

1972

## **Peggy L. Nickle v. Dominic Guarascio : Brief of Appellant**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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PEGGY L. NICKLE,

*Plaintiff and Respondent,*

vs.

DOMINIC GUARASCIO,

*Defendant and Appellant.*

Case No.  
12980

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## BRIEF OF APPELLANT

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Appeal from the Third District Court, the Honorable  
Hanson, Judge, Finding Defendant Owe a Duty of  
the Uniform Reciprocal Enforcement of Support Act  
39 Utah Code Annotated (1963).

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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PEGGY L. NICKLE,

*Plaintiff and Respondent,*

vs.

DOMINIC GUARASCIO,

*Defendant and Appellant.*

Case No.  
12850

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

Defendant appeals the finding of the Third District Court, Honorable Stewart M. Hanson, Judge, presiding, that Defendant owes a duty of support to Plaintiff enforceable under the Unified Reciprocal Enforcement of Support Act §§ 77-61a-1 to 39, Utah Code Annotated (1963).

## DISPOSITION IN THE LOWER COURT

Defendant was adjudged to be the parent of one Lisa Nickle and ordered to provide support payments in her behalf by the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Judge presiding.

## STATEMENT OF FACTS

Defendant was tried under the Uniform Reciprocal Enforcement of Support Act in the District Court of Salt Lake County, the Honorable Stewart M. Hanson, Judge presiding, to determine whether a duty of support was owed to one Lisa Nickle. The original petition filed in Mesa County, Colorado, revealed that Lisa Nickle was born April 14, 1967, and that the defendant was not the husband of the mother of Lisa Nickle at any time prior or subsequent to said birth. The defendant moved to dismiss the complaint in the Third Judicial District Court and the Order to Show Cause served thereunder on the grounds that the Court lacked jurisdiction, first because the statute of limitations for determining paternity in Colorado as a civil matter expired on April 5, 1968, and secondly because the entertaining of the issue of paternity under the Uniform Reciprocal Enforcement of Support Act was tantamount to the application of a Colorado criminal statute in a Utah state Court. It is this denial of defendant's Motion to Dismiss that defendant claims was error, and from which he appeals.

## RELIEF SOUGHT ON APPEAL

The matter should be remanded to the District Court with instructions to grant defendant's Motion to Dismiss for lack of jurisdiction.

## ARGUMENT

THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION BECAUSE:

A. THE QUESTION OF PATERNITY WAS BARRED AT THE DATE OF TRIAL BY THE COLORADO STATUTE OF LIMITATIONS.

B. THE SUBJECTING OF DEFENDANT TO A TRIAL ON THE PATERNITY QUESTION IN UTAH AMOUNTS TO AN IMPROPER APPLICATION OF COLORADO CRIMINAL LAW WITHIN THIS STATE.

A. Plaintiff in the instant proceeding alleged that the defendant was the father of the child born in April of 1967 and invoked §§ 77-61a-1 to 39 Utah Code Annotated (1963), the Uniform Reciprocal Support Act to secure child support payments for said child. The Colorado equivalent to that act is found in §§ 43-2-1 to 33 Colo. Rev. Stat. (1963). An examination of both the Colorado and Utah acts reveals that neither of those acts

give rise to an action to determine paternity. By her bringing this action and invoking the jurisdiction of this Court under the foregoing acts, the defendant raises not so much the question of support as the question of paternity. Thus, the proceeding in the District Court from which your appellant appeals was a proceeding to determine paternity. In the absence of a specific authority in the Uniform Reciprocal Acts to determine the question of paternity, the law of the state in which the conception and/or birth occurred is the applicable law to determine paternity as a civil matter.

In Colorado, paternity may be determined in a bastardy proceeding pursuant to §§ 22-6-1 to 6 Colo. Rev. Stat. (1963). A proceeding under these subsections has been determined to be a civil action. *Yeager vs. People*, 116 Colo. 379, 181 P.2d 442 (1947). Section 22-6-6 Colo. Rev. Stat. (1963) imposes a limitation on this civil proceeding and states: "No proceeding under this article shall be instituted after the child is 12 months old." Thus, the civil question of paternity could have been tried in the State of Colorado or possibly in the State of Utah through the Uniform Reciprocal Support Act within twelve months after the birth of the child.

An examination of the Utah and Colorado Uniform Reciprocal Support acts again reveals no provision purporting to expand or change the Statute of Limitations of a paternity proceeding.

The Uniform Reciprocal Enforcement of Support Acts in both states do not give rise to or create new duties

of support. On the contrary, these acts merely provide for the enforcement between sister states having adopted this act of the duties "imposed or imposable" under already existing law. See § 43-2-2, 7 Colo. Rev. Stat. (1963); § 77-61a-2, 7 Utah Code Ann. (1963). The wording in the last quoted sections means that state law must give rise to an action and grant the appropriate court jurisdiction thereof before the same could be enforced in an interstate action pursuant to the Uniform Reciprocal Enforcement of Support Acts.

It is clear that more than twelve months had expired since the birth of Lisa Nickle whom the plaintiff claims defendant fathered. Plaintiff's right to try the paternity issue there involved expired at the expiration of twelve months after April 4, 1967, under § 22-6-6 Colo. Rev. Stat. (1963). Therefore, the Utah court had no jurisdiction to entertain a paternity proceeding in this state when such was clearly barred as a civil matter under the laws of the state wherein the cause of action arises.

For jurisdictional purposes, two points of law are undisputed requiring no citation. First, jurisdiction is vested in the Court in the county or district wherein the cause of action arose and second, should any other court obtain personal jurisdiction of the defendant, that court would apply the law of the state wherein the cause of action arose. Thus, the Utah court is bound to observe Colorado law in this instance. If the action would not be cognizable in Colorado, a Utah court has no jurisdiction notwithstanding the attempt to confer jurisdiction was

made through the Uniform Reciprocal Support Act. The time for bringing a paternity action as a civil matter in Colorado had expired. And having expired, there exists no basis in either the common law or statutes, in which the Utah court could assert jurisdiction for the purposes of determining that question. Thus, the Court's failure to dismiss on counsel's motion was reversible, prejudicial error and the same should be reversed on that ground.

B. In addition to determining the paternity as a civil matter as heretofore argued, the Colorado cases provide that paternity may be adjudicated as a criminal matter under the Desertion and Nonsupport Statutes. *Wamsley vs. People*, 64 Colo. 521, 173 Pac. 425 (1918). In the *Wamsley* case, the court acknowledges that civil proceedings for paternity are limited by § 22-6-6 Colo. Rev. Stat. (1963), but decide that paternity may be determined pursuant to § 43-1-1 Colo. Rev. Stat. (1963) as a criminal matter. Thus, although the paternity question which the Utah court allowed to be determined could not have been decided in Colorado as a civil matter, that question could have been decided in Colorado pursuant to a criminal proceeding. However, in entertaining the paternity proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act, the Utah Court in effect gave improper and unlawful application to Colorado penal law. Under well established principles of the common law and the statutes and criminal law of both Utah and Colorado, the situs of a crime is that where the crime is committed and it is that situs which confers

jurisdiction. § 77-8-1 Utah Code Ann. (1963), Art. II Sec. 16, Colo. Const.

§ 43-1-1 Colo. Rev. Stat. (1963) makes the wilfull failure of any man to support his children a felony. Thus, pursuant to that statute and the case law, the paternity of Lisa Nickle could be tried. But jurisdiction in criminal matters "rests solely in the courts of the state or country in which the crime is committed." 21 AmJur 2d § 383. It is further stated in 21 AmJur 2d § 384 that "The court of one state or country will not execute the penal or criminal laws of another state or country, where such laws are deemed to be strictly local and distinguishable from obligations under foreign statutes of a purely contractual, rather than penal, nature."

As has been stated previously, the Uniform Reciprocal Enforcement of Support Acts operate merely as conduits through which duties of support existent in one state may be applied in the state where an obligor is found. The duties of support must be created by a statute other than those encompassed by the Uniform Reciprocal Enforcement of Support Acts. In this case, a duty of support is in fact created by § 43-1-1 Colo. Rev. Stat. (1963) and pursuant to *Wamsley*, paternity may be tried thereunder. But this treats the question as a criminal action. The Uniform Reciprocal Enforcement of Support Acts under which the instant action was brought could not and do not operate in such a way as to allow the bringing of an action based on criminal statutes in any state other than that in which the violation is committed. Therefore, the taking of jurisdiction by the Utah

court in this proceeding for the determination of a paternity pursuant to the criminal statutes of Colorado is error. The Uniform Reciprocal Enforcement of Support Acts of both Utah and Colorado recognize that duty of support and questions such as paternity arising under criminal statutes are not cognizable under either act. This is evident from an examination of Colorado statutes §§ 43-2-5, 6 Colo. Rev. Stat. (1963) and the Utah statutes §§ 77-61a-5, 6 Utah Code Ann. (1963) which provide for the interstate rendition of persons charged with crime. Section 43-2-5 Colo. Rev. Stat. (1963) provides:

The Governor of this State may demand the Governor of any other state the surrender of any person found in such other state who is charged in this state with a crime of failing to provide support of any person in this state and may surrender on demand by the Governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of any person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand, although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath, nor any proceedings for extradition, pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or other state.

Clearly, from the section quoted above, the Uniform Reciprocal Enforcement of Support Acts recognize that

the crime of a "Wilfull Failure to Provide" may not be prosecuted in any other State and therefore make extradition considerably easier by this method. It is undisputed that the defendant would be subject to a criminal prosecution for failure to provide for Lisa Nickle in the State of Colorado and that pursuant to that prosecution, his paternity of said child could legitimately be determined. Such is in fact the remedy which should have been applied to determine the paternity. Had this been done, then the State of Colorado could avail itself of the less complicated extradition which is provided for under §§ 77-61a-5,6, Utah Code Ann. (1963). These sections dealing with interstate rendition in both the Colorado and Utah acts are clear evidence that the various legislators understood the jurisdictional prohibitions to trying a crime in a State other than that in which it was committed. If the crime itself cannot be tried in another State, a fortiori, the element of that crime could not be litigated in a civil action in another State. Paternity is the very foundation of a "Wilfull Failure to Provide" criminal action. That paternity must be determined, if such is treated as a criminal matter, in the State in which the criminal action took place.

The Utah court in the instant case in fact took cognizance of a paternity question and decided the same. That paternity question could only be presented under a criminal sanction in the State of Colorado. In entertaining the criminal statute borne question of paternity in this State, the Utah court committed prejudicial and reversible error.

## CONCLUSION

Because of the expiration of the time under Colorado statutes within which paternity could be litigated as a civil question, the Utah court, the Uniform Reciprocal Enforcement of Support Act notwithstanding, had no jurisdiction to proceed on that question. In proceeding, the Utah court committed reversible error. Further, although paternity could be litigated in Colorado as a criminal issue, the same could not be litigated in Utah under the civil provisions of the Uniform Reciprocal Enforcement of Support Act since that issue can be determined only at the situs of the crime.

Therefore on these two grounds, the determination by the District Court that the defendant herein is the parent of one Lisa Nickle, is improper, because the Utah court had no jurisdiction to try that question. For these reasons, defendant urges that the findings of the lower court be reversed, that the matter be remanded to the District Court with instructions to grant plaintiff's Motion to Dismiss for lack of jurisdiction.

Respectfully submitted,

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