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Brief of Appellant, *Grames v. Grames*, No. 10539 (1966).
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CASE NO. 10539

IN THE SUPREME COURT of the STATE OF UTAH

WILLIAM B. GRAMES,

Plaintiff and Appellant,

vs.

[illegible]SSA ANN GRAMES,

Defendant and Respondent.

APPELLANTS BRIEF

Appeal from the Judgment of the Second District [illegible]
in and for the County of Weber.

Honorable Parley E. Norseth, Judge

DARRELL GEORGE RENSTROM
259 - 24th Street, Ogden
Attorney for Plaintiff and Appellant

Defendant has appeared neither in person
nor by way of counsel.

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State v. Hunt 13 Ut. 2d 32, 368 P2d 261

CASE NO. 10539

IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM B. GRAMES,

Plaintiff and Appellant,

vs.

TESSA ANN GRAMES,

Defendant and Respondent

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This case involves the question:

1. Can a man be held liable for the support of a child, not his own, conceived prior to his marriage to the natural mother, but born to the natural mother after she had married said man?

DISPOSITION IN LOWER COURT

The case here on appeal is the result of a judgment entered in a default divorce wherein the court found that the plaintiff was not the natural father of a child born to the natural mother while married to the plaintiff, but has required the plaintiff to pay the sum of $30.00) Dollars per month child support regardless.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's judgment to the extent that the plaintiff be relieved from further payment of child support payments pursuant to the order of the District Court and that the Divorce Decree be made absolute.

STATEMENT OF FACTS

The plaintiff on the 20th day of December, 1964 met the defendant Tessa Ann Grames, who at that time was pregnant by another man and had been pregnant since the month of August, 1964, and that the defendant began dating the plaintiff and on the 11th day of March, 1965, the defendant entered into marriage with the plaintiff within the State of California knowing full well that she was pregnant, but that the same was not his. During the month of May, 1965 the said child was born.

That shortly thereafter the plaintiff was advised by his wife, the defendant, that she no longer loved him and married him only for the purposes of giving her illegitimate child a name.

The plaintiff then filed an action for Annullment or in the alternative Divorce against the defendant. Complaint was served upon upon the defendant on the 15th day of September, 1965 within the State of California.

The following dates are significant in this case:

October, 1964 Defendant becomes pregnant by a man other than the plaintiff.

December 20, 1964 Plaintiff meets the defendant for the first time.

March 11, 1965 Defendant and plaintiff marry within the State of California.

May, 1965 Said child is delivered to the defendant.

June, 1965 Defendant advises plaintiff that she no longer loves him and married him only to acquire a name for her child.

September 10, 1965 Plaintiff files for divorce.
September 15, 1965 Defendant served with process.
December 22, 1965 Court grants final Decree of Divorce.

ARGUMENT

POINT I.

THIRD PARTY CANNOT LEGITIMATIZE AN ILLEGITIMATE CHILD EXCEPT BY ADOPTION

The court understandably in arriving at its decision was concerned about bastardizing the child in question, which perhaps is not relevant to the point before this court. However, the plaintiff chooses to comment on this point at this time because it was of concern to the trial court.

Black's Law Dictionary defines "bastard" as follows:

> "A child born of an unlawful intercourse and before the lawful marriage of its parents" (Pettus vs. Dawson, 82 Texas 18, 17 S. W. 714)

It further defines "bastard" as follows:

> "A child born after marriage, but of circumstances which renders it impossible that the husband of the mother can be the father." (State

vs. Coliton, 73 N.D. 582, 17 N. W. 2d 546)

The applicable State Statutes herein are as follows:

> 78-30-12, Utah Code Annotated, 1953 which reads: "The *father* of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereby deemed for all purposes legitimate from the time of its birth." 77-60-14, Utah Code Annotated, 1953 states as follows:
>
> "If the *mother* of any such child and the father shall at any time after its birth intermarry, the child shall in all respects be deemed to be legitimate, and the bond for its support shall thereupon become void."
>
> And 78-30-1 through 15 as amended, Utah Code Annotated, 1953 relevant to the adoption laws of the State of Utah.

It is plaintiff's contention that a child conceived or born outside the vows of marriage is an illegitimate child and there are only three ways under Utah Law by which the child can be made legitimate.

1. Acknowledgment by natural father.
2. Marriage between the natural father and natural mother.
3. Adoption.

The plaintiff calls the court's attention to the fact

that the Code states *"the father"* of such child and makes no provision for a third party to adopt the child by marriage or acknowledgment.

Therefore, regettably the child in question is an illegitimate child and can be legitimized only in the manner outlined above, and the plaintiff cannot legitimatize the child by marriage or acknowledgment, but may legitimatize the child by formal adoption, which was his plan as evidenced by his testimony. (Certified Record, Page 3, Lines 14—17)

The facts will further show that the defendant, in this action by her acts refused to allow plaintiff this opportunity. (Certified Record, Page 3, Lines 21—24)

POINT II.

PUBLIC POLICY

It would appear that the District Court ruling would strike at the heart of good public policy. Society should encourage young unmarried girls with child to marry in hopes that as a result of such marriage the husband will adopt the illegitimate child, thus causing it to lose the stigma of "bastard" and give it a name and good home.

However, plaintiff submits that most men would shy away from such an involvement if they were aware that by marrying a woman with child or even a woman who had given birth to prior illegitimate children, they would be required to thereafter and forever support those children conceived by the union of another.

Thus, it would seem that good public policy would dictate that a man, gentleman enough to step forward and marry a woman under those circumstances, should be encouraged to do so without the fear that he is going to be forever required to support her illegitimate children by a union other than his.

POINT III.

THE LAW DOES NOT SUPPORT THE COURT'S RULING THAT A MAN MAY BE HELD TO SUPPORT AN ILLEGITIMATE CHILD NOT HIS OWN. Plaintiff acknowledges this court's previous ruling that a child born during a marriage creates a presumption that the husband is the father. However, such presumption is subject to rebuttal and may be overcome by testimony. The record will show in this instance that under no circumstances could the child in question have been fathered by the plaintiff and indeed the trial court in its Findings of Fact, paragraph 3, found that no children were born of issue to the plaintiff and defendant herein.

Plaintiff concedes that there is a split in the line of decisions as to whether or not the father can be held. The lead case apparently holding that a man can be held under such circumstances is State v. Shoemaker (1883) 62 Iowa 343, 17 NW 589. Again in Miller v. Anderson (1885) 43 Ohio St. 473, 3 NE 605, the previous case was generally sustained, and again Gustin v. Gustin (1958) 108 Ohio App. 171, 9 Ohio Ops. 2d 204, 161 NE 2d 68, held similar to the previous two cases cited. However, the courts, at arriving at their conclusions apparently arrived at it the basis that the husband had

elected to stand in Loco Parentis.

The plaintiff in this case as previously indicated in this brief, intended at a future date to adopt the child and give it his name.

The line of cases holding that a man cannot be required to support a child not to be his own, appears to be in the majority and most recent. In Kucera v. Kucera (1962 ND) 117 NW2d 810, the court states as follows:

> "Where both the husband the the wife concede that a child born after marriage of the parties is not the child of the husband because of non-access by the husband at the time of conception, which occurred before the marriage of the parties, and where the husband married the wife with full knowledge of her pregnancy by another man and did so for the express purposes of giving the unborn child a name, the trial court cannot require the husband to support the child when the parties thereafter separate or are divorced, on the theory that the husband's marriage to the wife, with full knowledge of her pregnancy by another, was consent on his part to stand in loco parentis as to the child who thereafter was born."

Also it was similarly held in Commonwealth v. Sprouse (1957) 15 Pa. D. & C2d 701 that a man was not estopped from denying that he was the father of illegitimate children conceived by his wife and born to his wife prior to their marriage.

Similarly, it has been held in People ex rel. Hood v. Gleason (1918) 211 Ill. App. 390 that in a bastardy proceeding where a man married a woman five days

before the birth of her child, the court said by way of dictum that the law does not impose upon a husband any duty to support or to contribute to the support of his wife's bastard child, not withstanding the fact that the child was born five days after his marriage to the relatrix.

POINT IV.

DIVORCE TERMINATES FATHER IN LOCO PARENTIS FROM FURTHER SUPPORT

Thus in Clevenger v. Clevenger (1961) 189 Cal App. 2d 658, 11 Cal. Rptr. 707, 90 ALR2d, 569 it was held that a man may terminate by divorce his status of loco parentis to an illegitimate child without further obligations of child support or contribution.

In D. v. D. (1959) 56 NJ Super 357, 153 A2d 332, the court said that although a husband might have stood in loco parentis to an illegitimate child for a certain time, the continuance of such relationship was a matter lying entirely within his will and since it was ended by his will, the husband was not bound to support the illegitimate child of his wife.

Taylor v. Taylor (1961) 58 Wash. 2d 510, 364 P2d 444, the court said while a person standing in loco parentis was bound to support and educate the child, the relationship thus founded was a temporary one and depended upon the intentions of the party assuming the obligations of a parent, so that the decisive issue in the case at bar was whether such bonds can be dissolved and that the status of one in loco parentis is voluntary and temporary and may be abrogated at will by either the party in loco parentis or the child and that in re-

spect of the burdens attendant upon such status these may be abandoned at any time.

In Farris v. Farris (1961) 59 Wash. 2d 837, 365 P2d 14 it held that in a divorce action the husband cannot be ordered to support his wife's children unless he is the father.

We thus conclude that even if the court found the plaintiff did stand in loco parentis, it is a relationship that may be terminated at will or particularly by divorce and thus, the plaintiff herein cannot be required to pay permanent child support for a child conceived by another.

POINT V.

RELATED STATUTES

It would appear that the spirit of recent rulings of this court together with recent inactments of the Utah Legislature, that both the court and the legislature recognize that there are situations that exist where a husband should not be required to support a child not his own even though married to the natural mother.

Plaintiff calls the court''s attention to Utah's new Paternity Act, 78-45a-1, Utah Code Annotated, 1953 which states as follows:

> "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 wed-*

lock includes a child born to a married woman by a man other than her husband."

We would emphasize the last line of the above quote where it states, "A child born out of wedlock includes a child born to a married woman by a man other than her husband."

Thus the Legislature through its Paternity Act has recognized that a marrried woman may pursue the natural father for support even though she is married to another.

Further this court in State v. Hunt 13 Ut. 2d 32, 368 P2d 261 held that a woman may avail herself of the Bastardy Statute in seeking support for an illegitimate child even though the child was conceived during wedlock to another.

POINT VI.

TRIAL COURT EXPRESSES DOUBT

The Trial Court itself indicated that it felt that this was a matter upon which the Supreme Court of this state should pass upon. Thus plaintiff submits the court iself is in doubt and is requesting a guide for further action. (Certified Report, Last Page, Line 6 & 7)

CONCLUSION

The Trial Court's Order requiring the plaintiff to pay permanent child support should be declared void and in view of the fact that three months will have ex-

pired by the time that this matter has been ruled upon since the Decree of Divorce was entered, the Decree of Divorce should be made absolute.

Respectfully submitted,

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