

2006

Kelly F. Pearson v. Kimberlee Y. Pearson; Peter D. Thanos : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

KELLY F. PEARSON,
Respondent,

vs.

KIMBERLEE Y. PEARSON,
Petitioner.

)
)
) Case No. 20060563 – SC
20040677 – CA
)
)

PETE D. THANOS,
Intervenor and Petitioner.

BRIEF OF RESPONDENT

On Certiorari to the Utah Court of Appeals

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STATEMENT OF JURISDICTION OF UTAH SUPREME COURT

The Utah Supreme Court has jurisdiction to review adjudications of the Utah Court of Appeals pursuant to Section 78-2-2 of the Utah Code.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative or of central importance to this appeal.

STATEMENT OF THE CASE

Nature of the Case

This is a divorce proceeding involving the paternity of a child, Zachary, born during the marriage of Kelly and Kimberlee Pearson, and the custody of both Zachary and his brother, Nicholas.

Course of Proceedings and Disposition in Courts Below

Respondent Kelly F. Pearson ("Father") commenced divorce proceedings in December 2000 (R.1). Intervenor Pete D. Thanos ("Thanos") moved to intervene in the proceedings on January 23, 2001, claiming to be the biological father of Zachary, one of the children born of the marriage (R.37). Concurrently, petitioner Kimberlee Y. Pearson ("Mother") filed a motion requesting that Father be declared to be not the father of Zachary, and without visitation rights in Zachary. She also requested temporary custody of both Nicholas and Zachary (R.32). Father opposed both motions and requested that temporary

custody of the children be awarded to him (R.56). All three motions were heard by Commissioner Michael S. Evans on February 8, 2001 (R.122).

At the hearing, Mother attempted to proffer testimony that Father was not Zachary's father. Father's objections on the basis of Lord Mansfield's Rule were sustained. Mother then stipulated that custody should continue as it had since the Pearsons' separation, namely, that she and Father should continue to share joint legal and physical custody of Nicholas and Zachary, with the children splitting their time with each parent equally (R.122). The stipulation was accepted by the court and reduced to order (R.133).

On August 1, 2001, Thanos renewed his motion to intervene (R.165), which Father again opposed (R.222). The motion was heard by Commissioner Evans on August 30, 2001 (R.248). Commissioner Evans found that Thanos had not acknowledged his paternity of Zachary for more than two years, though he was aware of and believed himself to be Zachary's biological father, and that Thanos kept his biological connection to Zachary hidden from others, including his wife of twenty-six years, allowing Zachary to be regarded as Father's son and to become closely bonded with Father during critical stages of Zachary's development. Commissioner Evans further found that Thanos had not had substantial contact with Zachary prior to the initiation of the litigation, that he had not lived with Zachary in the same household or established a parent-child bond with Zachary, that he was completely absent from Zachary's life for the first year and a half and had only incidental contact with him thereafter, that during Thanos's absence Zachary had developed

critical bonds with his primary caregivers, Father and Mother, and that to permit Thanos to now be introduced as Zachary's father would be disruptive to the child's stability. Based on the foregoing, Commissioner Evans concluded that Thanos did not have standing to challenge the presumption of paternity in favor of Father and that he did not have a constitutionally protected liberty interest in establishing his paternity of Zachary. The Commissioner's findings and recommendation were subsequently reduced to order (R.671). Mother and Thanos objected (R.257, R.400).

The trial court heard argument on Mother's and Thanos's objections on December 3, 2001 (R.684). After taking the matter under advisement, the court in a telephone conference indicated it needed additional information to adequately address the policy considerations set forth in State In re J.W.F., 799 P.2d 710 (Utah 1990) ("Schoolcraft"). Therefore, the court appointed Dr. Jill Sanders "to provide the court with an independent 'Schoolcraft evaluation (R.728).'"

Dr. Sanders completed a written report on May 13, 2002 (R.860). She stated in the report that "Kelly Pearson functioned as Zachary's father prior to and following his birth in September 1999. . . . Zachary identifies Kelly as his father and their attachment is secure, strong and healthy." (R.862, ¶ 2.) She further stated that Thanos's contact with Zachary was minimal until January of 2001, when he began to see Zachary once or twice a month, that "Zachary identifies Peter as 'Peter'", and that he perceives him to be a familiar "caregiver" (R.862, ¶ 3).

Dr. Sanders went on to opine that “[m]ost adopted children spend considerable time and energy thinking about their biological parents, if not actively seeking to locate them” and that “psychologically speaking, some relationship between a biological parent and their child is necessary for the child’s normal development.” Id. at 4, ¶ 4. In this sense, she concluded, “the relationship between Peter and Zachary is essential.” Id.

Without addressing the question whether disestablishing Father as Zachary’s father would be disruptive to Zachary, Dr. Sanders stated that “[t]here is no research that I am aware of that suggests having two positive father figures has a detrimental impact on a child” and expressed her view that “Zachary has the opportunity to experience two positive, important relationships with the two fathers in his life.” Id. at 5, ¶ 2. She concluded, in summary, that “[f]rom a developmental and psychological perspective, Zachary’s functioning is not inherently disrupted by Peter’s involvement and Peter’s relationship with Zachary is necessary to Zachary’s normal and positive development.” Id. at 5, ¶ 4.

Upon receiving Dr. Sanders’ report, Father requested that Dr. Sanders address the impact on Zachary of a disruption in the parent-child relationship between Father and Zachary, which she had not done. Dr. Sanders refused to do so. Father therefore requested a telephone conference with the court, which was held May 28, 2002 (R.847). The trial court permitted Father to outline his concerns in a letter to the court, which he did (R.876). Dr. Sanders responded with a letter stating that she intended to address the issues raised by Father in the custody evaluation and did not deem it necessary to address

them in the context of the “Schoolcraft evaluation” (Ex. I-3). The trial court subsequently requested Dr. Sanders to address the issues raised by Father, and she responded to this request with a letter dated August 26, 2002 (R.865). In the letter, Dr. Sanders stated: “Zachary’s emotional security would likely be significantly disrupted in the case of severely limited or complete loss of contact with [Father]. . . . Obviously the way to protect Zachary from additional disruption is to maintain his relationship with [Father].” (R.866, ¶¶ 2-3.)

Dr. Sanders went on to state: “I do not believe Zachary has ‘lost’ his relationship with [Father]. To the contrary, their relationship is a strong and positive parent-child attachment. . . . There is no basis to believe that further disruption to the relationship between Zachary and [Father] is intrinsically linked to [Thanos’s] presence in Zachary’s life.” Id., ¶ 5. Thereafter, the matter was submitted for decision (R.857).

After one-hour oral argument on October 1, 2002, and without taking testimony, but relying solely on the affidavits and written reports previously filed with the court, the trial court granted Thanos’s motion to intervene (R.894). The trial court instructed counsel for Thanos to “prepare the Order consistent with the Court’s ruling” (R.894), but instead counsel submitted findings of fact and conclusions of law (R.975), and a separate order (R.971), which were signed over petitioner’s objection on November 7, 2002 (R.933).

The matter was subsequently set for a six-day trial on the issues of custody, alimony and attorney fees. At the conclusion of the evidence, the court took the matter under advisement, subsequently issuing written findings of fact (R. 2434) and entering a

supplemental decree of divorce (R.2503). Based on its previous paternity ruling, the court concluded that Father was a non-parent competing for custody of Zachary vis-à-vis Zachary's parents, and he was therefore required to rebut the parental presumption. As to Mother, the court found that Father had not done so, and thus "[Mother] benefits from the Parental Presumption on her claim for custody of Zachary against [Father]. Consequently, [Mother] and [Father] are not on equal footing." (R.2452).

As to Thanos, the court found: "The Parental Presumption has been rebutted regarding [Thanos's] claim for custody of Zachary. During approximately the first 15 months of Zachary's life, [Thanos], with the assistance of [Mother and Father], kept [Thanos's] parentage of Zachary a secret resulting in minimal contact between Zachary and [Thanos] during this period. During this critical 15-month period of time, [Thanos] and Zachary generally did not have a strong mutual bond, during this time [Thanos] did not demonstrate a willingness to sacrifice his own interests and welfare for Zachary, and generally lacked the sympathy for and understanding of Zachary that is characteristic of parents generally. Therefore, [Father] and [Thanos] stand on equal foot and Zachary's custody between them is determined solely by the best interests of the child." (R.2452).

Additionally, the trial court found, "In the context of the Parental Presumption Analysis, it is ironic at best to conclude that [Father] is a non-parent of Zachary when in real terms [Father] has established a strong mutual parental bond and relationship with Zachary, albeit *in loco parentis*. The Utah Supreme Court deemed Mr. Hutchison to be a 'non-parent'

in its analysis and Mr. Hutchison's parental relationship was of longer duration than [Father's] in the present case. 649 P.2d at 39. Consequently, following the dictates of the Hutchison case and in furtherance of the policies which support the Parental Presumption, the Court ruled accordingly." (R.2452-53).

Adopting the recommendations set forth in Dr. Jill Sanders' custody evaluation, the trial court awarded joint legal custody of Zachary to Mother and Thanos, denying Father legal custody rights in Zachary, and joint legal custody of Nicholas to Father and Mother (R.2467). The court designated Mother and Thanos primary physical custodians of Zachary, and Mother primary physical custodian of Nicholas. Father was awarded "third party access" to Zachary and his 50/50 access schedule, in place since the parties' separation, was reduced. Father and Mother's 50/50 access schedule with Nicholas remained unchanged (R. 2459; R.2467; R.2504, ¶ 4). Father's physical access schedule with both Nicholas and Zachary was made contingent upon Father relocating to Oregon (R.2505, ¶ 6; R.2507, ¶ 7).

Statement of Facts

Father and Mother were married in Salt Lake City, Utah on August 17, 1992. Their first son, Nicholas, was born July 6, 1997. Unbeknownst to Father, commencing in 1996 and continuing thereafter through Nicholas's birth and infancy, and Zachary's conception, Mother was involved romantically with Thanos (R.74, ¶¶ 4-6). Thanos was also married at the time, and Mother and Thanos concealed their relationship from their respective spouses

(R.74, ¶¶ 4-6). Mother became pregnant towards the end of 1998. In January 1999 she told Thanos that she believed the child was his. Thanos refused to leave his wife and was unwilling to be known or recognized as the child's father (R.2535, at 961:14 - 962:25; R.74, ¶¶ 4-6).

Thereafter, in late March 1999, Mother told Father of the pregnancy and of the affair. She was four months pregnant by this time (R.2532, at 433:1; R.45, ¶ 4). When Mother told Father that she was pregnant, she stated that she believed Thanos was the child's biological father. Father and Mother then discussed the viability of their marriage, and Mother stated that she must decide whether to stay with Father or to leave the marriage. She asked Father whether, if she stayed, he would rear the child as his own, making no distinction between him and their older son. Father affirmed that he would (R.2532, at 433:12 – 435:2; R.1570, ¶ 4).

The following day after this discussion took place, Mother told Father that she had decided she would stay and make their marriage work (R.2532, at 435:3 – 436:8; R.1570, ¶¶ 4-6). From that point forward, Mother repeatedly confirmed to Father that she considered him to be the father of the child she was carrying and that she would treat him as such in all respects (R.2533, at 450:8 – 452:8; R.1570, ¶¶ 4-6). Mother expressed her fear that Father would not treat the child as his own, and she repeatedly asked Father for assurance that he would, which Father gave. Id. Mother also confided to Father that

Thanos was unwilling to do anything that would reveal the situation to his wife and that he wanted the child's paternity to remain secret (R.2533, at 456:5-11; R.1570, ¶ 4).

Relying on Mother's repeated representations and assurances, Father took on the commitment of fatherhood and was as involved in the pregnancy as a father can be, caring for and supporting Mother, attending all prenatal examinations with her, and shouldering increased household duties to relieve Mother during the pregnancy (R.2532, at 438:16 – 439:12; R.45, ¶¶ 5-8; R.1570, ¶ 9).

After the child, Zachary, was born, Mother resumed her full work schedule, leaving Father with the lion's share of the responsibility for both Zachary and Nicholas (R.457:2-6). She had by this time been working for several months in a high management position for the startup company by which she'd been recruited (R.2533, at 459:14). She worked long hours during the week, typically leaving by 8:00 a.m. and not returning until 7:00 or 8:00 p.m. or later. She also worked full days on Saturdays and 4 to 6 hours on Sundays. Id. at 457:1-15. Father, on the other hand, consciously stepped back in his career in order to care for the children (R.2532, at 431:1-17). He maintained a schedule of working 8:00 a.m. to 5:00 p.m. Monday through Friday, and he did not work over-time or weekends (R.2533, at 457:20 – 458:4). He was involved in all aspects of the children's care. Id. at 458:7 – 459:23. He was the one who took Nicholas to school in the morning, and he was the one who arrived home in the evening to relieve the nanny (R.2535, at 1071:11-15).

Mother never acted inconsistently with her commitment to Father as Zachary's father until this litigation began (R.2533, at 452:12). She listed Father as Zachary's father on his birth certificate. The papers were filled out by both Father and Mother together after Zachary was born (R.2533, at 453:14 & Ex. P-9; R. 1570, ¶ 9 & 1580). Father chose Zachary's given name because Mother had chosen Nicholas's given name (R.2533, at 454:4-10). Father and Mother both agreed without question that Zachary's surname would be "Pearson" (R. 1570, ¶ 10).

When Zachary was 6 weeks old both Father's family and Mother's family gathered to bless Zachary as a member of the LDS Church. It was announced that Kelly Pearson, Zachary's father, would give Zachary his name and a blessing, and Father did so with members of both families participating. After the blessing, Mother spoke from the pulpit and expressed the joy that she felt to welcome Zachary into their family. Mother completed the form for Zachary's Blessing Certificate, signed by the Pearsons' bishop, stating that Father is Zachary's father and that he blessed him (R. 2533, at 454:11 – 455:23 & Ex. P-10; R.1570, ¶ 11 & R.1581, R.1582). The Pearson's church membership record confirms that Zachary was "born in the covenant" and is therefore sealed to Father as his father for all time and eternity (R.1570, ¶ 12 & R.1583).

Even after Father and Mother separated and Mother moved from the Pearsons' marital home in May 2000, she continued to act consistently with her repeated representations to Father that she considered him to be Zachary's father. She left both

Zachary and Nicholas with Father while she established herself in a new residence, and thereafter acquiesced in Father caring for both children in the home during the day while she worked. She established jointly with Father a 50/50 time-sharing schedule to care for Nicholas and Zachary, which continued through September of 2004, at which point the trial court's time-sharing schedule took effect (R.2434, at 16, ¶ 34.d; R. 1570, ¶ 13).

It was not until January 2001, when divorce proceedings commenced, that Mother changed her position regarding Father's paternity of Zachary. At that time she filed a motion with the court asking that the court declare that Father was not Zachary's father and that he had no rights of custody or visitation in Zachary (R.32).

Nevertheless, while taking this position in court papers, respondent continued to represent Father as Zachary's father in public forums and to acquiesce in his ongoing assumption of the role of Zachary's father. At Zachary's pre-school, which Zachary started in the Fall of 2002, respondent listed Zachary's home phone as "Dad – 467-8923", Father home phone, and his grandparents as "Velda and Wayne", Father's parents (R.1570, ¶ 15 & R.1587). Father is listed as Zachary's father at work, at Zachary's school, on the church records, and in this state's vital records (R.1570, ¶ 14 & R.1580-91).

Thanos also acquiesced in Father's assumption of the role of Zachary's father. Knowing of Zachary's existence before even petitioner did, and believing himself to be Zachary's father from the time he learned of Mother's pregnancy in January 1999, he allowed petitioner to assume that role for two full years, doing nothing to acknowledge his

paternity (R.2535, at 963:1; R.671, ¶ 9). He felt that he would be “Uncle Pete” to Zachary rather than father, yet he acquiesced in that occurring (R.2535, at 964:8-16; R.2536, at 1302:21 – 1303:21; R.449, at 2, ¶ 4). He kept his biological connection to Zachary hidden from others, including his family members, until as late as August 2001(R. 671, ¶ 9). Despite his belief and knowledge that he was Zachary's biological father, Thanos allowed Zachary to be regarded in every way as Father's son and to become closely bonded with Father during critical stages of Zachary's development. Id.; R.2452-53.

Thanos's desire to keep Zachary's parentage secret also resulted in minimal contact between Zachary and Thanos during these critical stages (R.2452). During the first year of Zachary's life, Thanos saw him twice, each time about an hour (R.2535, at 964:17-21). During the second year of Zachary's life, until February 2001, he saw him two to three times (R.2535, at 964:22-25).

On December 25, 2000, Thanos's wife died (R.2533, at 635:20). Beginning in February 2001, Thanos began to have contact with Zachary and Nicholas during the periods of time that the children were in Mother's custody (R.2437, ¶ 9). Zachary was seventeen months old by this time. The contact consisted of approximately the equivalent of standard visitation for a noncustodial parent (R.2534, at 716:8). Intervenor continued to live in Oregon through the time of trial (R.2437, ¶ 8).

Nicholas and Zachary make no distinction between themselves in their relationship with Thanos, identifying him as step-father and calling him “Pete” (R.2535, at 950). To both

children, Thanos is a stepparent, not a parent (R.2534, at 711:17). Nor do Nicholas and Zachary make any distinction between themselves in their relationship with Father, identifying him as their father and calling him “Dad” (R.2434, at 19). Nicholas and Zachary’s primary attachment figures are Father and Mother (R.2534, at 715:11, 716:18). They have a “secondary” attachment to Thanos (R.2534, at 716:14).

SUMMARY OF THE ARGUMENT

The Court of Appeals was not required to defer to the trial court’s application of the facts bearing on the standing inquiry in this case, nor to the trial court’s findings of fact, as the former analysis involves policy questions and legal conclusions that are the proper province of the appellate courts, and the latter were based on the trial court’s review of the written record only, which the Court of Appeals was equally well situated to review.

The Court of Appeals did not err in applying the standing analysis set forth by this Court in State In re J.W.F., 799 P.2d 710 (Utah 1990) (“Schoolcraft”) to the facts of this case. The Court of Appeals properly took a broader view of the policy concern of protecting marriage than was taken by the trial court – concluding that the policy concern did not lose all relevance simply because the Pearsons’ marriage ultimately dissolved. This is particularly so in light of the Utah Uniform Parentage Act, enacted in this state in 2005, which departs from the Uniform Act by denying standing to adjudicate the paternity of a marital child to anyone but the husband or wife, even in the context of divorce proceedings.

Thanos does not have a constitutionally protected right to establish his paternity of a child born into Father's marriage. Even if he did have such a constitutionally protected right, he waived it by failing to timely assert it.

The Court of Appeals' references to the findings of the trial court in its October 2001 order were immaterial to its opinion. The essential findings – though not the conclusions – were subsequently confirmed by Dr. Sanders' reports. The Court of Appeals correctly relied on the findings contained in Dr. Sanders' reports, rejecting her superfluous conclusions, in applying the policy concern of protecting children from disruptive attacks on their paternity.

The Court of Appeals' opinion is not ambiguous in its implications for the trial court's custody determinations in this case, and on remand the trial court should be instructed that Father is entitled to a new custody evaluation and a new custody trial, free from the inclusion of an improper third party and based on proper custody factors, not "biology."

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED THE POLICY CONSIDERATIONS ARTICULATED BY THIS COURT IN SCHOOLCRAFT

Mother and Thanos (collectively "Petitioners") articulate numerous reasons why they feel the Court of Appeals "wholly disregarded" the policy considerations articulated by this Court in In re J.W.F., 799 P.2d 710 (Utah 1990) ("Schoolcraft") and should be reversed. Petitioners' arguments do not accurately convey the court of appeals' opinion, slant the record facts, cite facts inapposite to the Schoolcraft analysis, and assume erroneous standards of review. Father responds to the arguments advanced by Petitioners as follows.

A. The Court of Appeals Did Not Err In Its Review of Thanos's Standing to Challenge Zachary's Paternity, Nor In Its Review of the Facts Bearing on This Issue

Petitioners argue, in relation to several substantive points, that the Court of Appeals erroneously substituted its own findings of fact for findings of the trial court. Petitioners cite Willey v. Willey, 951 P.2d 226, 234 (Utah 1997), an alimony case in which the trial court made findings of fact after trial, in support of this argument. The principle articulated in Willey – that the appellate court must not usurp the prerogative of the trial court and make its own independent determinations – does not apply in this case.

The Court of Appeals addressed only one issue raised in Father's appeal, namely, whether the trial court erred in the standing analysis it employed in granting Thanos's motion to intervene. As this Court has stated, "The question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue." Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372, 373 (Utah 1997). The standing determination implicates important policy considerations, as to which trial courts are granted minimal discretion. Id. at 374; cf. State v. Vincent, 883 P.2d 278, 281 (Utah 1994) (determining normative consequence of particular facts is the province of appellate courts). Thus, in contrast to Willey where the trial court was entitled to "considerable discretion" in fashioning an alimony award, see Willey v. Willey, 951 P.2d 226, 234 (Utah 1997), the trial court's determinations regarding the important policy considerations implicated in this case were not entitled to deference.

Moreover, the trial court's factual findings pertaining to the issue of standing – while normally entitled to deference, see Kearns-Tribune Corp., 946 P.2d at 373-74 – were not entitled to deference in this case. This is because the trial court decided the question of standing based solely on the affidavits and legal memoranda filed by the parties and the reports submitted by Dr. Sanders. The trial court did not conduct an evidentiary hearing, receive testimony, evaluate the credibility of witnesses, nor make findings resolving conflicting testimony. Thus, the Court of Appeals was in as good a position as the trial court to read the affidavits and reports, evaluate the evidence, and draw logical conclusions therefrom. See Brown v. Brown, 744 P.2d 333, 336-37 & n.1 (Utah Ct. App. 1987). The Court of Appeals was not required to defer to the trial court's findings on the motion to intervene, see In re Infant Anonymous, 760 P.2d 916, 918 (Utah Ct. App. 1988), and was instead entitled to review the facts pertaining to the motion to intervene *de novo*. See Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460, 461 (Utah Ct. App. 1988). Petitioners' oft-repeated contention that the Court of Appeals did not properly defer to the trial court's findings and/or substituted findings of its own is grounded in a misapprehension of the foregoing principles and should be disregarded.¹

¹ Petitioners also attempt to dispute “findings” made by the Court of Appeals by citation to testimony adduced at trial. However, the motion for intervention was granted nearly two years prior to trial and conclusively disposed of the standing issue. At no time did the trial court take evidence or receive testimony prior to ruling on the motion for intervention, nor, clearly did the trial court rely on testimony adduced at trial two years later to make its ruling.

B. The Court of Appeals Did Not Err in Its Application of the Policy Consideration of “Preserving the Stability of the Marriage”

1. The Court of Appeals appropriately took a broad view of the policy goal of preserving marriage.

Neither Schoolcraft, nor any other reported case in this jurisdiction, has involved a challenge to the paternity of a child born into the marriage of a husband and wife who, believing the child is not the issue of the husband, agree that the husband will rear the child as his own as a condition of reconciling and continuing the marriage. The Court of Appeals did not err in determining that, under these facts, the policy consideration of preserving the stability of marriage does not lose all relevance, even though the particular marriage at issue had since dissolved.

In making this determination, the Court of Appeals did not “find” that the Pearsons’ marriage was intact, nor that a stable marriage between them existed, nor that Thanos was “at fault” in undermining the Pearsons’ marital relationship, as petitioners claim. Rather, the Court of Appeals explicitly recognized that the Pearsons’ marriage eventually dissolved. See Pearson v. Pearson, 2006 UT App 128, ¶ 21. Nevertheless, the Court of Appeals properly recognized the importance of the Pearsons’ efforts to reconcile and to jointly rear Zachary as the child of their marriage, both prior to and after their separation.

In the context of this case, the policy of protecting marriage takes on broader implications than were present in Schoolcraft. The Pearsons, unlike Mr. Schoolcraft and his wife, who lived together for eight months and separated before any children were born of

their union, lived together for eight years and jointly participated in the rearing of two children. They subsequently separated, but continued to rear both of the children of their marriage jointly, albeit in separate households. The Pearsons' was not a marriage "in name only." As noted by the Florida Court of Appeals, "although divorce may separate and strain a family with children, divorce does not end the important child-rearing functions of the family." S.D. v. A.G. and J.G., 764 So. 2d 807, 810 (Fla. Ct. App. 2000).

The presumption of legitimacy protects not only the tranquility of an existing marriage and the legitimacy of children born into a marriage, but also the sanctity of parent-child relationships that develop in the context of marriage. From the standpoint of the child born into a marriage, the protection that is afforded by the presumption of legitimacy does not depend on the continued existence of the marriage, but to the contrary, acquires particular relevance when the marriage dissolves. Our sister state so recognized in In re Marriage of Freeman, 53 Cal. Rptr. 439 (Cal. Ct. App. 1996), where the court emphasized: "The state's interest in applying the [conclusive] presumption [that the husband is the father of children born into his marriage] is not limited to assuring adequate support for a child or protecting existing marriages from interference. Rather, as we have noted, the state has a well-recognized interest in preserving and protecting the dignity of parental relationships, especially when a marriage is being dissolved and instability is being introduced into a child's life." Id. at 448; see also Susan H. v. Jack S., 30 Cal. App. 4th 1435, 1442-1443 (1994)("The state has an 'interest in preserving and protecting the developed parent-child

and sibling relationships which give young children social and emotional strength and stability.’ This interest is served notwithstanding termination of the mother’s marital relationship with the presumed father.”).

The importance of the marital family as the basic unit of society is grounded in large part on the role that marriage plays in nurturing young children. “A child’s psychological tie to a parent is not a simple, uncomplicated relationship. A child requires from his parents not only bodily comfort and gratification, but also demands affection, companionship, and stimulating intimacy. Where these needs are answered reliably and regularly by the parent, the child-parent relationship becomes firm, with immensely productive effects on the child’s intellectual and social development. Where there are changes of the parent figure or other hurtful interruptions, the child’s vulnerability and the fragility of the relationship become evident.” See In re Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (citing Goldstein, Freud, & Solnit, Beyond the Best Interests of the Child, 17-20)

Thus, while genetic testing has become scientifically reliable to the extent that even the highest standard of proof required to rebut the presumption can be met, courts have nevertheless sustained the mandate of privileging the marital family and protecting children from disruption of the relationships developed within it. In California, the courts sustained the presumption from the attack that it no longer bore a reasonable relationship to the facts sought to be presumed by designating it a substantive rule of law. See In re Marriage of Freeman, 53 Cal. Rptr. 2d at 445 (“A conclusive presumption is in actuality a substantive

rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature.”) (quoting Kusior v. Silver, 7 Cal. Rptr. 129 (1960)). This Court has also recognized that the presumption of legitimacy is grounded not in considerations of fact, but in public policy. See Theros v. Metropolitan Life Ins. Co., 407 P.2d 685, 692 n.5 (Utah 1965) (“[T]he so-called absolute presumption of legitimacy of a child born in wedlock is based on considerations of public policy rather than absolute certainty as to fact.”). The stability of the parent-child relationships that are formed within marriage are of ongoing significance to the well-being of society and as such are entitled to the ongoing protection of the state, though the union between the husband and the wife dissolves.

In this case, the trial court’s finding that “the interest in preserving the stability of the marriage is not a consideration, due to the fact that there is no marriage to preserve,” R.983, ¶ 21, employs an extremely narrow view of the policy goal of preserving marriage. Father agreed to reconcile with Mother, and as part of that reconciliation promised to raise the child she had conceived of an affair with another man as his own. After having done so, and investing emotionally, financially, and in every other way in the child, Mother changed her mind, decided she would rather be with Thanos, and asserted that Father had no parental rights in the child that he had reared. The trial court endorsed this assertion, allowing Thanos standing to disestablish Father as the child’s father, and ultimately depriving Father of legal custody rights in the child, allowing him only physical access rights as a non-parent “third party”. Were the trial court’s ruling to be upheld, any husband who

finds himself in Father's position would be foolish to attempt reconciliation conditioned on a promise to rear the child as his own, knowing that the relationship he establishes with the child will be at the whim of the wife. Such a policy undermines marriage by discouraging reconciliation. Further, such a policy favors the rights of men who invade marriages and procreate with the wives of others, thus destabilizing marriages. The policy goal of preserving marriage can and should include fashioning rules of law that promote the stability of marriage by protecting instead the rights of husbands who attempt to preserve their marriages by parenting the children born into them.²

The Court of Appeals did not err in applying a broader perspective to the policy goal of preserving marriage to the facts of this case, disagreeing with the trial court's assumption that this policy goal loses all relevance when the particular marriage at issue ends in divorce. The stability of marriage is promoted by a rule of law that gives legal protection to the parent-child relationship that developed as a condition of the continuation of the marriage, and ensuring that that legal protection survives subsequent separation or divorce. The dissolution of the marriage between the legal father and the mother "does not change the preferred principle, which is to preserve the child's relationship with the social father, if

² The concept that rules of law that protect marriage may have continuing application, even though a particular marriage has dissolved, is evident elsewhere in our laws. An example is Rule 502 of the Utah Rules of Evidence, which protects spousal confidential communications after divorce, and even after death. See Edward Kimball & Ronald Boyce, Utah Evidence Law, 5-148 (2nd ed. 2004). The survival of the privilege, encourages open communication between spouses, thus protecting and promoting marriage, while having no positive benefit in application to the particular marriage that has dissolved.

there is one.” Ira M. Ellman, Thinking about Custody and Support in Ambiguous-Father Families, 36 Fam. L.Q. 49, 64-65 (2002); see also Susan H. v. Jack S., 30 Cal. App. 4th 1435, 1442-43 (1994); Steven W. v. Matthew S., 33 Cal. App. 4th 1108, 1116-17 (1995) (holding that extant father-child relationship should be preserved at cost of biological ties, though presumed father’s relationship with mother had ended). The Court of Appeals merely recognized that these broader implications are legitimately considered when analyzing the first policy consideration identified in Schoolcraft.

2. The Court of Appeals’ application of the policy goal of preserving marriage is consistent with the policies expressed in the Uniform Parentage Act enacted in Utah in 2005.

Petitioners cite a random selection of dated cases from other jurisdictions in support of the false assertion that “it is increasingly apparent that the presumption of paternity rule is being further eroded and limited.” In fact, the opposite is true, as evidenced by the revisions to the Uniform Parentage Act completed by the National Conference of Commissioners on Uniform State Laws in 2000, as amended in 2002 (“Uniform Act”). The Uniform Act incorporates, *inter alia*, a strict limitations period and the doctrine of estoppel to all challenges to the paternity of children having a presumed father. See Uniform Act, §§ 607 & 608. It thus incorporates legal principles developed by courts throughout the country to address complexities arising from social and scientific developments that have resulted in an increased need to assign legal paternity where there is knowledge of a divergence between social and biological paternity. See Ira Mark Ellman, Thinking about Custody and

Support in Ambiguous-Father Families, 36 Fam. L. Q. 49, 51-55 (2002). Professor Ellman

states:

Legal paternity and biological paternity have never been identical. That was once inevitable; today it is a matter of choice. Particularly as policymakers have become more determined to enforce child support obligations, the choice becomes more important. Even though the law's historic emphasis on social paternity owed much to scientific ignorance, it often produced sensible results. Those results should not be displaced by our new-found ability to establish biological paternity.

Id. at 77. That sentiment is echoed by the Michigan Supreme Court's holding in In re CAW, 665 N.W.2d 475 (Mich. 2003) that a biological father did not have standing to intervene in a child protective proceeding in which the child involved had a legal father. The court stated: "There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage."

Different legal principles have developed to address the question of legal paternity where the social father and the biological father are the not the same. "The key things we learn from all these cases . . . is that the rights and obligations of parentage appropriately arise from relationships, not just from biology." Ellman, supra, at 65. Schoolcraft, by application of a standing analysis that mandates attention to policy considerations protecting marriage and children before paternity of a child who has a legal father may be contested, simply makes use of one such legal tool. Other states have also employed standing analyses, see, e.g., Ex parte Presse, 554 So. 2d 406 (Ala. 1989); Nostrand v. Olivieri, 427 So. 2d 374 (Fla. Dist. Ct. App. 1983); Family Independence Agency v. Jefferson, 677

N.W.2d 800 (Mich. 2004); Girard v. Wagenmaker, 470 N.W.2d 372 (Mich. 1991); Evans v. Bisson, 970 S.W.2d 431 (Tenn. 1998), have required that a full evidentiary hearing be conducted prior to blood tests being ordered or considered or paternity being determined, see, e.g., N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000); Fernandez v. McKenney, 776 So. 2d 1118 (Fla. Dist. Ct. App. 2001), have weighed the competing interests at stake per their statutory schemes, see, e.g., In re Jesusa V., 85 P.3d 2 (Cal. 2004) or have employed estoppel principles, see, e.g., In re Marriage of Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996).

The version of the Uniform Act adopted by this State incorporates the foregoing principles, and additionally, re-affirms the strong public policy in Utah of protecting marriage from outside intervention. Thus, whereas the Uniform Act permits a presumed father, the mother, “or another individual” to adjudicate the parentage of a child having a presumed father within two years of the child’s birth, see Uniform Act § 607(a), the version of the Uniform Act adopted in this State does not allow “another individual” to adjudicate the parentage of a child having a presumed father. Instead, the Utah Uniform Parentage Act, codified at Title 78, Chapter 45(g) of the Utah Code, allows the issue to be raised only by “the presumed father or the mother at any time prior to filing an action for divorce or in the pleadings at the time of the divorce of the parents.” See Utah Code Ann. § 78-45g-607 (2006). Individuals outside the marriage, including putative fathers, may not adjudicate the paternity of a child of the marriage, even at the time of the divorce of the mother and the presumed father.

In light of the foregoing expression of this State's public policy regarding the protection of marriage and the presumption of paternity from outside challenges, even during divorce proceedings, it cannot be said that the Court of Appeals erred in concluding that the first prong of the Schoolcraft test should not have been dismissed by the trial court as irrelevant under the facts of this case.

C. The Court of Appeals Did Not Err in Its Application of the Policy Consideration of "Protecting Children From Disruptive and Unnecessary Attacks upon Their Paternity"

Petitioners again argue, in the context of the second policy consideration articulated by this Court in Schoolcraft, that the Court of Appeals should be reversed because it "rejected the unchallenged findings of the trial court and made findings of its own." Brief of Appellants, at 33. The essential facts in this case that bear on the policy consideration of protecting children from disruptive and unnecessary attacks on their paternity are clear and undisputed and were not rejected by the Court of Appeals. These facts are that Mother, Father and Thanos, with knowledge of Thanos's probable biological paternity of Zachary, concurred in Father taking on the role of father to Zachary, that Father did in fact take on that role, that Father and Zachary developed a strong father-child bond during critical stages in Zachary's development, that that father-child bond remained intact though Father and Mother subsequently separated and Thanos was introduced into Zachary's life, and that Zachary came to identify Thanos as "another loving caregiver", not his father. These facts are set forth in Dr. Sanders' "Schoolcraft" reports submitted prior to the October 1, 2002

hearing on Thanos's motion to intervene and the parties' affidavits submitted in support of and opposition to the motion. See R.28, ¶¶8; R.46, ¶¶ 3-7, ¶ 11-12; R.75, ¶¶ 2-8; R.860-68.

The essential facts remained unchanged nearly two years later, when the trial court found that Thanos, with Mother and Father's assistance, kept Thanos's parentage of Zachary secret during the first 15 months of Zachary's life, that this resulted in minimal contact between Thanos and Zachary during this time, that Thanos and Zachary did not have a strong mutual bond during this critical 15-month period of time, that Thanos did not demonstrate a willingness to sacrifice his own interests and welfare for Zachary during this time, and that during this time he generally lacked the sympathy for and understanding of Zachary that is characteristic of parents generally (R.2452), and that "it is ironic at best to conclude that [Father] is a non-parent of Zachary when in real terms [Father] has established a strong mutual parental bond and relationship with Zachary." (R.2452-53.)

The trial court made these findings despite the fact that Mother and Thanos had since married and established an "intact family unit" with Nicholas, Zachary and another child born to Mother and Thanos after their marriage. Though Zachary was certainly part of this household, Father and Mother remained Nicholas and Zachary's primary parental figures, while Thanos remained in a secondary, or step-parent role, to both Nicholas and Zachary. The testimony at trial establishing the continuing role of Father as father and Thanos as "another loving caregiver" or step-parent came from Petitioners' witness, Dr. Jill

Sanders, and was unrefuted. See R.2534, at 711:17-18; R.2534, at 718:18-20; R.2534, at 719:7-16; R.2534, at 738:11-13; R.2534, at 796:5-9.

The only “facts” rejected by the Court of Appeals, which Petitioners argue should bear on the second prong of the standing analysis are not facts at all, but speculation regarding the role that Thanos might play or should be able to play in Zachary’s life in the future due to his biological paternity of Zachary. Dr. Sanders’ summary opinion that “some relationship between a biological parent and their child is necessary for the child’s normal development” (R.863, ¶ 4), which led her to conclude that “Peter’s relationship with Zachary is necessary to Zachary’s normal and positive development” (R.864, ¶ 4), falls in this category. It is not a fact, but a conclusion, based on Dr. Sanders’ generalized opinion that all children – not Zachary Pearson in particular – must have a relationship with their biological parent to develop normally. If this view is translated into policy, then the second prong of the Schoolcraft standing analysis becomes superfluous in any case in which a biological father wishes to assert his paternity in a child having a presumed father.

The Court of Appeals, correctly, did not treat Dr. Sanders’ idiosyncratic view as a “fact” bearing on the standing analysis. It also correctly characterized Dr. Sanders’ focus in her reports on Thanos’s presence in Zachary’s life, rather than Thanos’s direct attack on Father’s paternity of Zachary, and the potential that such an attack had to disrupt the relationship between Father and Zachary, as being nonresponsive to the second policy concern identified by this Court in Schoolcraft. See Pearson v. Pearson, 2006 UT App 128,

¶ 24, n.6. Dr. Sanders, in fact, attempted to avoid the whole question of disruption by ignoring the reality that Thanos's paternity challenge would render Father a "non-parent" to Zachary. Thus, Dr. Sanders opined that Zachary had not lost his relationship with Father, that "[t]here is no inherent reason why the presence of Mr. Thanos as another loving caretaker should have any further disruptive impact on Zachary's relationship with Mr. Pearson," R.866, ¶ 2, and that Thanos's intervention was an opportunity for Zachary "to experience two positive, important relationships with the two fathers in his life." R.864, ¶ 2.

The Court of Appeals properly rejected these views as nonresponsive to the question that needed to be addressed, instead focusing on Dr. Sanders' findings that were responsive. These findings are that "Zachary's emotional security would likely be significantly disrupted in the case of severely limited or complete loss of contact with [Father]," R.866, ¶ 2, that "[o]bviously, the way to protect Zachary from additional disruption is to maintain his relationship with [Father]," R.866, ¶ 3, that Zachary and Father's relationship "is a strong and positive parent-child attachment," and that Zachary considers Father his father and Thanos "an additional caregiver." (R.867, ¶ 2).

Whatever the merits of Dr. Sanders' "two-father" view, the issue before the court was not whether Thanos could be a secondary father to Zachary. Clearly, by virtue of his marriage to Mother, Thanos is at liberty to attempt to foster whatever type of relationship with Zachary he wishes to foster, and would be expected most naturally to develop as a father figure to both Zachary and Nicholas. As the Court of Appeals' correctly observed,

however, “[t]he entire motivation for Thanos’s attempt to intervene was to establish that he, rather than Father, was to fulfill the paternal role in [Zachary’s] life.” Pearson v. Pearson, 2006 UT App 128, ¶ 28. Thanos’s challenge is not for the purpose of being introduced as another father figure in Zachary’s life, but for the sole purpose of displacing Father as such. The Court of Appeals’ penetration through Dr. Sanders’ generalized views regarding biological parents and their children and her “two-father” model, and its focus instead on the relevant findings in her report, was clearly not error, but necessary to the proper application of Schoolcraft in the context of this case.

Moreover, the Court of Appeals’ approach is in line with this State’s clearly articulated policy of ensuring the early identification of persons who will be fulfilling the parental role for children, and the protection and fostering of children’s uninterrupted bonding with these parents. See Wells v. Children’s Aid Society, 681 P.2d 199 (Utah 1984); In re J.M. & N.P., 940 P.2d 527, 539 n.8 (Utah Ct. App. 1997).

In the context of children born outside of marriage, this Court has stated:

It is and should be the policy of the law to so operate as to encourage the finding of suitable homes and parents for children in that need. It is obvious that persons who might be willing to accept a child for adoption will be more reluctant to do so if a consenting parent is permitted to arbitrarily change her mind and revoke the consent, and thus desolate the plan of the adoptive parents and bring to naught all of their time, effort, expense and emotional involvement.

See id.(quoting In re Adoption of F., 488 P.2d 130, 134 (Utah 1971)). Moreover, our legislature has found:

(a) The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

. . .

(c) Adoptive children have a right to permanence and stability in adoptive placements;

(d) Adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(e) An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. . . .

Utah Code Ann. § 78-30-4.12(2) (2006).

It is no less essential in the context of children born into marriage than in the context of children born outside of marriage to provide permanence and stability to the parent-child relationship. To adopt a policy that allows the legal relationship between a father and his three-year-old son³ to be severed by a paternity challenge from a biological father who demonstrated neither a timely nor full commitment to the responsibilities of parenthood is to afford marital fathers less protection than prospective adoptive parents, and to afford children born into marriage less permanence and stability than children born outside of marriage. Marital children are entitled to the same protection and the same permanence in the relationships they develop with the persons who actually function as their parents as are non-marital children.

³ Zachary had just turned three when the trial court granted Thanos's motion to intervene for the purpose of establishing his paternity of Zachary.

As the trial court found, Father is Zachary's father "in real terms". R.2452. The Court of Appeals' application of the second prong of Schoolcraft standing analysis to the facts of this case ensured that Father, who has functioned as Zachary's father from birth, and who continues to do so, remains the child's father legally, thus protecting Zachary from disruption in that relationship, and ensuring Zachary the "early and swift" permanence to which children in this State are ideally entitled. This was not a misinterpretation of the policy concern that this Court articulated in Schoolcraft, of protecting children from disruptive and unnecessary attacks on their paternity, but a vindication of it.

D. Thanos Does Not have a Constitutionally Protected Right to Challenge Zachary's Paternity

Petitioners argue that the Court of Appeals' application of the Schoolcraft analysis to the facts of this case resulted in a denial of Thanos's due process rights. In determining whether an asserted interest is a fundamental liberty interest protected by due process, the interest sought to be protected must first be carefully defined. See Dawn D. v. Superior Court of Riverside County, 17 Cal. 4th 932, 940 (Cal. 1998). In this case, the trial court concluded, without analysis, that "[b]oth the U.S. and Utah Constitutions grant Peter Thanos constitutional rights afforded to a natural parent." R.975, ¶ 23. This description of Thanos's interest is inaccurate. Thanos does not claim an interest simply as an alleged "natural parent." He claims an interest as the alleged biological father of a child born into the marriage of another man who is deemed the child's father by operation of law upon birth. See Utah Code Ann. § 30-1-17.2. The constitutional significance of his claim is therefore

distinct from that of other unwed fathers. The constitution requires some protection of the biological father's opportunity, which no other male possesses, to develop a relationship with his offspring. "Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage." Michael H. v. Gerald D., 491 U.S. 110, 129 (1989). Thus, to expand the "liberty" afforded Thanos is to contract the equivalent liberty of Father, or as Justice Scalia framed it: "[T]o *provide* protection to an adulterous natural father is to *deny* protection to a marital father." Id. at 130.

Carefully described, therefore, the interest Thanos claims is constitutionally protected is his interest in disestablishing Father as the legal father of a child born to Father's intact marriage, where the child has a fully developed and unquestioned father-child relationship with Father, to have himself declared the father of the child. Once the asserted interest is identified, the court must next determine whether the interest denominated as a "liberty" is a fundamental right traditionally protected by our society and rooted in history, tradition and the conscience of our people. See Michael H. v. Gerald D., 491 U.S. 110, 123 (1989)("[T]he Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))). Only if the liberty interest is fundamental is it necessary to conduct a complex balancing of competing interests. See Dawn D., 17 Cal. 4th at 940-41.

It is Thanos's burden to establish that the interest he has in disestablishing Father as Zachary's legal father to have his paternity declared is so deeply embedded within our traditions as to be a fundamental right. See Michael H., 491 U.S. at 126. He has made no effort to do so. The United States Supreme Court did not hold the similar claim of a biological father to be of constitutional significance, but instead considered the question of whether a state may give categorical preference to the marital father over the biological father to be a matter of public policy for the state to decide. See id. at 129-30.⁴

⁴ Justice Scalia's opinion in Michael H. was joined by Justice Rehnquist, and in all but footnote 6, by Justices O'Connor and Kennedy. Justice Stevens concurred in the judgment, and wrote separately to distinguish the issues at hand as he saw them: first, is it unconstitutional to prevent Michael from obtaining a judicial determination that he is her biological father; and second, is it unconstitutional to deny Michael a fair opportunity to prove that the child's best interests would be served by granting him visitation? See Michael H. v. Gerald D., 491 U.S. 110, 132 (1989). As to the first question, Justice Stevens wrote: "I agree with Justice Scalia that the Federal Constitution imposes no obligation upon a State to 'declare facts unless some legal consequence hinges upon the requested declaration.' 'The actions of judges neither create nor sever genetic bonds.'" Id. at 133 (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)). As to the second question, Justice Stevens assumed for the purposes of his opinion that a constitutionally protected family relationship might exist between Michael H. and his daughter. As distinct from this case, Michael H.'s daughter identified Michael as her father, calling him "Daddy" id. at 144, and the child's guardian ad litem asserted that she had more than one psychological or *de facto* father and should be entitled to maintain her filial relationship with both. Id. at 114. If so, Justice Stevens concluded, the relationship was sufficiently protected by California law that gave Michael H. the opportunity to prove his entitlement to visitation as "any other person having an interest in the welfare of the child." Id. at 133. Utah law also affords the psychological parent of a child the right to seek visitation with the child. See Gribble v. Gribble, 583 P.2d 64 (Utah 1978). Here, intervenor does not claim to be Zachary's psychological parent (and it is undisputed that he is not and that petitioner is) and does not seek rights in Zachary on any ground other than as would ensue from a judicial declaration that he is Zachary's biological father. The majority of the U.S. Supreme Court held that the federal constitution does not entitle him to such relief.

The question is whether the relationship between a married woman, a man married to another woman with whom she commits adultery, and a child born of that union into the extant marriage of the woman and her husband, has been treated as a protected family unit under the historic practices of our society. Id. at 124. It is impossible to find that it has. Historically, adultery has been treated as a crime, and it remains a crime in this state. See Utah Code Ann. § 76-7-103. At common law, alienation of affection and criminal conversation were widely recognized torts, the latter being directed specifically to adultery. The tort of alienation of affection, by which liability may attach to a third person who intentionally interferes with a marital relationship, retains continued validity in this state. See Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).

Traditionally, society was so scornful of bringing children into the world as a result of adulterous conduct that “bastardy” was also a crime. Utah’s Bastardy Act was enacted in 1911 as part of the penal code and provided for the arrest and arraignment of the putative father. Whereas the father of a child born out of wedlock historically had no parental rights in his child, the husband’s rights in children born to his marriage have, from ancient times, been protected by the presumption of legitimacy.

Consistent with the presumption of legitimacy and vindicating similar policies, Lord Mansfield’s Rule dates back to the common law of the eighteenth century, gained wide acceptance in the jurisdiction of this country, and has continued application today in this state. See In re J.W.F., 799 P.2d 710 (Utah 1990). The rule forbids a husband or wife to

give testimony that would tend to illegitimate their child, or for a court to consider such evidence. See id. at 714 (holding court of appeals erred in relying on evidence that contravened Lord Mansfield's rule). In 1777, Lord Mansfield said: "It is a rule founded in decency, morality, and policy that they [husband and wife] should not be permitted to say after marriage that the offspring is spurious; or especially the mother, who is the offending party." See Lopes v. Lopes, 518 P.2d 687, 691 n.3 (Utah 1974).

It is clear that our history and traditions demonstrate a resounding repugnance for the conduct of fathering a child in the marriage of another man. It cannot be claimed to be a "right" traditionally protected by our society and rooted in the history, tradition and the conscience of our people. To the contrary, the conduct has been criminalized, the resulting biological link accorded no protection, and the child and husband of the marriage protected from such claims by longstanding, universally applicable laws with enduring application to the present day.

Moreover, even if it were appropriate in this case to look at the liberty interest that the trial court identified as "rights afforded to a natural parent" in isolation from both Father's and Zachary's liberty interests that are necessarily implicated by those rights, which it is not, Thanos's claim of constitutional protection would nevertheless fail. The extent to which an unwed biological father's interest in parental rights in his child will acquire constitutional protection depends on the extent to which the unwed father "demonstrates a full commitment to the responsibilities of parenthood by [coming] forward to participate in the

rearing of his child.” Lehr v. Robertson, 463 U.S. 248 (1983). The interest the unwed father has is an opportunity interest, which is lost when he fails to seize the moment and permits another to assume the responsibility of meeting the child’s needs. See Utah Code Ann. § 78-30-4.12(e) (“An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child’s birth.”).

In In re D.B.S., 888 P.2d 875 (Kan. Ct. App. 1995), the court addressed the constitutional claims of a man in Thanos’s position who had not promptly asserted parental rights in his child, but instead allowed the child’s legal father to assume the role of father. After the mother and legal father divorced, the biological father then married the child’s mother and argued that the relationship he subsequently developed with the child should be accorded constitutional protection. The Kansas Court of Appeals rejected this argument. The court noted that the biological father had not been prevented from developing a relationship with the child by the mother, but rather had agreed to “stay out of the picture.” Id. at 884. The court held: “[I]n agreeing to [the mother’s request] to stay out of the picture, [the biological father] surrendered whatever constitutional opportunity he may have had to develop a protected relationship with D.B.S. There is no authority to support the proposition that having surrendered those rights he could later reclaim them by developing a stepfather relationship after four years of providing no parental contact or support. We are justified, as the United States Supreme Court did in Lehr, to hold that [the biological father’s] interest in

[the child] came too late to preserve any constitutional liberty interest. [The legal father] voluntarily assumed the duties of paternity long before [the biological father] acted to secure any rights. Therefore, without following the plurality opinion in Michael H., but relying on the total opinion of the United States Supreme Court therein, we hold the rights of [the biological father] herein do not amount to a liberty interest sufficient to require that he be granted the requested blood tests.” Id.

Even in Texas, where the Texas Supreme Court held its statutory scheme denying standing to an alleged biological father to assert paternity in a child born into the marriage of another unconstitutional under the Texas constitution, the court emphasized that the biological father must assert his interest near the time of the child's birth to preserve it. The court held: “In a situation such as that presented here where the biological father does assert his interest near the time of the child's birth, standing is constitutionally mandated if he both 1) acknowledges responsibility for child support or other care and maintenance, and 2) makes serious and continuous efforts to establish a relationship with the child.” In re J.W.T., 872 S.W.2d 189, 195 (Tex. 1994).

In this state, the Utah Supreme Court has held that an unwed biological father's opportunity interest in parenting his child is inchoate only and requires a demonstrated and timely commitment to the responsibilities of parenting to warrant constitutional protection. Cf. Swayne v. L.D.S. Social Services, 795 P.2d 637 (Utah 1990) (discussing cases involving unwed father's opportunity interest). The fact that Thanos procreated with the wife

of another man, rather than an unmarried woman, does not mean that he is thereby afforded the luxury of choosing when he may decide it is convenient to come forward and assert his interests. Rather, Section 30-1-17.2 of the Utah Code operates so that a child born into the marriage of a man who is not his biological father is “immediately subject to a de facto adoption by the mother’s husband.” Pearson v. Pearson, 2006 UT App 128, ¶ 35. There is indeed “no reason why a man who chooses to procreate with the wife of another should be granted significant latitude to challenge the husband’s de fact adoption, while one who fails to timely establish his paternity of a child born to an unmarried woman is permanently barred from doing so upon the mother’s mere consent to the child’s adoption.” Id.; see also Dawn D. v. Superior Court of Riverside County, 17 Cal. 4th 932 (Cal. 1998) (“A man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage, and undertaking the responsibilities marriage imposes. One who instead fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child’s life.”).

In this case, Thanos, with full knowledge of Mother’s pregnancy, and believing the child to be his from January 1999, took no steps whatsoever to come forward and shoulder the burdens of fatherhood during the pregnancy, nor to establish a relationship with Zachary after his birth. He did nothing, choosing to sit on whatever rights he may have had for two years, until January 2001, when he filed a motion to intervene in the Pearsons’ divorce

action. He so conducted himself to maintain intact the deception of his wife. It was Thanos's choice, and no one else's, to elevate his separate interests above Zachary's.

Though Thanos has now developed a healthy step-parent relationship with Zachary (and Nicholas), he cannot reclaim the lost opportunity that he may have had to come forward and act as Zachary's father. Zachary now has an established father, who is not simply a fungible item capable of replacement at the convenience of another. See In re Marriage of Freeman, 53 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 1996) ("The relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted."). The Court of Appeals' application of the Schoolcraft standing analysis to the facts of this case was not a denial of any constitutionally protected liberty interest extant in Thanos.

II. THE COURT OF APPEALS' REFERENCES TO THE TRIAL COURT'S OCTOBER 2001 ORDER ARE IMMATERIAL TO ITS OPINION

Petitioners complain about two references to the trial court's October 2001 order, at paragraphs 25 and 26 of the opinion. Paragraph 26 refers to the findings in the October 2001 order that Father is the psychological father of Zachary, that Zachary had become closely bonded with Father, that those bonds were critical, and that to permit Thanos to establish his paternity of Zachary and be introduced at that point as a father figure in Zachary's life would be disruptive to the child's stability. Paragraph 25 refers to the undisputed fact that Thanos had little interest or involvement in Zachary's life until he was approximately 16 months old, and notes that the trial court had recognized this in its October 2001 order.

Petitioners assert that these findings in the October 2001 order “were critical to the Court of Appeals’ Motion [sic] that Pete’s involvement was both unnecessary and disruptive to Zachary and Kelly’s relationship.” Brief of Appellants, at 51. This assertion is inaccurate. In support of it, petitioners point to paragraph 28 of the opinion, which states, “In light of those findings, we cannot say that Thanos’s attack on [Zachary’s] paternity would not have been disruptive to [Zachary’s] paternity relationship with Father and his expectations about whom his father was.” Pearson v. Pearson, 2006 UT App 128, ¶ 28 (emphasis added). Petitioners then make the false claim that “those findings” refers to the findings in the October 2001 order. A cursory review of paragraph 28 makes clear, however, that “those findings” refers to Dr. Sanders’ findings in her May 13, 2002 and August 26, 2002 reports.

With the exception of the ultimate finding, namely, that to permit Thanos to establish his paternity of Zachary would be disruptive, each of the findings in the October 2001 order is confirmed in Dr. Sanders’ reports. Dr. Sanders’ reports were the sole and exclusive supplementation of evidence between March 2002, when the trial court concluded that “the current record is insufficient to adequately address [the policy consideration of protecting children from disruptive and unnecessary attacks on their paternity] as it applies to the circumstances of this case” – and November 2002, when the trial court concluded that “intervention is appropriate based upon Dr. Sanders [sic] review and report to this court in regard to the parties and children in this action.” R.982, ¶ 20. The Court of Appeals was in as good a position as the trial court to review the reports, and did so, concluding based on

the findings contained therein that Thanos should not have been permitted to intervene to establish his paternity of Zachary, thus replacing Father as Zachary's legal father.

Any reference by the Court of Appeals to the October 2001 order, as opposed to the November 2002 order, is completely immaterial, as the essential record facts remain the same. The trial court did not "vacate" those facts, and did not vacate its findings. The Court of Appeals properly applied those facts to the standing analysis set forth in Schoolcraft.

III. THE COURT OF APPEALS DID NOT ERR IN DENYING PETITIONER'S PETITION FOR REHEARING

Respondent's petition for rehearing attempts to circumvent the plain language of the Court of Appeals' opinion to create ambiguity where none exists. The opinion is not about admissibility of evidence for one purpose or another, but legal parentage, which has "inescapable consequences" for the trial court's custody orders. The opinion is clear: "The trial court erred in applying the parental presumption in favor of Mother and against Father in making its ultimate custody decisions regarding Z.P. Other aspects of the trial court's supplemental decree of divorce also rely, explicitly or implicitly, on Thanos's paternity of Z.P., and these aspects of the final order are also erroneous and must be revisited as appropriate." Pearson v. Pearson, 2006 UT App 128, ¶¶ 37-38.

In fact, every aspect of the trial court's custody determinations stem directly or indirectly from the trial court's erroneous parentage determination and the presence of Thanos as a contestant for custody resulting therefrom. The Rule 4-903 factors addressed by the custody evaluator and set forth in the trial court's Finding of Fact No. 34 pertain to

Father, Mother and Thanos, and consistently refer to all three as parties and contestants for custody of not only Zachary, but also Nicholas. The legal and physical custody orders set forth in Findings of Fact Nos. 44 through 47 – incorporated directly from the custody evaluator's recommendations – award Thanos legal and physical custody rights in both Zachary and Nicholas, conferring on him, together with Mother, a joint physical custody access schedule in both children and decision-making rights in both children. Further, the court's application of the parental presumption against Father in his claim for custody of Zachary, at Finding of Fact No. 35, necessarily impacts Father's claim to custody of Nicholas as well because the court found that Nicholas and Zachary are "best of friends" and should not be separated. See Finding of Fact No. 34.b.

Peppered throughout the trial court's findings are additional references to parentage of the children that clearly impacted the trial court's custody orders. An example of this is the trial court's Finding of Fact No. 42, which states that Mother "is pivotal in this case in that she is the biological mother of both boys and their sister, Madelaine." Thus, the court concludes, she has "the strongest inherent responsibility for all three of these children." See Finding of Fact no. 42. This and other similar findings – which emphasize Mother's, Father's, and Thanos's biological relationship with not only the children whose custody is at issue, but a child born to Thanos and Mother while the custody litigation was pending – formed the basis for the court's ultimate custody determinations.

Mother's petition for rehearing asked the Court of Appeals to ignore the foregoing and pretend that Thanos's presence in the case as Zachary's legal and biological father, the evaluator's treatment of him as a contestant for custody of both Zachary and Nicholas and concomitant treatment of Father as a "third party" with less "inherent responsibility" for his children than Mother, made no difference in the trial court's custody orders. This argument is disingenuous, and it is belied by the trial court's findings and the custody orders themselves.

Clearly, it is impossible for the trial court to fairly evaluate Father's custody claims without the benefit of a new trial and a new custody evaluation that treats only the competing claims of Father and Mother as legal parents with equal "inherent responsibility" for their two children, and equal rights of custody in their two children, and does not confer on Thanos or any other third party the status of parent, nor permit Thanos or any other third party to be evaluated as a contestant for custody of either child. Father is entitled to have his custody claims in Nicholas and Zachary evaluated as the legal parent of both children, putting him on equal legal footing in all respects with Mother. Anything less than this unacceptably prejudices Father.

Petitioners' petition for rehearing also requested that the Court of Appeals "clarify" that the trial court may rely upon its findings and Dr. Jill Sanders' custody evaluation in considering revisions to its award of custody and parent-time on remand. The opinion is clear that the trial court's findings that rely either implicitly or explicitly on Thanos's paternity

are erroneous and may not be relied upon by the trial court. Nevertheless, petitioners asserted that the trial court should be permitted to consider the fact that she is married to Zachary's biological father and that Zachary's "biological sister lives with his biological parents." Petition for Rehearing, at 5, ¶ 1.

Petitioners' argument in this regard must be understood clearly. Their premise is that the trial court's findings are not erroneous because the trial court and the custody evaluator could properly consider biology in awarding custody. The premise is faulty in two respects. First, the trial court did not merely consider biology as a factor in its custody findings and orders, but structured the entire custody case around parentage determinations stemming from biology. Thus, the trial court allowed Thanos to participate in the litigation as a contestant for custody of both Nicholas and Zachary and awarded him custody rights in both children. This was because the trial court determined that Thanos was a parent. At the same time, the trial did not place Father on equal footing with Mother in his custody claims because it determined that Father was not a parent. The trial court's findings are primarily about biology as it relates to parentage, not about biology as a factor to be considered in determining custody.

Biology may be relevant to determine parentage, if parentage is at issue. However, the Court of Appeals resolved the question of legal parentage, reversing the trial court's biology-based determination. Legal parentage having been determined, biology is no longer relevant to that inquiry. The vast majority of the trial court's findings regarding biology are

therefore erroneous, either implicitly or explicitly conferring upon Thanos parental rights, concomitant standing to sue for custody, and treating him as a full contestant for custody in this litigation. As such, the findings may not be relied upon by the trial court, and the trial court should not be instructed that they may.

Petitioners' premise that the trial court's findings are not erroneous is based, secondarily, on her faulty assumption that biology is relevant to custody, independent of the parentage determination. The custody evaluator, and the trial court in reliance on the evaluator, did make findings that appear to consider biology as a factor directly relevant to custody, independent of parentage issues. Thus, one of the principle findings of the trial court – informing its award of primary custody of Nicholas to Mother – is that Mother is “pivotal in this case in that she is the biological mother of both boys and their sister, Madelaine” and that Father by implication has less “inherent responsibility” for his two children (being biologically related to only one) than Mother has.

Mother should not be permitted to advance this argument on remand. Legal parentage having been decided, biology plays no role in the custody determination, and is not a factor to be considered in assessing Father's and Mother's respective custody claims in their two children. This Court made this point clearly in Bonwich v. Bonwich, 699 P.2d 760 (Utah 1985). The father in that case made the argument that Mother now makes, i.e., that the trial court should have considered his biological relationship to the minor child whose custody was at issue, the mother having adopted the child, to elevate his custody

claim over hers. This Court refused to do so, stating: “The trial court did not abuse its discretion in giving overriding priority to the best interests of the child over the desires of defendant. Without discounting or even questioning the strong affection defendant bears for his son, plaintiff, as an adoptive mother, could well harbor feelings of equal intensity.” Id. at 762.

In Pusey v. Pusey, 728 P.2d 117 (Utah 1986), decided the following year, this Court emphasized that the best interests of the child analysis in custody cases should be “based on function-related factors,” not unnecessary and outdated stereotypes, such as the maternal preference. Id. at 120.

Mother’s argument that “biology” may be considered in determining custody equates to a request that function-related factors approved by the case law of this jurisdiction over the past 20 years be abandoned in favor of stereotypes and pre-conceived notions. Instead of relying on the function-related factors that are observed within each family constellation, the trial court would be free to speculate about “inherent responsibility” or other such concepts, completely independent of each parent’s actual relationship with his or her children.

Petitioners argue, however, that consideration of biology is appropriate due to the Hutchison factors set forth in Rule 4-903, and specifically, Rule 4-903’s direction that custody evaluators must consider “kinship, including in extraordinary circumstances

stepparent status.” Utah Code Jud. Admin. R. 4-903(5)(E)(vii). Petitioners misapprehend the meaning of “kinship” in the context of Hutchison and Rule 4-903.

Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), is a pivotal custody case in which this Court catalogues factors that had been appropriately relied upon in previous custody cases to determine the best interests of a child, citing one or more cases for each factor identified. In one group, the court listed several factors relating “primarily to the child’s feelings or special needs.” Id. at 41. In the second group, the court listed several factors relating “primarily to the prospective custodians’ character or status or to their capacity or willingness to function as parents.” Id. The second group includes the factor “kinship”, for which only one case, namely, In re Cooper, 410 P.2d 475 (Utah 1966), is cited.

In re Cooper does not stand for the proposition that biology can be considered as a factor in determining custody of a child between two legal parents. To the contrary, In re Cooper involves the competing custody claims of two sets of non-parents. This Court stated that in such cases, “all things else being equal, near relatives should generally be given preference over nonrelatives.” Id. at 475.⁵

Thus, it is clear that “kinship” as a factor involves the status of the prospective custodian vis-à-vis the child where two nonparents are competing for custody of a child, or where one parent is a step-parent, not a legal parent. Where the prospective custodians’

⁵ Nor is “kinship” equated with “biology”, as step-parent status is explicitly included within the kinship factor.

status vis-à-vis the child is exactly the same – i.e., they are both legal parents of the child – kinship is not a relevant factor.

Petitioners' request that it be treated as such anyway is contrary to Bonwich and contrary to the principle that best interests of the child is to be determined based on function-related factors. Mother should not be permitted to argue or remand, under the guise of "kinship", that she is biologically related to both children, whereas Father is biologically related to only one, and that this should somehow favor her in her custody claim.

Petitioners also requested that the trial court be instructed that it may consider Zachary's biological relationship with Thanos and Madeleine, the child born to Thanos and Mother while this custody litigation was pending, in determining custody. Clearly, neither Thanos nor Madeleine are contestants for custody of Nicholas and Zachary. Their relationship vis-à-vis Nicholas and Zachary is relevant only in relation to Mother's claim for custody of Nicholas and Zachary. Mother should not be permitted to circumvent the Court of Appeals' opinion by obfuscating the clear consequences of it.

Nor should Mother be permitted to confound Nicholas and Zachary's functional relationships with Thanos and Madeleine, which are relevant to the custody determination, with Nicholas and Zachary's biological relationships to Thanos and Madeline, which are not. While an evaluator and the trial court may and should look at the children's' functioning in both Mothers' and Fathers' homes, which will include looking at the children's relationship

with other individuals in those homes, this consideration has nothing to do with biology. If Zachary is closer with his sister than Nicholas, this can be observed and commented upon, and is not a question of mere speculation. “Biology” on the other hand, has no independent relevance to functional relationships, as relationships may correspond in importance, or not, with “blood ties”. Consideration of “biology” as a factor can only invite speculation, which is why “biology” has never been identified in any case in this jurisdiction as an appropriate factor to be considered in resolving a custody dispute between two legal parents.⁶ Mother should not be permitted to advance the argument on remand that it should be here.

Finally, petitioners impugn footnote 7 of the Court of Appeals opinion as sanctioning a balancing test between parental rights and best interests in the context of a custody determination. The footnote does not do so, but instead merely points out that best interests does not control in the context of determining paternity where paternity is contested. Instead, the test set forth in Schoolcraft controls, and this test balances both child-related and adult-related factors. Thus, a custody evaluator’s best interests conclusions cannot be the exclusive basis for appropriate application of the Schoolcraft test. Moreover, the Schoolcraft test is not to be applied in determining custody, nor does Footnote 7 say that it should be.

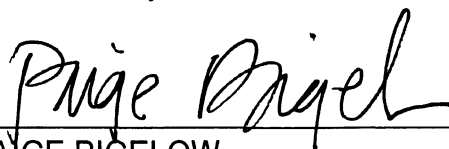
⁶ It should also be noted that “kinship ties”, including ties to a sibling of a subsequent marriage, have been held to constitute a “relatively unimportant” factor in the overall custody determination. Hudema v. Carpenter, 1999 UT App 290, ¶ 36, 989 P.2d 491.

CONCLUSION

For the foregoing reasons, this Court should (1) affirm the Court of Appeals reversal of the trial court's ruling permitting Thanos to intervene in this case, (2) hold that Thanos does not have standing to challenge Zachary's paternity, (3) affirm the Court of Appeals' denial of petitioner's petition for rehearing, and (4) instruct the trial court on remand that Father is to have his custody claims evaluated in a new custody evaluation and trial wherein he and Mother compete for custody on equal footing and biology is not considered as a factor for any purpose in resolving Mother's and Father's competing custody claims.

DATED this 9 day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of October, 2006, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be hand-delivered to the following:

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