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UDOMEH V. JOSEPH: WHEN ACKNOWLEDGING PATERNITY IS NOT ENOUGH

Taylor Gay*

I. BACKGROUND

The case of *Udomeh v. Joseph* involves a Plaintiff named Fidel Udomeh who filed suit for the wrongful death of his son.[1] Mr. Udomeh claimed that he and Sandra Joseph were the biological parents of a child named S.U., who was born on June 16, 1997. Although Mr. Udomeh and Ms. Joseph were never married, Mr. Udomeh alleged that he played an active role in S.U.'s life.

In February of 2006, Mr. Udomeh discovered that Ms. Joseph attempted to commit suicide while she was in the presence of S.U. Ms. Joseph subsequently committed herself for psychiatric treatment, and was released a few days later. Following this, Mr. Udomeh lodged a formal complaint against Ms. Joseph with the Louisiana Department of Social Services (LDSS). The LDSS, who employed Ms. Joseph, responded to his complaint by sending a form letter stating that they were "unable to investigate the situation because it does not meet the legal and policy definition of child abuse or neglect."

A few years later, in January of 2009, Ms. Joseph experienced a psychotic episode at a restaurant while S.U. was with her. The Lafayette City Police sent her to the University Medical Center (UMC) for treatment, and Ms. Joseph was eventually released with S.U in her custody. Later that month, Ms. Joseph began acting strangely and erratically at work, and her coworkers at the LDSS consequently filed complaints about Joseph, voicing concern for S.U.'s safety.

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1. Udomeh v. Joseph, 75 So. 3d 523 (La. App. 3d Cir. 2011).

Finally, on February 21, 2009, Ms. Joseph drove S.U. to Grand Coteau, Louisiana, and ordered him out of the car. She then used her car to intentionally and repeatedly run over S.U. until he died.

Mr. Udomeh accordingly filed a wrongful death action against Ms. Joseph, UMC, and the LDSS. UMC and the LDSS filed exceptions of no right of action and/or lack of procedural capacity. Because Mr. Udomeh failed to institute a Petition for Judgment of Filiation under Louisiana Civil Code article 198, the trial court sustained their exceptions and dismissed Mr. Udomeh's case against UMC and LDSS with prejudice.

Mr. Udomeh thereafter appealed the trial court's decision, alleging that the trial court erred in granting the exception because: "(1) Louisiana Civil Code article 198 does not require that a father establish paternity before having a right of action for wrongful death, (2) Such a finding leads to inequitable, unjust, and otherwise absurd consequence, and (3) The court should have considered the dilatory exceptions of lack of procedural capacity instead."

II. JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEAL OF LOUISIANA

A majority of the appellate court affirmed the trial court's finding that Mr. Udomeh lacked a right of action.[2] The court relied on First Circuit case *Thomas v. Ardenwood Props. & Scottsdale Ins. Co.*,[3] which addressed the question of whether a biological father could institute a wrongful death action on behalf of his child born out-of-wedlock.[4] The First Circuit suggested that such a father would have a right to bring this action, but only if he first complied with the requisite procedural formalities. The procedural formalities contemplated by the First Circuit include a judgment of filiation under Louisiana Civil Code article 198—action to obtain

2. *Id.* at 524.
3. *See* Thomas v. Ardenwood Props. & Scottsdale Ins. Co., 43 So. 3d 213 (La. App. 1 Cir. 2010).
4. Udomeh, 75 So. 3d at 525.

which must be instituted within a peremptive period of one year from the day of the child's death.

In *Udomeh v. Joseph*, although Mr. Udomeh alleged that he was S.U.'s biological father in his wrongful death petition, Mr. Udomeh never instituted a Petition for Judgment of Filiation to establish his filiation to S.U. within the one-year peremptive period. Thus, because Mr. Udomeh failed to timely institute an action to establish filiation, the appellate court decided that he is no longer within the class of persons entitled to bring a wrongful death action on S.U.'s behalf.

III. DISSENT BY JUDGE COOKS

Judge Cooks dissented from the majority's opinion. According to Judge Cooks, Louisiana Civil Code article 198 does not compel a father to institute an action to establish paternity before pursuing a wrongful death or survival action found in Louisiana Civil Code articles 2315.1 and 2315.2.[5] Judge Cooks suggested that Louisiana Civil Code article 198 is not mandatory. Her proposition is based on the seemingly permissive language found in the statute, which states that a "man *may* institute an action to establish his paternity." Judge Cooks argued that the majority should not have allowed the permissive language found in Louisiana Civil Code article 198 to "thwart the right of action provided to biological fathers to bring actions under our tort laws."

Judge Cooks went on to suggest that statutes found in the family law section of the Louisiana Civil Code should not override statutes found in the obligations section of the Code. She also noted that the majority should not have granted the Defendants' motion to strike references to and copies of the documents attached to Udomeh's brief, because these references and copies contained evidence that Udomeh was the biological father of S.U.[6]

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5. *Id.* at 526

6. *Id.* at 528. These stricken documents and records show that Mr. Udomeh is listed as the father of S.U. on S.U.'s birth certificate and that Mr.

IV. COMMENTARY

This case provides a stern warning for Louisiana lawyers wishing to avoid malpractice claims: if representing an unfiliated parent of a decedent child, you should institute a Petition for Judgment of Filiation contemporaneously with any wrongful death and survival actions or, at least, institute such an action within the one year peremptive period.[7]

In the author's opinion, the court's holding is severely unjust because the court allowed Mr. Udomeh's failure to comply with a vague procedural requirement, i.e. the requirement to file a Petition for Judgment of Filiation, to preclude his opportunity to recover damages for the loss of his son. Mr. Udomeh obviously cared for S.U. He provided child support to S.U., was declared to be S.U.'s biological father in a court proceeding, and was listed as S.U.'s father on S.U.'s birth certificate.[8] Furthermore, Mr. Udomeh attempted to protect S.U. from the unstable behavior of Ms. Joseph, but his efforts were quashed by LDSS, who employed Ms. Joseph.

Udomeh always held himself out to the community as S.U.'s father. The trial judge also stated that he had "no doubt" that Mr. Udomeh was S.U.'s biological father. Further, Udomeh voluntarily paid child support until Ms. Joseph filed for state mandated child support in 2001. After Ms. Joseph's filing for mandated child support, there were court proceedings in which it was determined that Mr. Udomeh was indeed S.U.'s biological father, and the court ordered him to pay monthly child support to S.U. on that basis.

7. This warning is equally applicable to cases, like *Udomeh*, where the plaintiff has filiated himself to the child by means of a formal acknowledgment under Louisiana Civil Code article 196. Article 196 provides that a man may formally acknowledge a child not filiated to another man. Formal acknowledgment may be accomplished by either authentic act or signing the child's birth certificate. This acknowledgement creates a presumption that the man who acknowledges the child is the father. Nevertheless, this presumption can only be invoked on behalf of the child. In the *Udomeh* matter, Mr. Udomeh was presumed to be S.U.'s father under Louisiana Civil Code article 196 because he formally acknowledged S.U. by signing his birth certificate. Mr. Udomeh's presumption of paternity, however, could have only been invoked by S.U. Thus, Mr. Udomeh could not use this presumption of paternity in his wrongful death and survival action because the effects of this article flow only in the child's favor. LA. CIV. CODE ANN. art. 196 (2009).

8. Udomeh, 75 So. 3d at 527.

As Judge Cooks' dissent correctly points out, Louisiana Civil Code article 198 does not require a father to file a Petition for Judgment of Filiation.[9] The author thus prays that the Louisiana Supreme Court will take notice of this article's words and reverse the lower court's decision so as to avoid inequitable judgments like the one found in *Udomeh v. Joseph*.

9. *Id*. at 527.