

2004

Kirk J. Peterson v. Hollie J. Peterson : Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

KIRK J. PETERSON,

Petitioner/Appellant

vs.

HOLLIE J. PETERSON,

Defendant/Appellee

BRIEF OF APPELLANT

Case No.: 20040562-CA

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**FILED
UTAH APPELLATE COURTS
FEB 14 2005**

THE UTAH COURT OF APPEALS

KIRK J. PETERSON,
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vs.
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TABLE OF AUTHORITIES

A	78-45a-2 U.C.A
B	78-45a-7 U.C.A.
C	78-45e-2 U.C.A.
D	78-45e-3 U.C.A.
E	78-45e-4 U.C.A.

CASE LAW

Maci v. Webb 614 P.2d 647

Wiese v. Wiese 699 P.2d 300

THE UTAH COURT OF APPEALS

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vs.

HOLLIE J. PETERSON,

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BRIEF OF APPELLANT

Case No.: 20040562-CA

STATEMENT OF JURISDICTION

Jurisdiction of this action is pursuant to Rule 5(a) of the Utah Rules of Appellant Procedure which allows petitioner to appeal an Interlocutory Order of the Court dated June 14, 2004.

STATEMENT OF ISSUES

May the Court revisit the issue of paternity where the parties have complied with Section 78-45a-2 UCA, declaring paternity and under 78-45e-4 UCA, where the parties never rescinded that declaration. Petitioner argues that §78-45e-4(1) on its face, indicates that a signed Voluntary Declaration of Paternity is a legal finding of paternity unless rescinded.

The standard of review in this divorce proceeding should be to disturb the action of the lower court if the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law. The major point here would be a misapplication of principles of law. *Weise v. Weise* 699 p 2d 700.

CITATION TO RECORD

Appellant filed a Motion to Reconsider the issue that is on appeal on January 5, 2004 (pages 471-472 of record). Said motion was denied on June 14, 2004 (pages 563 and 564 of record). Appeal was filed on July 6, 2004.

STATUTES

The principal statute of central interest to the case is 78-45e-4 cited below

78-45e-4. Rescission of the declaration

(1) A signed voluntary declaration of paternity is a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgement within the earlier of

(a) 60 days of signing; or

(b) The date of administrative or judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party.

(2) (a) After the period referred to in Subsection (1), a signed voluntary declaration of paternity may be challenged in court only on the grounds of fraud, duress, or material mistake of fact, with the burden of proof on the challenger.

(b) The legal responsibilities, including child support, or any signatory arising from the declaration may not be suspended during a challenge under Subsection (2)(a).

(3) In determining whether to rescind the declaration the court has the same authority and obligation with regard to genetic testing as is provided in Section 78-45a-7.

(4) A child support order based on the voluntary declaration of paternity remains in effect during the pendency of any proceeding under this section, and until a final order of the court rescinding the voluntary declaration.

(5) If the declaration is rescinded, the declarant father may not recover any support he provided for the child before entry of the order of recession.

STATEMENT OF CASE

1. A petition for divorce was filed on May 8, 2002. (p.1-9)
2. There is one child that is subject of a custody dispute. Daniel Kevin Peterson, age 12. (p.52-54)
3. That on January 21, 1998, the parties both signed in front of a notary public, an affidavit for voluntary declaration of paternity by parents that said affidavit was filed with the State of Utah Department of Health on January 21, 1998. (Copy enclosed) (p. 414-415) (Exhibit 6)
4. That said affidavit was filed after the parties had been married.
5. Neither party has filed any written statement with the State of Utah Department of Health rescinding the declaration of paternity.
6. Respondent contends that “Daniel’s bio-father was an air force man.” She did not know his correct name and had been unable to locate him. (p.17 Hearing on 5-29-03)
7. At a hearing on TRO, December 18, 2003, Respondent declared she didn’t remember signing the Voluntary Declaration of Paternity, saying the Petitioner drugged her. (p. 95 12-18-03 transcript)
8. That as a result, the respondent claims the petitioner is not the father, and the lower court ordered that the petitioner take a DNA paternity test. (see order attached)(p.562-564)
9. Petitioner filed a Motion to Reconsider the Order requiring a paternity test, since paternity had earlier been established pursuant to Section 78-45e-4(1) UCA. (p.471-472)
10. That said motion was denied by the lower court. (p 563-564)

SUMMARY OF THE ARGUMENTS

1. May the Court order a paternity test when a legal finding of paternity has not been properly challenged.
2. May the Court order a paternity test without finding that a recession of a declaration of paternity has occurred.

ARGUMENT

On January 21, 1998 after their marriage, the parties signed in front of a notary public and filed with the State of Utah Department of Health an affidavit for voluntary declaration of paternity for the minor child Daniel Kevin Peterson. (Exhibit 6 12-18-03 hearing)

Section 78-45a-2 (1b) U.C.A provides that such a declaration is a determination of paternity and that liabilities pertaining to paternity may be enforced. Section 78-45e-2 (1a) articulates that the voluntary declaration of paternity established a father-child relationship identical to the relationship established when the child is born to persons married to each other.

Subsection 2 of 78-45e-2 states that when the declaration is filed there does not need to be further proceedings regarding the establishment of paternity. In this case, the declaration was filed and a new birth certificate was issued showing petitioner as father (p 414-415).

As to the finality of the filing of the voluntary declaration of paternity, Section 78-45e-4 (1) U.C.A. indicates that such filing is a legal findings of paternity. A legal finding is clear language that paternity has been established.

Section 78-45e-4 (1a and 1b) does grant to any signatory the right to rescind the acknowledgement within the earlier of 60 days of signing or a judicial proceeding is filed

to establish a support order. There is no argument in the case that either party exercised any right of recession.

Subsection 2 of §78-45e-4 does give respondent the right to challenge the legal findings of paternity on the grounds of fraud, duress, or material mistake of fact after the recession period has passed.

Respondent testified on December 18, 2003 that Petitioner bragged to friends that he had drugged Respondent and that if she signed the document she was not in her right state of mind. (p 95 12-18-03 hearing).

The Court on May 29, 2003 had indicated its recognition that the declaration of paternity could be set aside in the grounds of fraud, duress, or material mistake and the burden was on the respondent. The court further indicated that it would require a hearing to determine if the declaration should be set aside (p 82 5-29-03 hearing).

Respondent's counsel acknowledged that a hearing would be necessary. (p 82 5-29-03 hearing). The Court went on to indicate that it would not order any paternity test or make any findings that petitioner was the biological father or the child's father by operation of law because the declaration of paternity cannot be attacked. The Court indicated that as of May 29, 2003, it was considering petitioner as the father of Daniel. (p 83 5-29-03 hearing)

Later in the hearing, the Court indicates that it may be necessary to hear from the notary if respondent didn't know what she was signing. The Court further indicated it needed a lot more information before it ordered a paternity test. (p. 92 5-29-03 hearing).

In the December 18, 2003 hearing, the Court in ruling indicated it would put the paternity issue to rest by ordering labs. The Court did not use as a basis for this ruling that respondent had presented further evidence of fraud, duress, or material mistake of

fact in signing the declaration but decided to “rely on science”. (p 125 12-18-03 hearing)

Petitioner’s counsel argued that the Court needed to make a finding of duress or coercion before ordering a paternity test. The Court then indicated if you don’t want to take the paternity test, get an order from the Court of Appeals.

Petitioner seeks this Court to uphold the legal finding that petitioner is the father of Daniel. Respondent by its lower court’s admission had presented insufficient evidence that fraud, duress, or material mistake of fact occurred.

Petitioner has legitimized Daniel as his child by acknowledging him as his own and treated him as his own. See Maci v. Webb 614 p.2d 647. Petitioner has done an honorable act. He has stepped forward and made himself liable for support payments to for Daniel and helped Daniel’s self-esteem rise because he has a father in his life.

The lower court should have at worst required respondent to meet her burden of setting aside the declaration by presenting the evidence of fraud, duress, or material mistake. Petitioner’s status as father was basically an unchallenged legal finding. A paternity test has the possibility of leaving Daniel with an unknown biological who is and will remain unaware of his existence.

If at a hearing, respondent establishes grounds for setting aside the declaration, then the court could order genetic testing.

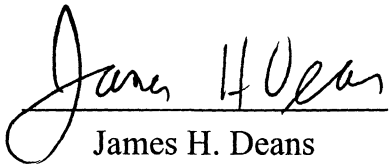
Section 78-45e-2 (2) appears to support the idea that if the declaration is valid there is no further requirement for a proceeding regarding the establishment of paternity. The sequence of events in this case eliminates the need for a paternity test or at least demands that this Court order the matter remanded for an evidentiary hearing when respondent meets her statutory burden.

This court has the right under Wiese v. Wiese 699 p.2d 700 to disturb the action of the lower court where there has been a misapplication of principles of law.

CONCLUSION

This Court should order the lower to find that the legal findings of paternity established by the voluntary declaration of paternity be upheld without further hearing. In the alternative, the Court should order the lower court to hold an evidentiary hearing where respondent must prove her grounds for rescinding the declaration of paternity.

DATED this 14th day of February, 2005


James H. Deans

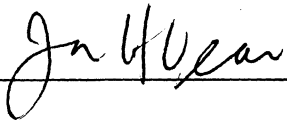
Attorney for Plaintiff/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two (2) copies of the foregoing Brief to the following on
February 14, 2005.

Mary Pat Cashman
Attorney for Respondent
205 No. 400 West
Salt Lake City, Utah 84103

Martha Pierce
Office of Guardian ad Litem
450 South State Street #W22
Salt Lake City, Utah 84111



ADDENDUM

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

KIRK J. PETERSON,	:	MINUTE ENTRY DECISION AND ORDER
Petitioner,	:	CASE NO. 024902937
vs.	:	
HOLLIE J. PETERSON,	:	
Respondent.	:	

FILED DISTRICT COURT
Third Judicial District

JUN 14 2004

SALT LAKE COUNTY

By

Deputy Clerk

The Court has before it a request for decision filed by current counsel for the petitioner, requesting a decision on the petitioner's Motion to Reconsider filed with this Court on January 5, 2004.

The Court has reviewed the Motion to Reconsider, together with the basis therefor, and sees no reason, either procedurally or substantively, why the Court should revisit its prior Orders, and accordingly the Motion to Reconsider is denied.

This Minute Entry stands as the Court's Order denying the Motion to Reconsider, no further Order is required.

Dated this 14 day of June, 2004.

151
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

LOCAL FILE NUMBER

18 421

Utah Department of Health

AFFIDAVIT FOR VOLUNTARY DECLARATION
OF PATERNITY BY PARENTS

STATE BIRTH NUMBER

143 92 001209

PURPOSE. Parents not married to each other may use this document to formally declare the paternity of their child without obtaining a court order. However if the mother is married and the husband is not the father, the husband must also sign an affidavit to affirm he is not the father. If a parent is unable or unwilling to sign this declaration, paternity can only be established by court order or adjudication of paternity. After this declaration is filed, parental information cannot be changed again except by court order, adjudication of paternity, or rescission.



NOTICE. THIS IS A LEGALLY BINDING DOCUMENT. Under Utah law, each mother and father is required to support her/his children, therefore, by signing this form you agree to accept all parental rights and obligations for the named child. You may wish to contact an attorney for additional information regarding the legal consequences of signing this form.

DO NOT SIGN THIS DOCUMENT IF:

1. You do not understand its legal consequences
2. You have doubts about the paternity of the child
3. You have not been provided with oral and written notice of the alternatives to and the legal consequences of signing this declaration

FATHER UNDER 18 YEARS OF AGE.

State Statute requires that if you are a father under 18, your parent or guardian must also sign this declaration on the reverse side.

INFORMATION AS REPORTED ON THE ORIGINAL CERTIFICATE	1a. CHILD'S FIRST NAME Daniel	1b. MIDDLE NAME Kevin	1c. LAST NAME GERBICH
	2. SEX Male	3. DATE OF BIRTH January 14, 1992	4. PLACE OF BIRTH City and County Salt Lake City Salt Lake Co.
	5. FACILITY NAME (if not institution, give street and number) University Hospital		
FATHER INFORMATION	6. NAME OF MOTHER (First, Middle, Last) Hollie J. Gerbich	7. DATE OF BIRTH 12-13-1955	8. BIRTH PLACE OF MOTHER Utah
	9. MAIDEN NAME OF MOTHER Jensen	10. NAME OF FATHER (First, Middle, Last) Kirk Jay Peterson	11. DATE OF BIRTH 7-6-1962
	12. BIRTH PLACE OF FATHER Utah	13. AGE OF FATHER AT TIME OF CHILD'S BIRTH 29	
THE CHILD SHALL BE KNOWN AS	14a. CHILD'S FIRST NAME Daniel	14b. CHILD'S MIDDLE NAME Kevin	14c. CHILD'S LAST NAME Peterson
OATH OF MOTHER	I certify, under penalty of perjury, that I am the birth mother of the listed child, that the man named as father is the father of this child; that I have read the notice at the top of this form, that I have been provided oral and written notice of the alternatives to and the legal consequences of signing this declaration, and that I have provided this information voluntarily.		Subscribed & sworn to before me this 21 st day of January 19 98
	15. SIGNATURE OF MOTHER (Sign ONLY in presence of a Notary Public) <i>Hollie J. Peterson</i>	16. DATE SIGNED 1-21-98	Notary Public <i>Raycene F. Eaton</i>
	17. COMPLETE ADDRESS OF MOTHER 680 West 500 South W Bountiful UT 84007	18. SOCIAL SECURITY NUMBER 528-92-3549	
OATH OF FATHER UDH-BVR-46 Rev 10/97	I certify, under penalty of perjury, that I am the father of the listed child; that I have read the notice at the top of this form, that I have been provided an oral and written notice of the alternatives to and the legal consequences of signing this declaration, and that I have provided this information voluntarily.		Subscribed & sworn to before me this 21 st day of January 19 98
	19. SIGNATURE OF FATHER (Sign ONLY in presence of a Notary Public) <i>Kirk Jay Peterson</i>	20. DATE SIGNED 1-21-98	Notary Public <i>Raycene F. Eaton</i>
	21. COMPLETE ADDRESS OF FATHER 680 West 500 South W Bountiful UT 84007	22. SOCIAL SECURITY NUMBER 528-68-8752	
FOR USE BY STATE OR LOCAL REGISTRAR	23. DATE ACCEPTED 1-21-98	24. OFFICE OF THE STATE OR LOCAL REGISTRAR <i>Barry E Nangle</i>	

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-22 of the Utah Code Annotated, 1953 As Amended.

Date Issued

AUG 22 2003

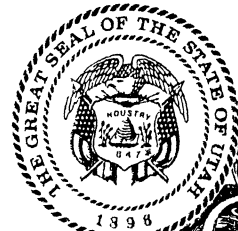
Barry E Nangle

Barry E Nangle

DIRECTOR OF VITAL RECORDS



* 0 0 2 8 4 5 5 9 *



CM6419

STATE OF UTAH - DEPARTMENT OF HEALTH

CERTIFICATE OF LIVE BIRTH

143 92 001209

18-421

LOCAL FILE NUMBER

STATE BIRTH NUMBER

✓ CHILD Access to the information on this form is limited by the Utah Vital Statistics Act and Rule	1 CHILD'S NAME FIRST: Daniel MIDDLE: Kevin LAST: Peterson		
	2 SEX Male	3a. DATE OF BIRTH (Month, Day, Year) January 14, 1992	3b. TIME OF BIRTH (24 Hour Clock) 20:40
	4a. PLACE OF BIRTH <input checked="" type="checkbox"/> Hospital <input type="checkbox"/> Freestanding Birthing Center <input type="checkbox"/> Clinic/Doctor's Office <input type="checkbox"/> Residence Planned <input type="checkbox"/> Residence Unplanned <input type="checkbox"/> Other		
	4b. PLACE OF BIRTH - HOSPITAL NAME (if not in hospital, give street and number) University of Utah Medical Center		
HOSPITAL CERTIFIER	5a. I CERTIFY THAT THIS CHILD WAS BORN ALIVE AT THE PLACE AND TIME AND ON THE DATE STATED ABOVE Signature: Al Tokunaga		5b. DATE SIGNED (Month, Day, Year) January 14, 1992
	5c. CERTIFIER'S NAME & TITLE Al Tokunaga <input type="checkbox"/> Hospital Administrator <input checked="" type="checkbox"/> Designated Representative <input type="checkbox"/> Other		
MEDICAL ATTENDANT	6a. I CERTIFY THAT THIS CHILD WAS BORN ALIVE AT THE PLACE AND TIME AND ON THE DATE STATED ABOVE Signature: Kathleen Doerrfeld		
	6b. ATTENDANT'S NAME AND TITLE (MD, DO, CERTIFIED NURSE, MIDWIFE, OTHER MIDWIFE, OTHER) Kathleen Doerrfeld MD		
	6c. MAILING ADDRESS OF ATTENDANT (Street, or RFD No., City or Town, State, Zip) 50 N Medical Drive, Salt Lake City, Utah 84132		
MOTHER	7a. MOTHER'S NAME FIRST: Hollie MIDDLE: Peterson LAST: Jensen		7b. MAIDEN LAST NAME Jensen
	8. DATE OF BIRTH (Month, Day, Year) December 13, 1955		9. STATE OF BIRTH (if not in USA, name country) Utah
	10a. RESIDENCE STREET AND NUMBER OF RESIDENCE 7543 Washington Road		10b. CITY, TOWN, OR LOCATION Magna
	10c. INSIDE CITY LIMITS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	10d. COUNTY Salt Lake	10e. STATE Utah
	11a. MOTHER'S MAILING ADDRESS (if same as above, enter zip code only)		11b. CITY OR TOWN Magna
FATHER	12. FATHER'S NAME FIRST: Kirk MIDDLE: Jay LAST: Peterson		13. DATE OF BIRTH (Month, Day, Year) July 6, 1962
	14. STATE OF BIRTH (if not USA, name country) Utah		
SIGNATURE	15a. I certify that the personal information provided on this certificate is correct to the best of my knowledge and belief (Signature of Parent or other informant) Hollie Peterson		15b. PARENTS REQUEST SOCIAL SECURITY ISSUANCE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
REGISTRAR	16a. REGISTRAR'S SIGNATURE Harry L. Gibbons MDMPH		16b. DATE RECEIVED Jan 17, 1992
			15c. IMMUNIZATION REGISTRY I wish to enroll my child in the Immunization Registry <input type="checkbox"/> YES <input type="checkbox"/> NO

UDH-51702A, Rev 10/97

229242

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-22 of the Utah Code Annotated, 1953 As Amended.

Date Issued

MAY 22 2003

Barry E Nangle

Barry E Nangle
DIRECTOR OF VITAL RECORDS

SL 229826



* 0 0 2 2 9 8 2 6 *



SDH-BVR 94 (9/96)