

1977

# Jason Michael Wright v. State of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Lambertus Jansen; Attorney for Respondent;

Gordon P. Esplin; Attorney for Appellant

---

## Recommended Citation

Brief of Respondent, *State v. Wright*, No. 15272 (Utah Supreme Court, 1977).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/684](https://digitalcommons.law.byu.edu/uofu_sc2/684)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE  
SUPREME COURT  
FOR THE  
STATE OF UTAH

---

In the Matter of the Adoption of:

JASON MICHAEL WRIGHT,  
a minor.

---

Case No. 15272

BRIEF OF RESPONDENT

---

AN APPEAL FROM THE ADOPTION OF JASON MICHAEL WRIGHT  
FROM THE THIRD JUDICIAL DISTRICT COURT

---

LAMBERTUS JANSEN  
MFT Plaza, Suite S-1  
105 East 5900 South Street  
Murray, Utah 84107  
Attorney for Respondent

GORDON F. ESPLIN  
Utah Legal Services, Inc.  
216 East Fifth South Street  
Salt Lake City, Utah 84111  
Attorney for Appellant

FILED

NOV - 4 1977

---

Clk. Supreme Court, Utah

---

# TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	3
POINT I. . . . .	3
POINT II. . . . .	7
CONCLUSION . . . . .	13

## CASES CITED

§ 76-53-19, U.C.A., 1953, as amended . . . . .	3,4
STATE v. HUNTSMAN, 115 Utah 283, 204 P.2d 448 . . . . .	3,4,5
§ 76-53-18, U.C.A., 1953, as amended . . . . .	3
§ 76-53-15, U.C.A., 1953, as amended . . . . .	4
65 AmJur 2d, Rape, § 19 . . . . .	4
STANLEY v. ILLINOIS, 405 U.S. 645, 31 L.E.D.2d 551, 9 U.S.Ct. 1208 (1972) . . . . .	5
STATE, IN THE INTEREST OF M., 25 U.2d 101, 476 P.2d 1013 (1970) . . . . .	5
§ 78-30-4, U.C.A., 1953, as amended . . . . .	5,6,7,11
THOMAS v. CHILDREN'S AID SOCIETY OF OGDEN, 12 U.2d 235, 364 P.2d 1029 (1961) . . . . .	5,6
§ 78-30-5, U.C.A., 1953, as amended . . . . .	8
CLAUNCH v. ENTREKIN, (Alabama) 128 S.2d 100 . . . . .	8
LANKFORD v. HOLLINGSWORTH, (Alabama) 219 S.2d 387 . . . . .	8
ANON. v. ANON., 25 Ariz.App.10, 540 P.2d 741 . . . . .	8,9
PETITION OF MARTINSON, (Colorado) 267 P.2d 658 . . . . .	9
KARKANEN v. VALDESUSO, (Colorado) 515 P.2d 128 . . . . .	9

	Page
RE: ADOPTION OF LAYTON, (Florida) 196 S.2d 784 . . . . .	9
PETITION OF MILLER, 15 Ill.App.2d 333, 146 N.E.2d 226 . . . . .	9
RE: ADOPTION OF HERBST, 217 Kans. 164, 535 P.2d 437 . . . . .	9
RE: CARSON, (Nevada) 375 P.2d 591 . . . . .	9
"B" v. "B", App.Div.2d 160, 385 N.Y.S.2d 821 . . . . .	9
RE: ADOPTION OF NUTTLE, 24 Misc.2d 588, 208 N.Y.S.2d 271 . . . . .	9
RE: ADOPTION OF ANONYMOUS, 39 Misc.2d 235, 240 N.Y.S.2d 235 . . . . .	9
RE: ADOPTION OF N., 78 Misc.2d 105, 355 N.Y.S.2d 956 . . . . .	9
RE: ADOPTION OF JECONO, 426 Pa. 98, 231 A.2d 295 . . . . .	9
ROBERTSON v. HUTCHINSON, 560 P.2d 1110 (1977) . . . . .	9
2 AmJur 2d, Adoption § 29 . . . . .	10
AmJur 2d, Adoption § 31 . . . . .	10
STATE IN INTEREST OF SUMMERS CHILDREN v. WOLFFENSTEIN 560 P.2d 331 (1977) . . . . .	10
§ 55-10-109(1)b, U.C.A., 1953, as amended . . . . .	10,
IN RE ADOPTION OF WALTON, 123 U. 380, 259 P.2d 881 (1953) . . . . .	11
STATE IN THE INTEREST OF A., 30 U.2d 131, 514 P.2d 797 (1973) . . . . .	11,
D.M. v. STATE, (Alaska) 515P.2d 1234 (1973) . . . . .	11
IN RE B.J., (Alaska) 530 P.2d 747, 749 (1975) . . . . .	12.
WILSON v. PIERCE, 14 U.2d 317, 383 P.2d 925 (1963) . . . . .	13

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

In the Matter of the Adoption of:

JASON MICHAEL WRIGHT,

Case No. 15272

a minor.

---

BRIEF OF RESPONDENT

---

STATEMENT OF THE NATURE OF THE CASE

On the 10th day of February, 1977, a final Decree of Adoption was entered in the above entitled matter by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. E. BANKS, Judge presiding. Appellant filed a Motion to Set Aside the Decree of Adoption and that motion was heard on the 10th day of March, 1977, at which time the Court took the motion under advisement, pending further testimony. On the 25th day of March, 1977, after hearing testimony of both the natural mother and the Appellant, the Court entered an Order setting aside the final Decree of Adoption previously granted. Further testimony then was taken on the 25th day of March, 1977, concerning the question of abandonment by the Appellant and as to the facts concerning conception of the minor child who is the subject of these adoption proceedings. Subsequently, on the 6th day of May, 1977, and the 1st day of June, 1977, Orders and a Decree of Adoption in these proceedings were granted to DEE R. MARSDEN, the husband of

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.*

*Machine-generated OCR, may contain errors.*

1. The Appellant had never acquired any parental rights in the minor child, JASON MICHAEL WRIGHT; and

2. In the event he had acquired any parental rights, the same were terminated on the grounds of his abandonment.

Appellant appeals from that Judgment granting the adoption.

#### STATEMENT OF FACTS:

On March 11, 1973, JASON MICHAEL WRIGHT was born in Salt Lake City, Utah, to SHERRIE LYNN WRIGHT, now SHERRIE LYNN WRIGHT MARSDEN, an unmarried 14-year-old girl. The Appellant, JOHN WAYNE COX, was 23 years old at the time of that birth. All doctor and hospital expense arising out of the birth of JASON MICHAEL WRIGHT were paid by SHERRIE LYNN WRIGHT'S parents and the Appellant did not contribute to the payment of any bills incurred by the birth of JASON MICHAEL WRIGHT. Subsequent to the birth of said child, JOHN WAYNE COX spent a short period of time in the United States Marine Corps; and while in the corps and stationed overseas, Mr. COX sent flowers to SHERRIE LYNN WRIGHT and wrote several letters to her. These letters were limited to inquires about SHERRIE; no inquiry was every made as to the health and welfare of JASON MICHAEL WRIGHT. After leaving the military, JOHN WAYNE COX returned to Salt Lake City, Utah, in early 1974; and, in the three years that have elapsed since that time, JOHN WAYNE COX has contacted SHERRIE LYNN WRIGHT only on one occasion, and that for the purpose of inquiring as to her personal welfare; and has contributed no monies towards the support of JASON MICHAEL WRIGHT in over three years.

On October 26, 1974, SHERRIE LYNN WRIGHT married DEE R. MARSDEN, the

with JASON MICHAEL WRIGHT and a second child born to DEE R. and SHERRIE MARSDEN. On December 8, 1976, DEE R. MARSDEN filed a Petition for Adoption of JASON MICHAEL WRIGHT. The final Decree of Adoption was entered in this matter on the 1st day of June, 1977.

# ARGUMENT:

## POINT I:

That the District Court properly applied the law in ruling that JOHN WAYNE COX never acquired any rights by being the father, either by statute and/or by common law.

The criminal statute which applied at the time that JOHN WAYNE COX took sexual liberties with SHERRIE LYNN WRIGHT is § 76-53-19, U.C.A., 1953, as amended. That statute was construed and interpreted in STATE v. HUNTSMAN, 115 Utah 283; 204 P.2d 448, as fixing the age of consent. The Court indicated that, where a statute makes it either rape or carnal knowledge to have illicit sexual intercourse with a female under a specified age without any provision regarding her consent, such statute fixes the age of consent. The Court further stated that the purpose of such statute establishing the age of consent is to protect young girls from illicit acts of the opposite sex. STATE v. HUNTSMAN, supra.

The next preceding statute, § 76-53-18, U.C.A., 1953, as amended, states:

Penalty.—Rape is punishable as follows:

(a) When the female upon whom the act is committed is under the age of thirteen years, by imprisonment in the state prison for a term which shall not be less than twenty years and which may be for life.

(b) In all other cases, by imprisonment in the state prison not less than ten years.

There was given a definition of rape in U.C.A., 1953, as amended, § 76-53-15, as follows:

"Rape" defined.—Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

- (1) When the female is under the age of thirteen years.
- (2) When she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
- (3) Where she resists, but her resistance is overcome by force or violence.
- (4) Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating, narcotic or anesthetic substance administered by or with the privity of the accused.
- (5) When she is at the time unconscious of the nature of the act, and this is known to the accused.
- (6) Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with the intent to induce such belief.

Utah, therefore, had a rather unusual grouping of sex offenses which provided for two degrees of statutory rape; the first being defined specifically as rape where it occurred under any of the circumstances described in § 76-53-15, supra; and the second, called carnal knowledge, when it occurred under any of the circumstances specified in § 76-53-19, supra. In either instance, the age of consent was 18 years. Prior to the age of 18, a woman was not deemed to be able to consent to any act of illicit sexual intercourse. *STATE v. HUNTSMAN*, supra.

In 65 AmJur 2d, Rape, § 19, it is stated, "In jurisdictions where a statute defines the crime as an act of sexual inter-

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.*  
Machine-generated OCR, may contain errors.



course with any female without indicating whether the absence of marriage is or is not an essential element of the offense. It has been held that the fact that the female was married or had been married did not make her capable of legally consenting to the sexual act; and, thus, her marriage is no defense to the crime of statutory rape committed by another than her husband if she is under the age of 18. STATE v. HUNTSMAN, supra.

Basically, what our legislature has done is to create two levels or degrees of statutory rape; that upon a child under the age of 13 and that upon a child between the ages of 13 and 18, setting different penalties for each. The mere fact that the legislature had designated the second as a crime of carnal knowledge made it no less a case of statutory rape. Thus, when JOHN WAYNE COX had illicit sexual intercourse with SHERRIE LYNN WRIGHT, he committed an act of statutory rape as defined by the statutes.

The Appellant cites a number of cases in support of his proposition that Appellant acquired parental rights in and to the child, citing STANLEY v. ILLINOIS 405 U.S. 645, 31 LED 2nd 551, 9 U.S. Ct. 1208 (1972), and STATE, IN THE INTEREST OF M, 25 U.2d, 101, 476 P.2d 1013 (1970), and the change in the § 78-30-4 U.C.A., 1953, as cited in THOMAS v. CHILDREN'S AID SOCIETY OF OGDEN, 12 U 2d 235, 364 P.2d 1029 (1961). But the issue presented herein is not merely one of whether the father of an illegitimate child acquires any parental rights in and to that child, but more clearly the question of whether any man, guilty of raping a woman, acquires rights in an child which he has, through this illicit act, created. The Utah State Legislature has never addressed itself to this issue and neither have our Courts.

Thus, it is a question which must be resolved by looking to the common law. If the child was illegitimate under the common law, the mother was the sole legal parent and all the rights of parenthood invested in her and her alone. Although this issue is not treated in our statutes, nor in the texts, it is the belief of the Respondent that to invest in a rapist any parental rights would result in a gross miscarriage of justice. It would be equivalent to saying that a thief acquired rights in the property that he steals from another.

This Court, in THOMAS v CHILDREN'S AID SOCIETY OF OGDEN, supra, stated:

The putative father of an illegitimate child occupies no recognized parental status at common law or under our statutes. The law does not recognize him at all except that it will make him pay for the child's maintenance if it can find out who he is. The only father it recognizes as having any rights is the father of a legitimate child.

Thus, this Court adopted the common law standard that the father of an illegitimate child acquired no rights in that child. While the statutes have been amended to grant certain limited rights to fathers of illegitimate children, nowhere in our statutes have those rights been extended to include a person, who through rape, causes the conception of a child.

In 1975, the Utah Legislature amended § 78-30-4, Utah Code Annotated, 1953, the chapter on Adoption, to provide as follows:

A person who...claims to be the father of an illegitimate child may claim rights pertaining to his paternity of the child by registering with the Bureau of Vital Statistics of the Division of Health, Utah Department of Social Services, a notice of his claim to paternity..."

Notwithstanding the contention of Appellant's counsel that the Utah Legislature wants to protect the rights of the fathers of illegitimate children, it is clear that the legislature's intent in amending § 78-30-4 was to limit and restrict the rights of such fathers to complaint about adoption proceedings, requiring them to file a notice of their claim of paternity in order to even be entitled to a notice of the impending adoption hearing. This statute does not create in such a father any right to custody or even a right to visitation. Conversely, it places certain obligations on the father that must be met before he is entitled to claim rights, if any, to the child or to notice of an adoption hearing. If the father fails to file his claim of paternity with the State, he is absolutely precluded from claiming any rights to the child or from contesting the prospective adoption.

It is clear, therefore, that the Appellant, JOHN WAYNE COX, having impregnated SHERRIE LYNN MARSDEN through an act of carnal knowledge, a crime equivalent to statutory rape, acquired no rights to the child, JASON MICHAEL WRIGHT. No such rights were recognized in common law and no such rights have been created by our State Legislature. To rule otherwise would be to say that this man, who did the wrong thing at the wrong time with the wrong person, should be rewarded with the joys and pleasures ordinarily reserved to the law abiding segment of our society.

#### POINT II:

The District Court further correctly ruled that even in the event the said JOHN WAYNE COX logs the Appellant's name in, it ac-

*Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Service and Reference Acquisition Program. Digitized by the University of Utah Libraries. Machine-generated OCR, may contain errors.*

in the minor child, JASON MICHAEL WRIGHT; he "abandoned the child and forfeited any rights that he may have had."

The standard which the Court followed in this lawsuit is set out in § 78-30-5, U.C.A., 1953, as amended, as follows:

Adoption of deserted child.—A child deserted by its parent or parents, and having no legal guardian, may be adopted as in this chapter provided, without the consent of the parent or parents having deserted said child, when the district court in which the proceedings are pending shall determine that such child has been deserted by its parent or parents. Notice of proceedings for the determination of the fact of desertion shall be by personal service, publication, or posting as the court may direct and deem most likely to give notice to the parent or parents, and the court may require such further notice of the proceedings to be given to the kindred of said child as may appear to be just and practicable.

Our State Legislature, seeing that desertion is difficult to prove, has amended that statute effective May 10, 1977, to read as follows:

Consent unnecessary where parents fail to support or communicate with child.—A child may be adopted without the consent of the parent or parents, when the district court in which the proceedings are pending determines, after notice to such parent or parents in a manner determined by the court, that the parent or parents, having the ability and duty to do so, have not provided support and have made no effort or only token effort without good cause to maintain a parental relationship with the child. It is a rebuttable presumption that no effort has been made if the parent or parents have failed to support and communicate with the child for a period of one year or longer.

Thus, the Legislature has amended the adoption statute to comply with the judicial interpretations of other State Supreme Courts. See

CLAUNCH v. ENTREKIN, (Alabama) 128 S.2d 100; LANKFORD v. HOLLINGS-

540 P.2d 741; PETITION OF MARTINSON, (Colorado) 267 P.2d 658; KARKANEN v. VALDESUSO, (Colorado) 515 P.2d 128; RE: ADOPTION OF LAYTON, (Florida) 196 S.2d 784; PETITION OF MILLER, 15 Ill.App.2d 333, 146 N.E.2d 226; RE: ADOPTION OF HERBST, 217 Kans. 164, 535 P.2d 437; RE: CARSON, (Nevada) 375 P.2d 591; "B" v. "B", App.Div.2d 160, 385 N.Y.S.2d 821; RE: ADOPTION OF NUTTLE, 24 Misc.2d 588, 208 N.Y.S.2d 271; RE: ADOPTION OF ANONYMOUS, 39 Misc.2d 235, 240 N.Y.S.2d 235; RE: ADOPTION OF N., 78 Misc.2d 105, 355 N.Y.S.2d 956; RE: ADOPTION OF JECONO, 462 Pa. 98, 231 A.2d 295.

Appellant relies heavily in his brief on ROBERTSON v. HUTCHINSON, 560 P.2d 1110 (1977). The Court should note some substantial factual differences between ROBERTSON v. HUTCHINSON and the instant case. In ROBERTSON v. HUTCHINSON, the children were legitimate children of a marriage between Mr. ROBERTSON and Mrs. HUTCHINSON. Mrs. HUTCHINSON had been seriously injured in 1971 and was hospitalized outside of the State of Utah. In that case, Mrs. HUTCHINSON was determined not to have abandoned her children. In the present case, Mr. COX was outside of the State of Utah by his own choosing, seeking to avoid prosecution for a crime which he admittedly committed. Mr. COX also was involved in an accident that occurred in the State of Utah and was in the State of Utah after April, 1974, yet took no action to visit the child or pay any support for him. He filed no legal document to provide for the support of the child, other than the acknowledgment of paternity with the Bureau of Vital Statistics. This merely was acknowledgment that he intended, at some unknown time, to do something for the child; but he took no affirmative action in

in the minor child, JASON MICHAEL WRIGHT; he "abandoned the child and forfeited any rights that he may have had."

The standard which the Court followed in this lawsuit is set out in § 78-30-5, U.C.A., 1953, as amended, as follows:

Adoption of deserted child.—A child deserted by its parent or parents, and having no legal guardian, may be adopted as in this chapter provided, without the consent of the parent or parents having deserted said child, when the district court in which the proceedings are pending shall determine that such child has been deserted by its parent or parents. Notice of proceedings for the determination of the fact of desertion shall be by personal service, publication, or posting as the court may direct and deem most likely to give notice to the parent or parents, and the court may require such further notice of the proceedings to be given to the kindred of said child as may appear to be just and practicable.

Our State Legislature, seeing that desertion is difficult to prove, has amended that statute effective May 10, 1977, to read as follows:

Consent unnecessary where parents fail to support or communicate with child.—A child may be adopted without the consent of the parent or parents, when the district court in which the proceedings are pending determines, after notice to such parent or parents in a manner determined by the court, that the parent or parents, having the ability and duty to do so, have not provided support and have made no effort or only token effort without good cause to maintain a parental relationship with the child. It is a rebuttable presumption that no effort has been made if the parent or parents have failed to support and communicate with the child for a period of one year or longer.

Thus, the Legislature has amended the adoption statute to comply with the judicial interpretations of other State Supreme Courts. See CLAUNCH v. ENTREKIN, (Alabama) 128 S.2d 100; LANKFORD v. HOLLINGS-

540 P.2d 741; PETITION OF MARTINSON, (Colorado) 267 P.2d 658; KARKANEN v. VALDESUSO, (Colorado) 515 P.2d 128; RE: ADOPTION OF LAYTON, (Florida) 196 S.2d 784; PETITION OF MILLER, 15 Ill.App.2d 333, 146 N.E.2d 226; RE: ADOPTION OF HERBST, 217 Kans. 164, 535 P.2d 437; RE: CARSON, (Nevada) 375 P.2d 591; "B" v. "B", App.Div.2d 160, 385 N.Y.S.2d 821; RE: ADOPTION OF NUTTLE, 24 Misc.2d 588, 208 N.Y.S.2d 271; RE: ADOPTION OF ANONYMOUS, 39 Misc.2d 235, 240 N.Y.S.2d 235; RE: ADOPTION OF N., 78 Misc.2d 105, 355 N.Y.S.2d 956; RE: ADOPTION OF JECONO, 462 Pa. 98, 231 A.2d 295.

Appellant relies heavily in his brief on ROBERTSON v. HUTCHINSON, 560 P.2d 1110 (1977). The Court should note some substantial factual differences between ROBERTSON v. HUTCHINSON and the instant case. In ROBERTSON v. HUTCHINSON, the children were legitimate children of a marriage between Mr. ROBERTSON and Mrs. HUTCHINSON. Mrs. HUTCHINSON had been seriously injured in 1971 and was hospitalized outside of the State of Utah. In that case, Mrs. HUTCHINSON was determined not to have abandoned her children. In the present case, Mr. COX was outside of the State of Utah by his own choosing, seeking to avoid prosecution for a crime which he admittedly committed. Mr. COX also was involved in an accident that occurred in the State of Utah and was in the State of Utah after April, 1974, yet took no action to visit the child or pay any support for him. He filed no legal document to provide for the support of the child, other than the acknowledgment of paternity with the Bureau of Vital Statistics. This merely was acknowledgment that he intended, at some unknown time, to do something for the child; but he took no affirmative action in

heavily on the Appellant's poverty as a reason for not taking affirmative action; yet Appellant is now, as he could have been then, represented by Salt Lake County Legal Services.

A parent's right or interest in or to the custody of an infant child is in the nature of a trust which imposes upon him a reciprocal obligation to maintain, care for, and protect the child; and the law secures him in this right so long as he shall discharge the correlative duties and obligations and no longer (emphasis added), 2 AmJur 2d, Adoption, § 29. At no time during the course of the lifetime of this minor child has the Appellant shown any interest in performing the obligations to maintain, care for, or protect the minor child. In fact, Mr. COX totally has abrogated the trust reposed in him by the law; and his parental rights, if any, were rightfully terminated by the Court below. As noted in 2 AmJur 2d, Adoption, § 31, "... (W)hen it is satisfactorily established that the parent has in fact abandoned or deserted the child the adoption may be allowed not only without the consent of the parents but even against their opposition." There has been, by this Appellant, a conscious disregard of the obligations owed by a parent to a child. See STATE IN INTEREST OF SUMMERS CHILDREN v. WOLFFENSTEIN, 560 P2d 331 (1977).

In WOLFFENSTEIN, a father who had been found to have abandoned his children by the Juvenile Court, appealed and the Utah Supreme Court affirmed the finding of abandonment by the Juvenile Court. In WOLFFENSTEIN, the Appellant was found to have abandoned his children under § 55-10-109 (1)b, Utah Code Annotated, 1953;



that "abandonment" should be interpreted and applied under § 55-10-109 (1)b just as the term "desert" has been interpreted under the adoption statute § 78-30-4, Utah Code Annotated, 1953. After reviewing IN RE ADOPTION OF WALTON, 123 U. 380, 259 P.2d 881 (1953), the Court stated as follows:

Although we have not specifically defined abandonment under the Juvenile Court Act of 1965, we have set forth evidence which sustained such a finding in State in the Interest of A, 30 Utah 2d 131, 514 P.2d 797 (1973). There, this Court noted the children has spend a great part of their lives away from their mother, who had shown very little interest in them for two and one-half years. The effort she put forth to visit the children was nil. Her failure to manifest an interest in them after losing custody, and to manifest a firm intention to resume physical custody of her children for over a period of two years was held sufficient to sustain a finding of abandonment under 55-10-109(1) (b).

In D.M. v. State, Alaska, 515 P.2d 1234 (1973), a termination proceeding, the appellant, as here, urged a traditional definition of abandonment, that it imports conduct on the part of the parent which evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child. The standard urged would require proof of an intent by the parent to relinquish all claim to a natural child in order to dissolve the normal legal relationship. In contrast, the State urged an objective standard, viz., appellant's intent was properly inferred from the realities of her conduct rather than from mere oral protestation.

We quote with approval the well-stated explanation of the principle.

Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parent but their conduct as parents as well. The subjective intent standard often focuses too much attention on the parent's wishful thoughts and hopes for the child and too little

on the more important element of how well the parents have discharged their parental responsibility . . . .

While it may well be that a subjective intent is determinative when dealing with abandonment of personal property, over which the owner exercises an absolute property rights, we believe that the relationship between parent and child mandates an objective standard of abandonment which looks to the parent's obligations and rights as well as to whether the natural bonds of love and affection between parent and child have been effectively dissolved by reason of parental conduct.

A better definition of abandonment for these purposes, is that abandonment consists of conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship.

The Court cited as evidence to sustain the finding of abandonment, the mother's failure to visit or communicate with the child for several years, her failure to support the child in any way, either emotionally or financially, together with the long term commitment of the child to a foster home. The Court concluded that time and human nature had operated to dissolve the normal bonds between the child and his natural mother.

The aforecited objective test was refined in In Re B. J., Alaska, 530 P.2d 747, 749 (1975), wherein the court said the test focuses on two questions--Has the parent's conduct evidenced a conscious disregard for his parental obligations, and has that disregard led to the destruction of the parent-child relationship?

The Utah Supreme Court, adopting the objective test set forth by the Alaska Supreme Court, went on to sustain the lower Court's decision in holding that:

...the father's conduct demonstrated a conscious disregard of the obligations owed by a parent to a child, leading to the destruction of the parent-child relationship--an abandonment.

Referring to the refined standard set forth in IN RE B. J., supra, where the Court stated that the test focuses on two questions: a) has the parent's conduct evidenced a conscious disregard for his parental obligations; and, b) has that disregard lead to the destruction of the parent-child relationship. In the present case, the answer to the first question is clearly yes; and the second question is moot as there has never been in existence a parent-child relationship. The only father that JASON MICHAEL WRIGHT knows, or has ever known, is DEE R. MARSDEN. With respect to the possibility in an adoption proceeding of a conflict between a child interest and a parent's rights, the Utah Supreme Court, in WILSON v. PIERCE, 14 U.2d 317, 383 P2d 925, (1963), stated as follows:

The custody of this child being involved, a primary concern is for her interest and welfare; and the rights of contesting adults are secondary.

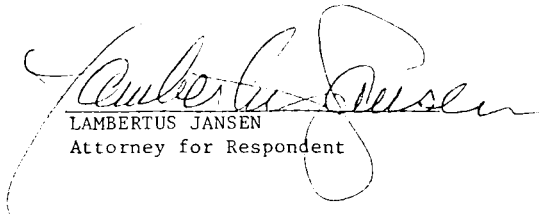
The Supreme Court affirmed this stand in STATE IN INTEREST OF A., 30 U.2d 131, 514 P2d 97 (1973), when it stated while

...(O)ne feels deeply for a parent who is deprived of a child, that feeling must not overcome the duty placed upon the Courts to act in the best interest of the child.

### CONCLUSION

The District Court ruled properly that the Appellant, being guilty of carnal knowledge, a near statutory rape, acquired no interest in the minor child, JASON MICHAEL WRIGHT, and that, in the event he did acquire any rights, he forfeited the same by having abandoned the child.

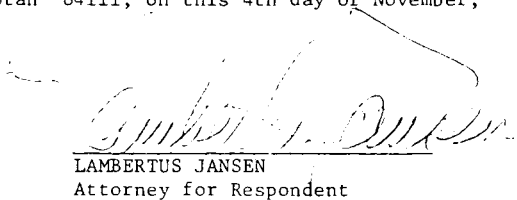
Respectfully submitted,



LAMBERTUS JANSEN  
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief for Respondent to Appellant's attorney, GORDON F. ESPLIN, Utah Legal Services, Inc., 216 East Fifth South Street, Salt Lake City, Utah 84111, on this 4th day of November, 1977.



LAMBERTUS JANSEN  
Attorney for Respondent