

1988

William "Billy Joe" Scheller v. Unknown : Brief of Respondent

Utah Court of Appeals

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Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 880337

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)	
)	
WILLIAM "BILLY JOE" SCHELLER)	Case No. 880337-CA
)	
Deceased)	Priority No. 7
)	

BRIEF OF RESPONDENT JOLEEN L. SCHELLER

APPEAL FROM AN ORDER OF FORMAL DETERMINATION OF HEIRS
WITH RESPECT TO THE CONSTITUTIONALITY OF AN APPLICABLE
STATE STATUTE ENTERED BY THE SECOND JUDICIAL DISTRICT IN
AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE DAVID
E. ROTH, DISTRICT COURT JUDGE

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COURT OF APPEALS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii - iii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	2
ARGUMENT	3
I. UTAH CODE ANNOTATED SECTION 75-2-109(1)(b)(ii) DOES NOT VIOLATE ARTICLE IV, OF SECTION 1 OF THE UTAH CONSTITUTION BY PROVIDING DIFFERENT CRITERIA FOR MOTHERS THAN FOR FATHERS TO INHERIT THROUGH THEIR DECEASED CHILD	3
II. SECTION 75-2-109(1)(B)(ii) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BY ANY GENDER-BASED DISCRIMINATION	11
III. POINT III. SECTION 75-2-109(1)(b)(ii) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY ALLOWING A MOTHER, BUT NOT A FATHER, TO INHERIT THROUGH THEIR CHILD, UNLESS THE FATHER HAS OPENLY TREATED THE CHILD AS HIS	16
IV. SECTION 75-2-109(1)(b)(ii) OF THE SUBJECT UTAH STATUTE IS NOT UNCONSTITUTIONALLY VAGUE, AND IT DOES MEET THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION	18
V. IT IS A MAXIM OF STATUTORY CONSTRUCTION, THAT A COURT MUST PRESUME A STATUTE TO BE CONSTITUTIONAL AND AVOID CONSTITUTIONAL INFIRMITIES WHENEVER POSSIBLE	20
CONCLUSION	21
PROOF OF SERVICE	22
ADDENDUM	

Deposition of Michael Pessetto (Richard Mike
Pessetto) as dated May 19, 1987

Findings of Fact and Conclusions of Law dated
November 3, 1987

Transcript of Proceeding of October 16, 1987, in
Case No. 16434

TABLE OF AUTHORITITES

<u>CASE</u>	<u>PAGE</u>
<u>Caban v. Mohammed</u> , 441 U.S. 300, 380, 388, 392, 397, (1979)	11, 12, 13, 14, 15, 18
<u>Califano v. Goldfarb</u> , 430 U.S. 300 (1979)	17
<u>Califano v. Webster</u> , 440 U.S. 313 (1977)	7, 17
<u>Califano v. Wescott</u> , 443 U.S. 76 (1979)	17
<u>Collins v. Division of Foster Care</u> , 377 So. 2d 1266 (1a. Ct. App. 1979)	16, 21
<u>Craig v. Boren</u> , 429 U.S. 190, 197 (1976)	11
<u>Ellis v. Social Services Department of the Church of Jesus Christ of Latter-day Saints</u> , 615 P.2d 1250 (Utah 198	4, 9, 15, 21
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973)	3, 8
<u>In Interest of T.E.T.</u> , 603 S.W. 2d (Texas 1980), 450 US 1025 (1981)	16, 21
<u>Kahn v. Shevin</u> , 416 US 351, 40 L Ed 2d 189, 94 S Ct 1734 (1974)	7
<u>Labine v. Vincent</u> , 401 US 532, 538 (1971)	12
<u>Lalli v. Lalli</u> , 439 US 259, 268 (1978)	12
<u>Lehr v. Robertson</u> , 463, U.S. 248, 266-67 (1983)	4, 9, 12, 14, 18, 21
<u>Malan B. Lewis</u> , 693 P.2d 62 (Utah 1984).	3
<u>Matter of Adoption of Baby Boy D</u> , 742 P2d 1059, Okla. (1985), at 1065	11, 16, 21
<u>Michael M. v. Superior Court of Sonoma County</u> , 450 US 464, (1981)	6
<u>Parham v. Hughes</u> , 441 U.S. 347, 354, 355 (1979)	3, 4, 7, 8, 9, 17, 21
<u>Pusey v. Pusey</u> , 728 P.2d 117 (Utah 1986)	3
<u>Redwood Gym v. Salt Lake County Commission</u> , 624 P.2d 1138 (Utah 1981)	4
<u>Reed v. Reed</u> , 404 U.S. 71 (1971)	3, 8

TABLE OF AUTHORITITES

<u>CASES</u>	<u>PAGE</u>
<u>Rinaldi v. Yeager</u> , 384 US 305,309, 16 L Ed 2d, 477, 86 S Ct 1497 (1966)	7
<u>Schlesinger v. Ballard</u> , 419 U.S. 498, 42 L Ed 2d 610, 95 S Ct 572, 9 BNA FEP Cas 33 (1975)	4, 7, 15, 16
<u>Matter of Estate of Spencer</u> , 147 Mich. App. 626, 383 N.W.2d 266 (1985)	10
<u>State v. Lindquist</u> , 674 P.2d 1234 (Utah 1983)	20
<u>State v. Casarez</u> , 656 P.2d 1005 (Utah 1982)	20
<u>Stone v. Department of Registration</u> , 567 P.2d 1115 (Utah 1977)	21
<u>Tigner v. Texas</u> , 310 US 141, 147, 84 L Ed 1124 60 S Ct 879, 130 ALR 1321 (1940)	7
<u>Trade Commission v. Skaqqs Drug Center, Inc.</u> , Utah 2d 431, 446 P.2d 958 (Utah 1968)	20
<u>Trimble v. Gordon</u> , 430 US 762, 771 (1977)	12
<u>W.E.J. v. Superior Court of Los Angeles</u> , 100 Cal App. 3d 303, 160 Cal. Rptr. 862, 969 (1980)	15, 21
<u>Weinberger v. Wissenfeld</u> , 420 U.S. 636, 653, 43 L Ed 2d 514, 95 S Ct 1225 ;(1975)	7, 17
<u>Statutes and constitutions cited</u>	
<u>Alaska Stat.</u> , Sec. 13.11.045(2)(B)	10
<u>Arizona Rev. Stat. Ann.</u> , Sec. 14-2109(2)(b)	10
<u>Colorado Rev. Stat.</u> , Sec. 15-11-109(b)(II)	10
<u>Idaho Code</u> , Sec. 15-2-109(b)(2)	10
<u>me Rev. Stat. Ann.</u> , tit. 18A, Sec. 2-109(2)(iii)	10
<u>Mich. Comp. Laws Ann.</u> , Sec. 700.111(4)(c)	10
<u>Neb. rev. Stat.</u> , Sec. 30-2309(2)(ii)	10
<u>N.M. Stat. Ann.</u> , Sec. 45-2-109(B)(3)	10
<u>Utah Code Annotated</u> , Sec. 75-2-109 (1)(b)(ii),	2, 3, 9, 10, 11, 16, 17, 18, 21

STATEMENT OF THE FACTS

Respondent, Joleen L. Scheller, concurs with the Statement of Facts as presented by the Respondent, but submits the following additional facts which are pertinent to this case.

That Joleen L. Scheller, mother of William "Billy Joe" Scheller, cared for her son in her own home, and in the home of her mother during the entire lifetime of the child. That Michael Pessetto, did not ever see the child or have any relationship with him during the entire lifetime of the child. (Michael Pessetto's deposition of May, 19, 1987, Page 16 - 17). There were contacts between Joleen L. Scheller and Michael Pessetto at the time of the paternity hearing on or about May 24, 1983, at Ogden, Utah, but Michael Pessetto made no effort at that time to ask where the mother and child were living, how the child was, where he could find the child or how he could visit the child. (See Transcript of Proceedings of October 16, 1987, pages 1 & 2, Case No 16434; and Findings of Fact dtd. November 3, 1987, paragraphs 4. & 5.)

The Trial Court found that Mr. Pessetto did not refuse to support the child. He paid what he had to pay and was forced to pay by the court, and he did absolutely nothing beyond that. (See Transcript of Proceedings of October 16, 1987, page 1, Case No. 16434; and Findings of Fact dated November 3, 1987, paragraph 3.). Michael Pessetto did not make an effort to visit his son, did not send cards or gifts to a last known address, nor did he inquire as to the well-being of his child at "some point". (See Transcript of Proceedings of October 16, 1987, page 1, Case

No. 16434; and Findings of Fact dtd. November 3, 1987, Paragraphs 4., 5., & 6.)

SUMMARY OF ARGUMENT

Section 75-2-109(1)(b)(ii) of Utah Code Annotated recognizes the reality that mothers and fathers of children born out of wedlock are not similarly situated. The statute discriminates in a legitimate manner between a father who openly treats an illegitimate child as his and a father who does not openly treat an illegitimate child as his. The statute does not violate Article IV, Section 1 of the Utah Constitution or the Fourteenth Amendment of the United States Constitution.

The statute creates a classification based upon gender, which classification serves and is substantially related to the important governmental objective of providing for a fair and efficient manner of inheritance from a child born out of wedlock, by ensuring that such inheritance is received by a parent who has actually had some participation in the nurturing of the deceased child during its lifetime. The statute passes the constitutional muster of the intermediate level of scrutiny applied by the courts.

The statute is not violative of the Fourteenth Amendment to the United States Constitution under the Equal Protection Clause or the Due Process Clause in that it permits different treatment of an unmarried mother and an unmarried father, recognizing that they are not similarly situated. It reasonably requires the father to evidence some degree of interest and commitment to the

child in order for him to acquire a right of the stature eligible for constitutional protection.

ARGUMENT

POINT I. UTAH CODE ANNOTATED SECTION 75-2-109(1)(b)(ii) DOES NOT VIOLATE ARTICLE IV, OF SECTION 1 OF THE UTAH CONSTITUTION BY PROVIDING A DIFFERENT CRITERIA FOR MOTHERS THAN FOR FATHERS TO INHERIT THROUGH THEIR DECEASED CHILD.

It is well settled that the Equal Protection Clause of Article IV, of Section 1, of the Utah Constitution protects against discrimination when legislation provides dissimilar treatment for individuals who are similarly situated. Malan B. Lewis, 693 P.2d 62 (Utah 1984). The Utah Supreme Court and the United States Supreme Court have both held that certain classifications based upon sex are invalid under equal protection analysis. Reed v. Reed 404 U.S. 71 (1971); Frontiero v. Richardson 411 U.S. 677 (1973); Pusey v. Pusey 728 P.2d 117 (Utah 1986). "Underlying these decisions is the principal that a state is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes, 441 U.S. 347, 354 (1979). It is only under those situations wherein a statute provides dissimilar treatment as between men and women who are similarly situated that the equal protection clauses of both the Utah State Constitution and the United States Constitution are violated.

A. UTAH CODE ANNOTATED 75-2-109 (1)(b)(ii) IS NOT DISCRIMINATORY BY GENDER ON ITS FACE.

The United States Supreme Court and the Utah Supreme Court have noted that in situations in which men and women are not

similarly situated, and a statutory classification is realistically based upon the differences in their situations, the statutory classification creates no gender-based discrimination. See e.g., Parham v. Hughes, Supra; Lehr v. Robertson, 463 U.S. 248 (1983); Schlesinger v. Ballard 419 U.S. 498 (1975); see also Ellis v. Social Service Department of the Church of Jesus Christ of Latter Day Saints, 615 P.2d 1250 (Utah 1980); Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981).

B. THE SUBJECT STATUTE'S GENDER DISTINCTIONS ARE RATIONAL AND REALISTIC, AND NOT IN VIOLATION OF THE UTAH CONSTITUTION.

Appellant erroneously argues that once the father has been adjudicated to be a parent of the child, that commencing at that moment the mother and the father are similarly situated, and that without any further requirement on the part of the father, he should inherit equally with the mother of the child. The father Michael Pessetto, reaches this conclusion in a conclusory manner without citation of any direct authority to support such view. The cited Utah Statute does not create a gender based classification at all, but it merely discriminates in a legitimate manner between a father who openly treats an illegitimate child as his and a father who does not openly treat an illegitimate child as his.

The mere adjudication under a State initiated paternity proceeding, as in the instant case, that the father is the parent of the child born to the mother does not make the father similarly situated with the mother from the time of adjudication forward.

We need not be medical doctors to discern that young women and young men are not similarly situated with respect to the problems and risk each incurs from sexual intercourse outside of the marital relationship. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of such sexual activity. The mother, by virtue of her pregnancy is automatically responsible for the child; she has the burdens and responsibilities of the pregnancy. She may choose to abort the child, or she may carry it full term. She is subject to any social stigmas against her during the pregnancy term by reason of her visible physical state. In short, the mother of a child has from conception a nurturing relationship and commitment to the child, which events after birth cannot alter. The role of the mother in carrying the child and giving birth thus alone establish a bond of relationship with the child which validly supports the legislative distinctions expressed in the subject statute.

On the other hand the biological father is not automatically responsible for the child. He may not have an interest in legitimating the child. In most cases, he can wait until after the child is born before committing himself, even to the point of awaiting State action against him before making any commitment. During this time while the unmarried pregnant female is trying to determine what she will do with the child, and how she will care for and properly support the child, if she elects to keep it, the father is totally free from any responsibility with respect to

the child or the mother. To classify him as a parent entitled to receive an inheritance from his deceased child, as in the case now before the court, absent any relationship with the child from date of birth to date of death, would constitute a windfall that makes no social or legal sense. The constitution protects only parent-child relationships of a father who has actually made some open commitments towards an association with the child. The cited provisions of the Utah Uniform Probate Code that:

"....the paternity established under this sub-section, (1)(b)(11), 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." (Utah Code Annotated Sec. 75-2-109 (1)(b)(11).)

in no manner violates the constitutional rights of a male adjudicated to be the parent of the child in respect to his right of inheritance from the child.

The hypothetical case situation presented by the Appellant and quoted as follows:

"The result being that if both the mother and the father were to abandon a child immediately after birth, the mother could recover automatically, yet the father could not. The only basis for making this distinction is that of gender" (Appellant's Brief, page 9)

is based upon the false assumption that once the father has been adjudicated a parent that both the mother and father have at once become similarly situated, which premise is clearly erroneous.

In Michael M. vs. Superior Court of Sonoma County, 450 US 464,(1981), The United States Supreme Court, upheld the constitutionality of a California statutory rape law under which men alone were held criminally liable for the act of sexual

intercourse, as nonviolative of the equal protection clause of the Fourteenth Amendment, and declared at pages 468 and 469 of the opinion as follows:

"But because the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact... to be treated in law as though they were the same.' Rinaldi vs. Yeager 384 US 305,309, 16 L Ed 2d 577, 86 S Ct 1497 (1966), quoting Tigner v Texas, 310 US 141, 147, 84 L Ed 1124, 60 S Ct 879, 130 ALR 1321 (1940), this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. Parham v Hughes, supra; Califano v Webster, 430 US 313, 51 L Ed 2d 360, 97 S Ct 1192 (1977); Schlesinger v Ballard, 419 US 498, 42 L Ed 2d 610, 95 S Ct 572, 9 BNA FEP Cas 33 (1975); Kahn v Shevin, 416 US 351,40 L Ed 2d 189, 94 S Ct 1734 (1974). As the Court has stated, a legislature may 'provide for the special problems of women.' Weinberger v Wiesenfeld, 420 US 636, 653, 43 L Ed 2d 514, 95 S Ct 1225 (1975)."

The case which most closely coincides with the instant case is the United States Supreme Court Case of Parham v. Hughes, Supra, which involved a Georgia statutory provision which determined which parties were entitled to bring a wrongful action upon the death of an illegitimate child. Under the Georgia code, a mother of a legitimate or illegitimate child was always entitled to bring a wrongful death action without further qualification, but the father of a child could only bring a wrongful death action if the child was legitimate and if the mother had died. The effect of the statute was to require the father of an illegitimate child to officially legitimize the child prior to the death of the child before he could bring a wrongful death action.

In Parham, the biological father of the boy, who died in an automobile accident with his mother, attempted to bring a wrongful death action to recover for the boy's death. The father had signed the child's birth certificate, contributed to his support, given the child his last name, and visited the child on a regular basis, but he had never taken the additional step of officially legitimatizing the child. Because of this latter factor, the United States Supreme Court affirmed the Georgia Supreme Court ruling which held that the father was not a proper party to bring a wrongful death action. The court rejected the father's claim that the statutory provision created a gender-based classification, holding squarely that:

"(t)he fact is that mothers and fathers of illegitimate children are not similarly situated." (441 U.S. at 355.)

Noting that the father had the ability to take action to establish his rights as a father, the court concluded:

"Thus, the conferral of the right of a natural father to sue for the wrongful death of his child only if he has previously acted to identify himself, undertake his paternal responsibilities, and make his child legitimate, does not reflect any overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child. Since fathers who do legitimate their children can sue for wrongful death in precisely the same circumstances as married fathers whose children were legitimate ab initio, the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not. Such a classification is quite unlike those condemned in the Reed, Frontiero, and Stanton cases which were premised upon overbroad generalizations and excluded all members of one sex even though they were similarly situated with members of the other sex." Id. at 356-57 (emphasis added; footnote omitted)."

The application of Parham to the present case is clear. As in Parham, Michael Pessetto was not precluded from inheriting from his deceased son merely by virtue of his status of being a father rather than a mother of an illegitimate child. Instead, he had the ability to place himself in a position of heirship simply by taking one of the two means under Utah Code Annotated Sec. 75-2-109 to establish his rights of inheritance as a father. These requirements placed on a father of an illegitimate child reflect the biological reality that mothers and fathers of illegitimate children are not similarly situated and the concomitant fact that the legislature has valid reasons for imposing more stringent requirements of proof of paternity and commitment to a child on the father of an illegitimate child than on the mother.

Even a casual reading of the cases of Lehr v. Robertson, 463 US 248 (1983) and Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints, 615 P.2d 1250 (Utah 1980) as cited by Appellant makes it apparent that neither of these cases support the Appellant's claim,

".....that a statute can discriminate on the basis of paternity, but once paternity is established, the mother and father stand on equal ground and no discrimination is allowable" (Quoted from Page 10 of Appellant's Brief)

In fact there are no cases that support Appellant's proposition that once paternity is established the father and mother stand on equal ground, without regard to the other factual circumstances of the respective parents in relationship to the child.

The subject statute does not discriminate against Michael Pessetto in violation of Article IV Section 1 of the Utah Constitution by denying him a windfall inheritance from his deceased son, under a determination of paternity initiated by State action.

C. NO OTHER STATES WITH PROVISIONS IN THEIR STATE CONSTITUTIONS SIMILAR TO ARTICLE IV, SECTION 1 OF THE UTAH CONSTITUTION HAVE INVALIDATED SIMILAR GENDER-BASED LEGISLATION.

This is a case of first impression, and no other state has specifically addressed the particular statute in question. Utah Code Annotated Sec. 75-2-109 (1)(b)(ii) is a provision of the Uniform Probate Code which has been enacted in the same form in at least ten states. See, e.g., Alaska Stat. Sec. 13.11.045(2)(B); Ariz. Rev. Stat. Ann. Sec. 14-2109(2)(b); Colo. Rev. Stat. Sec. 15-11-109(b)(II); Idaho Code Sec. 15-2-109(b)(2); Me Rev. Stat. Ann. tit. 18A, Sec 2-109(2)(iii); Mich. Comp. Laws Ann. Sec 700.111(4)(c); Neb. Rev. Stat. Sec. 30-2309(2)(ii); N.M. Stat. Ann. sec. 45-2-109(B)(3). This statutory provision has never been declared unconstitutional in any of these states. See e.g. Matter of Estate of Spencer, 147 Mich. App. 626, 383 N.W.2d 266 (1985) applying Michigan equivalent of Utah 75-2-109.

All of the gender discrimination cases as cited by the Appellant's brief are easily distinguishable on their facts from the particular situation at issue in this case. It is not true that other states have held similar statutes to be unconstitutional. In each instance where other states have held

statutes to be unconstitutional as being gender-based, the fathers have established emotional bonds with their children which have made them similarly situated with the mother. It is the emotional bond with the child and not his biological connection alone that gives the father an interest of the same constitutional stature as the mother. Matter of Adoption of Baby Boy D, 742 P2d 1059, Okla. (1985), at 1065.

POINT II. SECTION 75-2-109(1)(b)(ii) DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY ANY GENDER-BASED DISCRIMINATION.

A. RESPONDENT CONCURS THAT GENDER-BASED CLASSIFICATIONS OF STATE STATUTES BY THE UNITED STATES SUPREME COURT MUST PASS AN INTERMEDIATE LEVEL OF SCRUTINY.

Appellant has correctly expressed the intermediate level of scrutiny rationale as adopted by the Courts that gender-based distinctions in state statutes "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Caban vs. Mohammed, 441 US 380, 388 (1979); Craig vs. Boren 429 US 190,197 (1976).

B. SECTION 75-2-109(1)(b)(ii) EASILY PASSES CONSTITUTIONAL MUSTER UNDER THE INTERMEDIATE LEVEL OF SCRUTINY.

In the instant case, the cited statute clearly is substantially related to the important government interest in the maintenance of an accurate, fair, and efficient system for the disposition of property at death, and to the objectives of ensuring that an inheritance from an illegitimate child goes to a parent who has participated actively in the nurturing of the child, and of preventing a parent who has taken no active role in

the birth or rearing of the child from reaping a financial windfall.

The United States Supreme Court has frequently recognized that a state has an important and considerable interest in the maintenance of a fair and efficient method of intestate succession. See Lalli vs. Lalli, 439 US 259, 268 (1978); Trimble vs. Gordon, 430 US 762, 771, (1977); Labine vs. Vincent 401 US 532, 538 (1971). This Court interest is directly implicated in the issue of paternal inheritance from an illegitimate child because of the issues of proof, and the equities associated with a father's role in the child's life. Lalli vs. Lalli supra. Moreover the Supreme Court has also recognized that a state has an important interest in distinguishing between natural fathers who participate in the raising of illegitimate children and fathers who make not effort to have a part in a child's life beyond what is required of them by court decree. See Caban vs. Mohammed, supra 441 US at 392; Lehr vs. Robertson, supra, 463 US at 266-67. In the instant case, at the conclusion of the evidentiary hearing, the Trial Court, recited in its declaration of findings of fact as follows:

"I have already found that Mr. Pessetto did not refuse to support the child, I can only find, however, that he paid what he had to pay and was forced to pay by the Court. And he did absolutely nothing beyond that.

.....

A person, in my interpretation, who openly treats the child as his would try to find that child, would make an effort to pay support, would make an effort to visit the child, and would at least send cards or gifts

to a last known address. Would inquire as to the condition and well being of the child at some point. And I find that Mr. Pessetto made no meaningful attempt to do any of those things." (Trial Transcript of Proceedings of October 16, 1987, pages 1 and 2.

Although the United States Supreme Court has never directly considered the issues presented in this case, it is clear from analogous cases that the Court would uphold the classification created by the subject statute as being one which is substantially related to the important governmental interests in rights of inheritance. In Caban vs. Mohanned, supra, for example, the court struck down the application of a New York law which always permitted the adoption of an illegitimate child without the approval of the natural father, but it is clear from the court's opinion that the decision rested on the need to give an active, loving natural father a voice in whether to permit an adoption. The facts in Caban, showed the father of the illegitimate children had been identified as the father on the children's birth certificates, had lived with them for four years, and continued to support and visit with the children until the mother decided to marry another man and have him adopt the children. Because the statute made no distinction between fathers with a "substantial relationship" with a child and unmarried mothers who were similarly situated, the court held that it was unconstitutionally applied in the case before it. However, the court specifically added that the state could treat unmarried fathers and mothers differently when they did in fact treat their children differently,

"In those cases where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the state from withholding from him the privilege of vetoing the adoption of that child."(441 US at 392)

In Lehr vs. Robertson, supra, the Court applied this reasoning in the adoption context and squarely held that the quality of the relationship between a father and his illegitimate child could determine the extent of the father's right to receive notice of a pending adoption. The state law at issue permitted natural fathers to have a role in adoption decisions, but only if they filed a claim of paternity with the state's "putative father registry." The father in Lehr had not done so, but argued that he had substantially complied with the statute by acknowledging his paternity, attempting to support the child, and trying to visit her. The Court disagreed, holding that the state had a valid interest in creating specific means by which putative fathers could safeguard their parental rights, and that the distinctions drawn between such fathers and unmarried mothers were not unconstitutional. The Court concluded that

"the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating...the rights of the parent..." (464 US at 266-67).

With regard to how such a substantial relationship is shown the Court further stated:

"The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."

Id. at 260 n. 16 (quoting Caban vs. Mohammed, supra, 441 US at 397, J. Stewart, dissenting).

The Utah Supreme Court has applied the same reasoning in upholding a statute requiring an unmarried father to file a claim of paternity within a certain period of time or lose the right to prevent the adoption of his child. In Ellis vs. Social Services Department of the Church of Jesus Christ of Latter-Day Saints, supra, the court rejected the father's claim based on Caban vs. Mohammed, supra that the statute provided unequal treatment of the unwed mother and father. Citing the language in Caban concerning the legitimate distinction between a caring father and one who never came forward to participate in the rearing of his child, the court concluded that the holding in Caban was distinguishable merely by virtue of the fact that the Utah statute gave an unmarried father the opportunity to protect his rights, whereas the one in Caban did not.

Similarly, in W.E.J. vs. Superior Court of Los Angeles, 100 Cal App. 3d 303, 160 Cal. Rptr. 862 (1980), the court upheld a California law which withheld from a biological father the power to veto an adoption unless he had married the mother or "receives the child into his home and openly holds out the child as his natural child." Distinguishing Caban vs. Mohammed, supra, the court stated:

"The California statute.... avoids the fault of discriminating between all unwed mothers and all unwed fathers. The statutory classification sets apart those biological fathers who have neither gone through an apparently valid marriage ceremony with the mother nor live with the child as a parent.

.....

Those biological fathers who are denied the veto power are easily distinguished from those who hold that power. Members of this class have neither expressed the

interest which is implied in the marriage ceremony nor undertaken the care of the child in a common home..

To the extent that this classification is based upon gender, it is based upon an actual difference in situation. Whatever else may be said of an unwed mother, she is not a stranger to her child. A gender-based classification is not improper when men and women are not similarly situated. (See Schlesinger v. Ballard 419 US 498, 95 S. Ct. 572, 42 L.Ed. 2d 610.)"

160 Cal. Rptr. at 869; accord In Interest of T.E.T., 603 S.W.2d 793 (Tex. 1980), cert. denied, 450 US 1025 (1981); Collins vs. Division of Foster Care, 377 So. 2d 1266 (la. Ct. App. 1979); Matter of Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985).

Thus, the case law clearly establishes that a state may validly discriminate between an unmarried father and an unmarried mother when the discrimination is based not simply on status alone, but rather is linked to the degree of interest and commitment expressed by the father. The subject statute in the instant case permits different treatment only when the father and mother are not actually in similar positions, and it is substantially related to an important governmental objective of providing for an orderly manner of inheritance from illegitimate children. Utah Code Annotated, 75-2-109(1)(b)(ii) in the case before the Court is not violative of equal protection.

POINT III. SECTION 75-2-109(1)(b)(ii) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY ALLOWING A MOTHER, BUT NOT A FATHER, TO INHERIT THROUGH THEIR CHILD, UNLESS THE FATHER HAS OPENLY TREATED THE CHILD AS HIS.

As has been previously stated in the preceding portions of this brief, an unmarried father and an unmarried mother cannot

validly be characterized as being "similarly situated" for purposes of analyzing the application of the Equal Protection Clause. For the same reasons supporting this conclusion, it is also apparent that an unmarried father suffers no due process violation by virtue of a state statute which requires him to openly treat the child as his before he may inherit from the child.

Mr. Pessetto has failed to identify how the due process clause protects the right alleged in this case in any manner beyond that as alleged in his equal protection arguments. The cases cited by the Appellant in his due process claim all involve actions against the federal government, to which the Fourteenth Amendment does not apply, and thus the argument rests upon the equal protection component of the Fifth Amendment in lieu of the equal protection clause of the Fourteenth Amendment. See Califano vs. Goldfarb, 430 US 199 (1977); Weinberger vs. Wissenfeld, 420 US 636 (1975); Califano vs. Webster, 440 US 313 (1977); Califano vs. Wescott, 443 US 76 (1979). See Parham vs. Hughes, supra, 441 US at 1749, to the effect that the Due Process Clause is not implicated by statute setting forth which persons could bring wrongful death action on behalf of an illegitimate child.

However, even assuming that the Appellant could point to some recognized property or liberty interest, it is manifestly clear that such an interest is adequately protected by the subject statute 75-2-109. The numerous cases previously cited in

this brief indicate that an unmarried father may be treated differently from an unmarried mother so long as he is not completely precluded from enjoying rights shared with the unmarried mother. In Lehr vs. Robertson, supra, which in part involved an alleged deprivation of a liberty interest of a natural father in the adoption context, the court specifically stressed that the liberty interest in the family relationship rises to a protected level only when the father "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child'". 463 US at 261 (quoting Caban vs. Mohammed, supra, 441 US at 392). The Court further found that "the mere existence of a biological link does not merit equivalent constitutional protection" under the due process clause. Id.

Because of Mr. Pessetto's inattention and lack of caring towards his son prevented him from creating a protectible liberty interest and prevented his qualification as an heir of the decedent, he cannot now claim that any due process violation has occurred.

POINT IV. SECTION 75-2-109(1)(b)(11) OF THE SUBJECT UTAH STATUTE IS NOT UNCONSTITUTIONALLY VAGUE, AND IT DOES MEET THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The language of Sub-paragraph (11) of the subject statute requiring a father to have "openly treated the child as his own" in addition to "not refuse to support the child" is not vague language. The Trial Judge stated from the bench as follows in

his decision at the conclusion of the October 16, 1987, trial:

"The remaining issue of fact is whether he openly treated the child as his child. Apparently there is no help in the case law as to what that phrase means, so we look to just the common English language and terms that are used there. It appears to me that in some way he must have tried to act like a parent to that child at some point.

.....

A person, in my interpretation, who openly treats the child was his would try to find that child, would make an effort to pay support, would make an effort to visit the child, would at least send cards or gifts to a last known address. Would inquire as to the condition and well being of the child at some point." (Trial Transcript of Proceeding of October 16, 1987, pages 1 and 2.)

The Trial judge had no difficulty in immediately determining the meaning of "openly treat as his own" by the common usage approach of such term in the English language. The designation of a phrase that is simple and understandable in every day usage as "vague" does not make it vague. The term "openly treat as his own" and variations thereof are in common usage among most of us in our daily conversations about family life and the relationships exhibited between parent and child.

Most of us could agree by reason of our common sense and life experiences as a child and parent as to the objective elements of being "openly treat as his own" without the necessity of a definition. English speaking people in our American culture have a common understanding of such expressions, and our understanding would include the same basic objective standards as stated by the Trial Judge in his quoted opinion. Men of common intelligence would not have to guess as to the meaning of "openly treat as his own" in reference to a

parent child relationship. Without difficulty, such a phrase is commonly understood by all English speaking people in the culture of our state so as not to cause deprivation of rights or property.

POINT V. IT IS A MAXIM OF STATUTORY CONSTRUCTION, THAT A COURT MUST PRESUME A STATUTE TO BE CONSTITUTIONAL AND AVOID CONSTITUTIONAL INFIRMITIES WHENEVER POSSIBLE.


It is a well-established maxim of statutory construction that a court must presume a statute to be constitutional, and must construe a statute to avoid constitutional infirmities whenever possible. State vs. Lindquist, 674 P.2d 1234 (Utah 1983). Accordingly, it is the duty of a court to effectuate the intent of the legislature whenever possible, State vs. Casarez, 656 P.2d 1005 (Utah 1982), and it must investigate and discover any reasonable avenues by which the statute can be upheld. Trade Commission vs. Skaggs Drug Center, Inc., 21 Utah 2d 431, 446 P.2d 958 (Utah 1968). It is not within the province of the court to take into consideration every conceivable hypothetical situation in determining the constitutionality of statutes. As the courts have often demonstrated in gender discrimination cases involving unmarried fathers and mothers, the possibility that the statute might in some hypothetical case unconstitutionally favor an unmarried mother who may neglect or abandon her child is no basis for striking down the statute. In this case, it is beyond question that the mother did openly treat the deceased as her child from birth until death, while the Appellant did not. See

Parham vs. Hughes, supra; Lehr vs. Robertson, supra; Ellis Vs. Social Services Department of the Church of Jesus Christ of Latter Day Saints, supra; W.E.J. vs. Superior Court of Los Angeles, supra; In Interest of T.E.T., supra; Collins vs. Division of Foster Care, supra; Matter of Adoption of Baby Boy D, supra (all upholding statutes which assumed non-abandonment by the mother).

The Appellant bears the heavy burden of proving that the subject statute is unconstitutional. Ellis vs. Social Services Department of Chruch of Jesus Christ of Latter-Day Saints, Supra. Any doubts must be resolved in favor of the constitutionality of the statute, and the statute cannot be declared unconstitutional unless it is found to be so beyond a reasonable doubt. Stone vs. Department of Registration, 567 P.2d 1115 (Utah 1977)

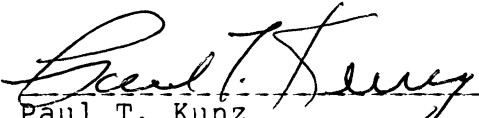
CONCLUSION

Respondent respectfully requests that the Judgment and Decree of Judge David E. Roth of the Trial Court, dated March 8, 1988, be affirmed, declaring that 75-2-109, Utah Code Annotated, 1953, as Amended is a constitutional statute of the State of Utah, and that Joleen L. Scheller, as mother of William "Billy Joe" Scheller, deceased, is the sole heir at law to inherit from said child; and that Michael Pessetto, father of said child shall not inherit.


PAUL T. KUNZ
Attorney for Respondent

PROOF OF SERVICE

I hereby certify that four (4) copies of the foregoing Brief of Respondent were mailed to Randall L. Skeen, attorney for Appellant, postage prepaid, to 1245 East Brickyard Road, Suite 600, Salt Lake City, Utah, 84016, this 4th day of August, 1988.


Paul T. Kunz
Attorney for Respondent

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

IN THE MATTER OF THE ESTATE OF)	
)	
WILLIAM "BILLY JOE" SCHELLER)	Case No. 880337-CA
)	
)	
Deceased.)	

ADDENDUM TO BRIEF OF RESPONDENT

PAUL T. KUNZ #1865
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Ogden, Utah 84401

Attorney for Respondent

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Salt Lake City, Utah 84106

Attorneys for Appellant

TABLE OF CONTENTS FOR ADDENDUM

Deposition of Michael Pessetto (Richard Mike Pessetto)
as dated May 19, 1987

Findings of Fact and Conclusions of Law dated November 3, 1987

Transcript of Proceeding of October 16, 1987, in Case No.
16434

COPY

SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY

STATE OF UTAH

-0-

In the Matter of the Estate
of William Billy Joe Scheller, : Probate No. 16434

Deceased.

-0-

Deposition of Richard Mike Pessetto

-0-

Place: HATCH, MORTON & SKEEN
3450 South Highland Drive
Salt Lake City, Utah

Date: May 19, 1987
10:35 a.m.

Reporter: Ariel Mumma, CSR/RPR

-0-

SEELY, STACY, JONES & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS

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Salt Lake City UT 84111
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Ogden Utah 84401
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-oOo-

I N D E X

Witness

Page

RICHARD MIKE PESSETTO

Examination by Mr. Kunz
Examination by Mr. Skeen
Re-examination by Mr. Kunz

3
26
28

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E X H I B I T S

No.

Description

Page

1 Order of Support and Judgment

17

-oOo-

Examination (By Mr. Kunz)

1 A. I don't remember.

2 MR. SKEEN: Let me just interject. Rather than
3 objecting to every question, I'm going to make a continuing
4 objection to relevance at this point.

5 MR. KUNZ: Off the record just a second.

6 MR. SKEEN: Maybe we could resolve it.

7 MR. KUNZ: Off the record for a second.

8 (There was a discussion held off the record.)

9 Q. BY MR. KUNZ: When was your first -- do you have any
10 recollection of any conversation with her between the time
11 that you found out she was pregnant and the child was born?

12 A. I don't remember.

13 Q. Okay. Do you have any recollection of any
14 conversations with her father or mother between the time that
15 you knew she was pregnant and the child was born?

16 A. I don't remember.

17 Q. Okay. Do you know that the child was born on
18 August 10th, 1981; do you know that?

19 A. Yes.

20 Q. Did you at any time during his lifetime see Billy Joe
21 Scheller?

22 A. I never knew where he was at.

23 Q. You're not answering my question. Did you at any
24 time during his lifetime see Billy Joe Scheller?

25 A. How could I when I didn't know where he was at?

Examination (By Mr. Kunz)

1 MR. SKEEN: It just calls for a yes or no.

2 MR. KUNZ: You need to instruct him. That's a
3 straightforward question.

4 MR. SKEEN: I've instructed him, Counsel. I
5 instructed him.

6 It takes a yes or no. Answer yes or no.

7 { A. No.

8 MR. SKEEN: If he wants to know beyond that he'll ask
9 you.

10 THE WITNESS: Okay.

11 { Q. BY MR. KUNZ: Did you at any time after this child
12 was born ever request to see or visit the child?

13 { A. No.

14 Q. Did you at any time after the payment of the \$1250
15 that was paid to the state pay any \$100 per month payments
16 through the Clerk of the Court for the support of the child?

17 A. I called and asked why I wasn't making support
18 payments anymore and they looked and said nobody's requesting
19 anything, we cannot give you any information.

20 Q. Did you receive a copy of the order that was mailed
21 to you setting forth your child support payments?

22 A. No, not to my recollect.

23 Q. I'll show you what we'll mark as Petitioner's
24 Exhibit 1 which purports to be an order from the Second
25 Judicial District Court of Weber County dated September 19th,

Reporter's Certificate

State of Utah)
) ss.
County of Salt Lake)

I, Ariel Mumma, Certified Shorthand Reporter,
Registered Professional Reporter, and Notary Public for the
State of Utah, do hereby certify:

THAT the foregoing proceedings were taken before me
at the time and place set forth herein; that the witness was
duly sworn to tell the truth, the whole truth, and nothing
but the truth; and that the proceedings were taken down by
me in shorthand and thereafter transcribed into typewriting
under my direction and supervision;

THAT the foregoing pages contain a true and correct
transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have subscribed my name and
affixed my seal this 26th day of May, 1987.



Notary Public
State of Utah

My commission expires
December 5, 1989.

PAUL T. KUNZ (1865)

KUNZ, KUNZ & HADLEY
ATTORNEYS AT LAW
SUITE 300, BANK OF UTAH BUILDING
2605 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
TELEPHONE: 394-4573

IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY
STATE OF UTAH

IN THE MATTER OF THE ESTATE	:	
OF	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE PETITION FOR FORMAL DETERMINATION OF HEIRS
WILLIAM "BILLY JOE" SCHELLER,	:	
Deceased.	:	Probate No. 16434

Joleen L. Scheller, as Petitioner, filed with the above-entitled Court her Petition for Formal Determination of Heirs of William "Billy Joe" Scheller, deceased, on the 2nd day of December, 1986, by and through her attorney, Paul T. Kunz. Prior to hearing of said Petition, Michael Pessetto, by and through his counsel, James E. Morton, of Hatch, Morton & Skeen, filed with the Court his Objection to the Petition for Formal Determination of Heirs, dated February 10, 1987, claiming that under Utah Code Annotated, 1953, as Amended, Section 75-2-109(1)(b)(ii), Michael Pessetto should be determined to be a legal heir of the estate of the above-named decedent under the laws of intestate succession of the State of Utah. The objecting party thereafter requested

IN THE MATTER OF THE ESTATE OF
WILLIAM "BILLY JOE" SCHELLER
Page 2 - Probate No. 16434
FINDINGS OF FACT AND CONCLUSIONS OF LAW

that the matter be placed on the trial calendar for determination.

The above entitled matter came on regularly for trial at 9:30 a.m., October 16, 1987, pursuant to notice to the parties, before the Honorable David E. Roth, Judge of the above-entitled Court, sitting without jury. Petitioner, Joleen L. Scheller, appeared in person and was represented by her counsel, Paul T. Kunz, and the Objecting Party, Michael Pessetto, appeared in person, and was represented by his counsel, James E. Morton and Randall L. Skeen, and the Court having heard the testimony of both the Petitioner and the Objecting Party, and the testimony of the respective witnesses as called by each party, and having heard the oral arguments of the respective Counsel, and the Court being fully advised in the premises, enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. The respective Counsel stipulated to the Court that the issues of fact and matters of law to be determined at trial were as follows:

a. For the purposes of inheritance by intestate succession from William "Billy Joe" Scheller, did Michael Pessetto establish the parent and child relationship with William "Billy Joe" Scheller within the meaning of 75-2-109(1)(b)(ii), Utah Code Annotated 1953, as Amended, by openly treating said

IN THE MATTER OF THE ESTATE OF
WILLIAM "BILLY JOE"SCHELLER
Page 3 - Probate No. 16434
FINDINGS OF FACT AND CONCLUSIONS OF LAW

named child as his and by not refusing to support said child both as required by the provisions of said cited statute?

b. Is 75-2-109(1)(b)(ii) of the Utah Uniform Probate Code an unconstitutional and sex discriminating statute as claimed by the Objecting Party, Michael Pessetto?

2. The Petitioner and Objecting Party through their respective counsel thereafter stipulated to the Court to proceed and present their evidence in regard to issue 1.a. above, and that issue 1.b. as to the constitutionality of the cited statute would thereafter be presented to the Court through written briefs, and by oral arguments, if requested.

3. Objecting Party, Michael Pessetto, did not refuse to support the minor child, William "Billy Joe" Scheller, during his lifetime, Michael Pessetto paid what support he had to pay and was forced to pay by Court Order, and he did absolutely nothing beyond that.

4. Considering all the evidence, the Court finds that Michael Pessetto did not openly treat William "Billy Joe" Scheller, deceased, as his child during his lifetime. That the excuse of Michael Pessetto that he could not find the location of the mother of the child is a hollow excuse. The Court further finds that Michael Pessetto made no meaningful effort to find the mother and the named child, now deceased.

IN THE MATTER OF THE ESTATE OF
WILLIAM "BILLY JOE" SCHELLER
Page 4 - Probate No. 16434
FINDINGS OF FACT AND CONCLUSIONS OF LAW

5. Although Michael Pessetto and the mother of the deceased child were present in Court at the time of the paternity hearing, on May 23rd and May 24, 1983, that Michael Pessetto made no effort at that time to ask where he could find the child, how the child was, or how he could visit the child.

6. The Court finds that in order for a person to openly treat a child as his, he would try to find that child; he would make an effort to pay support; he would make an effort to visit the child; he would at least send cards or gifts to a last known address; and he would inquire as to the condition and wellbeing of the child at some point. Michael Pessetto made no meaningful attempt to do any of those things.

7. The Court specifically finds that 75-2-109 of the Utah Uniform Probate Code requires more than an acknowledgement of paternity following a trial where a person is determined to be the father of a child. Michael Pessetto did acknowledge the child as his following a paternity hearing. The cited statute requires more than acknowledgment. Michael Pessetto did not, in the opinion of the Court, openly treat the child as his.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court hereby enters the following Conclusions of Law:

IN THE MATTER OF THE ESTATE OF
WILLIAM "BILLY JOE" SCHELLER
Page 5 - Probate No. 16434
FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That under the provisions of 75-2-109 Utah Code Annotated 1953, as Amended, Michael Pessettos may not inherit from the estate of his deceased child, William "Billy Joe" Scheller, and Joleen L. Scheller is the sole heir at law of said deceased child, unless Counsel for the Objecting Party hereafter convinces this Court that the cited Utah statute is unconstitutional.

2. Counsel for the Objecting Party, Michael Pessetto, is given the opportunity to present, within thirty days hereof, a Brief to the Court as to their claim of unconstitutionality of 75-2-109 Utah Code Annotated 1953, as Amended. Petitioner shall have twenty days thereafter to file a Response Brief, and the Objecting Party shall have ten days thereafter to file a Reply Brief. Oral arguments may be requested in accordance with the provisions of Court Rule 2.8.

3. If the Court is persuaded that the cited Utah statute is unconstitutional, the case will go forward from there. If the Court determines that the cited Utah statute is constitutional, the Conclusions of Law of the preceding paragraph 1. shall constitute the ruling for an Order and judgment of the Court.

4. For appeal purposes, there will be no final judgment until the Court has entered its determination of the Constitutional issue presented.

DATED this 31 day of November, 1987.

DAVID E. ROTH
DISTRICT JUDGE

IN THE MATTER OF THE ESTATE OF
WILLIAM "BILLY JOE" SCHELLER
Page 6 - Probate No. 16434
FINDINGS OF FACT AND CONCLUSIONS OF LAW

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Findings of Fact and Conclusions of Law re Petition for Formal Determination of Heirs, to JAMES E. MORTON and RANDALL L. SKEEN, Attorneys at Law, HATCH, MORTON, & SKEEN, 1245 Brickyard Road, Suite 600, Salt Lake City, Utah 84106, by United States Mail, postage prepaid, this 13th day of October, 1987.

Donna D. Miller
Secretary

1 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
2 STATE OF UTAH, IN AND FOR WEBER COUNTY
3
4

5 IN THE MATTER OF THE ESTATE)
6 OF)
7) Case No. 16434
8 WILLIAM "BILLY JOE" SHELTER,) TRANSCRIPT OF PROCEEDINGS
9 DECEASED)
10
11
12

13 BE IT REMEMBERED that the above entitled matter came
14 on for hearing before the Hon. DAVID E. ROTH, Judge of the
15 above entitled Court, on October 16, 1987.

16 WHEREUPON, the following proceedings were had, to wit:
17
18

19 A p p e a r a n c e s:

20 PAUL T. KUNZ, ESQ.,
21 Attorney for Petitioner
22 JAMES E. MORTON, ESQ.,
23 RANDALL R. SKEEN, ESQ.,
24 Attorneys for Respondent.
25

1 THE COURT: I am prepared to make findings of
2 Fact, and then it will be up to the attorneys to convince
3 me whether or not the statute is Constitutional.

4 I have already found that Mr. Pessetto did not refuse
5 to support the child. I can only find, however, that he
6 paid what he had to pay and was forced to pay by the Court.
7 And he did absolutely nothing beyond that.

8 The remaining issue of fact is whether he openly treated
9 the child as his child. Apparently there is no help in
10 the case law as to what that phrase means, so we look to
11 just the common English language and terms that are used
12 there. It appears to me that in some way he must have tried
13 to act like a parent to that child at some point.

14 After having heard all the evidence, I find that he
15 has not done that. His excuse is that he could not find the
16 mother or the child. I find that to be a hollow excuse.
17 I find that he made no meaningful effort to find the mother
18 and the child. I don't believe it would have been necessary
19 to hire a private investigator or an attorney. At least for
20 part of the time the Schellers were living in Ooden, and she
21 had a listed telephone. That there were contacts made at
22 the time of the paternity. He made no effort at that
23 time to ask where they were, how the child was, where he
24 could find the child, how he could visit the child.

25 A person, in my interpretation, who openly treats the

1 child was his would try to find that child, would make an
2 effort to pay support, would make an effort to visit the
3 child, would at least send cards or gifts to a last known
4 address. Would inquire as to the condition and well being
5 of the child at some point. And I find that Mr. Pessetto
6 made no meaningful attempt to do any of those things.

7 I find specifically that this statute requires more
8 than an acknowledgement of paternity following a trial where
9 you are determined to be the father. The evidence would
10 support a finding that he did, following that, acknowledge
11 that this was his child. It is curious, though, that he
12 would acknowledge that this was his child while not acknowledging
13 having sexual intercourse with the child's mother.

14 If the statute required only an acknowledgement, I
15 think that would be the wording of the statute. It does not
16 say that. It requires something more than that. And I
17 have already found Mr. Pessetto did not in my opinion openly
18 treat the child as his.

19 Based on that finding, it will be the Judgment of the
20 Court that he may not inherit from this child unless his
21 attorneys can convince me that this statute is unconstitutional.
22 If they persuade me that's the case, we will go from there.

23 MR. MORTON: How would the Court like to address
24 that? Does the Court want to make a Finding we can take it
25 up as constitutional, or would the Court prefer briefs?

1 THE COURT: Submit your authorities similar to the
2 way you do it under 2.8. Give Mr. Kunz an opportunity to
3 respond. Regardless of what my decision on that is, I
4 suspect it is something you will want to take up.

5 You want to have oral argument? I will leave it up to
6 you to request it if you want.

7 MR. MORTON: I am not necessarily certain that
8 we would need oral argument. May I have a timetable? May
9 we have 30 days to submit a brief, after which a response
10 period; something like that?

11 THE COURT: Alright.

12 MR. KUNZ: Your Honor, do you want the Findings
13 of Fact and Conclusions of Law prepared, except as to the
14 Constitutional question before that date, and signed, or
15 do you want to hold it?

16 THE COURT: I think that distills it down to one
17 issue remaining at this level anyway. Do it that way.

18 MR. KUNZ: Do it that way and reserve that item
19 as being open?

20 THE COURT: Right.

21 MR. SKEEN: However, just to clarify this, there
22 will be no final Judgment until the determination is made
23 relative to the Constitutional issue, for appeal purposes?

24 THE COURT: That's right.

25 MR. SKEEN: Thank you.

1 MR. MORTON: Your Honor, with regard to oral
2 argument, I hate to waive it at this time. Perhaps I could
3 reserve it.

4 THE COURT: Follow rule 2.8. It provides that you
5 can request it if you like.

6 MR. MORTON: Thank you.

7 THE COURT: And I can tell you right now if either
8 party requests oral argument, you can have it.

9 MR. MORTON: 30 days on my brief?

10 MR. KUNZ: That's fine with me.

11 THE COURT: You can have 30 days. And ten days
12 enough to respond? That's generally what you have under 2.8.
13 Do you need more than that?

14 MR. KUNZ: I think in this instance if he is going
15 to take 30, maybe I better have 15 anyway, 15 or 20.

16 THE COURT: Twenty, and then ten days for response
17 from you.

18 MR. MORTON: Okay, thank you.

19 THE COURT: Court is in recess.

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C E R T I F I C A T E

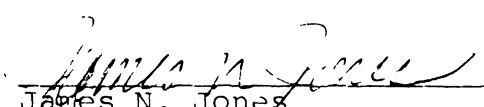
STATE OF UTAH)
) ss.
County of Weber)

I, James N. Jones, do hereby certify that I am one of
the official Court Reporters for the State of Utah, and a
competent machine shorthand writer.

That on October 16, 1987, I reported in machine shorthand
the proceedings had in the hereinbefore entitled matter.

That thereafter, I reduced my machine shorthand notes
to typewriting, and the foregoing transcript, pages 1 through
4, inclusive, constitutes a full, true and correct transcript
of the said machine shorthand notes taken by me on said date
in said matter.

WHEREUPON, I have hereunto set my hand this 19th day
of October, 1987.


James N. Jones
Official Court Reporter.