

1988

Michael Jon Reynolds v. Jennifer Franks Reynolds : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Evan R. Hurst; Mitchell R. Barker; Attorneys for Plaintiff/Appellant.

David S. Dolowitz; Michael S. Evans; Julie A. Bryan; Cohne, Rappaport and Segal; Attorneys for Defendant/Respondent.

Recommended Citation

Brief of Respondent, *Reynolds v. Reynolds*, No. 880420 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1217

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 Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO. 880420 IN THE UTAH COURT OF APPEALS

MICHAEL JON REYNOLDS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
	)	88-420 CA
JENNIFER FRANKS REYNOLDS,)	
)	
Defendant/Respondent.	)	Priority 14(b)

RESPONDENT' S BRIEF

AN APPEAL FROM THE DECISION
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG, JUDGE, PRESIDING

DAVID S. DOLOWITZ
MICHAEL S. EVANS
JULIE A. BRYAN
COHNE, RAPPAPORT & SEGAL
525 East 100 South
Fifth Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

Evan R. Hurst
Mitchell R. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692

JAN 19 1989

IN THE UTAH COURT OF APPEALS

MICHAEL JON REYNOLDS,)	
)	
Plaintiff/Appellant,)	
)	
v.)	
	)	88-420 CA
JENNIFER FRANKS REYNOLDS,)	
)	
Defendant/Respondent.	)	Priority 14(b)

RESPONDENT'S BRIEF

AN APPEAL FROM THE DECISION
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE DAVID S. YOUNG, JUDGE, PRESIDING

DAVID S. DOLOWITZ
MICHAEL S. EVANS
JULIE A. BRYAN
COHNE, RAPPAPORT & SEGAL
525 East 100 South
Fifth Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

Evan R. Hurst
Mitchell R. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
ISSUE ON APPEAL	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENTS	7
ARGUMENT	10
POINT I. - THE UNITED STATES SUPREME COURT'S DECISION IN PLANNED PARENTHOOD OF MISSOURI v. DANFORTH PRECLUDES A FATHER FROM UNILATERALLY VETOING A WOMAN'S DECISION TO TERMINATE HER PREGNANCY IN THE FIRST TRIMESTER.	10
A. The Supreme Court's decision in Danforth governs the instant action.	10
B. Courts have unanimously held that a woman's right to determine whether to continue a first trimester pregnancy outweighs a father's interest.	12
POINT II. - DENYING PLAINTIFF THE RIGHT TO FORCE DEFENDANT TO BEAR HIS CHILD DOES NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS.	15
A. Completely private acts, such as a woman's decision to terminate her pregnancy, do not violate the Fourteenth Amendment.	15
B. Plaintiff's right to procreate remains intact.	17
C. No right to rear children is implicated.	18
D. Gender discrimination is not an issue.	19
POINT III. - TRIAL COURT INTERVENTION ON PLAINTIFF'S BEHALF WOULD HAVE BEEN STATE ACTION IN VIOLATION OF THE FOURTEENTH AMENDMENT	20
POINT IV. - THE TRIAL COURT'S DECISION IS CONSISTENT WITH UTAH LAW	22
POINT V. - A MAN MAY NOT FORCE HIS WIFE TO BEAR A CHILD TO FURTHER HIS DESIRE TO BECOME A PARENT	25
POINT VI. - THE "BALANCING TEST" ADVOCATED BY THE PLAINTIFF IS INHERENTLY DANGEROUS	26
POINT VII. - ROE V. WADE HAS NOT BEEN REVERSED	29

POINT VIII. - DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES.	30
CONCLUSION	30
CERTIFICATE OF MAILING	31

TABLE OF AUTHORITIES

Utah Code Ann. §30-3-3	10, 30
Utah Code Ann. §76-7-304 (1978)	23
Utah Code Ann. §76-7-316	23
Utah Code Ann. §78-2a-3	1
Rule 3(a) of the Utah Court of Appeals	1
Rule 4(a) of the Utah Court of Appeals	1
Rule 33 of Appellate Procedure	10, 30
Utah Rule 54(b) of Civil Procedure	4
1986 U.S. Poverty Guidelines 51 C.F.R. 5105 (1986)	27
Fourteenth Amendment	7, 8, 15, 16, 20-22

TABLE OF CASES

<i>City of Akron v. Akron Center for Reproductive Health</i> , 462 U.S. 416 (1983)	14, 19, 23, 25
<i>Civil Rights Cases</i> , 109 U.S. 3 (1883)	16
<i>Coleman v. Coleman</i> , 57 Md.App. 755, 472 A.2d 1115 (1984)	14
<i>Conn v. Conn</i> , 526 N.E.2d 958 (Ind. 1988) <i>cert denied</i> 109 S.Ct. 391 (1988)	14, 29
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	20
<i>Doe v. Doe</i> , 365 Mass. 556, 314 N.E.2d 128 (1974)	14, 16, 17
<i>Doe v. Rampton</i> , 366 F.Supp. 189 (D.Utah 1973)	14, 23-25
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	26
<i>Eubanks v. Brown</i> , 604 F.Supp. 141 (D.Kenn. 1984)	24
<i>Evans v. Abbney</i> , 396 U.S. 435 (1970)	21, 22
<i>Ex Parte Virginia</i> , 100 U.S. 339 (1880)	21

<i>Jane Doe v. John Smith</i> , No. 84A01-8804-CV-00112, Slip. Op. (Ind. Ct. App. Oct. 24, 1988)	15
<i>John Doe v. Jane Smith</i> , 527 N.E.2d 177 (Ind. 1988)	15
<i>John Doe v. Jane Smith</i> , 108 S.Ct 2136 (1988)	16
<i>Jones v. Smith</i> , 278 So.2d 339 (Fla. Dist. Ct. App. 1973) . . .	14, 17
<i>Missouri v. Reproductive Health Services</i> , [cite]	29
<i>New York v. Sullivan</i> , 376 U.S. 254 (1964)	21
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984)	21
<i>Planned Parenthood of Rhode Island v. Board of Medical Review</i> , 598 F. Supp. 625 (D.R.I. 1984)	24
<i>Planned Parenthood of Missouri v. Danforth</i> , 428 U.S. 52 (1975) . . 1, 3, 7, 10-14, 25	25
<i>Rendell-Baker v. Kahn</i> , 457 U.S. 830 (1982)	16
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) 10, 11, 13, 19, 23, 25, 29	
<i>Rothenberger v. Doe</i> , 149 N.J. Super. 478, 374 A.2d 57 (1977) . .	21
<i>Scheinberg v. Smith</i> , 659 F.2d 476 (5th Cir. 1981)	24
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	21
<i>Thornburgh v. American College of Obstetricians and Gynecologists</i> , 90 L. Ed 779 (1986)	14
<i>Tulsa Professional Collection Services, Inc. v. Pope</i> , 108 S.Ct. 1341 (1988)	21, 22
<i>Wolfe v. Schroering</i> , 541 F.2d 523 (6th Cir. 1978)	12, 13

JURISDICTIONAL STATEMENT

This is an appeal from the Order of the Third Judicial District Court of Salt Lake County, State of Utah in which the trial court lifted an Ex-parte Temporary Restraining Order and denied plaintiff's Motion for a Preliminary Injunction enjoining the defendant from terminating her pregnancy.

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. §78-2a-3(2)(g) and Rules 3(a) and 4(a) of the Rules of the Utah Court of Appeals.

ISSUE ON APPEAL

In accord with the United States Supreme Court's decision in *Planned Parenthood of Missouri v Danforth*, its predecessors and its progeny, did the trial court correctly hold that a man cannot force a woman, even his wife, to bear his child by enjoining her from terminating her pregnancy during the first trimester?

STATEMENT OF THE CASE

Michael Jon Reynolds ("plaintiff") commenced the instant action in March, 1988 by filing a Complaint for divorce. At that time, the defendant, Jennifer Franks Reynolds (hereinafter "defendant") was eighteen (18) years old. The parties were married on November 7, 1986 and have one child, born on June 3, 1987.

Concurrent with the filing of a Complaint for divorce, plaintiff sought an Ex-Parte Temporary Restraining Order and Order to Show Cause to restrain the defendant from terminating her then existing pregnancy. In his affidavit supporting the Ex Parte Motion for Temporary Restraining Order, plaintiff stated defendant was approximately ten (10) weeks pregnant, he had commenced an

action for divorce seeking custody of the unborn child and defendant's planned abortion would cause him irreparable and permanent injury for which there was no relief available in law, equity or otherwise. See, Plaintiff's Affidavit, attached hereto as Exhibit "A," at paras 4, 7 and 9. In his Complaint for divorce, plaintiff requested the defendant be enjoined from terminating her pregnancy as "plaintiff was opposed to this and desires the custody, control and association with said child."

Defendant filed an Answer and Verified Counterclaim, a copy of which is attached hereto and marked as Exhibit "B." Defendant noted she was in the seventh (7th) week of pregnancy. She further explained that, prior to the parties' separation, plaintiff attended the meeting between she and her physician and, at that time, plaintiff was not only in favor of terminating the defendant's pregnancy, he scheduled the appointment for defendant's abortion. See, Answer and Verified Counterclaim, attached hereto as Exhibit "B," paras 27 and 28. It was not until after the defendant left the plaintiff, as a result of his extramarital affairs, that plaintiff objected to the scheduled abortion.

The district court issued an Ex Parte Temporary Restraining Order, as a result, defendant was unable to keep the date set by plaintiff for her to terminate her pregnancy.

A hearing on plaintiff's Order to Show Cause for a preliminary injunction was held before the Honorable Judge David S. Young, Judge, on March 30, 1988. Plaintiff submitted a Memorandum in Support of Restraining Order, (copy attached hereto as Exhibit "C") which emphasized his desire to take custody of the child and

to relieve defendant of her liability therefore.¹ See, *Memorandum in Support of Restraining Order* at pages 1, 4 and 7.

Defendant submitted two (2) Memoranda of Points and Authorities in Support of Defendant's Motion to Vacate Temporary Restraining Order and Order to Show Cause (copies attached hereto as Exhibit "D"). In those memoranda, defendant relied upon the authority of *Planned Parenthood of Missouri v. Danforth*, 428 U S 52, 69 (1975) and its progeny for the proposition that a woman's constitutional right to privacy prohibits a father or husband from vetoing her decision to terminate her pregnancy.

Judge Young held that the ruling in *Danforth* was controlling, lifted the Temporary Restraining Order and denied plaintiff's Motion for a Preliminary Injunction.

Plaintiff immediately submitted a Motion to Restore the Restraining Order to this Court. Based upon that Motion, the Restraining Order was reinstated. However, prior to the time the Restraining Order was served upon the defendant, her pregnancy was medically terminated. As a result, defendant moved to vacate the Interlocutory Appeal as moot; defendant's motion was granted on March 31, 1988.

¹ Although neither memoranda submitted to the district court included any argument as to the trimester of defendant's pregnancy and the issue was not accepted as a dispute in the district court. However, the Motion to Restore Restraining Order indicate that: "the disputed facts in this case are how far along Respondent is in her pregnancy. Appellant believes that she is twelve (12) weeks or more along and Respondent maintains she is not so far along." That argument is particularly surprising, given that the plaintiff's own affidavit in support of his Motion for Temporary Restraining Order, which was submitted only a week prior to his Motion to Restore the Restraining Order, placed the pregnancy at ten (10) weeks.

On April 15, 1988, plaintiff filed a motion in the district court to certify the abortion Order as a final judgment for appeal under Rule 54(b) of the Utah Rules of Civil Procedure. Plaintiff's Motion was granted by Order of the District Court entered on May 20, 1988.

While the appeal has been pending in this Court, the parties' divorce action has proceeded in the district court. In the divorce action, plaintiff seeks custody of the parties' eighteen (18) month old son and alleges that he is a fit and proper person to be granted said custody. Defendant denies that allegation and requests that she be granted custody of the parties' child. In support of her request for custody, defendant filed an affidavit noting that she had been the primary caretaker of the child until she began work in January of 1988 and thereafter, when she went to work, the child was cared for by her aunt or her mother. Defendant notes that plaintiff rarely took responsibility for the child and was physically abusive to the plaintiff. See, Defendant's Affidavit in Support of Motion for Temporary Relief attached hereto as Exhibit "E," paras. 1-14.² Plaintiff countered with an affidavit setting forth allegations formulated to support an argument that defendant was an unfit mother and, in fact, neglected the minor child. See, Affidavit of Michael Jon Reynolds attached hereto and marked as Exhibit "F."

² The District Court bifurcated the divorce issues from the issue now on appeal. However, a brief picture of the divorce proceedings may assist this Court to understand the practical difficulties inherent in the "balancing" approach advocated by plaintiff on appeal.

On May 2, 1988, at a hearing on plaintiff's Objection to Commissioner's Ruling on Defendant's Motion for Temporary Relief, the district court ordered that: (1) defendant be granted temporary custody of the parties' minor child; (2) plaintiff pay defendant the sum of not less than \$300.00 per month in child support commencing April 1, 1988; and (3) both parties cooperate in the performance of a custody evaluation to be commenced within forty-five (45) days of the date of the Order, the expense to be paid two-thirds (2/3) by plaintiff and one-third (1/3) by defendant. See, Order on Order to Show Cause attached hereto and marked as Exhibit "G." On September 1, 1988, defendant filed a Motion for Order to Show Cause in re: Contempt (copy attached hereto as Exhibit "H"). In support of said Motion, defendant submitted an Affidavit indicating that plaintiff had not paid child support for the months of July and August and had failed to pay two-thirds (2/3) of the expense of the custody evaluation as previously ordered

A hearing on defendant's Motion for Contempt was held September 13, 1988. At the hearing, Domestic Relations Commissioner, Sandra N. Peuler, found that plaintiff was in default of his obligation to pay two-thirds (2/3) of the cost of the custody evaluation and recommended plaintiff be ordered to pay the obligation within ten (10) days. The Commissioner also recommended that judgment for delinquent child support in the amount of \$320.00 be entered against the plaintiff.³ The plaintiff objected to the

³ Plaintiff had paid \$305.00 toward his obligation between the filing of the Motion for Contempt and the hearing thereon.

Commissioner's recommendation that he pay his share of the child custody evaluation. On September 15, 1988, the plaintiff filed a motion to have his child support obligation reduced to \$100.00 per month, effective September 1, 1988, on the grounds that he had been laid-off on August 31, 1988 and would be relying upon \$201.00 per week unemployment for his support. On September 22, 1988, plaintiff filed a Motion to Order Home Study by the Department of Social Services requesting that the Utah Department of Social Services perform the custody evaluation at no or low cost based upon the fact that, three (3) months after he was ordered to pay for the custody evaluation, he lost his job.

Plaintiff's Motion to Reduce Temporary Child Support was heard by Commissioner Peuler on September 23, 1988 who recommended that plaintiff's child support obligation be reduced from \$300.00 to \$150.00 per month beginning October of 1988 and required that plaintiff report his efforts to secure employment to defendant's attorney, in writing, on a monthly basis. Defendant objected to the reduction in child support. A hearing on plaintiff's objection to the Order requiring him to pay two-thirds (2/3) of the custody evaluation and on defendant's objection to the reduction in child support were held before the court on October 17, 1988. The district court affirmed the reduction of child support and ordered the defendant to pay two-thirds (2/3) of the costs of the child custody evaluation within thirty (30) days of the date of the hearing. Since entry of the judgment, plaintiff has been consistently late in paying his child support obligation and has, as of the date of this writing, paid nothing toward the cost of procuring

a custody evaluation to assist the court in determining custody of the parties' child.

SUMMARY OF ARGUMENTS

POINT I

In *Planned Parenthood of Missouri v. Danforth*, the United States Supreme Court held that no third party, not even a woman's husband, has the right to veto the decision, reached by a woman and her physician, to terminate her first trimester pregnancy. Furthermore, the Court noted that, inasmuch as it is the woman who physically bears a child, the right to privacy that protects her decision to terminate a first trimester pregnancy outweighs the interests that a third party may have in continuation of her pregnancy. In accord with that precedent, every appellate court faced with the issue has held that a husband or father cannot enjoin a woman from terminating her pregnancy in the first trimester. Following suit, the trial court in the instant case correctly refused to issue a preliminary injunction enjoining the defendant from terminating her pregnancy.

POINT II

The Fourteenth Amendment protects a person's fundamental rights from infringement by the state; one person's infringement on another's fundamental rights--with no state involvement--is not a violation of the Fourteenth Amendment. Thus, in the instant case, the plaintiff's argument that his constitutional rights were violated fails because the defendant's decision to terminate her pregnancy was a purely private decision and no state intervention was necessary to carry out her decision.

Moreover: (1) plaintiff's right to procreate remains intact. However, it is up to the plaintiff, not the trial court, to find a woman willing to bear plaintiff's child; (2) the right to rear children is not implicated because an embryo in the first trimester of gestation is not a "child"; and (3) denying plaintiff the ability to force defendant to bear his child does not unfairly discriminate against him on the basis of gender; it merely places the parties on equal footing as neither can force the other to bear a child.

POINT III

It has been long established that the actions of a state court, applying statutory or common law, is state action restricted by the Fourteenth Amendment, even if the law is applied in a civil suit between private parties. Thus, the trial court in the instant case correctly held that it was bound by the Fourteenth Amendment and could not intercede on plaintiff's behalf to enjoin the defendant from terminating her pregnancy.

POINT IV

No third party can veto a woman's decision to terminate her pregnancy in the first trimester. That constitutional mandate cannot be circumvented by a state through passage of laws that dictate when life begins. Thus, Utah law protecting children, parents and the family does not, and could not constitutionally, include in the definition of "child" an embryo in the first trimester of gestation in order to give the plaintiff the right to veto the defendant's decision to terminate her pregnancy.

Moreover, Utah had a law requiring the consent of a woman's husband and the embryo's father before a woman could terminate her pregnancy. A provision of the same law gave the father and the husband the right to resort to the courts to enjoin the abortion if they so desired. The law was found to be unconstitutional by the United States District Court for the District of Utah. Utah law now provides only that a husband must receive notice of his wife's intent to terminate her pregnancy so that he may play a role, at a private level, in his wife's decision. Nothing in Utah law now requires that a husband or father consent to an abortion or gives him the right to enlist court assistance if he disagrees with his wife's decision. Thus, the trial court's decision in the instant case was consistent with Utah law.

POINT V

The decision to become a parent belongs to each *individual*, married or single. Thus, despite the fact that procreation may be a primary purpose of marriage, no man may force his wife to bear his child by vetoing her decision to terminate her pregnancy during the first trimester.

POINT VI

The balancing act advocated by the plaintiff is disproportionately perilous for a woman in that it may result in her enduring an unwanted pregnancy and bearing the burden of deciding whether to place the child she has born for adoption or rearing the child with inadequate resources.

POINT VII

This court is not at liberty to reverse the Supreme Court's decisions in *Roe v. Wade* and its progeny. Unless the Supreme Court overturns those decisions, this court is bound by their precedent to uphold the trial court's ruling.

POINT VIII

Defendant is entitled to an award of attorneys' fees under Utah Code Ann. §30-3-3 and Rule 33 of the Utah Rules of Appellate Procedure because plaintiff's appeal is frivolous and because defendant's need and the plaintiff's ability to pay justify an award of fees in this case.

ARGUMENT

POINT I.

THE UNITED STATES SUPREME COURT'S DECISION IN
PLANNED PARENTHOOD OF MISSOURI v. DANFORTH PRECLUDES A FATHER
FROM UNILATERALLY VETOING A WOMAN'S DECISION TO TERMINATE HER
PREGNANCY IN THE FIRST TRIMESTER.

A. The Supreme Court's decision in *Danforth* governs the instant action.

The plaintiff acknowledges that the decision of the United States Supreme Court in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1975) prohibits a husband from vetoing the decision of a woman to terminate her pregnancy. Plaintiff seeks to limit the holding of *Danforth* to instances where a husband is granted an absolute right to veto a woman's decision, arguing that *Danforth* does not preclude a court from balancing the rights and interests of a father in determining whether it is appropriate that the father be allowed to insist that a woman bear his child.

Contrary to plaintiff's argument, *Danforth* did not limit its application to cases in which a husband was given an absolute veto over a woman's choice to terminate her first trimester of pregnancy. In *Danforth*, the court held that the authority to prevent an abortion cannot be granted to "any particular person, even the spouse" during the first trimester of a woman's pregnancy. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 69 [emphasis added].

Moreover, the plaintiff's distinction between a veto right that results from balancing a father's interests and one that is absolute is a distinction without a difference. In either case, the deprivation of a woman's right to choose to terminate her pregnancy is equally complete and, as a result, in both cases the woman must remain pregnant against her wishes and succumb to a third party's desire that she bear the child. Thus, in this setting a veto is a veto, whatever its origin.⁴

The Court in *Danforth* was cognizant of the difficulty involved in weighing the interest of a woman's spouse when he disagrees with the decision to terminate a pregnancy. The Court held that, in the face of such conflict:

Inasmuch as it is the woman who physically bears the child and who is more directly and immediately affected

⁴ Moreover, plaintiff's plea for temporary veto power ignores the reality that his "temporary veto" may be permanent. As the Supreme Court acknowledged in *Roe v. Wade*, the health risks involved with an abortion procedure increase with the passage of time. As a practical matter, an attempt to fit an evidentiary hearing into a trial court's docket may cause sufficient delay in the ability to terminate a pregnancy to reverse a woman's decision to obtain an abortion, based upon increasing risks to her health, or require her to face the increased risks in order to carry out her desire to terminate her pregnancy.

by the pregnancy, as between the two, the balance weighs in her favor.

428 U.S. at 71.

Thus, the Court in *Danforth* has acknowledged that, until a man can arrange to bear his own child, nature has placed the burden of gestation and child birth upon the woman. As a consequence of that burden, when balancing the interest of a father in an existing first trimester pregnancy, the balance is invariably weighted in favor of the woman's right to decide whether to continue the pregnancy.

B. Courts have unanimously held that a woman's right to determine whether to continue a first trimester pregnancy outweighs a father's interest.

A reading of plaintiff's brief gives the impression that plaintiff's appeal ventures into uncharted territory, which falls into an area that the courts have carefully avoided by limiting the application of *Danforth*. That is simply not the case.

Plaintiff cites *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1978) for the proposition that courts have limited *Danforth* and refused to determine whether a statute narrowly drafted to allow a husband something less than an absolute veto on a woman's decision to terminate her pregnancy would pass constitutional muster. See, Appellant's Brief at p. 3. In fact, the Circuit Court of Appeals in *Wolfe* held that a state cannot authorize a spouse, parent or guardian to veto a woman's decision to abort a pregnancy in the *second trimester of pregnancy* "for no reason or an impermissible reason, to wit, other than protect[ing] maternal health," such as protecting unrecognized interest in fetal life. 541 F.2d at 523.

Thus, *Wolfe* actually extends *Danforth* and *Roe v. Wade* to their logical conclusion by determining that a woman's choice to abortion in the second trimester cannot be vetoed by a spouse absent legitimate concern for maternal health. The only issue reserved in *Wolfe* was whether "a more narrowly drafted requirement of spousal consent, permitting the husband/father to 'veto' a post-viability abortion" could survive constitutional challenge. 541 F.2d at 526 [emphasis added]. The issue of a father's interest in a viable fetus is not addressed in *Danforth* or its progeny and, in fact, a holding that a father's interest in a viable fetus outweighs the mother's right to terminate her pregnancy may well be consistent with the Supreme Court's decision in *Roe* and *Danforth*.⁵ Thus, *Wolfe* does not limit application of *Danforth*; it simply refuses to extend the *Danforth* holding to third-trimester pregnancies.

Nothing in *Wolfe* or any other decision indicates that the holding of *Danforth* should be limited to allow a father to veto a woman's choice to terminate her pregnancy.

⁵ In Point III of his Appellate Brief, Plaintiff argues that the right to abortion is not absolute and therefore should be balanced with the father's rights. See, Brief of Appellant at pp. 15-16. Defendant agrees that the right to determine whether to terminate her pregnancy is not absolute but must be considered against important state interests in regulation. *Roe v. Wade*, 410 U.S. at 154. However, until the end of the first trimester, when the state interest in regulation becomes compelling, the woman, in consultation with her physician, is free to determine whether to terminate her pregnancy. Moreover, during that time period, the right to prevent the abortion cannot be granted to any particular person. *Danforth*, 428 U.S. at 69. Thus, while defendant's right to terminate her pregnancy is not absolute, the right is broad enough to withstand the plaintiff's efforts to use the state court to prevent her from having an abortion.

The Supreme Court has consistently reaffirmed its holding that the state may not override the choice of an adult woman, in consultation with her doctor, to terminate her first trimester pregnancy. See e.g. *Thornburgh v. American College of Obstetricians and Gynecologists*, 90 L.Ed 779 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). In reaffirming this position, the Supreme Court has emphasized that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental." *Thornburgh*, 90 L.Ed at 801.

Consistent with the principal, even before *Danforth*, courts held that a father could not intervene to prevent a woman from terminating her pregnancy. See, *Jones v. Smith*, 278 So.2d 339 (Fla. Ct.App. 1973); cert. denied, 415 U.S. 958 (1974); *Doe v. Rampton*, 366 F.Supp. 189, 193 (D.Utah 1973) (striking down, as unconstitutional, a Utah statute requiring that a father and/or husband consent to an abortion). In the wake of *Danforth*, several courts have rejected the arguments raised by plaintiff and held that a husband and/or father cannot interfere with a woman's decision to terminate her first trimester pregnancy. *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988) (specifically rejecting the "balancing of interests" approach advocated by plaintiff) application for stay denied, No. A-88-55 U.S. (July 22, 1988); cert denied 109 S.Ct. 391 (1988); *Coleman v. Coleman*, 57 Md.App. 755, 472 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128

(1974); *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), application for stay denied, 108 S.Ct. 2136 (1988); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112, Slip. Op. (Ind.Ct.App. Oct. 24, 1988).

In short, the decisions of the United States Supreme Court and their progeny have made it "crystalline" that

a woman in her first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse, nor the father of the child has any right to intervene so as to prevent her decision from becoming fact.

Coleman, 471 A.2d at 1119.

That precedent should, by all rights, conclude any argument on the merits of plaintiff's claim that he was wrongfully denied an opportunity to have his interests "balanced" so that he could obtain a court order forbidding the defendant from terminating her pregnancy. It has been conclusively determined that plaintiff has no such right.

POINT II.

DENYING PLAINTIFF THE RIGHT TO FORCE DEFENDANT TO BEAR HIS CHILD DOES NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS.

A. Completely private acts, such as a woman's decision to terminate her pregnancy, do not violate the Fourteenth Amendment.

Plaintiff argues that the defendant's decision to terminate her pregnancy violated his constitutional right to procreate, to rear and enjoy his offspring and discriminates against him on the basis of gender. In fact, plaintiff's constitutional rights are in no way implicated. The Constitution certainly protects the rights cited by the plaintiff; however, those rights are

constitutionally protected against *government* action *not* against wholly private actions. See, *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883) ("Individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment."); see also *Rendell-Baker v. Kahn*, 457 U.S. 830, 837 (1982). Every case cited by the plaintiff in support of his constitutional claims involves state action affirmatively interfering with the rights of an individual. In this case, defendant's choice involves *no* state action.

Justice Stevens recently pointed out the flaw in plaintiff's argument when denying an application for injunction in a legally and factually similar case, *John Doe v. Jane Smith*, 108 S.Ct 2136 (1988). Justice Stevens wrote:

I have serious doubts concerning the availability of a federal remedy for this claim in view of the fact that Jane Smith's decision to obtain an abortion can be carried out without any action on the part of the State of Indiana or any other state governmental subdivision.

Id. at 2137.

The constitutional rights asserted by plaintiff act only as "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974) (the court in *Doe*, rejected a request by a man to enjoin a woman's abortion, noting that there was no "basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." *Id.*). Plaintiff improperly seeks to twist the rights that the Constitution protects against government intrusion

into swords that call forth judicial action to subordinate women to their husband's will.

B. Plaintiff's right to procreate remains intact.

Plaintiff's argument that his right to procreate has been violated by defendant's decision to terminate her pregnancy is completely frivolous. Plaintiff clearly has a right to have natural children. However, it is up to the plaintiff, not the courts, to find someone willing to bear plaintiff's child.

The implications of plaintiff's interpretation of the right to procreate are staggering. Plaintiff claims that, to protect his right to procreate, courts may compel a woman to bear his child. If that is correct, may a court also order a party to refrain from the use of contraception, or to use contraception, to accommodate another parties desire to have, or refrain from having, children? As noted by the Supreme Judicial Court of Massachusetts:

[W]e would not order either a husband or a wife to do what is necessary to conceive a child or prevent conception, any more than we would order either party to do what is necessary to make the other happy. We think the same considerations prevent us from forbidding the wife to do what is necessary to bring about or prevent birth . . . Some things must be left to private agreement

Doe v Doe, 314 N.E.2d at 132. See also *Jones v. Smith*, 278 So.2d at 339 (wherein the court queries. If a man has a right to enjoin an abortion, could he then, by virtue of his right to choose not to procreate, compel a woman to have an abortion?) Fortunately, under the current state of the law, no court will be forced to determine to what extent it may order a party to do what is necessary to conceive, to give birth, or to prevent contraception and birth. Such court interference would violate the constitutional right to

procreate. A court's refusal to intervene in a couple's decision on contraception and birth is simply an act of good judgment, coupled with a correct application of existing constitutional law.⁶

C. No right to rear children is implicated.

Plaintiff argues, at some length, that the defendant's decision to terminate her pregnancy infringed upon his right to "raise, associate with, and enjoy [his] children." Brief of Appellant, p. 5. Certainly, both fathers and mothers have constitutional rights to their children that are protected from unjustified state interference. However, those rights are not implicated here because the case involves neither a child nor a father. Rather, the issue here is whether a man can force a woman to bear a child in order to satisfy his desire to have a child.

Plaintiff's alleged parental rights are based upon his opinion that life begins at conception, so that an embryo is a "child" and, having fertilized the ovum, he is a "father." The plaintiff's opinion on when life begins permeates his appellate brief, from beginning to end, in his various references to events that took place while the "child was still living," to his attestation that he sought to "save" his "child". Brief of Appellant at pp. vii and 12, respectively. However, plaintiff's theory of life has no legal

⁶ Plaintiff argues that divorce courts are the proper forum for a man to obtain an order enjoining his wife's abortion and laments that, if the court is denied the ability to issue such an injunction, there will be no opportunity for court intervention in a dispute between a man and his wife over whether a pregnancy should be terminated. Brief of Appellant, at pp. 29-30. Plaintiff ignores the fact that there is not a legal forum for resolution of all domestic disputes and courts have never held it appropriate to intervene to resolve a married couple's dispute over whether to have children.

relevance. The Court in *Roe* rejected a state's efforts to have plaintiff's theory of life enshrined as law. See, *Roe v. Wade*, 410 U.S. 113, 159-62 (1973); see also *Akron*, 462 U.S. at 444 ("a state may not adopt one theory of when life begins to justify its regulation of abortions").

Utah, in accord with the Supreme Court's ruling, does not have a law dictating that anyone accept plaintiff's theory of life. Yet, plaintiff herein seeks to convince this court that the trial court should have: (1) adopted his theory; (2) embedded it in the constitutional right to rear children; and (3) concluded that his right to rear children was not only protected from governmental intrusion, but formed a basis justifying affirmative court action to force her to bear his child. That reasoning directly conflicts with the *Roe/Akron* mandate that a state refrain from using the theory that life begins at conception to regulate abortion. Thus, contrary to plaintiff's argument, his right to rear children is not, and cannot be, implicated in defendant's decision to terminate her pregnancy.

D. Gender discrimination is not an issue.

In a final effort to convince this Court that his constitutional rights have been impaired by his inability to force defendant to bear his child, plaintiff argues that allowing defendant to unilaterally refuse to give birth after she conceived discriminates against him on the basis of gender. Brief of Appellant, pp. 16-19.

That argument is flawed, in the first instance, for the same reason that his prior constitutional arguments fail. The

Constitution prevents the state from denying a person equal protection under the law. Thus, where a law contains a classification based upon gender, the "classification by gender must serve important government objectives and be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190 (1976). In the instant case, there is no law, no classification and no state action. Thus, the equal protection clause, and its prohibition on unfair discrimination have no application.

Plaintiff's argument also fails because allowing the defendant to decide to terminate her pregnancy does not involve unfair gender discrimination. In fact, allowing the defendant to make that decision places the parties on equal footing. The defendant certainly cannot force the plaintiff to bear her child and, by virtue of defendant's right to terminate her pregnancy, plaintiff cannot force defendant to bear his. A contrary result would, in fact, be discriminatory as a woman could be forced to endure pregnancy and child birth against her will--a threat no man faces.

POINT III.

TRIAL COURT INTERVENTION ON PLAINTIFF'S BEHALF WOULD HAVE BEEN STATE ACTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

After arguing that defendant's decision to terminate her pregnancy violated his constitutional rights, plaintiff asserts that, had the state court intervened to veto defendant's decision, defendant's constitutional rights would not have been violated because the court's intervention would not constitute state action

barred by the Fourteenth Amendment. Brief of Appellant at pp. 25-30.

It is well established that the actions of the judiciary, as an arm of the government, are state actions that may not encroach upon federal rights protected by the Fourteenth Amendment. See e.g. *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S.Ct. 1341, 1345-46 (1988)(holding that, a court's involvement in triggering a statute of limitations constitutes state action); *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984)("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment") citing *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Ex Parte Virginia*, 100 U.S. 339 (1880); *New York v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that, a state court's application of common law was state action in violation of the Fourteenth Amendment, although the lawsuit in which the court acted was a civil suit between private parties) See also *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 59 (1977) (holding that although there was no state statute involved in a father's attempt to restrain a woman from terminating her pregnancy, "any compulsion by a state court to require consent of a natural father would constitute unauthorized and unconstitutional state interference.")

Plaintiff cites *Evans v. Abbney*, 396 U.S. 435 (1970) for the proposition that, by allowing a court to enforce a testator's discriminatory intent, the Supreme Court has backed away from its age old holding that court action is state action. In fact, in *Evans*, the Court noted that the result of the trial court's

decision was not discriminatory, but had the effect of eradicating the testator's discriminatory intent. 396 U.S. at 445. Thus, the Supreme Court held that the trial court's action did not violate the Fourteenth Amendment, not because the trial court was not a state actor, but because the trial court did not violate any right protected by the Fourteenth Amendment. *Id.*

In short, plaintiff cites no case that stands for the proposition that state court action applying state law or common law is not state action that is restricted by the Fourteenth Amendment. Contrary to the plaintiffs argument, the Supreme Court has consistently held that state court action *is* state action, and reaffirmed that holding in a decision that is less than a year old. See *Tulsa Professional Collections Services*, 108 S.Ct. 1340.

The trial court in the instant case correctly found itself bound by the Fourteenth Amendment and refused to infringe upon defendant's constitutional right to decide whether to terminate her pregnancy.

POINT IV.

THE TRIAL COURT'S DECISION IS CONSISTENT WITH UTAH LAW.

Plaintiff argues that Utah law with its emphasis on protection of the family, children and parental rights somehow mandates that the trial court have enjoined the defendant from terminating her pregnancy. Brief of Appellant at pp. 7-10 and 23-25. Utah law certainly protects parental rights, children and the family, as does the federal constitution. Once again, plaintiff's arguments presume that life begins at conception and thus the protection that Utah affords to parents and children begin when an ovum is

fertilized. However, as noted in Point II *supra*, *Roe* and *Akron* make it clear that a state may not determine when life begins as a matter of law in order to limit a woman's constitutional right to terminate her pregnancy. Thus, Utah law protecting parental rights, children and the family does not, and could not constitutionally, infringe upon defendant's right to obtain an abortion.

Moreover, plaintiff ignores the fact that it has been established in Utah for over fifteen (15) years that a woman need not obtain the consent of a father or her husband to obtain an abortion. See *Doe v. Rampton* 366 F.Supp. at 193. In *Rampton* the United States District Court held unconstitutional provisions of a Utah law requiring *inter alia* that a woman be required to obtain the consent of her husband and the embryo's father before terminating her pregnancy. *Id.* (invalidating Utah Code Ann. §76-7-304 (1953 as amended)). At the same time, the court invalidated the provisions permitting the husband or father to apply to the district court for an injunction to prevent the abortion. *Id.* (invalidating Utah Code Ann. §76-7-316).

Utah has not reenacted the statutory provisions found unconstitutional in *Rampton*. Instead, the state legislature has been satisfied with the Utah law requiring that a woman's spouse receive notification of the woman's choice to terminate her pregnancy. Utah Code Ann. §76-7-304 (1978). The validity of that

statute is not at issue in this proceeding, as the plaintiff obviously had notice of defendant's pending abortion.⁷

Plaintiff concludes that the right to notice is the equivalent to the right to seek to enjoin the abortion, querying: "For what possible purpose did the legislature require notification of the husband, unless it is so he may take a role on the decision, resorting to the courts if necessary. . . ." Brief of Appellant at pp. 7-8. Plaintiff underestimates the legislatures ability to be explicit. The law stricken by the court in *Rampton* specifically provided for resort to the courts to enjoin a pending abortion. No such provision accompanies Utah's notice statute. Moreover, if the right to notice is the equivalent of the right to enjoin, the Utah notice statute would be effectively identical to that stricken in *Rampton* and would be guilty of the same constitutional infirmities, a result that the legislature could not have intended when it enacted the law in 1974, one year after the United States District Court announced its decision in *Rampton*.

Plaintiff cites no authority for the proposition that the right to notice is equivalent to the right to enjoin. In fact, in upholding a notice statute against constitutional challenge, one court has noted that such statutes are small concessions in that they give a husband only "the right to know that his wife is considering an abortion." *Scheinberg v. Smith*, 659 F.2d 476, 485 (5th Cir. 1981). Thus, reading the Utah notice statute against

⁷ However, contrary to what the plaintiff would have this court believe, notice statutes similar to Utah's have not been universally upheld. See e.g. *Eubanks v. Brown*, 604 F.Supp. 141, 148 (D.Kenn. 1984); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F.Supp. 625, 634 (D.R.I. 1984).

the background of prior Utah law and in accord with the United States Court of Appeals for the Fifth Circuit's interpretation of a similar statute, it is apparent that the right to notice is not the equivalent of the right to enjoin. The right to notice granted by Utah law simply gives a spouse the right to know of a pending abortion. At that point, the spouse may well have a role in making the decision, but that role will be at a private level, without interference from the court or any other arm of the state, as should be all decisions on procreation through, at least, the end of the first trimester of pregnancy.

No Utah law entitles a husband to enlist the power of the court if he is unable to convince his wife to continue her pregnancy and any such law would run afoul of the Supreme Court's decisions in *Roe v. Wade*, *Akron* and *Danforth* and the United States District Court's decision in *Rampton*. Consequently, the trial court's decision in the instant case is consistent with Utah law.

POINT V.

A MAN MAY NOT FORCE HIS WIFE TO BEAR A CHILD TO FURTHER HIS DESIRE TO BECOME A PARENT.

The Plaintiff argues that denying him the right to veto his wife's decision to have an abortion would frustrate a purpose of marriage, specifically the purpose of bearing children. Brief of Appellant at pp. 19-22. That is simply not the case. A married couple may have children when they agree to do so. Thus, bearing children remains a purpose of marriage, if both parties desire to become parents. The purpose of child-bearing in a marriage extends no further privilege than the right to consensual procreation. There is no realistic argument that a woman can force her husband

to do what it takes for her to bear a child; nor can a man force his wife to bear his child. As the Supreme Court has held:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

Thus, the Supreme Court has made it clear that the decision to have children belongs to each individual, notwithstanding their spouse's wishes. If parties do not agree on that decision, the courts cannot compel the unwilling spouse to bear children to fulfill the other spouse's desire. If a person's decision not to bear children frustrates the purpose that their spouse entered into the marriage, the offended spouse may do just what the plaintiff did in this case, resort to the courts to end the marriage in hopes of finding a marriage partner whose feelings about parenthood are more consistent with his or her own.

POINT VI.

THE "BALANCING TEST" ADVOCATED BY THE PLAINTIFF IS INHERENTLY DANGEROUS.

In his brief, plaintiff repeatedly argues, in essence, that he was unjustly denied the ability to have his rights weighed against the defendant's right to terminate her pregnancy because he had a genuine interest in the embryo and desired to raise the child into which it could develop, relieving defendant of any responsibility therefore. Brief of Appellant at pp. 10-12, 12-15 22-23, 29 and 30. Indeed, plaintiff's affidavit in support of his Ex-Parte

Motion for Temporary Restraining Order and plaintiff's Complaint for divorce proclaim these noble aspirations. However, actions speak louder than words. Plaintiff's conduct throughout his pending divorce proceeding has demonstrated that he lacks either the ability or the desire to fulfill his aspirations. In his Complaint for divorce, plaintiff also sought custody of the parties two-year-old son. Temporary custody was awarded to the defendant. Plaintiff has been consistently late paying child support and has succeeded in convincing the court to reduce the amount of child support he pays from \$300.00 per month to \$150.00, which is less than the amount necessary to support a child at minimum subsistence levels according to the 1986 U.S. Poverty Guidelines 51 Fed.Reg. 5105-5106 (February 11, 1986).⁸ Moreover, he has refused to pay his proportionate share of the cost of obtaining a child custody evaluation (although he was ordered to do so some four (4) months before the date that he claims to have become unemployed).

There is no reason to assume that the plaintiff would have taken greater interest in supporting the child that defendant may have born than he has taken in the parties' son. In fact, defendant's Verified Counterclaim for divorce indicates that plaintiff never did have an interest in the embryo. It was plaintiff who made the appointment to abort the pregnancy. Only after the defendant left the plaintiff did he express a desire to enjoin the abortion, a desire that was more likely based on his wish to harass

⁸ Assuming that plaintiff genuinely desired to relieve the defendant of her post-natal obligations to the child, there is no mechanism under Utah law that allows plaintiff to succeed in his desire. Absent adoption by a third party, both parents remain financially responsible for their offspring.

the defendant than his wish to take on the responsibilities of fatherhood.

Consequently, had the trial court weighed plaintiff's interests, as those interests appear in his affidavits, and allowed plaintiff to enjoin defendant from terminating her pregnancy, defendant would have spent seven months pregnant with minimal, irregular, support from plaintiff and would now have an infant and a two-year-old under the same adverse financial constraints. The injustice in that result is magnified in the instant case by the fact that the defendant is only nineteen years old. Thus, had the court adopted plaintiff's "balancing approach" and enjoined the defendant's abortion, she would be facing the tremendous obstacle of trying to develop a career with no advanced education, two small children and very little financial help, a road that leads as likely to poverty as to any other end.

In short, while the balancing test advocated by the plaintiff may appear ultimately fair, the risks to the woman involved are staggering. Faced with the need to weigh the parties' interests quickly, a trial court may incorrectly conclude that a father sincerely wishes to take on the responsibilities of parenthood. When that conclusion is incorrect, the woman is faced, at minimum, with the difficulties inherent in being pregnant and bearing a child without significant support. In addition, the woman must make the difficult decision of placing for adoption the child she has born or rearing the child with insufficient resources. The magnitude of the burden placed upon a woman faced with these adversities was part of the impetus for the Court's determination

that the woman's right to terminate her pregnancy is a fundamental right protected by the United States Constitution. See *Roe v. Wade*, 410 U.S. at 153. Those burdens are no less bearable when they are the result of a third parties' acclaimed interest in the embryo. In short, the danger of unjustly burdening a woman with an unwanted pregnancy and an unplanned child, renders the "balancing test" advocated by the plaintiff disproportionately perilous for a pregnant woman.

POINT VII.

ROE V. WADE HAS NOT BEEN REVERSED.

Plaintiff ends his appeal with arguments that he believes justify reversal of *Roe v. Wade*. Plaintiff properly stops short of requesting that this court issue a decision reversing *Roe* and, of course, this is not a proper forum to render such a decision. Furthermore, less than six months ago, the Supreme Court denied certiorari on a case factually and legally identical to the instant case. See *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988) cert denied 109 S Ct 391 (1988), indicating that, if the Court is inclined to reverse *Roe*, it does not wish to do so in the instant context. On January 9, 1989, the Supreme Court noted probable jurisdiction over the appeal of *Missouri v. Reproductive Health Services*. At issue in that case is a Missouri statute that was enacted to severely restrict the right to abortion. Whether the Court will reverse or restrict *Roe* is, at this time, an unknown. The fact remains that *Roe* and its progeny still govern the instant action and the precedent announced in those cases bind this court to uphold the trial court's ruling.

POINT VIII.

DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES.

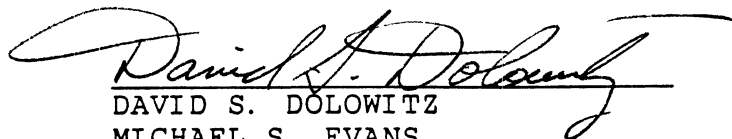
Plaintiff's arguments run directly contrary to well established Supreme Court precedent that governs the issue on appeal in the instant case. Moreover, the financial declaration filed by plaintiff with this Court indicates that plaintiff's gross monthly income is \$1,492.80, while that income has allegedly been cut substantially, to \$201.00 per week by unemployment, plaintiff's income still exceeds the income that defendant receives as a part-time grocery clerk earning \$4.35 an hour. Thus, defendant is entitled to an award of attorneys' fees both under Rule 33 of the Utah Rules of Appellate Procedure and Utah Code Ann. §30-3-3.

CONCLUSION

The United States Supreme Court has held that no third party can veto the decision, reached by a woman and her physician, to terminate a pregnancy during the first trimester. In accord with that holding, no law, state or federal, gives a husband or father the right to enjoin a woman from terminating her first trimester pregnancy. Consequently, the trial court's order, refusing to issue a preliminary injunction enjoining defendant from obtaining an abortion, should be affirmed and defendant should be awarded her costs and attorneys' fees for this appeal.

DATED this 18th day of January, 1989.

COHNE, RAPPAPORT & SEGAL



DAVID S. DOLOWITZ

MICHAEL S. EVANS

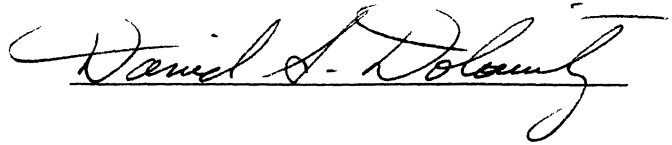
JULIE A. BRYAN

Attorneys for Respondent

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 19 day of January, 1989, I caused to be hand delivered four (4) true and correct copies of the foregoing to the following:

Mitchell R. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692

A handwritten signature in cursive script, reading "Daniel S. Reynolds", written over a horizontal line.

(td/jab/reynold)

E X H I B I T "A"

Evan R. Hurst, # 5091
Attorney for Plaintiff
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801)486-9636

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

MICHAEL JON REYNOLDS,

Plaintiff,

v.

JENNIFER FRANKS REYNOLDS,

Defendant.

PLAINTIFF'S AFFIDAVIT

Civil No. D-88- 944

Judge _____

STATE OF UTAH)

:

COUNTY OF SALT LAKE)

Having been duly sworn, Plaintiff deposes and states as follows:

1. I am the Plaintiff in the above-entitled matter.
2. The facts herein stated are based on my knowledge and personal observations.
3. I have been married to the Defendant since November 7, 1986.
4. My wife is now approximately two and one half (2 1/2) months pregnant with my child.
5. My wife is in good health and previously had a child without any extraordinary risks to her health.

6. I have been with my wife to the doctor and know of no extraordinary risks to her health which exist or could arise should she carry this child full term.

7. I am at this time commencing an action for divorce from my wife. In this action I am seeking custody of my unborn child.

8. The allegations in the complaint for divorce are true and correct.

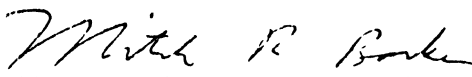
9. The Defendant informed me on March 19, 1988 that she would have an abortion performed to kill my unborn child. On information and belief I believe that the Defendant will go in to have the abortion performed at 11:00 a.m. today (March 22, 1988).

10. If the Defendant has this abortion, I will suffer immediate, irreparable and permanant injury for which there is no relief available in law, equity or otherwise.

Dated this 22nd day of March, 1988


Michael Jon Reynolds, Plaintiff

SUBSCRIBED AND SWORN to before me this 22nd day of March, 1988.


Notary public residing in Salt Lake County

My commission expires:

3 - 22 - 88

E X H I B I T " B "

3/2/10
MICHAEL S. EVANS, #1015
LEGAL AID SOCIETY OF SALT LAKE
ATTORNEY FOR DEFENDANT
225 SOUTH 200 EAST, SUITE 230
SALT LAKE CITY, UTAH 84111
TELEPHONE: 328-8849

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL JON REYNOLDS,)	
)	
Plaintiff,	)	ANSWER AND
	)	VERIFIED COUNTERCLAIM
vs.)	
)	
JENNIFER FRANKS REYNOLDS,)	
	)	Civil No. D-88-944
Defendant.	)	Judge

COPY

COMES NOW the Defendant, Jennifer Franks Reynolds, by and through her attorney, Michael S. Evans, Legal Aid Society of Salt Lake, and answers Plaintiff's Complaint, as follows:

FIRST DEFENSE

1. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

2. Answering Paragraphs 1, 2, 4, 10, 13 and 21 of Plaintiff's Complaint, the Defendant admits the allegations contained therein.

3. Answering Paragraphs 5, 6, 8, 9, 14, 15, 16, 17, 18, 19, 20 and 22 of Plaintiff's Complaint, the Defendant denies the allegations contained therein.

4. Answering Paragraph 3 of Plaintiff's Complaint, the Defendant admits that there has been one child born as issue of the marriage but denies the due date of another child expected and alleges that said due date is in November, 1988.

5. Answering Paragraph 7 of Plaintiff's Complaint, the Defendant admits the desire to have an operation performed to abort the unborn child of the Plaintiff but denies the remainder of said Paragraph.

6. Answering Paragraph 11 of Plaintiff's Complaint, the Defendant admits that they have acquired certain items of personal property during the course of their marriage but denies the remainder of said Paragraph.

7. Answering Paragraph 12 of Plaintiff's Complaint, the Defendant admits that the Plaintiff should assume and pay the credit union debt in the approximate amount of \$1,600.00 which debt Plaintiff occurred prior to the marriage but denies the remainder of said Paragraph

8. Defendant denies any and all allegations not specifically heretofore admitted.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant prays that Plaintiff's Complaint be dismissed with prejudice and that relief be granted as prayed in her Counterclaim set forth herein.

COUNTERCLAIM

Defendant counterclaims against the Plaintiff and alleges as follows:

Provisions Relating to Jurisdiction

1. Both Plaintiff and Defendant are bona fide residents of Salt Lake County, State of Utah, and have been for three months immediately prior to the filing of this action.

2. The parties maintained their marital domicile in the State of Utah at the time the claim arose and/or the acts complained of by the Defendant were committed by the Plaintiff in the State of Utah and therefore this Court has long-arm jurisdiction over the Plaintiff pursuant to Utah Code Ann. §78-27-24-(c), (1953) as amended.

3. Plaintiff and Defendant were married on November 7, 1986, at Salt Lake City, Salt Lake County, State of Utah and are presently married.

Provisions Relating to Grounds

4. During the course of the marriage the parties have experienced difficulties that cannot be reconciled that have prevented the parties from pursuing a viable marriage relationship.

Provisions Relating to Child Custody and Visitation

5. There has been one child born as issue of this marriage, to wit: ZACHARI REYNOLDS, born June 3, 1987.

6. The Defendant is a fit and proper person to be awarded the permanent care, custody and control of the minor child of the parties, subject to the Plaintiff's right to visit with the child at reasonable times and places to include: alternate weekends so long as Plaintiff's other child is not present and no overnight visitation until the minor child reaches the age of two (2) years of age.

Provisions Relating to Support Payments

7. It is reasonable and proper that the Plaintiff be ordered to pay to the Defendant a sum of not less than \$500.00 per month as support for the minor child of the parties. If the Plaintiff becomes delinquent in his child support obligation, in an amount at least equal to child support payable for one month, then the Defendant should be entitled to mandatory income withholding relief pursuant to Utah Code Ann. §78-45d-1, et seq.

(1953) as amended. This income withholding procedure shall apply to existing and future payors. All withheld income shall be submitted to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, Utah 84145-0011, until such time as the Plaintiff no longer owes child support to the Defendant.

Provisions Relating to Alimony

8. Neither party should be awarded alimony.

Provisions Relating to Real Property

9. The parties acquired no real property during the course of this marriage, nor do they presently own an interest in real property.

Provisions Relating to Personal Property

10. During the course of the marriage relationship, the parties have acquired personal property. Said personal property of the parties should be distributed as follows:

(a) To the Plaintiff: stereo, waterbed, and his personal effects and belongings;

(b) To the Defendant: couch acquired during the marriage together with her personal effects and belongings and clothing and those of the minor child;

(c) All remaining personal property should be awarded to each of the parties as they have heretofore divided it.

Provisions Relating to Debts and Obligations

11. The Plaintiff should be ordered to assume and pay, and hold Defendant harmless from liability on, any and all debts and obligations incurred by the parties prior to their date of separation, March 19, 1988 including, but not limited to the following: Mountain Bell, Plaintiff's Credit Union debts, Interwest Speciality, Utah Power and Light Company, Mountain Fuel and TCI Cable. Thereafter, it is reasonable and proper that

the Plaintiff be required to assume and pay all debts and obligations incurred for a family purpose. Otherwise, all debts and obligations contracted by the parties should be the responsibility of the party who incurred the particular debt.

Provisions Relating to Health Insurance

12. It is reasonable and proper that each party be required to maintain in effect a policy of dental, health and accident insurance, at all times that such may be available through their respective employers at reasonable cost, with the minor child of the parties as named beneficiary thereunder. Further, each party should pay one-half ($\frac{1}{2}$) of any deductible amounts and one-half ($\frac{1}{2}$) of all non-covered medical and dental expenses for said minor child. If neither party is able to secure said insurance, each party should be responsible for the payment of one-half ($\frac{1}{2}$) of all reasonable and necessary medical and dental expenses for the minor child.

Provisions Relating to Life Insurance

13. The Plaintiff currently has in force and effect a life insurance policy on his life in the face amount of \$54,000.00. It is fair and reasonable that Plaintiff be ordered to maintain in full force and effect said life insurance until such time as the parties' minor child reaches the age of eighteen (18). During such period, the Plaintiff should be ordered to irrevocably designate the Defendant, as trustee for the minor child, beneficiary on said life insurance policy.

Provisions Relating to Attorney's Fees and Costs

14. It has been necessary for the Defendant to secure the services of an attorney to represent her in this action and it is reasonable that the Plaintiff be required to pay the Defendant's attorney's fees, in the sum of not less than \$150.00, if this matter is uncontested, together with all Court costs.

In the event that the matter is contested, the Plaintiff should pay an additional reasonable sum as may be deemed appropriate.

Miscellaneous Provisions

15. Each party should be ordered to execute and deliver to the other such documents as are required to implement the provisions of the Decree of Divorce entered by the Court.

16. The Plaintiff should be permanently restrained from bothering, harassing, annoying, threatening, or harming the Defendant at her place of residence, employment or any other place.

17. The Court should grant such other and further relief as it may deem just and appropriate in this matter.

Provisions for Temporary Relief

18. The Defendant is a fit and proper person to be awarded the temporary care, custody and control of the parties' minor child subject to the Plaintiff's right to reasonable visitation to include: alternate weekends so long as Plaintiff's other child is not present and no overnight visitation until the minor child reaches the age of two (2) years of age.

19. Since the Defendant has little income with which to support herself and the parties' minor child, it is reasonable and proper that the Plaintiff be ordered to pay to the Defendant a sum of not less than \$500.00 per month as support for the minor child of the parties. If the Plaintiff becomes delinquent in his child support obligation, in an amount at least equal to child support payable for one month, then the Defendant should be entitled to mandatory income withholding relief pursuant to Utah Code Ann. §78-45d-1, et seq. (1953) as amended. This income withholding procedure shall apply to existing and future payors. All withheld income shall be submitted to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, Utah 84145-0011, until such time as the Plaintiff no longer owes child support to the Defendant.

20. The Plaintiff has physically abused or threatened physical abuse on several occasions the most recent being February, 1988. Such conduct by the Plaintiff constitutes a threat of immediate and irreparable harm to the Defendant. Therefore, the Plaintiff should be restrained from bothering, harassing, annoying, threatening, or harming the Defendant at her place of residence, employment or any other place.

21. It is fair and reasonable that the Plaintiff be ordered to maintain as current, and hold the Defendant harmless from liability on, all debts, payments and obligations of the parties during the pendency of this action.

22. It is fair and reasonable that the Plaintiff be ordered to maintain all present dental, health and medical coverage for the benefit of the Defendant and the parties' minor child, and to provide the Defendant with any necessary forms and information to effect continued coverage.

23. That since the birth of the parties minor child on June 3, 1987, she has been primarily responsible for the care of said minor child.

24. That Plaintiff has cared for said minor child without assistance very infrequently, never overnight, and has demonstrated an inability to adequately care for said minor child without assistance.

25. That Plaintiff's employment requires he work seven consecutive days, take two days off, again work seven consecutive days, etc. which effectively prevents him from acting as custodial parent.

26. That it is in the best interests of the parties minor child that his care, custody and control be awarded to Defendant during the pendency of this action.

27. That Defendant is presently in the seventh week of pregnancy.

28. That not only has Plaintiff been notified of Defendant's intention to terminate her pregnancy, but met with her physician and scheduled the appointment for her pregnancy to be terminated.

29. That Plaintiff knew well in advance of her scheduled appointment but intentionally delayed seeking and serving her with a Temporary Restraining Order from proceeding, until the morning of her appointment which caused her extreme emotional distress and suffering.

30. That Plaintiff, by his actions in this matter, has demonstrated a complete disregard for her emotional and physical well-being and has violated her constitutionally protected right to privacy in adopting a position totally unsupported by the law.

WHEREFORE, Defendant prays that a divorce be granted pursuant to the terms set forth in this Counterclaim and that the Ex Parte Temporary Restraining Order restraining Defendant from proceeding to terminate her pregnancy be vacated forthwith.

DATED this 28th day of March, 1988.

LEGAL AID SOCIETY OF SALT LAKE

/s/
MICHAEL S. EVANS
Attorney for Defendant

STATE OF UTAH)
 : ss
County of Salt Lake)

JENNIFER FRANKS REYNOLDS, being first duly sworn upon her oath, deposes and says that she is the Defendant in the above-entitled action; that she has read the foregoing Answer and Verified Counterclaim, and understands the contents thereof, and the same is true of her own knowledge, information and belief.

Jennifer Franks Reynolds
JENNIFER FRANKS REYNOLDS

SUBSCRIBED AND SWORN TO before me this 28TH day of March, 1988.

David S. Hays
NOTARY PUBLIC
Residing in Salt Lake County

My Commission Expires:

12/16/89

CERTIFICATE OF MAILING HAND DELIVERY

On this 28TH day of March, 1988, I ~~deposited in the United States Mail, postage prepaid,~~ ^{HAND DELIVERED} a true and correct copy of the foregoing Answer and Verified Counterclaim to Evan R. Hurst, Attorney for Plaintiff, at 2870 South State Street, Salt Lake City, Utah 84115-3692.

151

E X H I B I T "C"

21-110
Evan R. Hurst, # 5091
Mitchell R. Barker # 4530
Attorney for Plaintiff
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801)486-9636

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

MICHAEL JON REYNOLDS,
Plaintiff,

v.

JENNIFER FRANKS REYNOLDS,
Defendant.

MEMORANDUM IN SUPPORT OF
RESTRAINING ORDER

Civil No. D-88- 944

Judge David S Young

SUMMARY OF RELEVANT FACTS

Plaintiff and defendant are husband and wife, having been married November 7, 1986. The parties have one child by their marriage. Late last year or early this year, the parties conceived another child while in the usual course of marriage. The parties are now estranged, and neither party wishes to continue the marriage. Defendant has expressed a desire to abort plaintiff's child that she is carrying. Plaintiff is very much opposed to termination of the parties' child, and intends to take custody of the child when it is born. Obviously, if defendant is not restrained from obtaining an abortion, the child will never be born. Defendant is in good health and this pregnancy poses no extraordinary risks to her health.

ARGUMENT

1. Fathers' Rights in their unborn children have not been extensively litigated.

The law concerning rights of fathers of unborn children is very unsettled. There are very few cases dealing with the issues raised by this case. Most existing case law is inapplicable. Virtually all abortion cases deal with governmental restrictions on the rights of women to obtain abortions. This case is distinguishable because it involves a private individual, the father of the child, seeking to restrain another private individual, the mother, from obtaining an abortion. Previous cases concerning spousal consent statutes were not fathers' rights cases but were cases involving governmental attempts to use fathers' rights as a conduit to regulate abortion.

2. The Roe v. Wade and Planned Parenthood v. Danforth lines of cases are inapplicable.

By their terms, the Constitutional Amendments which have been used to curtail governmental regulation of abortion apply only to the State and not to private individuals. The Fourteenth Amendment starts the prohibitive sections with the phrase "no state shall. . . ." The Constitution rarely if ever acts to determine the interests of one private party as against encroachment by another private party. Laws are enacted pursuant to the Constitution to protect private parties from encroachment by other private parties, but Congress has taken no such action

as regarding the rights of husbands and wives with respect to abortion. The limited actions Utah's legislature have taken favor the rights of Mr. Reynolds here.

3. Giving one party absolute control over an interest shared with another party solely on the basis of status, without regard to the motives and intentions of the parties is inequitable.

State abortion statutes which attempt to give a husband veto power over his wife's abortion decisions regardless of reasons or intentions have been uniformly stricken down. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976). Conversely, that same unilateral power, not limited by intentions or reasons, should not be granted a woman in her abortion decision when she faces opposition from her husband, especially when he is the interested father of the child. To find that a father can have no interest in his unborn child, particularly when he is married to the mother and the pregnancy resulted from a mutually consensual act, would be utterly ridiculous. The Supreme Court of the United States has found a protected right to procreate. See Skinner v. Oklahoma, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942).

The right to an abortion is premised on privacy rights. It is doubtful a right to privacy exists **as between spouses** concerning the destruction of part of the fully anticipated products of the marriage. The right or interests of the father are recognized by the state of Utah in its abortion statute, UCA

76-7-304, where notification of a married woman's husband, if possible, is required before she can have an abortion performed. The legislature must have intended the husband be given consent because the husband had an interest and, depending on the circumstances, a say in the decision.

It should be noted that here we have a husband desirous of custody of the child, and willing to adopt to relieve Mrs. Reynolds of her liability. See affidavit of Mike Reynolds. Conversely, Mrs. Reynolds has waffled on whether she will abort the child, and has stated that her decision to do so was because she did not want to carry any child that was Mr. Reynolds' (not that she did not want to be pregnant). Id.

Also, as the conception of a child incurs liability for a husband, the act should logically also vest some right in him. As both parties have interests in conflict here, their interests must be balanced.

4. Current abortion procedure, including defendant's actions in this case, pays only lip service to the instructions in Roe v. Wade.

The decision of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d. 147 (1973), gives the following factors that a woman and her responsible physician will "necessarily consider" in consultation in making the abortion decision.

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be

imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. Roe v. Wade at 410 U.S. 153.

Many of these factors are negated by the presence of a father who desires the child and is willing to not impose any postnatal duties upon the mother. There are no medical problems in this case which warrant abortion. In fact, defendant's original doctor found no medical problems and declined to perform an abortion. It was at that time that defendant sought out a physician who specializes in performing abortions. With physicians whose livelihoods depend on performing abortions, one could very easily question whether the consultations called for in Roe v. Wade actually and meaningfully take place. Plaintiff, as the father, is a person who is affected by defendant's abortion decision. In this case he seeks to provide his input so that the consultation envisioned by Roe v. Wade occur in actuality and not just as a meaningless formality to mask "abortion on demand".

5. Granting the restraining order in this case will best preserve the expectations and rights of the parties.

The unborn child in this case resulted from an act of intimacy between the parties while in the bonds of marriage. A major expectation of marriage is the procreation of children.

The parties have a previous child, so both parties were aware of the possible consequences of their actions. In fact, as stated in Mr. Reynolds' affidavit, Mrs. Reynolds desired to abort the parties' now living child. When Mr. Reynolds objected she acquiesced, apparently acknowledging that as father he has an interest and voice in the decision.

Now the parties are contemplating divorce, a part of which process is the division of the products of the marriage. Real and personal property acquired during marriage will be divided. Custody of the already born child of the parties will be determined. Plaintiff now asks for some consideration as to the expectancy he has in this unborn (inchoate) child, considered property or issue. Defendant has very clearly expressed that she does not want the child. If an abortion is allowed, defendant will receive her full expectations, while plaintiff will be denied his expectation in its entirety. If the child is allowed to be born and then given into plaintiff's custody, plaintiff will receive his expectancy and defendant's expectancy will have been postponed only six months.

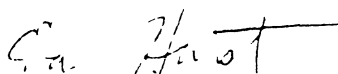
SUMMARY OF ARGUMENTS

An interest that the father of an unborn child has in that child does not derive from the State or from the child. Hence, those rights are not bounded by constitutional restrictions on State power or lack of status of an unborn child. The rights of such a father are strengthened if the child was conceived during

marriage, as procreation is an anticipated activity of marriage. Granting either parent the unilateral, unbounded power to abort or prevent abortion of an unborn child disregards the respective rights of the parties.

There may be some husband/wife abortion conflicts when it would be inappropriate to interfere with a wife's decision. But under the circumstances, this is clearly not such a case. Consideration needs to be given to criteria propounded in Roe v. Wade and also to the respective intentions, expectancies and motives of the parties. Considering that defendant desires only to be rid of plaintiffs baby, and that plaintiff is divorcing defendant and wants custody and care of the baby, and also that no extra medical risks are presented to defendant by carrying the baby full-term, defendant should be restrained from having an abortion performed on this child.

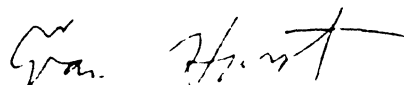
Dated this 28th day of March, 1988



Evan Hurst, Attorney for
Plaintiff

Certificate of Hand Delivery

I certify that a copy of the foregoing Memorandum in Support of Restraining Order was hand delivered this 28th day of March, 1988 to Jennifer Franks Reynolds at 3339 Greenmont Drive, West Valley City, Utah.



E X H I B I T "D"

MICHAEL S. EVANS, #1015
LEGAL AID SOCIETY OF SALT LAKE
ATTORNEY FOR DEFENDANT
225 SOUTH 200 EAST, SUITE 230
SALT LAKE CITY, UTAH 84111
TELEPHONE: 328-8849

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL JON REYNOLDS,)	
)	
Plaintiff,)	
	)	MEMORANDUM OF POINTS
vs.	)	AND AUTHORITIES
)	
JENNIFER FRANKS REYNOLDS,)	
	)	Civil No. D-88-944
Defendant.)	
	)	Judge

COMES NOW the Defendant by and through her attorney of record, Michael S. Evans, Legal Aid Society of Salt Lake and submits this Memorandum of Points and Authorities in support of her objection to Plaintiff's Order to Show Cause.

QUESTION PRESENTED

Can a third party prevent a woman from voluntarily terminating her pregnancy?

It is clear that under Roe v. Wade and its progeny, any third party veto power over a woman's decision to terminate a pregnancy is constitutionally invalid.

STATEMENT OF FACTS

The parties were married November 7, 1986 in Salt Lake County, Utah. During their brief marriage they have experienced repeated marital difficulties and have separated several times. When the Defendant learned that she was pregnant, she and the Plaintiff decided to terminate the

COPY

pregnancy. The Plaintiff accompanied the Defendant to her doctor's office where the matter was fully discussed. He later made the appointment at the Utah Women's Health Center for the procedure, on behalf of the Defendant.

Defendant was served with a Divorce Complaint and a Temporary Restraining Order to prevent her from terminating the pregnancy, on the morning of March 22, 1988 as she was leaving for her appointment at the Utah Women's Health Center. Defendant is toward the end of her first trimester where the procedure could easily be performed with safety. Plaintiff has demonstrated an utter disregard for the Defendant's health and emotional well-being as well as her legal rights by his conduct.

DISCUSSION

Title 76, Chapter 7 of the Utah Code Annotated regulates abortion. Section 76-7-304, CONSIDERATION BY PHYSICIAN - NOTICE TO MINOR'S PARENTS OR MARRIED WOMAN'S HUSBAND reads in pertinent part:

To enable the physician to exercise his best medical judgment, he shall:

(2) Notify, if possible, the parents . . . of the women upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

The statutory language should be read plainly on its face. The provision addresses notification, not consent. Therefore, under the Code the Plaintiff is entitled only to be notified of the Defendant's choice to have an abortion. The facts of the case make it clear that the Plaintiff knows of the Defendant's decision. He attended a counseling session involving the Defendant and her personal physician, Dr. Glade Curtis, where the subject was discussed. Furthermore, he made the appointment for the procedure at the Utah Women's Health Center for the Defendant. Finally, he has sought help from the Court in preventing the Defendant from exercising her choice.

Any attempt to interpret Section 76-7-304 as containing an implied

spousal consent to a pregnancy termination as opposed to mere notification is disingenuous and flies in the face of both legislative and case law history. The only consent provision requirement regarding abortion in the Code is contained in Section 76-7-305. It reads in pertinent part:

(1) No abortion may be performed unless a voluntary and informed written consent is first obtained by the attending physician from the woman upon whom the abortion is to be performed.

This provision is consistent with United State Supreme Court rulings on the issue. While a State may constitutionally require informed consent from the woman upon whom the procedure is to be performed, it may not impose other consent restrictions regarding the decision. Roe v. Wade, 410 U.S. 113 (1973); Doc v. Bolton, 410 U.S. 179 (1973).

An earlier version of the Utah Code, later repealed, which expressly required a husband's consent to his wife's abortion was held unconstitutional in Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1975), *aff'd*, 535 F.2d 1219 (10th Cir. 1975). Section 76-7-304 read at that time:

. . . (2) If the woman upon whom the abortion is to be performed is married at the time of the performance of the abortion, such consent must be given by her husband.

In rejecting this provision, the United States District Court held; "Section 76-7-304 is invalid because it subjects the exercise of the individual right of privacy of the mother, in all abortions at all stages of pregnancy to the consent of others." Doe v. Rampton 394 F.Supp. at 193.

The United States Supreme Court has clearly established a woman's right to terminate a pregnancy without consent of, or against the objections of, the child's father. In Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), the Court examined a Missouri Statute, which, similar to Utah's earlier Code version, required the prior written consent of the spouse of a woman seeking to terminate a pregnancy. While recognizing that

the decision to undergo an abortion may have profound effects on a marriage, the Court nevertheless held that ". . . the State cannot have the constitutional authority to give the spouse the unilateral ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." Id at 70. See also Eisenstadt v. Baird, 405 U.S. 438 (1972).

Cases in which a constitutionally permissible form of notice requirement may indirectly impact on a woman's choice to have an abortion are distinguishable. For instance, certain parental notice requirements where minors seek to terminate a pregnancy have been upheld. H. - B. v. Wilkinson, 639 F.Supp 952 (D. Utah 1986); H. - L. v. Matheson, 604, P.2d 907 (Utah 1979), 101 S.Ct. 1164 (1981).

Despite the potentially adverse impact these restrictions may have upon the choice to terminate, they were upheld in part because they did not vest with the parents a blanket power to veto the minor's choice to abort. H. - L. v. Matheson, 101 S.Ct at 1166. Furthermore, such cases are distinguishable because they involve either immature, dependant, or unemancipated minors who sometimes lack the ability to make fully informed choices.

The Defendant in this case is an 18 year old married woman who has already given her fully informed consent to have the procedure performed.

SUMMARY

It is clear that under Roe v. Wade and its progeny, any unilateral third party veto power over a woman's decision to terminate a pregnancy is constitutionally invalid. In Danforth the Court struck down a spousal consent requirement. To interpret Utah's Notice Statute as a consent provision is to ignore 15 years of both State and Federal case law. The only constitutional choice to be made on the present facts of this case is to permit the Defendant to exercise her right to privacy in whatever way she and her physician deem best.

DATED this 28TH day of March, 1988.

LEGAL AID SOCIETY OF SALT LAKE

151

MICHAEL S. EVANS
Attorney for Defendant

KATHERINE FOX
Legal Intern for Michael S. Evans

CERTIFICATE OF HAND-DELIVERY

On this 28TH day of March, 1988, I deposited hand-delivered,
a true and correct copy of the foregoing Memorandum of Points and
Authorities to Evan R. Hurst, Attorney for Plaintiff, at 2870 South State
Street, Salt Lake City, Utah 84115-3692.

151

David S. Dolowitz (0899)
Julie A. Bryan (4805)
of and for
COHNE, RAPPAPORT & SEGAL
525 East 100 South
Fifth Floor
P O Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666
Attorneys for defendant and the
American Civil Liberties Union

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL JON REYNOLDS,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
Plaintiff,	)	DEFENDANT' S OBJECTION TO AND
	)	MOTION TO VACATE TEMPORARY
vs.	)	RESTRAINING ORDER AND ORDER
	)	TO SHOW CAUSE
JENNIFER FRANKS REYNOLDS,)	
	)	Civil No. D88-944
Defendant.	)	Judge David Young

Defendant respectfully submits this Memorandum in Support of her Objection to and Motion to Vacate the Temporary Restraining Order.

FACTS

The defendant, Jennifer Franks Reynolds ("Defendant") is an 18 year old woman. She has been married to the plaintiff, Michael Jon Reynolds ("Plaintiff"), since November 7, 1986, less than 18 months. A child was born to the parties on June 3, 1987.

On March 22, 1988, Plaintiff filed a Complaint for Divorce in this court. On the same day Plaintiff secured an ex-parte Temporary Restraining Order and an Order to Show Cause restraining Defendant from terminating her pregnancy, which is approximately 10 weeks into the gestational period. The Temporary Restraining Order issued by this court forced defendant to cancel the appointment she had scheduled with her physician to terminate her pregnancy.

This court issued an Order to Show Cause why the Restraining Order should not be made permanent. Defendant herein sets forth the points and Authorities in Support of her opposition to the Order to Show Cause, which demonstrate that this court may not, consistent with the Constitution of the United States restrain defendant's choice as to whether to continue her pregnancy.

ARGUMENT

I. THIS COURT'S RESTRAINING ORDER IS A VIOLATION OF DEFENDANT'S CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY.

Defendant has a constitutionally protected right of privacy that encompasses her decision whether or not to terminate her pregnancy. Roe v. Wade, 410 U.S. 113, 153 (1972); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983). During the first trimester of her pregnancy, defendant's

constitutional right prevents any state interference with her decision regarding abortion. Roe v. Wade, 410 U.S. at 164. Just as the State may not directly interfere with defendant's decision, neither can it "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 69 (1975)(citing 392 F.Supp 1362, 1375 (1975)).

In conjunction with its holding that a State may not constitutionally create a right in a husband to veto his wife's decision whether to terminate her pregnancy, the United States Supreme Court made it clear that the interest of the pregnant woman's husband or the fetus' purported father does not outweigh the woman's constitutional right to decide whether to terminate her pregnancy. The Supreme Court stated:

"We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship in the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the 'interest of the State in protecting the mutuality of decisions vital to the marriage relationship.'

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." 428 U.S. at 69-71 (citations omitted).

The Court in Danforth held that a State cannot grant a husband veto power over a woman's decision to terminate her pregnancy; the woman's constitutional right to privacy prohibits such interference by a third party. Id.¹

¹Other courts have rejected similar attempts by states to statutorily limit a woman's right to abortion during the first trimester which were based upon assertions that the state was protecting the father's interests in the fetus. See e.g., Planned Parenthood of Rhode Island v. Bd. of Medical Review, 598 F.Supp 625, 639 (D.C.R.I. 1984) (husband's right to procreate does not outweigh a wife's constitutional right to terminate pregnancy); Eubanks v. Brown, 604 F.Supp 141, 148 (W.D.Ky. 1984) (given the absolute right of the woman to terminate the

A state may not statutorily grant a spouse or father the right to infringe upon a woman's constitutional right to privacy, when it has no power to so act directly and common law cannot abrogate the constitutional protected right. The Maryland Court of Special Appeals so held in deciding an issue identical to the one before this Court. In Coleman v. Coleman, 57 Md.App. 755, 471 A.2d (1984) cert. denied 298 Md. 353, 469 A.2d 1274 (1984), the petitioner sought an order enjoining his wife from terminating her pregnancy. The trial court granted a Temporary Restraining Order, but dissolved the Temporary Restraining Order and denied injunctive relief to the petitioner after a hearing on the issue. The petitioner appealed.

In affirming the trial court's refusal to grant an injunction, the Maryland court considered and rejected the argument advanced by the plaintiff herein, which is essentially, that as the fetus' purported father and the woman's husband he has the right to enjoin his wife from terminating her pregnancy. The Coleman court noted that implicit in the petitioners argument is the assertion:

"that he has standing to enjoin the wife from having an abortion. The husband has no such standing inasmuch as the Supreme Court has determined that a husband's consent to a

pregnancy during the first trimester, the state does not have the constitutional power to require notification to her husband of her decision to terminate her pregnancy.

wife's abortion, during the first trimester, is unnecessary, [citing Danforth] and any attempt by a State to confer such a statutory right is 'absolutely and totally prohibited . . . , during the first trimester of pregnancy,' " 471 A.2d. at 1119 [emphasis added].

The court held that the petitioner was constitutionally prohibited from enjoining his wife from terminating her pregnancy. Id.

In the instant case, as in Coleman, in view of the Supreme Court's decision in Danforth, it is plain that defendant has a constitutional right to determine whether to continue her pregnancy without interference from the plaintiff. Consequently, the defendant requests that the court vacate the Temporary Restraining Order and prohibit plaintiff from further interfering with the defendant's decision and actions regarding an abortion.

CONCLUSION

Defendant has a constitutional right to determine whether to continue her pregnancy during the first trimester. Neither the State nor her husband may veto her decision to terminate the pregnancy. Therefore, defendant requests that the court vacate the Temporary Restraining Order and prohibit the plaintiff from further interfering with her decision on whether to continue her pregnancy.

RESPECTFULLY SUBMITTED this 28 day of March, 1988.

COHNE, RAPPAPORT & SEGAL

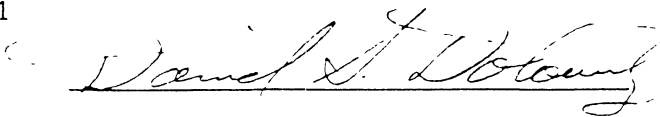

DAVID S. DOLOWITZ

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 28th day of March, 1988, I
hand delivered a true and correct copy of the foregoing, to :

Evan R. Hurst
2870 South State
Salt Lake City, Utah 84115-3692

Michael Evans
Legal Aid Society
225 South 200 East
#230
Salt Lake City, Utah 84111



(td/john/reynolds.mem)

E X H I B I T " E "

61.1/21
MICHAEL S. EVANS, #1015
LEGAL AID SOCIETY OF SALT LAKE
CO-COUNSEL FOR DEFENDANT
225 SOUTH 200 EAST, SUITE 230
SALT LAKE CITY, UTAH 84111
TELEPHONE: 328-8849

DAVID S. DOLOWITZ, #0899
JULIE A. BRYAN, #4805
COHNE, RAPPAPORT & SEGAL, P.C.
CO-COUNSEL FOR DEFENDANT
525 EAST 100 SOUTH, FIFTH FLOOR
P.O. BOX 11008
SALT LAKE CITY, UTAH 84147-0008
TELEPHONE: 532-2666

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL JON REYNOLDS,)	
)	
Plaintiff,)	
)	
vs.	)	AFFIDAVIT IN SUPPORT
	)	OF DEFENDANT'S MOTION
	)	FOR TEMPORARY RELIEF
JENNIFER FRANKS REYNOLDS,)	
	)	Civil No. D-88-944
Defendant.	)	Judge David S. Young

STATE OF UTAH)
 :ss
COUNTY OF SALT LAKE)

Comes now the above-named Defendant, Jennifer Franks Reynolds, being first duly sworn and deposes and says as follows:

Allegations Regarding Custody and Visitation

1. That there has been one (1) minor child born as issue of the marriage of the parties hereto, to wit: ZACHARI REYNOLDS, born June 3, 1987.

2. That since the birth of said minor child, the Defendant has been regularly, continuously and solely responsible for the primary care of said child until she returned to work in January, 1988.

COPY

3. That since January, 1988 the Defendant has worked not more than thirty (30) hours per week and that at the time she is at work her aunt, Rose Jones, or her mother have provided the primary care for said minor child.

4. That from the time of said child's birth until the parties hereto separated in March, 1988, the Plaintiff's employment prevented him from spending much time with the parties minor child, but that even when Plaintiff was not at work he provided minimal care for said child, despite the Defendant's request that he do so.

5. That Plaintiff was unemployed for approximately two (2) months in late 1987, but still refused to provide anything other than minimal care for said child and specifically refused to bathe the minor child and would give said minor child a bottle instead of feeding the minor child baby food.

6. That Plaintiff has never been solely responsible for the minor child's primary care for a period of more than seven (7) hours, and then only infrequently when the Defendant was at work and the Plaintiff was off of work.

7. That at no time has the Plaintiff been solely responsible for said child's care overnight.

8. That the parties separated several times during their brief marriage and that said minor child resided with the Defendant in each of those separations. Further, that the Plaintiff voiced no objection to the minor child residing with Defendant.

9. That the parties separated for approximately one (1) month commencing July 4, 1987, as a result of physical abuse inflicted on the Defendant by the Plaintiff. Further, that during this one (1) month separation, Plaintiff refused to provide to the Defendant the child's belongings, made no effort to see the child at all for the first week of the separation, and visited for a total of two to four hours during the balance of the separation.

10. That since the parties hereto separated on March 19, 1988, Plaintiff has visited the parties' minor child on only three (3) occasions: for approximately twenty-five (25) minutes in Defendant's home on Easter Day, 1988; and on April 16 and April 23, 1988 from the hours 9:00 a.m. to 6:00 p.m.

11. That the Defendant understood Plaintiff was to visit with the parties minor child on April 9, 1988, and when he didn't appear the Defendant telephoned the Plaintiff to ask why he did not come to the visitation to which the Plaintiff replied "I didn't sign any papers and I am not your _____ babysitter."

12. That Plaintiff has advised the Defendant that he cannot visit with the parties' minor child on April 30, 1988, as anticipated because such visitation would conflict with his work schedule.

13. That Plaintiff is the known non-custodial parent of another minor son and that Plaintiff failed to effect any visitation whatsoever with said other minor child from mid-November, 1987 until the end of January, 1988, including Thanksgiving and Christmas Day.

14. That the Defendant is a fit and proper person to be awarded the care, custody and control of the parties' minor child during the pendency of this action, subject to Plaintiff's rights of reasonable visitation, to include daytime visitation only.

Allegations Regarding Child Support

15. That the Defendant is employed by Smith's Food King as a clerk at the camera bar and is compensated at the rate of \$4.45 per hour.

16. That the number of hours each week varies somewhat, but that the Defendant is not allowed to work more than thirty (30) hours in any one week.

17. That her gross income from all sources totals approximately \$420.00 per month. That her average monthly expenses are as follows:

car payment	\$100.00
Interwest Specialities	74.95
child care	150.00
food for Zachari	75.00
gas	50.00
clothing for Zachari, including diapers	50.00
automobile insurance	44.00
rent and utilities	75.00
incidentals	<u>25.00</u>
TOTAL	\$493.95

18. That the Defendant and the parties' minor child presently reside with her at the Defendant's parents home and pay a minimal amount for utilities and rent but that the Defendant desires to obtain a separate residence for herself and the parties' minor child as soon as she is financially able and that a reasonable housing expense is \$400.00 per month.

19. That since the parties hereto separated on March 19, 1988, the Plaintiff has paid the Defendant a total of \$150.00 as and for support of the parties' minor child.

20. That from the information provided in Plaintiff's Affidavit, Plaintiff's monthly gross income exceeds \$2,300.00.

21. That in Plaintiff's Affidavit, previously filed herein, he has noted a \$250.00 per month expense for rent and a \$100.00 per month expense for utilities, even though he is living with relatives. Further, that Plaintiff's Affidavit indicates a monthly expense of \$292.91 for a boat payment even though said boat payment was made by Plaintiff's mother throughout the marriage of the parties hereto.

22. That Defendant and the minor child are in need of, and Plaintiff has declared ability to pay, temporary maintenance in the sum of at least \$500.00 per month.

DATED this 26 day of APRIL, 1988.

JSI

JENNIFER FRANKS REYNOLDS
Affiant

SUBSCRIBED AND SWORN TO before me this 26 day of APRIL, 1988.

JSI

NOTARY PUBLIC
Residing in Salt Lake County

My Commission Expires: 9-22-90

CERTIFICATE OF MAILING

On this 26 day of APRIL, 1988, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Affidavit in Support of Defendant's Motion for Temporary Relief to Evan R. Hurst, Mitchell R. Barker, Attorneys for Plaintiff, at 2870 South State Street, Salt Lake City, Utah 84115-3692.

James E. Logan

E X H I B I T " F "

Evan R. Hurst, # 5091
Mitchell R. Barker # 4530
Attorneys for Plaintiff
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801)486-9636

IN THE THIRD JUDICIAL DISTRICT

FOR SALT LAKE COUNTY

STATE OF U.

MICHAEL JON REYNOLDS,

Plaintiff,

v.

JENNIFER FRANKS REYNOLDS,

Defendant.

AFFIDAVIT OF MICHAEL
JON REYNOLDS

Civil No. D-88- ~~994~~ 949

Judge David S. Young

STATE OF UTAH

)

:

COUNTY OF SALT LAKE

)

Having been duly sworn, Michael J. Reynolds deposes and states as follows:

1. I am the Plaintiff in the above-entitled matter.

2. The facts herein stated are based on my knowledge and personal observations.

3. I have been married to the Defendant since November 7, 1986. We have a nine month old son and my wife is pregnant with another child. My wife wanted to abort our first child, but I was able to convince her not to.

4. My wife and I are now separated. On March 21, 1988, after previously informing me she would have an abortion, my wife and her Mother informed me that she would have the baby, quit her job, and "really stick it to me" on child support and alimony. I did not react to this threat. Later, when they realized that it would hurt me more, my wife informed me that she was not going to have one more of my children. She has informed me that part of the reason she wants an abortion is to get back at me through my unborn child. I feel she also wants to avoid any responsibility.

5. During most of our son's life, I have been the primary care-giver of the child.

6. My wife has been less than adequate as a parent. She will not get up earlier than 10:00 to care for the baby. On several occasions I have come home from the graveyard shift after working two shifts and cared for the baby because my wife would not get up to care for him.

7. Jennifer informed me that last Thursday my wife left our nine month old baby with an eleven year old neighbor boy, who is a delinquent and has had several problems with the police. My wife does not like to spend time with my son but prefers to shuttle him between various sitters and relatives.

8. I have arranged for child care for my children during my working hours should I get custody of them. The sitter's name is Elaine Robinette. She is a professional child care provider in her home. She has provided care for my son from my previous

marriage since his infancy. I have considerable confidence in her ability to provide quality care for my children when I am unable to do so because of work.

9. Since our separation, my wife has been living with her parents. I worry about the safety and welfare of my children in that home. My wife's father is a frequent and occasionally heavy drinker. This condition has caused problems with some of my attempts to visit my son. On several occasions my father-in-law has threatened me while drunk. On at least one previous occasion, my wife's father has shown great indifference to the safety of my son while in a state of intoxication. On that occasion, he was trying to get at me to cause me harm, I was staying away from him so no one would get hurt and my mother-in-law, while holding my baby, was trying to interject herself to calm down her husband. He was pushing her without regard to the fact that she had a baby in her arms.

10. Since our separation Jennifer and her family have allowed little visitation, and only at great inconvenience to me. The limited visitation allowed was only permitted in her parents' home with her father present the entire time. Since this Court signed a Temporary Restraining Order I have had no visitation, despite repeated efforts. I had made an appointment with Jennifer to have visitation today. When Jennifer's family received (today) a hand-delivered copy of the memorandum submitted by my attorneys in support of making the restraining

order permanent, her father became angry and said I would need a court order to see my son any time from now on.

11. Even though my wife and I are separated, I have sought to maintain contact with my son. This has been difficult because of the belligerence of my wife's father.

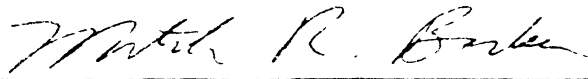
12. I believe I am a fit and proper parent to whom custody of our minor child, Zachary, should be awarded, subject to reasonable visitation in favor of Jennifer.

13. If Jennifer is concerned about any future child support obligation concerning our unborn child, I am willing to adopt the child to extinguish any such obligation.

Dated this 28th day of March, 1988


Michael Jon Reynolds, Plaintiff

SUBSCRIBED AND SWORN to before me this 28th day of March, 1988.


Notary public residing in Salt Lake County

My commission expires:

4-15-90

E X H I B I T " G "

on April 1, 1988, as support for the parties' minor child. If the Plaintiff becomes delinquent in his child support obligation, in an amount at least equal to child support payable for one month, then the Defendant should be entitled to mandatory income withholding relief pursuant to Utah Code Ann. §78-45d-1, et seq. (1953) as amended, and any Federal and State tax refunds or rebates due the Plaintiff may be intercepted by the State of Utah and applied to existing child support arrearages. This income withholding procedure shall apply to existing and future payors. All withheld income shall be submitted to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, Utah 84145-0011, until such time as the Plaintiff no longer owes child support to the Defendant.

3. That each party is hereby restrained and enjoined from bothering, harassing, annoying, threatening, or harming the other party at the other's place of residence, employment, or any other place.

4. That the Plaintiff is hereby ordered to maintain as current, and hold the Defendant harmless from liability on, all debts, payments and obligations of the parties during the pendency of this action.

5. That the Plaintiff is hereby ordered to maintain all present health and medical coverage for the benefit of the parties' minor child, and to provide the Defendant with any necessary forms and information to effect continued coverage.

6. That a custody evaluation shall be performed, and both parties shall cooperate as necessary to insure its completion, by a mutually agreed upon evaluator. Such evaluation shall be commenced within forty-five (45) days of the date of this Order and the expense for such evaluation shall be paid two-thirds (2/3) by Plaintiff and one-third (1/3) by Defendant.

DATED this _____ day of _____, 1988.

BY THE COURT

THE HONORABLE DAVID S. YOUNG
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

On this _____ day of _____, 1988, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Order on Order to Show Cause to Mitchell Barker and Evan Hurst, Attorneys for Plaintiff, at 2870 South State Street, Salt Lake City, Utah 84115-3692.

David S. Dolowitz (0899)
Julie A. Bryan (4805)
COHNE, RAPPAPORT & SEGAL
525 East 100 South
Fifth Floor
P. O. Box 11008
Salt Lake City, Utah 84147-0008
Attorneys for defendant

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

MICHAEL JON REYNOLDS,	)	ORDER ON OBJECTION TO
	)	COMMISSIONER' S RULINGS
Plaintiff,)	
)	
v.)	
)	
JENNIFER FRANKS REYNOLDS,)	
	)	Civil No. D88-944
Defendant.	)	Judge David S. Young

Plaintiff's objection to the Recommendation of Domestic Relations Commissioner Sandra Peuler and defendant's counter objection to said recommendation came on regularly for hearing before the Honorable David S. Young on October 17, 1988 at 9:00 a.m. Plaintiff was present and was represented by his counsel, Evan R. Hurst and Mitchell R. Barker. Defendant was present and represented by her counsel, Julie A. Bryan. Having reviewed the pleadings and heard arguments of the parties, it is hereby

ORDERED:

1. The Court adopts the Commissioner's Recommendation and hereby reduces the defendant's support obligation from \$300.00 per month to \$150.00 per month commencing with the month of October, 1988.

2. The Court adopts the Commissioner's Recommendation that plaintiff will report, in writing, to defendant's counsel on a monthly basis, as to his efforts to obtain employment.

3. The plaintiff shall have thirty (30) days to pay two-thirds (2/3) of the custody evaluation as previously ordered by the Court on or about May 2, 1988.

DATED this 22nd day of November, 1988.

BY THE COURT:

DAVID S. YOUNG
HONORABLE DAVID S. YOUNG
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of November, 1988, I caused to be mailed a true and correct copy of the foregoing, postage prepaid, to:

Evan R. Hurst
Mitchell R. Barker
2870 South State Street
Salt Lake City, Utah 84115-3692

James T. Baker

E X H I B I T "H"

DAVID S. DOLOWITZ [0899]
MICHAEL S. EVANS [1015]
Attorney for Defendant
of and for
COHNE, RAPPAPORT & SEGAL
525 East First South, #500
P. O. Box 11008
Salt Lake City, Utah 84110-0008
Telephone: [801] 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

MICHAEL JON REYNOLDS,	:	
	:	MOTION FOR ORDER TO
Plaintiff,	:	SHOW CAUSE IN RE CONTEMPT
	:	
vs.	:	
	:	Civil No. D88-944
JENNIFER FRANK REYNOLDS,	:	
	:	Judge: David S. Young
Defendant.	:	

* * * * *

THE DEFENDANT IN THE ABOVE MATTER, hereby moves this Court to issue an Order to Show Cause in Re Contempt requiring the Plaintiff to appear at a date and time certain, and there to show cause, if any he has, why:

1. Judgment should not be entered against him in the sum of \$625.00 for child support due and owing but unpaid from June, 1988, through August, 1988.

2. Plaintiff's pleadings be stricken insofar as they

request that Plaintiff be awarded the care, custody and control of the parties' minor child.

3. Plaintiff be found in contempt for his willful failure and refusal to pay child support and to initiate a custody evaluation as previously ordered by the Court.

Said Motion is based upon the grounds and for the reasons that Plaintiff has willfully failed and refused to pay anything as and for child support, despite the Court's previous Order the Plaintiff pay the sum of \$300 per month, and Plaintiff has willfully failed and refused to initiate a custody evaluation within forty-five days of the Court's prior Order. Further, said Motion is supported by Plaintiff's Affidavit, which is filed herewith.

DATED this the 18 day of August, 1988.

COHNE, RAPPAPORT & SEGAL

By: Michael S. Evans
MICHAEL S. EVANS,
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing
MOTION FOR ORDER TO SHOW CAUSE IN RE CONTEMPT to be mailed,
postage prepaid, on this the 1st day of SEPTEMBER, 1988,
to the following individuals at the addresses indicated:

Mitchell Ronald Barker
Ronald C. Barker
2970 South State Street
Salt Lake City, Utah 84115-3692

A handwritten signature, possibly reading "M. R. Barker", is written over a horizontal line.

REYNOLDS.MT1\HB

DAVID S. DOLOWITZ [0899]
MICHAEL S. EVANS [1015]
Attorney for Defendant
of and for
COHNE, RAPPAPORT & SEGAL
525 East First South, #500
P. O. Box 11008
Salt Lake City, Utah 84110-0008
Telephone: [801] 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

MICHAEL JON REYNOLDS,	:	DEFENDANT' S AFFIDAVIT
	:	IN SUPPORT OF MOTION FOR
Plaintiff,	:	ORDER TO SHOW CAUSE
	:	IN RE CONTEMPT
vs.	:	
	:	
JENNIFER FRANK REYNOLDS,	:	Civil No. D88-944
	:	Judge: David S. Young
Defendant.	:	

* * * * *

STATE OF UTAH)
 (ss.
County of Salt Lake)

COMES NOW, JENNIFER REYNOLDS, being first duly sworn,
deposes and states as follows:

1. She is the Defendant in the above-entitled Action.
2. On or about May 2, 1988, this Court entered an Order to Show Cause.
3. Pursuant to said Order, Plaintiff was required to pay

to Defendant the sum of \$300 per month as and for support of the parties' minor child.

4. Defendant paid only \$275 for the month of June, 1988, and has paid or offered to pay nothing for the months of July and August, 1988.

5. She is in need of such child support payments to adequately provide for the parties' minor child and believes Plaintiff's failure to abide by the Court's prior Order is willful and intentional.

6. Pursuant to said Order, the parties were required to cooperate in the performance of a Custody Evaluation to be commenced within forty-five days of the Court's Order, with Plaintiff to pay two-thirds of the expenses of said evaluation and Defendant to pay one-third of such expense.

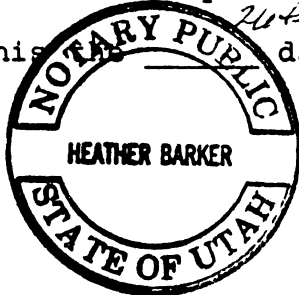
7. She caused to be forwarded to Plaintiff's attorney a check in the sum of \$166.67, made payable to Mr. Kim Peterson, M. S. W., which amount represented one-third of the retainer necessary to initiate such custody evaluation.

8. Plaintiff has willfully failed and refused to pay his two-thirds share of the retainer necessary to initiate the custody evaluation, and no such evaluation has been commenced.

9. The pending divorce Action, particularly Plaintiff's refusal to agree that she may be awarded the permanent care, custody and control of the parties' minor child, has caused her

and continues to cause her emotional distress, and is disruptive to the relationship of the parties hereto, and their minor child.

DATED this ^{26th} day of August, 1988.



Jennifer Reynolds
JENNIFER REYNOLDS,
Defendant/Affiant

Subscribed and sworn to before me this the 26th day of August, 1988

[Signature]
NOTARY PUBLIC

Residing at: Salt Lake County

My Commission Expires:

March 22, 1992.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER TO SHOW CAUSE IN RE CONTEMPT to be mailed, postage prepaid, on this the 1st day of SEPTEMBER, 1988, to the following individuals at the addresses indicated:

Mitchell R. Barker
Ronald C. Barker
2970 South State Street
Salt Lake City, Utah 84115-3692

Michael J. Evans

REYNOLDS AF1\HB