1978

Bryan L. Slade v. Eleanor A. Sanchez Dennis : Brief of Appellant

Utah Supreme Court

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(19)

IN THE SUPREME COURT OF THE STATE OF UTAH

BRYAN L. SLADE,

Plaintiff and Respondent,

vs.

ELEANOR A. SANCHEZ DENNIS,

Defendant and Appellant.

Civil No. ~~236340~~ 15710

BRIEF OF ~~RESPONDENT~~ APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

BRYAN L. SLADE, Plaintiff and Respondent,	)	
vs.	)	Civil No. 236340
ELEANOR A. SANCHEZ DENNIS, Defendant and Appellant.	)	

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In the Court below, respondent Bryan L. Slade sought judgment finding him to have legitimated Corey Leon Slade and awarding him visitation rights.

DISPOSITION IN LOWER COURT

In the Court below, Judge Dean E. Conder, by temporary order, awarded respondent visitation rights on alternate week-ends. Upon conclusion of trial, after having taken the matter under advisement, Judge David K. Winder found respondent to have legitimated this child; found that respondent was entitled to have visitation with this child once a month only, from 10:00 A.M. to 6:00 P.M. on the third Saturday of each month; and ordered respondent to pay child support in the amount of $150.00 a month, although appellant had not counter-claimed or otherwise prayed for child support.

RELIEF SOUGHT ON APPEAL

Appellant appeals from the decision of the Court below, seeking reversal *in toto*, or in the alternative, reversal limited to that part of the Decree which awarded to respondent rights of visitation.

STATEMENT OF FACTS

In 1973, appellant conceived Corey Leon Slade, her son. She asked respondent, father of her child, to marry her so that she could give this child a home. His response was to tell her to get an abortion. Appellant refused as this was morally repugnant to her. Later he asked her to have the child adopted at his expense. She refused as her maternal feeling for the unborn child was so strong that the prospect of giving up her child was unacceptable to her. (Trans. A, p. 57, l. 19-p. 58, p. 10)

On March 30, 1974, Corey was born out of wedlock. His father had not prepared a home for him, choosing instead to reside alone in the house he was purchasing while Corey lived with appellant in proverty-level lodging. (Trans. A, p. 58, l. 15, et seq.)

After Corey was born, respondent paid the medical expenses of his birth, as requested by appellant's mother. (Trans. B, p. 18, l. 5) Before Corey's birth, respondent signed, upon request of appellant, a Declaration of Paternity, stating his willingness to support the child. (Trans. A, p. 3, l. 29-p. 4, l. 6)

Respondent did not support Corey. Not until so ordered by Judge David K. Winder on September 23, 1977 (R.96), three years and four months later, did he make meaningful contribution to the child's support.

Respondent visited sporadically with Corey during his infancy. (Trans. A, p. 59, ll. 25-29) He gave Corey toys. He introduced Corey to members of his family, but at no time did Corey even remain overnight with respondent. Corey never stayed or resided with respondent in his home. No de facto family relationship of mother, father, and child was ever established. And respondent has never represented appellant to be his wife.

Respondent has not participated in the child's religious or secular education. He has assumed no responsibility for his physical, mental, and spiritual development and well being. The evidence shows only that he has enjoyed his playmate status with Corey.

On May 15, 1976, appellant married Carmen Richard Dennis, who had, over a period of many months before this marriage, developed a strong, warm relationship with Corey. It was -- and it remains -- Mr. Dennis's intent to adopt Corey. Perhaps aware of this intent, on or about July 13, 1976, respondent filed his complaint and had issued his Order to Show Cause in this action in the Third District Court, State of Utah. Also, upon advice of counsel, respondent filed an Acknowledgement of Paternity at this time. (Trans. A, p. 3, l. 29-p. 4, l. 6)

On July 21, 1976, Judge Dean E. Conder issued an order granting respondent visitation on alternate weekends, requiring respondent's counsel to file a memorandum of points and authorities, and requiring the parties to engage a psychiatrist

or other competent professional to evaluate the effect on the child of visitation with respondent. (R.) Upon respondent's recommendation, Dr. Delbert T. Goates, M.D., was engaged to interview Corey, appellant, her husband, and respondent, and to submit his findings and recommendations to the Court. Dr. Goates' report, recommending termination of the relationship of Corey and respondent, was filed with the Court on December 1, 1976. (R. 119-134.)

On April 15, 1977, and May 26, 1977, trial was had in this matter before Judge David K. Winder without a jury.

At trial, appellant testified that visitation with respondent had been harmful to Corey and that it is not in his best interests. Her testimony, corroborated by other witnesses, was not rebutted by respondent. Testimony of expert witnesses, Dr. Goates and Virginia Husband, M.S.W., established that visitation with respondent is not in the best interests of the child. (Trans. B, pp. 27-28, 32-34, 37-44, 45-48)

Nevertheless, by Memorandum Decision, dated August 1, 1977, Judge David K. Winder, ruling that Corey had been legitimated pursuant to §78-30-12, Utah Code Annotated, 1953, found for respondent, although decreasing his visitation to only six (6) hours a month and ordering him to pay, although appellant had not so prayed, child support in the amount of $150.00 per month. (R.91.)

Subsequently, following denial of various motions for reconsideration submitted by the parties, appellant, on or about February 27, 1978, filed her Notice of Appeal.

POINT I.

THE CHILD'S BEST INTERESTS SHOULD BE THE PRIMARY CONCERN IN DETERMINING QUESTIONS OF VISITATION PRIVILEGES.

It has been uniformly recognized, in determining awards of visitation to fathers of children born out of wedlock, that the best interests of the child rather than the rights or alleged rights of the parent, or parents, are of paramount importance. See, e.g., Annot., 98 A.L.R.2d 417, 421-28; J. Harkins, "Putative Father's Visitation Rights," 19 CLEV.ST.L.REV. 549 (1970). See also, generally, Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child (1973).

For example, the Pennsylvania court in Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965), stated:

> [E]very case must be decided on the basis of its own particular facts. The unique problems of each child must receive individual attention and consideration. Any attempt by us to determine the best interest of every child by a single rule would be judicially, socially, and morally unsound. Id., at 158.

Appellant calls the attention of the Court to yet another authority supporting this principle. In Sullivan v. Bonafonte, 376 A.2d 69 (1977), the Connecticut Supreme Court applied this principle, that the paramount consideration is the child's best

interest, to a case involving a putative father's visitation privileges. The Court noted that the father -- who initially refused to marry the child's mother when she was pregnant, who urged her to have an abortion, who voluntarily helped pay some of the medical expenses associated with the child's birth, and who sent child support money and Christmas gifts -- had visited the child only infrequently when he was between three and six months old. Further, the father did not introduce evidence showing that the child needed to be given the chance to develop a relationship with him or that visitation would have a "positive effect" on the child. The Connecticut Supreme Court affirmed the lower Court's determination that visitation would not be in the child's best interests.

In the words of the Court, the "friction which would be engendered by court-ordered visitation was not offset by any prospective benefit to the child, nor was the child threatened by the termination of an important existing relationship." Id., at 71.

The parallels between Sullivan and the instant case are strikingly obvious. Expert testimony introduced at trial also found no positive benefit to Corey accruing from visitation by the plaintiff. (Trans. B, pp. 27-28, 32-34, 37-44, 45-48.) Respondent has not and cannot deny that Corey's best interests are paramount. Further, he has not challenged or contested appellant's argument that her family's right of privacy should

be weighed in considering Corey's best interests and that this child would directly benefit from the protection of that family privacy. See Point IX, infra.

POINT II.

RESPONDENT HAS NOT ESTABLISHED THAT VISITATION WITH RESPONDENT IS IN THE BEST INTERESTS OF THE CHILD

Respondent acknowledged at trial, in preliminary comment, his burden of proving that Corey's best interests should be paramount in determination of the visitation issued. (Trans. A, p. 6, ll. 9-14)

Respondent did not meet this burden of proof.

Respondent did not rebut or challenge Dr. Goates' findings that respondent is "primarily immature," that he "has difficulty making decisions on an altruistic basis," and that he makes decisions "on an infantile basis of seeking his own gratification." Respondent did not rebut or challenge Dr. Goates' recommendations.

> For the welfare of the child, it would be optimal if he were provided the opportunity to have a divorce, as did his mother, from Mr. Slade. However, there is no divorce involved inasmuch as his mother was never married. Indeed, she could have had him aborted, and there would be no further litigation. It was her decision not to have an abortion; she kept him, and it would be her preference that he be adopted by her husband. For the welfare of Corey, who primarily knows no other father than Mr. Dennis except as a gentleman who, for his own needs, periodically comes to visit him, it would be

> preferable if a complete separation between the biological father and the child would occur just as if he had been adopted out rather than aborted and that he now be allowed to be adopted by his mother's husband -- indeed this represents an optimal circumstance, inasmuch as he could well be reared by his natural mother and her present consort. (Report, R. 133) [Emphasis added]

Mrs. Virginia Husband, certified clinical social worker, expert witness for the appellant, testified that all of Corey's needs for a father were being met by appellant's husband and that Corey was in no need for additional fathering by the respondent. (Trans. B, p. 27, l. 27, p. 28, l. 23) Finding that further visitation by the respondent with Corey would result in difficulty, confusion and conflict, Mrs. Husband summarized respondent's conduct as "a dastardly thing to do to a child." (Trans. B, p. 32, ll. 20-25) She further testified that such visitation would place Corey's self-esteem and self-confidence in jeopardy. (Trans. B, p 33, ll. 1-9)

Testimony of the appellant and her witnesses further corroborated the expert testimony of Dr. Goates and Mrs. Husband. Appellant testified that on April 23, 1977, Corey returned from a visit with respondent with motorcycle burns on his leg and that on other occasions he had returned from such visits with soiled pants. (Trans. B, p. 4, l. 19-p. 5, l. 2) Testimony of Julia Sanchez established that the respondent volunteered no explanation of these burns. (Trans. B, p. 20, ll. 17-24). In addition Carmen R. Dennis testified that the child has returned from visits with the respondent tired and in ill humor. (Trans. B, p. 8, ll. 8-9)

No testimony was elicited from any witness that the respondent has in any way contributed to the moral, intellectual, or physical development of Corey or that respondent has the capacity, skills, or inclination to do so in the future.

POINT III.

THE COURT BELOW ERRED IN FINDING FOR THE RESPONDENT ABSENT EVIDENCE THAT VISITATION IS IN THE BEST INTERESTS OF THE CHILD

Judge David K. Winder's Memorandum Decision, dated August 1, 1977, makes no mention of Corey's best interests, and this issue is not touched upon in his Findings of Fact and Conclusions of Law, filed September 23, 1977 (R. 93). Appellant's motion to amend these documents to, inter alia, incorporate this issue was denied. See Memorandum Decision, dated January 24, 1978 (R. 107). The decision to award judgment in favor of the respondent, however reluctant, appears to be grounded entirely on Judge Winder's conclusion that respondent had legitimated the child pursuant to §78-30-12, Utah Code Annotated, 1953. As the preponderance of the evidence established that visitation with the respondent was detrimental to Corey's best interest, the Court below was in error.

POINT IV.

RESPONDENT IS NOT ENTITLED TO RIGHTS EQUAL TO THOSE OF A DIVORCED FATHER

Some months after judgment in this matter, the United States Supreme Court considered the question of whether or not principles of equal protection require the same standard to be applied to married and unmarried fathers. The Court found no violation of the Equal Protection Clause of the Fourteenth Amendment in a Georgia statutory scheme which, as applied, gave fit fathers of legitimate children the authority to veto adoption while denying this right to fathers of illegitimate children. Quilloin v. Walcott, 54 L.Ed.2d 511 (1978)

In affirming the decision of the Georgia tribunal, the Court also considered the countervailing parental interests posited by the biological father's assertions of legitimation and his alleged rights of visitation and the appellee's allegations of disruption of the de facto family unit, counter to the best interests of the child. Thus, the Court addressed the question left unresolved in Stanley v. Illinois, 405 U.S. 645 (1972).

> . . .the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial. Quilloin, at 511.

The trial court had found that the appellant father had provided support only on an irregular basis, that he had visited with his child on "many occasions," that he had given the child toys and other gifts, and that his contacts with the child were having a disruptive effect on the child and on the appellee's entire family. On the basis of these findings and others pertain-

to appellee's marriage and the mother's uninterrupted custody, the Court determined adoption to be in the best interest of the child and found legitimation and visitation rights to be counter to the best interests of the child. Id., at 517.

Claiming violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment, appellant took an appeal to the Georgia Supreme Court. In affirming for the appellee, this Court relied generally on the strong state policy of rearing children in a family setting, emphasized that the adoption was being sought by the child's stepfather who was part of the family unit, and noted in addition that the appellant biological father had never been a de facto member of the child's family unit.

In affirming the decision of the Georgia Court, the United States Supreme Court found no violation of the rights secured to the biological father under the Fourteenth Amendment, finding his interests readily distinguishable from those of divorced fathers.

In so concluding, the Court observed that although the biological father had been subject to support obligations, unlike a divorced father, he had never exercised actual or legal custody over the child, and had thus never assumed any significant responsibility for his daily supervision, education, protection, or care. Id., at 520.

In the case now under consideration, this equal protection issue was initially raised at trial by respondent. For example,

see the cross-examination of Mrs. Husband in which respondent attempts to establish that although visitation may cause diffi culties, these must be endured equally whether or not the chi was born in wedlock. (Trans. B, p 41, l. 14, et seq.) Judge Winder, toward conclusion of trial, also suggested that, in h opinion, divorced fathers and fathers of children born out of wedlock must, as a matter of law, be treated equally.

> It isn't necessarily what I would like to do any more than I like to have visitation by the father after the divorce. I think it is disruptive and I think it is going to be very disruptive to have Mr. Slade -- somewhat disruptive to have him visit with the child. But I think that it is inherent in any divorce situation. (Trans. B, p. 66, l. 26-p. 67, l. 1

The relationships of the biological fathers and their o of-wedlock children in Quillion, supra, and the instant case a so nearly identical that, it is respectfully submitted, had Quillion been decided before September 23, 1977, Judge Winder may well have decided in favor of the appellant, denying visit tion to the respondent. The following passage would have been considered with care.

> Appellant contends that even if he is not entitled to prevail as a matter of due process, principles of equal protection require that his authority to veto an adoption be measured by the same standard that would have been applied to a married father. In particular, appel lant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently. We think appellant's interests are readily distinguishable from those of a divorced father, and accordingly believe that the State could permissively give appellant less veto authority than it provides to a married father.

> Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, . . .he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is of course a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child. Id.,at 520. [Emphasis added]

Application of Quilloin to the issues presented by the case now before this Court, in a manner favorable to appellant, would not be violative of respondent's rights to due process, as Quilloin does not negate rights previously conferred upon respondent and persons similarly situated. Respondent's arguments to the Court below, citing Stanley v. Illinois, supra, as supportive of his alleged rights of visitation are in error. See Point VII, infra.

POINT V.

THE COURT BELOW ERRED IN FINDING RESPONDENT TO HAVE LEGITIMATED THE CHILD BY ACKNOWLEDGMENT, PURSUANT TO §78-30-12, UTAH CODE ANNOTATED, 1953.

A. General.

In his Memorandum Decision of August 1, 1977, Judge Winder found the respondent to have legitimated Corey by acknowledgment pursuant to §78-30-12, Utah Code Annotated, 1953, for

the reasons that respondent was deemed to have received the child as his own, to have received him into his family, and to have treated him as a legitimate child. In so finding, the Court below was in error.

Section 78-30-12, Utah Code Annotated, 1953, reads as follows:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

This statute, adopted by the Utah legislature in 1911, is a literal copy of §230 of the California Civil Code, first enacted in 1870.

The purpose of the California legitimation statute, and by direct inference that of the Utah statute, is to effect a change in the procedures of "legitimation." The statute is designed to expedite the assimilation of the previously illegitimate child into the home and family of its father without the publicity of a judicial proceeding. Note, 12 SO. CAL.L.REV. 97, 98 (1938). It is submitted that the primary purpose of the statute is to confer a benefit upon the out-of-wedlock child, not to bestow a benefit upon his father, especially when to do the latter would be detrimental to the best interests of the ch

While this Court has not previously had an opportunity to apply the statute to the questions in issue, courts in California and in other states have construed like statutes in their own decisions. See, Annot., 33 A.L.R.2d 705, 741-50.

B. Because Corey has not been received into respondent's family, the Court below erred in finding respondent to have legitimated the child.

Legitimation of an illegitimate child under the California species of legitimation statute has been held to require proof that the biological father received the child into his family, with the consent of his wife, if he is married. In re Peterson's Estate, 214 Cal.App.2d 258, 29 Cal.Rptr. 384 (Cir.Ct. 1963); H. CLARK. LAW OF DOMESTIC RELATIONS 160 (1968). Reception into the father's family implies some residence of the child with the father. See, e.g., Re Kessler's Estate, 74 N.W.2d 599 (S.D. 1956); Clark, supra, at 160-61; Annot., 33 A.L.R.2d 705, 784 (1954).

The statute clearly indicates that the relationship contemplated is the equivalent of the adoption of a non-related child. Actual residence in the home and family of the biological father is required. In re Reyna, 55 Cal.App.3d 288, 298, 126 Cal.Rptr. 138, 145 (Ct. App. Cal. 1976). Darwin v. Granger, 174 Cal.App.2d 63, 72, 344 P.2d 353, 358, would require that the biological father live with the mother and child "for a short period during which he represented the mother as his wife and the child as his own." The main theme is the establishment of a

normalized family relationship for at least some period of tir

The California Courts of Appeal have required that the child be physically received into the father's home, or "settl place of habitation," for a period of time. In re Reyna, 55 C App.3d 288, 298, 126 Cal.Rptr. 138, 145 (Ct.App.Cal. 1976); In Richard M., 14 Cal.3d 783, 794, 122 Cal.Rptr. 531, 537, 537 P. 363, 371, (Cal. S.Ct. 1975); Guardianship of Truschke, 237 Cal. App.2d 75, 76-77, 46 Cal.Rptr. 601, 603, 604 (Cal.App. 1965).

The courts have emphasized the propriety and necessity of a de facto family relationship as between the mother, the natural father and the child. In Truschke, supra, the lower court's determination denying the natural father's petition fo appointment as guardian of his illegitimate child was upheld o appeal, on the ground that he had not legitimated the child in accord with §230. The facts closely resemble those of the cas now under consideration, except for the fact that the father i Truschke, unlike respondent, offered to marry his child's moth In Truschke, the appellant contended that because he had offer to marry the child's mother and had expended approximately $31 for a crib, baby clothes, and other necessities for the child' wefare before her birth, it should not be required that he tak his child physically into his family circle to comply with th terms of §230. In pertinent part, the court rejected appellan reasoning as follows:

> We cannot accept appellant's argument that because of his willingness and desire to receive his child into

his home and his purchase of a crib, baby clothes and equipment, he has constructively complied with §230. Appellant cites such cases as Lavell v. Adoption Institute, 185 Cal.App.2d 557, S.Cal.Rptr. 365, and Estate of Abate, 166 Cal.App.2d 282, 333 P2d 200 in support of this contention. But the facts of those cases readily distinguish them from the case we now consider. ... It clearly appears in each of these cases that there was an existing family unit into which the illegitimate child was born. Here no family unit has ever existed. It cannot properly be said that the casual and unfortunate relationship here involved ever achieved the dignity of de facto family status, such as was present in both Lavell and Abate. Id., at 604 [Emphasis added]

In In re: Adoption of Pierce,15 Cal.App.3d 244, 93 Cal. Rptr. 197 (Cal.App.1971), the appellant had publicly acknowledged his paternity. By stipulation and order of the court he had supported the child and has been allowed visitation with the child, the latter against the mother's protestations. On appeal, the court found that the appellant had acknowledged the child but that he had not received him "into his family" in accord with the strict construction of that phrase of §230 as held required in In Estate of DeLaveaga, 142 Cal.158, 75 Pac. 790. In arriving at this decision, the court discussed and found controlling the meaning of the term "family" as used in §230, as previously considered in Darwin v. Granger, 174 Cal.App.2d 63, 72, 344 P.2d 353, 358:

> If a man has no wife, he can legitimate his offspring by a course of conduct which the community would consider a public acknowledgment that he was the father of the child (Estate of Gird, 157 Cal. 534, 542-543, 108 P. 499, 137 Am.St.Rep. 131) but the existence of such public acknowledgment by an unmarried man is a question to be decided on the circumstances of each case. Estate of Baird, 193 Cal. 225, 274-279, 223 P. 974. Where a man has no wife, he can publicly acknowledge his child notwithstanding the fact that he does not maintain

> a household into which the child is taken. See Blythe v. Ayres, supra, 96 Cal. 532, 560, 592-593, 31 P.915; In re Jessup, 81 Cal. 408, 433-434, 21 P.976, 22 P. 742, 1028, 6 L.R.A. 594. If the man is unmarried the 'family' referred to in section 230 may consist only of the father, the mother, and the child. Estate of Gird, supra, 157 Cal. 534, 540, 108 P. 499; Serway v. Galentine, 75 Cal. App.2d 86, 90, 170 P.2d 32. Thus, an unmarried man may legitimate his offspring by living with the mother and child for a short period during which he represented the mother as his wife and the child as his own. Serway v. Galentine, supra, 75 Cal. App.2d 86, 90-91, 170 P.2d 32. [Emphasis added]
>
> Pierce, at 195.

Respondent has not received Corey into his family in any meaningful way. The child was not born into a family unit composed of appellant and respondent. To the contrary, the parties have never lived together; never have they functioned as a single social or economic unit. No de facto family, comprising appellant, respondent and Corey, has ever come into existence, largely as a consequence of respondent's willful acts.

For example, respondent refused to marry appellant in order to provide a home for Corey, proposing, as alternative solutions morally reprehensible to appellant, that Corey be aborted or adopted by strangers. (Trans. A, p. 57, l. 19-p.58, l. 10) And further, after Corey's birth, respondent did not offer to share the house he was purchasing with appellant and the child. He chose to continue living alone leaving appellant to fend for herself and her child as best she could. (Trans. p. 52, l. 30-p. 53, l. 3; p. 59, l. 16)

C. Because respondent has not held out Corey's mother, the appellant, to be his wife, the Court below erred in finding respondent to have legitimated the child.

Section 78-30-12 must be construed to require that the biological father of an illegitimate child must, in order to legitimate him, receive the child into his family as if he were a legitimate child. No other construction is compatible with public policy. Note, 12 SO.CAL.L.REV. 97, 98 (1938). A legitimate child is received and associated with his mother. Hence, consistent with the authorities cited herein, a child cannot be received into a family as a legitimate child unless his mother is held out to be his biological father's wife.

At no time has respondent represented appellant to be his wife and at no time has he represented Corey to be his legitimate son. Instead, by his every act, including bringing this action, he has chosen a course of action calculated to emphasize the illegitimacy of both relationships, disregarding the risk of exposing both Corey and his mother to shame and ridicule.

D. Because appellant has not relinquished exclusive custody and control of Corey, the Court below erred in finding respondent to have legitimated this child.

As discussed in detail in Point VII, infra, under Utah law, a mother has a superior right to custody and control of her child born out of wedlock. Where the mother retains custody and control of the child, she may effectively preclude legitimation by refusing to marry the father or by refusing to relinquish custody of the child to him. Cheryl Lynn H. v. Superior Court, 41 Cal. App.3d 273, 277-78, 115 Cal.Rptr. 849, 852, (Cal.App. 1974); In re Adoption of Irby, 37 Cal.Rptr. 879, 881 (Cal. App. 1964).

In Irby, supra, the court interpreted the holding in a previous case, Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888, as judicial recognition that, under the provision of §230 of the California Civil Code,

> ... There are two situations in which the father of an illegitimate child cannot legitimate the child even though he is willing to do so. The first situation is where his wife, who is not the mother of the child refuses to permit him to receive the child into the family circle, and the second is where the natural mother of the child refuses to give up custody of the child thereby preventing him from receiving the child. If either of these consents is lacking, he may not legitimate the child. Irby, supra, at 881.

California's Second District Court of Appeal found the Irby reasoning, quoted above, and the holding therein, controlling, and held that the appellant natural father, who sought reversal of a decree of adoption, had not legitimated his child. In re Adoption of Pierce, 15 Cal.App.3d 244, 93 Cal.Rptr. 171 (Cal.App. 1971).

In Pierce, supra, the court reasoned that since the mother of an illegitimate child has the right to "custody and control of the child and therefore must (impliedly at least) consent to the legitimation of the child by its natural father," her stipulation to the natural father's visitation rights did not amount to consent to legitimation.

Appellant has never relinquished her exclusive rights to custody and control of Corey. She has taken every step possible, as demonstrated by her defense in the Court below, to prevent erosion of these rights.

E. Because respondent had not made meaningful contribution to Corey's support, the Court below erred in finding respondent to have legitimated this child.

Although most of the cases cited herein do not require proof of support as a primary element in determining legitmation, the payment of support remains a recognized index for determining motivation of the biological father.

Until so ordered by Judge Winder, after trial in this matter, respondent made no meaningful contribution to Corey's support. In 1974, he gave appellant some "spare money." Respondent testified to no support since 1974, stating that there was no particular reason for this delinquency. (Trans. A, p. 37, ll.10-14)

Respondent paid nothing toward the support of appellant and her unborn child, thus forcing appellant to continue living

in a vermin-infested duplex without adequate heating and sanit tion facilities, where she remained with Corey, as a matter of financial necessity, until her marriage to Carmen R. Dennis. (Trans. A, p. 58, ll. 15-29; Trans. B, p. 14, l. 25-p. 15, l. Respondent refused appellant's mother's plea for financial ass tance. (Trans. A, p. 58, l. 30-p. 59, l. 20) Respondent did p appellant's hospital expenses, but only when requested to do s by appellant's mother. (Trans. B, p. 18, l. 5)

Upon hearing the evidence adduced during only the first day of trial,Judge Winder stated, "I think he is a 'Johnny-com lately,' and I am going to make a heavy order of support. I am tempted to make the order retroactive." (Trans. A, p. 67, l. 1

POINT VI.

A FINDING THAT RESPONDENT HAD COMPLIED WITH §78-30-12 DID NOT COMPEL AN AWARD OF VISITATION RIGHTS TO RESPONDENT BY THE COURT

Assuming, arguendo, that the Court below was not in err in finding the respondent to have complied with §78-30-12, Uta Code Annotated, 1953, it does not follow that the Court was co pelled to grant visitation as a matter of right inherently flo ing from such compliance. §78-30-12 provides as follows:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption. [Emphasis added]

Because he has admitted that he is Corey's biological father, respondent cannot claim to have adopted this child. "Adoption, properly speaking, refers only to persons who are strangers in blood," Black's Law Dictionary, (4th ed., 1968), and must thus be distinguished from legitimation or an attempt to legitimate.

§78-30-12 is a literal copy of the California statute, which is found at §230 of the California Civil Code (1941). Therefore, as there are no Utah cases directly on point regarding the construction of "adoption," "adopts," and the last sentence of this statute, it is appropriate to refer to California case law pursuant to rules of judicial construction. 73 Am.Jur. 2d, Statutes, §166.

The California Supreme Court has held that the final sentence of §230--"The foregoing provisions of this chapter do not apply to such an adoption"--must be strictly construed, "neither adding to nor subtracting from its words." In re Lund's Estate, 159 P.2d 643, 654. See also, Estate of McNamara, 181 Cal. 82, 183 P. 552; 7 A.L.R. 313.

Therefore, it follows that the rights conferred on fathers through adoption by §78-30-10 are not conferred through legitimation. This is consistent with the purpose of the legitimation statutes, which is to confer a status benefit upon the child, not to award a benefit to his father. Visitation should be awarded as a

privilege, not a right, and only if such an award is consistent with the child's best interest.

Further, as it is uniformly recognized by the authorities that the best interests of the child must be afforded paramount consideration, and as Dr. Goates had recommended termination of respondent's visitation with the child, under any construction of the statutes in question, Judge Winder would not have abused his discretion by denying the privilege of visitation to respondent. Annot., 98 A.L.R.2d 417, 421-28; Harkins, supra; Goldstein, supra; Rozanski, supra; Sullivan, supra; Report, R 133.

POINT VII.

THE COURT BELOW ERRED IN FAILING TO RECOGNIZE APPELLANT'S RIGHT TO EXCLUSIVE CUSTODY AND CONTROL OVER HER OUT-OF-WEDLOCK CHILD

Under Utah law, the living natural mother of an out-of-wedlock child possesses a right to his full custody and control. This right is superior to the interests of all others, and is exclusive of them. See: State in the Interest of M, 25 Utah 2d 101, 105, 476 P.2d 1013, 1015-17 (1970); Jensen v. Earley, 63 Utah 604, 611-12, 228 Pac. 217, 219-20 (1924); R. Aaron, "Proposals for Truce in the Holy War: Utah Adoption," 1970 UTAH L.REV. 325, 331 (1970). The "custody and control" rights of the natural mother are superior to and exclusive of the concededly "secondary" rights of the biological father. See: Annot., 45

A.L.R.3d 216, 223-24; Annot., 98 A.L.R.2d 417, 431-34. This rule is consistent with the law of other jurisdictions. 98 A.L.R. 2d 417, 427-35 (1970).

In Thomas v. Children's Aid Society of Ogden, 12 Utah 2d 235, 364 P.2d 1029 (1961), this Court expressed the general rule regarding a biological father's rights:

> The putative father of an illegitimate child occupies no recognized paternal 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. 12 Utah 2d 235, at 239, 364 P.2d 1029, at 1031-32 [Footnotes omitted]

This rule was modified somewhat in State in the Interest of M, 25 Utah 2d 101, 476 P.2d 1013 (1970), which held that the acknowledged biological father of an illegitimate child has a legal right to care, control, and custody of his child, but only after the natural mother's superior rights have been lawfully terminated. For the purposes of the instant case, Thomas, supra, remains in force, unmodified.

That the biological father has no "custody or control" rights over the child in opposition to the rights of the mother is expressly declared by the Utah legislature at §77-60-12, Utah Code Annotated, 1953.

> The father of such child shall not have the right to its custody or control, if the mother is living and wishes to retain such custody and control, until after it shall have arrived at the age of ten years, unless, upon petition by the District Court ... it shall be made to appear that the mother is not a fit person to have custody and control of said child ... .

While this Court has not had an opportunity to apply this statute to the issue of visitation presented here, courts in other states have decided cases grounded on similar statutes. For example, in DePhillips v. DePhillips, 219 N.E.2d 465 (Ill. 1966), the Supreme Court of Illinois held that the statutory denial to the father of "custody and control" rights over his illegitimate child necessarily involves denial of any legal visitation rights. The Illinois Court held visitation to be an element of "control" of the child, which statutorily vests in the natural mother. See also: Wallace v. Wallace, 210 N.E. 2d 4 (Ill. 1965); Anonymous v. Anonymous, 56 Misc.2d 711, 289 N.Y.S.2d 792, 794 (N.Y.City Ct. 1968).

Respondent has filed an Acknowledgement of Paternity as required to establish "rights pertaining to paternity" pursuant to §78-30-4, Utah Code Annotated, 1953.

This statute was designed to accomodate the biological father's right prior to adoption, as recognized by the United States Supreme Court in Stanley v. Illinois, 405 U.S. 645 (197 It concerns only his rights to notice and hearing after termination of the natural mother's rights before adoption by persons not biologically related to the child. The limited "rights pertaining to paternity" secured by this statute do not include or create"custody and control" rights in conflict with those of appellant under §77-60-12, Utah Code Annotated, 1953.

Thus, the Court below erred in granting rights of visit

to the respondent, in violation of appellant's statutorily mandated right to full custody and control of her minor child.

POINT VIII.

THE COURT BELOW ERRED IN FAILING TO AFFORD APPELLANT THE SAME RIGHT TO WITHHOLD CONSENT TO LEGITIMATION AS HAS BEEN CONFERRED BY STATUTE ON THE WIFE OF A BIOLOGICAL FATHER

Section 78-30-12, Utah Code Annotated, 1953, requires that the father of an illegitimate child, if married, must have the consent of his wife in order to receive this child into his family. If she withholds her consent, his child cannot be legitimated pursuant to this statute.

There is no indication that this provision has ever been challenged in the Utah courts, though on its face, and as applied, hypothetically, it would inequitably and arbitrarily deny some children born out of wedlock the status of legitimacy.

The presumption arises that when the Utah legislature chose to incorporate §230 of the California Civil Code into Chapter 30 of the Utah Code Annotated, 1953, as §78-30-12, it recognized this issue of unequal treatment. Therefore, it is submitted, the legislature was moved to enact this particular provision by what it found to be a more compelling principle of public policy -- the sanctity of the marital bond and the privacy of the family unit -- the formal married state being favored by the law and all other major public and quasi-public institutions.

It follows that in enacting §78-30-12, the legislature recognized that were the biological father's wife's consent not required as a matter of law, there would be instances in which a child could be brought into her home against her will, to the possible detriment of her relationship with her husband and to that of other intra-family relationships, including that of husband and wife to children born within their marriage, and that of the legitimated child to these children. Since the wife of a biological father is to be afforded total discretion to prevent legitimation, even if to the certain detriment of the child, the why should this right not also be extended to the mother of the child, especially when to do so would be in the best interests of the child?

The California courts, in having held, under §230 of the California Civil Code, that mothers of children born out of wedlock are entitled to withhold consent to legitimation by biological fathers, appear to have considered this equal protection argument, however indirectly and cryptically. See, In re Adoption of Irby, In re Adoption of Pierce, and Darwin v. Granger, supra.

The Court below erred in failing to recognize appellant's right to withhold consent to legitimation by the respondent, to the detriment of Corey's best interests. Report, R 133, Trans. B, p. 32, l. 20-p. 33, l. 9.

POINT IX.

THE COURT BELOW ERRED IN FAILING TO PROTECT DEFENDANT'S CONSTITUTIONAL RIGHT TO PRIVACY IN FAMILY RELATIONS AS IT BEARS UPON THE CHILD'S BEST INTERESTS.

The courts have frequently emphasized the importance of the family. The United States Supreme Court in Meyer v. Nebraska, 262 U.S. 390 (1932) held that "liberty" under the Fourteenth Amendment denotes not only freedom from bodily restraint but also the right "... to marry, establish a home and bring up children... ." The Court considered these rights to be "essential." Id., at 399. The rights to conceive and to raise one's children were termed "basic civil rights of man," in Skinner v. Oklahoma, 316 U.S.535, 541 (1942). Mr. Justice Burton, in May v. Anderson, 345 U.S.528 (1953) described a mother's rights to the care and custody of her children as "rights far more precious ... than property rights." Id. at 533. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder," said the Court in Prince v. Massachusetts, 321 U.S.158, at 166 (1944).

This Court has been consistentin affirming these principles. In State in the Interest of M., 25 U.2d 101, 476 P.2d 1013 (Utah 1970), the Court stated, "The right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court. This rule applies to

illegitimate as well as legitimate children." Id., 25 U.2d, at 107, 476 P.2d 103, at 1017.

In recent years, the United States Supreme Court, as well as other courts, has applied the "right of privacy" as it has evolved under specific constitutional guarantees to the marital and family relationships. The roots of this development can be traced through several decisions, such as Pierce v. Society of Sisters, 268 U.S.510 (1925), in which the Court held unconstitutional an Oregon law forbidding parents from sending their children to private schools. The act, the Court said, "unreasonably interferes with the liberty of parents to direct the upbringing and education of children under their control." Id., at 534-35. Two decades later, the Court commented in Prince v. Massachusetts, supra, that the decisions in Pierce and Meyer, supra, "have respected the private realm of family life which the state cannot enter." Mr. Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. 497, 551-52 (1961), stated, "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicity granted constituional right ... ."

In Griswold v. Connecticut, 381 U.S.479 (1965), the Court expressly brought marital relationship under the protection of the "right of privacy" in holding a Connecticut statute forbidding use of contraceptive devices unconstitutional under the Fourteenth

Amendment. In the words of Mr. Justice Goldberg, concurring,

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. Id., at 495.

Since Griswold, the United States Supreme Court has extended constitutional protections to safeguard the privacy of the individual control of personal life, as in Planned Parenthood of Missouri v. Danforth, 428 U.S.52 (1976), and in parental control of children and family relations, as in Wisconsin v. Yoder, 406 U.S. 205 (1972). In Wisconsin v. Yoder, the Court, per Mr. Chief Justice Burger, struck down the application of compulsory education laws to Amish children, commenting, "a state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as ... the traditional interest of parents with respect to the religious upbringing of their children ... ." Id., at 214.

In the case now before this Court, appellant has married, resides with her husband, and is establishing a home and family of which her "illegitimate" son is an integral part. Corey, her son, benefits from the development of a secure, autonomous family unit under the control of the appellant and her husband. Therefore, the enforced intrusion of the respondent into the appellant's family should have been strictly scrutinized from the standpoint of Corey's interests in the privacy and security

of the appellant's marital and family relationships.

The Court below, in awarding judgment to the respondent, erred in failing to protect these interests.

SUMMARY OF ARGUMENT

For the following reasons, the Court below was in error in awarding rights of visitation to respondent and was in error in finding the respondent to have legitimated the child, absent the consent of appellant:

(1) Although the child's best interests must be considered paramount, the Court awarded visitation rights to respondent absent any showing by respondent that visitation would benefit the child and in the face of Dr. Goates' recommendations against visitation, which were neither challenged nor rebutted by respondent;

(2) Respondent was not and is not entitled to rights equal to those of a divorced father, for unlike the latter, he has never exercised actual or legal custody over the child, and has thus never assumed any significant responsibility for his daily supervision, education, protection, or care;

(3) The child has not been legitimated by respondent for the reasons that appellant has not relinquished custody and control of her child and has not consented to legitimation by respondent, respondent has not received the child into his

family, has not held out appellant to be his wife, and has made no significant contribution to the child's support. Sporadic visitation and mere "declaration of paternity" do not meet the requirements for legitimation pursuant to §78-30-12, Utah Code Annotated, 1953;

(4) Assuming, arguendo, that respondent had legitimated the child, such a finding did not dictate an award of visitation to respondent in the absence of evidence that such visitation would be in the child's best interests;

(5) The Court below erred in failing to recognize appellant's right to exclusive custody and control over the child;

(6) The Court below erred in failing to recognize appellant's right to withhold consent to legitimation by respondent;

(7) The Court below erred in failing to protect appellant's right to privacy in family relations as it bears upon the child's best interests.

CONCLUSION

The controlling concern, inextricably a part of each issue discussed in the preceding pages, is the best interests of the child, not alleged rights of paternity. The evidence adduced at trial established that visitation was not in the best interests of the child, and consistent therewith, no reference to the child's best interests, present or future, is made in the Findings of Fact, Conclusions of Law, and Decree entered in the Court below.

Therefore, even if considered solely on this ground, the award of visitation rights to respondent was in error.

It is also submitted that the Court below was in error in finding respondent to have legitimated the child. This conclusion is also predicated on respondent's failure to act in the child's best interests, including his failure to synthesize, at any time since the birth of the child, a normal family relationship incorporating himself, the child, and appellant.

Appellant respectfully submits that she is entitled to a reversal of the lower Court's decision on the ground that legitimation of the child and visitation by respondent with the child are not in the child's best interests. In the alternative, should this Court determine that the Court below was not in error in finding respondent to have legitimated the child, appellant submits that reversal in part, finding the respondent not to be entitled to visitation with the child, would be appropriate and proper.

DATED May 5, 1978.

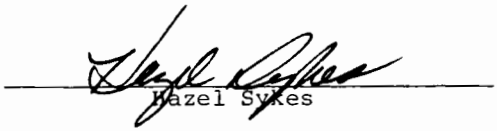
Respectfully submitted,

Judith Romney Wolbach

JUDITH ROMNEY WOLBACH

MAILING CERTIFICATE

I certify that two copies of the foregoing Brief on Appeal were mailed to E. H. Fankhauser, attorney for respondent, 430 Judge Building, Salt Lake City, Utah 84111, United States mail, postage prepaid, on May 5, 1978.



Hazel Sykes