

1987

In Re: Baby Doe, Sylvester Eno-Idem v. John and Mary Doe : Brief of Respondent

Utah Court of Appeals

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Melvin G. Calver; Attorney for Plaintiff/Appellant.

Tim W. Healy; Attorney for Defendant/Respondents.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870476-CA

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

IN RE: BABY DOE,)	
SYLVESTER ENO-IDEM,	)	RESPONDENTS' BRIEF
Appellant,	)	ON APPEAL
vs.	)	Priority 7
JOHN AND MARY DOE,	)	Case No: 870476-CA
Respondents.)	

RESPONDENTS' BRIEF

Response to the Appeal filed in this matter from the decision of The Honorable Ronald O. Hyde, District Judge, Second Judicial District Court, Weber County, Utah.

TIM W. HEALY, #1437
Attorney for Defendants/Respondents
863 25th Street
Ogden, Utah 84401
Telephone: (801) 621-2630

Melvin G. Calver #0549
Attorney for Plaintiff/Appellant
290 25th Street, #204
Ogden, Utah 84401
Telephone: (801) 621-2911

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JURISDICTION

The Court of Appeals has jurisdiction over this appeal from a final decree pursuant to Section 78-2a-3(2)(g) of the Utah Code Annotated (1953, as amended 1986).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- POINT I THE TRIAL COURT DID NOT ERR IN REFUSING
 TO GRANT APPELLANT AN EVIDENTIARY HEARING.
- POINT II APPELLANT HAS NO EQUITABLE RIGHT TO HIS CHILD
 WHICH TRANSCENDS THE STATES' INTEREST
 IN SPEEDILY IDENTIFYING ADOPTIVE PARENTS
 AND SECURELY CONCLUDING ADOPTIONS.
- POINT III THE BEST INTERESTS OF BABY BOY DOE WILL
 SERVED BY HIM REMAINING WITH HIS
 ADOPTIVE PARENTS.
- POINT IV 78-30-14(4) U.C.A. DOES NOT EXPAND
 THE TIME SET FORTH IN 78-30-4(3) U.C.A.
 TO FILE A NOTICE OF CLAIM OF PATERNITY.

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

IN RE: BABY DOE,)	
SYLVESTER ENO-IDEM	)	RESPONDENTS' BRIEF
Appellant,	)	ON APPEAL
vs.	)	Priority 7
JOHN AND MARY DOE,	)	Case No. 870476-CA
Respondents.)	

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Respondents agree with Appellant's statement of the case except as to the facts set forth hereunder:

1. The natural father (appellant) returned to Nigeria due to his employment and to further his education (Petitioner's Exhibit "A", paragraph 4, appellant's brief).

2. The natural father and mother were involved in a brief relationship near the first part of October 1985 which culminated in a single act of intercourse. (Emphasis supplied) The natural mother was married, although separated, at the time of conception and did not intend to marry the natural father. Within a few days after said act of intercourse, appellant left the State of

Utah and the United States and the natural mother had no contact with him from October 1985 until he returned in November 1986. She was unaware of his whereabouts during said period of time. (See Addendum, Deposition and Consent To Adoption, paragraph 3, TAB 1, hereinafter referred to as TAB 1).

3. During the time appellant resided in Nigeria, he did not contact the natural mother, nor inform her of his address or telephone number, or any way that she could contact him. (Exhibit "A", paragraph 5, appellant's brief).

4. At the time of appellant's return to the United States in November 1986, he was newly married, and just had a son of his own (ostensibly in Nigeria). (See Addendum, letter of natural mother dated 12/16/86, TAB 2, hereinafter referred to as TAB 2).

5. The natural father did not contact respondents' counsel to express that he wanted the child and did not want the adoption to proceed until February 13, 1987, more than three weeks after the adoption was finalized on January 21, 1987. (Record, pages 52-53, hereinafter referred to as R.pp. 52-53)

6. The sole contact by appellant with respondents' counsel prior to finalization of the subject adoption was a letter from the natural mother dated 12/16/86, advising that both she and appellant agreed with the subject adoption and felt it was in the best interests of the child but expressed a desire to see the

child to be assured that all was well. (TAB 2, R.pp. 37,52-53).

7. The natural mother was not aware that she was pregnant until sometime after she had conceived. She was unable to contact appellant because he was out of the country and she had no way to contact him. (See Addendum, Transcript of October 2, 1987 hearing, page 3, TAB 3, hereinafter referred to as TAB 3.)

SUMMARY OF ARGUMENTS

POINT I THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT AN EVIDENTIARY HEARING.

- A. It was not impossible for appellant to file the required paternity notice through no fault of his own.
- B. Due process does not require actual notice to an unwed father before his rights may be terminated.
- C. 78-30-4(3) U.C.A. is constitutional and does not violate due process as applied to the facts of the instant appeal.
- D. The exceptions to the statutory cutoff as reflected in the Ellis & Baby Boy Doe cases have no application to this case.

POINT II APPELLANT HAS NO EQUITABLE RIGHT TO HIS CHILD WHICH TRANSCENDS THE STATES' INTEREST IN SPEEDILY IDENTIFYING ADOPTIVE PARENTS AND SECURELY CONCLUDING ADOPTIONS.

POINT III THE BEST INTERESTS OF BABY BOY DOE WILL BE SERVED BY HIM REMAINING WITH HIS ADOPTIVE PARENTS.

POINT IV 78-30-14(7) U.C.A. DOES NOT EXPAND THE TIME SET FORTH IN 78-30-4(3) U.C.A. TO FILE A NOTICE OF CLAIM OF PATERNITY.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT AN EVIDENTIARY HEARING.

The appellant urges at some length that his circumstances fall within the parameters of the case of Ellis v Social Services Department of the Church of Jesus Christ of Latter Day Saints, 615 P2d 1250 (Utah 1980). He argues, therefore, that he should be afforded a reasonable opportunity i.e. an evidentiary hearing to show that it was impossible for him to file the required statutory notice through no fault of his own and that he came forth within a reasonable time and did file his notice of paternity. (Emphasis supplied) In Wells v Childrens' Aid Society, 681 P2d 199 (Utah 1984), the court, citing Ellis extended the "reasonable opportunity to comply with the statute" after the statutory filing deadlines had passed, only in cases "when it is first shown that it was 'impossible' for the father to file' through no fault of his own' Id.at 207-08).

Surely, appellant, who is a college educated Nigerian and has attended Weber State College in Ogden, Utah, must be presumed to know that sexual intercourse may result in conception and the ultimate birth of a child. His acknowledged statement, that during a 13 month absence from the United States and the natural mother with whom he claimed he was involved in an 8 month love

affair to whom he was strongly bonded and with whom he intended to resume his relationship upon his return, yet he had absolutely no contact with her, neither did he furnish her with his address or telephone number or any way to contact him, (Exhibit "A", paragraphs 4, 5, & 6, and p.4 appellant's brief), cannot justify his claim that it was impossible for him to file the required notice through no fault of his own (emphasis supplied). Appellant claims that when the natural mother learned of her pregnancy, she attempted to contact him but was unable to do so. (See Addendum, Transcript of October 2, 1987 hearing TAB 3, hereinafter referred to as TAB 3).

Had appellant, in fact, maintained the close relationship which he claimed existed with the natural mother, he would have provided her with his address and phone number and she could have notified him upon learning of her pregnancy. Clearly, it was due to appellant's own fault (emphasis supplied) that such notification could not be made. Accordingly, appellant should not be allowed an evidentiary hearing to show that he did not have a reasonable opportunity to comply with the statute.

Appellant next contends that he was not afforded due process in that he was not notified of the subject adoption proceeding nor of the birth of his child. In Wells, the Utah Supreme Court cited with approval the United States Supreme Court case of Lehr v Robertson, 463 U.S. 248 (1983) which dealt with a New York statute containing similar filing requirements as the Utah

statute. The U.S. Supreme Court rejected the argument that an unwed father was entitled to notice of the adoption proceedings and held that he must comply with the filing requirements of the New York statute. The court, in Wells, specifically stated:

"...due process does not require that the father of an illegitimate child be identified and personally notified before his parental rights can be terminated..." Id. at 213.

If, in fact, the requirement of due process articulated in Ellis and In Re Adoption of Baby Doe 717 P2d 686 (Utah 1986), required actual notice of either the birth of the child, the statutory filing requirements or the adoption proceeding itself, to an unwed father before his failure to file an acknowledgement of paternity would constitute a bar, the adoptive processes of the state would be totally chaotic. It would mean, in a case such as this, that any time a "one night stand" occurred and the unwed father was unaware that the act of intercourse had resulted in conception, he could come back at any time, three months, six months, or even six years later and disrupt and void the adoption process that had occurred soon after the birth of the child. A similar claim could be made if he were unaware of the statutory requirement or the adoption proceeding itself. It is submitted that such an interpretation was never contemplated by the legislature in its adoption of the Utah statute.

A comprehensive treatment of the state of the law in Utah

regarding adoptions is contained in the article, The Adoption Conundrum, Part 1, Utah Lawyer Alert, Vol. 87. No. 4. (See Addendum, TAB 3 hereinafter referred to as TAB 3). Therein, Professor Lynn Wardle of the Brigham Young University Law School analyses the statutory notice filing requirements of 78-30-4(3) U.C.A. in light of four recent Utah Supreme Court cases i.e. Ellis, supra, Wells, supra, Baby Boy Doe, supra, Sanchez v L.D.S. Social Services, 680 P2d 753 (Utah 1984). All four cases have held that 78-30-4(3) U.C.A., requiring the filing of an acknowledgement of paternity prior to the petition for adoption being filed by adoptive parents is constitutional and valid. In Wells and Sanchez, the Court held that unwed fathers had not complied with the statute, however, the requirements of due process had been met. In the cases of Ellis and Baby Boy Doe, the Court, in essence, held that the statute violated due process as applied, and remanded the cases for evidentiary hearings.

In an effort to assist judges and attorneys in determining which cases fall within the Ellis and Baby Boy Doe exceptions to the strict statutory requirements of 78-30-4(3) U.C.A., Professor Wardle cites four common threads running through those two decisions. (1) There was deceit or misconduct by the mother or her agents at a critical time which prejudiced the ability of the unwed father to comply with the notice-filing requirement. (2) In both cases, the child was conceived out of Utah by non-Utah residents and the mother came to Utah shortly before giving

birth. (3) The putative fathers registered their claim of paternity immediately upon learning of the statutory requirement.

(4) Such registration occurred within a few days after the child was released for adoption. None of the four criterion mentioned above apply to the subject case.

(1) There was no deceit or misconduct on behalf of the natural mother. The pregnancy resulted from a single act of intercourse and within a few days thereafter appellant left the United States with his whereabouts unknown. (paragraph 3, TAB 1) In the Ellis and Doe cases, there was an ongoing relationship between the parties wherein they had lived together for a period of time and marriage had been contemplated in both cases. Here, there was no such ongoing relationship. Appellant's claim that he was involved in a love affair with the natural mother for approximately 8 months and that they had developed a strong, bonded relationship which he intended to resume upon his return to the United States, (Exhibit "A", paragraphs 4 & 6 & p.4, appellant's brief), is expressly contradicted by the natural mother. Therein, she stated that in the first part of October, 1985, she became involved in a brief relationship with appellant which resulted in a single act of intercourse. (See paragraph 3, TAB 1). Furthermore, his claim of a strong, bonded relationship is inconsistent with his admission that at no time during his

absence from the natural mother (approximately 13 months) did he contact the natural mother or inform her of his address or telephone number or any way to contact him. (Exhibit "A", paragraph 5, appellant's brief) Rather his total lack of contact or communication with the natural mother is consistent with his new marriage and fathering a child during his absence in Nigeria. (See Addendum, TAB 2).

(2) The child in the subject case was conceived in Utah by the natural mother who was a Utah resident and by the appellant who resided in Utah at the time of conception and then left the United States voluntarily.

(3) The subject case is clearly distinct from the Doe and Ellis cases. In Doe the putative father learned of the filing of an adoption petition on August 28th, one day after the petition had been filed on August 27th. He immediately contacted a lawyer, drove from Arizona to the State of Utah and filed a Notice of Claim of Paternity on August 29th. In Ellis, the putative father learned of the filing of the petition for adoption within a day or two of its filing. Thereafter, his attorney contacted the adoption agency in Utah on December 21st, and the Notice of Claim of Paternity was filed approximately 10 days later on January 2nd. By contrast, the appellant in this case learned of the birth of his child in November, 1986,

concurred in its placement for adoption as reflected in the letter from the natural mother to counsel for respondents dated 12/16/86 (TAB 2), and did not file a Notice of Acknowledgement of Paternity until January 13, 1987, approximately two months after learning he was the father of the child. While appellant attempted to justify the lengthy delay between his knowledge of the birth of his child and the filing of the Notice of Claim to Paternity on the basis that he needed to confer and consult with his family in Nigeria and determine their wishes, the decision to assert such a claim was solely his as the natural father. Also, appellant's claim in paragraph 11 of Exhibit "A" in appellant's brief that it took several weeks for his family in Nigeria to respond to his consultations with them is inappropriate and should not be considered by the court inasmuch as said claim is raised for the first time on appeal. Nowhere in the previous pleadings filed in this matter with the court, has appellant contended that the delay in filing the Notice of Claim to Paternity resulted in any manner from any political or economic unrest in Nigeria. (See Statement of Facts, appellant's brief pages 3-5,; TAB 3).

(4) The registration of the acknowledgement of paternity did not occur within a few days after the child was released for adoption, but approximately 6 months later and approximately two

months after appellant knew of the birth of his child.

The recent cases of K.B.E, In Re:, 740 P2d 292 (Utah 1987) and K.O. v Denison, 748 P2d 588 (Utah 1988) decided by the Utah Court of Appeals are clearly distinguishable from the subject case. In K.B.E. the natural mother and her grandfather filed a petition for adoption on August 26th 1985 the morning of T.M.E.'s birth. The child's father filed an Acknowledgement of Paternity during the afternoon of the same day, after learning of the child's birth. There, the court held that the statute as applied violated due process. An evidentiary hearing was not deemed necessary inasmuch as the natural mother was not voluntarily terminating her parental relationship to place the child with new parents. Rather, she petitioned for joint custody for herself and her grandfather. In addition, the natural father filed his Acknowledgement of Paternity within just a few hours of the Petition for Adoption. In the subject case, by contrast, the natural mother did relinquish her parental rights within two days of the birth of the child, said child was placed with the respondents (the adoptive parents), the adoption was finalized on January 21, 1987, and the adoptive parents and the child have continuously resided together and bonded as a family unit for approximately 22 months. Also, in the subject case, the appellant did not file his Acknowledgement of Paternity within a

few hours of the filing of the petition for adoption, but approximately six months later and two months after he knew of the birth of the child.

In K.O., the court held that the natural grandmother who had raised and cared for her grandchild for a period of more than 6 years since birth, was entitled to notice of the subject adoption proceeding and to be heard regarding her fitness. In the subject case appellant has been involved in no such care and raising of his child. Further, despite his statement that he was involved in a love affair with the natural mother for 8 months and had a strong bonded relationship with her which he intended to resume upon his return to the United States, for 13 months he had no contact with the natural mother, neither did he provide her with his address, phone number or any way to contact him. In addition, he fathered another child in Nigeria during his absence and was newly married at the time of his return to the United States. (See Statement of Facts, page 4 and Exhibit "A", paragraphs 4,5,6 and 7 appellant's brief; also TAB 2).

The comments of the trial court based upon the totality of these circumstances, are very perceptive: "... if you open this one up, our statute is absolutely meaningless, would be meaningless altogether..." (p.5, TAB 3). The trial court did not err in refusing to grant appellant an evidentiary hearing.

POINT II

APPELLANT HAS NO EQUITABLE RIGHT TO HIS CHILD WHICH TRANSCENDS THE STATES' INTEREST IN SPEEDILY IDENTIFYING ADOPTIVE PARENTS AND SECURELY CONCLUDING ADOPTIONS.

After examining the fundamental rights of parents to sustain a relationship with their children, the Court stated In Re J.P., 648 P2d 1364, 1374-75 (Utah 1982):

"...Parents in different circumstances are apparently entitled to different degrees of protection for their parental rights. Parental rights are at their apex for parents who are married. Some variation exists among unwed fathers. While those who have fulfilled a parental role over a considerable period of time are entitled to a high degree of protection, unwed fathers whose relationships to their children are merely biological or very attenuated may, in some circumstances, be deprived of their parental status merely on the basis of a finding of the 'best interest' of the child..."

The United States Supreme Court in the case of Lehr v Robertson, 463 U.S. 248 (1983) likewise applied a rationale of variable parental rights where it referred to the rights of the parents as a counterpart of the responsibilities they have assumed. In its opinion, the Court elaborated that statement in reference to an unwed father who had no custodial, personal or financial relationship with the infant involved in that case.

" When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process of the law ...But the mere existence of a biological link does not merit equivalent constitutional protection" Id. at 261.

Justice Oaks, speaking for a unanimous court in Wells, 681 P2d 199, 203 (Utah 1984), described the legitimate and compelling interest of the state as it relates to unwed fathers:

"...The State has a strong interest in speedily identifying those persons who assume the parental role over such children not just to assure immediate and continued physical care, but also to facilitate early and uninterrupted bonding of a child to its parents. The state must, therefore, have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities or whether adoptive parents must be substituted."

The court further emphasized the compelling state interest in adoption cases:

"...If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations, must also be final and irrevocable." Id at 206-07.

Recognizing the significant and important interest of the State in placing children swiftly and securely for adoption our Supreme Court, in rejecting the claim of a mother to recover her child 8 months after she had given it up for adoption, stated:

"It is and should be a policy of the law to so operate as to encourage the finding of suitable homes and parents for children in that need. It is obvious that persons who might be willing to accept a child for adoption would be more reluctant to do so if a consenting parent is permitted to arbitrarily change her mind and revoke the consent, and thus desolate the plan of the adoptive parents and bring to naught all of their time, effort and expense and emotional

involvement... A moment's reflection will reveal that to the degree that such commitments are given respect and solidarity, so they can be relied upon, persons desiring children will be willing to accept and give them homes. Conversely, to the degree that such commitment can easily be withdrawn and the adoptive plan thus destroyed, such persons will tend to be discouraged from doing so." In Re Adoption of F, 488 P2d 130, 134 (Utah 1971)

While the above case involved a situation where the natural mother sought to revoke her consent, the Court as noted in the foregoing decisions, has clearly determined that in cases of unwed fathers, their rights are least where they merely have a biological link to the subject child. The same reasoning applies to them as it would to the mother in the case cited above. The adoptive parents must have the assurance that the statute does contain a cut-off provision which will be honored by the courts particularly where, as here, a single sexual act resulting in conception occurred after which the appellant left the country for a period of more than one year, during which time no communication was had with the natural mother, neither did she know of his whereabouts. Further, no interest of any kind had been expressed by the appellant even as regards the natural mother as demonstrated by his complete lack of communication. Subsequently, 13 months later, the appellant returned to the United States and learned that his child had been born, however, he delayed taking any steps to file the required Notice of

Paternity for approximately 2 months. To allow him to open the subject adoption file, have an evidentiary hearing and seek to set aside the adoption entered into in good faith by the adoptive parents and the subject child nearly two years ago would completely frustrate the adoption process, both for agencies and persons placing children for adoption as well as for those parents willing to come forward and provide homes for adoptive children.

POINT III

THE BEST INTERESTS OF BABY BOY DOE WILL BE SERVED BY HIM REMAINING WITH HIS ADOPTIVE PARENTS.

Appellant's contention that because he is a black Nigerian and the natural mother is white, somehow the best interests of the child will be better served by being returned to him than remaining with the respondents as the adoptive parents, is illogical and has no basis in fact. Appellant, as the natural father, has had absolutely no relationship with the child. Neither has he participated in the rearing of said child although he now expresses a desire to do so. Conversely, the respondents as the adoptive parents, immediately made themselves available and provided a home for the child at the time it was required. They did so because of their love for the child and their desire to provide a good home, where appropriate nurturing, physical and

emotional could occur. They also acted in reliance upon the consent given by the natural mother. Appellant's objection to the subject adoption was filed with counsel for the adoptive parents on or about February 13, 1987, nearly three weeks after the adoption had been finalized. The adoptive parents are the only parents this child has ever known. The bonding which commenced on or about July 20, 1986 has continued now for almost two years. Clearly, the best interests of this child dictate that he remain in the home of his adoptive parents.

POINT IV

78-30-14(7) U.C.A. DOES NOT EXPAND THE TIME SET FORTH IN 78-30-4(3) U.C.A. TO FILE A NOTICE OF CLAIM OF PATERNITY.

Appellant asserts the rather novel argument that 78-30-14(7) U.C.A. which provides that the petition for adoption shall not be granted until the child has lived in the home of the adoptive parents for 6 months, in some way expands the statutory cut-off period of 78-30-4(3) U.C.A. beyond the time of filing the petition for adoption and up to a period of six months. He then attempts to justify his delay in filing the acknowledgement of paternity due to mistaken advice which he received from someone, that he had six months in which to file his acknowledgement of paternity. What the appellant thought or understood the law to be is neither material nor relevant. All of the cases which have considered the statutory cut-off provisions of 78-30-4(3) U.C.A.

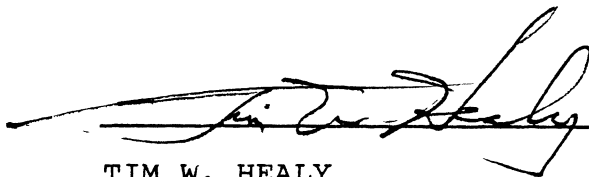
i.e. Ellis, Wells, Sanchez, and Baby Doe, have held the statute constitutional. None of those decisions or any other to the knowledge of respondents' counsel, by either the Utah Court of Appeals or the Utah Supreme Court have ever mentioned, or considered 78-30-14(7) U.C.A. as expanding the statutory cut-off time for an unwed father to file an acknowledgement of paternity to six months.

CONCLUSION

To allow appellant to open the subject adoption file and have an evidentiary hearing, would open a Pandora's box of immeasurable proportions. If, in fact, notice of the birth of a child, the subject adoption proceedings or the statutory requirements were required, it would mean in a case such as this, that anytime a "one night stand" occurred and the putative father was unaware that the act of intercourse resulted in conception, or unaware of the adoption proceedings or the statutory requirement, he could come back at any time, and disrupt and void the adoption process that had occurred soon after the birth of the child. It is respectfully submitted that such an

interpretation of the statute was never contemplated by the legislative framers. Further, this case does not come within the Ellis and Baby Doe exceptions in that it was not impossible for appellant to file the required notice through no fault of his own. Finally, to allow someone as the appellant to have an evidentiary hearing when he failed for two months to file an Acknowledgement of Paternity after learning that he fathered a child and the child had been placed for adoption some six months earlier, would result in total chaos insofar as the adoption processes of the State of Utah are concerned and would render the adoption statutes unreliable and meaningless. 78-30-4(3) U..C.A. as applied to the facts of this case does not violate due process. The trial court correctly denied appellant's petition to open the adoption file and have an evidentiary hearing. The decision of the trial court should be affirmed.

RESPECTFULLY submitted this 12 day of May, 1988.

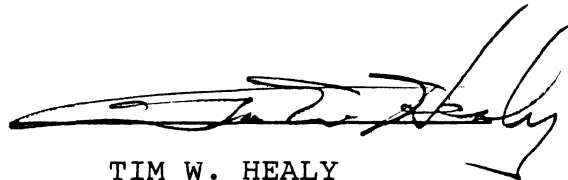
A handwritten signature in black ink, appearing to read "Tim W. Healy", is written over a horizontal line.

TIM W. HEALY

Attorney for Respondents

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) copies of the foregoing Respondents' Brief to Merlin Calver, Attorney for Appellant, 290 25th Street, Ogden, Utah 84401 on this 13 day of May, 1988.

A handwritten signature in black ink, appearing to read "Tim W. Healy", with a stylized flourish at the end.

TIM W. HEALY

ADDENDUM

- TAB 1 Deposition and Consent of the Natural Mother
 To Adoption, dated July 21, 1986.
- TAB 2 Letter from Natural Mother, dated December
 16, 1986.
- TAB 3 Transcript of District Court hearing of October
 2, 1987 denying request for evidentiary
 hearing.
- TAB 4 The Adoption Conundrum, Part I, Utah Lawyer
 Alert, Vol. 87, No. 4.

TIM W. HEALY
Attorney for Petitioners
863 25th Street
Ogden, Utah 84401
Telephone: 621-2630

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

IN THE MATTER OF THE ADOPTION)	
)	
OF	)	DEPOSITION & CONSENT
	)	TO ADOPTION
INFANT DOE aka)	
)	
A Minor Child.	)	Civil No. <u>4068</u>
)	

Come now SHELLY D. BROPHY and her husband, LARRY BROPHY and being first duly sworn upon their oath depose and say:

1. That the deponents are married to each other and have two children previously born as issue of that marriage.

2. That the parties have been separated at various periods during the past three - four years and have lived apart for significant periods of that time.

3. That on or about the first part of October 1985, your affiant, SHELLEY D. BROPHY, became involved in a brief relationship with a male person not her husband with whom she engaged in a single act of sexual intercourse from which act she conceived and bore a child on the 18 day of July, 1986 in Ogden Utah. The natural father of said child is a Nigerian and left the United States within a few days after said act of intercourse. Your affiant, SHELLEY D. BROPHY, has had no further contact with said person since October 1985, and does not know his present whereabouts. Your affiant does not intend to marry the father of said child and is presently married to your affiant, LARRY BROPHY.

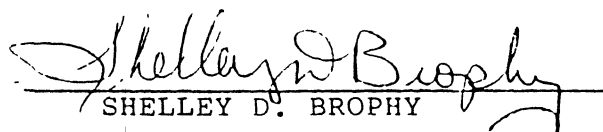
4. That your affiant, LARRY BROPHY, admits and acknowledges that he is not the father of the aforesaid minor child born on the 18 day of July, 1986 in Ogden, Utah. However, inasmuch as said child was born during the marriage of Larry Brophy to Shelley D. Brophy your affiant understands that said child is

DEPOSITION & CONSENT
Page Three

hereby join in said Petition and respectfully request that the Petition for Adoption be granted.

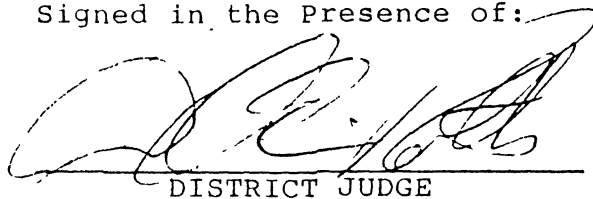
10. That this consent to adoption is given freely without compulsion, payment or promises from anyone and that the best interest of all parties herein shall be served by this adoption and that the undersigned are not currently under the influence of medications, drugs or intoxicants or in any manner unable to understand the importance and finality of this Consent to Adoption that all rights have been fully explained to their satisfaction.

DATED this 21 day of July, 1986.


SHELLEY D. BROPHY


LARRY A. BROPHY

Signed in the Presence of:


DISTRICT JUDGE

helleY Brophy
'S N. 3 E
insville, ut. 84037

12/16/66

Dear Mr. Healy,

I'm writing in regards to the adoption you handled for me in July of this year.

The baby's biological father is in Ogden until sometime after New Years. He is desirous of seeing the baby. He supports my decision to put the baby up for adoption. He is newly married & just had a son of his own.

I realize this is a major inconvenience for all involved but for both our sakes we need to see him and be reassured that he is healthy and being well cared for.

Neither the baby's father or I have any doubts that this adoption was for the best. It just seems that we both
that the
close it
I.

arr.

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1 THE COURT: Is this adoption ready?

2 MR. HEALY: Yes, Your Honor.

3 MR. CALVER: Merlin Calver for the petitioner in
4 this matter, Your Honor. We both submitted memorandums and
5 briefs, which I think basically cover all the issues. What
6 we're asking the Court to do is to have an evidentiary
7 hearing regarding the placement of the baby in this matter.
8 Basically, what we're asking is based upon the facts, the
9 natural father was unaware that there was, in fact, a child.
10 He was out of the country during any statutory time, and
11 therefore, he could not have protected his rights had he
12 known. And upon his returning to the country and becoming
13 aware that he was a father, he thought he had filed within
14 the statutory time. His understanding was he had six
15 months from placement, and he filed before the six months and
16 before the adoption was final.

17 THE COURT: Now, his understanding is not the
18 question. The question, basically, is whether or not he had
19 a reasonable opportunity.

20 MR. CALVER: He did not have a reasonable
21 opportunity, Your Honor.

22 THE COURT: According to the letter from the
23 natural mother, he was back in the United States for a
24 couple of months before he did anything.

25 MR. CALVER: I think, though, that the real issue

1 at the time of the placement , even though -- I think that
2 Mr. Healy would argue either way. If I were to say, well,
3 immediately upon his return to the country, he filed for
4 acknowledgement of paternity, Mr. Healy would then state,
5 well, that was too late, also, because he filed after the
6 child was placed and after the petition was filed. And the
7 Court in a couple of cases I've submitted, said that if the
8 father was not aware and did not have an opportunity to file
9 the acknowledgement of paternity, that an evidentiary hearing
10 may be appropriate, and that's what we're asking for is an
11 evidentiary hearing.

12 THE COURT: How long after he arrived back in the
13 United States did he file?

14 MR. CALVER: It would have been approximately two
15 months. And these are the kinds of things that I think
16 should be brought before the Court, but I'll proffer, the
17 natural father is not an American citizen. He was not aware
18 of the American judicial process. He was informed by
19 someone, not an attorney, that he had six months. He
20 wanted to confirm that the child was his. He wanted to have
21 some time to consult his family in Nigeria regarding what
22 their desires were regarding the child. The Nigerians have
23 an extended family system. He had to consult with his
24 father and his mother to get their opinion. As soon as he
25 got their opinion on what they felt he should do, he filed

1 within the six month period. And I truthfully think that
2 any time he would have filed after the placement, he would
3 have fallen under some of these Supreme Court cases. But
4 they also say he has a right to due process. If he was not
5 aware of the child -- and I can proffer, also, the mother
6 was not aware of the child at the time that the father left
7 the country. The mother was not aware that she was pregnant
8 for quite some time. And as soon as she found out, she
9 attempted to contact the father, and he was out of the
10 country, and she had no way to contact him. I think it's a
11 proper matter for an evidentiary hearing, and that's what
12 we'd like to ask.

13 MR. HEALY: Your Honor, in response, we've submitted
14 another lengthy statement of facts and briefs, and I think
15 the Court can clearly see from the cases that have been
16 cited, that the only time our Supreme Court, and subsequently,
17 the Court of Appeals, has allowed an evidentiary hearing,
18 have been in those cases where it appears that due process
19 as applied may have been violated. In the two cases that
20 are exceptions to that rule that are cited there are Baby
21 Doe and Baby Ellis. Those are both circumstances that are
22 totally different than the one before the Court now. Those
23 acknowledgements were filed within a day or two after the
24 matter came to the attention of the punitive father. The
25 other significant thing is those were ongoing, long-term

1 relationships, where marriage had been discussed in each
2 instance, and where there had been some ongoing period for
3 a period of many months, where there had been those regular
4 and daily contacts. I think the great concern that has been
5 expressed here, Your Honor, is that number one, this did not
6 occur immediately. He took a couple of months to consult
7 with his family, to talk to different people, to decide,
8 should I do something about this child. He may be a
9 Nigerian, but he also has attended Weber State College, and
10 certainly is not naive as to U.S. matters and customs.

11 The other thing, Your Honor, is the fact that if
12 the Court were to permit this type of a situation to grow
13 into evidentiary hearings and to overturn placements for
14 adoption, these one-night stands -- which is clear from the
15 deposition and consent of the natural mother, it was a
16 single act of intercourse -- would clearly jeopardize our
17 adoption processes. People could come back at any time and
18 say, well, gee, I just didn't know. And as our Supreme
19 Court has said, and as the United States Supreme Court has
20 said, actual notice is not a requirement to be met in this
21 particular circumstance.

22 I would submit for that reason, Your Honor, that
23 first of all, this case does not fall within the Ellis and
24 Doe exceptions, and secondly, any time that did occur, far
25 exceeded what would have been a reasonable opportunity.

1 Mr. Calver said they must have an opportunity. The Court
2 said they must have a reasonable opportunity. I submit that
3 waiting two months to make such a determination is far too
4 long.

5 THE COURT: I've read your briefs in this thing,
6 and my opinion, if you open this one up, our statute is
7 absolutely meaningless, would be meaningless altogether. I
8 think it's finalized, and it's a standard one. He had
9 reasonable opportunity for two months. I do not think it
10 would go for hearing, and I reject your petition.

11 MR. CALVER: Your Honor, could we have a written
12 decision on that for our files? We would attempt to appeal
13 that decision, and I would need something.

14 THE COURT: It's on the record.

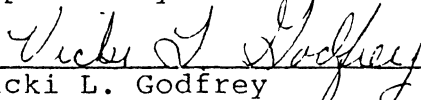
15 MR. CALVER: Thank you.

16 THE COURT: There will be a minute entry. There's
17 also a record over here. There's also your briefs.

18 MR. HEALY: Thank you.

19
20 .Transcript of Hearing held October 2, 1987.

21 Reported by:

22 
23 Vicki L. Godfrey
24 Official Court Reporter
25

THE ADOPTION CONUNDRUM PART I

Professor Lynn D. Wardle¹

Contested child custody cases often present courts with exquisite dilemmas. None are more poignant than contested adoption cases. Two recent controversial decisions of the Utah Supreme Court highlight the adoption conundrum. In *In re Adoption of Baby Doe*, 717 P.2d 686 (Utah 1986) the court probably reached the right result for the wrong reasons. In *In re Halloway*, 732 P.2d 962 (1986) the court probably reached the wrong result for the right reasons. Yet, both decisions may help to prevent future abuses and to preserve the fine balance of Utah's adoption law.

In this article the *Baby Boy Doe* decision will be reviewed. In the next issue of Utah Lawyer Alert the *Halloway* decision will be assessed.

The Baby Boy Doe Decision.

In *In re adoption of Baby Boy Doe*,² the Supreme Court of Utah, in a 3-2 decision, reversed the judgment of a Utah district court denying a motion filed by an unwed father to vacate an adoption petition respecting his child. The man (A.) and the girlfriend (S.H.) had lived together out of wedlock in California for three and a half years. In June, 1984, when she was apparently six or seven months pregnant, S.H. left A. and moved to Utah to live with relatives, who discouraged her from having further contact with A. Nevertheless, S.H. continued to talk with A. by telephone and, in early August, a few weeks before the child was born, A. visited her in Utah for several days. She told him that she was considering adoption; he told her that he opposed adoption and wanted to rear the child. S.H. ostensibly agreed to resume living with A. and he went to Arizona to look for a job and for a place for them to live. On August 24, A. telephoned S.H. from Arizona to advise her that he had secured a job and a place to stay, and that he would return to California to pick up their belongings and move them to Arizona. The next day, S.H. gave birth to the Baby Boy Doe in Utah, at least a week prematurely.

Two days later, on August 27, S.H. appeared in court and formally relinquished her parental rights and consented to the adoption of Baby Boy Doe. S.H.'s sister-in-law had made arrangements for the baby to be adopted by an Oregon couple, whose relatives, the Burns, lived in Utah. The Burns filed an adoption petition in Utah in their own names the same day that S.H. relinquished her parental rights and were awarded temporary custody. The Oregon couple came to Utah and took custody of the child from the Burns the next day, August 28th, and three days later they returned to Oregon with Baby Boy Doe.

Mr. A. attempted to contact S.H. from Arizona by telephone on August 27, but was thwarted by her relatives. He learned of the adoption on August 28. Thereupon he immediately contacted a lawyer and drove to Utah. He filed a notice of claim of paternity on August 29 and filed his motion to vacate the adoption petition on September 6.

Utah Code Annotated §78-30-4(3) requires the father of a child born out of wedlock who wishes to claim parental rights and receive notice of adoption to file a notice of claim of paternity before a petition for adoption is filed. Mr. A. did not file his notice until two days after the filing of the adoption petition. The district court found that it was not impossible for appellant to have filed his notice of claim of paternity before the petition of adoption was filed, and that he had reasonable opportunity to do so. Accordingly, the district court rejected Mr. A's claim to parental rights and denied his motion to vacate the adoption petition.

the majority, analyzed two issues on appeal. The first issue was whether the district court erred in rejecting Mr. A's allegation that the adoption petition was fraudulent because the Burns only intended to adopt the child if their out-of-state relatives did not adopt the child, and they gave the child to the out-of-state relatives less than 24 hours after getting temporary custody. The Supreme Court of Utah noted that the district court had extensively explored this point, personally questioning the parties at the hearing, and had made an explicit finding of fact that the Burns had a good faith (if conditional) intention to adopt the child when they filed the adoption petition. The supreme court approved the trial court's analysis, emphasizing that "this determination was one which was particularly within the province of the fact finder".³

The second issue addressed by the Supreme Court was whether the lower court erred in holding that Mr. A. was not denied due process of law because he had a "reasonable opportunity" to comply with the notice filing requirements of the Utah statute, and that it was not "impossible" for him to do so. The court reviewed the landmark decision in *Ellis v. Social Services Department of The Church of Jesus Christ of Latter-day Saints*.⁴ In that case the Utah Supreme Court upheld section 78-30-4(3) as facially constitutional, but stated that if it was impossible for an unwed father to file the required notice within the statutory period of time, "through no fault of his own[.], . . . due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute."⁵ The court in *Baby Boy Doe* also stressed that "where a father does not know of the need to protect his rights, there is no 'reasonable opportunity' to assert or protect parental rights."⁶ And while "actual notice is not required prior to termination of parental rights of an unwed father under section 78-30-4(3)," this general rule only applies "where the putative father knows or should know of the birth and can reasonably take the timely action required to avoid the statutory bar."⁷ The totality of circumstances in the *Baby Boy Doe* case, rather than any single factor, persuaded the majority that Mr. A. did not have a "reasonable opportunity" to comply with the statute in this case, and that it was "impossible" for him to do so. The circumstances specifically noted by the court included "the clearly articulated intent of the father to keep and rear the child, the full knowledge of that intent on the part of all involved, the representations made by the mother, the actions of her family, the premature birth, and the non-residency of the father coupled with his absence at the time of birth . . ."⁸

Justice Stewart wrote a strong dissenting opinion, joined by Justice Howe. The dissent was primarily concerned about the suggestion in the majority opinion that in some cases actual notice of adoption might need to be given to the illegitimate father. In *Ellis* the court had emphasized that the "impossibility" that was the basis for the *Ellis* exception was only that the father "could not reasonably have expected his baby to be born in Utah."⁹ Inasmuch as Mr. A. knew long before the child was born that it would be born in Utah, he did not come within the *Ellis* exception. The due process analysis of the majority was contrasted with that used by the Supreme Court of the United States in *Lehr v. Robertson*,¹⁰ in which application of a very similar New York statute to terminate the parental rights of an unwed father, whose efforts to establish a parental relationship with his child had been thwarted by the deliberate acts of the child's mother, was upheld. The dissent also emphasized that the majority decision effectively overruled the trial court's findings of fact that "[i]t was not impossible for Mr. Aguilar to have filed his Notice of Claim prior to the filing of the adoption petition . . ." and that he had "a reasonable opportunity to file the Notice of Claim before the petition to adopt was filed."¹¹ Finally, as a policy matter, the dissent emphasized that the majority ruling made "the validity of many adoption proceedings turn on the majority's notion of 'fairness' which would create unpredictability" in many adoptions.

The Adoption Proceedings in *Baby Boy Doe* were Statutorily Defective.

The Utah Supreme Court unfortunately overlooked some serious *nonconstitutional* deficiencies in the *Baby Boy Doe* case. The adoption procedures utilized by the parties to effect an out-of-state child placement for adoption clearly violated the express statutory re-

requirement of both Utah and Oregon for inter-state adoptions. Utah and Oregon, and approximately 40 other states, are parties to the Interstate Compact on the Placement of Children.¹² Under the ICPC, any "person, corporation, association or other entity which sends, brings, or causes to be sent or brought any child to another party state" is deemed to be a "sending agency."¹³ The Burns clearly were a "sending agency" under the Compact. Article III of ICPC expressly prohibits any sending agency to "send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption" unless all of the requirements of the compact are satisfied. Among the requirements are that the appropriate public authorities in the receiving state be given written notice of the intent to bring the child to the state, that those authorities investigate the prospective adoptive parents, and that those authorities notify the responsible agency in the sending state "that the proposed adoption does not appear to be contrary to the interests of the child." *Id.* It does not appear that any of the basic requirements of the ICPC for an interstate adoption were satisfied in this case.

The overwhelming weight of authority holds that the requirements of the ICPC apply to private adoptions, as well as adoptions through licensed agencies.¹⁴ A 1979 opinion from the Utah Attorney General unequivocally advised the Division of Family Services that the ICPC applies to private placements.¹⁵ Numerous official Secretariat Opinions of the ICPC Compact Administrator have held that the Compact applies to private placements.¹⁶ In *In re Adoption of T M M*,¹⁷ the Montana Supreme Court ordered a child removed from the home of its prospective adoptive parents in Montana and returned to its biological mother in Mississippi because the requirements of the ICPC had not been observed.¹⁸ Thus, the procedure employed by the parties in this case to effect a private interstate placement for adoption violated the ICPC.¹⁹

Another nonconstitutional problem with the adoption in Baby Boy Doe that was overlooked or ignored by the Utah Supreme Court was the conditional nature of the petition for adoption that was filed by the Burns. Their intent, apparently, was to adopt Baby Boy Doe only if their out-of-state relatives did not adopt him as arranged. The Supreme Court of Utah could easily have interpreted §78-30 4(3) to cut off the time for filing a notice of claim of paternity only if the adoption petition is filed by the actual, ultimate adopting parents, not a conditional intermediary. In fact, in light of the legislative scheme embodied in that section, that is the natural construction. Section 78 30 4(3) provides not one but two "cut off" points before which the putative father of a child born out of wedlock must file his notice of claim of paternity. If the child is released to a licensed agency (an agency subject to strict professional scrutiny, regulation, and legally to be act in a very professional manner) the cut-off date is the date on which the mother relinquishes the child to the agency for adoption. On the other hand, if the adoption is to be a "private" adoption, not involving an agency, the cut off date is "the filing of a petition [for adoption] by a person with whom the mother has placed the child for adoption."²⁰ This language suggests that the legislature intended to cut off the right of the unwed father to file a notice of claim of paternity in private adoptions when the couple actually adopting the child files a petition.

In *Baby Boy Doe* the Burns, who filed the adoption petition in Utah, were acting as an intermediary, unlicensed, nonprofessional child placement agency. The Utah Supreme Court should have ruled that the filing of the adoption petition by them did not constitute "the filing of a petition by a person with whom the mother has placed the child for adoption" inasmuch as the Burns turned the child over to another couple for adoption less than 24 hours after filing their adoption petition and getting custody. The court did not have to find the Burn's adoption petition was fraudulent or invalid to hold that it did not operate to cut off Mr. A's right to file a notice of claim of paternity, only that the petition was not filed by the person with whom Baby Boy Doe was ultimately "placed" for adoption.

The "New" Due Process Analysis in *Baby Boy Doe*

The due process analysis in *Baby Boy Doe* is intriguing.²¹ The case illustrates why the requirements of "due process of law" cannot be

reduced to a mechanical formula. Justice Durham's majority opinion in *Baby Boy Doe* demonstrates a special sensitivity to individual fairness and practical justice. Justice Stewart's dissenting opinion reveals a remarkably perceptive understanding of the systemic principles of "due process of law." Justice Stewart is concerned that hard cases make for bad law. Justice Durham is concerned that hard law makes for bad cases.

The majority opinion in *Baby Boy Doe* modifies the test for due process of law established in prior Utah adoption cases. The seminal case, *Ellis*, was decided by the Utah Supreme Court in 1980. That case involved two residents of California, Mr. Ellis and his fiancée, who were engaged to be married and were expecting a child. In July, just two weeks prior to their wedding, when the woman was three or four months pregnant, and Ellis knew of the pregnancy, the woman terminated the engagement. Five months later, just a few days before the child was to be born, the woman secretly traveled to Utah and arranged to place the child for adoption. A few days later, on December 15, the child was born. On December 19 the mother relinquished the child to a licensed adoption agency. Somehow, about this time, Ellis discovered what the woman had done and where she had gone. He immediately contacted his attorney who apparently contacted the Utah adoption agency by telephone on December 21. On January 2, he filed his Notice of Claim of Paternity, and two days later he filed a complaint in Utah court seeking habeas corpus. The trial court dismissed his complaint on the ground that his failure to file a timely notice of claim of paternity constituted a total negation of his parental rights.

The Supreme Court of Utah reversed, declaring "In the usual case, the putative father would either know or reasonably should know approximately when and where his child was born. It is conceivable, however, that a situation may arise when it is impossible for the father to file the required notice of paternity prior to the statutory bar, through no fault of his own. In such case due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute."²² Since both of the parties were California residents, the woman left California just prior to the birth of the child without advising the man where the birth was to occur, and since she relinquished custody just four days after birth, the court reversed and remanded to give the father an opportunity to show "that he could not reasonably have expected his baby to be born in Utah."²³ The court said that he should be deemed to have complied with the statute if he could show that "he came forward within a reasonable time after the baby's birth."²⁴

Baby Boy Doe was quite a different case. In *Baby Boy Doe* the father knew "approximately when and where his child [would be] born."²⁵ Justice Durham's majority opinion carefully emphasized the "no fault of his own" factors. S.H. had agreed to move to Arizona with Mr. A. before the child was born, in reliance on her agreement to live with him. A. went to Arizona, got a job, secured housing, returned to California to gather their possessions and take them to Arizona, etc., S.H.'s family to prevented Mr. A. from talking with the mother the day that, unbeknownst to him, she released the child for adoption, etc. Justice Durham makes a convincing case that Mr. A. reasonably believed that S.H. would not release their illegitimate child for adoption. In that sense, it was "no fault of his own" that he was surprised to learn that she had released the child for adoption only two days after it was born. But it is questionable whether this was really the focus of the "no fault of his own" *Ellis* test, the "no fault" standard articulated in *Ellis* did not modify the father's belief that compliance with the statutory requirements was unnecessary, but the existence of conditions which made it impossible for him to comply with the statutory requirement of filing a timely notice of claim of paternity. The *Ellis* court only held that a father was entitled to an opportunity to show that "as a factual matter he could not reasonably have expected his baby to be born in Utah."

Justice Durham suggested a reformulation of the *Ellis* rule application of U.C.A. §78-30-4(3) to terminate the parental rights of the father of a child born out of wedlock does not violate due process "where the putative father knows or should know of the birth and can reasonably take the timely action required to avoid the statutory bar."²⁶ However, even applying that test in *Baby Boy Doe*

it is not self evident that Mr. A's failure to file was excusable, I knew of the approximate time and place of the birth of the child, I had personally visited the mother in Utah for several days before the birth of the child, and could have 'reasonably take[n] the timely action' of filing a notice of claim of paternity then. Justice Durham again emphasized the reasonableness of the father's belief that I would not need to file a notice of claim of paternity. But this misses the point, the issue is not whether the father's decision to ignore (or to fail to inquire about) the requirement of filing a notice of claim of paternity was reasonable, but whether the requirement that he take the timely action required is reasonable as applied to him. That is, the 'reasonableness' modifies the requirement that the father file the notice before the cut off event, not his excuse for failure to comply.²⁷

After *Ellis*, the next Utah decision to discuss due process in adoption cases was *Wells v. Children's Aid Society*.²⁸ In that case, a couple of Moab high school students had sex and the girl became pregnant. When the girl informed her boyfriend (Wells) of her probable pregnancy he shunned her. When the girl was about eight weeks pregnant Wells was informed that the pregnancy was confirmed, and he finally told his parents. Wells' parents offered financial support to the pregnant girl and attempted to dissuade her from giving the child up for adoption. They also contacted an attorney and were informed that the putative father would need to file a notice of claim of paternity. However, Wells and his parents decided not to file the notice of claim of paternity because they were not sure if the child was really his, they decided to wait to see when the child was born. About a week before the child was to be born, the girl left Moab and went to Ogden to have the child. The baby was born on September 23. Wells learned of the birth the same day, and immediately telephoned the notice of claim of paternity. However, the notice did not arrive until September 30. On September 24, the girl formally relinquished her parental rights and placed the child with a licensed agency for adoption. The next day the child was placed by the agency for adoption, and two days later the Department of Health issued a certificate of search verifying that no notice of claim of paternity had been filed. A week later, Wells brought an action seeking custody of the child in alleging that the girl and the agency had fraudulently concealed facts surrounding the infant's birth to deprive him of his parental rights. The trial court held that the father was denied "a reasonable opportunity to file" his notice of claim of paternity and awarded him custody.

The Supreme Court of Utah unanimously reversed. The court emphasized the concept of "variable parental rights" which the United States Supreme Court had established in *Lehr v. Robertson*, i.e., "the rights of the parent are a counterpart of the responsibilities they have assumed."²⁹ The court distinguished *Ellis* because

here the birth occurred in the same state as the father's residence, and neither the child's mother nor the agency was involved in any effort to prevent him from learning of the birth or from asserting his parental rights. Neither the mother nor the agency knew at the time the child was relinquished that the father was seeking to or intending to assert his parental rights. The father had sufficient opportunity to [file his claim of paternity], including ample advance notice of the expected time of birth and the fact that the mother intended to relinquish the child for adoption, advice of counsel, and the copy of the form.³⁰

Ellis had extended the "reasonable opportunity to comply with the statute" after the statutory filing deadlines had passed only in case "when it is first shown that it was 'impossible' for the father to file 'through no fault of his own'."³¹ Perhaps most importantly, the court also held that a particularized, subjective standard of fairness was not required by the due process clause because the statute on its face was sufficiently fair. "The legitimate state interests in facilitating the adoption of young children and having the adoption proceedings completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute."³²

Conceptually, the decision in *Baby Boy Doe* is at odds with the

principles articulated in *Wells*, which emphasized that individualized "fairness" will only be required after the dual threshold requirements of "impossibility" and "no fault of his own" have been satisfied. Factually, however, *Baby Boy Doe* can be distinguished from *Wells* because the father and mother were Utah residents, no effort was made to prevent the father from learning of the birth or asserting parental rights, and the mother did not know at the time that she released the child for adoption that the putative father intended to assert his parental rights. Moreover, the putative father in *Wells* had spoken to counsel before the birth of the child, knew specifically the Utah legal requirements, and made a deliberate decision to postpone the filing. *Wells* emphasizes that due process does not require the state to indefinitely protect the parental rights of fathers who genuinely wish to assert their parental responsibilities; the rights of sincere unwed fathers may be cut off if they fail to act in the prompt and timely manner required by the statute.

A month after *Wells* was decided, the Utah Supreme Court decided *Sanchez v. L.D.S. Social Services*.³³ In that case a woman, CSM, lived with a man, Sanchez, for four months and became pregnant by him. Sanchez proposed marriage, but CSM refused. Sanchez expressed the desire to have CSM and their baby live with him, but CSM told Sanchez that she was thinking of giving the baby up for adoption. He did not protest the mother's decision to place the child for adoption, but he said that he assumed that she would not. Together they discussed adoption with a counselor from an adoption agency. The counselor did not inform Sanchez of his right to file a notice of claim of paternity. Approximately seven months after CSM quit living with Sanchez she gave birth to the child. Three days later, on October 27, she formally relinquished the child to the agency for adoption. Earlier that same day Sanchez had visited her and the baby at the hospital after CSM had called him to come "if you want to see the baby one last time." He tried to sign the birth certificate, but was not allowed to do so. That afternoon, after CSM had relinquished the child for adoption, Sanchez attempted unsuccessfully to file his notice of claim of paternity; he succeeded in filing his claim the next day. Later Sanchez filed a petition for writ of habeas corpus to obtain custody of the child. The trial court dismissed the petition.

The Supreme Court of Utah affirmed by a vote of 3 to 1. Justice Stewart, writing for the majority, emphasized *Wells* and distinguished *Ellis* on the basis that Sanchez lived in Utah throughout the pregnancy, knew the time and place of the birth of the child, and could fairly be presumed to know the law of his state of residence.³⁴ The court emphasized the need for a clear and final "cut off" date to protect the profound interests of the adoptive parents, the natural mother, and the illegitimate child. "It is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare [adoption]."³⁵

Justice Durham, alone, dissented and attempted to distinguish *Wells*. She emphasized that Sanchez had consistently asserted his interest in the child throughout the pregnancy, proposed marriage, publicly acknowledged paternity, filed his notice of claim of paternity within hours of learning of the statutory requirement, and was not informed of her intent to release the child for adoption until it was too late for him to file his notice of claim of paternity. Interestingly, Justice Durham based her argument upon Article 1, section 7, of the Utah Constitution. She did not attempt to distinguish the United States Supreme Court's interpretation of the due process clause of the fourteenth Amendment of the United States Constitution in *Lehr*; apparently she would have the Utah Supreme Court hold that the due process clause of the Utah Constitution provides greater protection to the parental rights of fathers of illegitimate children than does the United States Constitution. However, no other justice joined in her position.

The analysis of the majority in *Baby Boy Doe* is difficult to reconcile with the emphasis in *Sanchez* on the need for a "firm cut off date" for putative fathers of children born out of wedlock to assert

their claim to paternal rights. The apparent incompatibility of the two cases is underscored by the significant common facts: the putative fathers in both cases knew of the pregnancy, did not know that the law required them to file a notice of claim of paternity until it was too late, both men showed an interest in raising the child and expressed their desire to live with the mother and child, both fathers mistakenly believed that the mother would not give the child up for adoption, and both men acted promptly to assert parental rights as soon as they learned that the child had been placed for adoption. But the difference in results can be partially justified by several key factual differences: in *Sanchez* the father and mother were residents of Utah, the mother in *Baby Boy Doe* had agreed to resume living with the putative father, and the putative father was out of state seeking employment and housing in reliance upon that representation.

Probably the loosest language in the majority opinion in *Baby Boy Doe* is that suggesting that "where a father does not know of the need to protect his rights, there is no 'reasonable opportunity' to assert or protect parental rights."³⁶ Literally, this is an "actual knowledge" standard--and since most fathers of illegitimate children probably do not have "actual knowledge" of the specific requirements of §78-30-4(3), literal application of that standard could create severely unjust uncertainty and confusion in adoption cases. However, this language does not stand alone. A little later in the same paragraph Justice Durham clarified that actual notice was not required "where the putative father knows or should know of the birth and can reasonably take the timely action required . . ."³⁷ It is worth noting, that the United States Supreme Court, in *Lehr*, expressly rejected the requirement that putative fathers of illegitimate children be actually notified of the requirements of the law:

The possibility that (the father of an illegitimate child) failed to (comply with a statute requiring filing of a notice of claim of paternity) because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself. The . . . legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risks of un-

necessary controversy, and impair the desired finality of adoption decrees [W]e surely cannot characterize the states' conclusion as arbitrary.³⁸

Conclusion.

In the final analysis, *Baby Boy Doe* makes a positive contribution to the fine balance of due process in terminating parental rights in adoption proceedings in Utah. It provides a healthy counterbalance to *Wells* and *Sanchez*; in those cases the Utah Supreme Court demonstrated that it was willing to strictly apply the requirements of section 78-30-4(3) even if it meant that biological fathers who sincerely wanted to raise their children would be deprived of that opportunity forever. The importance of compliance with the adoption statutes and the substantial risk that a dilatory unwed father runs have clearly been emphasized. Utah's serious commitment to protecting the important interests of unwed mothers, adoptive parents, adopted children and to promptly insuring stability of adoptions have been vindicated by those decisions. *Ellis* and *Baby Boy Doe* protect the competing interests and emphasize the importance of the rights of biological fathers and the significance of potential families. They ensure that every putative father will be entitled to an opportunity--at least a minimum period of time in which to inquire and act--to claim parental rights. These cases stand for the proposition that the "reasonable" time which must be provided may, in exceptional cases, extend beyond the cut off time set in §78-30-4(3).

The question remaining, of course, is how can judges and attorneys tell when a case falls within the *Ellis-Baby Boy Doe* exception. While that is not crystal clear now, there were four significant factual circumstances in both *Ellis* and *Baby Boy Doe* that might be expected in other exceptional cases. First, there was deceit or misconduct on the part of the mother or her agents at a critical time, which prejudiced the ability of the putative father to comply with the notice-filing requirement. Second, in both cases the child was conceived out of Utah by non-Utah residents, and the mother came to Utah just a short time before giving birth to the child (there are choice-of-law and jurisdictional overtones here). Third, the putative

fathers registered their notice of claim of paternity immediately upon learning of the statutory duty to do so. Finally, such registration occurred within just a few days after the child was released for adoption.

FOOTNOTES



1 Professor of Law, J. Reuben Clark Law School, Brigham Young University. Professor Wardle has taught Family Law for nine years.

2 717 P.2d 686 (Utah 1986).

3 717 P.2d at 689.

4 615 P.2d 1250 (1980).

5 615 P.2d at 1256.

6 717 P.2d at 686.

7 *Id.*

8 *Id.* at 691.

9 *Ellis*, 615 P.2d at 1256.

10 463 U.S. 248 (1983).

11 *Id.* at 694.

12 Utah Code Annot. §55-8B-1 Oregon Rev. Stat. §417-200.

13 *Id.*

14 Most states appear to apply the Compact to private placements and the wording of the Compact appears to support this interpretation. A. Haralambie, *Handling Child Custody Cases* §15.16 (1983).

15 Letter dated Oct. 23, 1979, from Sharon Peacock, Assistant Attorney General to James P. Wheeler, Director, Division of Family Services.

16 See generally Secretariat Opinion 16, May 16, 1975, Secretariat Opinion 37, Apr. 7, 1977, Secretariat Opinion 38, Apr. 7, 1977, Secretariat Opinion 39, Apr. 15, 1977, compiled in American Public Welfare Assn., I.C.P.C.

Compact Administrator's Manual (1981).

17 608 P.2d 130 (Mont. 1980).

18 See also *In re Adoption of Baby E*, 104 Misc.2d 185 (Fam. Ct. N.Y. County, 1980) (ICPC applies to private placement, failure to ICPC not fatal to adoption where it is in best interest of child).

19 An intermediate court in Missouri recently raised the question whether the Compact applies to private placement but apparently the court was unaware of any other authority. *In re adoption of Baby Boy W*, 701 S.W.2d 534 (Mo. Ct. App. 1985). And in 1982 the Wyoming Supreme Court held that the Compact does not apply to private adoptions arranged directly between the consenting natural parents and the adopting parents. *In re adoption of MM*, 652 P.2d 974 (Wyo. 1982). However, the Wyoming court mistakenly believed that the issue had never been addressed in any other court and that it was addressing an issue which never had been considered before. In fact, the weight of authority clearly holds that the I.C.P.C. applies to private adoptions. See *supra* notes 14-18 and accompanying text.

20 Utah Code Annot. §78-30-4(3)(b) (1986 Supp.).

21 Justice Durham, who wrote a solitary dissent in *Sanchez*, authored the majority opinion in *Baby Boy Doe*. Justice Stewart, who authored the majority opinion in *Sanchez*, wrote the dissenting opinion in *Baby Boy Doe*. Justice Howe voted with Justice Stewart in both cases. Justice Zimmerman, who was not on the Court when *Sanchez* was decided, voted with Justice Durham in *Baby Boy Doe*. Chief Justice Hall, who voted with Justice Stewart in *Sanchez*, voted with Justice Durham in *Baby Boy Doe*. The balance of this article addresses the question: what difference between *Baby Boy Doe* and *Sanchez* convinced Chief Justice Hall to change sides?

22 615 P.2d at 1256.

23 *Id.*

24 *Id.*

25 *Id.*

26 717 P.2d at 691.

27 615 P.2d 1256.

28 681 P.2d 199 (Utah 1984).

29 681 P.2d at 203 quoting *Lehr v. Robertson*, 103 S.Ct. at 2991.

30 681 P.2d at 207-08.

31 *Id.*

32 *Id.* citing *Lehr*, 103 S.Ct. at 2995.

33 680 P.2d 753 (Utah 1984).

34 680 P.2d at 755.

35 *Id.* at 756.

36 717 P.2d at 691.

37 *Id.*

38 *Lehr*, 463 U.S. at 264 [Variable parenthood *id.* at 261].