

1988

Michael Jon Reynolds v. Jennifer Franks Reynolds : Reply Brief and Motion to Strike

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 880420 IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

MICHAEL JON REYNOLDS,

Plaintiff/Appellant,

vs.

JENNIFER FRANKS REYNOLDS,

Defendant/Respondent.

**APPELLANT'S REPLY BRIEF
AND MOTION TO STRIKE**

Docket No. 880420-CA

District Court No. D88-944

Priority Classification 14b

* * * *

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE DAVID S. YOUNG PRESIDING

* * * *

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FEB 27 1989

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COMMENTS REGARDING RESPONDENT'S

"STATEMENT OF CASE"

The mother has set forth in her "Statement of Case" several "facts" which are inappropriate to present to this Court. The Rules of this Court require that the facts from the record be set forth with appropriate citations to the record. Rule 24 (a)(7),(b),(c), R. Utah Ct. App.

The father appealed a decision District Judge Young rendered as a matter of law: that a husband may not, regardless of his claims, be awarded an injunction preventing his wife from aborting their common child. See Order Denying Injunctive Relief, dated May 31, 1988. Since the ruling was as a matter of law, the unresolved factual claims of the two sides have little or no relevance.

The important facts are agreed upon (see complaint and answer; R. 2-7, 14-22):

1. The parties are married (seeking a divorce).
2. The parties are parents of one young child.
3. The parties conceived a second time.
4. The mother desired to abort this second child, since she is young and did not feel ready for a second baby.
5. The father desired to raise both children.

Nevertheless, the mother has throughout her brief and particularly in her "Statement of the Case" recited in a way most

favorable to herself (as respondent), what she believes to have been the facts. In many instances she has set forth "facts" without citation to the record, often knowing they were clearly in dispute. At no time has an evidenciary hearing been held in this matter and no Findings of Fact have been made, since the ruling below was as a matter of law.

For example, the mother asserts without citation to anything that it was "not until after the defendant left the plaintiff, as a result of his extramarital affairs, that plaintiff objected to the scheduled abortion." Brief p. 2. The mother is acutely aware that these facts were not presented to the court for decision, are denied by the father and are hotly disputed between the parties. It is worse than inappropriate to make such an assertion in a brief for this Court to rely upon, as if it were factual.

The mother also uses considerable space explaining her assertions in the divorce proceedings which are still pending in the court below. See, e.g., Brief pp. 4-6. These factual assertions are also irrelevant, since the case has been certified for appeal and bifurcated, and the divorce issues have nothing to do with whether a father has a right to be heard with regard to the termination of the unborn he has sired.

Pages five and six of the mother's brief recite what she apparently claims to be a procedural history of the case. However, those pages contain no citations to the record and are

likewise irrelevant to the issues on appeal. Besides wasting the Court's time, these discussions are misleading. For example, the mother claims (Brief pp. 5-6) that plaintiff "objected to the Commissioner's recommendation that he pay his share of the child custody evaluation". If the mother has studied the file or recalls the proceeding she is aware that the objection was only to the commissioner's order that the father pay the **entire** cost of the evaluation. This objection succeeded in causing Judge Young to order the mother to pay her third. See, Order on Order to Show Cause, exhibit G to **Respondent's** Brief.

It is particularly inappropriate for the mother to allege (Brief pp. 6-7; 26-28) that the father has been "consistently late" in paying his support since entry of the judgment, etc. The details involved which are in dispute, are again irrelevant to this appeal, and are not a part of the record.

The father feels that such abuse of the facts and misleading of the Court are wholly inappropriate, and therefore **moves to strike the Brief of respondent, or at least pages 3 through 7 and 26 through 28 thereof, together with Exhibits G and H.**

SUMMARY OF ARGUMENT

The mother's brief may be disregarded in whole or in part, since it is grounded upon an improper use of facts outside the record, misstates facts and fails to cite to the record.

It is the mother, not the father, who seeks an exclusive, nonreviewable veto power over her mate in the abortion decision. The rights of the parties are both private or both involve state action, making balancing appropriate.

ARGUMENT

I. The mother's brief should be disregarded.

As pointed out in the foregoing comments, the mother's response brief contains factual inaccuracies, recites "facts" which are not in the record, and fails to cite to the record. Rule 24(a)(7) and (b) requires stated facts to be supported by citations to the record. And the facts used must be "relevant to the issues presented for review." R. Utah Ct. App. 24(a)(7) and (b). See also R. Utah Ct. App. 24(e).

Many of the facts used by the mother which, though disputed, actually do appear in the trial court's file are from documents submitted and proceedings held after the matter was certified for appeal, bifurcated and appealed.

The record in a case where there is not a transcript consists of documents "filed in the court from which the appeal

is taken." R. Utah Ct. App. 11(a). The father believes this could not include documents and proceedings in the divorce portion of the case occurring in the trial court after this Court had taken jurisdiction over the abortion issues. The advisory committee, in drafting the comparable rule for the Utah Supreme Court, noted that the court may rely on any material contained in the "district court's **original** file." Adv. Comm. Note to Rule 11(a), R. Utah S. Ct. (emphasis supplied).

The Supreme Court's notes for Rule 24(a)(7) point out that the prior rule had a similar requirement for use of the record, but the new rule was for emphasis, as the old one was often disregarded. Adv. Comm. Note to Rule 24(a)(7), R. Utah S. Ct.

Briefs may not contain burdensome, irrelevant, immaterial or scandalous matters. R. Utah Ct. App. 24(k). The response brief appears to violate this restriction, since it contains several pages of inaccurate, irrelevant and somewhat inflammatory factual narrative. Briefs not in compliance with Rule 24 may be disregarded or stricken on motion or sua sponte, and the court may assess attorney fees against the offending draftsman. Id.; see also R. Utah Ct. App. 40(b) [sanction for failure to comply with rules]. The father requests such action under that rule as the Court deems appropriate.

The Court recently warned that Rule 24's penalties of attorney fees or disregarding or striking a brief are real. Demetropoulos v. Vreeken, 754 P.2d 960, 961, 962, 82 Utah Adv.

Rep. 26, 27 (Utah App. 1988); Dirks v. Cornwell, 754 P.2d 946, 947, 948, 81 Utah Adv. Rep. 30 (Utah App. 1988).

The courts have often lamented the use of facts alleged but not supported by the record on appeal, and will not consider irrelevant material. State v. Cook, 714 P.2d 296 (Utah 1986); State v. Wulffenstein, 657 P.2d 289 (Utah 1983), cert. den. 460 U.S. 1044, 103 S.Ct. 1443; 75 L.Ed.2d 799 (1983). "Appellant makes many immaterial factual allegations that are not supported by the record and has failed to cite those portions of the record that do support the material facts. . . . This Court need not, and will not, consider any facts not properly cited to, or supported by the record." Uckerman v. Lincoln National Life Ins., 588 P.2d 142, 144 (Utah 1978).

II. The mother continues to confuse the issue.

It appears to the father that the two briefs filed to date are to a large extent arguing opposite sides of different issues. The father asks that his rights in his procreation be recognized, and defined, and, when properly and speedily asserted, balanced against the mother's desire to terminate the procreative right for both parents. The mother continues to argue against a veto power by the father over his wife's choice. See, e.g., Resp. Brief Points I, II and V; Summary of Arguments, Brief pp. 7-10, 13, etc.

For example, both parties have referred to Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1978). App. Brief p. 3; Resp. Brief p. 12-13. The mother seems to use Wolfe, like most of her other authorities, to show that somehow the father's balancing of rights suggestion is prohibited by the Supreme Court's rejection of a spousal **veto**. Resp. Brief p. 12-13. The mother makes the same mistake with Judge Ritter's decision in Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973), App. Brief p. 14.

In deciding this case, the father suggests that the Court ignore all arguments as to why husbands should not be allowed an absolute, nonreviewable control of their mate's abortion options. It is the mother, not the father, who seeks an absolute veto--the right to decide whether the fetus develops or dies--without being inconvenienced by input from the husband-father.

III. Danforth does not control this case.

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 797 (1975), discussed in the father's prior brief, does not determine the outcome in this case as the mother believes. In fact, to hold that under no circumstances may the husband enjoin abortion of his unborn child would be to extend Danforth beyond its limits. Danforth condemned absolutes. Such an effectively absolute wife veto of the husband's voice would actually be contrary to the spirit of Danforth.

The Supreme Court has itself stressed the limited coverage of Danforth. "In Danforth we struck down state statutes that imposed a requirement of prior written consent of the patient's spouse and of a minor patient's parents as a prerequisite to an abortion." H.L. v. Matheson, 450 U.S. 398, 408, 101 S.Ct. 1164, 1170, 67 L.Ed.2d 388 (1981).

In Matheson a minor sought to overturn the Utah statute requiring abortionists to notify, if possible, parents of the minor before performing her requested abortion. § 76-7-304, Utah Code Anno. (1974). The mandate comes from a phrase in the same statutory sentence that requires the physician to notify, if possible, the spouse if the woman is married. Parental notification, the only provision at issue, was upheld. 450 U.S. at 1173. Relying on Danforth and other abortion decisions upon which the mother here relies, the Utah Supreme Court had also upheld the statute, affirming Judge Winder. H.L. v. Matheson, 604 P.2d 907 (1979).

The Matheson minor alleged that her right to privacy would be violated by having to notify her parents, also attempting to rely on Danforth. But the Supreme Court pointed out that Danforth held merely that a state may not give "an absolute, possibly arbitrary, veto over the decision . . . to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 450 U.S. at 408 quoting Danforth, 428 U.S. at 74.

The court noted that the Bellotti decisions also dealt with absolutes. 450 U.S. at 408, 409, citing Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976) (Bellotti I); and Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (Bellotti II) [where four justices felt the defect in statute was absolute veto, failing to allow judicial determination that particular minor is mature and should not have to notify parents].

But the Matheson provision was acceptable, since "[t]he Utah statute gives neither parents nor judges a veto power over the minor's abortion decision." 450 U.S. at 411. So Danforth and its progeny hold only that as between a blanket veto by the father (or parent), and the woman's right to abort, the latter prevails.

Not only does Danforth deal with absolute veto, it also adjudicates the rights of a mere husband, who may or may not be the father. The opinion noted, "In Roe and Doe we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed." 405 U.S. at 69. Of these questions, Danforth decided only one: may the state delegate to all spouses an absolute veto in every case. The Matheson case later decided parental notification was an acceptable requirement, again disallowing a blanket veto.

And in Planned Parenthood v. Ashcroft, 462 U.S. 476, 490-493 (1983) a requirement of parental or judicial consent was upheld for unmarried minors. The structure was acceptable since parents have power over their minor children. The statute did not "give a third party an absolute, and possibly arbitrary, veto . . . regardless of the reason for withholding the consent," since a court could waive the lack of consent on a case by case basis. *Id.* at 643. Without saying so, this seems to approve a balancing of sorts of parents' and minor child's interests. This case presents an opportunity to determine the issue of a balancing of parental versus personal interests.

The father's rights here are perhaps more compelling than a parent's right to give or withhold consent to abortion (subject to a court waving consent in a given case). He seeks to prevent permanent extinguishment of his constitutional rights, rather than to merely influence a minor child's decision.

Danforth is not controlling, since the invalidation of the Missouri spousal consent law was based on the premise that the state could not delegate that which it did not have. Danforth at 69. The interests of a father in his children do not derive from the state. If they did the state could arbitrarily curtail those rights, something the state is not permitted to do. Santoskey v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972). The line of United States Supreme Court abortion cases

all involve state statutes.

The mother has argued that distinguishing the father's balancing suggestion from an absolute veto is "a distinction without a difference." Brief p. 11. This is true, she contends, because the balance may result in overcoming her will, and "a veto is a veto." Id. This is analogous to saying that because a father may win custody at trial, allowing him the trial is tantamount to robbing her of the right to her children, since the outcome could be the same. The Matheson dissent took a similar stance, equating notice with allowing a veto (Marshall, joined by Blackmun and Brennan). The majority rejected the attempt. 450 U.S. at 411 n. 17.

Neither Danforth nor Matheson, nor any other decision controlling this Court, has considered the father's rights under the circumstances of this case.

IV. The father's rights are as "private" as the mother's.

By reasoning which defies logic, the mother has asserted that her right to abort is purely "private" while his rights as a father are "state action." This inaccurate categorization is convenient for the mother. Casting the father's right to see his child born as state action lets pro-choice decisions apply the constitutional right to privacy. And if the mother can hide her desire to abort behind the "private rights" label, the Court may ignore the fundamental rights of the father to procreate and

raise children. Brief p. 15-16.

The mother has made the distinction based upon the fact that the father here resorted to the trial court to weigh the respective rights. Of course the parties' rights were first asserted in private discussions. But whenever someone's exercise of private rights is infringed upon, his or her options are to give in, use self help or resort to the courts. Here when an impasse arose, the mother attempted self help by planning an abortion, and the father went to court. Had he resorted to self help to prevent the abortion, the mother would have been the one in court seeking an injunction.

The father believes both parents' rights are private, regardless of who wins the race to the courthouse or, who has the physical ability to subordinate her spouse's will to her own.

V. No state action is involved.

Even the pro-choice dissent by Justice Marshall stated that the abortion right must be free of unwarranted **state** action. H.L. v. Matheson, 450 U.S. 398, 408, 101 S.Ct. 1164, 1170, 67 L.Ed.2d 388 (1981), Marshall, J. dissenting, joined by Brennan, J. and Blackmun, J. The Fourteenth Amendment provides, *inter alia*:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty , or property, without due

process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV.

Clearly there can be no violation unless state action is involved. Antieau, Modern Constitutional Law, Vol 1 § 8:1. All the Supreme Court cases cited by the mother are attacks on state statutes, where state action is unquestioned. They do not apply to this case.

State action does not necessarily exist simply because the courts are resorted to for enforcement of private rights. See, e.g., Evans v. Abney, 396 U.S. 435, 24 L.Ed.2d 634, 90 S.Ct. 628. State action in fathers' rights cases usually is found when the rights are defined by **statute**. Swayne v. L.D.S. Social Services, 91 Utah Adv. Rep. 17, 19 (Utah App. Sept. 15, 1988).

In the case of Portland Feminist Women's Health Center v. Advocates for Life, Inc., abortion advocates brought a civil rights action against abortion opponents, claiming they had disrupted their abortion business, and intimidated and harassed patients. 681 F.Supp. 688 (D.Or. 1988). The court found that to be liable under 42 U.S.C. § 1985(3), plaintiffs would need to prove violation of their right to privacy (abortion rights) under the Fifth, Ninth and Fourteenth Amendments, as defined by Roe v. Wade and its progeny. 681 F.Supp. at 691. The court stated:

This right to personal privacy is founded upon the Fourteenth Amendment's concept of personal liberty and its restrictions upon state action. . . . The recognition of a constitutional right to privacy guarantees to women the right to make certain

fundamental intimate choices without governmental interference. . . . It does not, however, protect that right from private interference. . . .

Id. (citations only omitted, emphasis supplied). In that case no state action was found, since the actions of defendants were private, and not dependent upon a state statute.

A similar case was Chico Feminist Women's Health Center v. Butte Glenn Medical Society, 557 F.Supp. 1190 (E.D. Cal. 1983). Chico, an abortion clinic, brought a claim against the only local hospital and others under the same civil rights statute as was used in Portland. Part of the claim was that since the actions of defendants made performing abortions more difficult and expensive there was a right to privacy infringement. The court held that state action must be shown, not merely interference by a private party. Where the only facts showing state action were the hospital's receipt of state funds and its local monopoly, no state action was found. 557 F.Supp. at 1197.

Danforth (428 U.S. at 69) held that since the state cannot proscribe abortion, it cannot delegate the authority to do so to any particular person, even the spouse. But by the Court simply recognizing that the husband has, independent of the state, an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of his wife, the state delegates nothing.

It by no means follows, from the fact that the mother's interest in deciding 'whether or not to terminate her pregnancy' outweighs the State's interest in the potential life of the fetus, that

the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child . . . may be unmatched by any other interest in his life.

Conn v. Conn, 526 N.E.2d 958, 960 (Ind. 1988), Pivarnik, J. dissenting, cert. den. 109 S.Ct. 391 (1988).

The whole concept of the Supreme Court's abortion cases is one of "zones of privacy" into which the state may not enter. See, Roe v. Wade, 410 U.S. 113, 153, 35 L Ed 2d 147, 93 S.Ct. 705, 727 (1973); Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 756, 35 L.Ed.2d 147 (1973). It is simplistic to a fault to assume the father of the unborn child (who is also husband) stands in the same position as the state, in the life or death decision.

In each [abortion] case the right of privacy was but the correlative of the duty of the State to refrain from activity to which, by virtue of the limited nature of our constitutional government, it was obliged to remain a stranger. But who will assert that the husband here is, or could ever be, a stranger to the destruction of the fetus which he begot or the possible future birth of his child. . . . [A] father's rights in the birth of a child cannot be dissolved unreasoned reference to the Fourteenth Amendment.

Doe v. Doe, 314 N.E.2d 128, 136 (Mass. 1974). Reardon, J. dissenting. It is not unusual for a court to enforce private rights which are denied to the state. See, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

VI. Plaintiff's fundamental rights are threatened.

The mother coldly states, "it is up to the plaintiff, not the courts, to find someone willing to bear plaintiff's child." Brief p. 17. Of course the father's child here will never be born. Another opportunity to procreate could arise, but never as to the child destroyed by the mother's actions.

The father has not sought help from the courts or anyone else to "find someone to bear his offspring." The mother consensually committed the acts necessary to conceive this child. See, C.S. v. Nielson, 98 Utah Adv. Rep. 4, 6 (Utah App. Dec. 6, 1988) ["Clearly [a] person's decision **not to conceive a child** and to undergo surgical sterilization should not be confused with one's decision **to abort a child already conceived.**"] (emphasis in original, citation omitted). The impassioned arguments she has made concerning forced contraception, compelling a woman to do the acts necessary to become pregnant, etc., should be disregarded. See, e.g. Brief pp. 17-18, 25-26.

Despite what the mother argues, a father's fundamental rights in his children are directly involved in the abortion dispute. Doe v. Doe, 314 N.E.2d 128, 133 (Mass. 1974). Hennessey, J. dissenting. The father cited several pages of Utah and United States Supreme Court cases on a father's rights in his opening brief, and they will not be repeated here. As in Doe, "a substantial, indeed precious interest of the husband has been extinguished." *Id.* at 135, Reardon, J. dissenting. Justice Hennessey summarized his feelings about the case, which illustrate its similarity to this one:

The father's rights asserted here are surely among the fundamental rights protected by the Constitution.

In the circumstances of the case before us, the father's rights were dominant. The woman's health was not a factor. She had separated from her husband and did not want the child because she doubted her ability to care for the child and

because she said her husband had indicated to her that he would not support it. The husband wanted the pregnancy to continue to full term and a normal birth. He stated he would be willing to assume custody, and care for the child, in the event that the wife would not. The wife's assertions were not supportable by contrast with those of her husband. Thus, justice to her husband, at the very least, required forbearance by the wife.

Id. at 134.

The Doe majority, whose ruling is not controlling in Utah, felt obliged to rule in favor of a mother's unfettered right to abortion. The father believes this Court would do better to follow the better reasoned dissents.

The problem for the mother is, in part, the attitude expressed in her brief that she considers the father a "third party" who should not interfere. Brief p. 11, ¶ 2. Hopefully no court would take such an attitude.

The father's rights are fundamental, and any attempt to overcome them is viewed by the courts with "strict scrutiny." Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942). It would be absurd to suggest this interest springs into existence, fully bloomed, on the day of birth. As for the mother, the gestation period is for the father a time of anxiety, anticipation, and increase in feeling for the unborn child. See, generally, Spock, Baby and Child Care, pp. 28031 (Revised Pocket Book ed. 1968); Poe v. Gerstein, 517 F.2d 787 (1975); Jones v. Smith, 474 F.Supp. 1160, 1168 (1979).

A Florida husband consent statute was rejected because (like Danforth) it allowed withholding of consent "for any reason or no reason at all." Coe v. Gerstein, 376 F.Supp. 695, 698 (S.D. Fla. 1973), aff'd, 517 F.2d 787. cert. den., 417 U.S. 279, aff'd (as to denial of injunctive relief), 417 U.S. 281 (1974). But the court wrote that interests (like fathers') which arise at the moment of conception, and are outside the categories of protection of maternal health and potential life, would not be controlled by Roe v. Wade and its progeny, and would withstand constitutional attack. 376 F.Supp. at 697-698.

We recognize that the interest of the husband in the embryo or fetus carried by his wife, especially if he is the father, is qualitatively different from the interest which the mother may have in her health and the interest of the viable fetus in its potential life. The interest which a husband has in seeing his procreation carried full term is, perhaps, at least equal to that of the mother. The biological bifurcation of the sexes, which dictates that the female alone carry the procreation of the two sexes, should not necessarily foreclose the active participation of the male in decisions relating to whether their mutual creation should be aborted or allowed to prosper. It may be that the husband's interest in this mutual procreation attaches at the moment of conception.

VII. The balancing approach is less restrictive than a veto.

It appears there are a couple of concepts upon which both parties to this action can agree:

1. Under Danforth an absolute veto is not allowed.
2. The father has rights in his offspring and to procreate, though the effect of those rights on this case are disputed.

The balancing approach suggested by the father addresses these two problems, allowing involvement and a possibility of winning an injunction preserving the unborn child, while falling short of the absolute veto.

The court in Jones v. Smith, 474 F.Supp. 1160 (S.D. Fla. 1979) was faced with a Florida statute requiring notification and consultation with the husband before an abortion could be performed. The court upheld the statute, noting that Danforth would not apply, since something less than a veto power was given to the husband. 474 F.Supp. at 1167. Like Danforth (428 U.S. at 69), Jones recognized the deep and proper concern and interest a devoted husband or father might have. 474 F.Supp. at 1168. And Jones agreed with Poe v. Gerstein, 517 F.2d 787 (1975) that the state has an interest in protecting the rights of a pregnant woman's husband. 474 F.Supp. at 1168.

Jones found the statute was an appropriate promotion of the state's interest in protecting the husband's rights and fostering the marital relationship, without the constitutional infirmity that exists when the husband is given an absolute veto. Id.

Where a court is faced with a less restrictive attempt to protect a father's rights, as here, it may recognize the rights asserted.

VIII. The balancing approach is not unworkable.

The mother's arguments against the balancing approach are for the most part more examples of inappropriate and misleading use of facts not in the record, devoid of attempts to cite to the record. See, e.g. Brief pp. 27-28. And it approaches scandalous for the mother to state that his desire to enjoin the abortion "was more likely based on his wish to harass the defendant than his wish to take on the responsibilities of fatherhood." Brief pp. 27-28. On what can she base such an assumption? It is not only inappropriate--it is belied by these proceedings.

The mother makes the point that had the court below weighed the interest, she believes she would have prevailed anyway. Brief p. 28. This is an argument for, rather than against, a balancing approach.

The mother states that if the trial court had ruled in favor of the father, she would be faced with the "difficult decision of placing for adoption the child she has born or rearing the child with insufficient resources." Brief p. 28. Such a comment, apparantly presuming automatic custody in the mother, illustrates the gender bias on which the mother's claim rests. How can she assume the decision would be hers? How can she assume care of the child would be awarded to the mother that wished it not to be born?

The argument (Brief pp. 27-28) that the judicial reduction of support (due to the father's loss of employment) or alleged late payments illustrate why he should not prevail are likewise

flawed with bigotry. To base a father's rights on financial ability has never been appropriate, and would surely be met with a lawsuit by the mother's supporters if such criteria were used by a court or statute to terminate parental rights or deny custody.

IX. A balancing approach can be effective.

From its inception the abortion right has been regarded not as absolute, but as an interest to be weighed and balanced against other important interests. For example, after finding abortion within the right of privacy, 410 U.S. 113 (1973), the Roe v. Wade court wrote:

[S]ome argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatsoever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. . . . In fact, it is not clear to us that the claim asserted by some . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests. . . .

The same day the Supreme Court struck down Danforth's husband veto statute, it refused to invalidate on its face a statute that provided for a judicial balancing of the facts and circumstances in which a minor desires to obtain an abortion without parental consent. Rather, it directed the lower court to

get more information about whether the judicial proceedings would protect the minor's rights. Bellotti v. Baird, 428 U.S. 132 (Bellotti I) (1976).

Bellotti I observed that a statute preferring parental consent was acceptable, so long as the minor could reasonably obtain an order permitting the abortion without consent where she shows herself capable of giving informed consent, and that to do so without parental permission would be in her best interest. 428 U.S. at 145. Accord, Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) [grounded in an individual judicial determination on a case by case basis].

In the case of Doe v. Smith the facts were almost identical to this case. Certiorari was denied at 108 S.Ct. 2136 (1988). Justice Stevens seemed to note that one reason for denial was that the balancing had already been performed by the Indiana trial court, which had found in favor of the mother. See 108 S.Ct. at 2137. Justice Stevens did not state whether the trial court was in error in performing such a balancing.

Issues which might be considered in a balancing approach were used in the lower court in Conn v. Conn, 526 N.E.2d 958, 961 (Ind. 1988), Pivarnik, J. dissenting, cert. den. 109 S.Ct. 391 (1988). Those included the effect on the spouses of a ruling one way or the other, circumstances of the parties, specifics of the pregnancy, opinions of doctors, etc.

The balancing approach fits naturally into a divorce action, as this one was.

This case arises from the attempt of a trial judge to make a decision involving one of the issues presented in a dissolution case in which he had full jurisdiction over all issues arising from and involved in the marriage relationship of these two people. It falls on him to hear the facts and apply the law to make a distribution of the parties' property and to provide for the care, custody and support of the minor children. In so doing he can place the custody of the child with either party. . . . A finding that the wife conceives, even in the first trimester, fixes a responsibility on the husband to care for that child. . . . It is incomprehensible to me that this same trial court is foreclosed from even considering the question of whether the wife should be permitted to destroy this creation of both parties in the marital relationship merely because she wants to. At least up to now, no right has been determined to be absolute. Every right must yield and respond to rights of others.

526 N.E.2d at 962, Pivarnik, J. dissenting.

Neither the father's interest in bringing the pregnancy to term nor that of the mother in terminating it has been declared to be absolute and cancel out the other. "The balance of these two rights, each of such a sensitive nature and personal nature, is, as I see it, the real task confronting the court." Doe v. Doe, 314 N.E.2d 128, 138 (Mass. 1974), Reardon, J. dissenting. Justice Reardon pointed out that the mother's interests, while significant, were largely temporary.

The mother opposes a balancing test, because she seeks an absolute right.

It is one thing to emancipate women from discrimination and male tyranny; it is quite another to emancipate them from all human claims and obligations toward the rights of others. But to

claim or presume an absolute right to abortion or to make 'women's rights' absolute is to create a set of rights for women subject to none of the normal limitations of life in human community.

Callahan, Abortion: Law, Choice and Morality, 464 (1970). No authority gives her such an absolute right. And no one stands in a better position to test the limits of the abortion right in a fair hearing than the father and husband. If he had no rights that can, under any circumstances, outweigh those of his wife, abortion on demand would be absolute after all. It is not. See, e.g., H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981).

X. Roe v. Wade should be narrowed.

The mother is concerned that authority has been used to indicate that Roe v. Wade may be overturned soon. While this is the case, and the father's hope, it is not necessary for him to ask that any controlling case be reversed. As indicated above, the limits of the abortion right are not fully defined. The authority cited in the father's opening brief to indicate Roe's strength is waning illustrates that its bounds are being (and should be) restricted, not expanded.

The days of knee-jerk negative reactions to even the least restriction on the abortion right are long gone. The Court could as easily point find the father's rights consistent with Roe v. Wade, Danforth and other cases, as to overturn them.

XI. Fees should be awarded to the father, not the mother.

The mother has asked that she be awarded her attorney fees on appeal against the father, Brief p. 30, again based upon facts not in the record. The apparent basis for her request is need. That is not a criterion for attorney fees on appeal under R. Utah Ct. App. 33. The Court may award costs and attorney's fees to the prevailing party if it finds the appeal frivolous or brought for delay. Eames v. Eames, 55 Utah Adv. Rep. 49, 50 (Utah App. 1987) [where evidence was mischaracterized].

Even if capacity to pay were considered to determine the attorney fee issue, the mother would not be entitled to an award in this case. She points out that both parties have low income. Brief p. 30. But she fails to mention that her counsel is acting as "Attorneys for defendant and the American Civil Liberties Union." Resp. Brief Ex. D p. 6. It is disturbing for the mother to request reimbursement of fees (based on need) without disclosing whether she is responsible for or paying those fees, and the extent to which she is assisted by the ACLU. The father's support has consisted of \$1,000 received from National Right to Life, hardly enough to cover out of pocket costs.

Either fees should be born by each party, or the mother should be required to pay the father's.

CONCLUSION

It is impossible to restore the father's rights, so a remand would profit little. The mother aborted the parties' fetus, even though the father's counsel had declared in open court his intention to go immediately to this Court for a similar order. Apparently she believed she had done so during the narrow window of opportunity between Judge Young's oral dissolution of the temporary restraining order and Presiding Judge Garff's ruling, less than an hour later, again restraining the abortion. Actually the abortion occurred after the order was entered, but allegedly without notice of the order.

Since the child is gone the father merely seeks an order declaring that the trial court was in error not to balance the private rights and interests of the parties to determine whether to issue a permanent injunction against aborting the child.

The father requests a recognition that he has rights, and that the mother's rights are not limitless. Such a holding would be entirely consistent with Roe v. Wade, Danforth and all other decisions of controlling jurisdictions.

To hold for the mother would further a sex bias, as stated in the father's opening brief.

Finally, the Court should strike or disregard the mother's brief, and award attorney fees to the father as a consequence of the misuse of facts.

Respectfully so requested this twenty-fourth day of
February, 1989.




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

CERTIFICATE OF SERVICE

I hereby certify that on the twenty-fourth day of February,
1989, I caused four copies of the foregoing to be hand delivered
or mailed, postage prepaid, to:

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Mitchell R. Barker

EXHIBIT "A"

ORDER DENYING INJUNCTIVE RELIEF

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MAY 31 1988
Q. R. R.

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

MICHAEL JON REYNOLDS,
Plaintiff,

v.

JENNIFER FRANKS REYNOLDS,
Defendant.

ORDER DENYING INJUNCTIVE
RELIEF

Civil No. D-88-944

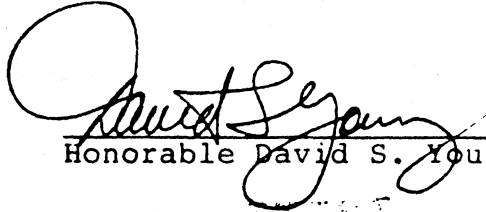
Judge David S. Young

On March 30, 1988, the above Court, with the Honorable David S. Young presiding, based upon an Order to Show Cause previously issued, heard the request of plaintiff that the Order temporarily restraining defendant from having an abortion be made a permanent injunction. Plaintiff appeared and was represented by Mitchell R. Barker and Evan R. Hurst. Defendant, by leave of the Court, did not appear but was represented by Michael S. Evans of the Legal Aid Society of Salt Lake City. David S. Dolowitz, also appeared, appearing on behalf of the American Civil Liberties Union and defendant. Argument was heard, and the Court being fully advised, it is hereby

ORDERED, that the Temporary Restraining Order previously issued be immediately dissolved and that no permanent injunction issue.

So Ordered this 5th day of May, 1888.

BY THE DISTRICT COURT:


Honorable David S. Young

CLERK
H. BRADSHAW

By C Porter