

1995

Audrey Lynne Athay Dow v. Frank Kenneth Gilroy : Brief of Appellant

Utah Court of Appeals

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Charles M. Bennett; Callister, Nebeker & McCullough; Attorneys for Appellant.

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

* * * * *

AUDREY LYNNE ATHAY DOW,)	
)	Case No. 950095-CA
Plaintiff and Appellee,)	
)	District Court No. 940904441
vs.)	
)	Honorable Glenn K. Iwasaki
FRANK KENNETH GILROY)	
)	Priority: Rule 29(b)(10)
Defendant and Appellant.)	Category

* * * * *

Priority No. 10

INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT

* * * * *

BRIEF OF APPELLANT

* * * * *

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FILED

JUN 14 1995

COURT OF APPEALS

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Appellant, Frank K. Gilroy, through his attorneys, Callister Nebeker & McCullough and Charles M. Bennett, files this Brief in Support of his Appeal.

JURISDICTION

Plaintiff/Appellee, Audrey Lynne Athay Dow ("Ms. Dow"), filed this lawsuit seeking a declaration that she is the daughter of the Defendant/Appellant, Frank K. Gilroy ("Mr. Gilroy"). Petition for Paternity ("Petition") ¶ 5, R. at 3. Mr. Gilroy filed a petition with the Supreme Court seeking permission to file an interlocutory appeal. The Supreme Court granted that petition and poured the case over to the Court of Appeals. R. at 67. In ruling on Ms. Dow's motion to compel Mr. Gilroy to submit to genetic testing, the Court of Appeals noted that it had jurisdiction of the appeal pursuant to Utah Code § 78-2a-3(2)(i) (1994) and granted the petition for permission to file an interlocutory appeal *nunc pro tunc*. See Order of the Utah Court of Appeals dated May 10, 1995. Accordingly, the Court of Appeals has jurisdiction of Mr. Gilroy's appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue for review is: Does Utah Code § 78-12-25(3) (four year statute of limitations for "[a]n action not otherwise provided by law") apply to an action to determine a child's paternity filed over 50 years after the birth of that child and

over 25 years after the child's mother advised the child of the identity of the putative father?

Mr. Gilroy filed a motion to dismiss on the basis of that Ms. Dow filed her action more than 4 years after the cause of action arose. The trial court denied Mr. Gilroy's motion. As stated above, Mr. Gilroy sought an interlocutory appeal which was granted.

A trial court's application of a statute of limitations is a question of law that the Court of Appeal reviews for "correctness." *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d 194, 196 (Utah 1991).

DETERMINATIVE STATUTORY CITATION

The application of Section 78-12-1 and Section 78-12-25 of the Utah Code is determinative of this appeal. Those sections provides:

78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

78-12-25. Within four years.

Within four years:

. . .

(3) An action for relief not otherwise provided for by law.

STATEMENT OF THE CASE

Ms. Dow filed her Petition against Mr. Gilroy seeking a declaration that he was her father. Petition ¶ 5, R. at 3. Mr. Gilroy moved to dismiss on the basis of the statute of limitations. R. at 19-20. The trial court denied Mr. Gilroy's motion. R. at 63-64. He then petitioned for permission to file an interlocutory appeal, and that petition was granted. R. at 67; Order of the Utah Court of Appeals dated May 10, 1995.

STATEMENT OF FACTS

Although Mr. Gilroy denies the allegation that he is the plaintiff's father, for purposes of his Motion to Dismiss and this Interlocutory Appeal, he assumes the truth of all of the allegations in Ms. Dow's Petition. *St. Benedict's Development Co.*, 811 P.2d at 196. Accordingly:

1. Ms. Dow was born on October 5, 1943. Petition ¶ 6; R. at 3. She is now 51 years old.
 2. Ms. Dow's mother told plaintiff that plaintiff's father was Mr. Gilroy. Petition ¶ 8; R. at 4.
 3. Ms. Dow's mother died on October 2, 1969. Petition ¶ 8; R. at 4.
- Thus, Ms. Dow has known of the underlying factual allegations since October 2, 1969.

SUMMARY OF ARGUMENT

Because Ms. Dow filed her Petition over twenty (20) years after the running of the "catch-all" statute of limitations in Section 78-12-25(3), her Petition is barred by that statute. Accordingly, the District Court should have granted Mr. Gilroy's Motion to Dismiss and dismissed the petition with prejudice.

ARGUMENT

I. ABSENT A DISABILITY THAT TOLLS THE STATUTE, A PATERNITY ACTION MUST BE BROUGHT WITHIN FOUR YEARS OF THE DATE THE ACTION ARISES.

A. Utah's Statutory Provisions Establish a Four Year Statute of Limitations for Paternity Actions.

The Uniform Act on Paternity (the "Paternity Act") grants a mother, child or applicable public authority the power to seek a legal declaration of paternity. Utah Code § 78-45a-2 (1994). Like most Utah laws, the Paternity Act has no self-contained statute of limitations for bringing an action pursuant to the Act. However, the Paternity Act does limit the amount that can be recovered from a father for the support of the child to the support obligations incurred during the four year period preceding the filing of the complaint. Utah Code § 78-45a-3 (1994).

Utah law provides statutory limits to when lawsuits can be filed in two ways. First, there are specific statute of limitations contained within individual acts. For example, Section 75-3-107 provides a specific three year statute of limitations from the date of a decedent's death in which a petition from probate of a will can be filed in a probate proceeding. Utah Code § 75-3-107 (1994). Second, when the specific provisions of Utah law are silent, the general statutes of limitations apply. Utah Code § 78-12-1 *et seq.* (1994).

Section 78-12-1 provides the general rule regarding the application of limitations periods as follows:

78-12-1. Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

Thus, since no civil action may be commenced outside of the time periods provided in a specific statute of limitations or the general statute of limitations, every cause of action in Utah has a statute of limitations.

Section 78-12-25(3) further supports this conclusion. It provides:

78-12-25. Within four years.

Within four years:

. . .

(3) An action for relief not otherwise provided for by law.

In its most recent decision, the Supreme Court interpreted Section 78-12-25(3) in precisely this way. *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992). In *American Tierra*, the defendant argued that the six month statute of limitations in Section 78-12-31 barred the plaintiff's claim; the plaintiff argued that the four year period in Section 78-12-25(3) applied. In reaching its conclusion that Section 78-12-25(3) applied, the Court cited a number of its prior decisions concerning Section 78-12-25(3) and repeatedly referred to that statute of limitations as the "catch-all" statute. *American Tierra*, 840 P.2d at 760-61. The Court noted: "Before applying the catch-all statute to this case, however, we must satisfy ourselves that Utah's current statutes of limitations do not contain a more specific provision." *American Tierra*, 840 P.2d at 760. Thus, absent a more specific statutory period of limitations for paternity actions, the "catch-all" provision of Section 78-12-25(3) applies. There is no such thing as a Utah cause of action without a statute of

limitations. Therefore, an action for paternity, like any other cause of action in Utah, has a statute of limitations.

B. Utah Case Law Confirms that there is a Statute of Limitations for Paternity Actions, subject to Tolling during the Period a Claimant is Legally Disabled.

In 1976, the Supreme Court affirmed a trial court's dismissal of a paternity action on the basis of the eight year statute of limitations found in Section 78-12-22 ("an action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children"). *Martinez v. Romero*, 558 P.2d 510, 511 (Utah 1976). However, the very next year, in *Nielsen, State Dept. of S.S. v. Hansen*, the Utah Supreme Court re-examined the issue of whether the eight year statute of limitations under Section 78-12-22 precluded a lawsuit against the father to determine paternity and to collect 4 months of child support obligations. *Nielsen, State Dept. of S.S. v. Hansen*, 564 P.2d 1113 (Utah 1977). In reversing the trial court's dismissal on the basis of the statute of limitations in Section 78-12-22, the Court stated in *dicta*:

We are unable to find any time limitation as to when a suit may be instituted to determine paternity. The child has an interest in the matter and courts should be reluctant to invent limitations not set out in the

statute, especially where minor children may be adversely affected thereby.

Nielsen, 564 P.2d at 1114. Since both Utah Code § 78-12-1 and Section 78-12-25(3) were enacted prior to 1977, as to these statutes, this *dicta* is erroneous.

See Utah Code §§ 78-12-1 *et seq.* (1954; as amended through 1977).

Unfortunately, this erroneous *dicta* in *Nielsen* has created confusion and caused the trial court's erroneous decision in this case. R. at 76. ("I find that this matter is unsettled I'm going to deny the motion to dismiss at this time. It may very well need to go up and get clarification.")

The Supreme Court had an opportunity to revisit the issue at bar in 1981 in *Szarak v. Sandoval*. *Szarak v. Sandoval*, 636 P.2d 1082 (Utah 1981). The Court first acknowledged that the area was far from clear:

The question of the limitations period applicable to actions for paternity and child support has been a troubled one, complicated by multiple parties, overlapping statutes and contradictory opinions.

Szarak, 636 P.2d at 1083. Although acknowledging the Court's *dicta* in *Nielsen* quoted above, the Court noted that *Nielsen* stood *only* for the proposition that the eight year statute of limitations in Section 78-12-22 did not apply to paternity actions. *Szarak*, 636 P.2d at 1084.

The defendant in *Szarak* argued that the general statute of limitations in Sections 78-12-1 *et seq.* applied. ("Civil actions can be commenced only within the period prescribed in this chapter, after the cause of action accrues." Utah Code § 78-12-1 (1994)). Further, the defendant argued that either the three year period of Section 78-12-26(3) ("a liability created by the statutes of the state")¹ or the four year period of Section 78-12-25(3) ("[a]n action for relief not otherwise provided by law") applied to preclude that action. *Szarak*, 636 P.2d at 1084.

The Court did not reject the defendant's analysis. It did, however, reject the defendant's position by holding that whatever statute of limitations applied, it was tolled during the child's minority. *Id.* at 1084-85. Utah Code § 78-12-36 (1994) (statute of limitations are tolled during the time a person who has a claim is legally disabled). Since the child in *Szarak* was still a minor, that ruling resolved the case.

Although the Court did not rule on the issue presented in this case, it did indicate how it *would* have ruled absent the tolling provision. "While the

¹ In *Szarak*, the plaintiff was seeking support payments. Thus, the defendant argued that Section 78-12-26(3) applied to bar the plaintiff's claim. Since there is no claim for support in the present case, the applicable statute of limitations is the four year "catch-all" statute. Utah Code § 78-12-25(3) (1994).

child's action to establish paternity and enforce child support is not barred by the statute of limitations *until after* the child attains majority, the amount of recovery of child support is still limited by [the four year period in] Section 78-45a-3." *Id.* at 1084-85 (emphasis added). Moreover, the Court ruled: "Consequently, we hold that any statute limiting the time within which a paternity action must be commenced under the Uniform Act on Paternity is tolled for all statutorily qualified plaintiffs during the period of the child's minority." Accordingly, the Court properly noted that, like all causes of action in Utah, there is a statute of limitations for paternity actions once a child reaches majority, although the Court declined to determine what statute applied.

The ruling in *Szarak* is important because it answered the concern that prompted the erroneous *dicta* in *Nielsen*. In *Nielsen*, the Court noted: "The child has an interest in the matter and courts should be reluctant to invent limitations not set out in the statute, especially where minor children may be adversely affected thereby." *Nielsen*, 564 P.2d at 1114. Under the *Szarak* Court's holding (minority tolls the statute of limitations as to minors), the *Nielsen* Court's concern is met. *Szarak*, 636 P.2d at 1084. Thus, there is no need to ignore Utah law. Sections 78-12-1 and 78-12-25(3) establish a "catch-

all" provision that guarantees there will be a statute of limitations for *every* cause of action in Utah.

C. Application to Ms. Dow's Claim in this Case.

In the present case, Ms. Dow reached the ages of 18 and 21 in 1961 and 1964 respectively. Petition ¶ 6, R. at 3. She learned the allegation that Mr. Gilroy was her father from her mother and that occurred no later than October 2, 1969 (the date of her mother's death). Petition ¶ 8, R. at 4. In 1994, she filed her Petition asking the District Court to rule that Mr. Gilroy is her father. R. at 2. Since Ms. Dow filed her lawsuit over 20 years after the running of the "catch-all" statute of limitations of Section 78-12-25(3), the trial court should have dismissed her claim with prejudice.²

CONCLUSION

For these reasons, Mr. Gilroy asks the Court of Appeals to reverse the trial court's denial of his motion to dismiss and remand for an entry of an order dismissing Ms. Dow's Petition with prejudice.

² In cases where support is sought, the three year statute of limitation in Section 78-12-26(3) would apply. Utah Code § 78-12-26(3) (1994). If the statute were tolled because of a legal disability, the claimant would still be limited to support payments for the four years preceding the filing of the action. *Szarak*, 636 P.2d at 1084-85.

Dated June ~~4~~, 1995.

CALLISTER NEBEKER & McCULLOUGH

A handwritten signature in cursive script, appearing to read "Charles M. Bennett", is written over a horizontal line.

Charles M. Bennett

Attorneys for Appellant, Frank K. Gilroy

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CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing
BRIEF OF APPELLANT was mailed, postage prepaid, on this 14 day of
June, 1995 to the following:

Phillip Kent Card
Attorney for Plaintiff
960 West 2100 South
Salt Lake City, Utah 84119-1530

A handwritten signature in black ink, appearing to read "Charles A. Bennett", is written over a horizontal line.

ADDENDUM

1. Petition for Paternity
2. Order (Denying Motion to Dismiss)

PHILLIP KENT CARD (Bar #5261)
Attorney for Plaintiff
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Salt Lake City, Utah 84119-1530
Telephone (801) 973-0091

FILED
CLERK OF DISTRICT COURT
JUL 14 1994
BY *[Signature]*

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

AUDREY LYNNE ATHAY DOW,

Plaintiff,

vs.

FRANK KENNETH GILROY,

Defendant.

PETITION FOR
PATERNITY

Civil No. *940904441 PA*

Judge **JUDGE GLENN K. IWASAKI**

Pursuant to Utah Code Annotated, Section 78-45a-1, et seq., the Plaintiff by and through her counsel of record, Phillip Kent Card, ~~hereby~~ pleads as follows:

1. This is a paternity action instigated under Utah Code Annotated, Section 78-45a-1, et seq.

2. This court has jurisdiction over the Defendant, Frank Kenneth Gilroy (the "alleged father"), because he is either a

resident of Salt Lake County, State of Utah, or he submitted himself to the jurisdiction of this Court under Utah Code Annotated, Section 78-27-24(7), by engaging in sexual intercourse within the State of Utah which has given rise to this paternity action.

3. Venue is appropriate in this Court under Utah Code Annotated, Section 78-45a-14, because the Plaintiff, Frank Kenneth Gilroy, is a resident of Salt Lake County, State of Utah.

4. The Plaintiff, Audrey Lynne Athay Dow, currently resides in and is a resident of Teaneck, New Jersey,

5. Upon information and belief, Defendant Frank Kenneth Gilroy is the father of the Plaintiff. This allegation is supported by the Affidavit of the Plaintiff, attached to this Complaint as Exhibit "A".

6. The Plaintiff was born on the 5th day of October, 1943, at Holy Cross Hospital in Salt Lake City, Utah, and was born to her mother.

7. Throughout Plaintiff's life, the Defendant made regular contact with the Plaintiff and continues to be in contact with the Plaintiff.

8. Plaintiff's mother, now deceased, informed the Plaintiff that Defendant Frank Kenneth Gilroy is Plaintiff's father. The date of Plaintiff's mother's death was the 2nd day of October, 1969.

9. Genetic testing should be ordered for all individuals concerned and the Defendant should be required to pay for the costs of such genetic testing and compensation of any expert witnesses to determine Defendant's paternity.

10. If this matter is uncontested, each party should be ordered to pay their own attorneys' fees and Court costs. If contested, Defendant should be responsible for his attorney fees and Court costs and Plaintiff's reasonable attorney fees and Court costs.

WHEREFORE, Plaintiff prays for the following relief:

1. For a determination and Decree of paternity that Defendant Frank Kenneth Gilroy is the father of the Plaintiff Audrey Lynne Athay Dow.

2. Judgment be entered in favor of the Plaintiff against the Defendant for costs incurred by the Plaintiff herein, including

but not limited to genetic testing costs and compensation of expert witnesses.

3. For an order requiring each party to pay their own attorneys' fees and Court costs if uncontested. If contested, for an order requiring the Plaintiff to pay his attorney fees and Court costs and to pay Plaintiff's reasonable attorney fees and Court costs.

4. The Plaintiff be awarded such other relief as the Court deems proper.

DATED this 14th day of July, 1994.


PHILLIP KENT CARD
Attorney for Plaintiff

Plaintiff's Address:
584 Cumberland Avenue
Teaneck, New Jersey 07666

DEC - 2 1994

PHILLIP KENT CARD (Bar #5261)
Attorney for Plaintiff
960 West 2100 South
Salt Lake City, Utah 84119-1530
Telephone (801) 973-0091

Deputy J.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AUDREY LYNNE ATHAY DOW,

Plaintiff,

vs.

FRANK KENNETH GILROY,

Defendant.

ORDER

RULE 4-501 RULING 11/21/94

Civil No. 940904441 PA

Judge GLENN K. IWASAKI

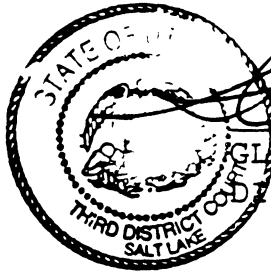
The Defendant's Motion to Dismiss having come on for hearing before the above-entitled Court on the 21st day of November, 1994, at the hour of 11:00 a.m., The Honorable Judge Glenn K. Iwasaki presiding. The Plaintiff was not present but was represented by counsel, Phillip Kent Card, and the Defendant was not present but was represented by counsel, Charles M. Bennett.

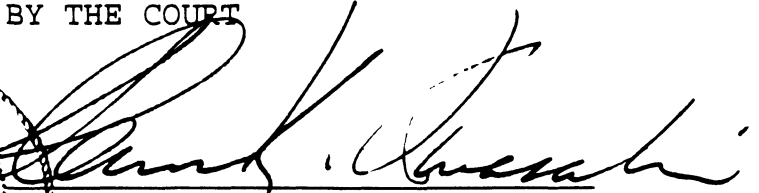
Based upon argument of counsel, full review of the pleadings on file, and good cause appearing, the Court orders as follows:

1. The Defendant's Motion to Dismiss is denied.

DATED this 2 day of Dec, 1994.

BY THE COURT





GLENN K. IWASAKI
DISTRICT COURT JUDGE

Approved as to Form:

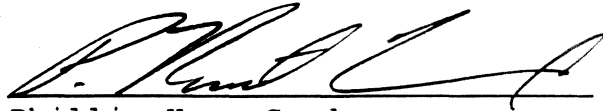
CHARLES M. BENNETT
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of November, 1994,
I mailed a true and correct copy of the foregoing ORDER, postage
pre-paid, to the following:

Charles M. Bennett
CALLISTER, NEBEKER & McCULLOUGH
800 Kennecott Building
Salt Lake City, Utah 84133

DATED this 22nd day of November, 1994.

A handwritten signature in dark ink, appearing to read "P. Kent Card", is written over a horizontal line.

Phillip Kent Card