

2010

Marco A. Donjuan v. Gabrielle McDermott : Brief of Appellee

Utah Court of Appeals

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Jennifer D. Reyes, Dale M. Dorius; Dorius and Reyes; attorneys for appellant.

Larry S. Jenkins, Lance D. Rich, Brinton M. Wilkins; Wood Crapo LLC; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

Marco A. Donjuan,

Petitioner and Appellant,

V.

Gabrielle McDermott,

Respondent and Appellee.

BRIEF OF APPELLEE

Case No. 20100012-CA

Trial Court No. 094100254

**On Appeal From the *Memorandum Decision and Order* of
The First Judicial District Court for Box Elder County, Utah
The Honorable Ben H. Hadfield**

DORIUS & REYES

Jennifer D. Reyes

Dale M. Dorius

P.O. Box 895

29 South Main

Brigham City, UT 84302

Telephone (435) 723-5219

Attorneys for Petitioner/Appellant

WOOD CRAPO LLC

Larry S. Jenkins (4854)

Lance D. Rich (10241)

Brinton M. Wilkins (10713)

500 Eagle Gate Tower

60 East South Temple

Salt Lake City, Utah 84111

Telephone: (801) 366-6060

Attorneys for Respondent/Appellee

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UTAH APPELLATE COURT
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Marco A. Donjuan,
 Petitioner and Appellant,
 v.
 Gabrielle McDermott,
 Respondent and Appellee.

BRIEF OF APPELLEE
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DORIUS & REYES	WOOD CRAPO <small>LLC</small>
Jennifer D. Reyes	Larry S. Jenkins (4854)
Dale M. Dorius	Lance D. Rich (10241)
P.O. Box 895	Brinton M. Wilkins (10713)
29 South Main	500 Eagle Gate Tower
Brigham City, UT 84302	60 East South Temple
Telephone (435) 723-5219	Salt Lake City, Utah 84111
	Telephone: (801) 366-6060
<i>Attorneys for Petitioner/Appellant</i>	<i>Attorneys for Respondent/Appellee</i>

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(h) because this is a paternity proceeding.

STATEMENT OF ISSUES

The Appellee restates the issues on appeal as follows:

ISSUE NO. 1

Because the child who is the subject of this proceeding was placed for adoption, did the district court correctly conclude that Mr. Donjuan lacked standing to seek a paternity adjudication because he did not strictly comply with all of the requirements of Utah Code Ann. § 78B-6-121(3), including the requirement to file a sworn affidavit in this proceeding?

Issues of standing are reviewed under a correctness standard. *In re Adoption of I.K.*, 2009 UT 70, ¶ 7, 220 P.3d 464. A district court's interpretation of a statute is also reviewed for correctness. *H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 19, 203 P.3d 943.

ISSUE NO. 2

Does the relation back provision of Utah R. Civ. P. 15(c) enable Mr. Donjuan to belatedly comply with the Adoption Act's sworn affidavit requirement where the state has a compelling interest in speedily identifying those fathers who have strictly complied with the statute within a very short time after the child's birth, Rule 15 only applies to pleadings and not affidavits or the verification of a pleading, and Mr. Donjuan's amended petition was never signed by his counsel.

- (3) If none of the defendants resides in this state, the action may be commenced and tried in any county designated by the plaintiff in the complaint.
- (4) If the defendant is about to depart from the state, the action may be tried in any county where any of the parties resides or service is had.

Utah Code Ann. § 78B-3-308

If the county in which the action is commenced is not the proper county for the trial, the action may nevertheless be tried in the county in which it is filed, unless the defendant, at the time the answer is filed or an appearance is made, files a written motion requesting the trial be moved to the proper county.

Utah Code Ann. § 78B-6-110(3)(b)

- (3)(b) If the unmarried, biological father does not know the county in which the birth mother resides, he may initiate his action in any county, subject to a change in trial pursuant to 78B-3-307.

Utah Code Ann. § 78B-6-121(3)

- (3) Except as provided in Subsection 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father:
 - (a) initiates proceedings in a district court of Utah to establish paternity under Title 78B, Chapter 15, Utah Uniform Parentage Act;
 - (b) files with the court that is presiding over the paternity proceeding a sworn affidavit:
 - (i) stating that he is fully able and willing to have full custody of the child;
 - (ii) setting forth his plans for care of the child; and
 - (iii) agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth;
 - (c) consistent with Subsection (4), files notice of the commencement of paternity proceedings, described in Subsection (3)(a), with the state registrar of vital statistics within the Department of Health, in a confidential registry established by the department for that purpose; and

On August 3, 2009, Ms. McDermott appeared before Judge Kate A. Toomey in the Third Judicial District Court in Salt Lake City, Utah, and executed her consent to adoption. R. 21, 45-49. At that hearing, Ms. McDermott's counsel informed the court that a paternity action had been filed and that notice of that action had been filed with Utah Vital Records, but that the putative father had not filed a sworn affidavit in the paternity proceeding. R. 21. The child was placed for adoption with prospective adoptive parents, who later filed a motion to intervene in the paternity proceeding. R. 64-74.

Counsel for the prospective adoptive parents served notice of adoption proceedings on Mr. Donjuan. In that notice, Mr. Donjuan was informed of his failure to timely file a sworn affidavit with the district court in the paternity proceeding. R. 21, 51-53.

On August 11, 2009, Mr. Donjuan filed his Amended Petition to Establish Paternity ("Amended Petition"). R. 9-14. Although the Amended Petition is verified by Mr. Donjuan, it is not signed by his counsel. *Id.* Ms. McDermott received the Summons and Amended Petition on August 29, 2009. R. 16.

On September 18, 2009, Ms. McDermott filed her Motion to Dismiss for Failure to State a Claim or for Summary Judgment ("Motion to Dismiss"). R. 17-63. On October 8, 2009, Mr. Donjuan filed his Objection to Respondent's Motion to Dismiss and also filed a Motion to Change Venue and Motion to Stay Decision on Respondent's Motion to Dismiss. R. 77-174, 175-196. The district court entered a Memorandum

Upon being informed of the notice of commencement of paternity proceedings, Ms. McDermott's counsel asked the court clerk what Mr. Donjuan had filed. R. 20. Counsel discovered that Mr. Donjuan had not filed a sworn affidavit or any document containing the sworn statements required by Utah Code Ann § 78B-6-121(3)(b). R. 20, 40-42. Counsel informed Ms. McDermott that Mr. Donjuan had not filed a sworn affidavit and, therefore, he had not strictly complied with Utah Code Ann. § 78B-6-121(3)(b). R. 20.

On August 3, 2009, Ms. McDermott appeared before Judge Kate A. Toomey in the Third Judicial District Court in Salt Lake City, Utah, and executed her consent to adoption. R. 21, 45-49. Therein, Ms. McDermott represents that she is currently single, and was not married at the time of conception to the birth father of the child or any other man. R. 48, ¶ 17. At that hearing, Ms. McDermott's counsel informed the court that a paternity action had been filed and that notice of that action had been filed with Utah Vital Records, but that the putative father had not filed a sworn affidavit in the paternity proceeding. R. 21.

Counsel for the adoptive parents served notice of adoption proceedings on Mr. Donjuan. R. 21, 51-54. In that notice, Mr. Donjuan was informed of the failure to file the sworn affidavit with this Court. R. 52.

On August 11, 2009, Mr. Donjuan filed the Amended Petition, apparently in an effort to correct his failure to timely file a sworn affidavit. R. 9-14. Although the Amended Petition is verified by Mr. Donjuan, it is not signed by his counsel. The

SUMMARY OF ARGUMENT

Mr. Donjuan, the unwed putative father, did not strictly comply with all of the requirements of the Utah Adoption Act prior to his deadline for compliance. He does not dispute that, as of July 9, 2009, he knew of a “qualifying circumstance” as defined by Utah Code Ann. § 78B-6-122(1)(a). Therefore, to preserve any rights to the child, he was required to fully and strictly comply with all of the requirements of Utah Code Ann. § 78B-6-121(3) by August 3, 2009, when Ms. McDermott, the birth mother, executed her consent to adoption. Because Mr. Donjuan did not file an affidavit with the district court by this date as required by Utah Code Ann. § 78B-6-121(3)(b), he has waived any right to the child, including the right to maintain this paternity proceeding.

Mr. Donjuan may not use Utah R. Civ. P. 15(c) to rectify his failure to timely file a sworn affidavit. Rule 15(c) applies solely to pleadings and cannot be used to retroactively comply with an affidavit requirement by filing an amended verified petition. This is particularly the case in the time-sensitive context of an adoption proceeding, where a firm cutoff to a putative father’s compliance period is essential. If a putative father were allowed to retroactively comply with the affidavit requirement through Rule 15(c), the state’s compelling interests in preventing disrupted adoptions and promoting early and uninterrupted bonding between child and parents would be frustrated because no one would know with certainty if the putative father would eventually seek to comply with this requirement. Also, the birth mother would be forced to make the decision regarding whether to place her newborn child for adoption without the benefit of his sworn and

McDermott's consent to adoption, and therefore, he was not denied due process. The state also has a rational basis for requiring putative fathers to timely comply with the affidavit requirement. Mr. Donjuan's full faith and credit argument is without merit because the Georgia court never entered an order adjudicating paternity and actually denied his request to enjoin Ms. McDermott from leaving Georgia. Even if the Georgia court later adjudicated paternity, it would not alter the district court's determination that Mr. Donjuan forfeited his parental rights by not strictly complying with the Utah Adoption Act.

strictly complying with the Adoption Act. 2009 UT 46, ¶ 1. Ultimately, the supreme court affirmed the district court's order dismissing the paternity proceeding because the unwed father lacked standing to assert any rights to the child. 2009 UT 46, ¶¶ 1, 46. The court reiterated that unwed fathers must strictly comply with the statutory requirements before the mother executes her consent to the adoption. *Id.* ¶ 28.

Therefore, unless Mr. Donjuan timely and strictly complied with the requirements of the Utah Adoption Act, the district court correctly dismissed his paternity action.

B. Because Mr. Donjuan knew of a “qualifying circumstance,” he was required to have complied with all of the requirements of Section 78B-6-121 prior to the birth mother’s consent to adoption.

An unwed father who has reason to know of a “qualifying circumstance,” as defined by Utah Code Ann. § 78B-6-122(1)(a), prior to the birth mother’s execution of her consent to adoption, waives any right to the child unless he strictly complies with the requirements of Utah Code Ann. § 78B-6-121. Under Subsection 78B-6-122(1)(a), a “qualifying circumstance” exists if, prior to the birth mother’s execution of her consent to adoption:

- (i) the child or the child’s mother resided, on a permanent *or temporary* basis, in the state;
- (ii) the mother intended to give birth to the child in the state;
- (iii) the child was born in the state; or
- (iv) the mother intended to execute a consent to adoption or relinquishment of the child for adoption:
 - (A) in the state; or
 - (B) under the laws of the state.

Utah Code Ann. § 78B-6-122(1)(a).

- (I) 20 days after the day that the unmarried biological father knew, or through the exercise of reasonable diligence should have known, that a qualifying circumstance existed; or
- (II) the time that the mother executed a consent to adoption or relinquishment of the child for adoption.

Utah Code Ann. § 78B-6-122(1)(c)(ii)(B). Consequently, where, as in this case, the unwed father learned of a “qualifying circumstance” more than 20 days prior to the day the birth mother signed her consent to adoption, he was required to have complied with the requirements of Section 78B-6-121 before she executed her consent.

Mr. Donjuan was placed on inquiry notice of several “qualifying circumstances” prior to August 3, 2009, the date when Ms. McDermott’s executed her consent to adoption. On July 9, 2009, Ms. McDermott’s counsel informed Mr. Donjuan that she had relocated to Utah, planned to give birth in Utah, and planned to place the child for adoption in Utah and pursuant to Utah law. R. 34, 37. Thus, at that time, Mr. Donjuan knew of “qualifying circumstances” listed in Utah Code Ann. § 78B-6-122(1)(a)(i), (ii), and (iv).

Notably, Mr. Donjuan did not argue before the district court or this Court that he did not learn of a “qualifying circumstance” on July 9, 2009. Therefore, it is undisputed that Mr. Donjuan had until Ms. McDermott signed her consent to adoption on August 3, 2009, to comply with the requirements of Section 78B-6-121.

- C. Mr. Donjuan was required to have strictly complied with *all* of the requirements of Subsection 78B-6-121(3) prior to the adoptive placement, but did not comply with the sworn affidavit requirement of Subsection 78B-6-121(3)(b).**

demonstrating his full commitment to his parental responsibilities prior to execution of the mother's consent to adoption. In *In re adoption of Baby Boy Doe*, 2008 UT App 449, 199 P.3d 368, this Court recently held that an unwed father waived his rights to the child due to his failure to file a sworn affidavit with the necessary statements in his timely filed paternity action. As a result of the Utah Supreme Court's earlier decision in *Thurnwald v. A.E.*, 2007 UT 38, 163 P.3d 623, the parties agreed that the unwed father had "timely initiated proceedings to establish paternity and properly filed notice with the Department of Health." *Baby Boy Doe*, 2008 UT App 449, ¶ 3, 199 P.3d 368. These actions gave the unwed father the right to notice of the adoption proceeding; however, it did not mean that he strictly complied with all the statutory requirements to preserve rights to the child. See *Thurnwald*, 2007 UT 38, ¶ 33, 163 P.3d 623. This Court agreed with the district court's decision that the unwed father had not strictly complied with the requirement to file a sworn affidavit under Subsection 78B-6-121(3)(b) and it affirmed the denial of his motion to intervene in the adoption. *Baby Boy Doe*, 2008 UT App 449, ¶¶ 4-6, 199 P.3d 368.

Similarly, Mr. Donjuan did not file a sworn affidavit prior to execution of the mother's consent to adoption. Ms. McDermott signed her consent to adoption on August 3, 2009, more than 20 days after Mr. Donjuan was informed of her plans to deliver the child in Utah and place the child for adoption pursuant to Utah law. R. 45-49. Mr. Donjuan filed his Petition on July 28, 2009. R. 3-6. However, the Petition was not

compliance is required by unwed fathers to prevent an adoption. *See, e.g., Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 755 (Utah 1984) (“It is of no constitutional importance that [the unwed father] came close to complying with the statute.”); *In re Adoption of W*, 904 P.2d 1113, 1121 (Utah Ct. App. 1995) (“[R]equiring strict compliance with the adoption statutes is reasonable because of the nature of adoptions.”). In other areas of law where strict compliance is required, Utah courts “have repeatedly denied recourse to parties that have even slightly diverged from the exactness required by” the statute. *See Wheeler v. McPherson*, 2002 UT 16, ¶ 12, 40 P.3d 632.

Thus, because Mr. Donjuan did not file a sworn affidavit or any of the sworn statements required by Subsection 78B-6-121(3)(b) prior to execution of Ms. McDermott’s consent to adoption, he did not strictly comply with this statute. And, Utah R. Civ. P. 15(c) does not excuse his failure to do so.

2. Utah R. Civ. P. 15(c) does not excuse Mr. Donjuan’s failure to file a sworn affidavit prior to execution of Ms. McDermott’s consent to adoption.

Mr. Donjuan’s reliance upon Utah R. Civ. P. 15(c) to attempt to correct his failure to file a sworn affidavit is fundamentally misplaced. While the rule may be used to have the filing of an amended “pleading” relate back to the date the original pleading was filed, it cannot be used to have the filing of an *affidavit* or the verification of a pleading relate

relationship with the child and “the child may be adopted without his consent unless he strictly complies with the provisions of this chapter . . . ”); *See also*, Utah Code Ann. §§ 78B-6-120(1)(f)(2) and 78B-6-122(2).

commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth . . . [and] the state has a compelling interest in requiring unmarried biological fathers to demonstrate commitment by providing appropriate medical care and financial support and by establishing legal paternity, in accordance with the requirements of this chapter.

Utah Code Ann. § 78B-6-102(5)(e, f) (emphasis added). This section also provides that an unwed father “has the primary responsibility to protect his rights,” and his “failure to strictly comply with the available legal steps to substantiate” his rights, would cause that “his biological parental interest may be lost entirely, or greatly diminished in constitutional significance.” Utah Code Ann. § 78B-6-102(6)(b, e). Finally, “[a] certain degree of finality is necessary in order to facilitate the state’s compelling interest,” and “the interests of the state, the mother, the child, and the adoptive parents . . . outweigh the interest of an unmarried biological father who does not timely grasp the opportunity to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.” Utah Code Ann. § 78B-6-102(6)(c).

The Utah Supreme Court long ago recognized the state’s compelling interest in speedily identifying those with a legal interest in an adoption even before enactment of these provisions:

The state has a strong interest in *speedily* identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain *within a very short time of birth* whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill

assurance that the unwed father is legally bound to fulfill his parental obligations. If assurance is not obtained within one full business day after the child's birth, then the mother and the state have the right to substitute adoptive parents willing to assume these responsibilities for the child. *See* Utah Code Ann. § 78B-6-102(5)(b) (“an unmarried mother, faced with the responsibilities of making crucial decisions regarding her future and the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of the adoptive placement”); *Thurnwald*, 2007 UT 38, ¶ 34, 163 P.3d 623.

Thus, this Court should not interpret Subsection 78B-6-121(3)(b) to allow an unwed father to fabricate compliance by verifying an amend paternity petition filed after the adoptive placement.

3. Case law supports an interpretation of Subsection 78B-6-121(3) that does not allow compliance through the relation-back doctrine.

No Utah case allows a party to satisfy a sworn affidavit requirement through the relation-back doctrine in any context, let alone in the time-sensitive context of adoption proceedings. Although the issue was raised in *Baby Boy Doe*, 2008 UT App 449, ¶¶ 3-5, 199 P.3d 368, this Court did not determine the issue.⁵ The unwed father had filed a timely

⁵ In that case the district court actually rejected the unwed father's attempt to use Rule 15(c) to comply with Subsection 78B-6-121(3)(b). Counsel for appellees was also counsel for the adoptive parents in *Baby Boy Doe*. While certain facts are unfortunately

Moreover, in many respects Mr. Donjuan showed less initial compliance with the sworn affidavit requirement than did the unwed father in *Baby Boy Doe*. Whereas the father in *Baby Boy Doe* filed a timely *verified* petition, Mr. Donjuan's paternity petition was unverified. R. 3-6. Also, whereas the father in *Baby Boy Doe* filed an amended petition in the effort to supplement his original petition the next day, Mr. Donjuan's amended petition was not filed until a week after his time for compliance had expired. Indeed, Ms. McDermott, through counsel, checked to see if he had filed a sworn affidavit. R. 20. Discovering its absence, she and the adoptive parents relied upon this fact in proceeding with the execution of her consent to adoption. *Id.* Thus, the reliance upon Mr. Donjuan's insufficient paternity petition was much greater than what occurred in *Baby Boy Doe*.

Furthermore, in the context of medical malpractice suits (which arguably require less finality than adoption cases), courts have repeatedly denied attempts to use Rule 15(c) to relate back to an original petition to correct a failure to file a sworn affidavit. *See Scarsella v. Pollak*, 607 N.W.2d 711, 713 (Mich. 2000); *Thigpen v. Ngo*, 558 S.E.2d 162, 166 (N.C. 2002); *Fales v. Jacobs*, 588 S.E.2d 294, 295 (Ga. Ct. App. 2003). In each of these cases, the courts rejected a plaintiff's argument that amendment under Rule 15(c) was proper to correct the failure to file an affidavit or certification with the original complaint as required by these states' laws. Each court ruled that to do so would conflict with the legislature's direct intent and effectively repeal the affidavit requirement.

4. Where Mr. Donjuan's paternity petition was null and void upon expiration of his statutory deadline for compliance, his amended petition is meaningless.

Where an unwed father is considered to have waived any rights to the child due to his failure to comply with the requirements of Subsection 78B-6-121(3), efforts to amend a paternity petition are futile because that petition becomes null and void once his time for compliance has expired. Utah Code Ann. § 78B-6-122(2) states that an unwed father “who does not fully and strictly comply with requirements of Section 78B-6-121 and this section is *considered to have waived and surrendered any right in relation to the child*[.]” (emphasis added). Failure to strictly comply renders his incomplete efforts to establish parental rights a nullity, because by failing to comply he has lost *any* right to the child. Use of the term “any” includes the right to maintain a paternity action, and use of the past tense “considered” is significant because it indicates he waived his rights at the point when his statutory deadline elapsed.

The time limit imposed by Subsection 78B-6-121(3) is similar to the deadline imposed by the mechanics lien statute. In *Diehl Lumber Transp. Inc. v. Mickelson*, 802 P.32d 739 (Utah Ct. App. 1990), the court rejected a contractor's argument that application of the relation-back doctrine preserved his counterclaim for foreclosure against the property owner. It stated that, because the deadline for foreclosing a mechanics lien “forms a part of the right and must be pursued within the time prescribed . . . [i]f an action is not brought within the time limited, the court is without jurisdiction to decree a

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO TRANSFER MR. DONJUAN'S PATERNITY PROCEEDING TO ANOTHER VENUE.

Mr. Donjuan argues that the district court did not have proper venue of the paternity proceeding and erred by denying his motion to transfer venue to the Third District Court, where the adoption petition was pending. Appellant's Brief at 18-19. He is mistaken.

Mr. Donjuan, as the petitioner (or plaintiff) in his paternity proceeding, was entitled to choose the forum in which his action was commenced. Utah Code Ann.

§ 78B-6-110(3)(b) provides that "[i]f the unmarried, biological father does not know the county in which the birth mother resides, he may initiate his action in *any* county, subject to a change in trial pursuant to Section 78B-3-307[.]" (Emphasis added). Mr. Donjuan claims that he did not know the county where Ms. McDermott resided when she delivered the child, so he elected to file his paternity action in the First District Court, in and for Box Elder County, where his counsel maintains their office. Although Mr. Donjuan could have chosen to file his petition in any county in Utah, he chose to file it in Box Elder County, which presumably was the most convenient forum for him to do so.

Although Subsection 78B-6-110(3)(b) acknowledges that the district court may transfer venue subject to Section 78B-3-307, it does not provide an unwed father with any right to request transfer to a different venue. Utah Code Ann. § 78B-6-110(3)(b). Section 78B-3-307 provides that an action should generally be tried in either the county in which "the cause of action arises" or the county in which "any defendant resides at the commencement of the action." Utah Code Ann. § 78B-3-307. However, unless the

his appearance long before filing the motion to change venue.⁷ Furthermore, his motion comes after even the defendant, Ms. McDermott, has made her appearance and, thus, any right to move for a change of venue was waived at that time. Each party is allowed one chance at selecting venue: for a petitioner when his petition is filed, and for a respondent when she makes her first appearance in the case.

Additionally, because Mr. Donjuan had his choice of the venue in which to file his paternity proceeding, he cannot credibly argue that such venue was inconvenient. He certainly was not prejudiced by the venue, particularly where the district court was able to resolve the case on briefing alone and without the need for an evidentiary hearing.

III. THE COURT SHOULD REJECT MR. DONJUAN'S CONSTITUTIONAL ARGUMENTS.

A. Mr. Donjuan did not preserve his constitutional arguments.

For the first time in his Appellant's Brief, Mr. Donjuan raises two constitutional arguments. First, he argues that requiring strict compliance with the affidavit requirement of Utah Code Ann. § 78B-6-121(3)(c) violates the due process clauses of the United States Constitution and the Utah Constitution. Next, he argues that Subsection 78B-6-121(3) is unconstitutional because it negates giving full faith and credit to paternity actions initiated

⁷ This situation makes it clear why Utah Code Ann. § 78B-3-308 specifically references a defendant, and not simply a party. A plaintiff cannot file a motion for change of venue before the complaint is filed, and since the motion must be filed before the answer or an appearance is entered, filing the complaint necessarily waives any option a plaintiff may possibly have had for asking for a change of venue. The plaintiff chooses where to file the complaint, and then the defendant chooses whether to move for change of venue or accept the plaintiff's choice of venue.

preserve an issue for appeal, the appellant's brief must include a "citation to the record showing that the issue was preserved in the trial court." Utah R. App. P. 24(a)(5)(A).

Mr. Donjuan did not raise his constitutional arguments in the district court. None of his briefing in the district court even references these issues, let alone specifically raises them with supporting legal authority as required. R. 3-16; 77-196. Moreover, because this case was resolved on the briefing, his counsel did not raise these arguments during any oral argument before the court. Mr. Donjuan certainly does not satisfy his burden of showing in the Appellant's Brief that the constitutional issues had been preserved. Indeed, he does not show that any of the arguments were preserved by citing to the record. Appellant's Brief at 3, 4. He also makes no effort to argue that this Court should consider arguments that had not been preserved before the district court. *Id.* Therefore, he may not raise his constitutional issues before this Court.

B. Even if the Court were to reach the merits of Mr. Donjuan's constitutional arguments, Subsection 78B-6-121(3)(b) as applied does not violate due process.

1. Because Mr. Donjuan had a meaningful opportunity to comply with the affidavit requirement prior to the birth mother's consent to adoption, he was not denied due process.

The Utah Supreme Court has recently defined the contours of an unmarried biological father's opportunity interest in a child and his due process rights if he grasps that opportunity interest. While Mr. Donjuan argues that the Utah Supreme Court has never decided whether the affidavit requirement of 78B-6-121(3) and its sub-parts passes constitutional muster, Appellant's Brief at 17, the court has definitely considered the

without due process of law where the putative father has not acquired a fundamental parental right by complying with the statutory requirements of the Utah Adoption Act. *In re adoption of T.B.*, 2010 UT 42, ¶¶ 26-44, 656 Utah Adv. Rep. 68. In *T.B.*, the putative father argued that, due to his interactions with the child and his payment of certain expenses relating to the child, he obtained fundamental parental rights, including the right to consent the adoption, that cannot be taken away by statute absent a compelling state interest. 2010 UT 42, ¶ 27, 656 Utah Adv. Rep. 68. However, the supreme court rejected his argument that he had acquired a constitutional right to consent to the adoption prior to the birth mother's relinquishment of the child for adoption. *Id.* ¶ 29.

In reaching this conclusion, the court reasoned that “constitutionally protectable ‘[p]arental rights do not spring full-blown from the biological connection between parent and child[, but] . . . require relationships more enduring.’” 2010 UT 42, ¶ 30, 656 Utah Adv. Rep. 68, *quoting* *Lehr v. Robertson*, 463 U.S. 248, 257, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). The court continued by defining the narrow contours of an unmarried biological father's due process rights:

[W]hat the Due Process clause protects, as far as an unwed natural father is concerned, is the “*opportunity*” to develop a relationship, by taking a responsible role in the life of his child. So long as a state's adoption code contains procedures that provide a putative father a meaningful chance to preserve his opportunity to develop a relationship with his child, due process is satisfied.

2010 UT 42, ¶ 31, 656 Utah Adv. Rep. 68 (emphasis in original). The court noted that “individual states may define when an unwed father has grasped that opportunity.”

guarantees an unwed father the right to preserve his parental opportunity by following state procedures. If he fails to comply with the procedures available to protect his right to develop an enduring, committed relationship with his child, a putative father risks the possibility that the natural mother's relinquishment of the child may eliminate his opportunity to acquire constitutionally protectable parental rights before he has been able to obtain them.

2010 UT 42, ¶ 40, 656 Utah Adv. Rep. 68 (emphasis added).

Mr. Donjuan had a reasonable opportunity to comply with the requirements of Utah Code Ann. § 78B-6-121(3) prior to his statutory deadline for doing so. He demonstrated this by filing a paternity petition and registering notice of it with Vital Records. He could have easily submitted the requisite sworn affidavit when he filed his paternity petition, but simply failed to do so. Therefore, like the putative father in *T.B.*, he “has no valid constitutional objection to the operation of the statute.” 2010 UT 42, ¶ 32, 656 Adv. Rep. 68.

2. The state has a rational basis for requiring putative fathers to comply with the affidavit requirement prior to the adoptive placement.

Mr. Donjuan argues that the sole purpose of Utah Code Ann. § 78B-6-121 is “to provide notice, prior to the consent of the mother, to the state [or] any party attempting to adopt a child that a father has filed a paternity action” and that “[t]he affidavit requirement serves no beneficial purpose.” Appellant’s Brief at 17. He is wrong.

Although Mr. Donjuan identifies one purpose underlying Section 78B-6-121, it is not the sole purpose. The state has “a compelling interest in requiring unmarried biological fathers to demonstrate commitment . . . by establishing legal paternity, in accordance with

Adoption Act often have little comprehension or consideration of the enormously difficult decision that unmarried mothers face. Unfortunately, it is commonplace for unwed mothers to be lulled into deciding to parent the child by false promises of an unwed father, only to find out too late that they alone must shoulder the entire burden of raising and providing for the child. Those birth mothers who have the courage to place their children for adoption should not have to wonder whether the adoption may later be undone by a putative father who has not made the requisite commitments beforehand. If a man is unwilling to commit to the mother and her future children by marrying her prior to the child's conception, it is not unduly harsh to require him to file a sworn affidavit making certain binding legal commitments to the child prior to her placing the child for adoption. *See Sanchez v. L.D.S. Social Serv.*, 680 P.2d 753, 756 (Utah 1984) ("It is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare.").

The affidavit requirement also actually protects certain unwed birth fathers and ferrets out those cases where the birth father truly does not want to be responsible for the child, but has been put up to filing a paternity action to obstruct the adoption by a paternal grandparent or someone else. It is not unusual in cases where an unwed birth father has filed a paternity action, that a paternal grandparent, and not the birth father, is actually the one opposed to the adoption. Thus, the affidavit requirement protects unsuspecting birth

pool of potential adoptive parents and possibly result in disrupted adoptions, contrary to the compelling interests of the state. *See id.* ¶ 47; *see also* Utah Code Ann. § 78B-6-102(5)(c) (“adoptive children have a right to permanence and stability in adoptive placement”).

C. Even if the Court were to reach the merits of Mr. Donjuan’s full faith and credit argument, the argument is without merit.

1. The Georgia court never entered an order adjudicating paternity and actually denied Mr. Donjuan’s request to restrain and enjoin Ms. McDermott from leaving Georgia.

Even if the Mr. Donjuan had preserved his full faith and credit argument by raising it in the district court, the argument is without merit. The Superior Court of Forsyth County, Georgia (“Georgia court”) has never issued an order adjudicating Mr. Donjuan to be the child’s father. Indeed, the only order the Georgia court has entered is its Order on Defendant’s Motion to Dismiss, entered on July 20, 2009. Therein the Georgia court dismissed Mr. Donjuan’s legitimation claim and stayed his paternity claim pending the child’s birth.

Importantly, the Order on Defendant’s Motion to Dismiss specifically denied Mr. Donjuan’s request “to restrain and enjoin [Ms. McDermott] from leaving the jurisdiction of” the Georgia court. R. 149. Mr. Donjuan’s representations to the contrary are false and misleading.

Mr. Donjuan points to language in the Georgia court’s Standing Domestic Relations Order to argue that Ms. McDermott was precluded from coming to Utah to deliver the child and place her for adoption. Although the Standing Domestic Relations Order does contain

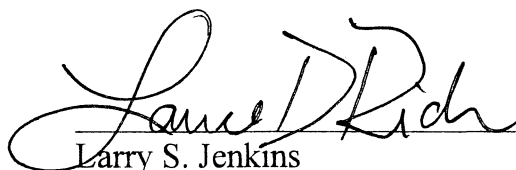
action in California prior to the child's birth); *In re Adoption of W*, 904 P.2d 1113, 1122 (Utah Ct. App. 1995) (holding that the district court was not required to wait until the Indiana court ruled on putative father's paternity claim before proceeding with the adoption).

Recently, the Utah Supreme Court denied intervention and enforcement of a temporary custody order from another state because the order was issued after the birth mother relinquished her parental rights to the child. *H.U.F. v. W.P.W.*, 2009 UT 10, 203 P.3d 943. In *H.U.F.*, the putative father argued that the district court should have given full faith and credit to a paternity order entered by an Arizona court after the adoptive placement. 2009 UT 10, ¶ 39, 203 P.3d 943. Although the Utah Supreme Court agreed that the paternity order was entitled to full faith and credit, it held that the district court's failure to afford the paternity order full faith and credit was harmless error because the paternity order was untimely and therefore did not give the birth father grounds to contest the adoption. *Id.* The court explained as follows:

First, the [district] court found that the order was a "nullity" because it was issued after the Birth Mother relinquished her rights to B.G.S., and, accordingly the Putative Father lost any right to consent the adoption. We agree. The paternity order was a "nullity" as it pertains to whether the Putative Father may contest the adoption of B.G.S. However, that determination does not mean that we decline to give the order full faith and credit. As our analysis indicates, the right to establish paternity is a separate and distinct right from the right to contest an adoption. The establishment of paternity is only one of many requirements that a putative father must satisfy before he establishes the right to contest an adoption. In this case, the Putative Father failed to meet the additional requirements, therefore, it is irrelevant whether he was able to establish paternity.

DATED this 28th day of June, 2010.

WOOD CRAPO LLC

A handwritten signature in cursive script, reading "Lance D. Rich", written over a horizontal line.

Larry S. Jenkins

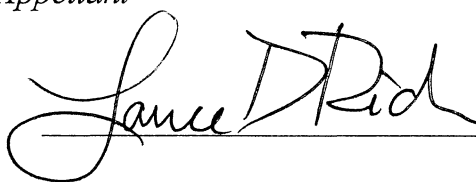
Lance D. Rich

Attorneys for Respondent/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2010, two true and correct copies of the foregoing ***BRIEF OF APPELLEE*** were mailed in the U.S. mail, postage prepaid, to the following:

Jennifer D. Reyes
Dale M. Dorius
DORIUS & REYES
P.O. Box 895
29 South Main
Brigham City, UT 84302
Attorneys for Petitioner/Appellant

A handwritten signature in cursive script, reading "Lance D. Rich", written over a horizontal line.

ADDENDUM A

A-1

FIRST JUDICIAL DISTRICT COURT
COUNTY OF BOX ELDER, STATE OF UTAH

MARCO A. DONJUAN,

Petitioner,

v.

GABRIELLE McDERMOTT,

Respondent.

MEMORANDUM DECISION

Case No. 094100254

Judge: Ben H. Hadfield

THE ABOVE MATTER is before the Court pursuant to Petitioner Marco Donjuan's ("Petitioner") *Motion to Change Venue* and *Motion to Stay Decision on Respondent's Motion to Dismiss for Failure to State a Claim or for Summary Judgment* ("Motion to Stay Decision"). In preparation of its decision, the Court has reviewed Petitioner's Motions and Memorandum in Support, Plaintiff's Memorandum in Opposition, each document submitted before the Court, and the applicable case law and statutory provisions. Having considered the foregoing, the Court issues this decision.

BACKGROUND

On July 28, 2009, Petitioner initially filed his paternity proceeding in the First District Court, Box Elder County. Petitioner asserts that he only filed in Box Elder County because he did not know where Respondent was residing in Utah, but has since learned that Respondent and the child at issue reside in Salt Lake County. Further, the child at issue in this paternity proceeding is also the subject of a pending adoption proceeding filed in the Third District Court, Salt Lake County. Therefore, Petitioner has moved the Court for an order changing venue to the Third District Court in Salt Lake County, arguing that the venue is more appropriate and convenient, and has moved the Court to stay its decision on Respondent's pending motion.

DISCUSSION

In Utah, a motion for change of venue may not be made by a plaintiff. U.C.A. § 78B-3-308. Plaintiff controls the initial choice of venue by choosing where to file the action.

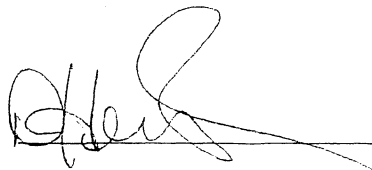
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 094100254 by the method and on the date specified.

MAIL: LANCE D RICH 500 EAGLE GATE TOWER 60 E S TEMPLE SALT LAKE CITY, UT 84111

BY HAND: DALE M DORIUS

Date: 11/17/09


Deputy Court Clerk

A-2

FIRST JUDICIAL DISTRICT COURT
COUNTY OF BOX ELDER, STATE OF UTAH

MARCO A. DONJUAN,

Petitioner,

v.

GABRIELLE McDERMOTT,

Respondent.

MEMORANDUM DECISION
AND ORDER

Case No. 094100254

Judge: Ben H. Hadfield

THE ABOVE MATTER is before the Court pursuant to Respondent Gabrielle McDermott's ("Respondent") *Motion to Dismiss for Failure to State a Claim or for Summary Judgment*. In preparation of its decision, the Court has reviewed Respondent's Motion and Memorandum in Support, Petitioner's Objection, each document submitted before the Court, and the applicable case law and statutory provisions. Having considered the foregoing, the Court issues this Memorandum Decision.

BACKGROUND

On July 31, 2009, in Salt Lake City, Utah, Respondent gave birth to a female child conceived during her non-marital relationship with Petitioner in the State of Georgia. On July 6, 2009, Respondent, through a letter sent by her counsel, informed Petitioner that she had relocated to Utah and that she intended to deliver the baby and place the child for adoption in Utah. Petitioner filed his initial Petition to Establish Paternity with this Court on July 28, 2009, and an amended verified petition on August 10, 2009. Respondent executed her consent to the child's adoption on August 3, 2009. Respondent now moves the Court to dismiss Petitioner's action or, in the alternative, for summary judgment.

DISCUSSION

A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *Hess v. Johnston*, 163 P.3d 747, 750 (Utah Ct. App. 2007). A motion to dismiss is appropriate only where it is clear that the plaintiff

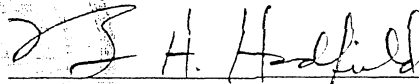
In this case, it is undisputed that Petitioner failed to file a sworn affidavit, as required by Utah Code Ann. Subsection 78B-6-121(3)(b), before Respondent executed her consent to the adoption. Therefore, the Court finds that Petitioner did not strictly comply with the requirements of Section 78B-6-121. The Court also finds that Petitioner's subsequent filing of an amended verified petition is insufficient to cure his failure to strictly comply with the statute. Accordingly, the Court concludes, as a matter of law, that Petitioner has waived and surrendered any right in relation to the child, including standing to pursue this proceeding to establish paternity.

CONCLUSION

Therefore, Respondent's *Motion to Dismiss for Failure to State a Claim or for Summary Judgment* is granted, and Petitioner's Petition to Establish Paternity is hereby dismissed.

Dated this 3 day of December, 2009.

BY THE COURT:



Ben H. Hadfield

DISTRICT COURT JUDGE.

A-3

WOOD CRAPO LLC
Larry S. Jenkins (4854)
Lance D. Rich (10241)
Brimon M. Wilkins (10713)
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060

Attorneys for Respondent

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
IN AND FOR BOX ELDER COUNTY

MARCO A. DONJUAN,)	
	)	<i>ORDER GRANTING MOTION TO</i>
	)	<i>DISMISS FOR FAILURE TO STATE</i>
Petitioner,	)	<i>A CLAIM OR FOR SUMMARY</i>
v.	)	<i>JUDGMENT</i>
)	
GABRIELLE McDERMOTT,)	
	)	Civil No. 094100254
Respondent.	)	Judge Ben H. Hadfield
)	

Respondent's Motion to Dismiss for Failure to State a Claim or for Summary Judgment came on for decision before the Court. Having reviewed the memoranda submitted by the parties and the applicable law, the Court is of the opinion that the motion should be granted. The facts are undisputed that Petitioner Marco Donjuan did not fully and strictly comply with all of the requirements for unmarried biological fathers who desire to preserve rights to children who are placed for adoption, which are found in Utah Code Ann. § 78B-6-121(3). Mr. Donjuan did not file a sworn affidavit with this Court as required by Utah Code Ann. § 78B-6-121(3)(b) prior to the time Respondent executed her consent to the adoption of the child. As such, he is

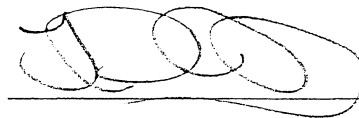
mgd

1/7/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11 day of December, 2009, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing *ORDER GRANTING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR FOR SUMMARY JUDGMENT* to the following:

Dale M. Dorius
Jennifer D. Reyes
DORIUS & REYES
P.O. Box 895
29 South Main
Brigham City, UT 84302
Attorneys for Marco Donjuan

A handwritten signature in black ink, appearing to read 'D. Dorius', is written over a horizontal line.

ADDENDUM B

B-1

2009 JUL 28 PM 3:31

DALE M. DORIUS - #0903
JENNIFER D. REYES - #9004
DORIUS & REYES
 Attorneys for Petitioner
 P. O. Box 895
 29 South Main
 Brigham City, UT 84302
 (435) 723-5219 Phone
 (435) 723-5210 Fax

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

MARCO A. DONJUAN,)	
Petitioner,	)	PETITION TO ESTABLISH
	)	PATERNITY
vs.)	
GABRIELLE McDERMOTT,	)	Civil No. 094100254
Respondent.	)	Judge

COMES NOW Petitioner, by and through his attorney Dale M. Dorius, and hereby petitions the Court and for cause of action alleges as follows:

FACTUAL BACKGROUND

1. Petitioner and Respondent had a relationship and from said relationship a child was conceived out of wedlock.
2. Respondent is expected to give birth to a child on or about July 31, 2009. Petitioner and Respondent are both residents of Georgia, however the current location of Respondent is unknown. It has recently come to Petitioner's attention Respondent may give birth in Utah and does not desire to keep the child.

cost. Each of the parties should be ordered to pay one-half of any uninsured medical costs incurred on said child.

LIFE INSURANCE

11. The parties should be ordered to maintain life insurance with said child as beneficiary thereunder, so long as it is available through their places of employment at a reasonable cost. Each party should be allowed to add any future children, born or adopted, as beneficiaries thereunder.

TAX DEDUCTION AND TAX CREDIT FOR THE MINOR CHILD

12. Petitioner should be entitled to claim the parties' minor child as his dependant for federal and state income tax purposes each and every year.

BENEFITS

13. The minor child should be awarded all the rights and benefits of the Petitioner and Respondent, including Social Security and other rights belonging to the minor child.

RESTRAINING ORDERS

14. Petitioner and Respondent should be restrained from disparaging or slandering each other in any manner, and should be restrained from allowing third parties to make disparaging or slanderous remarks about each other. The parties should be restrained from placing the minor child in the middle of the parties' dispute(s) with one another including, but not limited to, using the minor child as a messenger, or directing others to do the same.

B-2

BRIGHAM DISTRICT COURT
2009 AUG 11 PM 4:36

DALE M. DORIUS - #0903
JENNIFER D. REYES - #9004
DORIUS & REYES
Attorneys for Petitioner
P. O. Box 895
29 South Main
Brigham City, UT 84302
(435) 723-5219 Phone
(435) 723-5210 Fax

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

MARCO A. DONJUAN,)	
Petitioner,	)	AMENDED PETITION TO ESTABLISH PATERNITY
vs.)	
GABRIELLE McDERMOTT,	)	Civil No. 094100254
Respondent.	)	Judge Ben H. Hadfield

COMES NOW Petitioner, MARCO A. DONJUAN, being first duly sworn, and hereby petitions the Court and for cause of action alleges as follows:

FACTUAL BACKGROUND

1. Petitioner is over the age of 18, is competent to testify, and the information contained herein is based on Petitioner's personal knowledge or upon information and belief.
2. Petitioner and Respondent had a relationship and from said relationship a child was conceived out of wedlock. Respondent is expected to give birth to a child on or about July 31, 2009. Petitioner and Respondent are both residents of Georgia, however the current location of Respondent is unknown. It has recently come to Petitioner's attention Respondent may give birth in Utah and does not desire to keep the child.

8.11.09

child's paternal grandmother, would provide child care for the child when needed, however child care would be at a minimum due to Petitioner's ability to work from home.

d. Petitioner has a stable and suitable home for the child, and the child will have its own room.

PARENTING PLAN

9. Parenting time, whether by agreement of the parties or by applying the minimum guidelines, should be in compliance with the following provisions:

a. The minor child should reside in Petitioner's home and should have visitation with Respondent pursuant to Utah Code §30-3-35

b. Petitioner and Respondent should mutually discuss the minor child's education, health care, and religious upbringing, however Petitioner as custodial parent should have the primary decision-making authority.

c. Either parent may make emergency decisions affecting the health or safety of the child.

d. The parties should make a good faith effort to resolve future conflicts or disputes through the dispute resolution process.

e. If either party decides to move 150 miles or more from the custodial parent's home at the time of the Decree and Order Establishing Paternity, the moving party should provide the other party with 30 days written notice. Either party, upon motion, may seek review of the parenting time arrangements, to include extended parenting time and costs;

f. Special consideration should be given to each parent to make the child available to attend family functions, including funerals, weddings, family reunions, religious

HEALTH INSURANCE AND PAYMENTS OF MEDICAL EXPENSES

12. The parties should be ordered to maintain health and accident insurance on the minor child, so long as it is available through their places of employment at a reasonable cost. Each of the parties should be ordered to pay one-half of any uninsured medical costs incurred on said child.

LIFE INSURANCE

13. The parties should be ordered to maintain life insurance with said child as beneficiary thereunder, so long as it is available through their places of employment at a reasonable cost. Each party should be allowed to add any future children, born or adopted, as beneficiaries thereunder.

TAX DEDUCTION AND TAX CREDIT FOR THE MINOR CHILD

14. Petitioner should be entitled to claim the parties' minor child as his dependant for federal and state income tax purposes each and every year.

BENEFITS

15. The minor child should be awarded all the rights and benefits of the Petitioner and Respondent, including Social Security and other rights belonging to the minor child.

RESTRAINING ORDERS

16. Petitioner and Respondent should be restrained from disparaging or slandering each other in any manner, and should be restrained from allowing third parties to make disparaging or slanderous remarks about each other. The parties should be restrained from placing the minor child in the middle of the parties' dispute(s) with one another including, but not limited to, using the minor child as a messenger, or directing others to do the same.

ADDENDUM C

C-1

IN THE SUPERIOR COURT OF FORSYTH COUNTY

STATE OF GEORGIA

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE

JUL 20 2009

E. E. Cole
CLERK SUPERIOR COURT

MARCO DONJUAN,

Plaintiff,

v.

GABRIELLE ELAINE McDERMOTT,

Defendant.

CIVIL ACTION

FILE NO. 09CV-1492

ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant having filed her Motion to Dismiss and Motion for Expedited Hearing; and the Court having found that good cause exists to expedite argument and hearing on Defendant's Motion to Dismiss; and the Court having entered its Order setting this matter for an expedited hearing on July 9, 2009; and counsel for both parties having appeared and presented argument before the Court; and the Court having considered such argument together with the parties' respective briefs; now, therefore; the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

The Plaintiff filed his Petition to Legitimate and for Custody and Child Support on May 19, 2009, and Plaintiff served Defendant therewith on May 21, 2009.

148

C-2

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE

MAY 01 2007

INTERNAL OPERATING PROCEDURE 07-02 *Daighe Daniels*
CLERK SUPERIOR COURT

IN RE: DOMESTIC RELATIONS ACTION STANDING ORDER

IMPLEMENTING ORDER

Pursuant to O.C.G.A. § 19-1-1(b) and O.C.G.A. § 9-11-65(e), the Court hereby orders that the attached "Domestic Relations Action Standing Order" shall apply to all domestic relations actions, as defined in O.C.G.A. § 19-1-1(a), upon filing. The Clerk of Court shall complete the standing order by inserting the names of the parties and the case number, and shall file the order with the case.

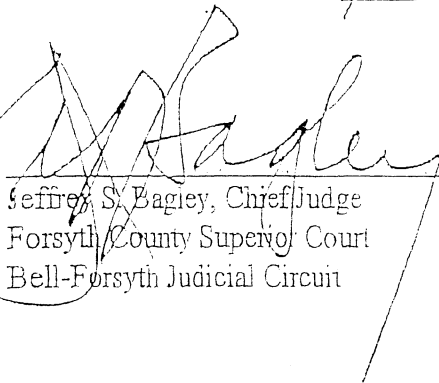
When domestic relations actions are filed requiring service by the sheriff or by publication, the Clerk shall attach copies of the filed standing order to the original and service copies of the action and give or mail a copy of the filed standing order to the attorney or person filing the action.

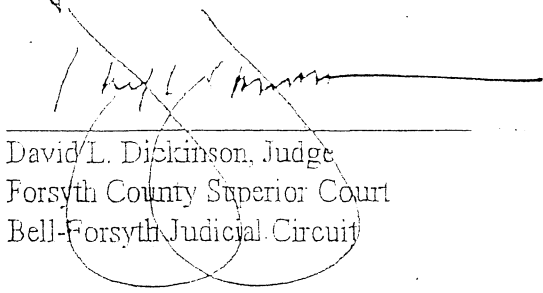
When domestic relations actions are filed with an acknowledgment of service, the Clerk shall attach a copy of the filed standing order to the original complaint and give or mail two copies of the filed standing order to the attorney or person filing the action, with instructions that he or she is responsible for serving the defendant with a copy of the order.

This Order shall apply to all domestic relations actions filed on or after MAY 1ST, 2007, and all pending domestic relations actions within which a final judgment and decree of divorce has not yet been entered by the Court prior to MAY 1ST, 2007. For actions pending prior to MAY 1ST, 2007, the requisite Child Support Worksheet and Schedules and Domestic Relations Financial Affidavit must be completed and filed by both parties prior to the next hearing on child support.

This Internal Operating Procedure shall supersede Internal Operating Procedure 06-02.

SO ORDERED, this 1ST day of May, 2007.


Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit


David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

maltreats, vilifies, molests, or harasses, or which may, upon judicial determination, constitute threats, harassment, or stalking the adverse party or the child(ren) of the parties or any act which constitutes a violation of other civil or criminal laws of this state.

4.

NO REMOVAL OF ANY PROPERTY- Each party is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of this Court, without the permission of the Court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action.

5.

MUST ATTEND SEMINAR FOR DIVORCING PARENTS- Parties to domestic relations actions involving minor children are required to attend a seminar for divorcing parents within 31 days of service of the original Complaint upon the Defendant. Failure to complete the seminar in a timely manner may subject the non-complying party to contempt or other sanctions, may delay any temporary hearings or mediation sessions, and may delay the granting of a final decree of divorce. See www.adr9.com for more information.

6.

MUST FILE DOMESTIC RELATIONS FINANCIAL AFFIDAVIT- Parties are to complete and file a Domestic Relations Financial Affidavit, as required by Uniform Superior Court Rule 24.2. That is, at the time of filing any action for temporary or permanent child support, alimony, equitable division of property, modification of child support or alimony or attorneys fees, the filing party shall file with the Clerk of Court the affidavit specifying his or her financial circumstances in the form set forth in Uniform Superior Court Rule 24.2.

The Clerk of Court shall be authorized to not accept the filing of any new action requiring the Domestic Relations Financial Affidavit if said affidavit is not completed and presented when the new action is sought to be filed. In cases not involving child support, in which a settlement agreement is filed with the complaint for divorce, the parties are relieved of the responsibility to file the Domestic Relations Financial Affidavit and the Clerk of Court shall notwithstanding the absence of the Domestic Relations Financial Affidavit, file the complaint and settlement agreement.

In protective order actions filed under O.C.G.A. §19-13-1, et. seq., the affidavit may be filed on or before the date of the hearing.

The opposing party shall serve his or her affidavit at least five (5) days prior to the temporary hearing; at least five (5) days prior to court ordered mediation; or with his or her answer or thirty days after service of the complaint, whichever first occurs, if no application for a temporary award is made and the parties do not participate in mediation prior to trial.

discretion, may consider the Plaintiff's proffered income evidence of Defendant's income as an admission by the Defendant. If the Plaintiff fails to indicate what he/she believes the Defendant's income to be, the Court may impute income to the Defendant at the prevailing federal minimum wage.

9.

FAILURE OF DEFENDANT TO FILE CHILD SUPPORT WORKSHEET AND SCHEDULES- The Clerk of Court will be directed to accept the Defendant's Answer even if the Worksheet and Schedules are not attached; however, the Defendant may be subject to the consequences as outlined above in paragraph 8.

The Clerk of Court shall be required to mail notice to the Defendant related to the Defendant's non-compliance with the Standing Order if any answer is accepted without the required Worksheet and Schedules attached.

10.

WEBSITE ADDRESS FOR CHILD SUPPORT WORKSHEET AND SCHEDULES- Where pro se parties are involved, the Clerk of Court shall inform said pro se persons as to the availability of internet access to the Georgia Child Support Commission's website with the guided electronic worksheet at all Forsyth County public libraries and law libraries. The Georgia Child Support Commission's web address is: <http://www.georgiacourts.org/csc>.

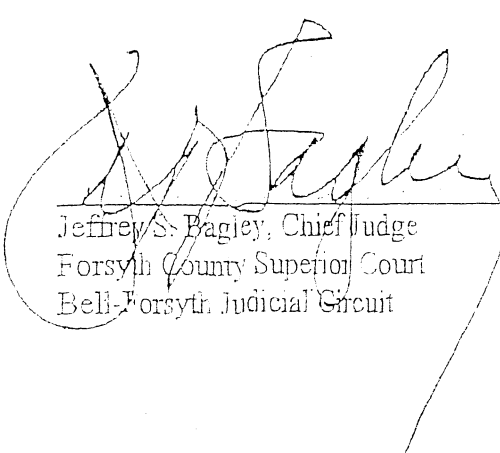
11.

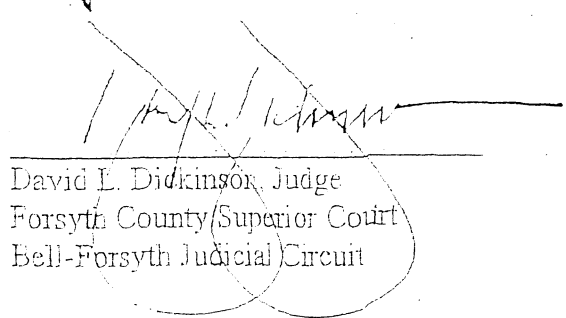
MEDIATION REQUIRED FOR CONTESTED CUSTODY CASES- Parties in cases involving contested custody are required to attend mediation prior to any final hearing.

12.

This Standing Order shall supersede previous versions and shall become effective on May 1, 2007.

SO ORDERED, this 15th day of May, 2007.


Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit


David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

12.

ADDENDUM D

WOOD CRAPO LLC
Larry S. Jenkins (4854)
Lance D. Rich (10241)
Brinton M. Wilkins (10713)
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060

UTAH DISTRICT COURT
2009 SEP 18 PM 12:30

Attorneys for Petitioners

IN THE FIRST JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH
IN AND FOR BOX ELDER COUNTY

MARCO A. DONJUAN,)	
	)	RESPONDENT'S MEMORANDUM
Petitioner,	)	IN SUPPORT OF MOTION TO
v.	)	DISMISS FOR FAILURE TO STATE
	)	A CLAIM OR FOR SUMMARY
GABRIELLE McDERMOTT,	)	JUDGMENT
)	
Respondent.	)	Civil No. 094100254
	)	Judge Ben H. Hadfield

INTRODUCTION

Because Petitioner Marco A. Donjuan knew by July 9, 2009 that Respondent Gabrielle McDermott intended to give birth and place the child for adoption in Utah but did not strictly comply with all of the requirements of Utah Code Ann. § 78B-6-121(3) prior to execution of her consent to adoption on August 3, 2009, he is considered to have waived and surrendered all rights to the child under Utah Code Ann. § 78B-6-122(2). In particular, Mr. Donjuan did not file a sworn affidavit in the paternity proceedings prior to the adoptive placement as required by Utah Code Ann. § 78B-6-121(3)(b). His efforts to rectify this failure a week after the adoptive placement by filing an amended petition that he verified are insufficient. The court should reject Mr. Donjuan's attempt to substantially comply with the paternity requirements for unwed fathers by use of the relation-back doctrine because applying Utah R. Civ. P. 15 in that manner would undermine the

9-18-09
10

5. On August 3, 2009, Ms. McDermott appeared before Judge Kate A. Toomey in the Third Judicial District Court in Salt Lake City, Utah, and executed her consent to adoption. A redacted copy of Gabrielle McDermott's Consent to Adoption, omitting the names of the adoptive parents, is attached as Exhibit D. Therein, Ms. McDermott represents that she is currently single, and was not married at the time of conception to the birth father of the child or any other man. Ex. D at 4, ¶ 17.

6. At that hearing on August 3, 2009, Ms. McDermott's counsel informed the court that a paternity action had been filed and that notice of that action had been filed with Utah Vital Records, but that the putative father had not filed a sworn affidavit in the paternity proceeding.

7. Counsel for the adoptive parents served notice of adoption proceedings on Mr. Donjuan. In that notice, Mr. Donjuan was informed of the failure to file the sworn affidavit with this Court. A copy of the notice is attached as Exhibit E.

8. On August 10, 2009, Mr. Donjuan signed the Amended Petition to Establish Paternity.

9. On August 29, 2009, Ms. McDermott received the Summons and Amended Petition to Establish Paternity, copies of which are attached together as Exhibit F. Although the Amended Petition is verified by Mr. Donjuan, it is not signed by his counsel.

An unwed father of a newborn child is required to take all of the following steps to preserve a legal interest in the child prior to execution of the mother's consent to adoption:

- (a) initiate[] proceedings in a district court of the state to establish paternity under Title 78B, Chapter 15, Utah Uniform Parentage Act;
- (b) file[] with the court that is presiding over the paternity proceeding a sworn affidavit:
 - (i) stating that he is fully able and willing to have full custody of the child;
 - (ii) setting forth his plans for the care of the child; and
 - (iii) agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth;
- (c) consistent with Subsection (4), file[] notice of the commencement of paternity proceedings, described in Subsection (3)(a), with the state registrar of vital statistics within the Department of Health, in a confidential registry established by the department for that purpose; and
- (d) offered to pay and paid a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless [he was excused for reasons set forth in the statute].

Utah Code Ann. § 78B-6-121(3) (emphasis added).

Because Mr. Donjuan was informed on July 9, 2009 that Ms. McDermott had relocated to Utah, planned to give birth in Utah, and planned to place the child for adoption in Utah and pursuant to Utah law, *see* Ex. A and B, he was required to strictly comply with each of Subsection 78B-6-121(3)'s requirements. He did not and has surrendered any interest in the child. As such, he lacks standing to pursue these paternity proceedings. *See* Utah Code Ann. §§ 78B-6-121(3) and 78B-6-122(2); *O'Dea*, 2009 UT 46, ¶¶ 1, 46.

II. MR. DONJUAN LACKS STANDING BECAUSE HE FAILED TO STRICTLY COMPLY WITH SUBSECTION 78B-6-121(3)(b).

Even where an unwed father has timely filed a paternity petition and registered notice of such proceeding, he has waived his rights to the child if he did not strictly comply with Subsection 78B-6-121(3)(b)'s requirement to file a sworn affidavit containing certain statements under oath to show his full commitment to his parental responsibilities prior to execution of the mother's consent to adoption. In *In re adoption of Baby Boy Doe*, 2008 UT App 449, 199 P.3d 368, the Utah Court of Appeals recently held that an unwed father waived his rights to the child due to his failure to file a

compliance means “fully meeting each test imposed by the statute.”); *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (“The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge’s determination to require all interested parties to adhere precisely to the procedural requirements of the statute.”). The importance of strict compliance is underscored by multiple references in the Adoption Act.² Also, Utah courts have repeatedly held that strict, not substantial, compliance is required by unwed fathers to prevent an adoption. *See, e.g., Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 755 (Utah 1984) (“It is of no constitutional importance that [the unwed father] came close to complying with the statute.”); *In re Adoption of W*, 904 P.2d 1113, 1121 (Utah Ct. App. 1995) (“[R]equiring strict compliance with the adoption statutes is reasonable because of the nature of adoptions.”). In other areas of law where strict compliance is required, Utah courts “have repeatedly denied recourse to parties that have even slightly diverged from the exactness required by” the statute. *See Wheeler v. McPherson*, 2002 UT 16, ¶ 12, 40 P.3d 632.

Thus, because Mr. Donjuan did not file a sworn affidavit or any of the sworn statements required by Subsection 78B-6-121(3)(b) prior to execution of Ms. McDermott’s consent, he did not precisely comply with this statute. And, Utah R. Civ. P. 15(c) does not excuse his failure to do so.

B. Utah R. Civ. P. 15(c) does not excuse Mr. Donjuan’s failure to file a sworn affidavit prior to execution of Ms. McDermott’s consent to adoption.

Mr. Donjuan’s apparent reliance upon Utah R. Civ. P. 15(c) to attempt to correct his failure to file a sworn affidavit is fundamentally misplaced. While the rule may be used to have the filing of an amended “pleading” relate back to the date the original pleading was filed, it cannot be used to have the filing of an *affidavit* relate back to the filing of a *pleading*. The Court should reject Mr.

² *See* Utah Code Ann. § 78B-6-102(6)(b, f) (unwed father’s parental interest may be lost entirely by “his failure to strictly comply with the available steps to substantiate” a relationship with the child and “the child may be adopted without his consent unless he strictly complies with the provisions of this chapter . . .”); Utah Code Ann. §§ 78B-6-120(1)(f)(2) and 78B-6-122(2).

parents . . . outweigh the interest of an unmarried biological father who does not timely grasp the opportunity to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.” Utah Code Ann. § 78B-6-102(6)(c).

The Utah Supreme Court long ago recognized the state’s compelling interest in speedily identifying those with an interest in an adoption even before enactment of these provisions:

The state has a strong interest in *speedily* identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain *within a very short time of birth* whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted.

Wells v. Children’s Aid Soc’y of Utah, 681 P.2d 199, 203 (Utah 1984) (emphasis added).

The Supreme Court recently reaffirmed the state’s compelling interest. In *Thurnwald v. A.E.*, the court stated that “[t]he state . . . has compelling interests in promoting ‘early and uninterrupted bonding between child and parents’ and in facilitating final and irrevocable adoptions.” 2007 UT 38, ¶ 34, 163 P.3d 623, *quoting Wells*, 681 P.2d at 206. The court decided that an unwed father must strictly comply with the statutory requirements no later than one business day after the child’s birth unless the mother waits longer to sign her consent. *Id.* at ¶ 46.

If the Court were to allow Mr. Donjuan’s untimely verification of the amended paternity petition to satisfy the sworn affidavit requirement through the relation-back doctrine, the purposes of the adoption statute would be frustrated. No one would be able to look at what the unwed father has timely filed and rely on the content thereof, because he would be able to fix any deficiencies after the critical time when the adoptive placement occurs.

Courts, and mothers of children born out of wedlock, need to know promptly that an unwed father can be bound to assume custody of the child, pay child support, and contribute to expenses of the pregnancy and birth. The sworn affidavit requirement makes the unwed father accept and acknowledge personal responsibility not only in writing, but under oath, so he cannot later retract

requisite statements. *Baby Boy Doe*, 2008 UT App 449, ¶¶ 3-5. That court's willingness to "assume, *without deciding*," that Rule 15 could apply and to dismiss the appeal on a simpler issue, does not create precedent to show that the relation-back doctrine applies in this context. *Id.* at ¶ 3 (emphasis added).

Additionally, as in *Baby Boy Doe*, neither of the petitions submitted by Mr. Donjuan is acceptable. The original petition is insufficient because it failed to contain the necessary sworn statements required by Subsection 78-6-121(3)(b). *See* Ex. C. The amended petition is insufficient because it was not signed by Mr. Donjuan's attorney. *See* Ex. F; Utah R. Civ. P. 11(a)(1) ("Every pleading, written motion, and other paper *shall* be signed by at least one attorney of record . . ."). As explained in *Baby Boy Doe*, the court should not read these documents together to comply with all of the requirements, when neither does so independently. 2007 UT App 449, ¶¶ 3-5.

Moreover, in many respects Mr. Donjuan showed less initial compliance with the sworn affidavit requirement than did the unwed father in *Baby Boy Doe*. Whereas the father in *Baby Boy Doe* filed a timely *verified* petition, Mr. Donjuan's paternity petition was unverified. *See* Ex. C. Also, whereas the father in *Baby Boy Doe* filed an amended petition in the effort to supplement his original petition the next day, Mr. Donjuan's amended petition was not filed until a week after his time for compliance had expired. Indeed, Ms. McDermott, through counsel, checked to see if he had filed a sworn affidavit. Discovering its absence, she and the adoptive parents relied upon this fact in proceeding with the execution of her consent to adoption. Thus, the reliance upon Mr. Donjuan's insufficient paternity petition was much greater than what occurred in *Baby Boy Doe*.

Furthermore, in the context of medical malpractice suits (which arguably require less finality than adoption cases), courts have repeatedly denied attempts to use Rule 15(c) to relate back to an original petition to correct a failure to file a sworn affidavit. *See Scarsella v. Pollak*, 607 N.W.2d 711, 713 (Mich. 2000); *Thigpen v. Ngo*, 558 S.E.2d 162, 166 (N.C. 2002); *Fales v. Jacobs*, 588 S.E.2d 294, 295 (Ga. Ct. App. 2003). In each of these cases, the courts rejected a plaintiff's argument that

has only partially completed the process to protect his economic interest in the property.⁴ Similarly, an unwed birth father has only inchoate parental rights to a child until he has strictly complied with all requirements to establish paternity. *See* Utah Code Ann. § 78B-6-102(5)(e). Thus, just as the time limit for pursuing a mechanic lien holder's inchoate right forms a substantive part of the holder's economic interest in the property precluding application of the relation-back doctrine, the time limit imposed by the Adoption Act formed a substantive part of Mr. Donjuan's interest in the child, and his failure to meet that time limit means that he has no claim to which his amended petition could relate back. Once Mr. Donjuan's deadline for complying with Subsection 78B-6-121(3)'s requirements passed on August 3, 2009, he had waived all rights to the child and his paternity petition became null and void.

CONCLUSION

For the foregoing reasons, the Court should dismiss this proceeding.

DATED this 17th day of September, 2009.

WOOD CRAPO LLC



Larry S. Jenkins
Lance D. Rich
Attorneys for Petitioners

⁴ Black's Law Dictionary defines "inchoate" as follows: "Partially completed or imperfectly formed; just begun." Black's Law Dictionary 765 (Deluxe 7th ed. 1999). Also, cases from other states follow a similar analysis when analyzing requirements that affidavits accompany an original complaint. For example, in *Washoe Medical Ctr. v. Second Judicial Dist. Court*, 148 P.3d 790 (Nev. 2006), the plaintiff filed a medical malpractice action but did not file the medical expert affidavit required by state law before the statute of limitations ran. *Id.* at 791. The Nevada Supreme Court held that "a [medical malpractice] complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed." *Id.* at 792. Also, "[b]ecause a void complaint does not legally exist, it cannot be amended." *Id.*

EXHIBIT A

AFFIDAVIT OF RELINQUISHMENT AND CONSENT TO ADOPTION

This document **must** be signed in front of a notary public.

I, Marco Arturo Donjuan, being first duly sworn on oath, depose and say that I believe I am the biological father of a child to be born to Gabrielle McDermott on or about July 31, 2009.

I do hereby relinquish and release forever any and all parental rights I may have with respect to the above-referenced child, whatever those rights may be, and consent to the legal adoption of said child.

I am emotionally stable at this time to make this decision of release.

I am not on any medication or drug that could alter my ability to decide.

I am not a member of a Native American tribe or qualified for membership in a Native American tribe, nor am I an Alaskan Native or member of an Alaskan Regional Corporation or Alaskan Village.

I am aware and understand fully my action of releasing my parental rights with regard to child.

I now waive any notice of any legal proceedings which may be held in the courts of the State of Utah, or elsewhere for the purpose of adoption of said child.

I have read the foregoing statement and understand fully the terms and conditions. I consent to the statements within. Action taken herein is of my own free will and choice and is executed voluntarily without force, duress, or promise.

I realize that this relinquishment is legally and irrevocably binding under the laws of the State of Utah.

Signature _____ Date _____
Marco Arturo Donjuan

STATE OF GEORGIA)
 :SS
COUNTY OF _____)

On this ____ day of _____, 2009, personally appeared before me, a notary public, the above named individual who swore or affirmed to me that his signature upon this instrument was voluntary and that he was under no undue influence or duress.

Notary Public

Amy Sorensen

From: UPS Quantum View [auto-notify@ups.com]
Sent: Thursday, July 09, 2009 2:10 PM
To: Amy Sorensen
Subject: UPS Delivery Notification, Tracking Number 1ZV022430291393726



***Do not reply to this e-mail. UPS and Wood Crapo LLC will not receive your reply.

At the request of Wood Crapo LLC, this notice alerts you that the shipment listed below has been delivered.

Important Delivery Information

Delivery Date / Time: 09-July-2009 / 3:45 PM
Driver Release Location: FRONT DOOR

Shipment Detail

Ship To:
Macro Donjuan
6245 GLEN BROOKE DR
CUMMING
GA
30040
US

UPS Service: 2ND DAY AIR
Shipment Type: Letter

Tracking Number: 1ZV022430291393726
Reference Number 1: Gabby McDermott

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Discover more about UPS:
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9/16/2009

3

EXHIBIT C

3. At the time of conception, the parties were unmarried. Petitioner believes that he is the child's biological father.
4. Petitioner has paid several expenses incurred in connection with the Respondent's pregnancy and has sent money orders to Respondent for financial support.

CUSTODY AND PARENT TIME

5. Petitioner is a fit and proper person and it is in the best interests of the minor child that Petitioner be awarded sole care, custody and control of the minor child.
6. Respondent should be awarded reasonable parent-time with the minor child to include the Minimum Schedule for Visitation contained in Utah Code §30-3-35, and such additional visitation as mutually agreed to by the parties, and those rights of the non-custodial parent listed as Advisory Guidelines in Utah Code §30-3-33.
7. Petitioner requests the Court issue an Decree and Order Establishing Paternity in this matter.

CHILD SUPPORT

8. The Court should calculate child support per the uniform guideline requirements.

CHILD CARE

9. Each party should pay one-half (½) of the work-related or educational-related child care incurred on behalf of the minor child.

HEALTH INSURANCE AND PAYMENTS OF MEDICAL EXPENSES

10. The parties should be ordered to maintain health and accident insurance on the minor child, so long as it is available through their places of employment at a reasonable

ATTORNEY FEES AND COSTS

15. Respondent should be ordered to pay attorney fees and costs incurred in this matter.

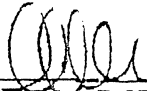
MISCELLANEOUS

16. Both parties should be ordered to execute and deliver to the other party any documents necessary to effectuate the terms of the Decree and Order Establishing Paternity in this matter.

WHEREFORE, Petitioner demands judgment as follows:

1. For a Judgment and Decree and Order Establishing Paternity, the same to become final upon the signing and filing thereof.
2. For relief granted in accordance with Petitioner's petition.
3. For any other relief the court determines to be fair and equitable.

DATED this 18 day of July, 2009.



DALE M. DORIUS
Attorney for Petitioner

FILED DISTRICT COURT
Third Judicial District

AUG 03 2009

SALT LAKE COUNTY

By mm Deputy Clerk

WOOD CRAPO LLC
Larry S. Jenkins (4854)
Richard J. Armstrong (7461)
Lance D. Rich (10241)
Brinton M. Wilkins (10713)
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060

Attorneys for Birth Mother

IN THE THIRD JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH

IN AND FOR SALT LAKE COUNTY

In the matter of the
adoption of Baby M,

)
) *GABRIELLE McDERMOTT'S*
) *CONSENT TO ADOPTION*
)

) Civil No. 092900321

) Judge _____
)

STATE OF UTAH)

:ss

COUNTY OF SALT LAKE)

GABRIELLE McDERMOTT deposes and states under oath, the following:

1. Pursuant to Utah Code Ann. § 78B-6-124, I hereby consent to the adoption of Baby M, who is a female child born to me at on July 31, 2009, at LDS Hospital in Salt Lake City, Utah, to the petitioners in this matter, I yield all of my rights to care, custody, and control of Baby M to petitioners.

46

9. I am not a member of an Indian Tribe, an Alaska Native, or a member of an Alaska Regional Corporation. To the best of my knowledge, the child's father is not a member of an Indian Tribe, an Alaska Native or member of an Alaska Regional Corporation, nor is this child eligible for membership in an Indian Tribe or an Alaska Regional Corporation.

10. I acknowledge my understanding that if the court accepts my *Consent to Adoption*, that this *Consent to Adoption* is irrevocable, that I will have no further responsibilities or rights in relation to Baby M, and that I cannot change my mind regarding my decision to place Baby M for adoption with

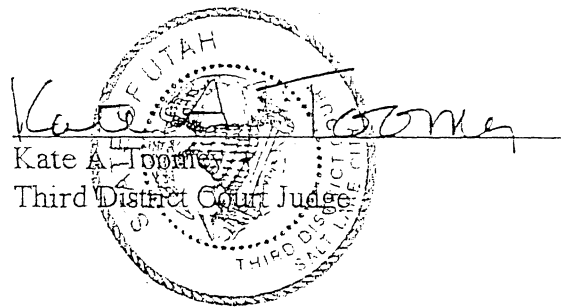
11. I intend that this *Consent to Adoption* be irrevocable as to
., the petitioners in this proceeding. I am not, however consenting to the adoption of Baby M by any other person or persons. If . are unable to complete the adoption of Baby M for any reason, and the adoption petition is dismissed, I desire, and I believe that it is in Baby M's best interests that Baby M be returned to my custody and control.

12. I waive any rights that I may have to notice of these proceedings or any further proceedings involving the adoption of Baby M.

13. I fully understand by consenting to the adoption, when the adoption is completed I will be relieved of all parental duties, obligations and responsibilities and shall have no further rights regarding care, custody, visitation, or adoption of Baby M. At the completion of

ACCEPTANCE AND APPROVAL OF CONSENT

This *Consent to Adoption* was EXECUTED IN OPEN COURT by GABRIELLE McDERMOTT this 3rd day of August, 2009, at 9:00 a.m. The Court certifies that, to the best of its information and belief, GABRIELLE McDERMOTT has read and understands this instrument and has signed it freely and voluntarily.


Kate A. Joorney
Third District Court Judge

PrAdv/17086-010

FILED DISTRICT COURT
Third Judicial District

AUG 06 2009

SALT LAKE COUNTY

By _____
Deputy Clerk

David M. McConkie (2154)
dmcconkie@kmclaw.com
David J. Hardy (5963)
dhardy@kmclaw.com
KIRTON & McCONKIE
Attorneys for Petitioners
60 East South Temple, #1800
P. O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

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

In the Matter of the Adoption of

BABY M,

a minor child

**NOTICE OF ADOPTION
PROCEEDING**

Civil No. 092900321

THE STATE OF UTAH TO:

**Marco Arturo Donjuan
6245 Glenbrooke Drive
Cumming, GA 30028**

PLEASE TAKE NOTICE that a Petition for Adoption has been filed in the Third Judicial District Court in and for Salt Lake County, Utah, in the above-entitled matter. The proceeding is regarding a female child born on July 31, 2009 to Gabrielle McDermott.

PLEASE BE ADVISED THAT YOU HAVE THIRTY (30) DAYS FROM THE DATE YOU RECEIVE THIS NOTICE TO FILE A MOTION TO INTERVENE IN THESE ADOPTION PROCEEDINGS.

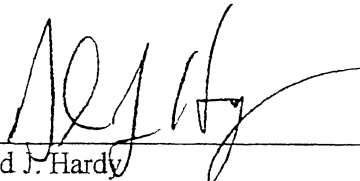
A Motion to Intervene must be filed with the Third Judicial District Court in and for Salt Lake County, 450 South State Street, Salt Lake City, Utah 84114, with a copy mailed to David J. Hardy and David M. McConkie at Kirton & McConkie, 1800 Eagle Gate Tower, 60 East South Temple Street, Salt Lake City, Utah 84111-1004. **A Motion to Intervene must set forth the specific relief sought and be accompanied by a Memorandum specifying the factual and legal grounds upon which the Motion is based.** Utah Code Ann. § 78B-6-110(6)(a).

If you desire to have a copy of the Petition filed in this matter, please contact David J. Hardy and David M. McConkie at Kirton & McConkie, 1800 Eagle Gate Tower, 60 East South Temple Street, Salt Lake City, Utah 84111-1004. Telephone: 801-328-3600.

If you fail to file a Motion to Intervene as outlined herein within thirty (30) days after receiving this notice, the Court may, without further notice to you, enter an Order stating: (1) that you have waived any right you may have had to further notice in connection with the adoption of the child, (2) that you have forfeited all rights you may have had in relation to the child, and (3) that you are barred from thereafter bringing or maintaining any action to assert any rights to or interest in the minor child.

DATED this 5th day of August, 2009.

KIRTON & McCONKIE



David J. Hardy
Attorneys for Petitioners

4852-3859-0468.1

SENDER: COMPLETE THIS SECTION

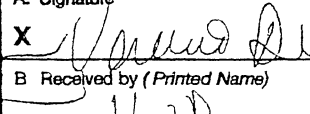
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to

Marco A. Donjuan
6245 Glenbrooke Drive
Cumming, GA 30028

COMPLETE THIS SECTION ON DELIVERY

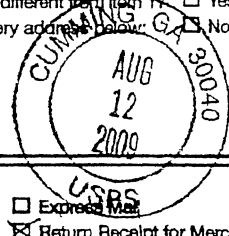
A. Signature

☒ X☐ Agent
☐ Addressee

B. Received by (Printed Name)

U 7 D

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type

☒ Certified Mail☐ Express Mail☐ Registered☒ Return Receipt for Merchandise☐ Insured Mail☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

2. Article Number

(Transfer from service label)

7000 1530 0004 0529 5850

17565-2

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

55

DALE M. DORIUS - #0903
JENNIFER D. REYES - #9004
DORIUS & REYES
Attorneys for Petitioner
P O Box 895
2nd South Main
Brigham City UT 84302
(435) 723-5219 Phone
(435) 723-5210 Fax

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

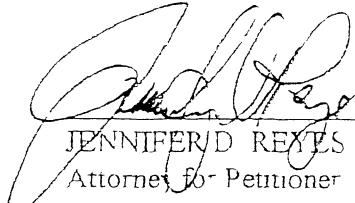
MARCO A. DONJUAN)	
Petitioner	)	SUMMONS
vs)	
GABRIELLE McDERMOTT	)	Civil No. 09-100254
Respondent	)	Judge Ben H. Hadfield

THE STATE OF UTAH TO THE ABOVE-NAMED RESPONDENT **GABRIELLE McDERMOTT**

You are hereby summoned and required to file an Answer in writing to the attached Amended Petition to Establish Paternity with the Clerk of the above-entitled Court at 43 North Main Street Brigham City UT 84302 and to serve upon or mail to Petitioner's attorney at P O Box 895 Brigham City, Utah 84302 a copy of said answer, within twenty (20) days after service of this Summons upon you.

If you fail to do so Judgment by Default will be taken against you for the relief demanded in said Amended Petition to Establish Paternity which has been filed with the Clerk of the Court and a copy of which is hereto annexed and served upon you.

DATED this 12th day of August 2009


JENNIFER D. REYES
Attorney for Petitioner

DOUGLAS A. McDERMOTT
Summons

3. At the time of conception, the parties were unmarried. Petitioner believes that he is the child's biological father.

4. Petitioner has offered to pay and did pay a fair and reasonable amount of expenses incurred with Respondent's pregnancy and is willing and ready to pay for expenses incurred in connection with the child's birth.

CUSTODY AND PARENT TIME

5. Petitioner is a fit and proper person and Petitioner is fully able and willing to have full custody of the child.

6. Respondent should be awarded reasonable parent-time with the minor child to include the Minimum Schedule for Visitation contained in Utah Code §30-3-35, and such additional visitation as mutually agreed to by the parties, and those rights of the non-custodial parent listed as Advisory Guidelines in Utah Code §30-3-35.

7. Petitioner requests the Court issue an Decree and Order Establishing Paternity in this matter.

PLAN FOR CARE OF CHILD

8. Petitioner hereby sets forth his plans for care of the child

a. Petitioner is currently employed and is capable of financially providing for both himself and the minor child.

b. Petitioner's work schedule is extremely flexible to the extent that the needs of the child would always come first.

c. Petitioner has a close-knit family and family support. Petitioner's mother, the

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holidays, important ceremonies, and other significant events in the life of the child or in the life of either parent which may inadvertently conflict with the parenting time schedule:

g. The non-custodial parent should pick up the child at the time specified and return the child at the time specified, and the child's regular school hours should not be interrupted;

h. The custodial parent should have the child ready for parenting time at the time the child is to be picked up and shall be present at the custodial home or should make reasonable alternate arrangements to receive the child at the time the child is returned;

i. Reasonable alterations in the parenting time schedule should be made to accommodate the work schedule of both parents;

j. The non-custodial parent should have access directly to all school reports, and medical records, and shall be notified immediately by the custodial parent in the event of a medical emergency; and

k. Each parent should provide the other with his or her current address and telephone number within 24 hours of any change.

CHILD SUPPORT

10. Petitioner agrees to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth.

CHILD CARE

11. Each party should pay one-half (½) of the work-related or educational-related child care incurred on behalf of the minor child.

ATTORNEY FEES AND COSTS

Respondent should be ordered to pay attorney fees and costs incurred in this matter.

MISCELLANEOUS

18. Both parties should be ordered to execute and deliver to the other party any documents necessary to effectuate the terms of the Decree and Order Establishing Paternity in this matter.

WHEREFORE, Petitioner demands judgment as follows:

For a Judgment and Decree and Order Establishing Paternity, the same to become final upon the signing and filing thereof.

For relief granted in accordance with Petitioner's petition.

For any other relief the court determines to be fair and equitable.

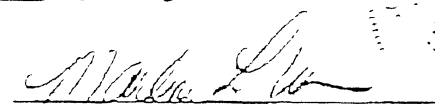
STATE OF MISSISSIPPI,
COUNTY OF HARRISON)
SS

MARCO A. DONJUAN, being first duly sworn and under oath, deposes and says that he is the Petitioner in the above-entitled action; that he has read the foregoing Amended Petition to Establish Paternity, and understands the contents thereof, and the same is true of his own knowledge, information and belief.

DATED this 10th day of August, 2009.


MARCO A. DONJUAN
Petitioner

SUBSCRIBED AND SWORN to before me this 10th day of August, 2009.


Notary Public

