

1973

## **Betty Sovey v. Paul Ronald Sovey : Brief of Respondent**

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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BETTY SOVEY,

*Plaintiff*

vs.

PAUL RONALD SOVEY,

*Defendant*

BRIEF OF PLAINTIFF

APPEAL FROM THE  
COURT OF THE  
CELLUS K. SNOW  
THIRD JUDICIAL DISTRICT  
CITY, UTAH.

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

BETTY SOVEY,

*Plaintiff-Respondent,*

vs.

PAUL RONALD SOVEY,

*Defendant-Appellant.*

Case No.

13116

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BRIEF OF PLAINTIFF-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 Donna Sovey 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 Emmett L. Brown, presiding.

On April 18, 1972, Judge Brown ordered defendant in the alternative to either secure a judicial declaration

by September 18, 1972, that he was not the father of the child, Donna Sovey, born to his wife during their marriage, or pay \$60.00 September 18, 1972, and \$60.00 each 18th thereafter, until the further Order of the Court for said child's support.

Defendant's motion to modify the previous Order of Judge Brown entered on April 18, 1972, to stay child support payments to the plaintiff until September 18, 1972, and ordering defendant to obtain a judicial declaration that he is not the father in the alternative was denied by the Honorable Marcellus K. Snow, of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

#### RELIEF SOUGHT ON APPEAL

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

#### STATEMENT OF FACTS

Plaintiff, a resident of California, brought an action under the Uniform Reciprocal Enforcement of Support Act seeking a determination that defendant owed a duty of support to Donna Sovey, daughter of plaintiff, and for judgment ordering defendant to provide support for Donna's benefit. The complaint states that Donna was born on July 10, 1971. At this time plaintiff and defendant were still married to each other. Defendant, a resident of Utah, failed to secure a judicial declaration that he was not the father of Donna prior to September 18, 1972. He endeavored to have the District Court of Salt Lake County, Utah, do such at a hearing in Divorce Case

No. D-6284 which he initiated and was heard on May 23, 1972, but in which the Court made no determination as to paternity. The reason for no determination was that the plaintiff had not been personally served with process within the State of Utah nor had defendant served plaintiff with process in California under the Long Arm Statutes of Utah and California. The divorce action was only an *in rem* proceeding; therefore, the Court could not make an Order adjudicating paternity.

The District Court of Salt Lake County, State of Utah, the Honorable Emmett L. Brown presiding, determined that the Court had jurisdiction to hear the matter and found that defendant is the father of Donna Sovey. He ordered defendant in the alternative to secure a judicial declaration that he was not the father prior to September 18, 1972, or pay \$60.00 September 18, 1972, and \$60.00 each 18th thereafter until further Order of the Court. The defendant appeals from the jurisdictional ruling of the Lower Court and upon the grounds that defendant was allegedly denied due process and equal protection by being denied the right to examine and confront the plaintiff.

## ARGUMENT

### POINT I.

THE LOWER COURT HAD JURISDICTION TO ESTABLISH A DUTY OF SUPPORT IN THE ALTERNATIVE TO THE DEFENDANT SEEKING A JUDICIAL DECLARATION OF THE ISSUE OF PATERNITY UN-

DER THE UNIFORM RECIPROCAL EN-  
FORCEMENT OF SUPPORT ACT (URESА).

Defendant endeavored the District Court of Salt Lake County, Utah, to make a judicial determination that he was not the father of Donna Sovey in the divorce hearing. The hearing was conducted in Divorce Case No. D-6284 which defendant initiated and which was heard on May 23, 1972. The Court made a determination as to paternity because the defendant had not had the plaintiff personally served with process within the State of Utah nor had he had plaintiff served with process in California under the Long Arm Statutes of Utah and California. The Court declared that the divorce case was only an *in rem* action and therefore could not make an Order adjudicating the issue of paternity. *Hartford v. Superior Court in and for Los Angeles County*, 304 P. 2d 1, 47 C. 2d 447 (1956).

The child for whom support was ordered paid was born on July 10, 1971. At this time plaintiff and defendant were still married to one another. Defendant denied that he was the father to the Court in connection with a Reciprocal Support Case which was initiated by plaintiff from California. The Honorable Emmett L. Brown on April 19, 1972, ordered defendant in the alternative to either secure a judicial declaration by September 18, 1972, that he was not the father of the child born to his wife, the plaintiff, during their marriage, or pay \$60.00 September 18, 1972, and \$60.00 each 18th thereafter until the further Order of the Court for said child's support.

On September 8, 1972, before the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Marcellus K. Snow presiding, defendant moved to modify Judge Brown's Order of April 18, 1972. The defendant presented arguments to the Court that the prior Order be stayed in view of Section 77-61a-29 Utah Code Annotated, 1953. Defendant alleged that he had presented a defense by representing to the Court that he had not had sexual relations with the plaintiff since September of 1970 and that he had taken plaintiff back to California in October of 1970. The Court considered this argument and disallowed it.

The presumption is that defendant is the husband/father of the child living within the jurisdiction at the time of conception. It was defendant's obligation to rebut that presumption which he never did. *Kusior v. Silver*, 354 P. 2d 657, 54 C. 2d 603, 7 Cal. Rptr. 129 (1960). Defendant was ordered to seek a judicial declaration that he was not the father of the child and given a five month period to obtain that determination before the first support payment became due and owing under the Order. The defendant never obtained the requisite judicial declaration with regard to the issue of paternity.

Section 27 of the 1968 version of the Uniform Reciprocal Enforcement of Support Act authorizes the determination of paternity in such proceedings. Plaintiff filed a reciprocal support action under the Revised Uniform Reciprocal Enforcement of Support Act of 1968, title 10a, Part 3, Code of Civil Procedure. Under the California law, the obligor is "any person owing a duty of support

or against whom a proceeding for the enforcement of a duty of support is commenced." California Code of Civil Procedure, Section 10a-3-1653 (g). Defendant is an obligor under this statutory definition. He is further bound by Section 10a-3-1670 which states:

"Duties of support applicable under this title are those imposed under the laws of any state where the obligor was present for the period during which support is sought." California Code of Civil Procedure, Section 10a-3-1670.

Defendant was living in the State of Utah during the period when support became due. The laws of the State of Utah governing defendant in regard to this action fall under Section 77-61a of Utah Code Annotated (1953).

The Supreme Court of Alabama stated that a support order may be issued in a URESA action if there is a judicial determination of paternity or an acknowledgement. *Kamp v. Morang*, 277 Ala. 575, 173 So. 2d 566 (1965). The defendant was granted a five month period to obtain a judicial determination on the issue of paternity and failed to obtain one. Defendant alleges no remedy under Section 77-61a-2(g) by citing *Smith v. Smith*, 40 Ohio 2d 135, 224 N. E. 2d 925 (1965). This case held that the petitioner must pursue the necessary legal procedure to determine the paternity of a child. Defendant was granted such a remedy and never exercised this legal procedure during the period of his allotment of five months.

Defendant was given five months to seek a judicial declaration on the issue of paternity before the imposition

of the Order to pay child support. The trend of case law holds that the issue of paternity may be determined under the Uniform Reciprocal Enforcement of Support Act. *M. v. W.*, 227 N. E. 2d 469 (1967); *M. v. W.*, 95 N. J. Sup. 165, 230 A. 2d 192 (1967); *Sardonis v. Sardonis*, 261 A. 2d 22 (1970); *Brown v. Thomas*, 426 S. W. 2d 496 (1968); *People ex rel. Franks v. Franks*, 126 Ill. App. 51, 261 N. E. 2d 502 (1970); *Commonwealth v. Dillworth*, 431 Pa. Sup. 479, 246 A. 2d 859 (1964).

The defendant was married at the time of conception of the child. Defendant was ordered by the District Court to seek a judicial declaration of the issue of paternity in the Reciprocal Support Action. He failed to obtain the determination by September 18, 1972, and, therefore, was ordered to pay child support on behalf of Donna Sovey. Defendant failed to rebut the presumption that he was the husband/father and get a determination excluding himself as the father. *Holder v. Holder*, 9 Utah 2d 163, 340 P. 2d 761 (1959). Therefore, the Order for child support payments properly commenced on September 18, 1972.

The holding which defendant seeks would unfairly restrict and complicate the Uniform Reciprocal Enforcement of Support Act. This holding would be contrary to the liberal view taken by the courts to make this statute operable. *Maskil v. Greon*, 25 Utah 2d 187, 479 P. 2d 343 (1971); *Davidson v. Davidson*, 405 P. 2d 261 (Wash. 1965).

## POINT II.

PATERNITY PROCEEDINGS ARE STATUTORY AND CIVIL IN NATURE, AND NO CORROBORATION OF TESTIMONY OF THE CHILD'S MOTHER AS TO PATERNITY IS NECESSARY.

Paternity proceedings are civil in nature, and normally corroborative testimony of the child's mother is not necessary with regard to the issue of paternity. *McGuire v. State*, 84 Ariz. 242, 326 P. 2d 362 (1958); *State of Arizona v. the Superior Court of Pima County*, 3 Ariz. App. 541, 416 P. 2d 435 (1966). Proceedings under the Bastardy Act, although prosecuted in the name of the state and being criminal in form, are civil in nature. The purpose of the Bastardy Act is not to inflict punishment by imprisonment or fine, but to compel the father of the child to support it during its tender years. Utah Code Annotated (1953), Section 77-60-1 - 77-60-3; 78-45a-1; Utah Rules of Civil Procedure, Rule 3; *State v. Judd*, 27 Utah 2d 79, 493 P. 2d 604 (1972).

The purpose of the statute is to compel the putative father to support the child, not to punish him. A proceeding to establish paternity and compel the payment of the expenses of the mother's pregnancy and confinement, and maintenance, education and support of the child was civil in nature and paternity could be proven by a preponderance of the evidence. *State v. Mottet*, 73 Wash. 2d 114, 437 P. 2d 187 (1968); *State v. Russell*, 68 Wash. 2d 748, 415 P. 2d 503 (1966).

The defendant was not denied any of his rights under due process and equal protection of the law. Section 77-61a-23 of the Utah Code Annotated (1953) states that the Court under the Reciprocal Enforcement of Support Act shall be bound by the same rules of evidence that bind the District Court. Section 77-61a-21 of the Utah Code states:

“If the petitioner is absent from the responding state and the respondent presents evidence which constitutes a defense, the court shall continue the case for further hearing and the submission of evidence by both parties.” Section 77-61a-21, Utah Code Annotated (1953).

Defendant had an adequate time period of five months to seek a judicial declaration and subpoena his wife and obtain his right to cross-examination of her. He had sufficient opportunity by grant of the District Court to obtain evidence from plaintiff, his wife, either by deposition or personal appearance. Plaintiff submits defendant had the necessary provisions of law to obtain his protections under the law. Plaintiff further alleges defendant's action is a civil action and, therefore, defendant cannot raise the defense that he was denied the right to cross-examine his wife. The corroborative evidence of Betty Sovey was not necessary to determine the issue of paternity. Despite this, defendant had adequate opportunity under law to avail himself of such right to confrontation. The burden of proof lies on the defendant to obtain a determination of the issue by virtue of the Order of the District Court.

## CONCLUSION

Defendant was ordered in the alternative to either secure a judicial declaration on the issue of paternity by September 18, 1972, or pay \$60.00 September 18, 1972, and \$60.00 each 18th thereafter. The issue of paternity could not be decided in the divorce hearing because the action was *in rem*. The defendant never obtained the judicial declaration to rebut the presumption that he is the father of the child. The trend of case law holds that the issue of paternity may be determined under the Uniform Reciprocal Enforcement of Support Action.

Paternity proceedings are civil and statutory in nature. No corroborative testimony of the child's mother is necessary with regard to the issue of paternity. The action is not criminal in nature, and defendant had adequate time to have the issue of paternity heard with cross-examination of the plaintiff. The defendant could have used the necessary procedures pertaining to discovery to obtain confrontation of his wife. Defendant, therefore, was not denied any of his constitutional rights. Plaintiff submits the decision of the Lower Court should be affirmed.

Respectfully submitted,

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