

1972

Peggy L. Nickle v. Dominic Guarascio : Brief of Respondent

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

PEGGY L. NICKLE,

Plaintiff-Respondent

vs.

DOMINIC GUARASCIO,

Defendant-Appellant

BRIEF OF RESPONDENT

Appeal from the Third District Court,
County, the Honorable State of Utah

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

PEGGY L. NICKLE,
Plaintiff-Respondent,

vs.

DOMINIC GUARASCIO,
Defendant-Appellant.

Case No.
12850

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action under the Uniform Reciprocal Enforcement of Support Act, Utah Code Annotated 77-61a-1 through 77-61a-39 (1963), for determination of whether defendant owes a duty of child support.

DISPOSITION IN LOWER COURT

Defendant was adjudged to be the parent of 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, presiding.

RELIEF SOUGHT ON APPEAL

Plaintiff asks that the judgment of the Lower Court be affirmed.

STATEMENT OF FACTS

Plaintiff, a resident of Colorado, brought an action under the Uniform Reciprocal Enforcement of Support Act seeking a determination that defendant owed a duty of support to Lisa Nickle, daughter of plaintiff, and for judgment ordering defendant to provide support for Lisa's benefit. The complaint discloses that Lisa was born on April 14, 1967. The District Court of Salt Lake County, State of Utah, the Honorable Stewart M. Hanson presiding, determined the Court had jurisdiction to hear the matter and found that defendant is the father of Lisa Nickle and ordered defendant to pay \$50.00 per month for her support. The defendant appeals only from the jurisdictional ruling of the Lower Court.

ARGUMENT

POINT I.

THE LOWER COURT CORRECTLY DENIED DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION.

In answering plaintiff's complaint for child support payments brought under the Uniform Reciprocal Enforcement of Support Act, Utah Code Annotated 77-61a-1 through 77-61a-39 (1963),¹ defendant denied that he

¹The equivalent statute in Colorado is Section 43-2-1 through 43-2-33 Colo. Rev. Stat. (1963).

was the father of Lisa Nickle, putting before the Court the issue of the paternity of the child. Defendant's sole contention on appeal is that the action should be dismissed because a Colorado bastardy statute, Sections 22-6-1 through 22-6-6 Colo. Rev. Stat. (1963), provides that no action may be initiated under that statute after a child is 12 months old (Section 22-6-6) and a paternity determination under the Reciprocal Support Act is subject to that statute of limitations, which bars this proceeding as Lisa was more than a year old at the time the proceeding was initiated. The major drawback to this contention is that the bastardy statute upon which defendant relies was repealed in 1967 by the Children's Code (1967) Perm. Supp. Colorado Rev. Supp. 22-6-1 through 22-6-7 (1963), and under the new act an action to determine paternity may be brought within five years after the birth of the child, Section 22-6-1 (2). As the proceedings herein were initiated under the Reciprocal Support Act within five years of the birth of the child, defendant is left without an argument.

Plaintiff would submit that even if the Colorado bastardy statute upon which defendant relies were in effect, defendant's argument would still be without merit as the two cases cited by defendant in his brief do not support his position. *Yeager v. People*, 116 Colo. 379, 181 P. 2d 442 (1947), cited by defendant holds only that the bastardy statute is a civil statute while *Wansley v. People*, 64 Colo. 521, 173 P. 425 (1918), ironically supports plaintiff's position not defendants. In that case the Colorado

Supreme Court held that paternity could be decided under Colorado's Desertion and Non-Support Act, Section 43-1, Colo. Rev. Stat. (1963), and the one year Statute of Limitations in the bastardy statute was not applicable to the proceedings. The holding was not based upon the fact that one statute was civil and one was criminal, as defendant asserts in his brief, but upon the fact that the statute of limitations for one statute could not govern an action brought under another statute. This is made clear by the case *Dikeou v. People*, 195 Colo. 573, 33 P. 2d 772 (1934), where the Court held that paternity could be determined under a Colorado statute for Contributing to Juvenile Dependency, a *civil* statute, and that the one year statute of limitations for the bastardy statute was not applicable. The Court stated:

“We have held that, although a bastardy prosecution under one statute is barred because not brought in time, an action may still be maintained under another statute for failure to support the illegitimate child. *Wansley v. People*, 64 Colo. 521, 173 P. 425.”

This holding is directly against defendant's position that determination of paternity under URESA is subject to the statute of limitations of the now repealed bastardy statute.

Defendant's attempted classification of paternity actions as criminal or civil has also been rejected because of the hybrid nature of such statutes.

In *M*..... v. *W*....., 227 N. E. 2d 469 (Mass. 1967), the petitioner brought an action under the Massachusetts Uniform Reciprocal Enforcement of Support Act for support of her minor child. The Court rejected defendant's contention that a paternity proceeding was improper under the act holding that such a proceeding could be decided under the Reciprocal Support Act on the basis of the criminal support statute of Massachusetts:

"This commonwealth, by G. L. c. 273, Section 15, places the father under a legal duty to support an illegitimate child wherever begotten. Section 15 is a criminal statute for it creates a misdemeanor. Although criminal in form, it is sometimes regarded and used as a method of enforcing a support duty . . . In any event even though in form a criminal statute, c. 273, Section 15, clearly establishes the civil duty of a natural father to support a child of his born out of wedlock. The question for decision is whether the existence of his relationship to the child (that is, his paternity) can be established in a civil proceeding under c. 273 A, [Uniform Reciprocal Enforcement of Support Act], where Massachusetts is a responding state.

No practical considerations preclude having Massachusetts District Court determine paternity in civil proceedings under c. 273 A. These courts habitually make such determinations in criminal proceedings under c. 273, Section 11-18 . . ."

The holding which defendant seeks would unduly restrict and complicate the Uniform Reciprocal Enforcement of Support Act and would be contrary to the liberal

view heretofore taken by the courts to make this statute operable. *Maskil v. Green*, 25 U. 2d 187, 479 P. 2d 343 (1971); *Davidson v. Davidson*, 405 P. 2d 261 (Wash. 1965).

POINT II.

DEFENDANT WAS NOT SUBJECTED TO THE APPLICATION OF COLORADO CRIMINAL LAW UNDER THE UNIFORM RECIPIROCAL ENFORCEMENT OF SUPPORT ACT PROCEEDING.

Defendant contends that failure to dismiss his complaint amounts to application of Colorado penal law, specifically Section 43-1, Colo. Rev. Stat. (1963), and that the defendant should be extradited for such crime. (Defendant is willing to suggest extradition because the statute of limitations has now run.)

This argument has to be based on the premise that the URESA proceeding applied to the four-year statute of limitations under Section 43-1, as the one-year statute of limitations under the now repealed civil bastardy Act had run. As plaintiff has previously pointed out, the statute of limitations for bringing civil paternity actions in Colorado is five years from the date of the birth of the child, and not one year as defendant has assumed and this fact again leaves defendant with no argument.

Regardless of the fact defendant is basing his argument upon a repealed statute, the simple answer to this

contention is that the reciprocal proceeding was a civil proceeding. The complaint asked for \$50.00 per month as support payments for Lisa's benefit and did not subject defendant to any possible criminal liability. In contrast to this civil proceeding, Section 43-1 is a felony with a jail sentence up to five years. The fact that paternity may be determined under both statutes certainly is no basis to support the contention that Utah has applied a Colorado penal statute. In any event, defendant's contention that he can only be tried in Colorado for the crime of non-support is contrary to law:

"Under statutes containing no specific provisions as to residence, [U. C. A. 76-15-1 is of this type] it has been held that a father may be prosecuted for non-support of his minor children in the state of his residence, even though the children are residing outside that state." 44 A. L. R. 2d 886,906; Re Alexander, 42 Delaware 461, 36 A. 2d 361 (1941); State v. Peoples, 112 S. C. 310, S. E. 813 (1908); State v. James, 100 A. 2d 12, Maryland (1953).

Thus defendant's attempt to analogize the reciprocal proceeding as an application of Colorado penal law is also without merit.

POINT III.

DEFENDANT HAS ERRONEOUSLY CONCLUDED THAT COLORADO LAW APPLIES IN THIS MATTER.

Section 71-61a-7 of Utah's Reciprocal Support Act states:

“Duties of support applicable under this act are those imposed or imposable under the laws of any state *where the obligor was present during the period for which support is sought*. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.” [Emphasis added.]

Plaintiff in this case seeks no support for past periods when defendant was residing in Colorado or for maternity expenses. The complaint and the judgment are limited to \$50.00 per month support beginning February, 1972 (R. 15, 16).

Under the clear wording of the statute the governing law is the law of the state where defendant was present for the period for which support is sought and not the law of the state where the child was born. On this basis plaintiff submits Utah law should apply in this action. This position is supported by the case of *M..... v. W.....*, *supra*, where the Court applied Massachusetts law in deciding the case, as the complaint sought support for a period the defendant resided in Massachusetts, although the child was born in New York.

The Statute of Limitations under Utah's Uniform Paternity Act provides only that an action cannot be commenced seeking damages for more than four years next preceding the instigation of the complaint. U. C. A. 78-45A-3 (1965).

Thus under Utah law as under Colorado law, defendant is left without any argument.

CONCLUSION

Defendant has based his entire argument upon a repealed Colorado statute. It is clear defendant has no case under the legislation that superceded the repealed statute. Even the one case defendant cites to support his position under the repealed statute, supports plaintiff's position not defendant's. Finally, the clear wording of the Reciprocal Support Act dictates that Utah law and not Colorado law applies to the case, which again leaves defendant without an argument. For the above reasons, plaintiff submits the Lower Court should be affirmed.

Respectfully submitted,

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