1975

Richard W. Miller v. Sheryl Rae Marticorena and Sergio A. Marticorena : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD W. MILLER,
Plaintiff-Respondent,

vs.

SHERYL RAE (MILLER) MARTICORENA,
Defendant,

and

SERGIO A. MARTICORENA,
Third-Party Defendant-Appellant.

Case No. 13629

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal by the third-party defendant, SERGIO A. MARTICORENA (second husband of the decedent) from a DECREE AND ORDER of the Family Courts Division of the Third Judicial District Court, in and for Salt Lake County, State of Utah, declaring the plaintiff, RICHARD W. MILLER (first husband of the decedent) to be the nat-

ural father of the minor child Michael Wayne Miller, and awarding sole care, custody and control of said child to the plaintiff-respondent, MILLER.

DISPOSITION IN THE TRIAL COURT

On February 6, 1974, the plaintiff-respondent RICHARD W. MILLER and the third-party defendant-appellant, SERGIO A. MARTICORENA, came before the Family Courts Division of the Third Judicial District Court, the Honorable Peter F. Leary, District Judge, presiding, pursuant to the plaintiff's MOTION AND ORDER TO SHOW CAUSE (R. 11, 14), requiring the third-party defendant MARTICORENA to show cause why the minor child, Michael Wayne Miller, should not be delivered to the plaintiff MILLER, why sole care, custody and control of said child should not be permanently awarded to him, and why a previous Decree of Divorce (between the plaintiff RICHARD W. MILLER and the defendant SHERYL RAE MILLER (R. 9)) should not be modified accordingly.

The Court conducted a brief hearing, received some evidence and heard some of the testimony as proffered by the parties, and at the close of the evidence, the Court ruled from the bench that the plaintiff was entitled to the relief he sought and ordered the third-party defendant to deliver the child to the plaintiff, MILLER, awarded sole care, custody and control to the plaintiff, and modified the Decree of Divorce ac-

cordingly. From that Order the third-party defendant MARTICORENA respectfully appeals.

RELIEF SOUGHT ON APPEAL

On appeal, the appellant seeks equitable review, to have the Court review both the law and the facts, pursuant to Rule 75(a) U.R.C.P., vacate the Decree and Order made and entered by the District Court on February 6, 1974, and remand the case back to the trial court for a rehearing upon the merits.

STATEMENT OF THE FACTS

1. On May 10, 1969, the plaintiff, RICHARD W. MILLER, and the defendant SHERYL RAE (MILLER) MARTICORENA were married in Provo, Utah (R. 112).

2. On May 22, 1969, RICHARD W. MILLER left the State of Utah and took up residence at Ft. Gordon, Georgia, pursuant to a six-month active duty assignment with the National Guard (R. 112).

3. Approximately a week after MILLER's departure for Georgia, SHERYL RAE left the State of Utah and moved to Glendale, California to visit with her father (R. 93).

4. Sometime in the early summer of 1969 while living in California, SHERYL RAE became acquainted with the third-party defendant, SERGIO A. MARTICORENA (R. 92, 93).

5. SHERYL RAE and MARTICORENA became romantically involved and eventually lived in co-

habitation together in California for several months during the summer of 1969 (approximately June, July and through most of August of 1969 (R. 92, 93).

6. Sometime in the late summer of 1969, SHERYL RAE learned shat she was pregnant (R. 99, 126) with the minor child who is the subject matter of this action, Michael Wayne Miller (R. 99, 126). She communicated this fact to several other individuals (R. 99, 126).

7. On or about the third week of August, 1969, the plaintiff RICHARD W. MILLER took emergency leave from the National Guard and traveled to California in order to locate the defendant SHERYL RAE MILLER (R. 113).

8. During his visit in August, 1969, MILLER was successful in persuading the defendant SHERYL RAE to leave MARTICORENA and return to the State of Utah.

9. MILLER remained in California for only three days and then returned to Georgia to complete his tour of active duty, whereupon the defendant, SHERYL RAE, returned to the State of Utah (R. 115, 116).

10. On approximately August 16 and September 2, 1969, SHERYL RAE consulted the Salt Lake City physician, Dr. Donald M. Kirk, who confirmed that she was in fact pregnant (R. 126).

11. On October 17, 1969, the plaintiff, RICHARD W. MILLER, completed his six-month tour

of active duty with the National Guard, and on October 18, 1969, returned to Salt Lake City and took up residence with SHERYL RAE (R. 116).

12. On May 26, 1970, the minor child, Michael Wayne Miller, was born in Salt Lake City, Utah (R. 112).

13. The plaintiff, RICHARD W. MILLER, and the defendant SHERYL RAE (MILLER) continued to live together for approximately six months after the birth of the child, and then separated (R. 120).

14. After the separation of RICHARD MILLER and SHERYL RAE, SHERYL began to correspond with MARTICORENA in California and sent to him certain letters in her own handwriting (Exhibit D-1), explaining her reasons for leaving California and discussing the paternity of the child (R. 99, 100, 101).

15. In the early part of November, 1970, SHERYL RAE moved back to California and again took up residence with MARTICORENA.

16. On December 31, 1970, the plaintiff RICHARD W. MILLER filed his Petition for Divorce (R. 1); the defendant SHERYL RAE (MILLER) did not contest the action and on December 30, 1970, signed and later filed with the Court her Appearance and Waiver and Consent to Default (R. 5).

17. In March of 1972, a Decree of Divorce was entered granting the divorce to the plaintiff RICH-

ARD W. MILLER; on June 30, 1972, the divorce became final and absolute (R. 4).

18. On July 30, 1972, the defendant SHERYL RAE and the third-party defendant SERGIO A. MARTICORENA were married to each other in Salt Lake City, Utah (R. 88).

19. At the time of his marriage to SHERYL RAE and at all times thereafter, MARTICORENA acknowledged the child as being his own and lived with him as his father (R. 89).

20. Approximately September of 1972, SHERYL RAE MARTICORENA and SERGIO A. MARTICORENA moved their residence to Salt Lake City, Utah, and contacted attorney Grant Aadnesen with regard to MARTICORENA's legally adopting the child.

21. SHERYL RAE (MILLER) MARTICORENA and SERGIO A. MARTICORENA remained together as husband and wife with the child, Michael, until October 20, 1973, when SHERYL RAE (MILLER) MARTICORENA was killed instantly in an automobile accident near Winnemucca, Nevada (R. 90).

22. On October 26, 1973, the plaintiff, RICHARD W. MILLER (the first husband of the deceased defendant) joined SERGIO A. MARTICORENA (the second husband of the deceased defendant) as third-party defendant and served him with an Order to Show Cause why the child should not be delivered

to him (MILLER); why MILLER should not be awarded permanent care, custody and control of the child, and why the Decree of Divorce should not be amended accordingly (R. 14).

23. On October 31, 1973, the plaintiff's Motion and Order to Show Cause came on before the Family Courts Division of the Third Judicial District Court, Honorable James S. Sawaya, District Judge, presiding. The plaintiff was represented by his present attorney, Brant H. Wall, Esq., and the defendant MARTICORENA was represented by Grant Aadnesen, Esq. of Salt Lake City, Utah. The Court did not take testimony or hear evidence at that time, but ordered both parties and the child to submit to a blood test in order to determine paternity, and further ordered the child be placed in the temporary custody of the maternal grandparents until the matter was finally resolved. (R. 16, 17, 19).

24. On November 13, 1973, Dr. Stanley Gibbon concluded and delivered the results of his blood type analysis to counsel for the parties, showing that neither husband could be excluded as the natural biological father of the child (Exhibit D-2) (R. 127).

25. On February 6, 1974, the plaintiff's Motion and Order to Show Cause came on again for hearing before the Family Courts Division, this time before the Honorable Peter F. Leary, District Judge, presiding. The plaintiff was represented by Brant H. Wall, Esq. and the defendant was again represented by Grant Aadnesen, Esq. (R.25).

26. The trial court afforded a brief hearing to the parties and at the close of the evidence, ruling from the bench, granted relief to the plaintiff as prayed (R. 25). It is from this hearing and the final Order that the third-party defendant MARTICORENA assigns error and seeks equitable review of both the law and the facts and requests the matter be remanded to the trial court for rehearing.

27. The third-party defendant SERGIO A. MARTICORENA has subsequently changed attorneys, and engaged the services of Robert D. Maack, Attorney at Law, to represent him on this appeal. (R. 62).

ARGUMENT

POINT I

THE NATURAL PARENT HAS THE PRIMARY, SUPREME AND PARAMOUNT RIGHT AGAINST ALL THE WORLD TO REAR AND NURTURE HIS OWN NATURAL OFFSPRING.

The case at bar presents the anomalous situation of two sequential husbands of the same woman attempting to prove their paternity and obtain permanent custody of the only child born by her. In that regard, the action may be considered an inverse paternity suit.

Although the form of the action is one of child custody, the turnkey issue is the true identity of the natural and biological father, as it cannot be disputed

that one of the most universal, fundamental and axiomatic concepts of all primitive, Roman, canon, common, civil, natural and constitutional law is that a natural parent has a supreme and paramount right against the entire world to rear and nurture his natural offspring so long as he is competent to care for and suitable to take charge of the child. *State of Utah in the Interests of M.*, 25 Utah 2d 101, 476 P.2d 1013, 45 ALR 3d 206 (1970); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972); *see also*, 37 ALR 2d 882 Annotation; superseded by 45 ALR 3d 216, 227, §4(b).

POINT II

THE TRIAL COURT ERRED IN REFUSING TO RECEIVE, ADMIT AND CONSIDER VIRTUALLY EVERY ITEM OF EVIDENCE OFFERED BY THE THIRD-PARTY DEFENDANT TO PROVE HIS CASE.

At the hearing on plaintiff's Order to Show Cause, the third-party defendant, MARTICORENA, attempted to introduce evidence and testimony with respect to the true paternity of the child. The trial court however, refused to allow such evidence and testimony for a variety of reasons, all of which the appellant contends were and are legally erroneous.

1. *The Trial Court Erred in Excluding Testimony by Dr. Donald M. Kirk, M.D. with Respect to the Date of the Mother's Conception and Pregnancy.*

At pages 125 through 127 of the transcript of the proceedings on plaintiff's Order to Show Cause, the appellant attempted to introduce testimonial evidence by the mother's obstetrician-gynecologist, Dr. Donald M. Kirk, M.D., to show, *inter alia*, the dates upon which she visited Dr. Kirk and definitely established the fact of her pregnancy, and that she later delivered on schedule (R. 126). The proffer of evidence to the Court demonstrated that as early as August 16, 1969, the mother of the child visited Dr. Kirk and learned of her pregnancy (R. 126). This was a significant and crucial point, as the plaintiff MILLER had already testified that he did not take emergency leave from Ft. Gordon, Georgia and come to California until the third week of August, 1969, which date was after the defendant SHERYL RAE (MILLER) MARTICORENA had already learned of her pregnancy.[1]

In addition to the medical facts with regard to which Dr. Kirk was prepared to testify, he also was to testify with respect to statements made by the mother to him with bearing upon the paternity of the child,[2] which were made on August 16, 1969 and September 2, 1969, in the presence of Dr. Kirk and in the presence of his nurse (R. 86, 103), who was also present and available to testify, although no proffer was made of

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1 The physician's testimony directly corresponds and corroborates the testimony of MARTICORENA at R. 99, where he testified that SHERYL RAE had told him of her pregnancy before MILLER came to California.

2 Whether the statements are excludable under Lord Mansfield's Rule is discussed in full at Point III, infra, at p. 28.

her testimony after Dr. Kirk's testimony was excluded. (R. 86, 125, 126).

The trial court excluded the testimonies of Dr. Kirk and his nurse as to date of pregnancy and paternity on three separate grounds:

1. Hearsay;

2. Inconsistency with the prior Divorce Decree; and

3. As being a self-serving statement (R. 126).

1. *Hearsay:*

(a) The testimony of Dr. Kirk regarding the date of the mother's pregnancy was not testimonial in nature, but were statements of existing fact within the physician's personal knowledge (i.e., bodily condition on a date certain); therefore, the Court's holding of hearsay could not reasonably have been meant to apply to the doctor's statements regarding his knowledge of when pregnancy was first ascertained.

(b) Statements made by the mother bearing upon paternity of the child fall directly under an exception to the Hearsay Rule and were specifically admissible under the old case law and under the new UTAH RULES OF EVIDENCE which were cited to the Court by counsel for the appellant (R. 95).

At page 95 of the transcript, counsel for the appellant cited to the Court all the language of Rules 63 (23) & (24) in their entirety for the purpose of show-

ing such testimony was not excludable pursuant to a hearsay objection. Exception (24) to Hearsay Rule 63 provides as follows:

> A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or upon a repute in the other's family, and (b) finds that the declarant is unavailable as a witness; . . . [Emphasis added].
>
> UTAH RULES OF EVIDENCE Rule 63(24)

Certainly the case at bar fails squarely within the Subsection (24) exception to Hearsay Rule 63, and depending upon the character of the statement, the only objection must go to weight and not to admissibility of the evidence. The language of the case *In Re Lewis Estate* cited to the trial court by plaintiff's counsel at the time of hearing only further buttresses the admissibility of the statements as an exception to the Hearsay Rule. See, *In Re Lewis Estate*, 121 Utah 385, 242 P.2d 565 (1952), a case holding testimony far less reliable than that in the instant case to be specifically admissible. *See also*, statements of plaintiff's counsel at (R. 96). The trial court had before it the Rule of Evi-

dence and the law of the case and *still* excluded the evidence on the basis of hearsay.

2. *Inconsistency with Prior Divorce Decree:*

(a) Obviously, Dr. Kirk's testimony regarding the date of SHERYL RAE's pregnancy could not be excludable as being inconsistent with the Divorce Decree, as no mention of the date of pregnancy was made in the Decree or in the Findings of Fact and Conclusions of Law. Therefore, one must determine that the Court's statements regarding inconsistency with the Divorce Decree did not go to the admissibility of the doctor's testimony as to the date pregnancy was first definitely established.

(b) The Court's ruling that the declarant's statements were inconsistent with the Decree of Divorce belies three basic considerations:

First, the Decree of Divorce was granted by default. The defendant mother SHERYL RAE merely signed an Appearance, Waiver and Consent to Default rather than contesting the divorce. She did not even appear at time of trial. A determination of the fact based upon failure to deny and default, because the defendant elects not to contest a divorce, is tenuous grounds indeed upon which to place much reliance. See *Almeida v. Correa*, 465 P.2d 564 (1970), where the Supreme Court of Hawaii refused to admit a previous Decree of Divorce as evidence of paternity in a subsequent action.[3]

3 See also Nulman v. Cooper 120 Colo. 98, 207 P.2d 814 (1949); Combs v. Hodge 21 How. (U.S.) 397, 16 L.Ed. 115; 14 ALR 64, 90 ALR 1402.

Second, the third-party defendant MARTICORENA was not a party to the former action (MILLER v. MILLER, Docket 2993 (R. 1)), and cannot be barred by collateral estopple from relitigating the issue of paternity of the child.

In *Almeida v. Correa, supra,* at page 571, the Supreme Court of Hawaii in reviewing and remanding for new trial held:

> "A determination of the husband's non-paternity in the divorce proceedings was certainly not binding upon the defendant, who was not a party thereto, nor was it admissible as evidence by the petitioner in the present case. . . .
>
> The Divorce Decree, if it was relevant and material at all, was admissible only for the purpose of establishing the mere fact of its own rendition and those legal consequences which result from that fact. It should not have been used as affirmative evidence against a stranger to the suit in which it was rendered to prove the existence of any fact underlying the Divorce Decree . . . such as the issue of paternity. [Id. at 571].[4]

3. *Self-Serving Statement:*

The third ground upon which Dr. Kirk and his nurse's testimonies were excluded was upon the ground of being self-serving. It would seem that virtually all testimony offered in a lawsuit could be construed in a sense to be self-serving; however, the cases discussing the Rule of Evidence excluding self-serving statements

4 See also cases cited at Footnote 3 supra p. 13.

clearly demonstrate that in order to be excluded as self-serving, the statement must be favorable or beneficial to the *declarant* who stands to directly benefit from the statement. See *State Road Commission v. Thompson*, 17 Utah 2d 412, 413 P.2d 604 (1966); *Sedam v. United States*, 116 F.2d 80 (10th Cir., Utah 1940).

Without quarreling with the concept, it is difficult to understand how statements made to a physician regarding the date of a woman's pregnancy and paternity by a man who was not her husband while she was still married to her first husband could possibly be self-serving for any purpose. Common sense would lead one to the opposite conclusion that such a statement would be a "*declaration against interest*" and admissible under that ground as well, as was urged upon the Court by counsel for the appellant at page 99 of the transcript.

Finally, the statements made to Dr. Kirk regarding the date of pregnancy and the date they were made, in addition to being admissible under the two previously discussed exceptions to the Hearsay Rule,[5] would also qualify to come in under Hearsay Rule Exception (12) (b): *statements made to the physician regarding the mother's symptoms and bodily condition.* The testimony of the doctor with respect to the date pregnancy was first discovered and the statements of the mother bearing upon the true paternity of the child were clearly improperly excluded.

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5 Rule 63(24) Statement Concerning Family History of Another: Rule 63(10) Declaration Against Interest.

2. *Testimony Offered by the Second Husband and Third Party Defendant MARTICORENA Regarding the Period of Time During Which he Lived in Cohabitation with the Child's Mother Prior to and at the time of Her Conception and Pregnancy was Improperly Excluded as Being too Remote.*

In the transcript of the proceedings (beginning at Page 93 through 95), the appellant attempted to introduce testimonial evidence with respect to the period of time the child's mother was living in cohabitation with him in California, and of his knowledge of non-access to the mother by the respondent, MILLER, who was then living in Georgia during the very time which was critical in determining the time of conception and the identity of the siring husband. It is submitted that the period of gestation, the living arrangements of the mother during the summer of 1969, and the relative access of the respective parties, was highly relevant, material and, in fact, critical in a realistic determination of true paternity. See *Dazey v. Dazey*, 50 Cal. App. 2d 15, 122 P.2d 308, 310 (1942) (for discussion and legal authority pertaining to access and periods of gestation); cited with approval in *Holder v. Holder*, 9 Utah 2d 163, 350 P.2d 761, 765 (1959).

The fact that the first husband, MILLER, was living 3,000 miles away in Georgia and the mother was living in California during the time of conception has been held to be sufficient to rebut the presumption of the husband as being the natural father in most other states which, like Utah, subscribe to the *beyond reason-*

able doubt standard of proof in rebutting the presumption of legitimacy. For example, the Supreme Court of Georgia held in *Wright v. Hicks*, 12 Ga. 1551, 56 Am Dec. 451:

> Where the husband and wife reside at a distance from each other, so as to exclude the possibility of sexual intercourse, there it is admitted that the presumption of legitimacy is at once rebutted.

It is clear that the Court's evidentiary ruling excluding testimony on the fact of non-access by the first husband, MILLER, and access by the second husband, MARTICORENA, at the time of conception is not only legal error, but contrary to logic and common sense.

3. *The Trial Court Erred in Refusing to Allow Appellant's Counsel to Examine the Plaintiff, MILLER, Regarding his own Knowledge and of Statements by the Child's Mother With Respect to Paternity.*

Beginning at page 116 through 118 of the transcript, counsel for the appellant attempted to examine the plaintiff, MILLER, with regard to his knowledge of the true paternity of the child and with respect to statements made by SHERYL RAE to MILLER regarding her becoming pregnant by the appellant (R. 116). The trial court disallowed this testimony on two grounds:

1. Marital privilege — confidential communications (R. 117).

2. Inconsistency with prior Divorce Decree (R. 118).

Marital Privilege:

The point of evidence is controlled by statute, Rules of Evidence and Utah case authority. Section 78-24-8(1), UTAH CODE ANNOTATED, (1953) and Rule 28 of the UTAH RULES OF EVIDENCE, Section 78-24-8 provides in part that:

> Neither a husband or wife can "either during the marriage or afterwards be . . . examined as to any communications made by one to the other during the marriage." (See Section 78-24-8(1), U.C.A. (1953).

The definitive case in Utah on the question of marital privilege and confidential communication is *State v. Musser*, 110 Utah 534, 175 P.2d 724 (1946). In that case, the Utah Supreme Court per Justice McDonough held that the statute prohibited a spouse from testifying only with respect to "*confidential communications*". At page 737, of 175 P.2d, the Court stated:

> "It is stated that the 'communication' between husband and wife contemplated by said statute consists of those communications and knowledge which are confidential in character . . . Such remarks were to be and were discussed with third parties. Consequently, it could not be deemed confidential." Id.

The Court in holding non-confidential statements between spouses to be admissible evidence cited *In Re Ford's Estate*, 70 Utah 456, 261 Pac. 15 (1927). (A

case standing directly for the proposition cited above, that in order to be privileged and therefore inadmissible under the statute, the communication *must* be confidential in character). The Utah cases have been recently followed with approval by sister states. See *STATE v. CHAFFIN* 92 Idaho 629, 448 P.2d 243 (1968). The requirement of *"confidentiality"* is unquestionably the general as well as the Utah rule on the point. See for example: *LEEMHUIS v. LEEMHUIS*, 137 C.A. 2d 117, 289 P.2d 852 (1955); *THOMPSON v. STEINKAMP*, 120 Mont. 475, 187 P.2d 1018 (1947); *HILL v. HILL*, 202 Okl. 483, 215 P.2d 553 (1949); *STATE v. THORNE*, 43 Wash. 2d 47, 260 P2d 331 (1953).

Accordingly, the recently adopted UTAH RULES OF EVIDENCE incorporated the requirement into the body of RULE 28, as it provides in part:

MARITAL PRIVILEGE - CONFIDENTIAL COMMUNICATIONS

> [A spouse may] . . . refuse to disclose and prevent the other from disclosing communications found by the judge to have been had or *made in confidence* between them while husband and wife. Id. Rule 28 U.R.E.

In view of the fact that **SHERYL RAE** told at least four other witnesses[6] present at the trial that the appellant was the father of her son, both during the pregnancy and afterward, and both during the marriage and afterward; it cannot seriously be contended that her

6 See Testimony of Bishop Robert Charles Meyer, (R. 129-132); Proffer of testimony of Dr. Donald Kirk and Nurse (R. 125); Testimony of Sergio A. Marticorena (R. 95).

communications regarding becoming pregnant by the appellant while the plaintiff was in the state of Georgia was a *confidential communication.* The refusal by the trial court to allow appellant's counsel to examine the plaintiff with respect to his knowledge of the true paternity of the child and statements made by the child's mother was clear error.

Inconsistency with prior divorce decree. The court's exclusionary ruling on grounds of inconsistency with a prior Decree of Divorce has been discussed at Point I, 2 above, and will not be recounted here.

4. *The Trial Court Erred in Refusing to Admit Written Documents in the Mother's Own Handwriting Declaring the Appellant to be the True Father of the Child.*

Beginning at page 99 of the transcript, counsel for the appellant attempted to offer a dated letter (Ex. D-1) in the handwriting of the deceased mother, addressed, mailed and received in the mails by the appellant. Although appellant's counsel went to great lengths to lay the appropriate foundation (R. 99, 100, 101) the court sustained an objection to admissibility on the following grounds:

(1) That it was hearsay,

(2) That it was not the best evidence,

(3) No foundation,

(4) As being incompetent, irrelevant and immaterial. (R. 100, 101).

> The Exhibit D-1 was reoffered at (R. 128) and rejected.

It is, of course, appellant's contention that the handwritten letter was admissible evidence. Examining the court's grounds for exclusion, it is not clear specifically which objection the court sustained in excluding the written document. Examining each objection in order:

(1) *Hearsay Objection:*

The hearsay objections to the mother's statements are controlled by Rule 63 (24) *Statements Concerning Family History*, UTAH RULES OF EVIDENCE and by the Utah case of *In Re: Lewis Estate, supra,* and *Midgley v. Denhalter supra,* discussed at length at Point II, 1 *supra,* this brief, and will not be reargued here.

(2) *Best Evidence Objection:*

The Best Evidence Rule has been clarified and incorporated into the new UTAH RULES OF EVIDENCE at Rule 70. That Rule provides in part:

> [A]s tending to prove the content of a writing, no other evidence other than the writing itself is admissible . . . Id Rule 70 U.R.E.

The document offered (D-1) was the original letter sent by SHERYL RAE to the appellant and no other copy was offered. Clearly the "Best Evidence" Rule cannot be the basis of the court's ruling for exclusion.[7]

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7 In fact the Plaintiff's objection cuts the other way. **See discussion of Best Evidence Rule with regard to letters 29 AM. JUR. EVIDENCE**, Section 473, Letters at p. 531.

(3) *No Foundation:*

The objection of No Foundation was merely dilatory and overzealous rhetoric on the part of Plaintiff's counsel as the record discloses two pages of Foundation (**R. 99, 100, 101**) amply sufficient to support introduction of the document under Utah law. *See:* State of *Utah v. Abram* 27 Utah 2d 266, 495 P.2d 313 (1972) (a Utah case holding a foundation where the offeror, to whom it was addressed, received it in the regular course of the mails and it contained matters within their knowledge "supplying a connecting link" to be adequate foundation for its introduction.); *See also State of Kansas v. Mulum* 202 Kan. 196, 447 P.2d 801 (1968) (a case holding a foundation for a letter less adequate than the case before the court to be sufficient for admission and consideration). The letter (D-1) was later offered again near the end of the trial and similarly rejected (**R. 128**). The objection to foundation for the writing is ridiculous in light of the Record and the Utah Case of ***ABRAM***.

(4) *Immaterial, Incompetent and Irrelevant.*

Here counsel for plaintiff used the old standard refrain which became platitudinous by the end of the hearing. With respect to being "immaterial and irrelevant" the objection is *prima facia* without merit as the substance of the letter and the point for which it was offered (vis., paternity of the child) was the very heart of the issue to be determined.

The objection to the letter as being incompetent

also fails when recent Utah Case Authority is reviewed. In the recent paternity action ***STATE OF UTAH v. ABRAM***, 27, Utah 2d 266, 495 P.2d 313 (1972) (cited supra) the Utah Supreme Court in approving the competence and admissibility of a typewritten and unsigned letter addressed to and received by the prosecutrix held per Mr. Justice Tuckett:

> The contents of the letter dealt with a number of facts which were the subject of conversations . . . The genuineness of a letter may be established as any other material fact by circumstantial evidence. If the tenor of the letter and its subject matter supply a connecting link with other communications between the purported sender and the addressee its admission is justified. [citing] 9 A.L.R. 985; Jones on Evidence, Vol. 3 Section 536.

None of the objections cited by plaintiff's counsel to the admissibility of the handwritten letter and sustained by the Court were legally sufficient to exclude the written evidence.

5. ***The Court Erred in Excluding From Consideration the Fact that the Appellant Marticorena Paid the Doctor and Hospital Bills for the Birth of the Child.***

Beginning at page 101 (through 106) of the transcript, counsel for the appellant attempted to introduce evidence that the second husband Marticorena had paid the doctor and hospital bills incurred by Sheryl Rae in connection with the birth of the child

even though Sheryl Rae was married to Miller at the time of the birth. Upon the objection by plaintiff's counsel that such fact was irrelevant, the court ruled that an inadequate foundation had been laid, whereupon counsel for the appellant laid a foundation in order for Doctor Kirk to testify as to the identity of the individual who paid his medical fees for prenatal care and delivery of the child. Later in the hearing, however, the court disallowed testimony by the attending physician which was intended to connect up the preliminary testimony as to payment of medical bills by Marticorena. (R. 126) It is submitted that sufficient foundation had been laid for the introduction of appellant's testimony that he in fact did pay the medical and hospital expenses incurred in connection with the birth of the child.

6. *The Trial Court Erred in Refusing to Admit or Consider Corroborating Statements Made by Sheryl Rae to Marticorena, Miller, Dr. Kirk, Dr. Kirk's Nurse, and Bishop Robert Meyer concerning the True Paternity of the Child.*

(1) At pages 95, 97, and 99 of the transcript, the Court refused to admit into evidence Marticorena's testimony that two or three weeks before Miller came to California from Georgia, Sheryl Rae informed him that she was pregnant. (R. 99) In excluding the evidence, the Court stated that it was concerned with uncorroborated or "naked" statements about what the defendant SHERYL RAE may have said . . ." (R. 97). However, later when the appellant attempted to in-

troduce corroborating testimony, the Court applied a different logic.

(2) *Miller:*

At page 116 of the transcript where Appellants counsel attempted to elicit testimony from SHERYL RAE's first husband, Miller, concerning statements she had made to him concerning Marticorena's being the father of the child. The Court held any such corroborating testimony to be inadmissible as violative of the Confidential Communications Between Spouses Rule. (R. 118).

(3) *Dr. Donald A. Kirk:*

At page 126 of the transcript where the Court refused to admit corroborating testimony of Dr. Donald A. Kirk, M.D., the trial court reasoned that testimony by Dr. Kirk concerning the date when pregnancy was first determined and statements made by SHERYL RAE to her physician, were hearsay and inadmissible as conflicting with the prior Divorce Decree and/or self-serving. (R. 126).

(4) *Dr. Kirk's Nurse:*

In the transcript at page 86, counsel for the appellant indicated to the Court that the nurse was present and ready to testify (R. 86). Marticorena testified that Dr. Kirk's nurse, "Beulah," was present during one of his visits to Dr. Kirk's office with SHERYL RAE and the child (R. 102, 103) and could have given corroborating testimony. However, the Court for all in-

tents and purposes excluded the nurse's corroborating testimony at the same time it refused to admit the proffer as to Dr. Kirk. (R. 125, 126).

(5) *Bishop Robert C. Meyer:*

Beginning at page 129 of the transcript appellant's counsel attempted to introduce corroborating testimony by the L.D.S. Bishop, Robert C. Meyer, who performed the marriage of SHERYL RAE and SERGIO MARTICORENA and who had served on numerous occasions as their counselor and advisor (R. 131). Bishop Meyer was present and prepared to testify with respect to lengthy discussions he had had with the child's mother regarding Miller, Marticorena, and the paternity of the child Michael. The Court, however, ruled the testimony to be improper as hearsay and the court sustained an objection to its introduction *"on the same basis as the objection to Dr. Kirk's testimony."* (R. 132).

SUMMARY

It cannot be disputed that the testimony offered by the witnesses called by the Appellant meets the Rule 63 (24) U.R.E. Exception to the Hearsay Rule. Likewise, a prior Divorce Decree cannot be conclusive against a stranger to the former action. The court's reasoning that the communication between SHERYL RAE and Miller regarding paternity was "confidential" and therefore privileged, fails by the sheer numbers of people in whom the mother confided. Finally,

the Court's ruling that the statements made by SHERYL RAE that she was pregnant by another man, not her husband, while still married to her first husband constituted a self-serving declaration is totally illogical. Such statements indicate the declarant to be guilty of a felony. Moreover, such statements would tend to hold the declarant up for ridicule and social disapproval and would provide grounds for an action sounding in libel *per se* if uttered by a third party for imputing unchastity to a married woman. The statements, if anything, were *Declarations Against Interest* and should have been specifically admitted and considered under Rule 63(10).[8] As a consequence of the Court's evidentiary rulings, the Appellant, SERGIO A. MARTICORENA, second husband of the deceased Defendant SHERYL RAE MARTICORENA, not only was prohibited from testifying himself because his statements were uncorroborated, but was prevented from introducing other evidence and corroborating testimony in order to support his testimony and otherwise prove his case. The trial court's evidentiary rulings constitute gross legal error, were extremely prejudicial to his cause and cannot be allowed to stand.

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8 Rule 63 (10) Utah Rules of Evidence provides as follows: Declarations Against Interest. Subject to the limitations of exception (6), a statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval that the declarant under the circumstances existing would not have made the statement unless he believed it to be true;

POINT III

LORD MANSFIELD'S RULE HAS NO APPLICATION TO THE CASE AT BAR.

At the outset of his argument the Appellant recognized the existence and application of LORD MANSFIELD'S RULE as recently enunciated by the Utah Supreme Court in *Lopes v. Lopes*, 30 Utah 2d 393, 518 P.2d 687 (1974). Although the Trial Court did not exclude any evidence offered by the Appellant on the basis of LORD MANSFIELD'S RULE, the Plaintiff, Miller, (who in prosecuting his case did not introduce any evidence or offer any testimony) stood upon the presumption that a child born during wedlock is the legitimate offspring of the mother and her then husband. Because the court has recently expressed that closely related to this presumption of legitimacy is the limitation on the method of proof of non-paternity,[9] the appellant deems it necessary to distinguish this case from one in which Lord Mansfield's Rule might reasonably apply.

1. *The Child Cannot Possibly Be Illegitimatized.*

Lord Mansfield's Rule, which was most recently approved by the Utah Supreme Court in *Lopes v. Lopes, supra*, is described as follows:

> Closely related to the presumption that a child born during wedlock is the legitimate offspring to herself and her husband is the limitation on the method of proof of non-paternity: That the

9 See Lopes v. Lopes 30 Utah 2d 393, 518 P.2d 687 (1974) at page 689 P.2d.

> spouses themselves may not give testimony which would tend to illegitimatize the child. This is known as the Lord Mansfield's Rule. Its genesis and wide acceptance arise out of the same considerations as the presumption of legitimacy: The importance of the integrity of the family; and the policy of giving the interests and welfare of children priority over those of warring adults. *Id* at p. 689 P2d.

Section 77-60-14 Utah Code Annotated (1953) provides in part:

> MARRIAGE OF PARTIES LEGITIMIZES CHILD — 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, . . .

See also, In Re Lewis Estate, 121 Utah 385 242 P.2d 565 (1952) where Justice Wade speaking for the Court held: "The wording of [The statute] is clear and explicit and unambiguous. It provides that if the father and the mother of the illegitimate child intermarry at any time after its birth 'The child shall in all respects be deemed to be legitimate.' There are no conditions attached to such legitimation."

Id., In Re Lewis Estate at p. 568 P.2d.

Moreover, Section 78-30-12 U.C.A. (1953) provides as follows:

> ADOPTION BY ACKNOWLEDGMENT. — 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 fam-

> ily, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. . . .

See also Carter v. Carter, 19 Utah 2d 183, 429 P.2d 35 (1967) "A child was born to the parties in April of 1951 and has been reared by the parties and acknowledged by the [father] as his child. Hence, the child is his legitimate child by adoption, pursuant to Section 78-30-12 U.C.A. (1953)." See *In Re Garr's Estate*, 31 Utah 57, 86 Pac. 757.

From the above-cited statute and Utah case authority, it is clear that, by virtue of the marriage between SHERYL RAE and SERGIO MARTICORENA, together with Marticorena's subsequent acknowledgment of the child as his own, the child Michael, regardless of his true paternity, would be legitimate from the time of his birth and the testimony of the mother cannot possibly tend to illegitimatize him.

2. *The Policy Reasons for Lord Mansfield's Rule Do Not Apply to the Mother's Testimony.*

As the mother's statements bearing upon the true paternity of the child to MARTICORENA, MILLER, DR. KIRK, DR. KIRK's NURSE, Beulah, and BISHOP ROBERT CHARLES MEYER cannot "tend to illegitimize the child," they are and must be specifically admissible to aid the court in its search for the truth. Lord Mansfield's Rule of Law as announced in *Lopes v. Lopes, supra*, cannot and should

not be blindly applied to work a travesty against the appellant. Perhaps the best argument that can be advanced on the point is a quotation from the pen of Mr. Justice Crockett. In writing the *Lopes* decision at footnote 6 he explained why Lord Mansfield's Rule was an exception to Rule 7 U.R.E. as follows:

> [A] rule is a general statement of policy made without focus upon the particular problem here involved. Such generality should not be deemed to control in a specific situation where its effect would be to distort justice by subverting such a sound and well-established rule as that under consideration here. The parties affected, and the principle of law involved, are entitled to be considered upon their own merits as to reason, justice and policy. . . . It would of course be presumptuous to suppose that this is the final word to be said upon the law of evidence.

It is submitted the same reasoning applies against the application of Lord Mansfield's Rule to the case before the Court.

POINT IV

THE HEARING BEFORE THE TRIAL COURT ON PLAINTIFF'S ORDER TO SHOW CAUSE WAS FUNDAMENTALLY AND INHERENTLY UNFAIR, UNJUST AND INEQUITABLE, DID NOT DO SUBSTANTIAL JUSTICE AND DEPRIVED THE APPELLANT OF THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

From only a cursory examination of the transcript of the proceedings (less than 50 pages in length), one senses a general impression that the case was not well tried or fully heard, and that many of the crucial facts and much important information was summarily suppressed. For example: when counsel for the appellant in attempting to develop the critical chronological order of events prior to the mother's conception in the summer of 1969, in order to demonstrate the period of non-access by MILLER and access by MARTICORENA, the court cut off such examination as being "too remote". (R. 93) Later, when the appellant attempted to introduce testimony as to the date when the doctor first definitely established the fact that SHERYL RAE was pregnant, the Court excluded that testimony on grounds that were never made clear (R. 126). Moreover, the Court seemed reluctant to give appropriate consideration to certain facts that the appellant did manage to get into evidence (i.e., at page 99 of the transcript the Court stated: "Not going into that, I don't see that the fact that she may have been pregnant in the summer of 1969 goes and has any weight to it particularly"). The conclusion seems strange, in light of the fact that the plaintiff had been residing away from the child's mother in the State of Georgia since May 22, 1969. (R. 116).

In contrast, however, the Court took judicial notice of a Default Divorce Decree and excluded most of the appellant's proffered evidence on that basis even though the appellant was never a party to that action

(R. 120). The Court saw no relevance in the fact that the appellant MARTICORENA paid the doctor and hospital bills incurred in connection with the birth of the child (R. 24), but saw all statements made and letters written by the child's mother indicating that she was pregnant by another man while still married to her first husband, as self-serving rather than against her interests (R. 97, 127, 132).

Perhaps the most striking was the line of questioning that the Court found to be material beginning at page 109 of the transcript. There the Court, over the objection of the appellant's counsel, allowed counsel for the plaintiff to delve into such pertinent issues as the third party defendant's place of birth, the location of a prior marriage, his citizenship, where he obtained a divorce, the present address of his former wife and other such vital information. (R. 110).

The appellant does not suggest that the summary manner in which the hearing was conducted was intentional on the part of any party thereto, but only that the proceedings as a whole were cursory, superficial and not legally sufficient to finally determine an issue of the magnitude presented. The trial court then, and the Appelate Court now on review is faced with one of the most important, precious and fundamental rights known to man: The right to have and rear a man's own son. The fact that the outcome of this case will affect only two or three individuals, and does not contain far-reaching social ramifications affecting hundreds or thousands of the state's citizens, should have no bearing upon the

quality and quantity of the Court's examination and consideration.

It is submitted the trial court's determination was too cursory and superficial, both in its evidentiary rulings and in the amount of attention afforded to the litigants in one small child custody case to constitute the due process of law and equal protection required by the Constitution.

POINT V

INDEPENDENT SCIENTIFIC EVIDENCE EXISTS AND IS AVAILABLE TO AID THE COURT IN ESTABLISHING TRUE PATERNITY AND THE APPELLANT REQUESTS THE COURT'S IMPRIMATUR ON THE POINT.

Although the blood type analysis by Dr. Gibbon failed to exclude either husband as the true father of the child, (R. 127 and Exhibit D-2) both the appellant and respondent had in attendance expert witnesses learned in the science of genetics and prepared to testify: Dr. Charles Scott and Dr. Wilmer C. Wiser. (R. 128). What their testimony would have been was discussed off the record in the trial court and therefore cannot be considered by the Appellate Court on review. *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963); *Reliable Furniture Co. v. Fidelity and Guaranty Insurance Co.*, 14 Utah 2d 169, 380 P.2d 135 (1963).

However, the trial court was concerned with the

admissibility of such evidence and requested authority on the point which was provided (R. 78). In light of the Court's pronouncements in *Lopes v. Lopes* (supra) where the Court stated:

> When a new trial or further proceeding is ordered, it is our duty to pass upon questions of law which may be pertinent and helpful in arriving at a final determination of the case. *Id.*

should the Court determine that a rehearing on the matter is appropriate the Appellant pursuant to Rule 76(a) U.R.C.P. and in accordance with the Rule announced in *Johnson v. Peterson*, 18 Utah 2d 260, 420 P. 2d 615 (1966), reaffirmed in *Lopes*, requests the court's imprimatur on the admissibility of genetic evidence as to the biological possibilities of inheriting certain genotypic and phenotypic characteristics and as to the mathematical and statistical probabilities of the child's ability to inherit certain characteristics from either of the reputed fathers as fully discussed in *Almeida v. Correa*, 51 Hawaii 594, 465 P.2d 564 (1970); *People in the Interests of S.*, 514 P. 2d 772 (Colo. 1973). *See, Utah v. Anderson*, 63 Utah 121, 224 Pac. 442, 40 ALR 94 (1924); 55 ALR 3d 1087 *Annotation*; 5 FAMILY LAW QUARTERLY 252, Krause, *Scientific Evidence, and the Ascertainment of Paternity* (1971); *See also*, The discussion beginning at page 78 of the record in the instant case.

CONCLUSION

The case at bar presents the Court with the unique problem of two men attempting to prove their paternity

of a young child which both of whom have lived with, cared for and nurtured. Despite the crushing burden of proof[10] placed upon the third-party defendant-appellant on review, he stands ready, willing and able to undertake the task.

The brief hearing afforded to the appellant in the trial court was replete with legal error and effectively prevented the appellant from introducing virtually every piece of evidence offered in his behalf.

Clearly, the cumulative effect of the suppression of admissable and highly probative evidence denied the appellant his day in court and thereby of the due process the law affords. The right with which the Court is here concerned dates back long before the *Magna Carta* and is fundamental to any well-ordered and free society. It is described in the Declaration of Independence and guaranteed by the Constitution. It cannot be that such a right can be extinguished in a summary manner without fully examining and considering the evidence in order to intelligently determine the issues.

The appellant urges the court on this equitable review to examine both the law and facts, remand the case for a full hearing with instructions to consider all competent and legally admissible evidence together with the court's imprimatur concerning what other independent scientific evidence may be considered.

Respectfully submitted,
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10 Beyond Reasonable Doubt. See **Lopes v. Lopes** (supra).