

IN THE SUPREME COURT OF NORTH DAKOTA

S.E.L.,

Plaintiff/Appellant,

vs.

J.A.P., J.D.M.,

Supreme Court No. 20180075

Stark County No. 45-2016-DM-203

Defendants/Appellees,

and

State of North Dakota

Statutory Real Party in Interest/Appellee.

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APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER FOR DISMISSAL ENTERED ON FEBRUARY 2, 2018.

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[2] STATEMENT OF THE ISSUES

[3] The Child Support Division of the North Dakota Department of Human Services and Stark County Social Services do not disagree with, object to, or oppose S.E.L.'s statement of the issues.

[4] STATEMENT OF THE CASE

[5] This is an appeal following an order for dismissal of the case issued by the Stark County District Court in a paternity action. S.E.L. brings this appeal to dispute the District Court's dismissal of this paternity action.

[6] STATEMENT OF THE FACTS

[7] The Child Support Division of the North Dakota Department of Human Services and Stark County Social Services disagree with, oppose, and object to S.E.L.'s Statement of the Facts insofar as it provides numerous assertions which are either hearsay or are not in evidence.

[8] J.A.P. and J.D.M. lived together for several years and were involved in a sexual relationship. J.A.P. and J.D.M. were involved in this relationship until July 2013, and they resumed the relationship in November 2013. (Docket ID #53; Appendix 85). Shortly after J.J.M.'s birth in 2014, J.D.M. and J.A.P. signed a paternity acknowledgment in which J.D.M. indicated he is the father of J.J.M. This paternity acknowledgment was duly filed with the state department of health. J.D.M. and J.A.P. also signed a paternity acknowledgment in which J.D.M. indicated he is the father of J.J.M.'s older sibling. In June 2014, J.A.P. applied for and began receiving public assistance. Support for J.J.M. and his older sibling was assigned to the Department of Human Services The Dickinson

Regional Child Support Unit initiated an action against J.D.M. to establish a child support obligation for both children. According to that action's Findings of Fact, J.D.M. was legally established as the father of J.J.M. and his older sibling via acknowledgments of paternity. (Stark County No. 2015-DM-2, Docket ID #16). Based on the legally established father-child relationship, J.D.M., on March 2, 2015, was ordered to provide child support and health insurance for both children. (Docket ID #69; Appendix 128-130.) (Stark County No. 2015-DM-2, Docket ID #17).

[9] In February 2016, J.J.M. and his older sibling entered foster care. Support for both children was again assigned to the Department of Human Services. (Stark County No. 2016-DM-154, Docket ID #14).

[10] On September 13, 2016, S.E.L. initiated this action with the filing of a summons and complaint. The State of North Dakota was included as a respondent, but S.E.L. did not specify which agency within state government he intended to include. In the complaint, S.E.L. admitted that two years had passed since J.D.M. executed an acknowledgment of paternity for J.J.M. Additionally, S.E.L. alleged that he is the biological father of J.J.M., born in 2014. S.E.L. also alleged that the child's biological mother, J.A.P., never informed J.A.P. that she was pregnant. S.E.L. also requested genetic testing. The record contains no indication that J.A.P. was ever served this initial summons and complaint. (Docket ID #1-2; Appendix 7-8).

[11] On October 25, 2016, the Dickinson Regional Child Support Unit (DRCSU) filed an answer to the complaint, admitting that J.A.P. and J.D.M. executed a paternity acknowledgment for J.J.M. greater than two years prior and opposing genetic testing. This

answer also indicated three affirmative defenses. First, S.E.L. failed to serve all parties pursuant to Rule 4 of the North Dakota Rules of Civil Procedure. Second, S.E.L. failed to state a claim upon which relief can be granted. Third, S.E.L.'s claim is barred by the applicable statute of limitations. (Docket ID #10; Appendix 18-20).

[12] S.E.L. filed a motion requesting genetic testing of him and J.J.M. (Docket ID #36; Appendix 55). The District Court denied this motion for genetic testing. (Docket ID #50; Appendix 73-75).

[13] On June 13, 2017, the District Court ordered a guardian ad litem be appointed for J.J.M. The District Court also ordered S.E.L., J.A.P., and J.D.M. to provide genetic samples to assist in determination of paternity. (Docket ID #77; Appendix 141-143). The notice of entry of this order was filed June 15<sup>th</sup>, 2017. (Docket ID #82; Appendix 153). The DRCSU filed a motion for re-consideration of the order for a guardian ad litem and for genetic testing. (Docket ID #88; Appendix 177).

[14] A hearing was held in Dickinson, North Dakota on September 5, 2017. At this hearing, the District Court informed the parties that the case could not proceed unless proof of service of the Summons and Complaint upon J.A.P. was provided. (Docket ID #126; Appendix 250).

[15] On February 2, 2018, the District Court found proper service was effected upon J.A.P. through publication, found J.A.P. in default, restated that J.D.M. had previously been found in default, found that S.E.L. commenced this paternity action outside the timeframe provided in N.D.C.C. §14-20-44(2), and dismissed the action in its entirety. (Docket ID #184; Appendix 347-349). Judgment of the same was entered March 1, 2018. (Docket ID

#198; Appendix 377-389). S.E.L. filed his notice of appeal. (Docket ID #189; Appendix 357-358).

[16] LAW AND ARGUMENT

[17] The Child Support Division of the North Dakota Department of Human Services argues Paragraphs 18 through 34. Stark County Social Services argues Paragraphs 35-37. All other paragraphs are argued jointly.

[18] **I. Whether the Uniform Parentage Act, as codified in North Dakota Century Code ch. 14-20, should apply in this case.**

[19] S.E.L. argues the Uniform Parentage Act, as codified in North Dakota Century Code ch. 14-20, (hereinafter the Uniform Parentage Act) should not apply in this case. This is incorrect. The Uniform Parentage Act applies in this case because J.D.M. is the acknowledged father of J.J.M., and the effect of the relationship created by this legal designation is outlined in this Act. Therefore, it was appropriate for the District Court to apply the Uniform Parentage Act.

[20] The interpretation of a statute is a question of law, fully reviewable on appeal. Gerhardt v. C.K., 2008 ND 136, ¶ 5, 751 N.W.2d 702, 704 citing Seehafer v. Seehafer, 2005 ND 175, ¶ 12, 704 N.W.2d 841. Whether the Uniform Parentage Act should apply in this case is a question of law, which the court reviews de novo on appeal. “Under the trial de novo standard, [the Court] review[s] the files, records, and transcript of the evidence in the juvenile court, and while [the Court is] not bound by the findings of the juvenile court, [the Court] give[s] those findings appreciable weight and give[s] deference to the juvenile court’s decision, because that court had an opportunity to observe the candor and demeanor



of the witnesses.” Interest of T.F., 2004 ND 126, ¶ 9, 681 N.W.2d 786. While the present case is a district court case, the Court would apply the de novo standard the same way when considering the trial court record and the provisions of the Uniform Parentage Act. When interpreting a statute, such as the provisions of the Uniform Parentage Act, commonly understood verbiage is not to be misconstrued.

Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. “When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1-02-05.

D.E. v. K.F. and M.F., 2012 ND 253, ¶ 7, 825 N.W.2d 832. The plain language of the Uniform Parenting Act, when construed as a whole, supports the District Court’s application of its provisions to the facts of this case.

[21] A review of the trial court record and hearing transcript supports the application of the provisions of the Uniform Parentage Act. S.E.L. is seeking to invade the legal parent-child relationship that has already been established by the Uniform Parentage Act between J.J.M. and J.D.M., who is the acknowledged father of this child. The Uniform Parentage Act establishes who is an acknowledged father and the effect of this relationship. The only way S.E.L. can accomplish what he seeks, is to comply with the requirements of the Uniform Parentage Act.

[22] Under the Uniform Parentage Act, an acknowledged father is a man who has established a father-child relationship by appropriately executing an acknowledgment of paternity. N.D.C.C. § 14-20-02(1). The effect of a validly filed acknowledgment of

paternity is that it is “equivalent to an adjudication of paternity of a child....” N.D.C.C. § 14-20-15(1). J.D.M. is the acknowledged father of J.J.M. because J.D.M. and J.A.P. properly executed an acknowledgment of paternity regarding the parentage of J.J.M. Accordingly, the statute of limitations outlined in N.D.C.C. § 14-20-44 applies to this case.

[23] In support of his argument that the Uniform Parentage Act does not apply in this matter, S.E.L. relies upon sections of the California version of the Uniform Parentage Act, which is different from the North Dakota Act. S.E.L. repeatedly quotes from a provision of California law which deals with presumed fathers, but he has not shown that this case involves a presumed father as defined in North Dakota law. Section 14-20-10 of the North Dakota Century Code provides that a man is presumed to be the father of a child if:

- a. He and the mother of the child are married to each other and the child is born during the marriage;
- b. He and the mother of the child were married to each other and the child is born within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or after a decree of separation;
- c. Before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within three hundred days after its termination by death, annulment, declaration of invalidity, divorce, or after a decree of separation;
- d. After the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
  - (1) The assertion is in a record filed with the state department of health;
  - (2) He agreed to be and is named as the child's father on the child's birth certificate; or
  - (3) He promised in a record to support the child as his own; or
- e. For the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

N.D.C.C. § 14-20-10. An acknowledged father is a man who has established a father-child relationship via an acknowledgment of paternity. N.D.C.C. § 14-20-02(1), 14-20-11

through -20. J.D.M. is not the presumed father of J.J.M. J.D.M. is the acknowledged father of J.J.M. because J.D.M. and J.A.P. executed a paternity acknowledgment for J.J.M. No matter how many times and methods S.E.L. attempts to argue that this is a situation where laws regarding a presumed father should apply, they do not. S.E.L.'s application of California Code to this matter is incorrect and should be disregarded.

[24] The District Court properly applied the Uniform Parentage Act to this case because J.D.M. is the acknowledged father of J.J.M.

**[25] II. If the Court determines that the Uniform Parentage Act does apply in this case, whether the District Court erred in granting the Child Support Division of the North Dakota Department of Human Services' Motion to Dismiss.**

[26] S.E.L. argues that, if the Court finds that the Uniform Parentage Act does, in fact, apply in this case, the District Court erred in granting the Child Support Division of the North Dakota Department of Human Services (hereinafter "Child Support")' Motion to Dismiss. This is incorrect. Because the Uniform Parentage Act applies in this case, the District Court appropriately dismissed this paternity action because S.E.L. commenced his action outside of the timeframe provided by North Dakota Century Code § 14-20-44(2).

[27] Section 14-20-44, N.D.C.C., establishes the statute of limitations to be applied when there is an acknowledged or adjudicated father. This section was considered by the district court and was properly applied to the facts of this case. The district court did not err in doing so. Section 14-20-44(2) provides that, when a child has an acknowledged father, an individual other than the child and who is a third party, must commence a proceeding "not later than two years after the effective date of the acknowledgment." By

his own admission, S.E.L.'s paternity action was brought after this statutory timeframe expired. See App. 7-8.

[28] S.E.L. is not a signatory to the subject acknowledgment of paternity, so he has no standing to challenge such acknowledgment. Even if S.E.L. were a signatory to the paternity acknowledgment, he would be subject to North Dakota Century Code Section 14-20-18, which provides the same timeframe of two years after the effective date of the acknowledgment to challenge a validly filed acknowledgment of paternity. Under North Dakota Century Code Section 14-20-18, a signatory to an acknowledgment of paternity has two years to challenge that acknowledgment on the basis of fraud, duress, or material mistake of fact. Under North Dakota Century Code Section 14-20-44(2), a party who is not a signatory to an acknowledgment of paternity has two years to commence an action seeking an adjudication of paternity. In other words, the Uniform Parentage Act creates symmetry between an acknowledged father and an interloper with respect to a child covered by an acknowledgment of paternity; an interloper seeking to invade the parent-child relationship created by a paternity acknowledgment has no more or less time to act than an individual who signed an acknowledgment and then seeks to undo the acknowledgment for whatever reason.

[29] S.E.L. argues that D.E. v. K.F. and M.F., 2012 ND 253, 825 N.W.2d 832 is similar to this case. Once again, S.E.L. is conflating a presumed father with an acknowledged father. The present case regards the paternity of a child with an acknowledged father. D.E. v. K.F. and M.F. regards the paternity of a child with a presumed father. Beyond that error, the facts of the two situations contain significant differences. The mother and presumed

father in D.E. v. K.F. and M.F. died, and after their deaths, the subject child was in an informal placement with two non-relatives who had no legal claim to raise the child. J.A.P. and J.D.M. are alive, J.J.M. is under the guardianship of Stark County Social Services, and he is placed with his sister in the home of J.D.M.'s family. In D.E. v. K.F. and M.F. this court found that the informal foster parents had no standing to raise the statute of limitations defense found in N.D.C.C. § 14-20-42, concerning the limitations when there is a presumed father. In the instant case, because of the guardianship and the assignment of support, there is no lack of standing for Stark County Social Services or Child Support to raise the limitations found in N.D.C.C. § 14-20-44, concerning when there is an acknowledged father, such as in this case. D.E. v. K.F. and M.F. is not applicable under the facts in this case. Defendant's action is barred by the statute of limitations established by N.D.C.C. § 14-20-44, and it was properly dismissed.

[30] S.E.L. also argues that North Dakota Century Code sections 14-20-10, 14-20-41, and 14-20-42 apply in this case. North Dakota Century Code section 14-20-41 pertains to situations where there is no presumed, acknowledged, or adjudicated father. This section does not apply because J.J.M. has an acknowledged father, J.D.M. North Dakota Century Code sections 14-20-10 and 14-20-42 are specific to situations where there is a presumed father. These sections do not apply because J.J.M. does not have a presumed father. (Stark County No. 2015-DM-2, Docket ID #16).

[31] Additionally, S.E.L. states that Section 14-20-42 was applied by the District Court. See Appellant's Brief 15-16. This is incorrect. A review of the Findings of Fact,

Conclusions of Law, and Order for Dismissal dated February 2, 2018, shows that the District Court applied North Dakota Century Code section 14-20-44. (App. 352).

[32] S.E.L. argues that North Dakota Century Code Section 14-20-26 could have been applied to allow for genetic testing in this case. This is incorrect. Section 14-20-26(1) states, "Except as otherwise provided in sections 14-20-25 through 14-20-58, the court shall order the child and other designated individuals to submit to genetic testing." The first clause of the quoted statute is determinant. North Dakota Century Code § 14-20-44(2) must be considered when reading and applying Section 14-20-26. Because this case involves an acknowledged father, and because the action commenced more than two years after the effective date of the acknowledgment, Section 14-20-26 may not be applied to allow for genetic testing in this case. S.E.L.'s paternity action was barred by the statute of limitations, and the District Court had no basis for applying N.D.C.C. § 14-20-26.

[33] S.E.L. asserts that the District Court should have considered North Dakota Century Code Section 14-20-43 instead of dismissing the case. This section allows the District Court to deny a motion seeking an order for genetic testing in a proceeding to adjudicate the parentage of a child who has a presumed father or an acknowledged father. This section also requires the District Court to consider the best interest of the child when determining whether to deny a motion seeking an order for genetic testing. The District Court would have erred if it had considered section 14-20-43 because this case does not involve a presumed father and the statute of limitations of section 14-20-44 bars such a consideration because the child has an acknowledged father.

[34] S.E.L. argues that it is highly probable that he is the father of J.J.M. because he was in a sexual relationship with J.A.P. at or around the likely time of J.J.M.'s conception. See Appellant's Brief 17. S.E.L.'s belief or desire to be J.J.M.'s father does not create an exception to the statute of limitations established by N.D.C.C. § 14-20-44.

[35] Further, it is important to note that J.A.P. and J.D.M. resided together during a time when J.J.M. could have been conceived. (App. 85-86, 180). As such, there is question regarding who the biological father may be despite S.E.L.'s assertions.

[36] S.E.L., without analyzing the factors provided in N.D.C.C. § 14-20-43, indicates that if the district court would have considered this statute, it would have "undeniably" resulted in the court ordering genetic testing. See Appellant's Brief. Stark County Social Services opposes this assertion. In the event the factors set forth in Section 14-20-43 of the North Dakota Century Code were to be considered, the determination should be affirmed as there is a relationship with the child and acknowledged father; there is a relationship between the child and his older sibling; harm could certainly result if the acknowledged paternity is successfully disproved; and there is no relationship between J.J.M. and S.E.L.

[37] S.E.L. makes assertions that affirming the district court's order would be harmful to the child, but this assertion is not based in fact or law. A parent's relationship with a biological child is entitled to constitutional protection, but that relationship is neither absolute nor unconditional. In re K.J., 2010 ND 46, ¶17, 779 N.W.2d 635; quoting Interest of D.C.S.H.C., 2007 ND 102 ¶13, 733 N.W.2d 902. Children need consistency, predictability, and stability in their environments with caretakers to progress in healthy development. In re K.J., at ¶6. J.J.M. is receiving this where he is at with his older sibling

in the family placement of J.D.M. (App. 133-134). Reunification efforts must be done in a time frame that enables the child to return to the home without causing severe dislocation from emotional attachments formed during long-term foster care. In re T.K., 2001 ND 127, ¶ 15, 630 N.W.2d 38. S.E.L. simply did not commence this action in a manner allowed by law, and J.J.M. should not be required to wait any longer for a resolution to this matter.

[38] The District Court appropriately dismissed this paternity action because S.E.L. commenced his action outside of the timeframe provided by North Dakota Century Code § 14-20-44(2). Consideration of other statutes that regard presumed fathers are inapplicable to this case. Therefore, the District Court's dismissal of this case should be affirmed.

[39] CONCLUSION

[40] The District Court did not err in applying the Uniform Parentage Act, as codified in North Dakota Century Code ch. 14-20, because J.D.M. is the acknowledged father of J.J.M. The District Court did not err in dismissing this case because S.E.L.'s action was brought outside the two-year time frame provided in North Dakota Century Code Section 14-20-44(2).

Dated this 19<sup>th</sup> day of September, 2018.

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**CERTIFICATE OF SERVICE**

[43] I hereby certify that a true and correct copy of the foregoing Appellees' Brief was served on the 19<sup>th</sup> day of September, 2018, by sending via electronic mail to the following:

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**CERTIFICATE OF COMPLIANCE**

[44] The undersigned, as attorneys for the Child Support Division of the North Dakota Department of Human Services and Stark County Social Services, respectively, in the above captioned matter, and as the authors of the Joint Appellee Brief, hereby certified, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Appellee Brief, excluding words in the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance totals 3520 words. Appellees' joint brief was created using Microsoft Word 365.

Dated this 19<sup>th</sup> day of September, 2018.

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