 278 Utah Adv. Rep. 16 (Utah Ct. App. 1995).
ly proceeding. ntary termination of adoptive father's	Cited in Crump v. Crump, 821 P.2d 1172 (Utah Ct. App. 1991).



- (4) (a) The advisory committee shall review the child support guidelines to ensure their application results in the determination of appropriate child support award amounts.
- (b) The committee shall report to the Legislative Judiciary Interim Committee on or before October 1 in 1989 and 1991, and then on or before October 1 of every fourth year subsequently.
- (c) The committee's report shall include recommendations of the majority of the committee, as well as specific recommendations of individual members of the committee.
- (5) (a) (i) Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (ii) Members may decline to receive per diem and expenses for their service.
- (b) (i) State government officer and employee members who do not receive salary, per diem, or expenses from their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the committee at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.
- (ii) State government officer and employee members may decline to receive per diem and expenses for their service.
- (6) Staff for the committee shall be provided from the existing budgets of the Department of Human Services.
- (7) The committee ceases to exist no later than the date the subsequent committee under this section is appointed.

**History:** C. 1953, 78-45-7.13, enacted by L. 1989, ch. 214, § 15; 1990, ch. 183, § 58; 1994, ch. 118, § 14; 1996, ch. 243, § 195; 1997, ch. 233, § 1.

**Amendment Notes.** — The 1997 amendment, effective May 5, 1997, substituted "one representative" for "two representatives" in

Subsections (1)(a) and (1)(b); added new Subsections (1)(d) and (1)(e), renumbering accordingly; substituted "three" for "five" in Subsection (1)(f); and deleted "and the Judiciary Council" after "Department of Human Services" in Subsection (6).

## **78-45-7.22. Social security number in court records.**

The social security number of any individual who is subject to a support order shall be placed in the records relating to the matter.

**History:** C. 1953, 78-45-7.22, enacted by L. 1997, ch. 232, § 73.

**Effective Dates.** — Laws 1997, ch. 232, § 142 makes the act effective on July 1, 1997

## **CHAPTER 45a**

## **UNIFORM ACT ON PATERNITY**

Section		Section
78-45a-2.	Determination of paternity — Effect — Enforcement.	78-45a-8, 78-45a-9. Repealed.
78-45a-5.	Remedies.	78-45a-10. Effect of genetic test results.
78-45a-6.5.	Standard of proof.	78-45a-11.5. Social security number in court records.
78-45a-7.	Authority for genetic testing	

## §45a-2. Determination of paternity — Effect — Enforcement.

- 1) Paternity may be determined upon:
  - (a) the petition of the mother, child, putative father, or the Office of Recovery Services; or
  - (b) a voluntary declaration of paternity executed in accordance with Title 78, Chapter 45e, Voluntary Declaration of Paternity Act.
- 2) If paternity has been determined or has been acknowledged according to laws of this state or any other state, the liabilities of the father may be forced in the same or other proceedings by:
  - (a) the mother, child, the Office of Recovery Services, or the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses; and
  - (b) other persons including private agencies to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses.
- 3) An adjudication of paternity or a voluntary declaration executed in accordance with Title 78, Chapter 45e, Voluntary Declaration of Paternity Act, shall be filed with the state registrar in accordance with Section 26-2-5.
- 4) A party to an action under this chapter has a continuing obligation to the court informed of the party's current address.

**History:** L. 1965, ch. 158, § 2; 1990, ch. 23; 1994, ch. 127, § 2; 1997, ch. 232,

of Recovery Services" for "public authority chargeable by law with the support of the child" in Subsection (1)(a); added "the Office of Recovery Services" in Subsection (2)(a); and added Subsections (3) and (4).

**Amendment Notes.** — The 1997 amendment effective July 1, 1997 substituted "Office

## §5a-5. Remedies.

The district court has jurisdiction of an action to establish paternity. All remedies for enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for putative children shall apply. The court has continuing jurisdiction to modify or set aside a judgment for future education and necessary support. All remedies available under Title 78, Chapter 45f, Uniform Interstate Family Support Act, are available for enforcement of duties of support under this chapter.

(a) The obligee may enforce his right of support against the obligor and the state may proceed on behalf of the obligee or in its own behalf, pursuant to the provisions of Title 62A, Chapter 11, Recovery Services, to enforce that right of support against the obligor.

(b) The provisions of Title 62A, Chapter 11, Recovery Services, apply in all actions by the state.

(c) Whenever the state commences an action under this chapter, it shall be the duty of the attorney general or the county attorney of the county where the obligee resides to represent the state. Neither the attorney general nor the county attorney represents or has an attorney-client relationship with the obligee or the obligor, in carrying out his responsibilities under this chapter.

Upon motion by a party, the court shall issue a temporary order in an action to require the payment of child support pending a determination of paternity if there is clear and convincing evidence of paternity in the

form of genetic test results under Section 78-45a-7 or 78-45a-10, or other evidence.

(4) The court may enter an order awarding costs, attorney fees, and witness fees in the manner prescribed by Section 30-3-3 upon a judgment or acknowledgment of paternity.

(5) Rule 55, Default Judgment, Utah Rules of Civil Procedure, applies to paternity actions commenced under this chapter.

**History:** L. 1965, ch. 158, § 5; 1975, ch. 96, § 24; 1990, ch. 183, § 60; 1992, ch. 160, § 2; 1993, ch. 137, § 16; 1994, ch. 140, § 16; 1997, ch. 232, § 75.

**Amendment Notes.** — The 1997 amendment, effective July 1, 1997, in the last sentence of Subsection (1) substituted “Title 78, Chapter 45f, Uniform Interstate Family Sup-

port Act” for “Title 77, Chapter 31, Uniform Reciprocal Enforcement of Support Act”; substituted “chapter” for “act”; in Subsection (2)(a) substituted “state” for “Department of Human Services”; substituted “state” for “department” throughout Subsections (2)(b) and (2)(c); added Subsection (3) and made related redesignations; and made stylistic changes.

### **78-45a-6.5. Standard of proof.**

The standard of proof in a trial to determine paternity is “by a preponderance of the evidence.”

**History:** C. 1953, 78-45a-6.5, enacted by L. 1988, ch. 93, § 1; 1997, ch. 232, § 76.

**Amendment Notes.** — The 1997 amend-

ment, effective July 1, 1997, rewrote the section.

### **78-45a-7. Authority for genetic testing.**

(1) Upon motion of any party to the action, made at a time so as not to delay the proceedings unduly, the court shall order the mother, the child, and the alleged father to submit to genetic testing if the request is supported by a sworn statement by the requesting party:

(a) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(b) denying paternity and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.

(2) The court may, upon its own initiative, order the mother, the child, and the alleged father to submit to genetic testing.

(3) (a) The court shall order genetic testing:

(i) of a type generally acknowledged as reliable by accredited bodies designated by the federal Secretary of Health and Human Services; and

(ii) to be performed by a laboratory approved by such an accreditation body.

(b) Except as provided in Subsection (6), the cost of genetic testing shall be paid by the party who requested it or shared between the parties requested by the court, subject to recoupment against the party who challenges the existence or nonexistence of paternity if the result of the genetic test is contrary to the position of the challenger.

(4) Upon request by a party, a court may order a second genetic test if it complies with Subsection (3) if paid for in advance by the requesting party requested within 15 days of the result of the first genetic test being sent to the last-known address on file under Section 78-45a-2.

(5) If any party refuses to submit to genetic testing, the court may resolve the question of paternity against that party, or may enforce its order if the rights of others and the interests of justice so require.

(6) The office may request genetic testing under this section and shall pay for genetic testing it requests subject to recoupment as provided in Section 2A-11-304.1.

**History:** L. 1965, ch. 158, § 7; 1992, ch. 0, § 3; 1997, ch. 232, § 77.

**Amendment Notes.** — The 1997 amendment, effective July 1, 1997 added “if the request is supported by a sworn statement by the requesting party” in the opening paragraph of

Subsection (1); added Subsections (1)(a) and (1)(b); deleted “or upon request made by or on behalf of any person whose blood is involved” after “initiative” in Subsection (2); added Subsections (3), (4), and (6) and made related redesignations; and made stylistic changes.

### **78-45a-8, 78-45a-9. Repealed.**

**Repeals.** — Laws 1997, ch. 232, § 141 repeals §§ 78-45a-8 and 78-45a-9, as enacted by Laws 1965, ch. 158, §§ 8 and 9, relating to

selection and compensation of experts, effective July 1, 1997.

### **78-45a-10. Effect of genetic test results.**

1) Genetic test results shall be admissible as evidence of paternity without need for foundation testimony or other proof of authenticity or accuracy if:

(a) of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of Health and Human Services;

(b) performed by a laboratory approved by such an accreditation body; and

(c) not objected to with particularity and in writing within 15 days after the written test results being sent to the parties.

) (a) Upon a motion of a party, a court may receive testimony from genetic testing experts and others involved in conducting the genetic tests if the testimony:

(i) is based on a genetic test performed in accordance with Subsection 78-45a-7(3)(a) or 78-45a-7(4); and

(ii) is useful to the court in determining paternity.

(b) Unless a party objects with particularity and in writing within 15 days after the written test results are sent to the last-known address of that party on file under Section 78-45a-2, testimony received under Subsection (2)(a) shall be in affidavit form.

(a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150.

(b) A presumption under Subsection (3)(a) may only be rebutted by a second genetic test:

(i) that complies with Subsection 78-45a-7(4); and

(ii) results in an exclusion.

If a presumption of paternity established under Subsection (1) is not rebutted by a second genetic test under Subsection (2), the court shall issue an order establishing paternity.

Bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

**History:** C. 1953, 78-45a-10, enacted by L. ch. 232, § 78.

**Repeals and Reenactments.** — Laws 1997, ch. 232, § 78 repeals former § 78-45a-10,

as amended by Laws 1992, ch. 160, § 4, prescribing the effect of genetic test results, and enacts the present section, effective July 1, 1997.

**78-45a-11.5. Social security number in court records.**

The social security number of any individual who is subject to a paternity determination shall be placed in the records relating to the matter.

**History:** C. 1953, 78-45a-11.5, enacted by L. 1997, ch. 232, § 79.

**Effective Dates.** — Laws 1997, ch. 232 § 142 makes the act effective on July 1, 1997

## CHAPTER 45e

### VOLUNTARY DECLARATION OF PATERNITY

## Section

78-45e-2. Voluntary declaration of paternity.

## Section

78-45e-3. Requirements for filing.  
78-45e-4. Rescission of the declaration.

**78-45e-2. Voluntary declaration of paternity.**

(1) (a) A voluntary declaration of paternity filed in compliance with this chapter establishes a father-child relationship identical to the relationship established when a child is born to persons married to each other.

(b) When a voluntary declaration of paternity is filed, the liabilities of the father include, but are not limited to, the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support, and any funeral expenses for the child.

(c) When a father voluntarily declares paternity, his liability for past amounts due is limited to a period of four years immediately preceding the date that the voluntary declaration of paternity was filed.

(2) When a voluntary declaration of paternity is filed it shall be recognized as a basis for a child support order without any further requirement or proceeding regarding the establishment of paternity.

(3) The voluntary declaration of paternity may be completed and signed any time after the birth of the child. A voluntary declaration of paternity may not be executed or filed after consent to or relinquishment for adoption has been signed.

(4) The voluntary declaration of paternity shall become an amendment to the original birth certificate. The original certificate and the declaration shall be marked so as to be distinguishable. The declaration may be included as part of subsequently issued certified copies of the birth certificate. Alternatively, electronically issued copies of a certificate may reflect the amended information and the date of amendment only.

(5) The voluntary declaration of paternity shall be in the form prescribed by the state registrar of vital statistics and shall be accompanied with an explanation of the alternatives to, the legal consequences of, and the rights and responsibilities that arise from signing the declaration.

(6) The social security number of any person who is subject to a voluntary declaration of paternity shall be placed in the records relating to the matter.

**History:** C. 1953, 78-45e-2, enacted by L. 1994, ch. 127, § 4; 1995, ch. 258, § 16; 1997, ch. 232, § 80.

**Amendment Notes.** — The 1997 amend-

ment, effective July 1, 1997 added "and shall be accompanied..." in Subsection (5) and added Subsection (6).

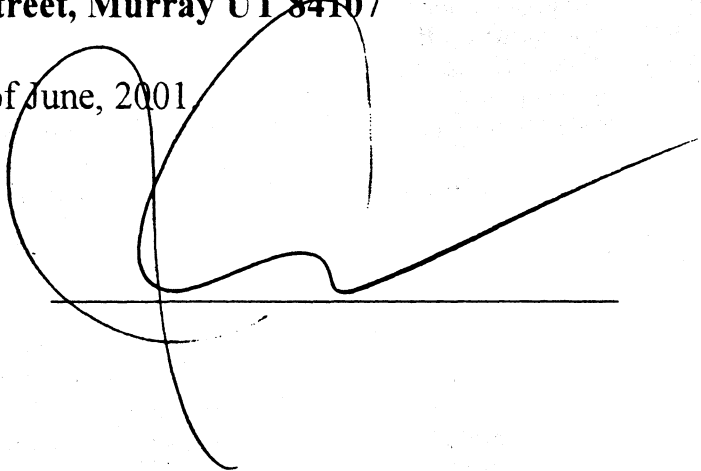
## **CERTIFICATE OF SERVICE**

True copies of the foregoing were mailed to:

**David W. Steffensen**  
**Attorney for Karly Yvette Madsen, a minor child.**  
**2159 South 700 East, Suite 100, SLC UT 84106**

**Michael E. Day**  
**Attorney for Sheri Marion**  
**45 East Vine Street, Murray UT 84107**

on this, the 2 day of June, 2001

A large, stylized handwritten signature, likely of Michael E. Day, is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.