1978

Barbara Zito v. Gary Butler : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

BARBARA ZITO,

Plaintiff and Respondent,

vs.

GARY BUTLER,

Defendant and Appellant.

Case No. 15493

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial District Court of Weber County, Utah, Honorable John F. Wahlquist, Judge

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BARBARA ZITO,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 15493
GARY BUTLER,	:	
Defendant and Appellant.	:	

BRIEF OF RESPONDENT

NATURE OF CASE

This is a paternity action brought by the Respondent against the Appellant seeking a declaration of paternity, expenses of pregnancy and child birth, past and future support, and attorney's fees.

DISPOSITION IN LOWER COURT

The Lower Court entered Judgment upon a jury verdict declaring Appellant to be the father of the minor child and awarding Respondent past and future child support. Respondent was not allowed to recover expenses of pregnancy and child-birth and attorney's fees.

RELIEF SOUGHT ON APPEAL

Respondent requests that the Judgment of the Lower Court be affirmed except insofar as it denied Respondent recovery of expenses of pregnancy and childbirth and reasonable attorney's fees and except insofar as the determination of the amount of child support was based on the ruling that a father of a illegitimate child owes a lesser duty of support than a father of a child conceived in wedlock. With respect to these issues, Respondent seeks reversal of the Judgment below and remand for further proceedings.

STATEMENT OF FACTS

Respondent agrees with the recitations contained in Appellant's STATEMENT OF FACTS which set forth the history of the proceedings below. In addition, the material facts are as follows:

Respondent first met Appellant on December 6, 1969. (R-150). She began to see him regularly and she grew to love him very much. (R-150). They discussed plans for marriage as soon as Appellant obtained a divorce. (R-152). During the middle and latter parts of 1970, Appellant and Respondent engaged in frequent sexual intercourse. (R-152). Their sexual relationship continued until after Respondent confirmed she was pregnant in March of 1970. (R-153,-154,-157). During

the entire period from December 6, 1969 until the birth of the baby on September 2, 1971, Respondent did not have sexual relations with any other person. (R-153).

The baby was due on August 24, 1971, but was born two weeks later on September 2. (R-212). Appellant made certain implicit and express admissions that he was the father of the child. (R-159, -166).

Respondent's expert, Dr. Charles W. DeWitt, testified that he supervised the administration of an HLA blood test to Appellant, Respondent and the minor child. (R-125). The results of the test indicated that Appellant could not be exluded as the father, (R-129), and that the probability that Appellant was the father was 99.6%, even if there were two possible fathers at the time of conception. (R-130), (R-73 (Exh. 1-P)). The high probability was due to very rare haplotypes contained in the blood of Appellant and the minor child.

Appellant admitted having sexual intercourse with Respondent (R-177) but denied that he had done so during the time when Respondent became pregnant. (R-177). Appellant's latter testimony was impeached by counsel for Respondent. (R-178,-179).

A friend of Respondent also testified that she observed Respondent and Appellant together during the time Respondent became pregnant. (R-204).

ARGUMENT

POINT I

THIS ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS AND THE LOWER COURT PROPERLY DENIED THE MOTION FOR SUMMARY JUDGMENT.

In Nielsen and the State of Utah, by and through Utah State Department of Social Services v. Hansen, 564 P.2d 1113 (Ut. 1977), this Court held that there is no statute of limitations as to when a suit may be instituted to determine paternity. Although there were three separate opinions in this case, all five Justices specifically adhered to the above proposition due to the policy considerations favoring support of the child.

In so ruling, this Court subscribed to the general view that the courts will not invent limitations in the absence of a specific statute. Annot., 59 ALR3d 685, 709 (1974). The general rule is that a parent has a continuing obligation to support his child, be it legitimate or illegitimate, and that this continuing obligation should not be avoided in the absence of a specific statute to the contrary. Id.

Appellant's argument that the statute of limitations under the Bastardy Act should apply was implicitly rejected by the main opinion in Nielsen, et al. v. Hansen, supra, where

Chief Justice Ellett stated:

> "Neither is this a case under the Bastardy Act wherein a prosecution must be brought within four years after the birth of the child." 564 P.2d 114.

This Court has long recognized that the Uniform Act on Paternity and the Bastardy Act are wholly independent and alternative remedies which may be pursued against the putative father. State of Utah v. Judd, 493 P.2d 604 (Ut. 1972). Appellant's argument presupposes some conflict between the two remedies which does not exist.

POINT II

RESPONDENT PRESENTED A PRIMA FACIE CASE TO THE JURY AND THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS.

It is well established that an appellate court reviewing the sufficiency of the evidence will view the evidence, including the fair inferences to be drawn therefrom and all of the circumstances shown thereby, in the light most favorable to the successful party below. Carnesecca et al. v Carnesecca et al., ___ P.2d ____ (Ut. 1977); Hanover Limited v. Fields, 568 P.2d 751 (Ut. 1977).

Nowhere does Appellant site authority for his argument that the gestation period and the date of conception are essential elements of a prima facie case. The evidence, when viewed in a light most favorable to Respondent, proves that

Respondent was engaged in an exclusive sexual relationship with Appellant until well after the time of her conception. Under the circumstances, medical testimony as to the period of gestation and the exact date of conception is unnecessary.

In any event, counsel for Respondent requested the Court to take judicial notice of the normal gestation period and the Court in essence did so. (R-182). The normal period of gestation is a fact so generally known that it cannot reasonably be the subject of dispute. Rule 9, Utah Rules of Evidence. The Supreme Court of Wyoming has held that the normal period of gestation is a proper subject of judicial notice. X v. Y 482 P.2d 688 (Wyo. 1971).

POINT III

THE DEFENSES OF LACHES AND ESTOPPEL ARE NOT APPLICABLE AND THE LOWER COURT PROPERLY REFUSED TO INSTRUCT THE JURY THEREON.

It is generally accepted that the defense of laches is a purely equitable doctrine and has no application in a Court of Law. 27 Am.Jur.2d "Equity" §152-154. The instant case is an action at law since it was brought under the Uniform Act on Paternity, §78-45a-1 et seq., U.C.A., 1953.

In Perez v. Singh, 21 Cal. App 3d 870, 97 Cal. Rptr. 920 (1971), the Court rejected an attempt to apply the doctrine of laches to defeat an action by a mother seeking an adjudica-

tion of paternity and child support on the grounds that the cause of action was legal rather than equitable. The Court noted that the result would be no different if the Complaint was considered to raise equitable issues since the child is the real party in interest and the laches of the mother could not be imputed to the child during its minority. Id. This Court has also recognized that the interests of the minor child are involved in paternity proceedings. Nielsen, et al. v. Hansen, supra.

Nonetheless, Respondent's actions do not constitute laches since any delay on her part was not unreasonable or unconscionable. In response to questions by counsel for Appellant, Respondent testified as follows:

> Q. Isn't it true that part of the reason you decided not to proceed at that time was that you had some doubts that the defendant was the father?
>
> A. No. I still loved him too much and I could not go through with it. (R-173).

In addition, Respondent testififed that Appellant contacted her from time to time prior to the initiation of this action and advised her that he would support his child. (R-166). Under the circumstances, any delay on Respondent's part was not unreasonable.

There are no facts of record supporting Appellant's claim of estoppel and waiver nor has Appellant set forth any authority or argument therefor.

POINT IV

THE REFUSAL OF THE LOWER COURT TO INSTRUCT THE JURY THAT RESPONDENT COULD RECOVER HER EXPENSES OF PREGNANCY AND CHILDBIRTH IS ERROR.

Section 78-45a-1, U.C.A., 1953, provides in relevent part:

> "The father of a child which is or may be born out of wedlock is liable . . . for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child."

Section 78-45a-3, U.C.A., 1953, provides:

> "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."

It is apparent on the face of the statute that §78-45a-3 is only a partial limitation upon the father's liability since it does not exclude the reasonable expenses of the mother's pregnancy and confinement as provided for in §78-45a-

POINT V

THE REFUSAL OF THE LOWER COURT TO INSTRUCT A JURY THAT A FATHER OF AN ILLEGITIMATE CHILD OWES THE SAME DUTY OF SUPPORT AS A FATHER OF A CHILD BORN IN WEDLOCK IS ERROR AND THE ORDER OF FUTURE CHILD SUPPORT BASED ON THAT RULING IS INADEQUATE.

Counsel for Respondent requested an instruction to the jury that a father of a child born out of wedlock is liable for support to the same extent of a father of a child born in wedlock. The Court refused to give the requested instruction. (R-216,-217). Based on this ruling, the Court

later ordered future child support in the amount of Sixty Dollars ($60.00) per month.

Section 78-45a-1, U.C.A., 1953, provides:

> "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, . . . for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child. . . . (Emphasis Added).

In view of Appellant's gross salary, which ranged from Two Hundred and Forty Dollars ($240.00) to Two Hundred and Eighty Dollars ($280.00) per week, (R-180,-181) it is extremely likely that the jury award, which was calculated on the basis of Fifty Dollars ($50.00) per month, might have been influenced by the Court's refusal to give the requested instruction.

More importantly, the Lower Court at a later hearing ordered future support in the amount of Sixty Dollars ($60.00) per month. This order was clearly based on the Court's ruling that a father of an illegitimate child owed a lesser duty of support.

POINT VI

THE REFUSAL OF THE LOWER COURT TO AWARD RESPONDENT A REASONABLE ATTORNEY'S FEE IN THE PATERNITY ACTION IS ERROR.

Section 78-45a-5, U.C.A. 1953, provides that the District Court has available to it all remedies under the

Uniform Reciprocal Enforcement of Support Act for enforcement of the duties of support under the Uniform Act on Paternity. The Uniform Reciprocal Enforcement of Support Act, §77-61a-13 U.C.A., 1953, provides in relevant part:

> "[B]ut a Court of this state acting either as an initiating or responding state may, in its discretion, direct that any part of or all fees and costs incurred in this state, including without limitation by innumeration, fees for filing, service of process, seizure of property, and stenographic service of both Petitioner and Respondent or either, be paid by the obligor." (Emphasis Added).

Thus, it would appear that the Lower Court had ample authority to award attorney's fees to Respondent as the successful party.

CONCLUSION

This action was commenced within the allowable time and is not barred by the doctrine of laches. The evidence propounded by Resondent constituted a prima facie case and was sufficient to justify the jury's verdict, especially since the only evidence to the contrary was an equivocal denial by Appellant. Therefore, it is respectfully urged that this Court affirm the Judgment of the Lower Court declaring Appellant to be the father of the minor child. However, for the reasons set forth above, Respondent urges this Court to remand the

matter to the Lower Court for a determination of Respondent's expenses of pregnancy and childbirth, a redetermination of past and future child support and a determination of reasonable attorney's fees.

Respectfully submitted this 13 day of February, 1978.

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CERTIFICATE OF MAILING
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I hereby certify that on this 13 day of February, 1978, I mailed two copies of the foregoing Brief of Respondent, postage prepaid to Pete N. Vlahos, Attorney for Appellant, 2447 Kiesel Avenue, Ogden, Utah 84401; and Ronald W. Perkins, Attorney for Appellant, 2447 Kiesel Avenue, Ogden, Utah 84401.

Tori H. Thurston

Tori H. Thurston, Secretary