

1980

# Ronald D. Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints; Lds Social Services; Et al. : Brief of Appellant

Utah Supreme Court

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William A. Stegall, Jr., John D. Parken; Attorneys for Plaintiff-Appellant Allen M. Swan; Attorney for Defendants-Respondents

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RONALD D. ELLIS, :

Plaintiff-Appellant, :

v. :

Case No. 16881

SOCIAL SERVICES DEPARTMENT OF :  
THE CHURCH OF JESUS CHRIST OF :  
LATTER-DAY SAINTS; LDS SOCIAL :  
SERVICES; and CHRISTINE :  
BRUNER, :

Defendants-Respondents. :

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BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court  
in and for Salt Lake County  
Honorable Bryant H. Croft, Judge

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FILED

MAR 7 1980

Chief Justice Court Utah

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SERVICES; and CHRISTINE	:	
BRUNER,	:	
Defendants-Respondents.	:	

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NATURE OF CASE

Plaintiff-appellant Ronald D. Ellis (hereinafter "Mr. Ellis") commenced this habeas corpus action in the District Court in and for Salt Lake County on January 3, 1980, seeking to obtain custody of his infant son born December 15, 1979, to defendant-respondent Christine Bruner (hereinafter "Miss Bruner"), who relinquished the child to defendant-respondent LDS Social Services (hereinafter "LDS Social Services) immediately following its birth.

DISPOSITION IN LOWER COURT

On January 21, 1980, the Honorable Bryant H. Croft dismissed plaintiff-appellant's action with prejudice upon the motion of LDS Social Services, thereby purportedly



forever precluding Mr. Ellis from gaining custody of his son. This motion was presumably based upon Rule 12(b)(1) of the Utah Rules of Civil Procedure and the dismissal upon the District Court's belief that Mr. Ellis had not complied with the notice requirements of Section 78-30-4(3), Utah Code Annotated (1953 as amended).

#### RELIEF SOUGHT ON APPEAL

Mr. Ellis respectfully requests that this Court reverse the District Court's dismissal of this action and remand the matter with instructions to determine Mr. Ellis's fitness to have custody of his son and to award custody to Mr. Ellis unless he is found unfit.

#### STATEMENT OF FACTS

The District Court received no evidence before dismissing plaintiff-appellant's verified Complaint; therefore, there is no evidentiary Record presently before this Court and the allegations of the verified Complaint must be considered true.

Mr. Ellis and Miss Bruner are both bona fide residents and domiciliaries of California. Neither has lived within Utah at any time material to this action. Mr. Ellis is 23 years of age and gainfully employed as a department manager by a retail grocery store in San Marino, California.

Miss Bruner and Mr. Ellis were to be married on July 16, 1979; however, approximately two weeks before the marriage was to take place, Miss Bruner advised Mr. Ellis that, because of religious differences existing between them, she had decided to terminate their engagement. At this time, both parties were aware that Miss Bruner was pregnant. Miss Bruner has since consistently refused Mr. Ellis's proposals of marriage.

Immediately prior to her delivery, Miss Bruner left California and came to Utah without the knowledge or consent of Mr. Ellis. On December 15, 1979, Miss Bruner gave birth to Mr. Ellis's son in the Utah Valley Hospital, Utah County, Utah. On December 19, 1979, the fourth day following her delivery, Miss Bruner executed a document entitled "Affidavit and Release" by which she purportedly relinquished her infant to LDS Social Services and abandoned all further interest in the child.

Through a bishop of the L.D.S. Church in California, Mr. Ellis learned of Miss Bruner's whereabouts and the birth of his son. During the week of his son's birth, Mr. Ellis and his California attorney contacted LDS Social Services and informed them both of his paternity and of his desire to support and have custody of his son. LDS Social Services refused to relinquish custody of the infant to Mr. Ellis or

even to give him any information concerning the child's whereabouts and also failed to advise him of any steps which would have to be undertaken to protect his parental rights.

On January 2, 1980, Mr. Ellis filed with the Bureau of Vital Statistics an acknowledgement of his paternity of the child and a statement of his willingness and intent to support his son to the best of his ability.

Thereafter, Mr. Ellis filed the present action just 12 working days after the birth of his son. The hearing on the Writ of Habeas Corpus was scheduled for January 22, 1980; however, defendants-respondents noticed their motion to dismiss for hearing before the Law and Motion Division on January 21, 1980. Following this hearing, at which no evidence was received, the District Court dismissed this action with prejudice. It is from this ruling that Mr. Ellis appeals to this Court.

#### ARGUMENT

It was the contention of defendants-respondents in their oral argument to the District Court that Mr. Ellis's action was barred by his failure to plead timely compliance with the provisions of Section 78-30-4(3), Utah Code Annotated (1953 as amended). That section provides that any unwed

father who fails to file the required notice of paternity shall be forever barred from bringing any action to establish his paternity of, to gain custody of, or to adopt his child. The notice must be filed with the Bureau of Vital Statistics within the time period prescribed by subsection (b), which provides, in pertinent part, that:

The notice may be registered prior to the birth of the child but must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services or prior to the filing of a petition by a person with whom the mother has placed the child for adoption. . . .

§78-30-4(3)(b), Utah Code Annotated (1953 as amended). In their arguments to the District Court, defendants-respondents placed complete reliance upon the fact that Miss Bruner signed a document entitled "Affidavit and Release" on December 19, 1979, whereas Mr. Ellis did not file his notice of paternity until January 2, 1980. The issues raised by this appeal, therefore, include both the construction to be placed upon Section 78-30-4(3) (Points II and III, infra) and the constitutional validity of the section (Point I, infra).

I. THE DISMISSAL OF THIS ACTION DENIES MR. ELLIS THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW GUARANTEED

TO HIM BY THE UTAH AND UNITED STATES CONSTITUTIONS.

Section 7 of Article I of the Utah Constitution, in language identical with that of the Fifth Amendment to the United States Constitution, mandates that "no person shall be deprived of life, liberty or property, without due process of law." Accordingly, if Mr. Ellis, although unwed, has an interest in his son which rises to the level of "liberty or property", then that interest may not be terminated or infringed except through such means as satisfy the so-called "due process" and "equal protection" requirements of both the Utah Constitution and the Fifth Amendment to the United States Constitution, which is made applicable to state action by the Fourteenth Amendment.

A. The Interest of an Unwed Father in His Child is Constitutionally Protected.

This Court has held that in determining the scope of the interests to be protected and degree of protection to be afforded by the Utah Constitution, the constitutional decisions of the United States Supreme Court are "highly persuasive". For example, in Untermeyer v. State Tax Commission, 102 Utah 214, 129 P.2d 881 (1942), this Court observed:

The due process clause of the state constitution is substantially the same as the Fifth and Fourteenth Amendments to the Federal Constitution.

Decisions of the Supreme Court of the United States on the due process clauses of the Federal Constitution are "highly persuasive" as to the application of that clause to our state constitution.

129 P.2d at 885. Accordingly, in order to determine in the present case whether, although unwed, Mr. Ellis has an interest in his son which is to be afforded constitutional protection, it is appropriate to look to the opinions of the United States Supreme Court.

In Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972), the United States Supreme Court firmly held that an unwed father does have a constitutionally protected interest in his children. At issue in that case was a state law which, in effect, provided that children of unwed fathers became wards of the state upon the death of the natural mother. The Court first ruled that the interest of a father in his children was sufficiently important to be constitutionally protected, holding:

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



economic arrangements."

The rights to conceive and raise one's  
children have been deemed "essential"  
. . . and "(r)ights far more  
precious . . . than property rights"  
. . . .

405 U.S. at 651, 31 L.Ed.2d at 558 (citations omitted,  
emphasis added). The United States Supreme Court also made  
clear that a man's interest in his children was no less  
constitutionally protected merely because he had not been  
formally married to their mother:

[T]he law [has not] refused to  
recognize those family relationships  
unlegitimized by a marriage ceremony.  
The Court has declared unconstitutional  
the state statute denying natural, but  
illegitimate, children a wrongful-death  
action for the death of their mother,  
emphasizing that such children cannot  
be denied the right of other children  
because familial bonds in such cases  
were often as warm, enduring, and  
important as those arising within a  
more formally organized family unit.  
. . . "To say that the test of equal  
protection should be that of 'legal'  
rather than biological relationship  
is to avoid the issue. . . ."

405 U.S. at 651-52, 31 L.Ed. 2d at 559 (citations omitted).

The Court then unequivocally stated its holding that:

Stanley's interest in retaining  
custody of his children is cogniz-  
able and substantial.

405 U.S. 652, 31 L.Ed.2d at 559. Thus, in addition to what-  
ever statutory rights may be accorded to Mr. Ellis under

Utah law, he has a constitutionally protected interest in his son.

The holding of the United States Supreme Court in Stanley that an unwed father has a constitutionally protected interest in his children remains firmly intact. In Quilloin v. Walcott, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978), the United States Supreme Court emphasized that the case was distinguishable from Stanley since the natural father was seeking, some 11 years after the birth of the child, merely to assert a "veto" to an adoption by the child's step-father. The Court pointedly observed that, in Quilloin, the natural father did

not challenge the sufficiency of the notice he received with respect to the adoption proceeding . . . nor [could] he claim that he was deprived of a right to a hearing on his individualized interests in his child, prior to entry of the order of adoption. Although the trial court's ultimate conclusion was that the appellant lacked standing to object to the adoption, this conclusion was reached only after appellant had been afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent.

434 U.S. at 253, 54 L.Ed.2d at 518-19 (footnote omitted).

Moreover, the Court expressly stated its continued recog-



dition of the constitutionally protected relationship between all parents and their children and again emphasized that Quilloin was

not a case in which the unwed father at any time had, or sought, actual or legal custody of his child.

434 U.S. at 255, 54 L.Ed.2d at 520.

The continued applicability of Stanley has been consistently emphasized in many subsequent state court decisions, including In re Adoption of Lathrop, 575 P.2d 894 (Ct. App. Kan. 1978). In that case, the court held:

It is clear that Quilloin does not abrogate the basic premise of the Stanley case: that is, that a putative father does in fact have parental rights in his child. The holding of the Quilloin case is actually quite narrow: the constitutional rights of an unwed father who merely seeks to veto the adoption of his child, without seeking custody of the child, are adequately protected by something less than a fitness hearing, and under the facts of that case his rights were protected by a "best interest of the child" hearing.

575 P.2d at 898. See also, Willmott v. Decker, 541 P.2d 13 (Hawaii 1975); People ex rel. Slawek v. Covenant Children's Home, 52 Ill.2d 20, 284 N.E.2d 291 (1972); State ex rel. Lewis v. Lutheran Social Services, 59 Wis.2d 1, 207 N.W.2d 826 (1973).

Accordingly, the holding of the United States Supreme Court in Stanley that an unwed father has a constitutionally protected interest in his child continues to be recognized as the final pronouncement of the United States Supreme Court on this subject.

B. Section 78-30-4 Unconstitutionally Denies Mr. Ellis Due Process of Law.

Having determined that Mr. Ellis does in fact have a constitutionally protected interest in his son, it is next necessary to determine the minimum degree of protection which must be afforded to that interest. In Riggins v. District Court of Salt Lake County, 89 Utah 183, 51 P.2d 645 (1935), this Court concisely summarized the essential safeguards to be afforded constitutionally protected interests:

Due process of law requires that notice be given to the persons whose rights are to be affected. It "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."

51 P.2d at 660. Notice and a meaningful opportunity to be heard are, therefore, the essential elements of due process.

A more detailed statement of this concept was set forth in Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945). It was notice accompanied by a meaningful opportunity to be heard that were again held to be the primary requirement:

Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in court--that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense, after which comes judgment upon the record thus made. . . . [All of the] methods and means provided for the protection and enforcement of human rights have the same basic requirements--that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses.

163 P.2d at 316-17.

The constitutional requirement of a meaningful hearing upon notice has frequently been reaffirmed by the United States Supreme Court. For example, in United States Department of Agriculture v. Murry, 413 U.S. 508, 37 L.Ed.2d 767, 93 S. Ct. 2832 (1973), the Court held constitutionally invalid a provision of the food stamp program that denied participation to any household having a member 18 years of age or older if that person was claimed as a dependant by any taxpayer. The basis of the decision was that the statutory provision created a presumption (which was not

universally true) that such households were not in need of the assistance afforded by the food stamp program. The Court rejected the contention that such a presumption was justified since it rendered the administration of the overall program more efficient:

[W]here the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices.

413 U.S. at 518, 37 L.Ed.2d at 775 (Marshall, J., concurring).

In this case, defendants-respondents place total reliance upon the claimed failure of Mr. Ellis to file his notice of paternity with the Bureau of Vital Statistics within the time period prescribed by Section 78-30-4(3)(b), Utah Code Annotated (1953 as amended). Assuming, arguendo, that Mr. Ellis did not timely file the notice required by this section (Contra, Points II and III, infra) and that such a requirement is valid (Contra, Point I(C), infra), subsection (c) then operates to presume, from such failure, an abandonment of the child:

Any father of [an illegitimate]  
child who fails to file and register

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

§78-30-4(3)(c), Utah Code Annotated (1953 as amended). Thus the statute, as defendants-respondents contend it should be applied to Mr. Ellis, presumes his abandonment of his son from the mere fact that he is an unwed father and did not file his notice of paternity prior to the relinquishment of the child by its mother to LDS Social Services.

This presumption of an abandonment of the child is directly analogous to the presumption held to be constitutionally impermissible in Stanley. In that case, as noted above, the Illinois statute at issue provided that, upon the death of the natural mother, illegitimate children were deemed wards of the state, thereby creating a presumption that all unwed fathers were unfit as parents. The United States Supreme Court noted that the state

insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the

Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect.

405 U.S. at 658, 31 L.Ed.2d at 562. The court also considered, and summarily rejected, the state's contention that since most unwed fathers probably were unfit, the economy and efficiency achieved through the statute justified any infringement upon the interests of unwed fathers in their children:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

405 U.S. at 656-57, 31 L.Ed.2d at 562. The Court concluded that all parents are "constitutionally entitled to a hearing



on their fitness before their children are removed from their custody." 405 U.S. at 658, 31 L.Ed.2d at 563.

In Stanley, the statute presumed that unwed fathers were unfit to care for their children. In this case, the statute presumes that all unwed fathers who do not file a notice of paternity within the extremely narrow time limits imposed by the statute have abandoned their children. Just as the presumption in Stanley that all unwed fathers were unfit was not true in the case of Mr. Stanley, the presumption created by this statute that all unwed fathers not filing a notice of paternity within the strict time periods imposed have abandoned their children is not true in the case of Mr. Ellis. Accordingly, this statute is, like the statute stricken by the United States Supreme Court in Stanley, constitutionally invalid as applied to Mr. Ellis.

Likewise, in In re Adoption of Lathrop, supra, the court, after considering the pronouncements of the United States Supreme Court in Stanley and Quilloin, held:

[D]ue process requires that a putative father who appears and asserts his desire to care for his child has rights paramount to those of non-parents, unless he is found to be an unfit father in a fitness hearing. . . .

. . . .

In view of the fact that the father

of an illegitimate child does have parental rights, we hold today . . . that due process and equal protection require that he be given notice of the pending adoption of his child. Actual notice should of course be given whenever possible; and when the father's identity and whereabouts are unknown and unascertainable by due diligence, constructive notice must be given in a form reasonably calculated to actually inform him of the adoption, while at the same time duly protecting the privacy rights of the mother.

. . . .

[O]ur holding today is not a bar to further legislative treatment of the problem so long as it recognizes the father's right to notice and an opportunity to be heard, and makes distinctions rationally related to the objectives to be achieved.

575 P.2d at 898-99 (emphasis added). Thus, the court held that in order to provide the minimum due process protection required in light of Stanley, an unwed father must be given notice and a meaningful opportunity to present his case; any statutory scheme which, like a bolt of lightning, obliterates constitutional rights cannot be tolerated.

The interest of an unwed father in his child was also recognized by the Minnesota Supreme Court in In re Brennan, 134 N.W.2d 126 (Minn. 1965). In that case, which predated even Stanley, the court held that an unwed father must be afforded an opportunity to express his interest in



his child when its natural mother has relinquished the child for adoption. In so holding, the court noted with language equally applicable to this case that on a nation-wide basis the more recent decisions demonstrated

a natural and understandable willingness to listen to a natural parent who asserts a sincere interest in and concern for his child. Certainly, in the case before us, where a mother seeks to relinquish the child and refuses marriage to legitimate it, a court cannot well look with indifference on the interest of the father who wishes to raise and provide for it. Even though the out-of-wedlock father does not appear before the court in the most favorable light, he should nevertheless be given an opportunity to express his interest when the mother has relinquished the child. A sincere concern which springs from a sense of responsibility to his own flesh and blood is reason enough to permit him to be heard. Although this policy may present some risk for the adoption process, it should nevertheless be permitted where the claim is asserted promptly and under circumstances so as to minimize the risk of trauma to the child or the adoptive parents which would accompany judicial acceptance of his assertion.

134 N.W.2d at 131-32. In this case, Mr. Ellis has acted with extreme swiftness to acknowledge the child and assert his rights. Within hours after the birth of the child, he had contacted LDS Social Services and advised them of his claim. Within days, he filed not only his notice of paternity but also the present action to enforce his rights. The

child is yet so young that it will suffer no trauma, and Mr. Ellis has done all that he reasonably can to place the adoptive parents on notice of his claims. Any unhappiness which will be visited upon the prospective adoptive parents through the exercise of Mr. Ellis's rights will be a result not of his conduct but of the conduct of LDS Social Services and the procedure necessitated by the laws of this state.

Similarly, in Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974), the Circuit Court of Appeals reviewed an Oregon statute which, under certain circumstances, provided that in connection with the adoption of his child, an unwed father was to be "disregarded just as if he were dead." In reliance upon Stanley, the court held:

The application of the statute in question would infringe upon the Federal constitutional rights of the appellant and natural fathers similarly situated. We declare that said statute is constitutionally null and void and, hence, unenforceable.

504 F.2d at 1068.

As applied to Mr. Ellis in this case, Section 78-30-4(3) is particularly pernicious. Mr. Ellis and Miss Bruner are residents of California. Their child was conceived in California. Miss Bruner remained in California up until the time of her delivery, leaving for Utah only

immediately prior to the birth of the child. Under such circumstances, it is unrealistic to suppose that Mr. Ellis could have filed his notice of paternity prior to the birth of his son since he would have had no knowledge that Miss Bruner would come to Utah or even that she would elect to leave California. Accordingly, the time period prescribed by Section 78-30-4(3)(b) would require that Mr. Ellis quite literally "shadow" the child's mother; follow on her heels to the state in which she selects to be delivered of the child; and immediately learn of and comply with Utah's stringent statutory requirements. In this case, Mr. Ellis would have had to follow Miss Bruner to Utah, locate her whereabouts in Utah County, and file his notice within four days. Examination of the practical effect of this statute in light of these facts makes abundantly clear that, as a practical matter, the statute affords unwed fathers absolutely no protection.

The due process standards established by this Court's decisions and the decision of the United States Supreme Court in Stanley, require that the unwed father be given notice and a meaningful opportunity to be heard. Section 78-30-4(3), as applied to the facts of this case, gives Mr. Ellis neither notice nor a meaningful opportunity to be heard; rather, it imposes time requirements so strict

that, as applied to these facts, the protection purportedly offered by the statute is but a shadowy illusion.

C. Section 78-30-4 Unconstitutionally Denies  
Mr. Ellis Equal Protection.

The United States Supreme Court has held not only that an unwed father has a constitutionally protected interest in his child which must be accorded the protections of procedural due process (see, Point I(B), supra), but also that statutes enacted by the states to afford this due process protection must comply with so-called "equal protection" concepts. In Caban v. Mohammed, \_\_\_ U.S. \_\_\_, 60 L.Ed.2d 297, 99 S. Ct. \_\_\_ (1979), the United States Supreme Court very recently held that a New York statutory adoption scheme closely similar to that of Utah was constitutionally void because, as applied to unwed fathers, it denied equal protection. The statute before the Court required actual consent to adoption to be given by both parents of children "born in wedlock" but only consent "[o]f the mother . . . of a child born out of wedlock." \_\_\_ U.S. at \_\_\_, 60 L.Ed.2d at 303. The statute also provided that actual consent was unnecessary in cases where a court determined that the parent whose consent would otherwise be necessary had abandoned the child. Thus, the statutory scheme was essentially identical with Utah's.

In Caban, the unwed father, who sought to adopt and have custody of his two children, appealed from decisions of the New York state courts that allowed his children to be adopted by their natural mother and her present husband without his consent and against his wishes. As construed by the United States Supreme Court, the New York statute operated in the exact manner that the Utah statute does in this case:

[A]n unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial--as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

\_\_\_ U.S. at \_\_\_, 60 L.Ed.2d at 303-04. In defense of the statute, New York contended that an unwed father was accorded full due process since he was given notice of the petition for adoption and a full opportunity to be heard and to establish that the interests of the child would be best served by a denial of the petition. Additionally, it was argued that various state interests, including the encouragement of the swift adoption or legitimation of illegitimate children,

were served by the challenged statute. Nevertheless, the Court held:

In sum, we believe that [the New York statute] is another example of "overbroad generalizations" in gender-based classifications. . . . The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. [The statute] both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.

\_\_\_ U.S. at \_\_\_, 60 L.Ed.2d at 308 (footnote and citations omitted). Accordingly, the United States Supreme Court has unequivocally held that a statute which denies to an unwed father the rights and privileges accorded to unwed mothers is constitutionally invalid.

In Utah, Section 78-30-4(1) establishes the circumstances under which parental consent is necessary as a



condition precedent to the adoption of a child:

A child cannot be adopted without the consent of each living parent having rights in relation to said child, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion . . . .

§78-30-4(1), Utah Code Annotated (1953 as amended). Additionally, Section 78-30-5 provides that consent is not necessary where a parent has been determined by the District Court to have failed to provide support and otherwise maintain a parental relationship. This statute also creates a rebuttable presumption that the child has been abandoned if there is no contact within a one-year period.

No child, therefore, can be adopted unless its mother and, if it is legitimate, its father, either consent to the adoption or have been judicially deprived of all parental rights. A child may, however, be adopted absent the consent of its unwed father under subsection (c) of Section 78-30-4(3), which provides:

Any father of [an illegitimate] child who fails to file and register his notice of claim to paternity and his agreement to support the child shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. Such failure shall further

constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in a judicial proceeding for the adoption of said child, and the consent of such father to the adoption of such child shall not be required.

§78-30-4(3)(c), Utah Code Annotated (1953 as amended).

Thus, only in the case of an unwed father may a child be adopted without either consent or judicial deprivation; moreover, the child may be adopted even over the objection of its unwed father. Accordingly, while the consent of an unwed mother is required (unless she has been judicially deprived through an appropriate hearing), the consent of an unwed father is unnecessary unless the father has complied with the onerous burden of filing his notice within the narrow time period prescribed by Section 78-30-4(3)(b).

Unless an unwed father immediately files his notice, he is irrebuttably presumed to have abandoned his child. In the case of an unwed mother, however, abandonment of the child must be proven to the satisfaction of the court and

the court does not easily find such abandonment, but will do so only when the evidence is clear and convincing that the parent has either expressed an intention, or so conducted himself as to clearly indicate an intention, to relinquish



parental rights and reject parental responsibilities to his child.

Robertson v. Hutchison, 560 P.2d 1110, 1112 (Utah 1977).

Under the clear holding of the United States Supreme Court in Caban, such disparity of treatment is unconstitutional.

Likewise, if an unwed mother consents to the adoption of her child and then has a change of heart, this Court has held that the validity of her consent must be "carefully scrutinize[d] . . . lest an honest, worthy and well meaning natural parent be unjustly deprived of her child." In re Adoption of D, 122 Utah 525, 252 P.2d 223, 226 (1953). In the case of an unwed father, however, Section 78-30-4(3)(c) provides that "the consent of [an unwed] father to the adoption of [an illegitimate] child shall not be required." Again, this disparity of treatment is constitutionally impermissible and renders the statute unenforceable.

In Stanley, the United States Supreme Court held that an unwed father has a constitutionally protected interest in his child and that this interest must be afforded at least minimal due process protection. In this case, Section 78-30-4 has purported irrevocably to deprive Mr. Ellis of all interest in his child. Yet, as applied to Mr. Ellis, that statute affords him no notice and no oppor-

tunity to be meaningfully heard; it, therefore, denies him the due process protection required by Stanley. Since Mr. Ellis and Miss Bruner were residents of California, where the child was conceived and where Miss Bruner continued to reside until immediately prior to the birth of the child, Mr. Ellis had no opportunity to file the notice purportedly required by Section 78-30-4 prior to the birth of the child. Yet, defendants-respondents claim that within four days following the birth of the child, Mr. Ellis had been forever deprived of the opportunity to file such notice, since Miss Bruner had released the child to LDS Social Services. To require a resident of California to locate his child's mother in Utah, come to Utah, and file his notice of paternity all within four days of the birth of the child is so unreasonable as to deny any semblance of due process protection.

In Caban, the United States Supreme Court held that a state statute which afforded the interests of unwed mothers in their children a greater degree of protection than it afforded the corresponding interests of unwed fathers was unconstitutional. In this case, Section 78-30-4 operates irrevocably to terminate all rights of an unwed father in his child; to presume his abandonment of the child; and to render unnecessary his consent to the adoption of the

child. On the other hand, unless she has abandoned her child and been judicially deprived of her parental rights, an unwed mother must freely and voluntarily consent to the adoption of her child. This Court has held "clear and convincing" evidence to be required to sustain a finding of abandonment and has required that any consent given by the mother be "carefully scrutinized" in order to assure that it was freely and knowingly given. None of these meaningful and necessary protections are afforded to unwed fathers. Accordingly, the gender-based disparity of protections afforded unwed fathers, such as Mr. Ellis, have denied him equal protection of the law in violation both of the Utah Constitution and of the United States Constitution. As applied in this case, Section 78-30-4(3) is void.

## II. THE NOTICE OF PATERNITY WAS TIMELY FILED IN THIS CASE.

Assuming, arguendo, the constitutionality of Section 78-30-4, the notice of paternity filed by Mr. Ellis was timely. The strict time period within which an unwed father must file his notice of paternity is established by Section 78-30-4(3)(b), which provides:

The notice may be registered  
prior to the birth of the child

but must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services or prior to the filing of a petition by a person with whom the mother has placed the child for adoption.

§78-30-4(3)(b), Utah Code Annotated (1953 as amended) (emphasis added). Accordingly, the notice may be filed prior to the birth of the child. However, in this case, this was impractical since Mr. Ellis and Miss Bruner were both residents of California and Mr. Ellis had no way of knowing that Miss Bruner would elect to travel to Utah to be delivered of their child.

The section also mandates that the notice must be filed prior to the occurrence of two stated events. These events are separated by the word "or", indicating that the notice must be filed before at least one of the events, but not necessarily before both. Therefore, the unwed father must file his notice either before "the illegitimate child is relinquished or placed with an agency licensed to provide adoption services" or before the "filing of a petition by a person with whom the mother has placed the child for adoption." It is important to note that the section does not state that the unwed father's notice must be filed before whichever is applicable of the specified events.

In this case, Mr. Ellis had filed his notice before any petition was filed for the adoption of his son. In fact, the Record presently before this Court demonstrates that no such petition has been filed and none will be during the pendency of this appeal. (Stipulation dated February 11, 1980.) Since Mr. Ellis filed his notice prior to the filing of a petition for the adoption of his son, his notice was timely.

To construe Section 78-30-4(3)(b)--as the District Court apparently did--to mean that if the child is placed with a licensed agency, the unwed father's notice must be filed, if at all, prior to the release of the child by its mother, is to arrive at a total absurdity, since subsection (d) provides:

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

§78-30-4(3)(d), Utah Code Annotated (1953 as amended)

(emphasis added). In this case, if it is held that Mr. Ellis's notice was not timely even though it was filed before any petition for adoption was filed, then an insurmountable problem is created: While Mr. Ellis is precluded from asserting any right to the child by subsection (c), no one else may adopt the child because it is not possible to comply with subsection (d). The required certificate of the director of the Bureau of Vital Statistics cannot be filed because a diligent search of the Bureau's records will reveal Mr. Ellis's notice. But, absent the filing of a certificate stating that no such notice was filed, the child cannot be adopted.

The only way to resolve this apparent conflict in the statute is to construe subsection (b) in such a manner that the unwed father's notice of paternity is deemed timely if it is filed either before the child is relinquished to the licensed agency or before a petition for the adoption of the child has been filed. Such a construction is appropriate not only because it avoids creating an absurdity in the statute, but also because it narrowly and strictly construes a statute that is in derogation of the unwed father's rights in his child.

A similar problem was faced by the Wyoming Supreme Court in In re Adoption of Narragon, 530 P.2d 413 (Wyo. 1975).

In that case, the Wyoming Supreme Court refused to grant an adoption without the consent of the child's natural father although the petitioners argued that the father's consent was unnecessary under a Wyoming statute that permitted adoption without the consent of any parent who had "caused the child to be maintained in a public or private children's institution or the Wyoming Department of Public Welfare for a period of one year . . . ." The petitioners argued that the statute should be construed as if the word "by" had been inserted by the Legislature so that the statute would provide that it was applicable to children "maintained in a public or private children's institution or by the Wyoming Department of Public Welfare." The petitioners pointed out that the Wyoming Department of Public Welfare did not have any actual facilities to care for children but rather merely provided funds for their support; therefore, it was apparent that the phrase "maintained . . . by the Wyoming Department of Public Welfare" was what the Legislature had intended. Nevertheless, since the statute was in derogation of parental rights, the Wyoming Supreme Court refused to construe it so as to destroy or infringe the rights of a child's natural father, holding:

There is a well-recognized and almost universal rule that when a



proceeding is against a nonconsenting parent in an adoption proceeding the statute must be strictly construed and every reasonable intendment is made in favor of the nonconsenting parent's claims . . . .

It would seem particularly important, since this involves the matter of minor children, that the intention of the legislature be clearly expressed and the statute clarified.

530 P.2d at 414 (numerous citations omitted). Likewise in this case, since the only construction of the statute which does not result in a total absurdity renders timely the notice filed by Mr. Ellis, that construction should be applied, thereby preserving Mr. Ellis's legitimate and substantial interests in his child.

There is no justification to construe the statute, as did the lower court, in such a manner as to both deprive Mr. Ellis of all rights in his child and to thereby create an absurdity under which not only can Mr. Ellis not obtain any rights in the child, but the child can never be adopted by anyone. Such a result is to sentence a child, whose father earnestly desires to provide for him, to a life without any legally recognized parents.

III. BY PUBLICLY ACKNOWLEDGING THE CHILD AS HIS,  
MR. ELLIS HAS LEGITIMATED AND ADOPTED HIS SON.



Immediately following the birth of his son, Mr. Ellis advised LDS Social Services that he was the father of the child and that he desired to care for him. A notice of his paternity of the child has been filed with the Bureau of Vital Statistics. Moreover, Mr. Ellis has publicly acknowledged that he is the father of this child by filing his verified Complaint in this action. Under the provisions of Section 78-30-12, Mr. Ellis has legitimated and adopted his son:

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

§78-30-12, Utah Code Annotated (1953 as amended).

Accordingly, by advising LDS Social Services that he was father of the child; by filing his notice of paternity with the Bureau of Vital Statistics; and by filing his verified Complaint in which he stated his desire to bring the child into his home and, there, in conjunction with his parents, to care for it, Mr. Ellis has legitimated and adopted the child. By the express provisions of the statute,

the child is "deemed for all purposes legitimate from the time of its birth." Additionally, the strict and constitutionally infirm provisions of Section 78-30-4 are expressly made inapplicable where the child has been legitimated by its father in accordance with this section.

Since Mr. Ellis is, by virtue of Section 78-30-12, considered the father of his son, and the child's mother has released and abandoned it, Mr. Ellis is entitled to the custody of his son. This Court faced a similar situation in In re Baby Girl M, 25 Utah 2d 101, 476 P.2d 1013 (1970). In that case, however, the father did not publicly acknowledge his paternity of the child until a deprivation hearing was commenced in Juvenile Court. In the course of his opinion for this Court, Justice Callister noted:

This is the first time that this court has been confronted with the issue of whether the father of an illegitimate child, who has publicly acknowledged it, has a legal right to the care, custody, and control of his child, assuming that he is a fit and proper person. Undoubtedly, the dearth of cases involving this issue is probably attributable to the provisions of Section 78-30-12, U.C.A. 1953. The factual background in the instant case indicates that but for the acts of an alert social worker, who removed Baby M at three days of age from the nursery of the hospital where the mother was confined for the birth, Baby M would

have been legitimated according to the statutory provisions.

476 P.2d at 1015 (footnotes omitted). It was then held that:

A statutory parent-child relationship has been established between the publicly acknowledged child and his putative father that places the child in parity with a legitimate child in the rights of support, education, and inheritance.

The putative father of an illegitimate child is entitled to its custody and control as against all but the mother, if he is competent to care for and suitable to take charge of the child and if it appears that the best interests of the child will be thereby secured.

476 P.2d at 1017 (emphasis added). The case was remanded to the Juvenile Court for a determination of whether the unwed father was a fit person to have the custody of his child.

Likewise in this case, having legitimated and adopted his son by his concerted efforts to publicly acknowledge the child, Mr. Ellis is entitled to the custody of his son unless it appears from a full hearing in the District Court that he is unfit to have custody.

#### CONCLUSION

Both this Court and the United States Supreme Court have recognized that an unwed father's substantial interest in his child is entitled to constitutional protection.

No individual may be deprived of a constitutionally protected interest except by such means as assure due process of law. This Court has frequently held that, as a minimum, due process requires reasonable notice and an opportunity for a meaningful hearing. In this case, Section 78-30-4(3) purports forever to bar Mr. Ellis from asserting his interest in his son solely because, as an unwed father, he did not file a notice of paternity within the narrow time period prescribed. In order to have complied with this requirement, Mr. Ellis, who is a resident of California, would have had to have located the child's mother here in Utah and filed his notice within four days of the birth of the child. Accordingly, the provisions of Section 78-30-4(3) operate not only to deny Mr. Ellis any hearing but also fail to provide reasonable notice that he needs to take some action to protect his interests. In other words, as applied to Mr. Ellis, the section creates an irrebuttable presumption that (within four days after the birth of his son) Mr. Ellis has abandoned the child. Such cavalier presumptions and so severely limited an opportunity to protect his interests deny Mr. Ellis any semblance of due process and are, therefore, constitutionally invalid as applied to him.

Additionally, Section 78-30-4(3) operates to create a statutory adoption system under which the interests

of unwed fathers in their children are accorded immensely less protection and consideration than are the corresponding interests of unwed mothers. For an adoption to take place under Utah law, an unwed mother must either freely and voluntarily consent or have abandoned the child and been judicially deprived of all parental rights. An unwed father, on the other hand, loses forever any opportunity to enjoy his interests in his child merely by failing to file the required notice within an extremely short time period. The decisions of this Court hold, moreover, that the consent of an unwed mother is to be "carefully scrutinized" to assure its validity and that in a proceeding to judicially deprive an unwed mother of her parental rights, her abandonment of the child must be proved by "clear and convincing" evidence. There is, therefore, an overwhelming disparity of treatment between unwed mothers and unwed fathers in relation to the assertion of their interests in their children. The United States Supreme Court has held unequivocally that such gender-based disparity of treatment is constitutionally impermissible. As applied to Mr. Ellis in this case, Section 78-30-4(3) is void.

Even assuming the constitutional validity of Section 78-30-4(3), the District Court's decision dismissing

the action by which Mr. Ellis sought to assert his interests in his child is erroneous. Under the only construction of Section 78-30-4(3)(b) that does not result in a total absurdity, Mr. Ellis's notice was timely because it was filed before any petition for the adoption of his son had been commenced. To accept the District Court's construction of this section is to deprive Mr. Ellis of any interest in his child while at the same time creating a statutory boonedoggle in which no other person may adopt the child. Such a result is as unfair as it is illogical.

Finally, the ruling of the District Court cannot be supported because it fails to recognize that by publicly acknowledging his son, Mr. Ellis is deemed to have adopted the child. Under the express statutory provisions of Section 78-30-12, the notice provisions of Section 78-30-4(3), which are essential to the District Court's dismissal, are inapplicable to this case. Since Mr. Ellis is deemed to have adopted his son and the child's mother has clearly manifest her desire to relinquish and abandon the infant, Mr. Ellis is entitled to be awarded custody of his son subject only to a parental fitness determination.

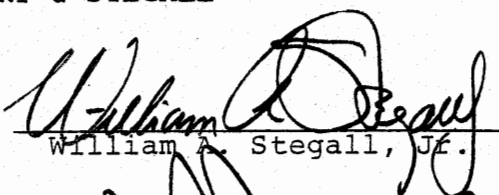
Although plaintiff-appellant submits that Section 78-30-4 is clearly unconstitutional as applied to him, even assuming the constitutional validity of the statutory

provision, the District Court's dismissal of his action was erroneous and must be reversed.

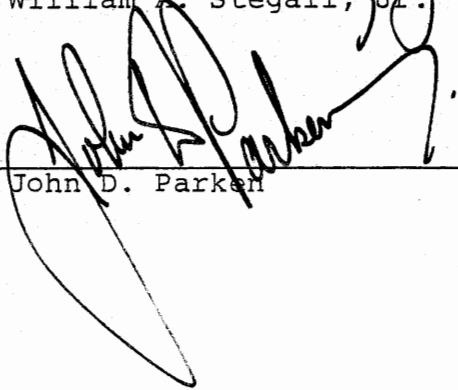
RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of March,  
1980.

DART & STEGALL

By

  
William A. Stegall, Jr.

By

  
John D. Parker



MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing plaintiff-appellant's brief to Allen M. Swan, Kirton & McConkie, attorneys for defendants-respondents, 330 South 300 East, Salt Lake City, Utah 84111, this 6<sup>th</sup> day of March, 1980.

William A. Regan