

1988

# Michael Jon Reynolds v. Jennifer Franks Reynolds : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH

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**MICHAEL JON REYNOLDS,**

Plaintiff/Appellant,

vs.

**JENNIFER FRANKS REYNOLDS,**

Defendant/Respondant.

**BRIEF OF APPELLANT**

Docket No. 880420-CA

District Court No. D88-944

Priority Classification 14b

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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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### **JURISDICTION**

The Court of appeals has jurisdiction over this appeal and cross appeal by virtue of § 78-2a-3(2)(h) (1988) and Rule 4(a) and 4(d), R. Utah Ct. App. (1988). The abortion issues in this divorce action were certified for appeal under Rule 54(b), Utah Rules of Civil Procedure, and the case was also bifurcated pursuant to Rule 42(b), Utah Rules of Civil Procedure. R. 139-141.

### **NATURE OF PROCEEDING**

The issues here appealed arose within a divorce action which is still pending before the Third District Court, Salt Lake County, before the Honorable David S. Young. The only issues appealed at this time are those dealing with abortion, specifically, whether appellant, as a father and husband, should have been afforded the opportunity of a full evidentiary hearing to weigh and balance his rights and interests against the interests of respondent in having an abortion. R. 139-141.

### **RELATED OR PRIOR APPEAL**

When the trial court dissolved its restraining order March 30, 1988, but while the child was still living, Mr. Reynolds filed an Application for Interlocutory Appeal, #880180-CA. Upon hearing the next day that the baby had been aborted, the Court dismissed the interlocutory appeal.

## **ISSUES PRESENTED ON APPEAL**

### **ISSUE I**

Did the trial court err in ruling as a matter of law that Mr. Reynolds had no right to enjoin his wife from aborting their unborn child?

### **ISSUE II**

Should the trial court have balanced the rights and interests of Mr. and Mrs. Reynolds and determined whether Mr. Reynolds' right to procreate and associate with his child should, under the circumstances, prevail over Mrs. Reynolds' right to an abortion?

### **ISSUE III**

Did the trial court err in holding that this controversy involves "state action", and therefore was controlled by Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975)?

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case stems from a divorce court dispute over the disposition of the parties' unborn child. Only the abortion related issues are involved in this appeal.

### **Course of Proceedings**

Mr. Reynolds filed for divorce March 22, 1988 and was awarded a Temporary Restraining Order, which was served upon

Mrs. Reynolds, preventing her temporarily from aborting their unborn child.

After hearing the matter (without taking evidence) on March 30, 1988, the trial court refused to grant a Preliminary Injunction and lifted the Temporary Restraining Order. An interlocutory appeal was taken to this Court, which appeal was dismissed when Mrs. Reynolds had her abortion before being served with the Restraining Order from this Court.

The honorable David S. Young then certified this issue for appeal and also bifurcated the case.

#### **Disposition at Trial Court**

No trial was had in the matter, and the denial of an injunction was accomplished based solely upon affidavits and proffers. The judge ruled as a matter of law that Mr. Reynolds as a father had no right to present a case as to why his wife should be enjoined from aborting their child.

#### **Summary of Relevant Facts**

The parties were married for less than two years, and at the time of commencement of this action defendant was pregnant with their second child, which she wished to abort. R. 2-7 and 14-22. It is undisputed that plaintiff was the natural father of the unborn child, and for purposes of appeal plaintiff concedes the pregnancy was nearing the end of the first trimester. Id. No allegation has been made that defendant is in anything but good health, and no claim has been made that

order. R. 122-124. The Honorable Judge Garff, the first available judge, signed the temporary order at about 12:55 p.m. The order was served on the clinic about 1:25 p.m. and defendant herself was not served until later that evening. According to the clinic, the abortion had been performed about 1:00. This Court denied the petition for interlocutory appeal the next day. R. 126-127.

The trial court certified the abortion issue for immediate appeal and bifurcated the Case on May 20, 1988. R. 139-141.

#### **SUMMARY OF ARGUMENT**

Fathers have fundamental liberty rights and interests in their own children, which is of approximately equal value with mothers' right to abortion. No controlling jurisdiction has decided this issue. Due process rights may be accorded to a father only by allowing a full hearing to weigh the respective rights and interest of the parents.

This appeal is not barred by mootness since it is a controversy which is likely to repeat itself, yet evades review.

No state action is involved, so the Roe v. Wade decisions do not apply.

## ARGUMENT

I. Danforth does not preclude a court from balancing a father's rights in an unborn child with the mother's right to an abortion.

This is a case of first impression in Utah. However, the mother has consistently but incorrectly argued that the father's claim is entirely overcome by the Supreme Court's decision in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975). An overbroad reading of that case is the root of the lower court's error. Danforth held that a "State may not constitutionally require the consent of the spouse, as is specified under [the Missouri statute examined], as a condition for abortion during the first 12 weeks of pregnancy." Id. at 69. But the Missouri statute troubling the Court purported to create rights much different from those asserted by the father here.

In Danforth the legislature had given one spouse an absolute veto, for any or no reason, to the absolute exclusion of the other. A husband (who might not even be the father, Id. at 69) had the unilateral power to forbid that an abortion be performed on his wife, and his mandate could not be controverted or reviewed by any higher authority. Id. at 71. While the father here seeks a case by case balancing of rights and interests, Missouri had done its own arbitrary balancing, striking the balance permanently and absolutely in favor of the father. The Court struck down a per se rule, not a balancing test.

Since the mother here seeks an unbridled right to decide whether the fetus is born or terminated, without regard for the father, the Court could find her position to be more repugnant to the spirit of Danforth than the individualized balancing the father proposes.

The trial court mistakenly read Danforth to have already accomplished the balancing of rights and interests the father sought. It is an understandable error, since, out of context, we find the following quote Judge Young read at the hearing:

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.

Id. at 71.

The Supreme Court, however, was weighing the effect of leaving the statutory per se absolute veto intact against the effect of striking it down and allowing the woman a choice. As between these absolutes, the Court preferred the right of the mother.

The Court carefully illustrated that it was not considering the constitutionality of a more tailored approach allowing for a case by case balance. Referring to the spousal consent provision it struck down, the Court wrote:

This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute

obstacle to a woman's decision that Roe held to be constitutionally protected from such interference.

Id. at 70-71 [emphasis supplied].

In the wake of Danforth, the Sixth Circuit Court of Appeals was careful to limit its ruling to the facts when faced with a similarly broad Kentucky statute. Wolfe v. Schroering, 541 F.2d 523 (1978). After striking down the absolute veto with which the legislature had endowed the husband, the court vowed it would refrain from deciding whether a more narrowly drafted statute would pass constitutional muster. 541 F.2d at 526.

Danforth and its progeny, despite claims to the contrary, do not really deal with the rights of men as fathers. They merely consider the rights of husbands. Thus, the statute Danforth struck down was overbroad. Not only did it give a veto power rather than an interest or voice for balancing, the power was given to husbands, not just fathers. The fathers issue remains to be decided by any court of controlling jurisdiction over this case.

## **II. Fathers have constitutional rights to their children.**

Along with society, in the twentieth century courts recognized that fathers have not only duties, but also important constitutional rights in their children. Failure to give appropriate weight to a father's interests is a violation of these rights.

The United States Supreme Court's decisions on point follow two important lines of cases: those supporting the right



to procreate and those limiting the termination of parental rights. "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court has repeatedly emphasized that [w]ithout doubt [the liberty guaranteed under the fourteenth amendment] denotes the right of the individual to . . . establish a home and bring up children. . . ." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

A. Fathers have a right to procreate.

"Procreation" means "the entire process of bringing a new individual into the world." Dorland's Illustrated Medical Dictionary (24th ed. 1965). Similarly, the recent case of In re Baby M, 537 A.2d 1227 (N.J. 1988), stated, "[t]he right to procreate very simply is the right to have natural children. . . . It is no more than that." *Id.* at 1253.

Obviously, the right to procreate--to have a natural child--extends to both parents. But a mother's procreation right is logically distinguishable from the limited right granted by Roe v. Wade to destroy the creation. 410 U.S. 113 (1973). Because the mother also has the right to procreate, the father may not force her to have an abortion. Harris v. State, 356 So.2d 623 (Ala. 1978). And despite his desire and offer to pay for an abortion, he may not escape his paternal duties when the mother refuses to abort. *Id.* at 624.

Similarly, the father claims no right to force a woman to become a mother against her wishes in order to satisfy his

desire to be a father. He has no right to force a woman to have intercourse with him, and in this case he did not. When the action began, the parties were already mother and father of an unborn child. The action was precipitated by the mother's desire to change father's status from father to man, extinguishing the father's constitutional rights, by terminating the child.

B. Fathers have rights to raise and enjoy their offspring.

Separate and in addition to the right to father, is the right to be a father. Natural parents have constitutional rights to raise, associate with, and enjoy their children that a state cannot sever absent clear and convincing evidence of parental unfitness. Santosky v. Kramer, 455 U.S. 745 (1982). In short, these family rights are "fundamental". Santosky held that a "preponderance of the evidence" standard of proof for termination of parental rights failed to sufficiently recognize "the fundamental liberty interest of natural parents in the care, custody, and management of their child." 455 U.S. at 753. Only "clear and convincing evidence" that parental rights are not in the best interest of the child can overcome such fundamental rights. In re Brand, 479 So.2d 66 (Ala.Civ.App. 1985).

Santosky observed that [e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." 455 U.S. at 753.

In 1972 Stanley v. Illinois, 405 U.S. 645 (1972), recognized paternal rights of illegitimate fathers. The decision was such a break with past civil and common law, one writer accused the Court of "having just discovered that dads are people, too." Marriage, Kinship, and Sexual Privacy, Mich. L. Rev. 81:463, 499. It appears some sectors of society wish to keep that discovery a secret. Stanley summed up the rights of fathers as follows:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'

405 U.S. at 651.

The Stanley Court did not stop there, but went on to observe:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 'basic civil rights of man,' Skinner v. Oklahoma, and [rights far more precious . . . than property rights,' May v. Anderson. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment.

[405 U.S. at 651, Citations Omitted].

Santosky confirms that the father's fundamental rights to care, custody and management of his child originate in the liberty clause of the Fourteenth Amendment. 455 U.S. at 745. So the foundation of the father's rights as father is the same one

on which Roe v. Wade found a right of privacy protecting abortion. 410 U.S. 153. A father's right in his child has been declared "cognizable and substantial" under the United States Constitution. Quillon v. Walcott, 434 U.S. 246, 248 (1978).

Obviously such rights may not be enjoyed in an aborted child. His fundamental rights may only be fully exercised if he is able to protect the child until live birth. In fact one of the basic interests of the father is that of providing "loving protection" for the child. Rivera v. Minnich, 107 S.Ct. 3001, 3004 (1987). Hence the father here sought to have his rights balanced against those granted to the mother by the same Court.

C. Utah carefully protects parental rights.

From the first compilation of statutes after statehood, Utah has given the father and mother substantial rights in their children. See R.S.Utah 1898 § 4. Those rights have been consistently protected since. Utah's Constitution declares, "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Art. I § 27. Fundamental rights of parents cannot be stressed too often or guarded too closely.

Utah's legislature has provided that any physician performing an abortion shall first follow various procedures. § 76-7-301 et seq., UCA 1953. One is that he must "Notify, if possible, . . . the husband of the woman, if she is married." § 76-7-304, UCA 1953 (emphasis supplied). For what possible purpose did the legislature require notification of the husband,

unless it is so he may take a role in the decision, resorting to the courts if necessary, as the father did here.

Spousal notification statutes have been upheld. Doe v. Deschamps, 461 F.Supp. 682 (Mont. 1976); Scheinberg v. Smith, 659 F.2d 476 (1981).

Like the Fourteenth Amendment, Utah's Constitution provides, "No person shall be deprived of life, liberty or property, without due process of law." Art. I § 7.

The words "life, liberty and property" are taken in their broadest sense as indicative of the three great subdivisions of all civil rights. McGrew v. Industrial Comm., 96 U. 203, 85 P.2d 608. "Property" embraces all valuable interests a person may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but to every species of vested right. *Id.* It must include, then, the rights to procreate, rear and enjoy children. As indicated above, the interest vests upon actual conception of an individual.

This provision has been used to protect the rights of Utah parents, and should protect the father here, independent of his federal protections. In 1980 the legislature passed the Children's Rights Act, ch. 40, 1980 Utah Laws 288, amending § 78-3a-48(1), UCA 1953. The requirement in the former statute that the court find a parent "unfit or incompetent by reason of conduct or condition seriously detrimental to the child" was removed, and replaced with a provision permitting involuntary termination upon a finding that such termination will be in "the

child's best interest." That change was struck down as violative of Art. 1 § 7. In re J.P., 648 P.2d 1364, 1374 (Utah 1982).

J.P. observed that until that amendment Utah's statutory and common law have invariably upheld the rights of natural parents except in "extreme circumstances." 648 P.2d at 1366. The Code, for example, allows adoption without consent of natural parents only if the parent "has been judicially deprived of the custody of the child on account of cruelty, neglect, or desertion," or has abandoned the child. §§ 78-30-4, 78-30-5, UCA 1953. See also current § 78-3a-48, UCA 1953.

On the other hand the state has an independent interest in the welfare of its children. State in re Jennings, 20 Utah 2d 50, 52, 432 P.2d 879, 880 (1967). But the "best interests" or "welfare" of the infant may only be considered after the parent's rights are terminated for unfitness, etc. In re J.P., 648 P.2d 1364, 1369 (Utah 1982).

By the 1980 enactment, Justice Oaks observed the legislature had failed to give appropriate weight to the right of a fit, competent parent to a parent-child relationship. 648 P.2d at 1368. Rearing children is, after all, a "fundamental right." In re Castillo, 632 P.2d 855, 856 (Utah 1981); State in re Walter B., 577 P.2d 119, 124 (Utah 1978)(plurality opinion). Castillo declared that "the ideals of individual liberty which protect the sanctity of one's home and family" are "essential in a free society. . . ." 632 P.2d at 856.

Under both the Federal (Amendment. IX) and State (Art. I § 25 Constitutions, personal liberties are not limited to those

granted, but are a retention of rights in the people. See, In re J.P., 648 P.2d 1373, 1369 (Utah 1982), which went on to state:

The rights inherent in family relationships-- husband-wife, parent-child, and sibling--are the most obvious examples of rights retained by the people. They are 'natural', 'intrinsic,' or 'prior' in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property. . . . Similarly, the Court has characterized the right to procreate as among the 'basic civil rights of man.' Skinner v. Oklahoma, 316 U.S. 535, 541 . . . . Blackstone deemed 'the most universal relation in nature . . . [to be] that between parent and child.' 1 W. Blackstone, Commentaries \* 446.

648 P.2d at 1364. Can it be doubted, then, that a father's rights are of at least as great import as the abortion rights of the mother?

A parent's inherent authority and right to rear his own children are recognized as fundamental axioms of Anglo-American culture. To protect the individual in his "constitutionally guaranteed right to form and preserve the family is one of the basic principals for which organized government is established." In re J.P., 648 P.2d 1364, 1373 (Utah 1982).

D. The father has shown a genuine interest.

In affidavits filed with the lower court, the father has made clear that he not only wished that the child be allowed life. Rather, he offered to take and care for the child, meet all his or her needs and completely excuse the mother from her parental obligations. He acted quickly, near the end of the first trimester. Importantly, the father was married to the mother at all relevant times. "Parental rights are at their apex

for parents who are married." In re J.P., 648 P.2d 1364, 1374 (Utah 1982).

In cases involving unwed fathers biology alone does not give rise to constitutional rights in one's children. The United States Supreme Court has stated in recent cases that illegitimate fathers have a protected relationship with their children only if they exercise their rights by assuming genuine responsibility for their children. See, Caban v. Mohammed, 441 U.S. 380 (1979); Quillon v. Walcott, 434 U.S. 246 (1978). Although no such requirements are imposed upon natural fathers who are married to the mother, like the parties here, this father has gone to great lengths to protect his interests, but for naught.

The right to procreate becomes particularized where, as here, conception results from an act of consensual intercourse. Once so particularized, that right continues through birth and beyond to the age of majority. The father's rights in the particular child conceived through the parties' consensual, marital act are fundamental. They are equal in weight to those asserted by the mother, so a judicial balancing particularized to their circumstances is required. It is surely unconstitutional to disregard the rights of one parent and enforce fully the rights of the other. See, The Rights of the Father, Notre Dame Lawyer 50:483 (1975); Stanley v. Illinois, 405 U.S. 645 (1972). If the father acts promptly, he must be afforded an immediate hearing to weigh the respective interests and burdens asserted by the father and mother. Id.



E. A balance may have tipped in favor of the father's right to save his child.

Thus a right to privacy is relative, making a balancing approach most appropriate. The right of a man in his children "undeniably warrants deference and, absent a powerful countervailing interest, protection. In re J.P., 648 P.2d 1364, 1374 (Utah 1982), quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972); 92 S.Ct. at 1208, 1212; 31 L.Ed.2d 551 (1972).

In the J.P. case Utah's Supreme Court has already undertaken to balance parental rights to their offspring, which precede the Constitution, against the newly created abortion right. 648 P.2d 1373-1375. The former, said Justice Oaks, are protected liberty rights under the due process clause of the United States Constitution. Id. at 1375.

Unlike substantive due process cases like Roe v. Wade, 410 U.S. 113 (1973), which rely on a 'right of privacy' not mentioned in the Constitution to establish other rights unknown at common law, the parental liberty right at issue in this case is fundamental to the existence of the institution of the family, which is 'deeply rooted in this Nation's history and tradition', Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion), and in the 'history and culture of Western civilization.' Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). . . . This rooting in history and the common law validates and limits the due process protection afforded parental rights, in contrast to substantive due process innovations undisciplined by any but abstract formulae. Moore v. City of East Cleveland, 431 U.S. at 503 n. 12.

J.P., 648 P.2d at 1375.

When the balancing is undertaken in a specific case, courts should be required to consider that parental rights cannot be denied absent a "clear and convincing evidence" standard to

overcome their rights. In re Castillo, 632 P.2d 855 (Utah 1981). Further, there are three interests, not two, to be considered. Utah has consistently emphasized it has an interest as parens patriae in children. See, J.P., 648 P.2d at 1367.

In a divorce case such as this one, the court is empowered to make such division of property and such child custody determinations as are just and reasonable. §§ 30-3-1 et. seq. The fetus must be either a child or a property right, and its status as between the parties may properly be determined.

If a father disputes a decision to abort, this may remove the legal decision from the ill-defined area of right to privacy. Abortion: The Father's Rights, 42 U. Cin. L. Rev. 441, 462 (1973). Since private rights meet private rights, both arising from similar sources and both fundamental, the woman's "right to privacy" as defined in extant abortion cases may not be relevant. The father's rights should be seen as about equal to those of the mother. Sherain, Beyond Roe and Doe: The Rights of the Father, 50 Notre Dame lawyer 483, 486 (1975). The father's interests and the state's could cumulate to override the mother's rights. Id. at 489.

The balancing suggested by the father is necessary due to the wide variety of factual scenarios, interests and intentions which may exist. Hopefully society has progressed beyond using stilted, universally applied assumptions that one spouse always wins out; the sort of narrow-mindedness loathed by Planned Parenthood of Missouri v. Danforth, 478 U.S. 52 (1976).

Fathers may assert that termination of the pregnancy could result in severe mental distress and possibly emotional illness, since he also has a bond with the fetus. The father here commented, "It feels like a part of me just got thrown away." Gurwell, Lawsuit May Have Ended With Abortion, USA Today, Thurs. March 31, 1988 p. 3A. Fathers realize that while they may or may not have another fathering opportunity, the child aborted cannot be conceived again. Said another father who was unable to prevent his wife's abortion, "I was willing to take full responsibility and raise it and take care of it; there's nothing for me to do now but let the wounds heal." Brannigan, Suits Argue Fathers' Rights in Abortion, Wall Street Journal, Tues., Aug. 23, 1988, p. 27.

Mothers also stress, as have the courts, the trauma involved for a woman in the abortion decision and unwanted pregnancy. Id.

Fathers may assert interests in procreation, health of their mate (including future fertility) and the health of their unborn child.

A mother may be unable financially or emotionally to meet the needs of the child, as was alleged here. In such cases perhaps only a father willing to assume all emotional, physical, financial and other responsibilities (including prenatal care) would fair well in a balancing of rights and interests. Such a father is assuming grave physical, emotional and financial burdens likely to last at least eighteen years after birth. The mother would undergo nine months or more of emotional and

physical difficulty. Can those months be said to always outweigh the eighteen years?

While a mother with a special health problem would likely overcome most fathers' interests, if her reasons are personal preference and convenience they may not always prevail.

### III. A woman's right to abortion is not absolute.

Clearly Roe v. Wade 410 U.S. 113, 153 (1973) held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The mother and the American Civil Liberties Union (ACLU) asserted below an "absolute" constitutional right to abortion. Faced with similar claims in amicus briefs, Roe expressly held that "[t]he privacy right involved . . . cannot be said to be absolute. . . . [T]his right is not unqualified and must be considered against important state interests and regulation." 410 U.S. at 154. It further declared, "Neither in this opinion nor in Doe v. Bolton do we discuss the father's rights" if asserted against a woman's abortion choice. *Id.* at 165 n. 67 [citation omitted]. And as indicated above, Planned Parenthood of Missouri v. Danforth, the Court's only other case to mention fathers' abortion rights, is not determinative of this case. Like all cases, Danforth controls only cases factually "on all fours" with it, or nearly so.

No case has precisely defined the right to privacy or its scope. It is a broad concept. The mother and ACLU have

suggested it involves a bodily privacy. While it is true government intrusion into the body is disfavored, the rights exercised here are private, not governmental acts (as explained below). No case stands for the principle that bodily privacy somehow holds a preferred position in the area of privacy over associational privacies or is absolutely inviolable. States have thus been upheld in compelling vaccinations, Jacobson v. Massachusetts, 197 U.S. 11 (1905), participation in eugenics, Buck v. Bell, 274 U.S. 200 (1927), involuntary blood testing, Schmerber v. California, 384 U.S. 757 (1966), and blood transfusion into a fetus over the religious objections of the mother, Raleigh Fitkin-Paul Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

#### **IV. The mother's theory discriminates on account of gender.**

Even if Roe were read to suggest an initial presumption must be made in the woman's favor, it is not an irrebuttable presumption. The father also has interests and must have his chance to raise them. In fact, since the father's rights are also fundamental and arise from the same Fourteenth Amendment roots, the presumption would run both ways, and be offset. Such fundamental rights cannot be summarily and stereotypically disposed of by the state or court. The Supreme Court held that Illinois' presumption that illegitimate fathers are uncaring was an unconstitutional assumption.

If the Constitution compels us to reject the legitimacy stereotype in that case, on what grounds can it be argued that it

does not compel us to reject the sexual stereotype and require individual determinations in the father vs. mother abortion scenario? An irrebuttable presumption in favor of the illegitimate mother was struck down explicitly on the basis of Stanley. Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). In Caban v. Mohammed, 441 U.S. 380 (1979) the Court simply declared unconstitutional on sex discrimination grounds a New York law which allowed the mother, but not the unwed father, to veto the proposed adoption of her children. The state could not rely upon a statute favoring the mother "in all circumstances." Yet extending Danforth's prohibition of an absolute one-parent veto to prevent consideration of the father's interests here is a strikingly similar and arbitrary discrimination. "The father then has the same rights, privileges, duties and powers as the mother. In the Interest of T.E.T., 603 S.W.2d 793, 796 (1980) (referring to adoption).

The mother's desire to abort may be matched by an even stronger paternal desire for a child. Assumptions simply have no place here. Some fathers, like this one, so want their children that they are willing to take on all parental responsibilities. The Rights of the Father, Notre Dame Lawyer 50:483, 491-92 (1975).

The proper goal must not be to give women a better status within the traditional stereotype, but to shatter the stereotype. Id. at 495. The "womens rights" cases were not merely victories for women, but for individuals whose rights should not be a function of sex. Fathers have too often been

victimized by sexism. Ironically it often comes from the women's movement. In this case, as Judge Young observed in chambers, the father's civil liberties are being overcome by the American Civil Liberties Union, and in similar cases "Planned Parenthood" has rejected its namesake in favor of planned motherhood.

In thousands of ways, in law, in social mores, employment pattern, and psychological health, males are victims, along with women, of a system that arbitrarily assigns roles on the basis of sex . . . [M]any people now see the issue as one of a more reasonable and humane allocation of social roles without regard to sex rather than one as simply involving women's rights.

Kanowitz, The Male Stake in Women's Liberation, Calif. W. L. Rev. 424, 427 (1972).

It appears many assume that because the woman bears the child physically, her interests must always have the greater weight. The father is, therefore, automatically and categorically disadvantaged by natural evolution. The automatic assumption the woman has the stronger interest is a gender based distinction. Hafen, B., The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 496-501 (1983). Yet in other categories where physical distinctions arise from nature, courts are skeptical to uphold distinctions based thereon. Courts apply very strict scrutiny to distinctions based upon sex, race and handicaps.

Utah disapproves of sex based classifications as a matter of public policy. The Utah Constitution provides, "Both male and female citizens of this State shall enjoy equally all

civil, political and religious rights and privileges." Art. IV § 1. Under corresponding federal laws provision a former law prescribing a lower age of majority for females than for males was discriminatory and denied equal protection under the laws. Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). And a preference for mothers over fathers in custody matters was held to violate that constitutional provision. Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

And state statute provides:

It is hereby declared that the practice of discrimination on the basis of . . . sex . . . in enterprises regulated by the state endangers the health, safety and general welfare of this state and its inhabitants; and that such discrimination . . . violates the public policy of this state. It is the purpose of [the Civil Rights Act] to assure all citizens full and equal availability of all goods, services and facilities offered by . . . enterprises regulated by the state without discrimination because of . . . sex . . . . This act shall be liberally construed with a view to promote the policy and purpose of the act and to promote justice. . . .

§ 13-7-1, UCA 1953. See also, §§ 34-35-1 to 34-35-8, UCA 1953 (Antidiscrimination Act). How can a court, consistent with the above act, deny all fathers procreative rights given to all mothers?

#### **V. The mother's theory would frustrate a purpose of marriage.**

In Scheinberg v. Smith, 550 F.Supp. 1112 (1982) a federal district court ruled that a father's interest would not be permanently harmed, by abortion since it was unlikely his wife would be rendered infertile by abortion. Based on that, the court struck down a statute requiring notification of the husband



On appeal the Court of Appeals reversed, Scheinberg v. Smith, 659 F.2d 476 (1981), stating:

If either partner is to enjoy one of the primary purposes of marriage, the bringing forth and nurturing of children . . . , each partner must cooperate in matters of childbirth.

659 F.2d at 485. The court observed that

[h]er husband has legally committed himself to a contractual relationship that prohibits the extra-marital creation of children. If his aspirations include a desire for children, it is a small concession for him to have the right to know that his wife is considering an abortion. The marital relationship is the only legitimate vehicle the husband presently has for realizing his procreative rights. The husband's ability to procreate, moreover, is entitled to constitutional protection. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The state, therefore, has a compelling interest in requiring a wife to inform her husband when she is contemplating termination of her pregnancy.

659 F.2d at 485.

The court concluded that "[h]aving children is a major purpose of the institution of marriage. The state's interest in maintaining the integrity of this component of marriage is compelling." 659 F.2d at 486-87.

Consideration of the words of a prominent local family scholar help illustrate the strong expectation a father has in his children:

Men and women in most cultures have long viewed their offspring as somehow being an extension of themselves. . . . The bearing and raising of children has probably brought people into contact with some sense of the Infinite, the mysteries of the universe, or Nature--however one may express it--more than any other human experience. Thus, it is not surprising that common law judges refer to parental interests as 'sacred,' natural,' or fundamental' rights. . . .

Hafen, B., Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights," 1976 B.Y.U.L.Rev. 605, 628 (footnotes omitted).

In fact, "the right of the parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court." People ex rel. Portnoy v. Strasser, 303 NY 539, 542, 104 NE2d 895, 896 (1952). Utah recognizes the preeminence of this "natural right". In re J.P., 648 P.2d 1364 (Utah 1982); State in re Jennings, 20 Utah 2d 50, 52; 432 P.2d 879, 880 (1967).

The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.  
Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972).

The parental right "transcends all property and economic rights." J.P., 648 P.2d at 1373. "Any invasion of the sanctity of the family, even with the loftiest motives, unavoidably threatens" the cherished values and traditions of our democratic society. Id. at 1376. "[I]t is proper to take alarm at the first experiment on our liberties." Madison, J., Memorial and Remonstrance Against Religious Assessment, 8 The Papers of James Madison 298, 300 (Rutland & Rachal ed. 1973).

The understandable frustration of a man in the father's position is well illustrated by the following:

By legislating against procreation outside the marriage relationship, the state has the power to make a man totally dependent upon his wife for legitimate offspring. Since the woman by repeatedly having abortions prevents a man from

procreating offspring within the marriage relationship, an infringement of his fundamental right to a family has occurred. Poe v. Gernstein, 517 F.2d 787, 790 (1975), citing Skinner v. Oklahoma, 316 U.S. 535, 541.

#### **VI. Fathers are entitled to due process, not a deaf ear.**

If a regulation of abortion is found not to impinge on a woman's decision to have an early abortion the state need show only a rational relationship to a legitimate purpose. Charles v. Carey, 627 F.2d 772 (C.A. Ill. 1980). A regulation that does unduly burden the abortion decision is not always prohibited, but merely must be justified by compelling state interests. Wynn v. Carey, 599 F.2d 193 (C.A. Ill. 1979).

As noted in the immediately preceding section, protection of the rights of a husband and father to be involved in abortion decisions may present a compelling state interest. Scheinberg v. Smith, 659 F.2d 476, 485 (1981).

Similarly, the liberty interest of the father is not absolutely protected against deprivation, only against deprivation without due process. Fathers' Rights, Cinn. L. Rev. 42:460 (1973). Like the Fourteenth Amendment to the Federal Constitution, Utah's Constitution provides that no "life, liberty or property" may be denied without "due process of law." Art. I § 7. The balancing suggested provides both parties their due process rights. See also, Art. I § 11, providing that for every injury the courts shall always be open and provide a remedy.

Quillon v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 stressed the necessity of notice and an opportunity for hearing before losing rights to his child in adoption. Substantial protections of that sort are provided for termination of parental rights in § 78-3a-48, UCA 1953, and related provisions. Only clear and convincing evidence will suffice. In re M.A.V., 736 P.2d 1031 (Utah 1987).

#### VII. Utah restricts abortion as a public policy.

As indicated previously, in this case the father's and husband's interests combine with the interest of the state in preventing abortion where possible. In addition to the requirement the doctor notify the husband of a married woman of her abortive intent, § 76-7-304 UCA 1953, the following are examples of restrictions and policy statements on point:

A. Abortion is prohibited on viable fetuses, unless necessary to preserve the life and health of the mother. § 76-7-302 UCA 1953. And even then the procedure used must be that which will give the unborn child the best chance of survival. § 76-7-307 UCA 1953. The physician must employ all his medical skills to save the child if it has "any reasonable possibility of survival outside of the mother's womb." § 76-7-308 UCA 1953.

B. Abortion procedures may not be designed to kill or injure the unborn child unless necessary for the mother's life or health. § 76-7-307 UCA 1953.

C. The state's declared policy is to "encourage all persons to respect the right to life of all others, regardless of

age, development, condition or dependency, including all handicapped persons and all unborn persons." § 78-11-23 UCA 1953. Note that unborn humans are "persons" under Utah law. Id. See also §§ 78-11-24 and 25 UCA 1953.

D. Criminal Homicide includes killing an unborn child. "A person commits criminal homicide if he . . . causes the death of another human being, including an unborn child [except for legal abortions]." § 76-5-201(1) UCA 1953.

E. Utah favors strengthening, not destroying, familial relationships. "It is the policy of the state of Utah to strengthen the family life foundation of our society and . . . to protect the rights of children." § 30-3-11.1, UCA 1953.

#### **VIII. Mootness should not prevent this appeal.**

The abortion in this case was within minutes after this Court issued its temporary restraining order, but before it was served upon the mother. Right after the lower court's similar order was dissolved, and knowing the father was seeking an immediate interlocutory appeal, counsel for the mother was quoted as saying his client would secure an abortion as soon as possible. Mitchell, Associated Press feed AP-NY-03-19-88 161SEST. See also, Thompson, Utah man will appeal abortion decision, Deseret News, Mon., May 9, 1988, p. B1. The close timing in this and other cases illustrates the need for guidance from this court to avoid loss of rights without due process.

As a British legal scholar pointed out, "Babies, like the tide, waiteth for no man, and certainly will not wait until a decision is reached." Kennedy, Husband Denied a Say in Abortion

Since the pregnancy has terminated, this case would ordinarily be moot. . . . We think because the subject that will likely arise again and again, the public interest will be best served if we address the merits of the matter, thus affording some guidance to litigants and trial courts. . . .

Coleman v. Coleman, 471 A.2d 1115, 1117 (Md.App. 1984).

Where the technically moot matter is of 'wide concern, affects the public interest, is likely to recur in a similar manner, and , because of the brief time any one person is affected, would otherwise likely escape judicial review. . .', it is justiciable. In re J.P., 648 P.2d 1364, 1371 (Utah 1982).

IX. This is a private action to enforce private rights, not 'state action', so constitutional abortion cases do not apply.

A. The United States Constitution limits the actions of government.

Because the United States Constitution was created to limit and regulate the exercise of governmental power by the states and federal government, the application of federal constitutional law in cases at law depends on whether the exercise of governmental power is at issue.

All of the cases the mother believes give her an unfettered right to an abortion notwithstanding the wishes of her husband, the father of the child, involve actions of states through legislative enactments. Griswald v. Connecticut, 381 US 479, 14 L.Ed.2d 510, 85 S.Ct.1678 (1965) (State statute forbidding distribution of contraceptive materials to married couples found unconstitutional); Eisenstadt v. Baird, 405 U.S. 438,

31 L.Ed 349, 92 S.Ct. 1029 (1972) (State statute forbidding sale of contraceptive materials to unmarried persons found unconstitutional); Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S. Ct.705, rehearing denied 410 U.S. 959, 35 L.Ed.2d 694, 93 S.Ct.1409 (1973) (State abortion statute found unconstitutional); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (State statute requiring husband's consent for wife to have abortion ruled unconstitutional); Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1975) aff'd 535 F2d 1219 (10th Cir. 1975); (State statute requiring husband's consent for wife to have abortion invalidated).

B. This father is a private actor, not a governmental entity.

The father was not trying to enforce a state statute when he sought to enjoin his wife's abortion. He sought to utilize the court system as a neutral forum to settle a private dispute with his wife concerning the disposition of their unborn child. He requested and was denied the opportunity to put on evidence as to whether his claim to have the child born alive should prevail over any right of his wife to have the child aborted. Instead the court ruled against him as a matter of law, not based on individualized facts.

The father has not been assisted by any governmental entity in bringing this action. Neither has he brought this action at the behest of any governmental entity. His motives were entirely personal; namely, his natural parental concern over the well being of his child.

To counter the father's claim of private action, the mother cites the old case of Shelley v. Kraemer, 334 US 1 (1948), which stated that under its facts the enlistment of the courts can turn a private action into government action because the judiciary is a branch of government. But Shelley actually reaffirms that the only action inhibited by constitutional rights is "such action as may fairly be said to be that of the States." 334 U.S. at 13.

C. Shelley is factually unique, and the 'judicial action as state action' rule can not be universally applied.

Under a very broad reading of Shelley v. Kraemer, all litigation becomes state action on the part of the plaintiff. 334 U.S. 1 (1948). Such a result should give cause to ask whether that aspect of Shelley should not be examined and perhaps confined to the facts of the case.

Shelley involved enforcement of covenants restricting the sale of property on the basis of race. The contract involved flew in the face of the fundamental right to be free of racial discrimination. It also was contrary to the public policy favoring free alienability of realty. On the other side was the enforcement of private contracts. While the law favors the enforcement of contracts validly made, courts of this state can refuse enforcement on the grounds that the contract would violate public policy. Frailey v. McGarry, 211 P.2d 840, 847 (Utah 1949). Shelley v. Kraemer thus becomes a case of a fundamental right opposing an interest that is valid only so long as it does



not violate public policy. The case should be limited to its public policy significance.

D. Fathers' constitutionally protected rights in their children constitute powerful public policy.

As discussed above in Section II, fathers have constitutional rights to their children. On both a federal and a Utah level, these rights are supported by the most basic, strong public policy. Quillon v. Walcott, 434 U.S. 246 (1978); In re J.P., 648 P.2d 1364 (Utah 1982).

E. Use of Shelley v. Kraemer to close courts to a case of opposing fundamental rights itself violates Shelley. The question is whether Shelley v. Kraemer, which involved a fundamental interest on the one hand and a covenant against public policy on the other hand, should govern this case, which involves fundamental rights on both sides. The refusal of the trial court to hear evidence and weigh the interests of the father denied him due process. A refusal of the court to act becomes state action, violative of Shelley v. Kraemer. The result is a hopeless tangle unless we back away from Shelley in cases involving constitutional interests on both sides.

The High Court itself has wisely backed away from Shelley v. Kraemer. In the "Baconsfield" controversy, a will left land to the city of Macon, Georgia to be used as a park for whites only. In Evans v. Newton, 382 US 296 (1966), the Supreme Court held that the city could not constitutionally maintain the park

as segregated. The state courts then determined that the land should revert to the heirs of the testator rather than be used contrary to the provisions of the will. The state courts were clearly enforcing a discriminatory intent. The case was appealed to the U.S. Supreme Court, which, in Evans v. Abbney, 396 U.S. 435 (1970), declined to disturb the state court holding even though it was enforcing a will provision that was clearly racist. Such judicial enforcement was not found to involve state action. The case did not even involve a fundamental interest on both sides.

F. The interests of society demand that a forum be available to resolve disputes between parties.

Our system of law calls for the settlement of disputes in an ordered courtroom rather than by resort to self help. No reasonable person could deny that a father has an interest in his unborn child. But if Shelley v. Kraemer blocks a father's entry into a courthouse to weigh his interest against the interest of his wife, what options are then available to him? Are the interests of society met by locking fathers of unborn children out of courtroom purely on the basis of gender? The Utah Constitution provides for the courts to be open to every person, and require a remedy for every injury. Art. I, § 11.

G. Cases of this sort involving unborn children are best handled within the context of divorce court.

The Utah Code empowers the courts of this state in divorce actions to make equitable orders relating to children and the parties. § 30-3-5, UCA 1953. Because the father is private party asserting a personal right, there was no cause to involve constitutional cases in making a decision. Absent controlling cases or statute, the court should have balanced the interests of the parties and made a determination.

The District Court, which is Utah's family court (§ 30-3-11.1 et. seq.) is an appropriate forum for such disputes, and has abundant experience in resolving highly charged domestic conflicts.

#### **VIII. Court support for Roe v. Wade is eroding.**

Since Roe v. Wade was decided in 1973 by a 7-2 margin, its support on the Court has declined. The case was reaffirmed in 1983 in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), by a 6-3 margin. The tally was 5-4 in Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986). Since then Justice Powell, one of the Thornburgh majority, has left the Court.

Griswald v. Connecticut, the case from which the privacy rights in Roe originated, has also come under fire. In a 1986 5-4 decision, the court said "[T]he court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers v. Hardwick, 106 S.Ct 2841 (1986). See Reidinger, Will Roe v. Wade Be Overturned,

A.B.A.J., July 1, 1988, at 66. Justice Oakes of our Supreme Court has pointed out that the Roe discovery of "rights" comes not from the Constitution's language, but from elsewhere. In re J.P., 648 P.2d 1364, 1375 (Utah 1982). Their source seems to be, according to Justice Douglas, "zones" and "penumbras" that "emanate" from various specific protections in the Bill of Rights. Griswald v. Connecticut, 381 U.S. 479 (1965).

Griswald's right to privacy was held not to extend to private homosexual conduct. Bowers v. Hardwick, 106 S.Ct. 2841 (1986).

Recently, Justice Blackmun, the author of the Roe v. Wade opinion, said to a law school audience in Little Rock, Arkansas recently, "Will Roe v. Wade go down the drain? I think there's a very distinct possibility that it will-- this term." Mauro, Blackmun sees switch on abortion, USA Today, Sept. 14, 1988, p. A1. As a member of the Court, and as author of the opinion, Mr. Justice Blackmun's comment certainly provides insight as to the erosion of the Roe majority.

One of Roe's weaknesses is its fatal dependence on 1973 medical technology, on which it based its arbitrary "trimester" system. Fundamental constitutional questions should not rise or fall with mankind's transitory knowledge. That has led Justice O'Connor to comment that Roe's mechanism for weighing the competing interests of mother and state is "completely unworkable", and that Roe is "clearly on a collision course with itself." Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), O'Connor, J. dissenting. The collision is the result of improvements in medicine that make abortions safer but also

make it possible to save fetal lives at ever younger ages. The Justice noted that first-trimester viability may be possible in the not-distant future. Id.

Roe used "viability" to determine when unborn children may be protected, suggesting 28 weeks as the dividing line. As indicated above, Utah physicians are required to try to preserve lives of premature infants, including the victims of abortion. See §§ 76-7-302, 76-7-307 (must employ medical skills to save the child with reasonable possibility of survival), 76-7-308 and 76-7-307 (abortion procedures may not be designed to kill or injure the unborn child), UCA 1953. A recent Readers' Digest article chronicled the successful efforts to save an infant born at 22 weeks, still solidly within the second trimester. The boy who would, under the definition of many in the "pro-choice" movement, be a nonhuman fetus for weeks after his live birth, is now a happy five year old with only an eye disorder. A two year old study showed about 20 percent of infants born at the 24th week of pregnancy survive. 25 Clinical Pediatrics 391 (1986).

## **IX. CONCLUSION**

Society is finally recognizing that a father's role in his children goes much deeper than finances. To hold that case law disallows consideration of the father's interest when faced with the prospect of destruction of his unborn would be an unacceptable throw-back to times when children were a man's mere chattel. A close look at all the abortion cases reveals this is a first impression case without controlling precedent.

The Court should recognize the fundamental constitutional rights of **both** parents in their children, and at least grant the father notice and an opportunity to be heard and have his interests weighed against those of his co-equal partner in procreation.

The Roe line of cases have unfortunately not yet expressly recognize the interests the father has in his unborn child. It is high time that recognition began, and this case provides the vehicle.

Appellant requests that the Court define fathers' rights as guidance to future courts, litigants and parents.

Respectfully so requested this seventh day of October,  
1988.



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

CERTIFICATE OF SERVICE

I hereby certify that on the seventh day of October, 1988,  
I caused to be hand delivered or mailed, postage prepaid, four  
true and correct copies of the foregoing to:

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Mitchell R. Barker

**ADDENDA**

CONSTITUTIONAL PROVISIONS

AND

SECTIONS FOR UTAH CODE



CONSTITUTION OF THE UNITED STATES      AMEND. XII

**AMENDMENT VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

**AMENDMENT VII**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**AMENDMENT VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT IX**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**AMENDMENT X**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first ten Amendments were proposed by the first Congress and were ratified as follows: New Jersey, Nov. 20, 1789; Maryland, Dec. 19, 1789; North Carolina, Dec. 22, 1789; South Carolina, Jan. 19, 1790; New Hampshire, Jan. 25, 1790; Delaware, Jan. 28, 1790; Pennsylvania, Mar. 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, Nov. 3, 1791; Virginia, Dec. 15, 1791. Connecticut, Georgia and Massachusetts ratified them on April 19, 1939, March 18, 1939 and March 2, 1939, respectively.

**AMENDMENT XI**

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

**History:** Proposed by Congress on September 5, 1794; declared to have been ratified by the legislatures of three-fourths of all the states on January 8, 1798.

**AMENDMENT XII**

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an

**AMENDMENT XIV**

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.**

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

**Section 5.**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ART. I, § 7

## CONSTITUTION OF UTAH

Gun control laws, validity and construction of, 28 A. L. R. 3d 845.

### Law Reviews.

The Constitutional Right to Keep and

Bear Arms, Lucilius A. Emery, 28 Harv. L. Rev. 473.

Restrictions on the Right To Bear Arms—State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905.

### Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

#### Comparable Provision.

Montana Const., Art. III, § 27.

#### Cross-Reference.

Eminent domain generally, 78-34-1 et seq.

#### In general.

"Due process of law" comes to us from the Great Charter and is synonymous with "law of the land." It means that a party shall have his day in court—trial. *Jensen v. Union Pac. Ry. Co.*, 6 U. 253, 21 P. 994, 4 L. R. A. 724.

Due process of law is not necessarily judicial process. *People v. Hasbrouck*, 11 U. 291, 39 P. 918.

Judgment against defendant, not served with process and not appearing either in person or by attorney, would not be due process of law. *Blyth & Fargo Co. v. Swenson*, 15 U. 345, 49 P. 1027.

It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment. *Parry v. Bonneville Irr. Dist.*, 71 U. 202, 263 P. 751.

"Due process of law" requires that, before one can be bound by a judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice. *Naisbitt v. Herrick*, 76 U. 575, 290 P. 950.

Due process of law requires that notice be given to the persons whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

The phrase "due process of law" apparently originated with Lord Coke, who defined the terms. Many attempts have been made to further define due process of law, but all of them resolve into the thought that a party shall have his day in court. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In depriving a person of life or liberty, the essentials of due process are: (a) the existence of a competent person,

body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. In the absence of specific provisions to the contrary, due process does not require that any or all of these requirements must be in writing or in any particular form. In the interests of orderly procedure and certainty as to its proceedings and action taken, any legally constituted body or agency should as far as practical have written records of all proceedings before it, except where otherwise provided by law. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

In the trial of criminal cases the statutes prescribe certain rules of procedure, which must be substantially complied with to keep the proceedings within the due processes of the law. A somewhat different set of rules is prescribed in civil cases and in special proceedings. Some rules, affecting all types, are not found in the statutes, but in that great basic body of the law commonly known as the decisions or rules of the courts. But all these methods and means provided for the protection and enforcement of human rights have the same basic requirements—that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

While normally we think of "due process of law" as requiring judicial action, yet "due process" is not necessarily judicial action. *Christiansen v. Harris*, 109 U. 1, 163 P. 2d 314.

## ART. I, § 11

## CONSTITUTION OF UTAH

Deficiency judgment, right to jury trial of issues as to, 112 A. L. R. 1492.

Driving while intoxicated or similar offense, right to trial by jury in criminal prosecution for, 16 A. L. R. 3d 1373.

Fingerprint, palm print, or bare footprint evidence as violating right to jury trial, 28 A. L. R. 2d 1141.

Garnishment; issues in garnishment as triable to court or to jury, 19 A. L. R. 3d 1393.

Indoctrination by court of persons summoned for jury service as violation of right to jury trial, 89 A. L. R. 2d 215.

Interlocutory ruling of one judge on right to jury trial as binding on another judge in same case, 132 A. L. R. 68.

Juvenile court delinquency proceedings, right to jury trial in, 100 A. L. R. 2d 1241.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A. L. R. 2d 780.

Provisions for determining custody or commitment of juvenile delinquents without jury trial as denial of due process, 100 A. L. R. 2d 1241.

Removal of public officer, right to jury trial in proceedings for, 3 A. L. R. 232, 8 A. L. R. 1476.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A. L. R. 3d 1321.

Right to consent to trial of criminal case before twelve jurors, 70 A. L. R. 279, 105 A. L. R. 1114.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A. L. R. 383.

Right to jury trial in action under Fair Labor Standards Act, 174 A. L. R. 421.

Right to jury trial in disbarment proceedings, 107 A. L. R. 692.

Right to jury trial in proceeding to determine insanity or incompetency, 33 A. L. R. 2d 1145.

Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 A. L. R. 9.

Seizure of property alleged to be illegally used, right to jury trial, 17 A. L. R. 568, 50 A. L. R. 97.

Substitution of judge: right to jury trial as violated by substitution in criminal case, 83 A. L. R. 2d 1032.

Validity of statute allowing for separation of jury, 34 A. L. R. 1128, 79 A. L. R. 821, 21 A. L. R. 2d 1088.

Waiver of jury trial in criminal cases and effect thereof on jurisdiction of court, 48 A. L. R. 767, 58 A. L. R. 1031.

### Law Reviews.

The Supreme Court: 1969 Term, Michael E. Tigar, 84 Harv. L. Rev. 1, 165.

New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process, George L. Jurow, 84 Harv. L. Rev. 567.

Jury Trial in Civil Cases, Glen W. Clark, 10 Mont. L. Rev. 38.

Right to Trial by Jury in State Court Prosecutions, 22 S. L. J. 875.

Right to Civil Jury Trial in Utah: Constitution and Statute, Ronan E. Degnan, 8 Utah L. Rev. 97.

Due Process Standard of Jury Impartiality Precludes Death-Qualification of Jurors in Capital Cases, 1969 Utah L. Rev. 154.

No-Fault Automobile Insurance in Utah—State Constitutional Issues, 1970 Utah L. Rev. 248.

## Sec. 11. [Courts open—Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

### Comparable Provision.

Montana Const., Art. III, § 6.

### Actions by court.

Court of equity has jurisdiction to open probate proceeding and to proceed against bond of administratrix where she has practiced extrinsic fraud on the court. *Weyant v. Utah Savings & Trust Co.*, 54 U. 181, 182 P. 189, 9 A. L. R. 1119.

### Actions by state.

This section did not alter the law with respect to certain rights which are vested in the state, which alone can exercise sovereign powers; therefore, it does not prevent the state from reserving to itself the sole right to bring actions for the dissolution of building and loan associations. *Union Savings & Investment Co. v. District Court of Salt Lake County*, 44 U. 397, 140 P. 221, Ann. Cas. 1917A, 821.

### 13-7-1. Policy and purposes of act.

It is hereby declared that the practice of discrimination on the basis of race, color, sex, religion, ancestry, or national origin in business establishments or places of public accommodation or in enterprises regulated by the state endangers the health, safety, and general welfare of this state and its inhabitants; and that such discrimination in business establishments or places of public accommodation or in enterprises regulated by the state, violates the public policy of this state. It is the purpose of this act to assure all citizens full and equal availability of all goods, services and facilities offered by business establishments and places of public accommodation and enterprises regulated by the state without discrimination because of race, color, sex, religion, ancestry, or national origin. The rules of common law that statutes in derogation thereof shall be strictly construed has no application to this act. This act shall be liberally construed with a view to promote the policy and purposes of the act and to promote justice. The remedies provided herein shall not be exclusive but shall be in addition to any other remedies available at law or equity.

**History:** L. 1965, ch. 174, § 1; 1973, ch. 18, § 1.

**Meaning of "this act".** — The term "this act" refers to Laws 1965, ch. 174, which enacted this section and §§ 13-7-2 to 13-7-4.

**Cross-References.** — Utah Anti-Discrimination Act, §§ 34-35-1 to 34-35-8.

#### COLLATERAL REFERENCES

**Utah Law Review.** — Note: State Legislative Response to the Federal Civil Rights Act: A Proposal, 9 Utah L. Rev. 434.

**Am. Jur. 2d.** — 15 Am. Jur. 2d Civil Rights § 16 et seq.

**C.J.S.** — 14 C.J.S. Civil Rights §§ 6-11, 14-21.

**A.L.R.** — Actionability under state statutes of discrimination because of complaining party's association with persons of different race, color, or the like, 35 A.L.R.3d 859.

Discrimination on basis of illegitimacy as denial of constitutional rights, 38 A.L.R.3d 613.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Recovery of damages for emotional distress resulting from racial, ethnic, or religious abuse or discrimination, 40 A.L.R.3d 1290.

Construction and operation of "equal opportunity clause" requiring pledge against racial discrimination in hiring under construction contract, 44 A.L.R.3d 1283.

Racial or religious discrimination in furnishing of public utilities, services, or facilities, 53 A.L.R.3d 1027.

Validity in application of provisions governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 A.L.R.3d 641.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 A.L.R.3d 944.

Trailer park as place of public accommodation within meaning of state civil rights statutes, 70 A.L.R.3d 1142.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, 85 A.L.R.3d 351.

State law prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 A.L.R.3d 7.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 A.L.R.3d 497.

Identification of job seeker by race, religion, national origin, sex, or age, in "situation wanted" employment advertising as violation of state civil rights laws, 99 A.L.R.3d 154.

On-the-job sexual harassment as violation of state civil rights law, 18 A.L.R.4th 328.

What constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status, 33 A.L.R.4th 964.

Race as factor in adoption proceedings, 34 A.L.R.4th 167.

Exclusion or expulsion from association or club as violation of state civil rights act, 38 A.L.R.4th 628.

## DIVORCE

30-3-1

- 30-3-5. Disposition of property - Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony.
- 30-3-6. Interlocutory decree.
- 30-3-7. When decree becomes absolute.
- 30-3-8. Remarriage — When unlawful.
- 30-3-9. Repealed.
- 30-3-10. Custody of children.
- 30-3-11. Repealed.
- 30-3-11.1. Family Court Act — Purpose.
- 30-3-11.2. Family Court Act — Appointment of counsel for child.
- 30-3-12. Family Court Act — Courts to exercise family counseling powers.
- 30-3-13. Repealed.
- 30-3-13.1. Family Court Act — Establishment of family court division of district court.
- 30-3-14. Repealed.
- 30-3-14.1. Family Court Act — Designation of judges — Terms.
- 30-3-15. Repealed.
- 30-3-15.1. Family Court Act — Appointment of domestic relations counselors, family court commissioner, and assistants and clerks.
- 30-3-15.2. Family Court Act — Domestic relations counselors — Powers.
- 30-3-15.3. Family Court Act — Commissioners — Powers.
- 30-3-15.4. Family Court Act — Salaries and expenses.
- 30-3-16. Repealed.
- 30-3-16.1. Family Court Act — Jurisdiction of family court division — Powers.
- 30-3-16.2. Family Court Act — Petition for conciliation.
- 30-3-16.3. Family Court Act — Contents of petition.
- 30-3-16.4. Family Court Act — Procedure upon filing of petition.
- 30-3-16.5. Family Court Act — Fees.
- 30-3-16.6. Family Court Act — Information not available to public.
- 30-3-16.7. Family Court Act — Effect of petition — Pendency of action.
- 30-3-17. Family Court Act — Power and jurisdiction of judge.
- 30-3-17.1. Family Court Act — Proceedings deemed confidential — Written evaluation by counselor.
- 30-3-18. Waiting period for hearing after filing for divorce — Use of counseling service not to be construed as condonation.
- 30-3-19 to 30-3-22. Repealed.

**30-3-1. Procedure — Residence — Grounds.** Proceedings in divorce shall be commenced and conducted in the manner provided by law for proceedings in civil causes, except as hereinafter provided, and the court may decree a dissolution of the marriage contract between the plaintiff and defendant in all cases where the plaintiff or defendant shall have been an actual and bona fide resident of this state and of the county where the action is brought or as to members of the armed forces of the United States who are not legal residents of this state, where the plaintiff shall have been stationed in this state under military orders, for three months next prior to the commencement of the action, for any of the following causes:

- (1) Impotency of the defendant at the time of marriage.
- (2) Adultery committed by the defendant subsequent to marriage.
- (3) Willful desertion of the plaintiff by the defendant for more than one year.
- (4) Willful neglect of the defendant to provide for the plaintiff the common necessities of life.

- (5) Habitual drunkenness of the defendant.
- (6) Conviction of the defendant for felony.
- (7) Cruel treatment of the plaintiff by the defendant to the extent of causing bodily injury or great mental distress to the plaintiff.
- (8) When the husband and wife have lived separate and apart under a decree of separate maintenance of any state for three consecutive years without cohabitation; provided that a decree of divorce granted upon this ground shall not affect the liability of either party under any provision for separate support and maintenance, if any, theretofore granted.
- (9) Permanent insanity of the defendant; provided, that no divorce shall be granted on the grounds of insanity unless, (a) the defendant shall have been duly and regularly adjudged to be insane by the legally constituted authorities of this or some other state prior to the commencement of the action, and unless, (b) it shall appear to the satisfaction of the court by the testimony of competent witnesses that the insanity of the defendant is incurable. In all such actions the court shall appoint for the defendant a guardian ad litem, who shall take such measures as may be necessary and proper to protect the interests of the defendant, and a copy of the summons and complaint must be duly served on the defendant in person, or by publication, as provided for by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county in which such action is prosecuted. It shall be the duty of such county attorney to make an investigation into the merits of the case, and, if the defendant resides out of this state, to have a commission issued to take such depositions as are necessary for that purpose, to attend the court upon the trial of the cause and make such defense therein as may be just and proper to protect the rights of the defendant and the interests of the state. In all such actions the court and judge thereof shall have all powers relative to the payment of alimony, the distribution of property and the custody and maintenance of minor children which such courts and judges may possess in other actions for divorce. Either the plaintiff or defendant shall, if the defendant resides in this state, upon proper notice, be entitled to have the defendant brought into the court upon the trial, or to have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant, and for such purpose either party may have process from the court to enter any asylum or institution where such defendant may be confined. The costs of court in such action shall be assessed or apportioned by the court according to the equities of the case.

**History:** R.S. 1898, § 1208; L. 1903, ch. 43, § 1; C.L. 1907, § 1208; C.L. 1917, § 2995; L. 1929, ch. 93, § 1; R.S. 1933 & C. 1943, 40-3-1; L. 1943, ch. 46, § 1; 1955, ch. 45, § 1; 1965, ch. 57, § 1; 1969, ch. 72, § 1.

**Compiler's Notes.**

Analogous former statutes, 2 Comp. Laws 1888, § 2602.

The 1903 amendment added subsec. (9).

The 1929 amendment inserted requirement of one year's residence in the state and three months' residence in the county.

Power of court to vacate decree of divorce or separation upon request of both parties, 3 ALR 3d 1216.

Prayer to impress trust upon property or otherwise settle property rights, propriety of inclusion in bill for divorce or annulment, 93 ALR 327.

Standing of strangers to divorce proceeding to attack validity of divorce decree, 12 ALR 2d 717.

Sufficiency of allegation of adultery in suit for divorce, 2 ALR 1621.

Vacating or setting aside divorce decree after remarriage of party, 17 ALR 4th 1153.

**30-3-5. Disposition of property - Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony.** (1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio, in which case alimony shall resume, providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined.

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

**History:** R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1.

**Compiler's Notes.**

Analogous former statutes, Comp. Laws 1876, § 1155; 2 Comp. Laws 1888, § 2606.

The 1969 amendment deleted a provision that children ten years of age and of sound mind have the privilege of selecting the parent to which they will attach themselves; and substituted the fourth sentence of subsec. (1) for "Such subsequent changes or new orders

may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

The 1975 amendment added the last sentence of subsec. (1).

The 1979 amendment added subsecs. (2) and (3).

The 1984 amendment substituted "include in it" for "make" in the first sentence of subsec. (1); inserted the second and third sentences in subsec. (1); inserted "and health and dental care" in the fourth sentence of subsec. (1); and made minor changes in phraseology and punctuation.



in, or pendency of, proceedings in habeas corpus for custody of child, 110 ALR 745.

Jurisdiction of trial or appellate court in respect of custody of children pending appeal from order or decree in divorce suit, 163 ALR 1319.

Jurisdiction to award custody of child domiciled in state but physically outside of it, 9 ALR 2d 434.

Jurisdiction to award custody of child having legal domicile in another state, 4 ALR 2d 7.

Maternal preference rule or presumption in child custody cases, modern status, 70 ALR 3d 262.

Mental health of contesting parent as factor in award of child custody, 74 ALR 2d 1073.

Mother's right to custody of child as affected by father's contract with third person, 38 ALR 222.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 ALR 4th 864.

Nonresidence as affecting one's right to custody of child, 15 ALR 2d 432.

Order in divorce or separation proceeding concerning removal of child from jurisdiction, and award of custody to nonresident, 154 ALR 552.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR 3d 605.

Physical disability or handicap of parent as factor in custody award or proceedings, 3 ALR 4th 1044.

Power of court to modify the provisions of its decree respecting custody of child as affected by absence of parent or child from its territorial jurisdiction, 70 ALR 526.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR 3d 1096.

Private interview with child in determining custody, propriety of court conducting, 99 ALR 2d 954.

Psychiatric or mental examination for party seeking to obtain or retain custody of child, right to require, 99 ALR 3d 268.

Race as factor in custody award or proceedings, 10 ALR 4th 796.

Religion as factor in child custody and visitation cases, 22 ALR 4th 971.

Remarriage as ground for modification of divorce as to custody of child, 43 ALR 2d 363.

Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody, 171 ALR 1405.

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party, 42 ALR 2d 1115.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR 3d 1074.

Sexual relations of custodial parent with third person as justifying modification of child custody order, 100 ALR 3d 625.

Social worker's expert testimony, admissibility on custody issue, 1 ALR 4th 837.

"Split," "divided," or "alternate" custody of children, 92 ALR 2d 695.

Stepparent, award where contest between natural parent and stepparent, 10 ALR 4th 767.

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa, 95 ALR 2d 118.

Welfare agency: consideration of investigation by welfare agency or the like in modifying award as between parents of custody of children, 35 ALR 2d 629.

#### Law Reviews.

Modification of Child Custody Predicated on Cohabitation of the Custodial Parent: *Jarrett v. Jarrett*, 1981 B.Y.U. L. Rev. 169.

### 30-3-11. Repealed.

#### Repeal.

Section 30-3-11 (L. 1957, ch. 55, § 2), relating to legislative policy and purposes, was repealed by Laws 1961, ch. 59, § 2.

**30-3-11.1. Family Court Act — Purpose.** It is the public policy of the state of Utah to strengthen the family life foundation of our society and reduce the social and economic costs to the state resulting from broken homes and to take reasonable measures to preserve marriages, particularly where minor children are involved. The purposes of this act are to protect

the rights of children and to promote the public welfare by preserving and protecting family life and the institution of matrimony by providing the courts with further assistance for family counseling, the reconciliation of spouses and the amicable settlement of domestic and family controversies.

**History:** C. 1953, 30-3-11.1, enacted by L. 1969, ch. 72, § 8.

**Title of Act.**

An act amending Section 30-3-1, Utah Code Annotated 1953, as amended by Chapter 45, Laws of Utah 1955, as amended by Chapter 57, Laws of Utah 1965; Section 30-3-4, Utah Code Annotated 1953, as amended by Chapter 55, Laws of Utah 1957, as amended by Chapter 59, Laws of Utah 1961; Section 30-3-5, Utah Code Annotated 1953; Sections 30-3-6 and 30-3-7, Utah Code Annotated 1953, as amended by Chapter 55, Laws of Utah 1957; Sections 30-3-8 and 30-3-10, Utah Code Annotated 1953; and Sections 30-3-12 and 30-3-17, Utah Code Annotated 1953, as enacted by Chapter 55, Laws of Utah 1957; enacting Sections 30-3-11.1, 30-3-11.2, 30-3-13.1, 30-3-14.1, 30-3-15.1, 30-3-15.2, 30-3-15.3, 30-3-15.4, 30-3-16.1, 30-3-16.2, 30-3-16.3, 30-3-16.4, 30-3-16.5, 30-3-16.6, 30-3-16.7 and 30-3-17.1, Utah Code Annotated 1953, relating to divorce; declaring the public

policy of the state of Utah to be the strengthening of family life by providing the courts with assistance for family counseling, authorizing the establishment of family court divisions in the district courts; providing for conciliation proceedings and marriage counseling services therein; providing for payment of salaries and expenses of family court assistants from county funds; and repealing Section 30-3-9, Utah Code Annotated 1953. — Laws 1969, ch. 72.

**Collateral References.**

Divorce ⇌ 87.5.  
27A CJS Divorce § 103.1.  
24 AmJur 2d 406, Divorce and Separation § 339.

**Law Reviews.**

The Family Court Act, 1970 Utah L. Rev. 106.  
New Approaches of Psychiatry: Implications for Divorce Reform, Brigitte M. Bodenheimer, 1970 Utah L. Rev. 191.

**30-3-11.2. Family Court Act — Appointment of counsel for child.**

If, in any action before any court of this state involving the custody or support of a child, it shall appear in the best interests of the child to have a separate exposition of the issues and personal representation for the child, the court may appoint counsel to represent the child throughout the action, and the attorney's fee for such representation may be taxed as a cost of the action.

**History:** C. 1953, § 30-3-11.2, enacted by L. 1969, ch. 72, § 9.

**30-3-12. Family Court Act — Courts to exercise family counseling powers.** Each district court of the respective judicial districts, while sitting in matters of divorce, annulment, separate maintenance, child custody, alimony and support in connection therewith, child custody in habeas corpus proceedings, and adoptions, shall exercise the family counseling powers conferred by this act.

**History:** C. 1953, 30-3-12, enacted by L. 1957, ch. 55, § 2; L. 1969, ch. 72, § 10.

**Compiler's Notes.**

The 1969 amendment substituted "alimony and support in connection therewith, child custody in habeas corpus proceedings, and adoptions" for "in connection therewith and

child custody in habeas corpus proceedings, alimony, support, and adoptions."

**Title of Act.**

An act amending Sections 30-3-4, 30-3-6 and 30-3-7, Utah Code Annotated 1953, relating to pleadings, findings and procedure in

**34-34-16. Right to bargain collectively not denied.**

Nothing in this chapter shall be construed to deny the right of employees to bargain collectively with their employer by and through labor unions, labor organizations or any other type of associations.

**History:** C. 1953, 34-34-16, enacted by L. 1969, ch. 85, § 158.

**34-34-17. Violation of act a misdemeanor.**

A violation of this act shall constitute a misdemeanor, and each day such unlawful conduct, as defined in this chapter, is in effect or continued shall be deemed a separate offense and shall be punishable as such, as provided in this chapter.

**History:** C. 1953, 34-34-17, enacted by L. 1969, ch. 85, § 159.

**Meaning of "this act".** — See same catch-line in notes following § 34-28-7.

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 48 Am. Jur. 2d Labor and Labor Relations § 20.

**C.J.S.** — 51B C.J.S. Labor Relations § 1003b.

**Key Numbers.** — Labor Relations ⇐ 1051, 1052.

## CHAPTER 35

### ANTIDISCRIMINATION ACT

Section		Section	
34-35-1.	Short title.	34-35-6.	Discriminatory or unfair employment practices — Permitted practices.
34-35-2.	Definitions.	34-35-7.	Repealed.
34-35-3.	Jurisdiction of industrial commission — Creation of antidiscrimination division — Co-ordinator of fair employment practices.	34-35-7.1.	Procedure for aggrieved person to file claim — Investigations — Adjudicative proceedings — Settlement — Reconsideration — Determination.
34-35-4.	Antidiscrimination division — Members — Meetings — Quorum.	34-35-8.	Judicial review — Procedure.
34-35-5.	Antidiscrimination division — Powers and duties.		

**34-35-1. Short title.**

This shall be known and may be cited as the "Utah Anti-Discriminatory Act."

**History:** C. 1953, 34-35-1, enacted by L. 1969, ch. 85, § 160.

**Cross-References.** — Discrimination in

business establishments and places of public accommodation prohibited, civil remedies, §§ 13-7-1 to 13-7-4.

(8) The commission or the charging party may reasonably and fairly amend any charge, and the respondent may amend its answer.

(9) (a) If, upon all the evidence at a hearing, the administrative law judge finds that a respondent has not engaged in a discriminatory or prohibited employment practice, the administrative law judge shall issue an order dismissing the action containing his findings of fact and conclusions of law.

(b) If, the case is dismissed, the administrative law judge may recommend that the respondent be reimbursed for his costs.

(10) The commission may enact rules to govern, expedite, and effectuate these procedures and its own actions that do not violate the provisions of Chapter 46b, Title 63, or this chapter.

(11) The procedures contained in this section and Section 34-35-8 are the exclusive remedy under state law for employment discrimination because of race, color, sex, age, religion, national origin, or handicap.

**History:** C. 1953, 34-35-7.1, enacted by L. 1985, ch. 189, § 4; 1987, ch. 161, § 105.

**Amendment Notes.** — The 1987 amendment, effective January 1, 1988, rewrote Subsections (1), (3), (4) and (5), deleted former Subsections (6), (7), (11) and (12) and redesignated the subsequent subsections accordingly; re-

wrote present Subsection (9); substituted "that do not violate the provisions of Chapter 46b, Title 63, or this chapter" for "subject to the conditions and provisions of this chapter" in present Subsection (10); and made minor changes in phraseology and punctuation.

## NOTES TO DECISIONS

### ANALYSIS

Procedure at hearing.  
Remedies of commission.

#### Procedure at hearing.

It is not improper for the complainant's case to be presented by the complainant personally or by counsel instead of an attorney or agent for the commission. *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

#### Remedies of commission.

Under proper circumstances, payment in lieu of job reinstatement is a permissible affirmative action. *Beehive Medical Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53 (Utah 1978).

## COLLATERAL REFERENCES

**A.L.R.** — Damages recoverable for wrongful discharge of at-will employee, 44 A.L.R.4th 1131.

Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 913.

Reinstatement as remedy for discriminatory discharge or demotion under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 78 A.L.R. Fed. 575.

## 34-35-8. Judicial review — Procedure.

(1) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

## PART 2

### CRIMINAL HOMICIDE

Section		Section	
76-5-201.	Criminal homicide — Elements	76-5-203.	Murder in the second degree.
	— Designations of offenses.	76-5-205.	Manslaughter.
76-5-202.	Murder in the first degree.	76-5-207.	Automobile homicide.

#### 76-5-201. Criminal homicide — Elements — Designations of offenses.

(1) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child. There shall be no cause of action for criminal homicide against a mother or a physician for the death of an unborn child caused by an abortion where the abortion was permitted by law and the required consent was lawfully given.

(2) Criminal homicide is murder in the first and second degree, manslaughter, negligent homicide, or automobile homicide.

**History:** C. 1953, 76-5-201, enacted by L. 1973, ch. 196, § 76-5-201; L. 1983, ch. 90, § 3; 1983, ch. 95, § 1.

**Compiler's Notes.** — This section was amended twice in the 1983 Session, once by chapter 90 and once by chapter 95. Neither act referred to the other. The section is printed incorporating the changes made by both amendments.

The 1983 amendment by chapter 90 inserted "or acting with a mental state otherwise specified in the statute defining the offense" in the first sentence of subsec. (1); deleted "unlawfully" before "causes the death" in the first sentence of subsec. (1); and made a minor change in phraseology.

The 1983 amendment by chapter 95 added

"human being, including an unborn child" to the first sentence of subsec. (1); and added the second sentence of subsec. (1).

#### **Self-defense.**

The absence of self-defense is not one of the prima facie elements of homicide needed to be proved beyond a reasonable doubt by the state. *State v. Knoll*, 712 P.2d 211 (Utah 1985).

**Law Reviews.** — For Everything There Is a Season: The Right to Die in the United States, 1982 B.Y.U. L. Rev. 545.

Note, *State v. Fontana*: An Illusory Solution to Utah's Depraved Indifference Mens Rea Problem, 12 J. Contemp. L. 177 (1986).

**A.L.R.** — Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

#### 76-5-202. Murder in the first degree.

(1) Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) The homicide was committed by a person who is confined in a jail or other correctional institution.

(b) The homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons are killed.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, aggravated robbery, robbery, rape, rape of a child,

**76-7-203. Sale of child.**

**Law Reviews.** — Artificial Insemination and the Law, 4 B.Y.U. L. Rev. 935 (1982).

### PART 3

### ABORTION

Section		Section	
76-7-301.	Definitions.		contraceptive or abortion services restricted.
76-7-305.5.	Informed consent — Information to be furnished to patient upon request — Notification that information is available — Exceptions — Physician's report — Annual report of department.	76-7-323.	Public funds for support entities providing contraceptive or abortion services restricted.
76-7-313.	Physician's report to department of health.	76-7-324.	Violation of restrictions on public funds for contraceptive or abortion services as misdemeanor.
76-7-321.	Contraceptive and abortion services — Funds — Minor — Definitions.	76-7-325.	Notice to parent or guardian of minor requesting contraceptive — Definition of contraceptives — Penalty for violation.
76-7-322.	Public funds for provision of con-		

**Law Reviews.** — Rethinking Roe v. Wade, 1985 B.Y.U. L. Rev. 231.

**76-7-301. Definitions.**

As used in this part:

(1) "Abortion" means the termination or attempted termination of human pregnancy with an intent other than to produce a live birth or to remove a dead unborn child, and includes all procedures undertaken to kill a live unborn child and includes all procedures undertaken to produce a miscarriage.

(2) "Physician" means a medical doctor licensed to practice medicine and surgery in all branches thereof in this state, or a physician in the employment of the government of the United States who is similarly qualified.

(3) "Hospital" means a general hospital licensed by the state department of health according to chapter 21 of Title 26, and includes a clinic or other medical facility to the extent that such clinic or other medical facility provides equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the state department of health. It shall be the responsibility of the state department of health to determine if such clinic or other medical facility so qualifies and to so certify.

(3) "Hospital" means a general hospital licensed by the state division of health according to Title 26, chapter 15, and includes a clinic or other medical facility to the extent that such clinic or other medical facility provides equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the state division of health. It shall be the responsibility of the state division of health to determine if such clinic or other medical facility so qualifies and to so certify.

**History:** C. 1953, 76-7-301, enacted by L. 1974, ch. 33, § 1.

**Compiler's Notes.**

Laws 1974, ch. 33, §§ 1 to 17 repealed old sections 76-7-301 to 76-7-317 (C. 1953, 76-7-301 to 76-7-302, enacted by ch. 196, §§ 76-7-301 to 76-7-317), relating to abortion, and enacted new sections 76-7-301 to 76-7-317.

**Title of Act.**

An act repealing and reenacting sections 76-7-301, 76-7-302, 76-7-303, 76-7-304, 76-7-305, 76-7-306, 76-7-307, 76-7-308, 76-7-309, 76-7-310, 76-7-311, 76-7-312, 76-7-313, 76-7-314, 76-7-315, 76-7-316, and 76-7-317, Utah Code Annotated 1953, as enacted by chapter 196, Laws of Utah 1973, and repealing sections 76-7-318, 76-7-319, and 76-7-320, Utah Code Annotated 1953, as enacted by chapter 196, Laws of Utah 1973; relating to the abortion provision of the Utah Criminal Code; providing definition, requirements, and procedures which must be met and followed before an abortion may be performed in the state of Utah.—Laws 1974, ch. 33.

**Cross-References.**

Corroboration necessary, 77-31-14.

**Collateral References.**

Abortion—1.

1 C.J.S. Abortion § 1.

1 Am. Jur. 2d 188, Abortion § 1.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 A. L. R. 2d 1080.

Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 A. L. R. 351.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts, 16 A. L. R. 2d 949.

Pregnancy as element of abortion or homicide based thereon, 46 A. L. R. 2d 1393.

Right of action for injury to or death of woman who consented to abortion, 21 A. L. R. 2d 369.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 A. L. R. 3d 858.

**Law Reviews.**

Utah Legislative Survey—1974, 1974 Utah L. Rev. 646.

**DECISIONS UNDER FORMER LAW**

1973 abortion provisions unconstitutional.

Sections 76-7-302(3), 76-7-303 to 76-7-311, and 76-7-313 to 76-7-319, enacted by Laws

1973, ch. 196, were held unconstitutional by a three-judge federal district court. Doe v. Rampton, 366 F. Supp. 189.

**76-7-302. Circumstances under which abortion authorized.**—An abortion may be performed in this state only under the following circumstances:

- (1) If performed by a physician; and
- (2) If performed ninety days or more after the commencement of the pregnancy, it is performed in a hospital; and
- (3) If performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health.

**History:** C. 1953, 76-7-302, enacted by **Collateral References.**  
 L. 1974, ch. 33, § 2.

Abortion  $\Rightarrow$  2.  
 1 C.J.S. Abortion § 2.  
 1 Am. Jur. 2d 195, Abortion § 14.

**76-7-303. Concurrence of attending physician based on medical judgment.**—No abortion may be performed in this state without the concurrence of the attending physician, based on his best medical judgment.

**History:** C. 1953, 76-7-303, enacted by  
 L. 1974, ch. 33, § 3.

**76-7-304. Considerations by physician—Notice to minor's parents or guardian or married woman's husband.**—To enable the physician to exercise his best medical judgment, he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

- (a) Her physical, emotional and psychological health and safety,
- (b) Her age,
- (c) Her familial situation.

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

**History:** C. 1953, 76-7-304, enacted by  
 L. 1974, ch. 33, § 4.

**76-7-305. Consent requirements for abortion.**—(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.

(2) No consent obtained pursuant to the provisions of this section shall be considered voluntary and informed unless the attending physician has informed the woman upon whom the abortion is to be performed:

(a) Of the names and addresses of two licensed adoption agencies in the state of Utah and the services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

(b) Of the details of development of unborn children and abortion procedures, including any foreseeable complications, risks, and the nature of the post-operative recuperation period; and

(c) Of any other factors he deems relevant to a voluntary and informed consent.

**History:** C. 1953, 76-7-305, enacted by  
 L. 1974, ch. 33, § 5.

**Collateral References.**

Mental competency of patient to consent to surgical operation or medical treatment, 25 A. L. R. 3d 1439.

Right of minor to have abortion performed without parental consent, 42 A. L. R. 3d 1406.

Woman's right to have abortion without consent of, or against objections of, child's father, 62 A. L. R. 3d 1097.



**76-7-306. Physician, hospital employee, or hospital not required to participate in abortion.**—(1) A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who states an objection to an abortion or the practice of abortion in general on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any person to participate shall not form the basis of any claim for damages on account of the refusal or for any disciplinary or recriminatory action against such person, nor shall any moral or religious scruples or objections to abortions be the grounds for any discrimination in hiring in this state.

(2) Nothing in this act [part] shall require any private and/or denominational hospital to admit any patient for the purpose of performing an abortion.

History: C. 1953, 76-7-306, enacted by  
L. 1974, ch. 33, § 6.

**76-7-307. Medical procedure required to save life of unborn child.**—If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure an unborn child may be used unless necessary, in the opinion of the woman's physician, to save her life or prevent serious and permanent damage to her health.

History: C. 1953, 76-7-307, enacted by  
L. 1974, ch. 33, § 7.

**76-7-308. Medical skills required to preserve life of unborn child.**—Consistent with the purpose of saving the life of the woman or preventing serious and permanent damage to the woman's health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

History: C. 1953, 76-7-308, enacted by  
L. 1974, ch. 33, § 8.

**76-7-309. Pathologist's report.**—Any human tissue removed during an abortion shall be submitted to a pathologist who shall make a report, including, but not limited to whether there was a pregnancy, and if possible, whether the pregnancy was aborted by evacuating the uterus.

History: C. 1953, 76-7-309, enacted by  
L. 1974, ch. 33, § 9.

**76-7-310. Experimentation with unborn children prohibited—Testing for genetic defects.**—Live unborn children may not be used for experimentation, but when advisable, in the best medical judgment of the physician, may be tested for genetic defects.

ex rel. Kelsey, 20 Utah 2d 131, 434 P.2d 445 (1967).

**Conditions for restoration of parental custody.**

Where there had been previous findings of parent's unfitness to have custody of his minor daughter, it was not an abuse of discretion for court to require such parent to conduct himself "becomingly" for a period of ten months before such custody would be given. *State v. Sorensen*, 102 Utah 474, 132 P.2d 132 (1942).

**Grandparent's petition for custody.**

This section does not prohibit a grandparent from filing a petition for custody of his grandchild after the rights of the grandchild's parents have been terminated. *State ex rel. Summers v. Wulffenstein*, 571 P.2d 1319 (Utah 1977).

**Mental condition of parent.**

Where children had been placed in custody of state department of public welfare for purpose of adoption because of parents' mental condition, mother was not entitled to restoration of custody where she was unable to demonstrate any real understanding of what was necessary for the welfare of the children or how much money it would take or how it could be pro-

vided. *State ex rel. F\_\_\_ v. Dade*, 14 Utah 2d 47, 376 P.2d 948 (1962).

**Notice.**

After original notice of petition had been given, no further notice need be given of application by probation officer or otherwise for a modification, suspension, or change of any order or judgment affecting the custody, control or conduct of a juvenile delinquent because child was constructively in custody of such court and failure to give further notice was not jurisdictional. It was better practice, however, to give notice of application both to delinquent and to those who might be interested in his welfare. *Stoker v. Gowans*, 45 Utah 556, 147 P. 911, 1916E Ann. Cas. 1025 (1913).

**Right to hearing.**

Where juvenile court had previously entered a proper order depriving parents of custody of their minor children and parents petitioned for restoration of custody on grounds of changed conditions, refusal of juvenile court to grant parents a hearing was an abuse of discretion. *In re State ex rel. L.J.J.*, 11 Utah 2d 393, 360 P.2d 486 (1961).

Cited in *State ex rel. A.H. v. Mr. & Mrs. H.* (Utah 1986) 716 P.2d 284.

**78-3a-48. Termination of parental rights — Grounds — Hearing — Effect of order — Placement of child — Voluntary petition of parent.**

(1) The court may decree a termination of all parental rights with respect to one or both parents if the court finds either (a), (b), (c), or (d) as follows:

(a) that the parent or parents are unfit or incompetent by reason of conduct or condition which is seriously detrimental to the child;

(b) that the parent or parents have abandoned the child. It is prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child;

(c) that after a period of trial, during which the child was left in his own home under protective supervision or probation, or during which the child was returned to live in his own home, the parent or parents substantially and continuously or repeatedly refused or failed to give the child proper parental care and protection; or

(d) has failed to communicate via mail, telephone, or otherwise for one year with the child or shown the normal interest of a natural parent, without just cause.

(2) A termination of parental rights may be ordered only after a hearing is held specifically on the question of terminating the rights of the parent or parents. A verbatim record of the proceedings must be taken and the parties

must be advised of their right to counsel. No hearing may be held earlier than ten days after service of summons is completed inside or outside of the state. The summons must contain a statement to the effect that the rights of the parent or parents are proposed to be permanently terminated in the proceedings. The statement may be made in the summons originally issued in the proceeding or in a separate summons subsequently issued.

(3) Unless there is an appeal from the order terminating the rights of one or both parents, the order permanently terminates the legal parent-child relationship and all the rights and duties, including residual parental rights and duties, of the parent or parents involved.

(4) Upon the entry of an order terminating the rights of the parent or parents, the court may (a) place the child in the legal custody and guardianship of a child placement agency or the department of public welfare for purposes of adoption, or (b) make any other disposition of the child authorized under § 78-3a-39. All adoptable children shall be placed for adoption.

(5) The parent-child relationship may be terminated upon voluntary petition of one or both parents if the court finds that the termination is in the best interests of the parent and the child. This termination with respect to one parent does not affect the rights of the other parent.

**History:** L. 1965, ch. 165, § 47, formerly C. 1953, 55-10-109 redes. as 78-3a-48; L. 1980, ch. 40, § 1; 1981, ch. 157, § 1; 1985, ch. 199, § 1.

**Amendment Notes.** — The 1985 amendment substituted "a termination" for "an involuntary termination" in Subsection (1); rewrote Subsection (1)(a), which formerly read as amended by Laws 1981, chapter 157, § 1; deleted Subsections (1)(a)(i) through (1)(a)(viii)(C), which formerly read as amended by Laws 1981, chapter 157, § 1; added Subsection (1)(d); substituted "may" for "shall" in the third sentence of Subsection (2); and made minor changes in phraseology.

**Compiler's Notes.** — The Supreme Court of Utah, in *In re J. P.* (1982) 648 P.2d 1364, held: that the 1980 amendment to this section, which permitted the involuntary termination

of parental rights upon a finding of best interests of the child without requiring a finding of parental unfitness, abandonment, or substantial neglect was unconstitutional on its face since it violated a parent's rights to his child under Utah Const., Art. I, Secs. 7 and 25 and the ninth and fourteenth amendments of the federal Constitution; that the 1981 amendment to this section, which only added new criteria for determining the child's best interest under the standard established by the 1980 amendment, does not remain in effect after the invalidation of the 1980 amendment; and that this section, as enacted in 1965, is not repealed, but remains in force to the same extent as if the portions of the 1980 and 1981 amendments invalidated by the opinion had never been enacted.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.

Abandonment.

Abandonment by parent not in legal custody of child.

Adoption considerations.

Conditions precedent to termination.

Diligent search for missing parents.

Divorce decrees.

Evidence.

—Sufficient to terminate rights.

—Standard.

—Standard of proof.

Grandparent's rights.

—Recommendation of welfare representative.

## COLLATERAL REFERENCES

**Utah Law Review.** — Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue, 1977 Utah L. Rev. 529.

Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 217.

**Journal of Contemporary Law.** — Taking

Notice of Good Samaritan and Duty to Rescue Laws, 11 J. Contemp. L. 219 (1984).

**A.L.R.** — Construction of "Good Samaritan" statute excusing from civil liability one rendering care in emergency, 39 A.L.R.3d 222.

**Key Numbers.** — Negligence ⇐ 8.

**78-11-23. Right to life — State policy.**

The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.

**History:** L. 1983, ch. 167, § 1.

## COLLATERAL REFERENCES

**Utah Law Review.** — Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 221.

**Journal of Contemporary Law.** — Note,

*Alquijay v. St. Luke's-Roosevelt Hospital: The Inequitable Umbrella of Wrongful Life*, 12 J. Contemp. L. 137 (1986).

**78-11-24. Act or omission preventing abortion not actionable.**

A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

**History:** L. 1983, ch. 167, § 2.

## COLLATERAL REFERENCES

**Utah Law Review.** — Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater, 1984 Utah L. Rev. 833.

**Journal of Contemporary Law.** — Note, *Alquijay v. St. Luke's-Roosevelt Hospital: The Inequitable Umbrella of Wrongful Life*, 12 J. Contemp. L. 137 (1986).

**78-11-25. Failure or refusal to prevent birth not a defense.**

The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

**History:** L. 1983, ch. 167, § 3.

## COLLATERAL REFERENCES

**Utah Law Reviews.** — Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah L. Rev. 319.

**Am. Jur. 2d.** — 2 Am. Jur. 2d Adoption § 10.

**C.J.S.** — 2 C.J.S. Adoption of Persons § 13.

**Key Numbers.** — Adoption ⇐ 4.

**78-30-3. Adoption by married persons.**

A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, adopt a child without his consent, if the spouse not consenting is capable of giving such consent.

**History:** R.S. 1898 & C.L. 1907, § 3; C.L. 1917, § 12; L. 1919, ch. 1, § 1; R.S. 1933 & C. 1943, 14-4-3.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 2 Am. Jur. 2d Adoption § 41.

**C.J.S.** — 2 C.J.S. Adoption of Persons § 14.

**Key Numbers.** — Adoption ⇐ 7.

**78-30-4. Consent to adoption — Paternity claims.**

(1) A child cannot be adopted without the consent of each living parent having rights in relation to said child, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion; provided, that the district court may order the adoption of any child, without notice to or consent in court of the parent or parents thereof, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, acknowledged before any officer authorized to take acknowledgments, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 8a, Title 55, and such agency consents, in writing, to such adoption or whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, released his or her or their control, custody, and all parental rights and interests in such child to any agency licensed or authorized by statute to receive children for placement or adoption in any state pursuant to that state's laws and said agency has in turn, in writing, released its control and custody of such child to any agency licensed under Chapter 8a, Title 55, or to any person, or persons, selected by that agency licensed under Utah law, as adoptive parents for said child, and such Utah agency consents, in writing, to such adoption.

(2) A minor parent shall have the power to consent to the adoption of such parent's child, and a minor parent shall have the power to release such parent's control or custody of such parent's child to any agency licensed to receive children for placement or adoption under Chapter 8 [Chapter 8a], Title 55, and, such a consent or release so executed shall be valid and have the same force and effect as a consent or release executed by an adult parent. A minor parent, having so executed a release or consent, cannot revoke the same upon such parent's attaining the age of majority.

(3) (a) A person who is the father or claims to be the father of an illegitimate child may claim rights pertaining to his paternity of the child by registering with the registrar of vital statistics in the department of health, a notice of his claim of paternity of an illegitimate child and of his willingness and intent to support the child to the best of his ability. The department of health shall provide forms for the purpose of registering the notices, and the forms shall be made available through the department and in the office of the county clerk in every county in this state.

(b) The notice may be registered prior to the birth of the child but must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services or prior to the filing of a petition by a person with whom the mother has placed the child for adoption. The notice shall be signed by the registrant and shall include his name and address, the name and last known address of the mother, and either the birthdate of the child or the probable month and year of the expected birth of the child. The department of health shall maintain a confidential registry for this purpose.

(c) Any father of such child who fails to file and register his notice of claim to paternity and his agreement to support the child shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. Such failure shall further constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of said child, and the consent of such father to the adoption of such child shall not be required.

(d) In any adoption proceeding pertaining to an illegitimate child, if there is no showing that the father has consented to the proposed adoption, it shall be necessary to file with the court prior to the granting of a decree allowing the adoption a certificate from the department of health, signed by the state registrar of vital statistics which certificate shall state that a diligent search has been made of the registry of notices from fathers of illegitimate children and that no registration has been found pertaining to the father of the illegitimate child in question.

**History:** L. 1981, ch. 126, § 61.

**Repeals and Enactments.** — Laws 1981, ch. 126, § 61 repealed former § 78-30-4 (R.S. 1898 & C.L. 1907, § 4; C.L. 1917, § 13; L. 1925, ch. 91, § 1; R.S. 1933, 14-4-4; L. 1941, ch. 16, § 1; C. 1943, 14-4-4; L. 1963, ch. 192, § 1; 1965, ch. 168, § 1; 1966 (1st S.S.), ch. 20, § 1; 1975, ch. 94, § 1), relating to consent to adoption, and enacted present § 78-30-4.

**Compiler's Notes.** — Chapter 8, Title 55,

referred to in this section, was repealed by Laws 1971, ch. 133, § 7. For present provisions concerning child placing agencies, see § 55-8a-1 et seq.

**Cross-References.** — Age of majority, § 15-2-1.

## NOTES TO DECISIONS

### ANALYSIS

Constitutionality.

Abandonment.

Acknowledgment of signature to consent.

Appearance before district court.

Consent.

Construction of statute.

Duress.

**78-30-4. Consent to adoption — Paternity claims.**

## NOTES TO DECISIONS

## ANALYSIS

## Constitutionality.

—Federal abstention.

—State action.

Father's filing of notice of paternity.

## Constitutionality.

## —Federal abstention.

The federal district court abstained from hearing a case challenging the constitutionality of this section in favor of requiring resolution by the state courts of the questions presented. *Swayne v. L.D.S. Social Servs.*, 670 F. Supp. 1537 (D. Utah 1987).

## —State action.

Termination of father's parental rights by operation of this section, which provides that the father of an illegitimate child conclusively is presumed to have abandoned his child if he fails to file a claim of paternity and notice of willingness to support the child in accordance with Subsection (3)(b), implicates the actors in

a private adoption to the extent that they may be considered state actors for the purpose of testing whether the father's parental rights were constitutionally terminated. *Swayne v. L.D.S. Social Servs.*, 670 F. Supp. 1537 (D. Utah 1987).

## Father's filing of notice of paternity.

To apply this section in order to deprive a putative father and his child of the possible benefits of their relationship simply because the father filed a notice of his claim of paternity filed just a few hours after the mother and her grandfather had filed a petition for adoption would fly in the face of fundamental fairness and due process. In re *K.B.E.*, 63 Utah Adv. Rep. 27 (Ct. App. 1987).

## COLLATERAL REFERENCES

*Utah Law Review*. — Recent Developments in Utah Law — Judicial Decisions — Family Law, 1987 Utah L. Rev. 200.

*Brigham Young Law Review*. — Note,

The Putative Father's Due Process Rights to Notice and a Hearing: In re *Baby Boy Doe*, 1986 B.Y.U. L. Rev. 1081.

**78-30-5. Consent unnecessary — Parents fail to support or communicate with child — Noncustodial parent — Conditions.**

(1) A child may be adopted without the consent of the parent or parents, when the district court in which the proceedings are pending determines, after notice to the parent or parents in a manner determined by the court, that the parent or parents, having the ability and duty to do so, have not provided support and have made no effort or only token effort, without good cause, to maintain a parental relationship with the child.

(2) A child may be adopted without the consent of the parent not having custody of the child, when the district court in which the proceedings are pending determines:

(a) the noncustodial parent is not obligated under any order or judgment of any court or administrative body to pay for support of the child; and

(b) the noncustodial parent has made no effort or only token effort, without good cause, to maintain a parental relationship with the child.

(3) It is a rebuttable presumption that no effort to maintain a parental relationship has been made:

- (a) under Subsection (1), if the parent or parents have failed to support and communicate with the child for a period of one year or longer; or
- (b) under Subsection (2), if the noncustodial parent has failed to communicate with the child for a period of one year or longer.

**History:** C. 1953, 78-30-5, enacted by L. 1977, ch. 147, § 1; 1988, ch. 165, § 1.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, added Subsection designation (1); deleted the former second sentence of Subsection (1) which read "It is a

rebuttable presumption that no effort has been made if the parent or parents have failed to support and communicate with the child for a period of one year or longer"; and added Subsections (2) and (3).

### **78-30-7. Jurisdiction of district and juvenile court.**

#### **NOTES TO DECISIONS**

Cited in *K.O. v. Denison*, 74 Utah Adv. Rep. 29 (Ct. App. 1988).

### **78-30-8. Procedure — Agreement of adopting parents.**

#### **NOTES TO DECISIONS**

#### **Appearance before district court.**

The appearance requirement of the person adopting the child, the child adopted, and the consenting parent must be strictly construed

and is jurisdictionally required, and that, without compliance, the adoption could be nullified. In *re M.L.T.*, 746 P.2d 1179 (Utah 1987).

### **78-30-11. Rights and liabilities of natural parents.**

#### **COLLATERAL REFERENCES**

**Utah Law Review.** — Note, Religious Matching and Parental Preference: *Easton v. Angus*, 1986 Utah L. Rev. 559.

### **78-30-12. Adoption by acknowledgment.**

#### **NOTES TO DECISIONS**

#### **Father.**

#### **—Adjudication of rights.**

Concomitant with the rights of a legitimated child adopted by the acknowledgment of its father are the rights of its biological father. In a dispute with the child's mother over visitation

rights or custody, the biological father's rights with respect to the legitimated child are adjudicated under the divorce laws codified in §§ 30-3-5 and 30-3-10. *Chandler v. Mathews* 734 P.2d 907 (Utah 1987).