STATE EX REL. HERMESMANN v. SEYER

252 Kan. 646 (1993) | Cited 7 times | Supreme Court of Kansas | March 5, 1993

The opinion of the court was delivered by

Shane Seyer et al., appeal from an order of the districtcourt granting the Kansas Department of Social and RehabilitationServices (SRS) judgment for amounts paid for the birth andsupport of Seyer's daughter and ordering Seyer to pay monthlychild support reimbursement to SRS.

The facts, as best we can determine them from an inadequaterecord, do not appear to be seriously in dispute.

Colleen Hermesmann routinely provided care for Shane Seyer as ababy sitter or day care provider during 1987 and 1988. The twobegan a sexual relationship at a time when Colleen was 16 yearsold and Shane was only 12. The relationship continued over aperiod of several months and the parties engaged in sexualintercourse on an average of a couple of times a week. As aresult, a daughter, Melanie, was born to Colleen on May 30, 1989.At the time of the conception of the child, Shane was 13 yearsold and Colleen was 17. Colleen applied for and receivedfinancial assistance through the Aid to Families with DependentChildren program (ADC) from SRS.

On January 15, 1991, the district attorney's office of ShawneeCounty filed a petition requesting that Colleen Hermesmann beadjudicated as a juvenile offender for engaging in the act ofsexual intercourse with a child under the age of 16, Shanandoah(Shane) Seyer, to whom she was not married, in violation ofK.S.A. 1992 Supp. 21-3503. Thereafter, Colleen Hermesmann enteredinto a plea agreement with the district attorney's office,wherein she agreed to stipulate to the lesser offense ofcontributing to a child's misconduct, K.S.A. 1992 Supp. 21-3612.On September 11, 1991, the juvenile court accepted thestipulation, and adjudicated Colleen Hermesmann to be a juvenileoffender.

On March 8, 1991, SRS filed a petition on behalf of ColleenHermesmann, alleging that Shane Seyer was the father of Colleen'sminor daughter, Melanie. The petition also alleged that SRS hadprovided benefits through the ADC program to Colleen on behalf ofthe child and that Colleen had assigned support

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rights due herself and her child to SRS. The petition requestedthat the court determine paternity and order Shane to reimburseSRS for all assistance expended by SRS on Melanie's behalf. OnDecember

17, 1991, an administrative hearing officer found Shanewas Melanie's biological father. The hearing officer furtherdetermined that Shane was not required to pay the birth expensesor any of the child support expenses up to the date of thehearing on December 17, 1991, but that Shane had a duty tosupport the child from the date of the hearing forward.

Shane requested judicial review of the decision of the hearingofficer, contending that the hearing officer "should have found afailure of consent would terminate rights." SRS sought review,asserting that the hearing officer correctly ruled that the issueof consent was irrelevant, but erred in allowing Shane to presentevidence pertaining to the defense of consent. SRS also allegedthat the hearing officer's denial of reimbursement to the Statefor funds already paid was arbitrary and capricious and contraryto the mandates of K.S.A. 1992 Supp. 39-718b.

The district judge, upon judicial review of the hearingofficer's order, determined that Shane was the father of MelanieHermesmann and owed a duty to support his child, stating: "Okay. I'm ready to rule. It's my view in this case that the Hearing Officer's ruling, which essentially is that a minor may be held legally liable to provide reimbursement to the State of Kansas under K.S.A. 39-701 et seq., is a correct ruling of law and that the issues of consent and the criminal case and so forth are not really relevant in a paternity proceeding, which we're talking about, civil liability to support a child. "Second, I'm going to hold that the State, by proceeding under 39-701 et seq., that there is no discretion in the Court regarding liability. The courts>, I believe, are ministerial at that point and are the vehicle for SRS to collect the support and it was error for the Hearing Officer not to assess all of the monies paid jointly and severally liable against both of the parents of this child. "And so I would enter a judgment for all of the SRS reimbursement against Colleen Hermesmann and Shane Seyer jointly and severally for the six thousand plus."

The court found that the issue of Shane's consent wasirrelevant and ordered Shane to pay child support of $50 permonth. The court also granted SRS a joint and several judgmentagainst Shane and Colleen in the amount of $7,068, for assistanceprovided by

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the ADC program on behalf of Melanie through February 1992. Thejudgment included medical and other birthing expenses as well asassistance paid after Melanie's birth. Shane appeals the judgmentrendered and the order for continuing support but does notcontest the trial court's paternity finding. SRS has notcross-appealed from any of the orders or judgment of the districtcourt.

This case was transferred from the Court of Appeals by thiscourt's own motion. K.S.A. 20-3018(c).

Shane has designated three issues on appeal, which he states asfollows: "I. Can a minor, who is a victim of the crime of indecent liberties with a child, be responsible for any children conceived of the criminal union? "II. Is it sound public policy for a court to order child support when the order creates

a clash of one minor's right to protection from being the victim of a crime with another minor's right to parental support? "III. Can a judgment ordering joint and several liability for child support be an adequate remedy when it fails to account for the wrongdoing of Plaintiff-appellee Hermesmann?"

Shane's argument on appeal is based on three basic premises.(1) Shane Seyer, as a minor under the age of 16, was unable toconsent to sexual intercourse. (2) Because he was unable toconsent to sexual intercourse, he cannot be held responsible forthe birth of his child. (3) Because he cannot be held responsiblefor the birth, he cannot be held jointly and severally liable forthe child's support.

Shane asserts as his first issue that, because he was a minorunder the age of 16 at the time of conception, he was legallyincapable of consenting to sexual intercourse and thereforecannot be held legally responsible for the birth of his child.Shane cites no case law to directly support this proposition.Instead, he argues that Colleen Hermesmann sexually assaultedhim, that he was the victim of the crime of statutory rape, andthat the criminal statute of indecent liberties with a childshould be applied to hold him incapable of consenting to the act.

What used to be commonly called "statutory rape" is nowincluded in the statutory crime of indecent liberties with achild. The statute, K.S.A. 1992 Supp. 21-3503, reads in pertinentpart:

"(1) Indecent liberties with a child is engaging in any of the following acts with a child who is under 16 years of age:

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(a) Sexual intercourse."

Both the administrative hearing officer and the district courtdetermined that whether Shane consented to sexual intercourse wasnot a relevant issue in a civil paternity and child supportproceeding.

SRS maintains that Shane was not the victim of the crime ofstatutory rape. SRS points out that while Colleen was originallycharged in juvenile proceedings with a violation of K.S.A. 1992Supp. 21-3503, she later stipulated to a lesser charge ofcontributing to a child's misconduct, K.S.A. 1992 Supp. 21-3612.While SRS is technically correct in asserting that Colleen wasnever found guilty of violating 21-3503, its entire case is basedupon the fact that Shane is the father of the child. As it isundisputed that Shane was under the age of 16 when conceptionoccurred, and throughout the entire time the sexual relationshipcontinued, the argument of SRS is specious at best. The admittedfacts established, without doubt, all of the elements necessaryto prove a crime under K.S.A. 1992 Supp. 21-3503(1)(a), and thefact that Colleen was able to plea bargain for a lesser offensedoes not preclude Shane from alleging he was a "victim" ofstatutory rape.

Although the issue of whether an underage alleged "victim" of asex crime can be held liable for support of a child born as aresult of such crime is one of first impression in Kansas, otherjurisdictions have addressed the question.

In In re Paternity of J.L.H., 149 Wis.2d 349, 441 N.W.2d 273(1989), J.J.G. appealed from a summary judgment in a paternityproceeding determining that he was the father of J.L.H. andordering him to pay child support equal to 17 percent of hisgross income. J.J.G. was 15 years old when the child wasconceived. On appeal, he asserted that the child's mother, L.H.,sexually assaulted him, contrary to Wis. Stat. § 940.225(2)(e)(1979) (the Wisconsin statutory rape statute in effect at thetime), and that, as a minor, he was incapable of consent underthe sexual assault law. The court rejected this argument andstated:

"The assumption underlying appellant's opposition to the motion for summary judgment is that a putative father in a paternity action has a defense if the sexual intercourse occurred without his consent. The amended civil complaint which his opposing affidavit incorporates alleges that the child born to L.H. was `the result of nonconsensual sexual assault in violation of

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sec. 940.225(2)(e), Wis. Stats.' . . . . That statute provides that it is a felony for a person to have `sexual intercourse with a person who is over the age of 12 years and under the age of 18 years without consent of that person, as consent is defined in sub. (4).' Subsection (4) provides:

`Consent' as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. A person under 15 years of age is incapable of consent as a matter of law. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2): (a) a person who is 15 to 17 years of age. . . .' . . . . "We reject appellant's assertion that because he was fifteen years old when he had intercourse with L.H., he was incapable of consent. The assertion rests on the argument that sec. 940.225(4)(a), Stats. 1979, created a rebuttable presumption to that effect. That statute pertains to the guilt of a criminal defendant, not to the civil rights or duties of the victim. Paternity actions are civil proceedings. State ex rel. Lyons v. DeValk, 47 Wis.2d 200, 203, 177 N.W.2d 106, 107 (1970). The presumption created by sec. 940.225(4)(a) does not apply in this proceeding." 149 Wis.2d at 355-57.The court then goes on to state: "If voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. This is true even if a fifteen-year old boy's parenthood resulted from a sexual assault upon him within the meaning of the criminal law." 149 Wis.2d at 360.

Although the question of whether the intercourse with Colleenwas "voluntary," as the term is usually understood, is notspecifically before us, it was brought out in oral argumentbefore this court that the sexual relationship between Shane andhis baby sitter, Colleen, started when he was only 12 years

oldand lasted over a period of several months. At no time did Shaneregister any complaint to his parents about the sexual liaisonwith Colleen.

In Schierenbeck v. Minor, 148 Colo. 582, 367 P.2d 333 (1961),Schierenbeck, a 16-year-old boy, appealed the adjudication in adependency proceeding that he was the father of a child born to a20-year-old woman. On appeal, Schierenbeck cited a Coloradocriminal statute which defined rape in the third degree by afemale of a male person under the age of 18 years. In discussingthe relevance of the criminal statute, the court stated:

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"Certain it is that [Schierenbeck's] his assent to the illicit act does not exclude commission of the statutory crime, but it has nothing to do with assent as relating to progeny. His youth is basic to the crime; it is not a factor in the question of whether he is the father of [the child]. "`The putative father may be liable in bastardy proceedings for the support and maintenance of his child, even though he is a minor. . . .' Bastards, 10 C.J.S. 152, § 53. If Schierenbeck is adjudged to be the father of [the child] after a proper hearing and upon sufficient evidence, he should support [the child] under this fundamental doctrine." 148 Colo. at 586.The trial court decision was reversed on other grounds notpertinent to the facts of our case and remanded for furtherproceedings.

The Kansas Parentage Act, K.S.A. 38-1110 et seq.,specifically contemplates minors as fathers and makes noexception for minor parents regarding their duty to support andeducate their child. K.S.A. 38-1117 provides, in part: "If a man alleged or presumed to be the father is a minor, the court shall cause notice of the pendency of the proceedings and copies of the pleadings on file to be served upon the parents or guardian of the minor and shall appoint a guardian ad litem who shall be an attorney to represent the minor in the proceedings."K.S.A. 1992 Supp. 38-1121(c) provides, in part: "Upon adjudging that a party is the parent of a minor child, the court shall make provision for support and education of the child including the necessary medical expenses incident to the birth of the child. The court may order the support and education expenses to be paid by either or both parents for the minor child."If the legislature had wanted to exclude minor parents fromresponsibility for support, it could easily have done so.

As previously stated, Shane does not contest that he is thebiological father of the child. As a father, he has a common-lawduty, as well as a statutory duty, to support his minor child.Keller v. Guernsey, 227 Kan. 480, 486, 608 P.2d 896 (1980);Strecker v. Wilkinson, 220 Kan. 292, 298, 552 P.2d 979 (1976);Grimes v. Grimes, 179 Kan. 340, 343, 295 P.2d 646 (1956). Thisduty applies equally to parents of children born out of wedlock.Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974); Doughty v.Engler, 112 Kan. 583, 585, 211 P. 619 (1923).

Under the statutory and common law of this state, Shane owes aduty to support his minor child. K.S.A. 1992 Supp. 21-3503

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does not apply to a civil proceeding and cannot serve to relieveShane of his legal responsibilities towards his child. Shanerelies upon six cases to support his position: State v. Fike,243 Kan. 365, 757 P.2d 724 (1988); State v. Hutchcraft,242 Kan. 55, 744 P.2d 849 (1987); State v. Lilley, 231 Kan. 694,647 P.2d 1323 (1982); State v. Price, 215 Kan. 718, 529 P.2d 85(1974); State v. Eberline, 47 Kan. 155, 27 P. 839 (1891);State v. Fulcher, 12 Kan. App. 2d 169, 737 P.2d 61 (1987). Eachof these cases involves the age of consent issue under the Kansasstatutory rape law and its present equivalent. We conclude thatthe issue of consent to sexual activity under the criminalstatutes is irrelevant in a civil action to determine paternityand for support of the minor child of such activity.Consequently, Shane's reliance on the foregoing criminal cases ismisplaced.

For Shane's next issue, he asserts that it is not sound publicpolicy for a court to order a youth to pay child support for achild conceived during the crime of indecent liberties with achild when the victim was unable to consent to the sexualintercourse. He claims that while the Kansas Parentage Actcreates a State interest in the welfare of dependent relatives,the policy behind the Parentage Act is not to force a minor, whois unable to consent to sexual intercourse, to support a childborn from the criminal act.

Shane provides no case law specifically on point, but onceagain relies upon the Kansas cases involving statutory rape. Healso refers the court to K.S.A. 39-718a, which authorized theSecretary of SRS to collect child support from an absent parent.Shane suggests that underlying K.S.A. 39-718a is the presumptionthat a parent consented to the conception, and argues that theproper remedy for SRS in this case is to seek support exclusivelyfrom Colleen Hermesmann, as she was the only parent legally ableto consent to the conception of the child. What Shane has failedto recognize, however, is that K.S.A. 39-718a was repealed by thelegislature in 1988. L. 1988, ch. 218, § 6. Any argument basedupon a statute which was repealed five years ago is obviouslywithout merit.

However, the argument of two allegedly conflicting publicpolicies of this state does merit consideration. Otherjurisdictions have recognized the conflict between a State'sinterest in protecting

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juveniles and a State's interest in requiring parental support ofchildren. In In re Parentage of J.S., 193 Ill. App.3d 563,550 N.E.2d 257 (1990), the trial court ordered a minor father to paychild support for his illegitimate son. The minor father appealedthe order, but did not contest the trial court's paternityfinding. In affirming the trial court's decision orderingsupport, the court stated: "The respondent initially argues that he should not be required to support his child, because he was a 15-year-old minor when the child was conceived. He contends that Illinois public policy protects minors from the consequences of their improvident conduct. "We note that contrary to the respondent's position, Illinois public policy has never offered blanket protection to reckless minors.

[Citations omitted.] At the same time, Illinois public policy has recognized the blanket right of every child to the physical, mental, emotional, and monetary support of his or her parents. (Ill. Rev. Stat. 1987, ch. 40, par. 2501.1.) The public has an interest in protecting children from becoming wards of the State. In re Petition of Sullivan (1985), 134 Ill. App.3d 455, 480 N.E.2d 1283. "In the instant case, we find that the public policy mandating parental support of children overrides any policy of protecting a minor from improvident acts. We therefore hold that the trial court properly found that the respondent was financially responsible for his child." (Emphasis added.) 193 Ill. App.3d at 565.

In Commonwealth v. A Juvenile, 387 Mass. 678, 442 N.E.2d 1155(1982), a 16-year-old father was ordered to pay child support of$8 a week toward the support of his child born out of wedlock.The minor father admitted his paternity, but appealed the supportorder. On appeal, the court affirmed the judgment of the lowercourt and said:

"The defendant's claim rests on an assertion that a support order is inconsistent with the statutory purpose of treating a juvenile defendant as a child `in need of aid, encouragement and guidance.' [Citation omitted.] Although we acknowledge that purpose, we see no basis, and certainly no statutory basis, for concluding that a juvenile should be free from any duty to support his or her illegitimate child. The illegitimate child has interests, as does the Commonwealth." 387 Mass. at 680.

This State's interest in requiring minor parents to supporttheir children overrides the State's competing interest inprotecting juveniles from improvident acts, even when such actsmay include criminal activity on the part of the other parent.Considering the three persons directly involved, Shane, Colleen,and Melanie,

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the interests of Melanie are superior, as a matter of publicpolicy, to those of either or both of her parents. This minorchild, the only truly innocent party, is entitled to support fromboth her parents regardless of their ages.

As his third issue, Shane asserts that the district court erredin finding he and Colleen were jointly and severally liable forthe child support. He argues that, as Colleen was the perpetratorof the crime of statutory rape, she alone should be heldresponsible for the consequences of the act, and he requests thiscourt to remand the case to the district court with instructionsto order Colleen solely responsible for the support pursuant toK.S.A. 39-718a. He states that K.S.A. 39-701 et seq. does notrequire a judgment ordering joint and several liability for childsupport.

Once again, Shane's reliance upon K.S.A. 39-718a is improper.This statute was repealed in 1988. L. 1988, ch. 218, § 6. Thecontrolling statute, as SRS points out, is K.S.A. 1992 Supp.39-718b, which explicitly requires a court to order joint andseveral liability, with some exceptions not applicable here, whenmore than one person is legally obligated to support the child.SRS correctly notes that the

mother's conduct has no bearing uponthe parties' respective obligations to support their child. Othercourts> have so held. In Weinberg v. Omar E., 106 A.D.2d 448,448, 482 N.Y.S.2d 540 (1984), the court held: "[T]he mother's alleged fault or wrongful conduct is irrelevant under section 545 of the Family Court Act [citation omitted]. The primary purpose of a paternity proceeding is to protect the welfare of the illegitimate child and, accordingly, the mother's conduct should have no bearing on the father's duty of support nor upon the manner in which the parents' respective obligations are determined [citation omitted]."

SRS also notes that Shane cites no authority in support of hiscontention. Nowhere does the law in this state suggest that themother's "wrongdoing" can operate as a setoff or bar to afather's liability for child support. Under the facts aspresented to this court, the district court properly held thatShane owes a duty of support to Melanie and properly ordered thatShane and Colleen were jointly and severally liable for themonies previously paid by SRS.

While the foregoing disposes of the issues on appeal, we wouldbe remiss if we did not comment upon various other facets of

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this appeal. This court was not supplied with any meaningfulrecord in this case. The only record supplied by counsel was aportion of the pleadings in the district court. No transcript orother evidence of the proceedings before the hearing officer wasincluded in the record, and the facts, while apparently notdisputed, have been gleaned from the pleadings, briefs, argumentsbefore this court, and a transcript of the arguments before thedistrict judge which this court felt compelled to obtain. Theappellants' brief does refer to two exhibits, allegedly attachedto their brief, in support of some of their statements of fact.However, such exhibits were not made part of the record onappeal, nor were they attached as exhibits to the brief. Neitherparties brief could be considered adequate, let alone a model,for appellate procedure.

Additionally, counsel for SRS joined the parents of Shane asparties defendant, although no relief was sought against thosedefendants. At oral argument, appellate counsel had noexplanation for joining Shane's parents, but it appears trialcounsel may have done so under some mistaken idea that it wasnecessary to obtain valid service on Shane.

Finally, we call attention to the fact that no issue was raisedas to the propriety of the judgment against a youngster who wasstill a full-time student when these proceedings were commenced.When questioned in oral argument about the policy of SRS inseeking a judgment in excess of $7,000, counsel replied with thesurprising statement that SRS had no intention of ever attemptingto collect its judgment. Under such circumstances, the reason forseeking that portion of the judgment still eludes us.

The judgment of the district court is affirmed.

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