

1995

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

Utah Court of Appeals

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P. Kent Card; Attorney for Appellee, Audrey Lynne Athay Dow.

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

Recommended Citation

Brief of Appellee, *Dow v. Gilroy*, No. 950095 (Utah Court of Appeals, 1995).

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NO. 950095CA

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

* * * * *

INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT

* * * * *

BRIEF OF APPELLEE

* * * * *

P. Kent Card
 Utah State Bar #5261
 960 West 2100 South
 Salt Lake City, Utah 84119-1530
 Telephone: (801) 973-0091

Attorney for Appellee,
 Audrey Lynne Athay Dow

CALLISTER NEBEKER & McCULLOUGH
 Charles M. Bennett (A0283)
 800 Kennecott Building
 Salt Lake City, Utah 84133
 Telephone: (801) 530-7300

Attorneys for Appellant,
 Frank K. Gilroy

FILED

JUL 17 1995

COURT OF APPEALS

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Appellee, Audrey Lynne Athay Dow (“Mrs. Dow”), by and through her attorney, P. Kent Card, files this Brief in Opposition to the Appeal by Frank K. Gilroy (“Mr. Gilroy”).

JURISDICTION

Mrs. Dow in filing this Petition seeks a judicial declaration establishing Mr. Gilroy as her biological father (legitimation); however, Mrs. Dow is not seeking support from Mr. Gilroy. Petition for Paternity (“Petition”) R at 1; ¶ 5, R. at 3. In response to the Petition, Mr Gilroy filed a Motion to Dismiss based on the statute of limitations defense. R. at 17-18. The Trial Court, the Honorable Glenn K. Iwasaki, denied Mr. Gilroy’s Motion to Dismiss. R. at 63-64. Mr. Gilroy then filed a petition with the Supreme Court seeking permission to file an interlocutory appeal. The Supreme Court granted the petition and poured the case over to the Court of Appeals. R. at 67. The Court of Appeals noted jurisdiction of the appeal under Utah Code § 78-2a-3(2)(I)(Supp. 1994) and granted the petition for permission to file an interlocutory appeal *nun pro tunc*. Therefore, jurisdiction is proper in the Court of Appeals as set forth in the Order of the Utah Court of Appeals dated May 10, 1995.

STATEMENT OF ISSUES PRESENT FOR REVIEW

Whether the filing of the Petition by Mrs. Dow under the Uniform Act on Paternity, Utah Code § 78-45a-1 et seq. (the “Paternity Act”), to establish paternity, absent any claim to enforce a support liability, may be barred by the statute of limitations in light of Utah Case Law and Statutes.

Whether the statutes of limitation contained in the Paternity Act, Utah Code § 78-45a-3 and Utah Code § 78-45a-4, are specific statutes of limitation enacted to supplant the general statutes of limitation of Utah Code § 78-12-1 and Utah Code § 78-12- 25(3).

Whether the Utah State Legislature intended to exclude from the Paternity Act a filing limitation period where the sole issue is legitimation and where other states include such statutes of limitation in their Paternity Acts.

STANDARD OF REVIEW

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). Initially, the court examines a statute’s plain language and resort[s] to other methods of statutory interpretation only if the language is ambiguous.” *State v. Masciantonio*, 850 P.2d 492 (Utah App. 1993). Further, if neither party has provided this court with any legislative history or other evidence of

legislative intent . . . we must look to related case law and “relevant policy considerations” for guidance. *Schurtz v. BMW of N. Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991).

CONTROLLING CITATIONS

The following cases and statutes are controlling:

Nielsen, State Dept, of S.S. v. Hansen, 564 P.2d 1113 (Utah 1977).

Szarak v. Sandoval, 636 P.2d 194 (Utah 1991).

Utah Code § 78-45a-3. Limitation on recovery from the father.

The father’s liability for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

Utah Code § 78-45a-4. Limitations on recovery from father’s estate.

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws.

Utah Code § 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.

Utah Code § 78-12-25(3). Within four years.

An action for relief not otherwise provided for by law.

STATEMENT OF THE CASE

Mrs. Dow in filing her Petition seeks a declaration that Mr. Gilroy is her biological father, she is not seeking support from Mr. Gilroy. Petition R at 1; ¶ 5, R. at 3. Mr. Gilroy, in response, filed a Motion to Dismiss based on the statute of limitations defense. R. at 17-18. The Honorable Glenn K. Iwasaki denied Mr. Gilroy's Motion to Dismiss. R. at 63-64. Next, Mr. Gilroy filed a petition for permission to file an interlocutory appeal which was granted and the Supreme Court poured the case over to the Court of Appeals. R. at 67.

STATEMENT OF FACTS

1. Mrs. Dow was born on October 5, 1943, in Salt Lake City, Utah and is the daughter of Audrey Athay ("Ms. Athay"), deceased October 2, 1969. R. at 3-4.
2. Ms. Athay told Mrs. Dow that Mr. Gilroy is her biological father. R. at 4.
3. Ms. Athay further told Mrs. Dow that she had sexual intercourse with and only with Mr. Gilroy during the time of Mrs. Dow's conception. R. at 8.
4. Throughout Mrs. Dow's life, Mr. Gilroy made regular contact with her and continued to be in contact with Mrs. Dow until the filing of this Petition. R. at 3.
5. On July 14, 1994, Mrs. Dow filed this Petition for a declaration that she

is the biological daughter of Mr. Gilroy. She is not seeking support from Mr. Gilroy. R. at 26-27.

SUMMARY OF ARGUMENT

Mrs. Dow's Petition is based on the Paternity Act and Mrs. Dow is pursuing this Petition in full compliance with the Paternity Act and Utah case law. Further, the Paternity Act itself contains 2 specific statutes of limitation and without further legislative enactments prohibiting such actions, the Petition must proceed. Accordingly, the District Court correctly denied Mr. Gilroy's Motion to Dismiss.

ARGUMENT

I. A PATERNITY ACTION FILED FOR THE SOLE PURPOSE OF LEGITIMATION, WITHOUT A CLAIM FOR SUPPORT, IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A. Utah Case Law Confirms that a Paternity Action Filed Solely for Legitimation is not Barred by the Statute of Limitations.

Utah case law supports Mrs. Dow's Petition and rejects the statute of limitations defense raised by Mr. Gilroy because Mrs. Dow's Petition is filed solely to establish paternity. In *Nielsen, State Dept. of S.S. v. Hansen*, 564 P.2d 1113 (Utah 1977), the Utah Supreme Court in reversing the trial court's dismissal of the Complaint on the

ground that the statute of limitations¹ prevents recovery, concluded: "We are unable to find any time limitation as to when a suit may be instituted to determine paternity." [emphasis added] *Id.* at 1114. The Justices in *Nielsen* unanimously agreed there is no statute of limitations in a suit filed solely to determine paternity. Chief Justice Ellett issued the main opinion. Justice Crockett concurred in the main opinion and in Justice Hall's concurring opinion. Justice Hall wrote:

However, this section [78-12-22, U.C.A.] pertains only to the issue of support and maintenance and does not encompass determinations of paternity which are separately and specifically provided for in Section 78-45a-1, ff, U.C.A.1953 (Uniform Act on Paternity), and while there is no limitation as to when a suit may be instituted to determine paternity, Section 3 thereof provides:

The father's liabilities for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

It is therefore clear that the Legislature has seen fit to specifically provide an eight year statute of limitations on the recovery of support and maintenance generally, but where *paternity* has not been determined and is in dispute such must first be determined and recovery of support and maintenance is

¹ 78-12-22, U.C.A. 1953 (1975 Pocket Supp.); is one of limitations. It says:

Within eight years:

* * *

An action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

then limited to the period of four years next preceding the commencement of the paternity action. [emphasis Added]

Id. at 1115. Next, in his dissenting opinion Justice Maughan agreed there is no limitation barring an action based solely to establish paternity. Justice Maughan wrote:

Succinctly stated, the statute and *Martinez* clearly state: if eight years have elapsed, since the inception of the claim, any action to enforce any liability due or to become due, for failure to provide support for dependent children, is barred. Conversely, any action brought for the purpose of establishing paternity, but not to enforce a support liability, is not barred. [emphasis added]

Id. Justice Wilkins concurred in Justice Maughan's dissent.

Because Mrs. Dow's Petition is based solely to establish paternity, not to enforce a support liability, her Petition may not be barred by the statute of limitations.

In *Szarak v. Sandoval*, 636 P.2d 1082 (Utah 1981), a paternity action was filed by the mother and State Department of Social Services and sought a determination of paternity coupled with a claim for child support. The action was filed six years after the birth of the child. The Court in *Szarak* noted: "In *Nielsen v. Hansen, supra*, the Court's opinion states: 'We are unable to find any time limitation as to when a suit may be instituted to determine paternity.' 564 P.2d at 1114. There was no dissent from that statement." [emphasis added] *Id.* at 1084.

The Court in *Szarak* did note two additional statutes of limitation raised by the defendant as compared to defenses raised in *Nielsen*. The statutes are Utah Code § 78-12-25 (4 year limitation) and Utah Code § 78-12-26 (3 year limitation). The Court in *Szarak* considered the additional statutes but instead ruled that the Paternity Act is tolled by Utah Code § 78-12-36 for all statutorily qualified plaintiffs during the period of the child's minority. Therefore, questions regarding the additional statutes of limitation raised in *Szarak* and their application to the Paternity Act, if any, remain unsettled.

B. Utah Statutes of Limitation do not Bar a Paternity Action Filed Solely for Legitimation.

Mrs. Dow's Petition is based on the Paternity Act as found in Utah Code § 78-45a-1 *et seq.* Contained in the Paternity Act are 2 statutes of limitation: Utah Code § 78-45a-3 and Utah Code § 78-45a-4. These statutes provide as follows:

Utah Code § 78-45a-3. Limitation on recovery from the father.

The father's liability for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

Id.

Utah Code § 78-45a-4. Limitations on recovery from father's estate.

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws.

Id. Therefore, the Paternity Act limits the father's liability or his estate's liability for support. The Paternity Act, however, does not limit the time period for an action filed solely to establish paternity.

A distinction is found in the types of statutes of limitation. A "specific" statute of limitation is a limitation found within the specific statute itself or is otherwise prescribed by statute. A "specific" statute of limitation, for example, is found in Utah Code § 75-3-107. This "specific" statute of limitation provides for a 3 year statute of limitation from the date of a decedent's death in which a petition from probate of a will can be filed. Utah Code § 75-3-107 .

The other type of statute is a "general" statute of limitation. A "general" statute of limitation is applied in conjunction with Utah Code § 78-12-1 which states:

Utah Code § 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. [emphasis added]

Id.

Mr. Gilroy claims the general statute of limitation as found in Utah Code § 78-

12-25(3) is dispositive because it provides a 4 year statute of limitation for “[a]n action for relief not otherwise provided for by law.”

However, the Paternity Act contains 2 statutes of limitation. The Paternity Act is a specific statute or instance where a different limitation is prescribed by the Legislature.

Therefore, any attempt to apply Utah Code § 78-12-1 or Utah Code § 78-12-25(3) as the statute of limitation in this action fails because the legislature already provided its own, different types of limitation in the Paternity Act. Utah Code § 78-45a-3 and Utah Code § 78-45a-3. The Legislature also provided an 8 year statute of limitation for recovery of support in Utah Code § 78-12-22. If the Utah State Legislature intended to limit a Petition based solely to establish paternity, certainly such a statute would be enacted. In addition, it is the provenance of the Legislature to create such a limitation, not for the court to judicially legislate one.

C. Application to Mrs. Dow’s Petition.

In Mrs. Dow’s Petition she seeks legitimation several years after she was notified by her mother that Mr. Gilroy is her natural father. Mrs. Dow is a licensed psychologist and has received her Ph.D. in psychology. She desires to have her legitimacy issues resolved, not only for herself, but for her children and their children. Mrs. Dow is entitled to and is provided a right of legitimation. If Mrs. Dow’s legitimation does not take

place, her injury continues. If Mrs. Dow's legitimation cannot take place, her injury is irreparable. And according to *Nielsen*, "[i]f [Mr. Gilroy] has any defenses to raise because of laches, etc., he can do so by answer. He cannot prevail by having the complaint dismissed." *Nielsen*, 564 P.2d at 1114.

CONCLUSION

Accordingly, for these reasons, Mrs. Dow requests this Court to affirm the Order entered by the Honorable Glenn K. Iwasaki dismissing Mr. Gilroy's Motion to Dismiss.

DATED this 17th day of July, 1995.



P. Kent Card
Attorney for Appellee,
Audrey Lynne Athay Dow

CERTIFICATE OF SERVICE

I certify that I caused two (2) true and correct copies of the foregoing BRIEF OF APPELLEE to be mailed, postage prepaid, on this 17th day of July, 1995 to the following:

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

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