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I. INTRODUCTION

One of the most universal and strongest presumptions in the law is that a child born to a married woman is presumed to be the legitimate offspring of her husband.[1] The presumption arose to preserve the integrity of the legally recognized family and to shelter the child from the "unjust social stigma"[2] which attaches to the very term "bastard." Nevertheless, most jurisdictions, including Utah, hold that the presumption can be rebutted.[3] Once rebutted, nature and law continue to define the rights, responsibilities, and relationship between biological father and child; but the legal rights and relationship of a husband to his wife's illegitimate offspring are put into question.

In *J.W.F. v. Schoolcraft*,[4] the Utah Court of Appeals held that a husband has no right to custody of his wife's illegitimate child born during their marriage where he admittedly is not the biological father. In so doing, it pronounced a broad absolute rule which, on its face, fails to comprehend equitable situations where the husband-child bond may be thicker than blood. It therefore carries the danger of misapplication by future courts to cut off relationships which may be in the best interests of all concerned. The purpose of this note is to propose a more sound and equitable method for adjudicating such cases. Specifically, this note will (1) review the court's analysis in *Schoolcraft*; (2) discuss weaknesses in its method of rebutting the presumption of legitimacy and determining the existence of parental rights; and (3) offer an alternative analysis of the rights and relationships in such cases as defined by Utah statutes and applied through equitable custody principles. Although reference is made to cases outside of Utah, the primary focus is upon Utah statutes and decisions.

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1. Teece v. Teece, 715 P.2d 106, 107 (Utah 1986); Holder v. Holder, 9 Utah 2d 163, 164-65, 340 P.2d 761, 762-63 (1959).

2. *Holder*, 9 Utah 2d at 165, 340 P.2d at 763. *Accord* Lopes v. Lopes, 30 Utah 2d 393, 395, 518 P.2d 687, 689 (1974).

3. *Teece*, 715 P.2d at 107.

4. 763 P.2d 1217 (Utah App. 1988).

II. *J.W.F. v. Schoolcraft*

A. Facts and Lower Court Procedure

Winfield and Linda Schoolcraft were married in California on October 6, 1984. They lived together for approximately eight months before Linda left Winfield.[5] On November 5, 1985, she gave birth to a son, J.W.F., in Ogden, Utah. She abandoned him one month later.[6] Subsequently, the parental rights of both Linda and the purported father, Michael Ford, were terminated.[7]

Winfield first learned of J.W.F. in August 1986 when he received a letter from the Utah State Division of Family Services, who had custody of J.W.F.[8] Since he was still married to Linda, he petitioned for custody as the presumed father. Convinced that Winfield could not be the biological father,[9] the court-appointed guardian ad litem claimed that Winfield had no legal right to custody.[10] The lower court ordered Human Leucocyte Antigen (HLA) blood tests, which excluded Winfield as the natural father.[11] Accordingly, the lower court held that Winfield "was not the father of J.W.F. and, therefore, had no legal rights to his custody."[12]

B. Court of Appeals' Analysis

On appeal, Winfield Schoolcraft conceded that he was not the biological father, but claimed to be the "legal father."[13] Thus, the Utah Court of Appeals examined the "unique issue . . . [of] the right a husband has to the custody of a child when he, admittedly, is not the biological father of the child, but the child was conceived and born during his marriage to the

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5. The record is unclear as to the exact date Linda left Winfield. *Id.* at 1218 n.1.

6. *Id.* at 1218.

7. *Id.* at 1219.

8. Brief of Respondent Guardian Ad Litem at 5-6, J.W.F. v. Schoolcraft, 763 P.2d 1217 (Utah App. 1988) (No. 870146-CA) [hereinafter Brief of Respondent Guardian Ad Litem]. By this time, J.W.F. was about nine months old.

9. Apparently, J.W.F. "is of Negro ancestry," while Winfield and Linda are "of fair complexion and Anglo-Saxon." *Id.* at 6.

10. J.W.F. v. Schoolcraft, 763 P.2d 1217, 1218-19 (Utah App. 1988).

11. Brief of Respondent Guardian Ad Litem, *supra* note 8, at 7. The tests were ordered by the juvenile court pursuant to Utah Code Ann. § 78-25-18 (1987). *Id. See* Teece v. Teece, 715 P.2d 106, 107 (Utah 1986) (blood tests are mandated in any civil action in which paternity is at issue).

12. *Schoolcraft*, 763 P.2d at 1219.

13. *Id.*

mother."[14] This involved (1) examining the effect of the presumption of legitimacy, and (2) determining the rights of the husband in the event the presumption was rebutted.

1. *Rebutting the presumption of legitimacy*

The court of appeals dealt with the presumption of legitimacy in summary fashion. Citing *Teece v. Teece*,[15] the court noted that Utah recognizes the presumption, but that it is rebuttable. The court held that by conceding non-paternity, Schoolcraft "effectively rebutted this presumption of legitimacy."[16]

2. *Determining the rights of the husband*

To determine Schoolcraft's rights outside the presumption, the court cited *Roods v. Roods*,[17] a paternity suit in which a child was conceived in one marriage but born during a second marriage. There, the Utah Supreme Court held that the first husband, the biological father, was responsible for support.[18] Extending *Roods*, the *Schoolcraft* court reasoned that since a "non-biological father has no responsibilities [toward the child], then, as a corollary, he also has no rights with respect to that child, including custody rights."[19] The court held that because Schoolcraft "is not the biological father and has rebutted the presumption of legitimacy, he has no right to custody of J.W.F. nor does he have any responsibility to support him."[20]

III. Weaknesses in the Court's Analysis

Although the result reached by the court of appeals may

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14. *Id.* at 1221. The issue in *Schoolcraft* was one of first impression in Utah. *Id.* at 1219 n.2.

15. 715 P.2d 106 (Utah 1986).

16. J.W.F. v. Schoolcraft, 763 P.2d 1217, 1222 (Utah App. 1988). The court of appeals made general reference to the Uniform Act on Paternity procedures and factual determinations of the trial court, presumably referring to the blood tests which excluded Schoolcraft from paternity. *Id.* at 1219. Nevertheless, they neither specifically nor explicitly based their decision upon such findings. Instead the court offered only one reason for rebutting the presumption of legitimacy—Schoolcraft's concession of non-paternity. Apparently the court found the concession alone sufficient to rebut the presumption, and did not rely upon the lower court findings.

17. 645 P.2d 640 (Utah 1982).

18. *Id.* at 643.

19. *Schoolcraft*, 763 P.2d at 1222.

20. *Id.*

have been correct under these particular facts,[21] the court's analysis fails in law, logic, and sound social policy because: (1) even if admissible as evidence, Schoolcraft's concession of non-paternity by itself does not satisfy the high evidentiary standard required to rebut the presumption of legitimacy; and (2) the absence of parental responsibility does not by itself prove the absence of parental rights.

A. The Court Failed to Properly Rebut the Presumption of Legitimacy

The legal relationship between a husband and child as well as the child's "legitimate" status depends upon the presumption of legitimacy. For this reason, Utah case law mandates that "the presumption of legitimacy will prevail unless the contrary is proved beyond a reasonable doubt."[22] Utah law limits the form of proof admissible to rebut the presumption of legitimacy. In *Schoolcraft*, the court of appeals ignored the limits and standards imposed by Utah law and therefore failed to properly rebut the presumption of legitimacy.

1. Schoolcraft's concession and the Lord Mansfield Rule

As applied in Utah, the Lord Mansfield Rule states that "spouses themselves may not give testimony which would tend to illegitimatize the child."[23] The rule rests upon the same principles that support the presumption itself—to preserve the integrity of the family and to protect children from the scandalous accusations of parents.[24] According to the rule, proof of non-paternity must come from sources other than the spouses' testimony.[25]

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21. It may have been in the best interest of J.W.F. to be reared by someone other than Schoolcraft, considering J.W.F. had never lived with nor presumably established any emotional bonds to Schoolcraft, and a two-parent adoption would probably provide him with a more secure environment.

22. Holder v. Holder, 9 Utah 2d 163, 166, 340 P.2d 761, 763 (1959). *Accord* Roods v. Roods, 645 P.2d 640, 642 (Utah 1982); Miller v. Marticorena, 531 P.2d 487, 489 (Utah 1975); Lopes v. Lopes, 30 Utah 2d 393, 395, 518 P.2d 687, 688 (1974). As Judge Cordozo stated, "the presumption will not fail unless common sense and reason are outraged by holding that it abides." *In re* Findlay, 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930), *cited with approval in Holder*, 9 Utah 2d at 166, 340 P.2d at 763.

23. Lopes v. Lopes, 30 Utah 2d 393, 395, 518 P.2d 687, 689 (1974). *See* Teece v. Teece, 715 P.2d 106, 107 (Utah 1986); Roods v. Roods, 645 P.2d 640, 641 (1982).

24. *Lopes*, 30 Utah 2d at 395, 518 P.2d at 689.

25. *Id.* at 396, 518 P.2d at 689. Although the Lord Mansfield Rule bars testimony of

The court of appeals did not refer to the Lord Mansfield Rule in its *Schoolcraft* opinion. Nonetheless, the court places the Rule's continued viability in doubt by basing its determination of non-paternity upon Schoolcraft's concession alone. If in testimony form, Schoolcraft's concession certainly "bastardizes" J.W.F., and thus violates the Lord Mansfield Rule. Under Utah law, such testimony should be inadmissible in court and incompetent to rebut the presumption of legitimacy. Instead, the court not only accepted the admission but relied upon it to cut back the presumption and decide the primary issue of the case—whether or not Schoolcraft was the presumed legal father of J.W.F.

Admitting Schoolcraft's concession of non-paternity also jeopardizes the principles which underlie the Lord Mansfield Rule. The court's holding encourages fathers and mothers who seek to avoid parental responsibility to simply "admit" non-paternity, illegitimatize their children, and disrupt the family relations which the rule and the presumption are supposed to protect. The obvious losers are those spouses and children who suffer the accusations and effects of illegitimacy or who are left behind as the former parent slips out the door opened by the *Schoolcraft* court.

2. *Schoolcraft's concession and proof beyond a reasonable doubt*

Even if Schoolcraft's concession is admissible, the concession alone fails to prove non-paternity beyond a reasonable doubt and is therefore insufficient to rebut the presumption of legitimacy.[26] According to the Utah Supreme Court, "substantial affirmative proof"[27] is required to rebut the presumption, proof which shows to a "high degree of certainty"[28] that "the husband was incapable of procreation or entirely absent and without ac-

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spouses, "[n]othing in the rule . . . prohibits the introduction of the results of blood or tissue typing tests or of testimony from witnesses other than the putative parents on the issue of paternity." *Teece*, 715 P.2d at 107. *Accord* Hales v. Hales, 656 P.2d 423, 424 (Utah 1982). The blood tests performed by the lower court would be acceptable proof of non-paternity. *See infra* note 30 and accompanying text.

26. *See supra* note 22 and accompanying text. *See also* Roods v. Roods, 645 P.2d 640 (Utah 1982) (in order to prove non-paternity and thus rebut the presumption of legitimacy, the standard of proof is beyond a reasonable doubt; in order to prove paternity affirmatively, the standard of proof is mere preponderance of the evidence).

27. Holder v. Holder, 9 Utah 2d 163, 169, 340 P.2d 761, 765 (1959).

28. *Id.* at 166, 340 P.2d at 763.

cess through the period during which the child must have been begotten, so that it was impossible for him to have been the father."[29]

In Utah, blood or tissue typing tests, such as the lower court ordered, are a statutorily authorized means of establishing non-paternity.[30] Nowhere in its opinion did the court of appeals rely upon or make specific reference to the lower court's tests and subsequent findings as a basis for its rebuttal; instead it found Schoolcraft's concession alone sufficient, and explicitly held that "by conceding that he was not the biological father of J.W.F., [Schoolcraft] effectively rebutted this presumption of legitimacy."[31]

In *Holder v. Holder*,[32] a husband claimed non-paternity and proved that he had access to his wife for only the seven-month period immediately prior to the birth of a child during their marriage. Despite the husband's claims, the Utah Supreme Court held that his assertions "could not reasonably be regarded as evidence of that credible and persuasive character which should be required to overcome the presumption that [the husband] was the father of the child."[33] Accordingly, the presumption stood.[34] In *Schoolcraft*, however, the presumption of legitimacy fell simply by Schoolcraft's concession of non-paternity.[35]

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29. *Id.*

30. The Utah legislature has mandated that "[i]n *any* civil action or in bastardy proceedings in which the parentage of a person is a relevant fact, the court shall order the child and alleged parents to submit to blood tests." Utah Code Ann. § 78-25-18 (1987) (emphasis added). Furthermore, "[t]he results of the tests *shall* be received in evidence where the conclusion of all examiners, as disclosed by the tests, is that the alleged father is not the actual father of the child, and the question of paternity *shall* be so resolved." *Id.* at § 78-25-21 (emphasis added). *See* Teece v. Teece, 715 P.2d 106, 107 (Utah 1986); Hales v. Hales, 656 P.2d 423 (Utah 1982). *See also* Miller v. Marticorena, 531 P.2d 487 (Utah 1975) (blood tests did not positively exclude either husband from paternity). The Utah Supreme Court has interpreted the statutes to include HLA tissue tests. Phillips v. Jackson, 615 P.2d 1228, 1233 (Utah 1980). For the standards of admissibility of HLA tests in paternity disputes, see Kofford v. Flora, 744 P.2d 1343 (Utah 1987).

31. J.W.F. v. Schoolcraft, 763 P.2d 1217, 1222 (Utah App. 1988).

32. 9 Utah 2d 163, 340 P.2d 761 (1959).

33. *Id.* at 169, 340 P.2d at 765.

34. *Id. See also* Miller v. Marticorena, 531 P.2d 487 (Utah 1975) (second husband's custody suit for child born during wife's first marriage failed where he failed to prove the non-paternity of her first husband); Hughes v. McCormick, 17 Utah 2d 372, 412 P.2d 613 (1966) (wife's paternity suit against a third man failed to state an essential element of her cause of action where she failed to prove the non-paternity of her own husband).

35. It is unclear to what extent the trial court's HLA tests, factual determinations, or J.W.F.'s apparently Negro ancestry added to the probative value of the admission in

Although situation and motive may be probative, the burden of proof should not shift nor the standard of proof relax depending upon the motivation of the presumed father in declaring non-paternity—whether he asserts it affirmatively or admits it reluctantly. The presumption exists as a matter of law; it is up to the party attacking it to introduce affirmative proof of non-paternity beyond a reasonable doubt before it can be overcome.[36] In *Schoolcraft*, the court of appeals failed to base its decision on any such affirmative proof. By stating that an admission of non-paternity alone is sufficiently probative, the court of appeals seriously lowers the standard of proof established by the supreme court in *Holder*.

Moreover, the court undermines the policy considerations expressed by *Holder* and upon which the presumption and its heightened standard of proof are based. Under the *Schoolcraft* analysis, any husband wishing to avoid parental duties could merely "admit" non-paternity, rebut the presumption of legitimacy, and walk away from paternal responsibilities. The stability and integrity of the family which the presumption protects are seriously weakened.

In summary, if the court of appeals had based its rebuttal of the presumption of legitimacy upon the trial court's blood tests, findings, or such affirmative proof, the presumption would have been rebutted according to Utah law. The issue would then properly become what rights does a husband have to his wife's illegitimate child when the presumption has been rebutted. But by relying solely upon Schoolcraft's concession of non-paternity, the court encourages the admission of spousal testimony in violation of the Lord Mansfield Rule. The court also lowers the burden of proof necessary to rebut the presumption. In effect, the court opens the doors of the courthouse to spouses who wish to avoid the responsibilities of parenthood. The court then goes on to decide that the husband has no rights without first depriving him of those rights already vested through the presumption and established Utah law.

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the appellate court's mind. Nevertheless, none of these factors were explicitly considered in the court's analysis and therefore cannot justify the court's conclusion that an admission of non-paternity alone should rebut the presumption of legitimacy.

36. *See supra* note 22 and accompanying text.

B. The Court Failed to Recognize a Husband's Responsibilities Which May Give Rise to Rights

1. The court's view of a husband's support obligations

The court relied on *Roods v. Roods*[37] for the proposition that a husband has no duty of support for his wife's illegitimate child. In *Roods*, the wife brought a paternity suit against her first husband, alleging that he was the natural father of a child conceived during their marriage but born during her subsequent marriage to another man. The first husband sought to avoid support obligations. He claimed that under the presumption of legitimacy the second husband was the legal father, and that he, the first husband, was absolved from support liability. The Utah Supreme Court held that paternity, not legitimacy, determined support obligations, and held the first husband liable for support.

In *Schoolcraft*, however, the court of appeals over-extended the reasoning in *Roods*. The court of appeals presumed that since the biological father has the support duty, the husband has no such duty, and therefore the husband has no concomitant rights. But there is a leap in the court's logic: just because the biological father has a duty of support does not mean that his duty is exclusive, *i.e.*, that the current husband has no such duty.

At common law, the husband of the mother of an illegitimate child[38] or a stepparent[39] generally had no duty to support his spouse's children. Utah's Uniform Civil Liability for Support Act[40] modified the common law. According to the Act, a natural parent has the "*primary* obligation of support" for his child;[41] nevertheless, "[a] stepparent shall support a stepchild to the same extent that a natural . . . parent is required to support a child" so long as the stepparent's marriage to the natural parent continues.[42] A stepparent is defined as "a person ceremonially married to a child's natural or adoptive custodial parent who is

37. 645 P.2d 640 (Utah 1982).

38. Annotation, *Liability of Mother's Husband, Not the Father of Her Illegitimate Child, for Its Support*, 90 A.L.R.2d 583, 584-85 (1963).

39. Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978).

40. Utah Code Ann. §§ 78-45-1 to -13 (1987).

41. *Id.* at § 78-45-4.2 (emphasis added).

42. *Id.* at § 78-45-4.1. The stepparent is entitled to recover support from the natural parent. *Id.* at § 78-45-4.2.

not the child's natural or adoptive parent . . . ."[43] Schoolcraft fits within the statutory definition.[44] Thus, contrary to the court's analysis, Utah *does* impose a duty of support upon the husband of the natural mother even though the biological father has the primary duty of support. If we rely upon the court's reasoning, it would appear that since the husband of the natural mother does have some responsibilities to her child, he must also have some legal rights.[45]

Beyond the statutory duty of support, the Utah Supreme Court has written that equity may impose responsibilities upon a husband to support his wife's children even though he is not the biological or adoptive father.[46] In *Wiese v. Wiese*, the court recognized that a man who marries a woman pregnant by another man becomes the stepfather of the child and might be equitably estopped from denying support obligations even after divorce.[47] If equity imposes such obligations, then it might also confer limited rights.[48] In light of such legislative and judicial expressions indicating a husband's obligation of support and with inadequate analysis of the contrary, the court of appeals fails to establish the non-existence of Schoolcraft's custody rights.

2. *The court's "chicken-or-the-egg" analysis*

The court of appeals seeks to prove the non-existence of rights by showing the non-existence of responsibility. Although

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43. *Id.* at § 78-45-2(6).

44. *See* Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985) (husband who married a woman pregnant by another man was deemed the stepparent of her child for purposes of Utah Code Ann. § 78-45-4.1).

45. In *Schoolcraft*, the parental rights of Linda were cut off. Since Winfield Schoolcraft's obligations to J.W.F. apparently derive from his marriage to Linda and her maternal relationship with J.W.F., one could argue that the termination of her rights also terminates his responsibilities. Therefore, in this unique fact situation it may be that Winfield has no responsibility to J.W.F.—such a situation is apparently not contemplated within the statute. Nevertheless, since the purpose of this note is to prevent the misapplication of the court's broad analysis in future cases involving a husband and his wife's illegitimate child, it remains important to consider the husband's responsibilities to the illegitimate child in a context beyond *Schoolcraft*'s particular factual setting.

46. Mace v. Webb, 614 P.2d 647 (Utah 1980). *See also* Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).

47. 699 P.2d 700 (Utah 1985) (in this case, however, the necessary conditions to impose estoppel were not present).

48. *See, e.g.*, Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (a stepparent achieving in loco parentis status may have imposed upon him certain rights and obligations pertaining to his stepchildren).

rights are associated with responsibilities, defining one by the other is merely circular reasoning: one exists because of the other, and vice-versa. We are left with the puzzle of which came first, the chicken or the egg (or in this case, the rights or the responsibilities)? Effective jurisprudence requires a beginning point—fundamental principles expressed for the existence or non-existence of rights—otherwise definition, analysis, and law (responsibilities) based upon those rights cannot be expressed, enlarged, or adjudicated.

3. The court's broad rule and the danger of its misapplication

Utah custody determinations are suits in equity.[49] The best interests of the child are the paramount consideration.[50] While it may be technically correct that a husband has no legal rights to his wife's children where he is not the biological or adoptive father, such a broad rule without full explication of guiding principles runs the danger of misapplication.

Undoubtedly, *Schoolcraft* will be seized and cited by anyone wishing to oppose any custody or visitation petitions by a stepparent or husband in Schoolcraft's position, whether it be in the best interest of the child or not. Although the guardian ad litem was appointed to seek the best interests of J.W.F.,[51] the rule announced by the court may prove to be an undiscriminating precedent used to deny valid claims and considerations of stepparents and husbands who have developed strong ties to their stepchildren. The broad rule may not be in the best interests of the children, the parties, or the courts.

IV. An Alternative Analysis Based on Utah Custody Principles

The analysis leading to the court's conclusion is as important as the rule laid down, since the analysis should chart the guiding principles which apply beyond the specific case. For this

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49. State *ex. rel.* A.H. v. Mr. and Mrs. H., 716 P.2d 284, 286 (Utah 1986); Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980); *In re* Cooper, 17 Utah 2d 296, 299, 410 P.2d 475, 476 (1966).

50. Utah Code Ann. § 78-3a-39(13)(b) (1989 Supp.). *Accord* Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1250 (Utah 1987); Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982); Cooper v. DeLand, 652 P.2d 907, 908 (Utah 1982); Tuckey v. Tuckey, 649 P.2d 88, 90 (Utah 1982); Kallas v. Kallas, 614 P.2d 641, 645 (Utah 1980); Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978).

51. J.W.F. v. Schoolcraft, 763 P.2d 1217, 1220 (Utah App. 1988).

reason, this note offers an alternative analysis of *J.W.F. v. Schoolcraft* in order to determine a husband's custody rights to his wife's illegitimate son assuming the presumption of legitimacy has been properly rebutted.[52] The purpose is to establish the legal and equitable principles which should govern not only *Schoolcraft*, but all similar disputes, thereby safeguarding against inequitable misapplication of *Schoolcraft*'s broad "no rights" rule. This note will: (1) distinguish and define the rights of natural parents from those afforded non-natural parents; and (2) identify the rights given to Schoolcraft through his relationship to J.W.F. under Utah law.

A. Utah Custody Principles

In Utah, the guiding principle in any custody determination is the child's best interest.[53] However, "there is a presumption in favor of the natural parent that must be overcome before a court determining custody can rely solely on the best interests of the child."[54] This "natural-parent presumption"[55] is founded in (1) the best interests of the child, and (2) the fundamental rights of natural parents.[56] Because of these fundamental principles coupled with policy concerns, the natural-parent presumption has not been extended beyond natural or adoptive parents.[57] Any person other than a natural or adoptive parent claiming custody

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52. If the presumption of legitimacy is not rebutted, then the presumption bestows all the rights belonging to a natural father upon the husband, and the *Schoolcraft* issue does not arise.

53. *See* cases cited *supra* note 50.

54. Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1252 (Utah 1987). *Accord* Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982); Cooper v. DeLand, 652 P.2d 907, 908 (Utah 1982); State *ex. rel.* Pilling v. Lance, 23 Utah 2d 407, 410, 464 P.2d 395, 397 (1970).

55. *Kishpaugh*, 745 P.2d at 1252.

56. *See* Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982). In *Bonwich v. Bonwich*, the Utah Supreme Court said that under Utah law, "[t]he relationship of the adoptive parent and child is the same legally as that of natural parent and child, with all the rights and all the duties of that relationship," including the right to the natural-parent presumption. 699 P.2d 760, 762 (Utah), *cert. denied*, 474 U.S. 848 (1985). Accordingly, for the purposes of this note, reference to the rights of natural parents includes the coextensive rights of adoptive parents.

57. *See Bonwich*, 699 P.2d 760 (adoptive parents receive the benefit of the natural-parent presumption); Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987) (grandparents not entitled to natural-parent presumption); Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982) (stepfather not entitled to natural-parent presumption); Cooper v. DeLand, 652 P.2d 907 (Utah 1982) (neither stepfather nor relatives entitled to natural-parent presumption).

rights receives those rights only after an adjudication that such would be in the best interests of the child.

1. Natural-parent presumption and the best interests of the child

As stated in *Hutchison v. Hutchison*,[58] the natural-parent presumption

> [i]s rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.[59]

Thus, "in accordance with the natural instincts and customs of mankind,"[60] it is presumed to be in the best interests of the child to be reared in the custody of his or her natural parent.

Although the courts recognize that love and devotion are not exclusive to the biological parent-child relationship,[61] the Utah courts have so far limited the parental presumption's favor to natural or adoptive parents.[62]

2. Natural-parent presumption and parental rights

Perhaps the more fundamental basis for the parental custody presumption and its exclusive application in favor of natural and adoptive parents is the "fundamental liberty interest of natural parents in the care, custody, and management of their child."[63] Even though the best interests of the child remains the primary standard in custody determinations, the Utah Supreme

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58. 649 P.2d 38 (Utah 1982).

59. *Id.* at 40. *Accord* Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1250-51 (Utah 1987). *See* Cooper v. DeLand, 652 P.2d 907, 908 (Utah 1982).

60. *In re* Castillo, 632 P.2d 855, 856 (Utah 1981).

61. *See, e.g.*, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977); Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1251 (Utah 1987); Tuckey v. Tuckey, 649 P.2d 88, 90 (Utah 1982); Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982); Gribble v. Gribble, 583 P.2d 64, 67-68 (Utah 1978).

62. *See* cases cited *supra* note 57.

63. Santosky v. Kramer, 455 U.S. 745, 753 (1982). *See* Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982) (the natural-parent presumption recognizes "the natural right and authority of the parent to the child's custody . . . ." (quoting State *in re* Jennings, 20 Utah 2d 50, 52, 432 P.2d 879, 880 (1967))).

Court has declared that the "rights of *natural* parents"[64] are so basic to nature and society that they may not be terminated absent a specific showing of parental unfitness.[65] Accordingly, in *Hutchison v. Hutchison*,[66] the Utah Supreme Court held that the natural-parent presumption could not be rebutted merely by showing that a nonparent would be a superior custodian. Instead rebuttal requires a showing of unfitness before a natural parent can be deprived of custody rights;[67] otherwise "the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent."[68]

Apparently, neither the Utah nor the United States Supreme Court has expressly defined who is entitled to "parental rights." In discussing parental rights, however, the courts repeatedly speak in the context of "the rights of the *natural parent* in his child."[69] According to the Utah Supreme Court, such "parental rights have their origin in biological relationships . . . ."[70] The United States Supreme Court has said that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[71]

a. The United States Supreme Court: Smith v. Organization of Foster Families for Equity and Reform. Perhaps the closest the U.S. Supreme Court has come to addressing the issue of who possesses parental rights was its decision in *Smith v. Organization of Foster Families for Equality and Reform* (O.F.F.E.R.).[72] In *O.F.F.E.R.*, foster parents claimed New York's

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64. *In re* J.P., 648 P.2d 1364, 1366 (Utah 1982) (emphasis added).

65. *Id.* at 1378. The Utah statute which allowed for the termination of parental rights under the best interests of the child standard alone was held unconstitutional.

66. 649 P.2d 38 (Utah 1982).

67. As stated in *Hutchison*:

> [T]he parental presumption can be rebutted only by evidence establishing that a particular parent at a particular time generally lacks all three of the characteristics that give rise to the presumption: that no strong mutual bond exists, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's, and that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally.

Id. at 41. *Accord* Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987).

68. *Hutchison*, 649 P.2d at 41.

69. *In re* Castillo, 632 P.2d 855, 856 (Utah 1981) (emphasis added). *See, e.g., In re* J.P., 648 P.2d 1364 (Utah 1982); Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

70. Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 202 (Utah 1984).

71. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

72. 431 U.S. 816 (1977).

provisions for removing children from foster homes violated the foster parents' fourteenth amendment due process rights. In examining the nature of the foster parents' liberty interest, Justice Brennan's majority opinion noted that while "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element,"[73] situations might arise in which a foster family could become the child's emotional family.[74] He was therefore unwilling to declare that the foster family had no liberty interest in their foster children. However, Justice Brennan went on to find "important distinctions"[75] between natural and foster families which allowed New York's statute to satisfy the foster parents' due process claims "even on the assumption that [they] have a protected 'liberty interest.' "[76]

In his concurrence, Justice Stewart, joined by Chief Justice Burger and Justice Rehnquist, was more direct in his attack upon the liberty interest asserted: "Rather than tiptoeing around the central issue, I would squarely hold that the interests asserted by the [foster parents] are not the kind that the Due Process Clause of the Fourteenth Amendment protects,"[77] since the foster relationship is defined, controlled, and supported by the state.[78] Thus, the U.S. Supreme Court has recognized a distinction between the natural parents' rights and those asserted by nonparents, although it has not clearly limited parental rights to natural or adoptive parents.

b. Utah Supreme Court: Wilson v. Family Services Division. The Utah Supreme Court has been more explicit than the U.S. Supreme Court in defining parental rights. In the principal case of *Wilson v. Family Services Division, Region Two*, the Utah Supreme Court held that only parents have *vested* rights in the custody of children, but nonparents may have certain *inchoate* rights to such custody.[79]

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73. *Id.* at 843.

74. *Id.* at 844.

75. *Id.* at 845-846 (a foster family's power is derived from state law and contract within the state; an individual's freedom to marry and reproduce is "older than the Bill of Rights" (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965))).

76. *Id.* at 847.

77. *Id.* at 858 (Stewart, J., concurring).

78. *Id.*

79. 554 P.2d 227 (Utah 1976). *Compare* Smith v. O.F.F.E.R., 431 U.S. 816, 842 n.48 ("Of course, recognition of a liberty interest in foster families for purposes of the procedural protections of the Due Process Clause would not necessarily require that foster

(1) Vested rights of parents. In *Wilson*, a grandmother sought to stay the agency adoption of her grandchild following termination of the mother's rights. The Utah Supreme Court declared that "the only persons having any actually *vested* interest in the custody of a child are the parents."[80] The court cited policy to support its decision:

> If the law recognized any right of custody beyond the parents, the number of potential protestants, such as grandparents, brothers and sisters of the parents . . . or immediate relatives, would create a situation so fraught with possibilities for trouble as to make the placement of children difficult if not entirely impractical, a result which we agree should be avoided.[81]

One can imagine the confusion generated by attempting to define a sub-parental hierarchy of custody rights based upon gradations of relationship through blood, marriage, or emotion. *Wilson's* policy choice reflects the natural-parent presumption by limiting the presumption's application to natural or adoptive parents.[82]

The exclusive vesting of parental rights is also reflected in the law concerning termination of parental rights. Fundamental rights are constitutionally protected, and therefore require due process before they can be terminated.[83] Absent some adjudication vesting such rights, Utah's statutes contemplate only the termination of *parental* rights.[84] In addition, the statutes contemplate only two parents.[85] By inference, it appears that the

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families be treated as fully equivalent to biological families for purposes of substantive due process review.").

80. *Id.* at 229 (emphasis added). *See State ex. rel.* A.H. v. Mr. and Mrs. H., 716 P.2d 284 (Utah 1986) (parents are the only persons with legally vested custody rights, but prospective adoptive parents do have a legally protectable interest subject to the child's best interests); State *ex. rel.* Summers v. Wulffenstein, 571 P.2d 1319 (Utah 1977) (although entitled to a hearing to determine custodial fitness, grandparent is not entitled to custody as a matter of right).

81. *Wilson*, 554 P.2d at 229.

82. *See* cases cited *supra* note 57.

83. *In re* J.P., 648 P.2d 1364 (Utah 1982).

84. *See* Utah Code Ann. § 78-3a-48 (1987).

85. *Id.* Section (1) provides that the court may terminate all parental rights "with respect to *one or both parents* . . ."; section (3) provides that unless there is an appeal, the order terminating rights of "*one or both parents* . . . permanently terminates the legal parent-child relationship . . ."; section (4) provides that following such an order terminating the rights of parents, adoptable children shall be placed for adoption; and section (5) provides that "*one or both parents*" may petition for a voluntary termination of rights, but such termination "with respect to *one parent* does not affect the rights of the *other parent*." *Id.* (emphasis added).

Utah legislature recognizes parental rights existing in only two persons at any one time—obviously the natural or adoptive parents.[86] This is consistent with *Wilson*, where the court declared that only the parents have any vested right to the custody of children absent a judicial award of custody, and therefore only parents require adjudication in order to sever their vested rights.[87]

(2) Inchoate rights of nonparents. The Utah Supreme Court did recognize that while parents are the only persons who have a vested custody right, "immediate relatives . . . have some legitimate concern for children of the family and interest in their welfare."[88] Accordingly,

> next of kin . . . do have some dormant or *incohate right* or interest in the custody and welfare of the children who become parentless, so that they may come forward and assert their claim; and that even though this does not rise to the dignity of an absolute legal right, it is a legitimate interest of such a nature that it should strongly commend itself to serious consideration by the administrative agency; and that failing, by the court, concerned with the welfare of the child, at least to the extent of according her a hearing and determination on the merits of her petition.[89]

Such inchoate rights, if found, do not automatically entitle the relative to custody; rather, they entitle the relative to petition for custody and receive a hearing in order to determine their custodial fitness.[90]

Comparing inchoate to vested rights, parents with vested rights are constitutionally entitled to custody absent an adjudication terminating those rights; on the other hand, relatives with inchoate rights are entitled only to a hearing to determine if they may receive custody rights. Because they have no vested right, nonparents receive custody only if the court determines

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86. Furthermore, under Utah law the natural parent's rights are terminated upon adoption. Utah Code Ann. § 78-30-11 (1987). The legal and logical premise is that a person can have only two parents with parental rights at anytime: either natural, adoptive, or one natural and one adoptive parent. Utah law apparently recognizes no more than two parents endowed with the concomitant parental rights at any time.

87. Wilson v. Family Services Division, Region Two, 554 P.2d at 230.

88. *Id.*

89. *Id.* at 231 (emphasis added). *See In re* Cooper, 17 Utah 2d 296, 298, 410 P.2d 475, 476 (1966) ("[I]n custody matters, all else being equal, near relatives should generally be given preference over nonrelatives.").

90. State *ex. rel.* Summers v. Wulffenstein, 571 P.2d 1319 (Utah 1977).

such to be in the best interests of the child.[91] For this reason, "kinship, including, in extraordinary circumstances, . . . stepparent status,"[92] is only one factor to be considered in awarding custody rights under the primary standard of the best interests of the child; it is not an independent custody right warranting protection by the natural-parent presumption.

These principles are reflected in the Utah statutes regarding visitation rights of grandparents and other relatives. Under Utah law, the court "may grant grandparents reasonable rights of visitation to grandchildren, if it is in the best interest of the grandchildren."[93] Likewise, in divorce decrees, "[when] determining visitation rights of parents, grandparents, and other relatives [including stepparents], the court shall consider the welfare of the child."[94] Under these statutes, any visitation rights allowed relatives become vested only after a court determines such to be for the welfare of the child. Similarly, a relative's inchoate right to petition for custody and receive a hearing to determine custodial fitness becomes a vested right to custody only after a court determination that such is in the best interests of the child.

In summary, the purpose of the natural-parent presumption is (1) to protect the child's best interest by giving effect to the presumption that a biological parent will be more devoted and more likely to care for his or her own child; and (2) to protect the natural parents' constitutional right to rear their own child. Accordingly, the presumption's application has been limited to natural or adoptive parents. The Utah Supreme Court has stated that only parents have a vested right to the custody of their children and "[i]f the presumption in favor of the natural parent is rebutted, the contestants for custody compete on equal footing, and the custody award should be determined solely by

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91. The Utah Supreme Court demonstrated this view in *In re* Cooper:

> [I]n custody matters, all things else being equal, near relatives should generally be given preference over nonrelatives. . . . Nevertheless, while [this] principle should be given due consideration in resolving such problems, they cannot be made absolutely controlling over the practical realities of life which the court must weigh in serving the paramount objective which must override all others: the welfare of the children.

17 Utah 2d 296, 298, 410 P.2d 475, 476 (1966).

92. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982).

93. Utah Code Ann. § 30-5-2 (1989).

94. *Id.* at § 30-3-5(4) (1989). In Gribble v. Gribble, 583 P.2d 64 (Utah 1978), the supreme court included stepparents standing in loco parentis to the child among those who might receive visitation rights.

reference to the best interests of the child."[95] Some persons sharing a close relationship with the child may have inchoate rights which entitle them to petition for custody. Even so, all nonparents claiming a custody interest, including near-relatives and stepparents, must prove that their custody would be in the best interests of the child before they receive a right to custody.[96]

B. Applying Utah Custody Principles to Schoolcraft

1. Schoolcraft's status

In order to apply these custody principles to *Schoolcraft*, it is necessary to define the relationship between Schoolcraft and J.W.F. If the presumption of legitimacy has *not* been properly rebutted, then Schoolcraft is deemed at law to be the father of J.W.F. and is entitled to all concomitant rights including the natural-parent presumption; *i.e.*, Schoolcraft would be entitled to custody by right as against a nonparent absent the requisite showing of unfitness.[97]

However, assuming that the presumption of legitimacy *has* been properly rebutted, Schoolcraft is not considered the father of J.W.F.[98] Utah law states that "[a] child born out of wedlock

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95. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982).

96. In *Hutchison*, the Utah Supreme Court listed factors to be considered in determining the child's best interest:

> Some factors . . . relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition.

Id.

97. *Id.*; Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987).

98. In Utah, "children *born to the parties* after the date of marriage, shall be deemed the legitimate children of both the parties for all purposes." Utah Code Ann. § 30-1-17.2 (1989). Schoolcraft argued that this statute acted as a conclusive presumption of legitimacy. Brief of the Appellant at 11-15, J.W.F. v. Schoolcraft, 763 P.2d 1217 (Utah App. 1988) (No. 870146-CA). But a child born to a man other than the husband can not be said to be "born to the parties." Brief for Respondent Guardian Ad Litem at 15-16. Furthermore, the Utah Supreme Court expressly stated that the presumption of legiti-

includes a child born to a married woman by a man other than her husband."[99] By definition, J.W.F. is a child born out of wedlock. J.W.F.'s biological father is considered his "father" for purposes of support obligations.[100] In *Mace v. Webb*,[101] a mother sought child support from her live-in boyfriend on the theory that he adopted her illegitimate son by acknowledgement, even though blood tests had excluded him as the biological father. The Utah Supreme Court held that "only a natural father can 'adopt' an illegitimate son by acknowledgment";[102] in order to establish the legal parent-child relationship "[f]or one not the biological father, recourse would have to be had to the strict requirements of the adoption statutes."[103] Under the reasoning in *Mace*, Schoolcraft has not acquired the legal parent-child status (at least with regard to support obligations) since he has not formally adopted J.W.F.

Schoolcraft's actual relation to J.W.F. arises through his marriage to Linda. By definition, he is J.W.F.'s stepparent rather than parent, since he is married to J.W.F.'s biological mother, but is not the biological or adoptive father.[104] Certainly, in the normal meanings of the terms he is more the stepparent than a parent. His rights should therefore be those accorded a stepparent rather than a natural parent.

2. *Schoolcraft's rights*

Applying Utah's custody principles to *Schoolcraft*, nonparents, including near-relatives, are not accorded vested

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macy is rebuttable, negating Schoolcraft's conclusive presumption interpretation. *See supra* note 3 and accompanying text.

99. Utah Code Ann. § 78-45a-1 (1987).

100. *Id.*

101. 614 P.2d 647 (Utah 1980).

102. *Id.* at 649.

103. *Id.*

104. *See supra* notes 43-44 and accompanying text. *See also* S.E.M. v. D.M.M., 664 S.W.2d 665, 667 (Mo. App. 1984) (although blood tests excluded husband's paternity as to a child born during the marriage, the court said that "[b]y entering into or remaining in the marriage a husband assumes the relationship of stepparent to the child . . . ."); In re Dombrowski, 41 Wash. App. 753, 705 P.2d 1218 (App. 1985) (live-in boyfriend was not a "parent" under meaning of the custody statute); Torres v. Gonzales, 80 N.M. 35, 36, 450 P.2d 921, 922 (1969) ("[T]he husband of the natural mother of an illegitimate child of which he is not the natural father is not the 'parent' of the child merely because married to the mother," and therefore the husband was excluded from any possible rights to custody under the statute).

custody rights.[105] A stepparent is a nonparent with regard to the natural-parent presumption.[106] Without the parental presumption, the determination of custody is left to the best interests of the child standard.[107] "[K]inship, including, in extraordinary circumstances, stepparent status,"[108] is a factor to be considered in custody awards, but not a vested custody right in itself. Thus, as a stepparent, Schoolcraft has no vested custody right to J.W.F.

On the other hand, a stepparent's relationship to his child may be of such a nature so as to allow him the inchoate right to petition for custody and receive a hearing on his custodial fitness.[109] In *Gribble v. Gribble*,[110] the Utah Supreme Court held that a stepparent standing in loco parentis to his stepchild is entitled to a hearing to determine if visitation rights are in the best interests of the child.[111] The court was careful to limit its analysis to visitation rights as compared to custody rights,[112] but the court did recognize the important interests which a stepparent in loco parentis may have in the stepchild.[113] It is clearly in

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105. *See supra* notes 80-87 and accompanying text.

106. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982); Cooper v. DeLand, 652 P.2d 907 (Utah 1982). *See* Quilloin v. Walcott, 434 U.S. 246, *reh. denied* 435 U.S. 918 (1978) (in a suit between natural parent and stepparent, the court only made reference to the constitutional rights of the natural parent, not the stepparent). *But see In re* Marriage of Allen, 28 Wash. App. 637, 626 P.2d 16 (App. 1981) (stepmother standing in loco parentis to stepchild was a parent for purposes of Washington's custody statute).

107. *See* Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982) ("If the presumption in favor of the natural parent is rebutted, the contestants for custody compete on equal footing, and the custody award should be determined solely by reference to the best interests of the child.").

108. *Id.*

109. *See supra* notes 88-94 and accompanying text.

110. 583 P.2d 64 (Utah 1978).

111. In *Gribble*, the court did not define the necessary elements for one to receive in loco parentis status, except that it requires "that the person *intends* to assume that obligation." *Id.* at 66. In that case the stepfather "claim[ed] to have lived with his stepson since the child was two months old, treated him 'as his own son,' and fe[lt] concerned about his future." *Id.* at 67. The court declared that these factors coupled with intent to assume parental responsibilities *might* establish loco parentis status. *Id.* The court remanded to the trial court to determine if the stepparent actually stood in loco parentis to the child. *Id.* at 68.

112. In *Gribble*, the court deemed it "important" that the stepparent "does not seek custody; he wishes only to exercise visitation privileges. Because [Utah Code Ann.] Sec. 30-3-5 conceivably allows visitation where custodial rights would not exist, this Court feels that there is greater flexibility in determining visitation than there is in determining custody." *Id.* at 67.

113. The court quoted a Pennsylvania case:

> Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent

the child's best interest that courts recognize and protect those inchoate interests by allowing the stepparent the right to petition for custody and receive a hearing to determine his custodial fitness. In *Hutchison*, the supreme court listed stepparent status, at least in extraordinary cases, as a factor to be considered when awarding custody under the child's best interests standard.[114] As a stepparent, Schoolcraft should have the inchoate right to petition and receive a hearing concerning his fitness as custodian to J.W.F.[115] Although he has no vested custody rights, these principles establish that Schoolcraft's status may entitle him to receive custody rights upon adjudication if it is in the best interests of J.W.F.

V. CONCLUSION

In *Schoolcraft*, the Utah Court of Appeals held that a husband has no rights to his wife's illegitimate child when admittedly he is not the biological father. In order to reach the result, the court's analysis was flawed in that it (1) improperly rebutted the presumption of legitimacy by allowing an admission of nonpaternity alone to satisfy the high standard of proof beyond a reasonable doubt, and (2) erroneously presumed that the husband has no duty of support and therefore denied him any concomitant rights. The court sets up a broad, absolute rule without giving a proper analytical foundation for examining its application. The rule carries the danger of misapplication by future courts which may terminate the husband's relationship with the child without giving proper consideration to the interests of all parties concerned.

Assuming that the presumption of legitimacy is properly rebutted, Utah custody principles indicate that although the hus-

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that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be.

Id. at 68 (*quoting* Spells v. Spells, 250 Pa. Super. 168, 170, 378 A.2d 879, 881 (1977)).

114. 649 P.2d 38, 41 (Utah 1982).

115. Under these specific facts, Schoolcraft probably did not stand in loco parentis to J.W.F. Although he intended to assume at least some responsibility for J.W.F., as evidenced by his petition for custody, J.W.F. had not lived with him nor presumably established strong emotional ties to him. On the other hand, the opinion introduces no third party who has closer ties to J.W.F. than Schoolcraft. Since all of these factors should be considered before custody is awarded under the best interest of the child standard, it seems consistent with *Wilson* and custodial philosophy to allow Schoolcraft to petition for custody rights.

band does not have any parental or *vested* custody rights, his relationship as a stepparent is such that he may have an *inchoate* interest in the custody of the child. This inchoate interest may entitle him to a hearing to determine his custodial fitness. If the court determines that it is in the best interest of the child, the husband may receive custodial rights. The rule announced by the court of appeals is technically correct in that the husband has no vested rights; nevertheless, the court fails to recognize that the husband may have an incohate right which affords him the opportunity to petition and prove his custodial fitness. Therefore, the husband's inchoate rights may indeed become vested under the best interests of the child standard.

Kim C. Stanger