

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 Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RONALD D. ELLIS,

Plaintiff-Appellant,

v.

SOCIAL SERVICES DEPARTMENT OF
THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS; LDS SOCIAL
SERVICES; et al.,

Defendants-Respondents.

Case No. 16881

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BRIEF OF RESPONDENTS

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

APR 21 1980

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF CASE	2
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3-4
ARGUMENT	4
POINT I	
THE PLAINTIFF-APPELLANT HAS NOT BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW GUARANTEED TO HIM UNDER THE UTAH AND UNITED STATES CONSTITUTIONS	5
POINT II	
THE NOTICE OF CLAIM OF PATERNITY WAS NOT TIMELY FILED	22
POINT III	
PLAINTIFF-APPELLANT HAS NOT LEGITIMATED AND ADOPTED THE CHILD BY PUBLICALLY ACKNOWLEDGING IT AS HIS	24
CONCLUSION	26

CASES CITED

	<u>Page</u>
Barron, "Notice to the Unwed Father and Termination of Rights: Implementing Stanley v. Illinois", 9 Fam. L. Q. 527 . . .	8
Caban v. Mohammed, 441 U.S. 380, 60 L. Ed. 2d 297, 99 S.Ct. _____ (1979)	18
Darwin v. Ganger, 174 Cal. App. 2d 63, 344 P.2d 353 (1959) . .	25
In re Adoption of Lathrop, 575 P.2d 894 (Kan. 1978)	18
In re Baby Girl M, 25 Ut. 2d 101, 476 P.2d 1013 (1970)	21, 25
In re Brennan, 270 Minn. 455, 462, 134 N.W. 2d 126, 131 (1968)	21
Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W. 2d 56, vacated sub. nom. Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972)	6
Lewis v. Lutheran Social Services of Wisconsin, 59 Wis. 2d 1, 207 N.W. 2d 826 (1973)	7
Lewis v. Lutheran Social Services of Wisconsin, 68 Wis. 2d 36, 227 N.W. 2d 643 (1975) . . .	7
Quilloin v. Wallcott, 434 U.S. 246 (1978)	14
Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L. Ed. 2d 551 (1972)	5, 6, 9
Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E. 2d 145, vacated 405 U.S. 1051 (1972)	6

AUTHORITIES CITED

	<u>Page</u>
Colo. Rev. Stat. Title 19 § 1-1013(21) (1973)	8
Ill. Ann. Stat. Ch. 4 § 9.1-1E (Smith-Hurd, 1975) . .	8
Ill. Ann. Stat. Ch. 4 § 9.1-8(a) (Smith-Hurd, 1975) .	8
Mich. Comp. Laws Ann. § 710.31 et seq. (Supp. 1972) .	11
Mich. Comp. Laws Ann. § 710.31 et seq. (Supp. 1976) .	11
Utah Code Ann. § 78-30-4(3) (1953 as amended)	4, 15
Utah Code Ann. § 78-30-4(3)(b) (1953 as amended) . .	4, 23
Utah Code Ann. § 78-30-4(3)(c) (1953 as amended) . .	15, 24
Utah Code Ann. § 78-30-4(3)(d) (1953 as amended) . .	23
Utah Code Ann. § 78-30-12 (1953 as amended)	24
Wis. Stat. Ann. § 48.02(11) (West Supp. 1976)	9
Wis. Stat. Ann. § 48.195 (West Supp. 1976)	10
Wis. Stat. Ann. § 48.42(3) (West Supp. 1976)	10

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BRIEF OF RESPONDENTS

Case No. 16881

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NATURE OF THE CASE

Plaintiff, Ronald D. Ellis, commenced a habeas corpus action in the District Court in and for Salt Lake County by filing a Verified Complaint, January 4, 1980, alleging that he was the natural father of a male child born out of wedlock in Salt Lake County, Utah, on or about December 17, 1979, (actual birthdate was December 15, 1979) seeking a determination that the liberty of the baby was "illegally restrained" and that he, the putative father, be awarded custody, which complaint was later amended.

DISPOSITION IN LOWER COURT

Following a hearing before the Honorable Bryant H. Croft, the Amended Complaint was dismissed with prejudice January 21, 1980 on the motion of defendant L.D.S. Social Services.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Appellant seeks to have this Court reverse the District Court's Dismissal and remand the matter with instructions to determine Mr. Ellis's fitness to have custody of the child.

STATEMENT OF FACTS

The Respondents agree with the statement in Appellant's brief that, for the purposes of this appeal, the allegations of the verified Complaint must be considered true. Appellant's statement of facts, however, contains several gratuitous additions to the verified Complaint among which are the following: "neither (natural parent) has lived within Utah at any time material to this action"; "the (natural mother) has since (the termination of the engagement) consistently refused Mr. Ellis's proposals of marriage"; "immediately prior to her delivery, (the natural mother) left California and came to Utah"; "through a bishop of the L.D.S. Church in California, Mr. Ellis learned of (the natural mother's) whereabouts and the birth of his son"; "during the week of his son's birth, Mr. Ellis and his California attorney contacted L.D.S. Social Services and informed them both of his paternity and of his desire to support and have custody of his son"; "L.D.S. Social Services . . . failed to advise him (the natural father) of any steps which would have to be undertaken to protect his parental rights".

According to the verified Complaint the California attorney's contact with the L.D.S. Social Services occurred "on or about December 21, 1979", a date subsequent to the relinquishment of the baby to the child placement agency, which relinquishment occurred December 19, 1979 (R.23). Appellant's attempt in the Statement of Facts to negate any contact of the natural mother with the State of Utah goes beyond the language of the Verified Amended Complaint.

As will be observed from the Stipulation Regarding Stay of Adoption and Expedited Appeal, the L.D.S. Social Services has not consented in writing to the adoption of the infant, although it has been placed in the home of prospective adoptive parents. No Petition for Adoption has been filed by the prospective adoptive parents and none will be filed pending the Appeal.

ARGUMENT

The Appellant in the District Court failed to plead or demonstrate timely compliance with Title 78-30-4(3) Utah Code Annotated 1953 as amended and particularly (b) thereof which provides

"The notice (of claim of paternity) may be registered prior to the birth of the child but must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services or prior to the filing of a petition by a person with whom the mother has placed the child for adoption. The notice shall be signed by the registrant and shall include his name and address, the name and last known address of the mother, and either the birth date of the child or the probable month and

year of the expected birth of the child. The Bureau of Vital Statistics shall maintain a confidential registry for this purpose."

The Affidavit and Release to the adoption agency was executed by the natural mother December 19, 1979, and Mr. Ellis failed to file his claim of paternity until January 2, 1980.

I. THE PLAINTIFF-APPELLANT HAS NOT BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW GUARANTEED TO HIM UNDER THE UTAH AND UNITED STATES CONSTITUTIONS.

Respondents do not dispute the contention made in Appellant's brief that the putative father has an interest in retaining custody of his children which is "cognizable and substantial" under the holding of Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). That case involved the custody of Peter Stanley's two minor illegitimate children after the death of their mother. Despite the fact that Stanley had lived intermittently with his children and their mother for eighteen (18) years and had supported them during that time, he was not considered a "parent" under Illinois law. The relevant statute defined "parent" as the mother or father of a legitimate child but only the mother of an illegitimate child. "Parents" were entitled to a hearing on the question of fitness before losing custody of their children, but because he had never married the mother, Stanley did not qualify for such a hearing. Under Illinois' practice, the only relevant question was whether he was the father of legitimate children. The answer was clearly no, and so the Illinois Supreme Court ruled that he was not

entitled to a hearing in which to establish his fitness. His children were adjudged wards of the court.

Stanley appealed to the United States Supreme Court which reversed the State Court decision ruling that Illinois' "method of presumption" would not be allowed to stand "in the light of the fact that Illinois allows married fathers--whether divorced, widowed or separated--and mothers--even if unwed-- the benefit of the presumption that they are fit to raise their children." Clearly, the Stanley decision holds that a man who has lived with and supported his illegitimate children is entitled to a hearing on the question of his fitness before he can be denied custody. Justice White refers to Stanley's interest as "that of a man in the children he has sired and raised", 405 U.S. at 651 (emphasis added). Shortly after the Stanley decision, the Supreme Court indicated that its ruling was not limited to cases in which the State intervened to deprive a putative father of custody. A second Illinois case, Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E. 2d 145, vacated 405 U.S. 1051 (1972) was remanded involving a custody dispute between parents of two illegitimate children. In addition, the court applied its ruling in Stanley to adoption cases in Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W. 2d 56, vacated sub. nom. Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). That case involved a Wisconsin father who sought to overturn the adoption of his child after it had been granted on the sole consent of the unwed mother. The Court directed reconsideration of the case "in light of

Stanley . . . and with due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time".

In the Lewis case the unwed father, seeking custody, filed for a declaration of his parental rights and duties. The initial court action took place in December, 1968, five months after the baby's birth and four months after the mother had relinquished the child for adoption. The father challenged the Wisconsin statute that required only the mother's consent to adoption without notice to the father. The father lost but two years later the United States Supreme Court remanded. The Wisconsin court then issued a new post-Stanley decision, (Lewis v. Lutheran Social Services of Wisconsin, 59 Wis. 2d 1, 207 N.W. 2d 826 [1973]) in which it held as a matter of law that both unwed parents were entitled to notice of the proposed adoption and both were required to consent, unless their parental rights had been legally terminated. The case was sent back to the trial court for factual findings regarding the parents' consents and rights. Finally in April, 1975, three years after Stanley and nearly seven years after the child's birth, the fourth and apparently final decision was rendered, Lewis v. Lutheran Social Services of Wisconsin, 68 Wis. 2d 36, 227 N.W. 2d 643 (1975). The Wisconsin trial court concluded and the Supreme Court affirmed that the father had forfeited his rights by abandoning the child before it was born (emphasis added).

The statute which Illinois enacted following Stanley has been criticized as "an overreaction to Stanley . . . entirely understandable in view of the reaction of the United States Supreme Court to the legal status of the unwed father in Illinois", see Barron, "Notice to the Unwed Father and Termination of Rights: Implementing Stanley v. Illinois," 9 Fam. L. Q. 527. The reaction, or overreaction, took the form of, first, including all unwed fathers in the statutory definition of "parent" Ill. Ann. Stat. Ch. 4, Sec. 9.1-1E (Smith-Hurd, 1975) and second, requiring notice of a proposed adoption and either consent or termination of rights by all such fathers, Ill. Ann. Stat. Ch. 4, Sec. 9.1-8(a), 9.1012(a) (Smith-Hurd, 1975). These statutes have been criticized as creating unmanageable practical difficulties in that the state assumes the burden of locating the putative father. In seeking to make its adoptions invulnerable to attack on due process grounds it requires that notice be given to all fathers, known and unknown, concerned and indifferent (emphasis added).

Some states have attempted to comply with Stanley's guidelines by shifting the initial burdens of identification and location onto the father or mother. For instance, Colorado requires notice only to fathers who have supported the child or acknowledged paternity in writing, or whose name appears on the birth certificate, Colo. Rev. Stat. Title 19, Sec. 1-103(21) (1973).

The cases thus far noted, Stanley, Vanderlaan, and Lewis, all involved fathers who had initiated legal proceedings. The difficulties of notice to those fathers who do not come forward were dealt with in Stanley only in a footnote in which the court noted, "if unwed fathers in the main do not care about the disposition of their children, they will not appear to demand hearings", 405 U.S. at 657 n. 11. It could be argued, therefore, that under Stanley the father has the initial burden of appearing so that he may be kept informed. The difficulty is the problem of fathers who are unaware either of their paternity, actual or impending, or of the adoption hearing. States that do not actively reach out to notify such fathers have decided that the biological link alone, clearly much weaker than the on-going relationship with his children of the father in Stanley, does not create such an "essential" interest that state protection is guaranteed, particularly where other interests such as speedy placement of a child in a permanent home may be affected.

Wisconsin's revised statute which went into effect June, 1974, defined "parent" as "a person adjudged in a court proceeding to be a natural father", (Wis. Stat. Ann. Sec. 48.02 (11), W. Supp. 1976). Wisconsin allows "any person(s) claiming to be the father" who has not acquired legal status as a "parent" to file a declaration of his interest in his child at any time prior to termination of his rights. The declaration is filed with the Department of Health and Social Services, and must contain the mother's name and address, and the date or expected

date of the child's birth, as well as a statement that the claimant has "reason to believe that he may be the father of the child". The Department sends a copy of the declaration to the mother who may file a response. The mother's failure to respond is not, however, an admission of the statements in the declaration and the mere filing does not extend parental rights to the claimant. The filing entitles the putative father only to notice and an opportunity to appear in court proceedings affecting the child.

Notice is also required in Wisconsin to a putative father who has not filed a declaration but who has been adjudged the father in a court proceeding or one "who may be the natural father . . . and is living in a familial relationship with the child", Wis. Stat. Ann. Sec. 48.195 (West. Supp. 1976). Finally, the right to notice of a proceeding to terminate parental rights is given to a person "alleged to the court to be the natural father", Wis. Stat. Ann. Sec. 48.42(3) (West. Supp. 1976). To this end, the court "shall make inquiry of the mother as to the identity of the natural father", *ibid*, Sec. 48.42(3). Wisconsin thus limits its notice to fathers who have been identified formally or informally, or who have come forward in some way.

Utah's statute most closely resembles that of Michigan which provided: "Release for purposes of adoption given only by a mother of a child born out of wedlock is sufficient and rights of any putative father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the probate court prior to the birth of the child,

a notice of intent to claim paternity" Mich. Comp. Laws Ann. Sec. 710.31 et seq. (Supp. 1972) which has since been repealed and a much more complex scheme inaugurated, Mich. Comp. Laws Ann. Sec 710.31 et. seq. (Supp. 1976). The present Michigan statute makes no provision for any but personal service, it contains specific guidelines and limitations on the rights of the recognized natural father to obtain custody and it emphasizes early procedures encouraging the father to claim or disclaim interest before the child's birth. Michigan allows the father to take the initiative by providing that "a person claiming under oath to be the father of the child" may file a notice of intent to claim paternity before the child's birth. Such filing entitles the presumed father to receive notice of the hearing at which parental rights are to be determined or terminated. The unwed mother may also initiate notice and is encouraged to do so. The notice of intent to release her consent is to be served on the named putative father personally by any officer or person authorized to serve process of the court and advises the putative father of his right to file a notice of intent to claim paternity and informs him that failure to so file before the birth or expected confinement whichever is later will constitute a waiver of further notice, a denial of interest, and a termination of all rights to the child. Following the birth of the child, the court holds a hearing as soon as practical to determine the father's identity and to determine his rights. Notice of the hearing must be given to 1) those who filed an intent to claim paternity, 2) those who were not served with the Notice of Intent to Release or

Consent at least thirty days before the anticipated birth and, 3) those who were not served at all but who the court has reason to believe may be the father of the child. Notice to an unknown father is not required at all. If a known father was properly served with a Notice of Intent to Release or Consent or received (or waived) notice of the hearing, the court may terminate his rights if he has 1) failed to file an intent to claim paternity within the specified time, 2) disclaimed paternity, or 3) failed to appear at the hearing. If the formally adjudged father is present at the hearing, has not lost or waived his rights and seeks custody, the statutes set out a procedure attempting to discriminate between fathers who have not established a relationship with the child and those who have. In the first category is the man who has "not established any custodial relationship" with the child, or who has not supported the pregnant mother and/or child. In such a situation the court must investigate the father's ability to care for the child and will award custody only if it is found to be in the child's "best interest". In the second category are fathers who have established a custodial relationship or who have supported the mother or child for at least ninety (90) days before receiving notice of the hearing. The rights of these fathers are not subject to the "best interests" rule, but may be terminated only on traditional grounds of parental unfitness, abandonment, etc. Michigan law originally required notice only to fathers who have filed a Notice of Intent in Probate Court, or were living with the mother as husband and wife, while under present law, a father

who has taken informal steps to make known his paternity such as having his name entered on the birth certificate, informally acknowledging the child, taking insurance for the child, etc., is given notice and the right to appear and establish his parental rights. The Michigan statute as well as that of Utah attempts to avoid the practical difficulties presented when the identity of the father is unknown. Both schemes involve a paternal registration system. In effect, the statutes reverse the notice burden and although a registered father will receive notice of a pending proceeding, he bears the initial responsibility of officially asserting his intentions.

Such registration laws aim to accomplish several objectives. First, they obviate the need for time consuming efforts to locate the father after the birth of the child. Both speed and preservation of the mother's anonymity are thereby served. Second, they seek to thwart the mother's efforts to defeat a father's interest by withholding his name from the adoption agency. Registration assures the father of notice. Third, by imposing a duty of action on the father, the statute operates to sever the interests of those who fail even to make themselves aware of the mother's pregnancy.

The impending birth of an illegitimate child carries the potential for warning the putative father of the possibility of forthcoming proceedings which will affect his rights. As the child's procreator, the putative father bears responsibility for his offspring's well-being. It should be clear to him that this responsibility must be assumed, and that his failure to do so will

result in the State's assuming responsibility for the child. Given this opportunity for knowledge, it is reasonable to permit self-information as the unknown putative father's sole means of notice.

The U.S. Supreme Court has distinguished Stanley in Quilloin v. Wallcott, 434 U.S. 246 (1978). In that case, the Court made it clear that a state has the right in custody cases involving illegitimate children to distinguish between parents of legitimate and parents of illegitimate children. The court noted that in the Stanley case the issue involved was between a State and the illegitimate father of a child to whom he had acted as a father for quite a number of years, who had the greater interest over the child absent any type of hearing on the question of fitness. In Quilloin, however, the Court was faced only with the question of approving an adoption which would "give full recognition to a family unit already in existence, a result desired by all concerned, except appellant". The Court stated "we think appellant's (the natural father's) interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the state could permissibly give appellant less veto authority than it provides to a married father", 434 U.S. at 256. In the Quilloin case the law which was being challenged provided that if the child was illegitimate the mother was the only recognized parent and was given exclusive authority to exercise all parental prerogatives. The court upheld that law which is substantially less protective of the rights of the father of an illegitimate child than is Utah Code

Annotated 78-30-4(3). There was, therefore, in Quilloin no denial of equal protection, the putative father having had no actual or legal custody and, therefore, having never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child, 434 U.S. at 256.

A review of the history of the U.C.A 78-30-4(3) discloses that the House Bill was intended to cure the problems presented by the Supreme Court ruling in Stanley v. Illinois. It was noted that often a father would be unknown, could not be found, or would not come forward and the purpose of the bill was to protect the rights of natural fathers, at the same time requiring the natural father to come forward by filing a Notice of Claim of Paternity with the Department of Vital Statistics. (See record of House of Representatives, introduction of bill by its Sponsor.) The Utah Senate amended 78-30-4 by adding subparagraph (3)(c) as follows:

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

Such language clearly reveals the intent of the Legislature to place the burden of self-inquiry notice on the putative father and evidences the further intent that placements be speedy, obviating the "state of limbo" in which a child is

placed upon birth where the natural mother consents to its release but the natural father has failed to come forward as required by the registration system.

As permitted by the statute, Mr. Ellis could have taken steps prior to the birth of the child to register within the State of Utah and failed to do so. He delayed doing so until eighteen days after the birth of the child and fourteen days after the mother relinquished the child to defendant agency. The statutory scheme places the burden on plaintiff to keep himself informed of the mother's intentions and whereabouts.

To set aside the registration scheme as a denial of due process creates uncertainty in the many adoptions that have been taken in reliance on that scheme.

The trial court in its summation stated the following commencing at page 61 of the record:

The statute says that failure to file the acknowledgment constitutes an abandonment of the child and a waiver and surrender of any right to notice.

I just finished my responsibilities on the division handling adoptions during the last six months and each time I conducted an adoption hearing involving the adoption of a child born out of wedlock, the Certificate of Search was required to be filed and was filed in which it was certified that the examination of the records of the state agency showed that no acknowledgment of paternity had been filed. And I made that finding in my rulings and recited the fact that that constituted, under our statute, an abandonment of the child by the natural father so that no further notice need be given to him and we could proceed with the adoption without any notice to him.

I think it is important that we have some sort of statutory authority for bringing this

sort of a thing to a quick head, that we cannot in our society put children out for adoption, let them be adopted, give them a decree of adoption, only to have the person claiming to be the natural father come in and say 'I never gave my consent and therefore the adoption is not valid and I want my day in court'*** It seems to me that there are two sides to this coin as there usually is to most questions. One is that the mother, the natural mother, who decides to give her child up for adoption arranges with a child placement agency to place the child and does so and they take the child and they place it out for adoption; and we protect her identity from the adopting parents and we protect their identity from other people. So that they don't know, in the natural course of events, and of course, there are exceptions, who the natural parents are or who the adoptive parents are. And it seems to me that the very birth of the child whose mother, because of her circumstances, wants to give up the child for adoption rather than assume the responsibility of raising the child, has some rights to have that decided rather quickly and taken care of rather quickly.

And so I think while your case, it may be a hardship because of the particular facts of the case, I don't think that that is grounds for ruling that this statute is unconstitutional. I think this court is bound by the mandatory language of the statute that says 'must be registered'. And I think that the facts of the case, or whether it comes to me in the pleadings, or failure to so allege, or by affidavit, aren't crucial where I think it is evident from the facts presented here that the acknowledgment of paternity was not in fact filed by the man claiming to be the natural father within the time required by the statute. I think it is probably as good a case as we will ever get here for letting the Supreme Court pass upon that question. But having lived with that statute for several years and I think this particular section was added in 1975, seeing it work and the advantages of the very language of the statute in enabling us to proceed with adoption matters in the absence of the consent of the natural father, I would

be reluctant to rule it unconstitutional because I don't think it is."

In re Adoption of Lathrop, 575 P.2d 894 (Kan. 1978), the Kansas Supreme Court stated that due process and equal protection do not require that the consent of a putative father be obtained before his child is adopted. The court reasoned that if a putative father chooses not to appear and make known his desires to care for the child, his rights are de minimus and may be terminated without his consent by finalizing the adoption. The court further stated that the minimal right must be weighed against "a strong state interest in placing children in a stable nurturing family atmosphere". The Lathrop case, therefore, holds that due process and equal protection require notice to a putative father of a pending adoption only where he has "appeared and asserted his desire to care for his child". The decision discusses notice to a father whose identity and whereabouts are unknown by "constructive notice" 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. Kansas had not adopted a registration system similar to that of Utah and the constitutionality of such a registration system was not at issue.

The case of Caban v. Mohammed, 441 U.S. 380, 60 L. Ed. 2d. 297, 99 S. Ct. ____ (1979) is cited by Appellant as determining that equal protection demands that an unwed father can veto the adoption of his child the same as unwed mothers. The unwed, natural father of two children challenged the constitutionality of the New York statute after petition was

granted allowing the natural mother and her second husband to adopt the children. The natural father had resided with the mother and had contributed to the childrens' support for a number of years, appeared as the father on their birth certificates, and maintained consistent contact with the children after separating from the mother. While the Supreme Court of the United States held that under such circumstances the permitting of unwed mothers, but not unwed fathers, to veto the adoption of a child by withholding consent violated the Equal Protection Clause Caban is distinguishable from the instant case on its facts. Appellant furnished no support or custodial care and had no contact with the child, nor had he lived with the mother. The Court at pg. 307 stated, "In those cases where the father never has come forward to participate in the rearing of his child nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."

The writer is impressed with the following reasoning of Mr. Justice Stevens with whom the Chief Justice and Mr. Justice Rehnquist joined in a dissenting opinion. At page 321 of U.S. Supreme Court Reports appears the following:

"Because I consider the course on which the Court is currently embarked to be potentially most serious, I shall explain why I regard its holding in this case as quite narrow.

The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose

retroactive application of this ruling (citing Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 92 S. Ct. 349). Families that include adopted children need have no concern about the probable impact of this case on their familial security.

Nor is there any reason why the decision should affect the processing of most future adoptions. The fact that an unusual application of a state statute has been held unconstitutional on equal protection grounds does not necessarily eliminate the entire statute as a basis for future legitimate action. The procedure to be followed in cases involving infants who are in the custody of their mothers whether solely or jointly with the father--or of agencies with authority to consent to adoption, is entirely unaffected by the courts holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless 'the adoption of older children is sought' ante at

60 L. Ed. 2d 307 and 'the father has established a substantial relationship with the child and is willing to admit his paternity' id. at 60 L. Ed. 2d 308. State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case, but as long as state courts are prepared to construe their existing statutes to contain a requirement of paternal consent 'in cases such as this' *ibid*, I see no reason why they may not continue to enter valid adoption decrees in the countless routine cases that will arise before statutes can be amended.

In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect that it will affect only a tiny fraction of the cases covered by the statutes that must now be rewritten. Accordingly, although my disagreement with the Court is as profound as that fraction is small, I am confident that the wisdom of judges will forestall any wide spread harm."

One gathers from reading both the majority and dissenting opinions in Caban (which is the latest U.S. Supreme

Court pronouncement relative to the right of an unwed father to block adoption of his child by withholding consent) that both Stanley and Caban should be read in the light of their own peculiar facts.

This court has stated that an unwed mother possesses a superior right to custody and control to an unwed father, In re Baby Girl M, 25 Ut. 2d 101, 476 P.2d 1013 (1970). It is in the public interest to impose upon one of the parties a legal responsibility for the welfare of the child. Since the female is present at the birth of the child and identifiable as the mother, the state should select the unwed mother rather than the unwed father as the parent with legal responsibility. Thus, unequal treatment under the law, is not unreasonable. Further, administrative convenience justifies the use of unequal treatment. The child's welfare is of prime consideration and has been recognized by the courts. The removal of children from adoptive homes following placement may be harmful, and, if accomplished frequently enough, will deter qualified and deserving prospective parents from applying for an adoptive child. The courts are also aware that the uncertainty as to its status is not only harmful to the child but also frustrates and makes more difficult the work of the adoption agencies," (quoted from In re Brennan, 270 Minn. 455, 462, 134 N.W. 2d 126, 131 (1968)). Prompt placement serves both the child's need for early parental care and minimizes detrimental psychological effects.

The unwed mother's interests are also of great importance. She should be shielded from external pressures which

force her to relive her experience. Notice requirements or hearings are often more harsh on her than on the putative father and making her situation public is equivalent to attaching a stigma to her in the eyes of the public and her rights to privacy are in jeopardy.

All of the above reasons would argue for a registration scheme such as our legislature has enacted which puts the notice burden of self-inquiry on the putative father and provides a speedy and final determination of his rights in the event of a failure to comply with the registration statute.

II. THE NOTICE OF CLAIM OF PATERNITY WAS NOT TIMELY FILED.

The Utah registration statute requires that the putative father must register 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. That language does not give the putative father an option, but rather, requires him to act by a certain event recognizing two kinds of adoptions; that is, agency placements and private placements. It is apparent that the intent of the legislature was to terminate the rights of the putative father upon his failure to register prior to the placement of the child with a licensed agency for the obvious reason that to leave uncertain the rights of said putative father following the relinquishment to the agency places the agency in a most difficult position, to wit; having to place the child with prospective adoptive parents with the question of the putative father's rights still

undetermined or, in the alternative, providing care for the child at its own expense until the putative father's rights are extinguished by a hearing. If, on the other hand, no agency is involved and the placement is a private one, the Petition for Adoption is, as a matter of practice, filed at approximately the time that the child is placed with the proposed adoptive parents and constitutes the basis for the award of temporary custody of the child to such parents pending the child's residing in their home the requisite six month period for adoption. In both cases, the language of the statute cuts off the rights of the putative father prior to the child's being placed in the home of the prospective adoptive parents which, it is submitted, is in the best interests of the child and subserves public policy.

Plaintiff-Appellant in the instant case failed to file his Notice prior to the relinquishment to a licensed agency. The alternative provision of the statute with respect to filing "prior to the filing of a Petition by a person with whom the mother has placed the child for adoption" is not operative in the instant case.

Plaintiff-Appellant argues that the language of 78-30-4(3)(b) if interpreted in the manner followed by the trial court in this case creates a total absurdity when read in connection with subsection (d) since the latter section requires the filing of a Certificate of Search of the records of the Bureau of Vital Statistics signed by its director stating 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".

It is submitted that there is no conflict in the subsections when the two are read in conjunction with subsection 3(c) which provides that "such failure (to file the notice within the requisite time) 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". It is not the filing of the Notice of Claim to Paternity that determines the right of the putative father to further notice of the proceeding, but the timely filing of such notice. Were this not so, the entire statutory scheme would be frustrated.

III. PLAINTIFF-APPELLANT HAS NOT
LEGITIMATED AND ADOPTED THE CHILD
BY PUBLICALLY ACKNOWLEDGING IT AS HIS.

Title 78-30-12 U.C.A. 1953 as amended provides:

"The father of an illegitimate child by publically 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."

Plaintiff-Appellant argues that by advising L.D.S. Social Services that he was the father of the child, by filing his Notice of Claim of Paternity with the Bureau of Vital Statistics, and by filing his verified Complaint in which he expresses his desire to bring the child into his parents' home

and care for it, he has legitimated and adopted the child. The statute does not by its terms purport to deal with the situation, as here, where the natural mother relinquishes the child to a placement agency for adoption. Obviously, under such circumstances, the putative father cannot "receive it as such (his own) with the consent of his wife, if he is married, into his family" nor can he "otherwise treat it as if it were a legitimate child." In a footnote in In re Baby Girl M. supra at page 1015, it is noted that Section 230 of the Civil Code of California is identical to 78-30-12 U.C.A. 1953. The case of Darwin v. Ganger, 174 Cal. App. 2d 63, 344 Pac. 2d 353 (1959) is cited wherein at page 358 the court stated:

"Where a man has no wife, he can publically acknowledge his child notwithstanding the fact that he does not maintain a household into which the child is taken. If the man is unmarried, the 'family' referred to in Section 230 may consist only of the father, mother, and child. Thus, an unmarried man may legitimize his offspring by living with the mother and child for a short period during which he represented the mother as his wife and the child as his own ***".

It is obvious that this court in In re Baby Girl M did not intend to approve the legitimizing and adopting of a child merely by a putative father acknowledging it as his own without the "receiving it into his family" which family includes the father, a mother and the child. In that case the putative father had married the child's mother in 1958 and divorced in 1963 and they had intended to remarry but the mother had been so upset by the loss of the child that the impending marriage had been postponed. During the mother's pregnancy the putative father and

natural mother had resided together. Such facts distinguish that case from the instant one. The use of the word "family" in the statute would indicate that the putative father have a wife or, in the alternative, that he create a "family" by at least living with the natural mother. The intent of the statute could hardly be stretched so far as to contend that the "family" referred to was the "family" consisting of the putative father and his parents.

CONCLUSION

Utah enacted a registration system for putative fathers to meet the possible implications of Stanley v. Illinois decided in 1972, which system meets the constitutional test in that the notice to the putative father is one of self-inquiry and places the burden upon him to come forward and to comply prior to the relinquishment of the child by the natural mother to a licensed placement agency. The sound public policy reasons for placing the burden on the putative father include the desirability of protecting the anonymity of the natural mother, the desirability of an immediate placement with the proposed adoptive parents, the certainty in adoptions where a Certificate of Search indicates no claim of paternity having been filed prior to the relinquishment of the child to a licensed placement agency, and the practical economic benefits of having the proposed adoptive parents assume the responsibility for the child immediately upon its release from the hospital. The registration system is effective and lends certainty to the adoption process which is necessary if

prospective adoptive parents are not to be deterred from taking a child born of an unwed mother into their home. The putative father has failed to timely file his claim of paternity in this case nor has he complied with the statutory requisites which would have legitimated and adopted the child as his own. The Order of Dismissal with Prejudice of Plaintiff's Amended Complaint for Writ of Habeas Corpus should be affirmed.

KIRTON & McCONKIE

By _____
Allen M. Swan

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Defendants-Respondents to DART & STEGALL, Attorneys for Plaintiff-Appellant, 430 Ten Broadway Building, Salt Lake City, Utah, 84101, this _____ day of April, 1980.

Allen M. Swan