

1988

Vickie Burrow v. Mark Vrontikis : Brief of Appellant

Utah Court of Appeals

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Thomas Arnett, Jr.; Attorney for Appellant.

Jerome H. Mooney; Mooney & Associates; Attorney for Respondent.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880098

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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VICKIE BURROW,

Plaintiff and
Appellant,

vs.

MARK VRONTIKIS

Defendant and
Respondent.

Case No. 88-0098CA

14b

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BRIEF OF THE APPELLANT

Appeal from the Judgment Rendered by
the District Court of the Third Judicial District
for Salt Lake County

Honorable J. Dennis Frederick Presiding

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JUL 1 1988

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

-----ooo0ooo-----

VICKIE BURROW,	:	
	:	
Plaintiff and	:	
Appellant,	:	Case No. 88-0098CA
vs.	:	
	:	
MARK VRONTIKIS,	:	
	:	
Defendant and	:	
Respondent.	:	

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JURISDICTION AND NATURE OF THE PROCEEDINGS

The Utah Court of Appeals has jurisdiction to decide the appeal of this case pursuant to the provisions of Section 78-2(a)-3(2)(g), Utah Code Annotated (1953 as amended).

This appeal is from the Order of Judge J. Dennis Frederick dated January 5, 1988, setting aside a Judgment in favor of the plaintiff previously entered by Judge Frederick on September 18, 1984. Judge Frederick ruled that the plaintiff's claim for back support in a paternity action was barred by the doctrine of laches and/or equitable estoppel (Copies of the Order and Findings of Fact and Conclusions of Law are included herein in the addendum.).

ISSUES PRESENTED BY APPEAL

1. Whether the equitable doctrines of laches and/or equitable estoppel apply to the facts of this case.
2. Whether the holding in Borland v. Chandler, 733 P.2d 144 (Utah 1987) is applicable to this case.

STATUTES, RULES AND CASES

1. Uniform Act on Paternity, 78-45a-1, et seq., Utah Code Annotated (1953 as amended) (A copy of the Act is included herein in the addendum.).

2. Borland v. Chandler, 733 P.2d 144 (Utah 1987) (A copy of this case is included herein in the addendum.).

STATEMENT OF THE CASE

1. This is a paternity action brought by plaintiff against defendant pursuant to the Uniform Act on Paternity, Section 78-45a-1, et seq., Utah Code Annotated (1953 as amended). (R. 2-5)

2. Judgment was entered in the Third Judicial District Court of Salt Lake County, State of Utah, on September 18, 1984. The Judgment declared the defendant Mark Vrontikis to be the natural father of Chad Laverne Harney, son of the plaintiff Vickie Burrow. The Judgment also awarded the plaintiff a Judgment against the defendant in the sum of \$7,200.00, representing back child support from June 1, 1979 through May 31, 1983, in accordance with the provisions of Section 78-45a-3, Utah Code Annotated (1953 as amended). (R. 165-167)

3. In entering the Judgment, the Third District Court ruled that it was bound by the ruling of the Utah Supreme Court in the case of Zito v. Butler, 584 P.2d 868 (Utah 1978), that the equitable doctrine of laches was not applicable in a statutory action. (R. 171) That ruling was subsequently overruled by the Utah Supreme

Court in the case of Borland v. Chandler, 733 P.2d 144 (Utah 1987).
(R. 249)

4. The defendant appealed the decision of the Third District Court to the Utah Supreme Court. (R. 172) The Utah Supreme Court thereafter transferred this case to the Utah Court of Appeals pursuant to the provisions of 78-2-2(4), Utah Code Annotated (1953 as amended). ([Missing from Record]) The Utah Court of Appeals subsequently reversed and remanded the Judgment of the Third Judicial District Court on the basis of the Utah Supreme Court's ruling in Borland, supra. (R. 247-251) The Third District Court thereafter held an evidentiary hearing concerning the issue of whether the doctrine of laches applied to the facts of this case and thereafter entered its Findings of Fact and Order that the doctrine of laches barred plaintiff's claim for back child support. (R. 253-258) Plaintiff thereafter filed this appeal. (R. 259)

STATEMENT OF FACTS

1. Plaintiff is the natural mother of a minor son Chad Laverne Harney, born August 17, 1976. (R. 179)

2. Defendant is the natural father of plaintiff's child Chad Laverne Harney. (R. 177-178)

3. When plaintiff informed defendant that she was pregnant in March 1976, he indicated that he was not able to make any commitment to her. (R. 180, 270, T. 20)

4. There was no further direct contact between the plaintiff and defendant prior to the filing of this action. (R 181, 214, T. 21)

5. Plaintiff never made any direct representations to defendant concerning his obligations or her intentions. (T. 8, 9)

6. Plaintiff never requested any third party to relay any representations to defendant concerning his obligations or her intentions. (T. 25, 26, 31, 32)

SUMMARY OF ARGUMENT

1. The equitable doctrines of laches and/or equitable estoppel are not applicable to the facts of this case. For these doctrines to apply requires some affirmative action on the part of the plaintiff more than mere silence. There is no evidence in the record to support the trial court's holding that there was more than mere silence.

2. The trial court misapplied the holding in Borland v. Chandler, in that it deals with Section 78-45a-2 and not Section 78-45a-3, Utah Code Annotated (1953 as amended). In Borland, the Utah Supreme Court discussed the possible prejudice to the defendant of plaintiff's delay in terms concerning defendant's ability to defend himself at trial. In the instant case, no assertion was made nor could one have been made that the defendant was prejudiced at trial by plaintiff's delay in bringing this action, because the defendant stipulated to the issue of paternity at trial. Section 78-45a-3 clearly is intended to protect persons in the position of the defendant by limiting the father's liability to a period of four years.

ARGUMENT

POINT I

THE EQUITABLE DOCTRINES OF LACHES AND/OR EQUITABLE ESTOPPEL ARE NOT APPLICABLE TO THE FACTS OF THIS CASE.

While the Utah Supreme Court has clearly ruled in the case of Borland v. Chandler, supra, that the equitable doctrines of laches and/or equitable estoppel can apply to a statutory paternity action. The doctrines are simply not applicable to the facts of this case. In the evidentiary hearing heard before Judge Frederick on December 7, 1987, both the plaintiff and defendant testified that no representations were made by the plaintiff to the defendant. The plaintiff testified that she did not make any agreements or promises to the defendant. (T. 7) The defendant testified that the plaintiff made no commitment to him. (T. 20, 21) The defendant further testified that he knew the plaintiff did not want a third party to tell him anything. He testified as follows: "As a matter of fact, she did not even want him to tell me - - at one time I was with Bill and I could tell that he had some information that he so badly wanted to tell me, yet he was asked not to . . ." The third party, William Robert Snape, Jr., testified that the plaintiff did not ask him to relay any information or message to the defendant. (T. 35)

In the case of Adams v. Adams, 593 P.2d 147 (Utah 1979), the Utah Supreme Court dealt with the issue of laches in a claim for accrued and unpaid alimony. The parties in that case were divorced in 1970 and in 1977 the plaintiff made a claim for unpaid alimony.

The trial court found for the defendant, ruling that the plaintiff was estopped by her silence from claiming the unpaid alimony. The Utah Supreme Court reversed and remanded with instructions to enter judgment in favor of the plaintiff. In so doing, the Utah Supreme Court stated:

Mere silence on the part of plaintiff is not sufficient to raise an estoppel, and we find nothing in the record to support the Court's finding that she had a duty to speak. In the case of French v. Johnson, 16 Utah 2d 360, 401 P.2d 315 (1965), this Court held:

The facts show no representations either explicit or implicit, by plaintiff to defendant with respect to discontinuation of payments . . . Mere silence over a period of time will not raise an estoppel. (Citations omitted)

The record does not show that plaintiff misled defendant in any way, nor that defendant changed his position to his detriment in reliance on any representations or actions on the part of plaintiff.

In the instant case, it is uncontroverted that the plaintiff never made any representations to the defendant concerning his obligations or her intentions. It is also uncontroverted that she never asked any third person to relay any representations concerning those matters. Apparently, a third person who knew of her stated intentions relayed these to the defendant. This does not rise to the level required by the Utah Supreme Court in Adams. In that decision, the court clearly contemplated some affirmative act on the part of the plaintiff and not mere conversation among friends that subsequently was relayed, without permission or request, to the defendant. Moreover, it is also uncontroverted that the only real information conveyed to the defendant was that the plaintiff said: "I'd like to tell the son of a bitch I don't want to see him ever

again." (T. 35) This is not the type of representation upon which the defendant is entitled to assume that he has no obligation for a child he has fathered.

In the case of Hunter v. Hunter, 669 P.2d 430 (Utah 1983), the plaintiff sought judgment against the defendant for nine years delinquent child support. The trial court found that the plaintiff had waived her right to, and was estopped to collect, the accrued child support, because she had concealed herself and the minor child from the defendant. The defendant had also been informed by third parties that he had no obligation of support. The Utah Supreme Court reversed and remanded for entry of judgment in favor of the plaintiff. In so doing, the court stated as follows:

The common element of the doctrines of waiver and estoppel is the requirement of action or conduct by the person against whom the doctrines are asserted. Such action or conduct is missing in the present case.

The Utah Supreme Court made this statement even in the face of conduct on the part of the plaintiff in concealing herself and the minor child from the defendant. The plaintiff claimed that her concealment was a result of her fear of the defendant. The Supreme Court found that this concealment and the plaintiff's inaction in seeking the unpaid support ". . . does not unequivocally evince an intent to waive her right to the accrued child support." This is precisely the situation in the present case. The plaintiff's statement to a third party, gratuitously relayed to the defendant,

that she did not want to see the defendant, does not unequivocally evince an intent to waive her right to support.

Even in his self-serving testimony, the defendant acknowledges that at the time the plaintiff told him she was pregnant in March 1976, he was aware he could have been the father of the child. He subsequently stipulated to a finding of paternity without a trial on that issue. He also testified that he knew from third persons that the plaintiff had given birth to the child and he acknowledged that he could have located the plaintiff and the child had he attempted to do so. The defendant cannot be allowed to avoid a statutorily imposed support obligation merely due to the delay on the part of the plaintiff in bringing this action. By her delay, the plaintiff has been penalized for all of the support rendered by her from the child's birth in 1976 through 1979 due to the precise limitation imposed by Section 78-45a-3, Utah Code Annotated (1953 as amended).

POINT II

THE TRIAL COURT MISAPPLIED THE HOLDING IN BORLAND V. CHANDLER.

In Borland, supra, as set forth above, the Utah Supreme Court held that the doctrines of laches and/or equitable estoppel may be applicable in a statutory action. However, the discussion in Borland clearly centers on the potential prejudice to the defendant at trial due to the plaintiff's delay. In that case, the defendant argued that due to the plaintiff's delay, he was unable to contact witnesses and locate documents material to his defense. The court

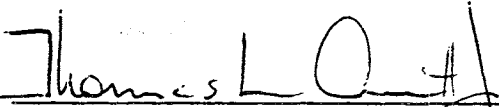
found that the defendant had not in fact suffered any prejudice in being able to conduct his defense at trial. The holding of the Supreme Court in Borland clearly deals with Section 78-45a-2. There was absolutely no discussion concerning the possible application of laches to Section 78-45a-3. This is appropriate since the intent and effect of Section 78-45a-3 is to limit the defendant father's potential exposure for past due support. It is clearly designed to protect the defendant father from prolonged delay on the part of the plaintiff mother. To go further as the trial court has done and deny the plaintiff any recovery whatsoever for any past due support is to completely ignore the statutory duty imposed by Section 78-45-3: "Every man shall support his child . . ." Due to the protective nature of the limitation in Section 78-45a-3, the defendant has already been excused from three years of support obligation for his son. To uphold the trial court's ruling and deny any obligation on the part of the defendant for past due support is to ignore the legislative intent in enacting Section 78-45a-3. This was not the intent of the Utah Supreme Court in Borland where the issue was clearly one of prejudice to the defendant at trial. No prejudice at trial in the instant case has been asserted nor could it be.

CONCLUSION

For the reasons set forth above, the plaintiff believes the trial court erred in setting aside the judgment previously entered. The plaintiff respectfully urges this court to reverse the decision of the trial court and reinstate the judgment in her favor.

RESPECTFULLY SUBMITTED this 15 day of July,
1988.

THOMAS N. ARNETT, Jr.


Thomas N. Arnett, Jr.
Attorney for Plaintiff and
Appellant

CERTIFICATE OF MAILING

STATE OF UTAH)
 :SS.
County of Salt Lake)

Kristine Wimmer, being duly sworn, says:

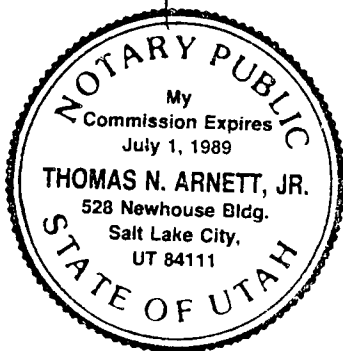
That she is employed in the offices of Thomas N. Arnett, Jr., attorney for plaintiff/appellant, Vickie Burrow, herein, that she served the attached Brief of Appellant upon the following parties by placing four true and correct copies thereof in an envelope addressed to:

Jerome H. Mooney
MOONEY & ASSOCIATES
236 South 300 East
Salt Lake City, Utah 84111

and depositing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah on the 15th day of July, 1988.

Kristine Wimmer

SUBSCRIBED AND SWORN to before me personally this 15 day of July, 1988.



Thomas N. Arnett, Jr.
Notary Public

JEROME H. MOONEY #2303
MOONEY & ASSOCIATES
Attorney for the Defendant
236 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 364-5635

Jan 5 1988
FILED
CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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VICKIE BURROW,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
vs.	:	
	:	Civil No. C83-3916
MARK VRONTIKIS,	:	
	:	JUDGE: J. Dennis Frederick
Defendant.	:	
	:	

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This matter came on regularly for hearing before the Honorable J. Dennis Frederick, Judge, this 7th day of December, 1987, on remand from the Court of Appeals for consideration of the application of laches and estoppel to Plaintiff's claim for support for the period prior to the commencement of the action in this matter; Plaintiff appearing in person and through her attorney, Thomas N. Arnett, Jr., and Defendant appearing in person and through his attorney, Jerome H. Mooney. The Court having reviewed the file in this matter and taken testimony now enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The Court notes that in the original trial in this matter conducted on the 13th day of August, 1984, that the Court expressed its concern with the inordinate delay of the Plaintiff in making her claim in this matter and for the impact of that delay on the Defendant.

2. That said delay extended from March of 1976 when the parties met and discussed the condition of the Plaintiff until the Plaintiff filed the instant action in May of 1983 which was prompted by support requirements from her then current husband due to a then recent separation.

3. That at the time of the original hearing this Court was bound by the Utah Supreme Court case of Zito v. Butler, which prohibited the application of laches in paternity actions. This case has now been overruled by the Utah Supreme Court in the case of Borland v. Chandler, which served as a basis for the reversal and remand in the instant case by the Court of Appeals with instructions to the application of laches and estoppel to the Plaintiff's claim.

4. Plaintiff in the instant action engaged in an unreasonable delay in making claim. Delaying said claim for seven years. This delay additionally was more than just mere silence. Plaintiff made statements to a mutual friend of the parties which statements she knew or should have known would be communicated to the Defendant and which were, in fact,

communicated to the Defendant indicating that she wanted nothing further to do with the Defendant and the Defendant was to have no contact with her or the minor child.

5. That the Defendant relied upon these representations which were relayed to him and that the Defendant's reliance was not unreasonable under the circumstances.

6. That during the period of time after 1976 and prior to 1983, the Defendant entered into a marriage and incurred debts and obligations of his own.

7. The failure of the Defendant to pay support for the minor child in this matter during the period of 1976 through 1983 is a result of the actions and inducements of the Plaintiff. To enforce the obligation for this period against the Defendant would create an injustice.

8. The obligation represented by the judgment in the amount of \$7,200.00 for the period prior to May, 1983, should be barred by the equitable doctrines of laches and/or equitable estoppel.

CONCLUSIONS OF LAW

1. Equity should be applied in actions to prevent injustices including actions for claims in paternity.

2. Claim of the Plaintiff for back support prior to the filing of the instant action should be and is barred by the doctrines of laches and/or equitable estoppel.

3. The judgment previously entered in the amount of \$7,200.00 for support prior to May of 1983 is set aside.

DATED this 24 day of June, 1987.

BY THE COURT:

J. DENNIS FREDERICK
District Court Judge

Approved as to form:

Thomas N. Arnett, Jr.
THOMAS N. ARNETT, JR.
Attorney for Plaintiff

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

DJJVRONT

FILED IN CASE NO. 10-10000-01

~~CONFIDENTIAL~~

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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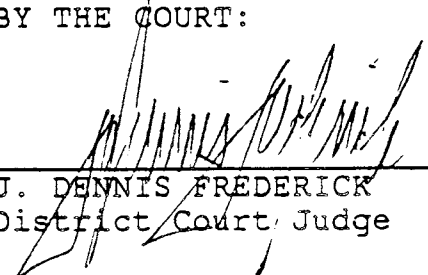
JUDGE: J. Dennis Frederick

The above-entitled action came on regularly for hearing on the 7th day of December, 1987. Plaintiff appearing in person and through her attorney, Thomas N. Arnett, Jr., and Defendant appearing in person and through his attorney, Jerome H. Mooney. The Court having heard the testimony of the parties, reviewed the file in the instant matter and heretofore made and entered its Findings of Fact and Conclusions of Law; now, therefore Orders as follows:

1. That portion of the original judgment outlined in Paragraph 6 in the amount of \$7,200.00 is set aside. The balance of the previous judgment remains in full force and effect.

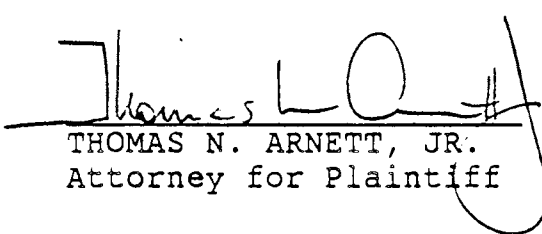
DATED this 5th day of May, 1987.

BY THE COURT:



J. DENNIS FREDERICK
District Court Judge

Approved as to form:



THOMAS N. ARNETT, JR.
Attorney for Plaintiff

ATTEST
H. DIXON HINDLEY
Clerk

By  _____
Deputy Clerk

DJJVRONT

CHAPTER 45a

UNIFORM ACT ON PATERNITY

Section		Section	
78-45a-1.	Obligations of the father.	78-45a-9.	Compensation of expert witnesses.
78-45a-2.	Enforcement.	78-45a-10.	Effect of test results.
78-45a-3.	Limitation on recovery from the father.	78-45a-11.	Judgment.
78-45a-4.	Limitations on recovery from father's estate.	78-45a-12.	Security.
78-45a-5.	Remedies.	78-45a-13.	Settlement agreements.
78-45a-6.	Time of trial.	78-45a-14.	Venue.
78-45a-7.	Authority for blood tests.	78-45a-15.	Uniformity of interpretation.
78-45a-8.	Selection of experts.	78-45a-16.	Short title.
		78-45a-17.	Operation of act.

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

The father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child. A child born out of wedlock includes a child born to a married woman by a man other than her husband.

History: L. 1965, ch. 158, § 1.

Cross-References. — Public support of children, Chapter 45b of this title.

Uniform Civil Liability for Support Act,
§ 78-45-1 et seq.

Uniform Reciprocal Enforcement of Support
Act, § 77-31-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Action to establish paternity.

—Attorney fees.

—Statute of limitations.

—Tolling.

Custody rights.

—Acknowledgment of paternity.

Right to trial by jury.

Action to establish paternity.— **Attorney fees.**

This act makes no provision for awarding attorney fees to the mother in an action to establish paternity. *Zito v. Butler*, 584 P.2d 868 (Utah 1978).

—**Statute of limitations.**—**Tolling.**

Any statute limiting the time within which a paternity action must be commenced under the Uniform Act on Paternity is tolled for all statutorily qualified plaintiffs during the period of the child's minority. *Szarak v. Sandoval*, 636 P.2d 1082 (Utah 1981).

Custody rights.—**Acknowledgment of paternity.**

Father who publicly acknowledged his pater-

nity had right to custody of his illegitimate child, second only to mother's right, so that it was improper for juvenile court to dismiss petition for custody and thereby terminate father's parental right without hearing to determine whether he was fit and proper person. *State ex rel. Baby Girl M*, 25 Utah 2d 101, 476 P.2d 1013, 45 A.L.R.3d 206 (1970).

Right to trial by jury.

Since there is no inherent constitutional right to a trial by jury in paternity proceedings in this state and the Legislature has not provided for such a right by statute, the defendant, a putative father, had no right to a trial by jury. *Hyatt v. Hill*, 714 P.2d 299 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — *Nordgren v. Mitchell: Indigent Paternity Defendants' Right to Counsel*, 1982 Utah L. Rev. 933.

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 68.

C.J.S. — 10 C.J.S. Bastards § 18.

A.L.R. — Validity and construction of puta-

tive father's promise to support or provide for illegitimate child, 20 A.L.R.3d 500.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Key Numbers. — Illegitimate Children — 21.

78-45a-2. Enforcement.

Paternity may be determined upon the petition of the mother, child, or the public authority chargeable by law with the support of the child. If paternity has been determined or has been acknowledged according to the laws of this state, the liabilities of the father may be enforced in the same or other proceedings

(1) by the mother, child, or the public authority which have furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses, and

(2) by 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.
Cross-References. — Enforcement of provisions by Department of Social Services, § 55-15a-24.
 Office of Recovery Services to perform duties

of Department of Social Services in collecting child support, § 55-15c-4.
 Public support of children, Chapter 45b of this title.

NOTES TO DECISIONS

ANALYSIS

Estoppel and laches.

Evidence.

—Conception and birth.

Right to counsel.

—Indigent prisoners.

—Blood tests.

—Discretion of court.

Standard of proof.

—Preponderance of evidence.

Estoppel and laches.

Under appropriate circumstances, laches may bar an action for paternity. *Borland v. Chandler*, No. 19066 (Utah Sup. Ct. filed Feb. 4, 1987).

A paternity action brought six years after the birth of the child was not barred by laches, where defendant made no factual showing to support his argument that he was prejudiced by the delay. *Borland v. Chandler*, No. 19066 (Utah Sup. Ct. filed Feb. 4, 1987).

Evidence.

—Conception and birth.

Where child was conceived while mother was married to her first husband and born while she was married to her second husband, the child was legitimate whichever husband was the father, and testimony by mother that disputed second husband's fatherhood and supported first husband's fatherhood would not illegitimize the child and was properly admissible in paternity action against first husband. *Roods v. Roods*, 645 P.2d 640 (Utah 1982).

Right to counsel.

—Indigent prisoners.

—Blood tests.

While due process does not require Utah to

appoint counsel for all indigent prisoners who are defendants in paternity cases, there may be some complicated paternity suits in which the risks of error would be high enough that the presumption against the right to appointed counsel would be overcome; given the availability and quality of the blood tests, there is no need for appointment of counsel prior to the time the tests are given. *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1983).

—Discretion of court.

Due process of law does not require that all indigent, incarcerated defendants in paternity actions must always be appointed counsel; whether due process requires the appointment of counsel in such cases is vested in the discretion of the trial court. *Nordgren v. Mitchell*, 524 F. Supp. 242 (D. Utah 1981), *aff'd*, 716 F.2d 1335 (10th Cir. 1983).

Standard of proof.

—Preponderance of evidence.

The applicable standard of proof where paternity is asserted is "by a preponderance of the evidence." *Roods v. Roods*, 645 P.2d 640 (Utah 1982).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Note, *Wiese v. Wiese: Support Obligations of Step-parents—The Utah Supreme Court Toppled by Estoppel*, 12 J. Contemp. L. 305 (1987).

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 74 et seq.

C.J.S. — 10 C.J.S. Bastards § 32 et seq.

A.L.R. — Death of putative father as precluding action for determination of paternity or for child support, 58 A.L.R.3d 188.

Statute of limitations in illegitimacy or bastardy proceedings, 59 A.L.R.3d 685.

Key Numbers. — Illegitimate children — 30 et seq.

78-45a-3. Limitation on recovery from the father.

The father's liability for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

History: L. 1965, ch. 158, § 3.

for support or maintenance of dependent children, § 78-12-22.

Cross-References. — Limitation of action

NOTES TO DECISIONS**Statute of limitations.**

for all statutorily qualified plaintiffs during the child's minority, the amount of recovery of child support is still limited by this section. *Szarak v. Sandoval*, 636 P.2d 1082 (Utah 1981).

—Tolling.

While any statute limiting the time within which a paternity action must be commenced under the Uniform Act on Paternity is tolled

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 *Am. Jur. 2d Bastards* § 127.
C.J.S. — 10 *C.J.S. Bastards* § 53.

Key Numbers. — Illegitimate children ¶ 35.

78-45a-4. Limitations on recovery from father's estate.

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws.

History: L. 1965, ch. 158, § 4.

1965, Chapter 158, which appears as §§ 78-45a-1 to 78-45a-17.

Meaning of "this act". — The term "this act," referred to in this section, means Laws

Cross-References. — Civil liability for support, Chapter 45 of this title.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 *Am. Jur. 2d Bastards* § 127.
C.J.S. — 10 *C.J.S. Bastards* § 53.

Key Numbers. — Illegitimate children ¶ 35.

78-45a-5. Remedies.

(1) The district court has jurisdiction of an action under this act and all remedies for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for legitimate children apply. The court has continuing jurisdiction to modify or revoke a judgment for future education and necessary support. All remedies under the Uniform Reciprocal Enforcement of Support Act, are available for enforcement of duties of support under this act.

(2) The obligee may enforce his right of support against the obligor and the state Department of Social Services may proceed on behalf of the obligee or in its own behalf pursuant to the provisions of Chapter 45b of this title to enforce that right of support against the obligor. In such actions by the department, all the provisions of Chapter 45b of this title shall be equally applicable to this chapter. Whenever a court action is commenced by the state Department of

Social Services, it shall be the duty of the attorney general or the county attorney, of the county of residence of the obligee, to represent that department.

History: L. 1965, ch. 158, § 5; 1975, ch. 96, § 24.

Meaning of "this act". — See note under same catchline following § 78-45a-4.

Uniform Reciprocal Enforcement of Support Act. — The Uniform Reciprocal Enforcement of Support Act, referred to in the

last sentence in Subsection (1), appears as Chapter 31 of Title 77.

Cross-References. — Creation of Department of Social Services, § 63-35-3.

General duties of attorney general, § 67-5-1.

• General duties of county attorney, § 17-18-1.

General jurisdiction of district court, § 78-3-4.

NOTES TO DECISIONS

Jurisdiction.

—Minority of putative father.

District court, and not the juvenile court, has jurisdiction over action brought under the Uni-

form Act on Paternity, when the putative father is a minor. State ex rel. Utah State Dep't of Social Servs. v. Dick, 684 P.2d 42 (Utah 1984).

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 126 et seq.

C.J.S. — 10 C.J.S. Bastards §§ 116, 117.

Key Numbers. — Illegitimate children ⇐ 69 to 71.

78-45a-6. Time of trial.

If the issue of paternity is raised in action commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage but during such delay testimony may be perpetuated according to the laws of this state.

History: L. 1965, ch. 158, § 6.

Cross-References. — Depositions before action, Rule 27 U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 123.

C.J.S. — 10 C.J.S. Bastards § 101.

Key Numbers. — Illegitimate Children ⇐ 55.

78-45a-7. Authority for blood tests.

The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

History: L. 1965, ch. 158, § 7.

Unreasonable searches, Utah Const., Art. I,

Cross-References. — Blood tests to determine parentage, §§ 78-25-18 to 78-25-23.

Sec. 14.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 118.
C.J.S. — 10 C.J.S. Bastards § 93.

Key Numbers. — Illegitimate Children 45.

78-45a-8. Selection of experts.

The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

History: L. 1965, ch. 158, § 8.

Court appointment of expert witnesses, Rule

Cross-References. — Blood test examiner as witness, § 78-25-20.

706, U.R.E.

78-45a-9. Compensation of expert witnesses.

The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

History: L. 1965, ch. 158, § 9.

Cross-References. — Judgment and costs, Rule 54, U.R.C.P.

COLLATERAL REFERENCES

C.J.S. — 10 C.J.S. Bastards § 138.

Key Numbers. — Illegitimate children 75.

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

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. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type.

History: L. 1965, ch. 158, § 10.

Cross-References. — Admissibility of blood test results, § 78-25-21.

NOTES TO DECISIONS

Admissibility.

—Human leukocyte antigen.

This section does not preclude the admissibility of human leukocyte antigen (HLA) test results if such test otherwise meets the relevant legal standards for the admission of scientific evidence; such test results were not admitted as evidence where the party submitting the test results failed to establish an adequate foundation at trial for their admissibility. *Phillips ex rel. Utah State Dep't of Social Servs. v. Jackson*, 615 P.2d 1228 (Utah 1980).

tific evidence; such test results were not admitted as evidence where the party submitting the test results failed to establish an adequate foundation at trial for their admissibility. *Phillips ex rel. Utah State Dep't of Social Servs. v. Jackson*, 615 P.2d 1228 (Utah 1980).

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 107.
C.J.S. — 10 C.J.S. Bastards § 93.

Key Numbers. — Illegitimate children ⇐ 53.

78-45a-11. Judgment.

Judgments under this act may be for periodic payments which may vary in amount. The court may order payments to be made to the mother or to some person, corporation, or agency designated to administer them under the supervision of the court.

History: L. 1965, ch. 158, § 11.

Meaning of "this act". — See note under same catchline following § 78-45a-4.

Cross-References. — Child support collection, Chapter 45d of this title.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 127.
C.J.S. — 10 C.J.S. Bastards § 111.

Key Numbers. — Illegitimate children ⇐ 67.

78-45a-12. Security.

The court may require the alleged father to give bond or other security for the payment of the judgment.

History: L. 1965, ch. 158, § 12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 128.
C.J.S. — 10 C.J.S. Bastards § 118 et seq.

Key Numbers. — Illegitimate children ⇐ 70.

78-45a-13. Settlement agreements.

An agreement of settlement with the alleged father is binding only when approved by the court.

History: L. 1965, ch. 158, § 13.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 98 et seq. Key Numbers. — Illegitimate Children 33.
C.J.S. — 10 C.J.S. Bastards § 40 et seq.

78-45a-14. Venue.

An action under this act may be brought in the county where the alleged father is present or has property or in the county where the mother resides.

History: L. 1965, ch. 158, § 14. Cross-References. — Venue, general provisions, Chapter 13 of this title.
Meaning of "this act". — See note under same catchline following § 78-45a-4.

COLLATERAL REFERENCES

Am. Jur. 2d. — 10 Am. Jur. 2d Bastards § 76. Key Numbers. — Illegitimate Children 37.
C.J.S. — 10 C.J.S. Bastards §§ 57, 58.

78-45a-15. Uniformity of interpretation.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: L. 1965, ch. 158, § 15. Cross-References. — Construction of statutes, Chapter 3 of Title 68.
Meaning of "this act". — As to meaning of "[t]his act," referred to in this section, see note under same catchline following § 78-45a-4.

78-45a-16. Short title.

This act shall be known and may be cited as the "Uniform Act on Paternity."

History: L. 1965, ch. 158, § 16. "[t]his act," referred to in this section, see note under same catchline following § 78-45a-4.
Meaning of "this act". — As to meaning of

78-45a-17. Operation of act.

This act applies to all cases of birth out of wedlock as defined in this act where birth occurs after this act takes effect.

History: L. 1965, ch. 158, § 17. see note under same catchline following § 78-45a-4.
Meaning of "this act". — As to meaning of "[t]his act," referred to throughout this section, "This act takes effect". The term "this act

takes effect," referred to in this section, means the effective date of Laws 1965, Chapter 158, i.e., May 11, 1965.

its response until three weeks after it was due. With knowledge that the notice was forthcoming and a response was necessary, the employer's neglect or mistake was not excusable. *Cf. Katz v. Pierce*, 41 Utah Adv. Rep. 12 (Sept. 12, 1986). The Department's refusal to consider it was reasonable and rational under sections 35-4-7 and 35-4-10.

We find the arguments on appeal to be without merit, and the decision of the Board of Review is affirmed.

Howe, Justice, concurs in the result.

1. §35-4-7(c)(3)(E); all statutory citations herein are to U.C.A., 1953 (1974 ed., Supp. 1986).

2. §35-4-10(i); *Utah Department of Administrative Services v. Public Service Commission*, 658 P.2d 601, 608-09 (Utah 1983).

3. Section 35-4-7(c)(3)(E) provides, in part:

Any employing unit that receives a notice of the filing of a claim may protest payment of benefits to former employees or charges to the employer if the protest is filed within ten days after the date the notice is issued.

4. See *Kirkwood v. Department of Employment Security*, 709 P.2d 1158, (Utah 1985); *Wood v. Department of Employment Security*, 680 P.2d 38 (Utah 1984); *Thiessens v. Department of Employment Security*, 663 P.2d 72 (Utah 1983).

5. *Airkem v. Parker*, 30 Utah 2d 65, 513 P.2d 429 (1973).

Cite as
51 Utah Adv. Rep. 14

IN THE SUPREME COURT OF THE STATE OF UTAH

Kathy BORLAND and the State of Utah, by
and through Utah State Department of Social
Services,

Plaintiffs and Respondents,

v.

Raymond CHANDLER,
Defendant and Appellant.

No. 19066

FILED: February 4, 1987

THIRD DISTRICT

Hon. Kenneth Rigrup

ATTORNEYS:

David E. Yocom, Sandy Mooy, David L.

Wilkinson for Plaintiffs and Respondents.

Randall Gaither for Defendant and
Appellant.

ZIMMERMAN, Justice:

Defendant Raymond Chandler appeals from a jury verdict finding him to be the father of a child of plaintiff Kathy Borland. The jury also awarded Kathy Borland and the State Department of Social Services damages for support of the minor child. Chandler asserts that the trial court erred in allowing the child to be exhibited to the jury so that it might determine whether the child resembled him. He also argues that the action was barred by laches. We hold that the action was not barred by laches, but reverse and remand because an inadequate foundation was laid for allowing the jury to see the child in person.

Beginning in January or February of 1973, Chandler and Kathy Borland began dating. They saw each other for several months and regularly had sexual intercourse. In the late summer or early fall of 1973, Chandler left Utah to work on a construction site in Rock Springs, Wyoming. Borland discovered she was pregnant in October of 1973. On June 8, 1974, Borland bore the child whose paternity is at issue here.

This action was begun by Borland and the Utah State Department of Social Services in 1980. Trial was held in 1983, at which time Borland testified that she had sexual intercourse with Chandler when he returned to Utah from Rock Springs, Wyoming, on weekends during August and September of 1973. She also testified that she did not have sexual intercourse with men other than Chandler from June of 1973 until the birth of the child. Borland testified that after she informed Chandler of her pregnancy, he offered at various times to pay for an abortion, marry her, support her and the child, and at one time offered her \$100 to tell the State that he was not the father. Borland also asserted that Chandler acknowledged his paternity when he visited her at Christmas in 1974. Borland's mother testified that Chandler told her that he had offered to marry Borland. Results of an HLA test established that Chandler was not excluded as a possible biological father of the child.

Chandler testified that although he returned to Utah upon occasion after moving to Rock Springs, he did not have sexual intercourse with Borland after July of 1973. He denied having offered to pay for an abortion or to marry Borland. One witness testifying on Chandler's behalf stated that he had seen Borland with a number of other male companions in September and October of 1973, after Chandler left Utah.

For complete Utah Code Annotations, see Code & Co's Annotation Service.

At the beginning of the trial, Chandler sought an order prohibiting the child's exhibition. The motion was argued at length. The State's attorney represented to the court that the child would be exhibited only while Borland pointed out specific physical similarities between Chandler and the child. The court then dismissed Chandler's motion. During trial, the child was allowed in the courtroom for about five minutes during which time his mother identified him. No testimony was introduced relating to specific resemblances between Chandler and the child. At the conclusion of the trial, the jury returned a verdict against Chandler. This appeal followed.

Chandler first argues that the child should not have been exhibited to the jury. He urges this Court to adopt the rule of *Almeida v. Correa*, 51 Hawaii 594, 465 P.2d 564 (1970). There, the Hawaii Supreme Court ruled that the exhibition of a child to establish resemblance was improper and that only expert evidence relating to specific resemblances would be admissible. *Id.* at 571. If the *Almeida* rule is not adopted, Chandler contends that the exhibition of the child was nonetheless improper under the standard set forth in *State v. Anderson*, 63 Utah 171, 224 P. 442 (1924), in which this Court approved the trial court's admission of independent evidence as to "specific resemblances of the child to the putative father, and thereafter permitted the child to be exhibited to the jury as evidence." 63 Utah at 174-75, 224 P. at 443.

The rules governing the exhibition of a child to establish paternity vary widely from one jurisdiction to another. Some prohibit exhibition altogether, while others allow a child of any age to be exhibited. See generally Annot., 55 A.L.R.3d 1087 (1974). The Hawaii Supreme Court's *Almeida* rule flatly prohibiting exhibition is based upon that court's finding, drawn from the current literature, that "the link between parent and child can be discerned only in ... very specific instances and not by evidence of general resemblance or by a comparison of individual features." 465 P.2d at 569. The Hawaii court concluded as follows:

The identification of a physical characteristic, whether that characteristic is in fact hereditary, what other factors may have helped shape it, and how the characteristic in question is linked to a similar characteristic possessed by the alleged parent are all questions for experts

Id. at 570. While the *Almeida* rule has been followed in a few states, see, e.g., *People in re R.D.S.*, 183 Colo. 89, 514 P.2d 772, 774 (1973); cf. *Commonwealth v. Kennedy*, 389 Mass. 308, 450 N.E.2d 167 (1983), it has not

been widely accepted. See *State v. Mesquita*, 17 Ariz. App. 151, 496 P.2d 141, 143 (1972); *Glascok v. Anderson*, 83 N.M. 725, 497 P.2d 727, 728-29 (1972). Although the scientific data currently available provides support for the ruling in *Almeida*, we are not persuaded that this evidence is sufficiently unanimous to justify a departure from the *Anderson* standard. Cf. *State v. Long*, 721 P.2d 483 (Utah 1986). In our view, the relatively cautious approach of *Anderson* to child exhibition strikes a sound middle ground between prohibiting exhibition of a child altogether and allowing exhibition regardless of age or other indicia of reliability, and the *Anderson* standard provides sufficient safeguards to protect against gross speculation on the part of the jury.

The issue, then, is whether the trial court properly allowed the child to be exhibited to the jury under *Anderson*. We conclude that it did not. There is no indication in the record that the trial court found that the child had the necessary "settled features." *State v. Anderson*, 63 Utah at 174, 224 P. at 443. More critically, no evidence regarding specific resemblances between Chandler and the child was introduced prior to the child's exhibition or even while the child was in front of the jury. *Id.* Under these circumstances, the trial court abused its discretion in allowing exhibition of the child. Aside from this resemblance evidence, the case turned solely upon the credibility of Borland, Chandler, and their respective witnesses. Because of the paucity of other evidence, we cannot predict how the jury would have decided the matter absent this error. Therefore, the case must be reversed and remanded for a new trial.

Chandler next argues that a new trial would be improper because the paternity action, instituted seven years after the child's birth, is barred by laches. He asserts that the State's failure to prosecute the action in a more timely fashion was prejudicial because the lapse of time has prevented him from gathering and producing documents and witnesses essential to his defense. The State and Borland, relying upon *Zito v. Butler*, 584 P.2d 868 (Utah 1978), argue that laches has no application to an action created by statute. While we conclude that laches may apply to a statutory action, the facts in the present case are not sufficient to invoke it.

The principle relied upon by the plaintiffs here has its roots in the common law distinction between law and equity. At common law, an equitable defense could not be raised to a legal action, and because a statutory action was legal in nature, equitable defenses would not apply. See 27 Am. Jur. 2d *Equity* §154 (1966). This seems to be the theory behind *Zito*, a per curiam opinion. However, Utah long ago abolished any formal distinc-

tion between law and equity. See Utah R. Civ. P. 2. It is well established that equitable defenses may be applied in actions at law and that principles of equity apply wherever necessary to prevent injustice. *Hilton v. Sloan*, 37 Utah 359, 374-75, 108 P. 689, 694-95 (1910); see generally *Marlowe Investment Corp. v. Radmall*, 26 Utah 2d 124, 485 P.2d 1402 (1971); *Williamson v. Wanlass*, 545 P.2d 1145 (Utah 1976). Therefore, it is clear that under appropriate circumstances, laches may bar an action for paternity. Even the majority opinion in *Nielsen ex rel. Department of Social Services v. Hansen*, 564 P.2d 1113, 1114 (Utah 1977), cited by *Zito*, recognizes in dictum that laches might apply in a paternity action. Therefore, we conclude that to the extent that *Zito* stands for the proposition that an equitable defense is not available, it is an incorrect statement of the law and is overruled.¹

To successfully assert a laches defense, a defendant must establish both that the plaintiff unreasonably delayed in bringing an action and that the defendant was prejudiced by that delay. *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1260 (Utah 1975). In this case, Chandler asserts that because of the time lapse, he was unable to contact witnesses material to his defense and was unable to locate time cards which would have established that he did not travel from Rock Springs to Salt Lake City every weekend. Argument alone is insufficient to persuade us that Chandler was prejudiced, and he had made no factual showing to support the argument. Chandler did not establish that he attempted and was unable to contact witnesses. Moreover, he had access to company records prior to trial, and his supervisor testified on his behalf at trial. There is nothing to indicate that the testimony equivalent to the evidence established by the time cards could not have come in through the supervisor. In addition, Chandler conceded that he returned to Utah upon occasion in the fall of 1983; therefore, the introduction of time cards to show that he did not return every weekend would not have materially assisted in his defense. Under the circumstances, no prejudice is apparent and further prosecution is not barred by laches. See *Doe v. Roe*, 705 P.2d 535, 541 (Hawaii Ct. App. 1985).

Reversed and remanded.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Justice
Christine M. Durham, Justice

Stewart, Justice, concurs in the result.

¹ *Zito's* analysis of the legal principles applicable to the time within which a

paternity action must be instituted is weak. A better reasoned and more recent statement of the law may be found in *Szarak v. Sandoval*, 636 P.2d 1082, 1084-85 (Utah 1981).

Cite as

51 Utah Adv. Rep. 16

IN THE SUPREME COURT OF THE STATE OF UTAH

Woodruff ASHTON,

Plaintiff and Respondent,

v.

Wilford ASHTON and Virginia M. Ashton,
Defendants and Appellants.

No. 19129

FILED: February 4, 1987

FIFTH DISTRICT

Hon. Christian Ronnow

ATTORNEYS:

Alan D. Boyack for Defendants and
Appellant.

Phillip L. Foremaster for Plaintiff and
Respondent.

HALL, Chief Justice:

Plaintiff brought this quiet title action to settle a dispute over real property located in Hurricane, Utah.

I

A trial was had in this case on February 1, 2, and 3, 1983, before an advisory jury. The case was submitted on special interrogatories which the jury returned in favor of plaintiff. The trial court entered findings of fact and conclusions of law which generally conformed to the pleadings and incorporated the substance of the jury's answers to the special interrogatories. Those findings provided, in pertinent part:

1. That the Plaintiff Woodruff Ashton and the Defendant Wilford Ashton are brothers, and the Defendant Virginia M. Ashton is the wife of the Defendant Wilford Ashton

2. That the Plaintiff and the Defendant Wilford Ashton had a brother known under the name and style of Frank Ashton, which brother is now deceased, having passed away some fourteen years prior hereto.

3. That prior to the death of said Frank Ashton he was the owner of the following described real property and water rights located in and or