

2006

# Kelly F. Pearson v. Kimberlee Y. Pearson; Pete D. Thanos : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE UTAH SUPREME COURT

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KELLY F. PEARSON,  
Petitioner/Appellee,

vs.

KIMBERLEE Y. PEARSON,  
Respondent /Appellant.

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PETE D. THANOS,  
Intervenor/Appellant.

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: Lower Court Civil No. 004907881  
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: Court of Appeals No. 20040677-CA  
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: Supreme Court No. 20060563-SC  
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BRIEF OF APPELLANTS

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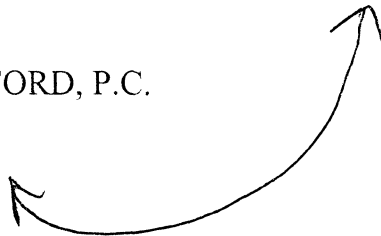
APPEAL FROM THE UTAH COURT OF APPEALS

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**SEP - 7 2006**

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Supreme Court No. 20060563-SC

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BRIEF OF APPELLANTS

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APPELLANT, Kimberlee Y. Thanos (“Kim”) and Pete D. Thanos, Intervenor and Appellant hereinafter (“Pete”), by and through counsel, hereby submit the following as the Brief of Appellants:

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

The provision conferring jurisdiction on the Supreme Court to review the Utah Court of Appeals Adjudication is found at Utah Code Ann. §78-2-2(3)(a) (2001).

Appellant’s Petition for Writ of Certiorari was granted on July 21, 2006, pursuant to Rule 51 of the Utah Rules of Appellate Procedure. A copy of the Order granting the Petition for Writ of Certiorari is attached hereto as Addendum 1.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE 1. Whether the Court of Appeals erred in its interpretation and application of the Schoolcraft analysis set forth by this Court in In re J.W.F., 799 P.2d 710 (Utah 1990).

Standard of Review. This issue involves a question of state law which the Court of Appeals has decided in a way that is in conflict with the decision of the Supreme Court and in which the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power, pursuant to Rule 46(a)(2) and (3) of the Utah Rules of Appellate Procedure.

ISSUE 2. Whether the Court of Appeals inappropriately relied on the District Court Commissioner's Recommendation which was subsequently vacated by the trial court.

Standard of Review. This issue involves a question of state law which the Court of Appeals has decided in a way that has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise for the Supreme Court's power of supervision, pursuant to Rule 46(a)(3) and (4) of the Utah Rules of Appellate Procedure.

ISSUE 3. Whether the Court of Appeals erred in denying the Appellants' Petition for Rehearing.

Standard of Review. This issue involves a decision of the Court of Appeals wherein the Court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court's supervisory power,

pursuant to Rule 46(a)(3) of the Utah Rules of Appellate Procedure.

CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, AND  
ORDINANCES

1. Constitution of United States, Article III, Section 1 [Addendum 2].
2. Constitution of United States, Amendment V [Addendum 3].
3. Constitution of Utah, Article I, Section 7 [Addendum 4].
4. Constitution of Utah Article VIII, Sections 1, 4 [Addendum 5].
5. Utah Code Ann. §30-3-10(1)(b) [Addendum 6].
6. Utah Code Ann. §78-45a-10(3)(a)(Repealed 2005) [Addendum 7].
7. Utah Code Ann. §78-45a-10.5 (2002) (Repealed 2005) [Addendum 8].
8. Significant applicable case law is as follows:

In re J.W.F., 799 P.2d 710 (Utah 1990) [Addendum 9].

STATEMENT OF THE CASE

Nature of the case, course of proceedings and disposition in the court below

This case concerns the question of standing of Intervenor (hereinafter “Pete”) to assert paternity of Zachary Thanos (“Zachary”). Zachary’s biological father is Pete. Kelly F. Pearson (hereinafter “Kelly”) was married to the biological mother, Respondent (hereinafter “Kim”) when Zachary was born on September 14, 1999.

Kelly and Kim separated in May, 2000, and Kelly filed for divorce in December, 2000. (R. 2533 at 465:7-11; 452: 9-11; R. 1-5.) Pete filed a Motion to Intervene in the divorce action in January, 2001. (R. 37-41.) Michael S. Evans, Domestic Relations

Commissioner, heard the Motion to Intervene and recommended that Pete's Motion be denied. (R. 671-75.) Pete and Kim filed a timely Objection to the Commissioner's Recommendation. (R. 257.) An Order was signed on October 17, 2001, based upon the Commissioner's Recommendation, specifically noting that the signed Order was subject to the pending Objection (R. 675.) The Honorable Judge Tyrone E. Medley heard Pete and Kim's Objection to Commissioner's Recommendation, (R. 684) and granted Pete's Motion to Intervene on November 7, 2002, and vacated the earlier Order of October 17, 2001 (R. 971-72). Judge Medley's granting of the Motion to Intervene and the sustaining of the objection were based upon his examination of the facts of the case, proffered testimony, pleadings, affidavits and completion of two Schoolcraft reports by Dr. Jill Sanders, the custody evaluator who had been stipulated to by Kelly and Kim. (Intervenor's Ex. 2,4.) Dr. Sanders' May 13, 2002 report is attached as Addendum 10. Dr. Sanders' August 26, 2002, report is attached as Addendum 11. Judge Medley's Findings of Fact and Conclusions of Law in re: Motion for Intervention and Order are attached as Addendum 12 and Addenda 13, respectively.

Subsequent to the court granting Pete's Motion to Intervene, Kelly filed a Petition for Extraordinary Relief, as well as a Motion for Stay seeking to prevent the trial court from proceeding with Pete as intervenor. The Motion for Stay was summarily denied by an Order dated, December 16, 2002, (R. 1364-68.) The Court of Appeals' memorandum decision, filed January 9, 2003, dismissed the petition. (R. 1634-35.)

Pete filed a Motion for Summary Judgment to declare that he was the biological



and natural father of Zachary and entitled to rights of custody and parent time. (R. 989-90.) On May 5, 2003, the trial court granted Pete's Motion for Summary Judgment and denied the Motion for Summary Judgment of Kelly. (R. 1745-47.) A copy of the court's Findings of Fact and Conclusions of Law stemming from that Motion are attached as Addendum 14. (See R. 1723-41.)

Kelly filed a Petition for Permission to Appeal Interlocutory Order which was denied by an Order of the Court of Appeals dated July 3, 2003. (R. 1784.)

The case was tried to Judge Medley on April 1, 2, 5-8, 2004. On May 11, 2004, Judge Medley published his Findings of Fact and Conclusions of Law, which, among other things, found that it was in the best interest of Zachary that Kim and Pete be awarded primary physical custody of Zachary and that Zachary's surname be changed to Thanos. The court's conclusions were incorporated in a Supplemental Decree of Divorce on July 12, 2004. (R. 2503-14.) Dr. Jill Sanders' Child Custody Evaluation, copies of the trial court's Findings of Fact and Conclusions of Law and the Supplemental Decree of Divorce are attached as Addendum 15, 16 and 17, respectively.

Kelly appealed the Order of Judge Medley. (R. 2518.) Although Kelly's Notice of Appeal was from "the entire judgment," Kelly's appeal focused on the right of Pete to intervene in the case and on the award of custody of Zachary and his brother, Nicholas.

On appeal, the Utah Court of Appeals found that even though Pete was Zachary's biological father, he did not meet the Schoolcraft test for standing to petition for custody. The Court of Appeals decision is attached as Addendum 18. On April 7, 2006, Kim and

Pete filed a Petition for Rehearing, asking for clarification as to whether the Court of Appeals' decision permitted the trial court, on remand, to consider Pete's status as Zachary's biological father in a new custody order under C.J.A. Rule 4-903, and whether the trial court could rely on Dr. Sanders' prior custody evaluation. This Petition was denied. (Addendum 19). Kim and Pete filed a Petition for Writ of Certiorari on June 19, 2006 (Addendum 1), which was granted by the Order of the Court dated July 21, 2006.

### STATEMENT OF THE FACTS

Kelly and Kim were married on August 17, 1992, and separated in May, 2000. (R.2532 at 387:19; 2533 at 465:7-11.)

During Kim and Kelly's marriage, they had a son, Nicholas, who was born on July 6, 1997. (Finding. 1, R. 2434-35; See Addendum 16.) A second child, Zachary, was conceived during the marriage. (Finding. 2, R. 2435; See Addendum 16.) Several months before Zachary's birth, Kim informed Kelly that Pete was Zachary's father (Finding. 2, R. 2435; See Addendum 16; R. 2535 at 1050:15-20; R. 2532 at 433:1-9, 23-24.) Approximately two weeks after Zachary's birth on September 14, 1999, Pete and Kim approached Kelly and had further discussions about Zachary's paternity and the fact that Pete was the father. (R. 303, ¶ 2.) Pete first saw Zachary when he was two weeks of age and again when he was a month old. (R. 77, ¶ 7.) For a period of time thereafter, Kelly prevented Pete from visiting with Zachary. It wasn't until after the separation of Kelly and Kim that Pete had an opportunity to develop his relationship and bond with Zachary. (R. 77 ¶¶ 7-8; See R. 2533 at 465:7-11.) During this period, Pete placed

approximately ten phone calls per week to Kim and received daily and updates from Kim on Zachary's development. Pete kept pictures of the child in his desk and received written notes from Kim apprising him of how Zachary was doing. (R. 78 ¶ 10.)

The relationship between Kelly and Kim had deteriorated and was unsatisfactory even prior to the romantic relationship of Kim and Pete. (R. 2535 at 1031:8-22, 1032:21 to 1033:20 (Kelly was unsupportive when Kim miscarried); R.2535 at 1035:1-23 (Kelly took only one-half day off when Nicholas was born).)

At the time of Zachary's conception and birth, Pete was married. His then wife was dying of ovarian cancer. Pete and his then wife lived in Portland, Oregon, and Pete was the sole source of emotional and physical support throughout her medical care, surgeries and treatment. Pete did not tell his wife about Kim or Zachary during the last months of her life, because he felt that the traumatizing effect of the revelation would undermine her battle with cancer and make her succumb to the disease faster. Further, he wished to remain with her to assist her with the final months of her life, and he felt that if she knew about the relationship with Kim, she would not allow him to support her through her fight with cancer. (Finding, No. 6, R. 2436-37; See Addendum 16; R 75-76 ¶¶ 4-5.)

Following Kim's disclosure of her pregnancy, Kim and Kelly attempted to work out their differences, with Kim telling Kelly that she would try to make the marriage work if he would not punish her and Zachary. (R. 2535 at 1056:4-22.) Further, Kelly and Kim discussed the role which Pete would have in raising Zachary and Kelly promised that he would, "... do whatever I can to help him have as much of a role as he wants with the

baby.” (R. 2535 at 1056:25 to 1057:6.) It was quickly clear to Kim, however, that a continued marital relationship between her and Kelly was not going to work. (R. 2535 at 1061:15-24, 1062:7-15.) Kelly placed restrictions and rules on Kim’s ability to communicate with Pete, which she did not agree to, (R. 2535 at 1058:6-22) and Kelly was upset and not supportive during the pregnancy (R. 2535 at 1061:15 to 1062:15). Despite Kim’s suggestion to Kelly that they participate in counseling, Kelly refused. (R. 2535 at 1064:2-19.) Subsequent to Zachary’s birth, Kelly was aware that Kim frequently spoke to Pete and knew that the continuation of the marriage was unlikely. (R. 2532 at 437:4-20.)

Kelly and Kim’s separation in May, 2000, was approximately eight months after Zachary’s birth. (R. 2533 at 452:9-11, 581:18-21.) Pete’s wife passed away in December, 2000. (Finding. 6, R. 2436-37.) Kelly filed his Complaint for Divorce on December 27, 2000. (R. 1-5.) Kim filed her Answer and Counterclaim on January 23, 2001. (R. 17.) Pete filed his Verified Motion to Intervene on January 23, 2001, one month following his wife’s death. (R. 37-41.)

Pete’s ongoing contact with Zachary continued to increase. (R. 187-88.) Pete began to spend a significant amount of time with Zachary, established a bond and displayed the type of interest in supporting Zachary that a parent of a minor child would show (R. 188), including providing financial support (R. 78, ¶ 9). During this time period, Pete and Kim’s relationship continued, and in pleadings filed with the court, they made clear their intention to marry once the divorce between Kelly and Kim was final. (R. 28, ¶ 9 and R. 76, ¶ 5.)

Shortly after the filing of Pete's Motion to Intervene, Pete, Kim and Kelly met several times with a mediator and, also, involved a therapist, Dr. Jay Thomas, in three sessions of the mediation. (R. 2533 at 651:3 to 652:5; R. 2535 at 925:4 to 926:25.)

From the commencement of the litigation, Kelly admitted that Pete was the father of Zachary. (See Complaint for Divorce and Custody Order, R. 2 ¶ 7, R. 4 ¶ b, ("[I]ntervenor is the natural father of Zachary"). In initial pleadings, Kim also identified Pete as the father of Zachary. (R. 28, ¶ 4.) Indeed, Pete obtained conclusive DNA paternity test results which were then filed in the District Court. (R.165-69, 999, 1004.) The provision of these conclusive paternity DNA results was governed by Utah Code Ann. §78-45a-10(3)(a)(repealed 2005).

Utah Code Ann. §78-45a-10 (2002) (repealed 2005) ("Effect of genetic test results") provides in relevant part:

- (1) Genetic test results shall be admissible as evidence of paternity without the need to foundation testimony or other proof of authenticity or accuracy if:
  - (a) of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of Health and Human Services;
  - (b) performed by a laboratory approved by such an accreditation body; and
  - (c) not objected to with particularity and in writing with 15 days after the written test result being sent to the parties.
- (3) (a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150.
- (4) if a presumption of paternity is established under Subsection (1) is not rebutted by a second genetic test under Subsection (2), the Court shall issue an order establishing paternity.

Kelly filed an Objection to Admissibility to Genetic Test Results and Motion to Strike on November 27, 2002, but nowhere within that Objection did Kelly object to the

accuracy of the tests. (R. 1298-1300.) Further, that Objection was not filed until fifteen (15) months after the test results were filed with the court by Pete on August 1, 2001. Further, there was no request for, nor was a second genetic test conducted, as allowed for or contemplated by Utah Code Ann. §78-45a-10 (2002) (repealed 2005).

On August 29, 2001 Kelly and Kim stipulated to the appointment of Dr. Jill Sanders as a custody evaluator. (R. 249-50.) Dr. Sanders is a well known and well respected custody evaluator who received her PhD in clinical psychology from the University of Utah in 1987. (R. 2534 at 672:3-6.) She has performed custody evaluations in the State of Utah since 1983 or 1984 and has focused on that area of her practice since 1989 or 1990. (R. 2534 at 674:13-16.) She has performed approximately 200 to 250 custody or parenting capacity evaluations. (R. 2534 at 675:2-6.) She had testified in Utah courts approximately fifty times. (R. 2534 at 675:17-21.)

Mediation was unsuccessful and Pete's Motion to Intervene was heard by Commissioner Michael S. Evans, August 30, 2001. At the time of the hearing, Commissioner Evans recommended to Judge Medley that Pete's Motion to Intervene be denied. (R. 671-77.) Judge Medley signed Commissioner Evans Recommendation on October 17, 2001, but did so subject to the Objections, which were then pending to the Commissioner's Recommendation. (R. 675.) A copy of the referenced Order is attached as Addendum 20.

As noted, Pete timely filed an "Objection to Recommendation" of Commissioner (R. 257-301) with a supporting memorandum (R. 302-83). Following the initial hearing

on the Objection to Recommendation, and by an Order dated March 7, 2002, Judge Medley requested the assistance of the stipulated custody evaluator, Dr. Jill Sanders, prior to the court entering a final ruling. (R. 729-30, ¶¶ 2-3.) He asked Dr. Sanders to evaluate the matter and report back to the court and to include in her analysis a consideration of the factors described in State In re J.W.F., 799 P.2d 710 (Utah 1990). (R. 729-30, ¶¶ 2-3.) Dr. Sanders produced her report on May 13, 2002. (Intervenor's Exhibit I-2, attached to this brief as Addendum 10 (hereinafter referred to as the "Schoolcraft Report"). Thereafter, by a letter dated August 26, 2002, Dr. Sanders supplemented her Schoolcraft Report by providing additional information which had been requested by Kelly's attorney. (Intervenor's Exhibit I-4: Addendum 11).

Subsequent to substantial briefing and argument of the case, the court entered an Order, which specifically vacated the earlier Order on Motion to Intervene, which had been recommended by Commissioner Evans. (R. 736 ¶ 4, attached as Addendum 13.) The court also granted Pete's Motion to Intervene and granted Pete standing to establish Zachary's paternity. (R. 971-72.) In the granting of the Motion to Intervene, the Court made very specific Findings of Fact and Conclusions of Law. (R. 975-84; Addendum 12.)

The court, within its Findings, set forth the procedure that the court had followed in order to determine whether Pete's Motion to Intervene should be granted. (R. 978-79.) The court pointed out that it had initially reviewed an Affidavit of Dr. Goldsmith that had been submitted by Kelly, but that Dr. Goldsmith's Affidavit was not case specific and was of little help to the court. Therefore, in order to address, in particular the second

prong of the Schoolcraft policies, Dr. Jill Sanders was appointed to provide input and an evaluation. (R. 979, ¶ 11.) The court found that Dr. Sanders' first report, dated May 13, 2002, stated that she was of the opinion that from "a developmental and psychological perspective, Zachary's functioning was not inherently disrupted by Peter Thanos' involvement," and that "Peter Thanos' relationship with Zachary was necessary to Zachary's normal and positive development." The court explained further that upon receipt of that first report, Kelly requested further clarification and the court permitted Kelly's counsel to address the court with a letter outlining her concerns and make further requests of Dr. Sanders. Based upon Kelly's Motion and letter, the court directed Dr. Sanders to provide a further analysis as to the impact to the relationship between Kelly and Zachary. (R. 980, ¶ 13.) It should be noted that this additional analysis goes beyond the two-prong analysis and policies set forth in Schoolcraft, which are that the court consider (1) preserving the stability of the marriage and (2) protecting children from disruptive and unnecessary attacks on their paternity. In re J.W.F., 799 P.2d, 710, 713 (Utah 1990).

Subsequent to hearing, the court found that according to DNA test results from the University of Utah dated March 6, 2001, Pete was the biological father of the child. The court specifically noted that while paternity had yet to be determined, given the need to address the standing issue first, Kelly had admitted that he was not the biological father of the child. (R. 976 ¶ 1.) The court found that Pete resided in the State of Oregon and that Kelly and Kim and the children resided in the State of Utah, but that Pete had ongoing



contact with the child commencing February, 2001. (R. 978, ¶ 7.)

Judge Medley found, after receipt of Dr. Sanders' Supplemental Report, dated August 26, 2002, that the primary disruption in Zachary's relationship with Kelly occurred at the date of Kim and Kelly's separation when Zachary was approximately nine months of age. (R. 980-81 ¶ 14.) The court noted that Dr. Sanders had found that by eighteen months, Zachary was firmly established in a loving, secure and relatively predictable relationship with Kelly, Kim and Pete and that there was no reason why the presence of Pete as another loving caretaker should have any further disruptive impact. (R. 980-81, ¶ 14.) The court also noted that Kim and Pete planned to marry and if they did marry, as indicated by Dr. Sanders, Pete would then have a role as a step-father and that his status, as also being Zachary's biological father, inherently escalated the importance of that relationship. (R. 981, ¶ 17.) The court found that, based upon the quality of the relationship that Zachary and Pete had and the likelihood that Zachary and Pete would have extensive contact in their future, that their attachment was likely to deepen and become more significant over time and that Zachary would likely develop a full father/ son attachment to Pete because Zachary was still young and because Zachary and Pete had had contact since infancy. (R. 982, ¶ 18.)

The court fully considered the criteria applicable to the facts of the present case, as set forth in Schoolcraft, and found that Pete should had standing to intervene. This analysis was based on a careful analysis of both the first and second prongs of the Schoolcraft "test."

As to the first prong of Schoolcraft, the court had found that the interest in preserving the stability of marriage was not of substantial consideration in this case, due to the fact that there was no marriage to preserve. The court specifically found that the first prong or test had been met, as the stability of the marriage had been shattered when Kim and Kelly separated when Zachary was approximately 9 months of age. (R. 983, ¶ 21.) Kim and Pete were also married at the time of the final hearing on the Motion for Intervention before Judge Medley. (R. 983, ¶ 21; See R. 976.) The court found that granting Pete standing to intervene would not be disruptive to Zachary or an unnecessary attack on his paternity, as Pete had an established relationship with the child and there was nothing in the reports of Dr. Sanders that would suggest that allowing Pete to intervene would be adverse to the best interests of the child or disruptive to him. To the contrary, the court indicated that it was in the best interest of the child to allow Pete to intervene. (R. 983, ¶ 22.) The court found that Utah Code Ann. §78-45a-1, et. seq., (repealed 2005) and the Uniform Paternity Act. (repealed 2005) provided Pete with paternity rights which entitled him to intervention, and that Pete had rights afforded him under both the United States and Utah Constitutions. The court reiterated, however, that paternity had not yet been determined. (R. 983, at ¶ 23.)

Pete filed a Motion for Partial Summary Judgment (R. 989-91) seeking a declaration by the court that he was the biological and natural father of Zachary and again, supported that Motion with a Memorandum and the paternity test results, certifying that the probability of his paternity of Zachary was 99.999% (R. 992-99). Kelly also

filed a Motion for Summary Judgment that he be declared Zachary's father and opposed Pete's Motion for Summary Judgment. (R. 1302-26;1361-63.)

The trial court granted Pete's Motion for Summary Judgment on May 5, 2003 and denied Kelly's Motion for Summary Judgment. (R. 1745-49.) Again, the court entered very detailed Findings of Fact and Conclusions of Law, restating a substantial portion of the findings previously entered on the Motion to Intervene. The trial court specifically found that Pete's involvement "was not only not disruptive, but necessary to Zachary's normal and positive development." (R. 1730, ¶ 18.) The court declared Pete to be the "biological and natural father of Zachary Andrew Pearson." (R. 1746, ¶1.)

Kelly filed a Petition for Permission to Appeal Interlocutory Order which was denied by an Order of the Court of Appeals dated July 3, 2003 (R. 1784).

Prior to this date, and on June 7, 2002, the court had granted Kim's Motion to Bifurcate (R. 848-851) and a Decree of Divorce ended the marriage of Kelly and Kim on June 21, 2002 (R. 855-856). Pete and Kim were married July 1, 2002. (R. 2437, ¶ 7.) On July 13, 2003, a daughter, Madelaine, was born to Kim and Pete. (R. 2437, ¶ 8.)

Dr. Sanders completed her full custody evaluation and provided a report on November 3, 2003 (Ex P-5: attached as Addendum 15). Dr. Sanders recommended that Kelly and Kim be named as joint legal custodians of Nicholas, and that Kim and Pete be named joint legal custodians of Zachary. (Ex. P-5 at 12, ¶ 1.) She did not specifically recommend the awarding of physical custody, be it as sole or joint custody, but did recommend what she called an "access schedule" which evenly divided parent time with

Nicholas on the same basis required by the interim order (Ex. P-5 at 12, ¶ 2.) As to Zachary, Dr. Sanders recommended that he spend five nights with Kelly every other week while Nicholas was with Kelly, and that holidays be rotated between Kelly, on the one hand, and Kim and Pete, on the other, in the same manner as with Nicholas. (Ex P-5 at 13, ¶ 2 (c)-(d).) Dr. Sanders also voiced her “strong recommendation” that Kelly relocate to Oregon. (Ex. P-5 at 12, ¶ 2, introductory ¶.)

In preparing that report, Dr. Sanders had multiple individual interviews with Kelly, Kim and Pete, as well as interviews with, two former nannies, Pete’s therapist, Pete’s adult son, two friends of Kelly and Kim and Dr. Jay Thomas, the psychologist who participated in the mediation and consulted with the Thanoses. (Child Custody Evaluation, Addendum 15.) Dr. Sanders observed Nicholas and Zachary in the presence of the Kim, Kelly and Pete during four different observation periods before her report was prepared and three times after its preparation. (R. 2534 at 692:13-23.) She tested the parties using two different psychological tests and had them fill out a “parenting questionnaire.” (Petitioner’s Exhibit P-5 at 1.)

Dr. Sanders provided all of the information required in C.J.A. Rule 4-903. (R. 2534 at 707:18-20.) She also complied with guidelines for the preparation of custody evaluations promulgated by the American Psychological Association and The Association of Family and Conciliatory Courts. (R. 2534 at 745:23 to 746:17.)

As mandated by Rule 4-903, Dr. Sanders considered the factor of “biology” (referred to as “kinship” in Rule 4-903), but found it to be no more important than any other factor required to be considered under Rule 4-903. (R. 2534 at 707 at 6-17.)

Dr. Sanders found the issues of “attachment” - which she described as “the relationship that develops between the child and the parent” - to be very important in her evaluation. (R. 2534 at 708:5-7, 712:12-14, 707:23 to 708:4 (Rule 4-903 uses the word “bonding” which, according to Dr. Sanders, is a term of art referring to the “ability of a parent to bond to a child, typically during the early infancy period.”).)

At trial, Dr. Sanders testified concerning the preparation of the child custody evaluation and reconfirmed her recommendations. By the time of trial she had conducted additional post-evaluation observations of the children. (R. 2534 at 749:7-19.)

The trial in this case was held on April 1, 2, 5, 6, 7, and 8, 2004.

The court at the time of trial had heard testimony that Nicholas and Zachary were strongly attached to Zachary’s full sister and Nicholas’s half sister, Madelaine. (R. 2535 at 1077:4 to 1078:24.) The court had heard testimony about the children’s relationship with Madelaine. For example, when Kim picked up Zachary from his preschool he frequently said, “Mommy, I need to show all the kids Maddy.” He would then try to introduce her to all of his schoolmates. (R. 2535 at 1079:5-11). Nicholas likes to write stories for Madelaine. He prepared a book (Respondent’s Exhibit R-14) entitled “My Sister by Nick” for his preschool class (R. 2535 at 1079:12 to 1081:19.) In viewing the relationship of Nicholas and Zachary with their sister Dr. Sanders had concluded, “These children [Nicholas and Zachary] are very best friends and it is likely that their sister will join their unusually strong relationship. They should not be separated.” (Petitioner’s Exhibit P-5 at 9, ¶ 2.) Similarly, the trial court found that “[t]here is a substantial benefit of keeping these siblings together.” (Finding. 34 (b), R. 2448-49.)

Judge Medley published his findings of fact and conclusions of law on May 11, 2004, (R. 2434-2469.) His findings adopted a substantial majority of findings of Dr. Sanders. In particular, he accepted and followed Dr. Sanders' recommendations with regard to joint legal custody and parent time as being in the best interest of the children. He also found that it would be in the best interests of the children if Kim and Pete were to be awarded primary legal custody of Zachary. (Findings No. 43, 46 and 47, R. 2456, 2458; See Addendum 16. )

The Supplemental Decree was signed over the objection of Kelly, on July 12, 2004. (R. 2503-2513.) Kelly appealed the Order of Judge Medley. (R. 2518.) Although Kelly's Notice of Appeal was from "the entire judgment," Kelly's appeal focused on the right of Pete to intervene in the case and on the award of custody of Zachary and his brother, Nicholas.

On appeal, the Utah Court of Appeals found that even though Pete was Zachary's biological father, he did not meet the Schoolcraft test for standing to petition for custody. The Court of Appeals decision is attached as Addendum 18. On April 7, 2006, Kim and Pete filed a Petition for Rehearing, asking for clarification as to whether the Court of Appeals' decision permitted the trial court, on remand, to consider Pete's status as Zachary's biological father in a new custody order under Rule 4-903, and whether the trial court could rely on Dr. Sanders' prior custody evaluation. This Petition was denied. (Addendum 19) Kim and Pete filed a Petition for Writ of Certiorari on June 19, 2006., which was granted by an Order of the Court dated July 21, 2006. (Addendum 1)

## SUMMARY OF THE ARGUMENT

The court of appeals improperly applied and substantially deviated from the two prong test established by this Court in In re J.W.F., 799 P.2d 711 (Utah 1990). In Schoolcraft, this court held that in determining who can challenge the presumption of legitimacy a paramount consideration should be preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks upon their paternity. Id. at 713.

In the instant case, however, the Court of Appeals wholly misconstrued and misinterpreted the Schoolcraft test. The Court of Appeals erroneously restricted the first prong of the Schoolcraft test by substituting its own findings to establish an intact marriage. The Court of Appeals further restricted the definition of an intact marriage by substituting their own findings to such an extent that it added a factor of fault into the determination of stability of a marriage. Such a misinterpretation and misapplication of the first prong of the Schoolcraft test unreasonably restricts a putative father's ability to assert his rights.

In its application of the second prong of the Schoolcraft test, the Court of Appeals erroneously substituting its own findings over the carefully considered and supported findings of the trial court. Such findings were created based upon a vacated order which was a recommendation of the Commissioner and not the findings of the trial court. The Court of Appeals further improperly applied the second prong or necessity test to Kelly, rather than Pete. Such a misinterpretation of the second prong of the Schoolcraft test unduly restricts the due process rights of Pete, as well as leaving other putative fathers

and their children without a means to establish, nurture and maintain a parent child relationship.

The Court of Appeals interpretation of both the first and second prong of the Schoolcraft test, wholly disregarded the policy considerations of Schoolcraft and should be reversed.

### ARGUMENT

#### **I. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT MISAPPLIES THE TWO-PRONGED SCHOOLCRAFT TEST.**

##### **A. The Utah Court of Appeals Improperly Interpreted And Restricted The First Prong of the Schoolcraft Test.**

The central issue of this appeal is whether Pete should have been granted standing to intervene in a divorce action to establish his paternity of Zachary. In determining whether Pete should be granted standing to intervene, the trial court analyzed and employed the “test” set forth in In re J.W.F., 799 P.2d 710 (Utah 1990) (“Schoolcraft”). In Schoolcraft, this court had found the Court of Appeals’ analysis in that case to be “too mechanistic and, consequently, insufficiently sensitive to the legitimate policy consideration Schoolcraft raises.” Id. at 713. The Utah Supreme Court stated that “In determining who can challenge the presumption of legitimacy, a paramount consideration should be preserving the stability of marriage and protecting children from disruptive and unnecessary attacks upon their paternity.” Id. This Court concluded that whether an individual can challenge the presumption of legitimacy should depend, not on legal status alone, but on a case-by-case determination of whether the above stated policies would be



undermined by permitting the challenge.

In this case Judge Medley took considered and deliberate steps to thoroughly analyze the Schoolcraft policy considerations as they applied to Pete. The Court of Appeals, however, failed to employ this analysis with any sensitivity of the intended policy considerations articulated in Schoolcraft, and overturned the trial court decision, finding that Pete did not have standing.

The Court of Appeals has wholly misconstrued the intended policy consideration in the first prong of the Schoolcraft “test.” The first prong centers on the policy consideration of whether the challenge to the presumption of paternity would be antithetical to the preservation of the marriage. In order to ascertain whether a challenge would undermine the preservation of the marriage, an inquiry must be made as to whether or not a stable and intact marriage exists at the time the application to assert rights is made. Subsequent to a factually intensive consideration of the circumstances in this particular case, Judge Medley had found that there was no stable and intact marriage to prohibit Pete from challenging the presumption of paternity. (R. 983, ¶ 21.)

1. The Court of Appeals erroneously restricted the first prong of Schoolcraft by substituting its own findings to establish an “intact marriage.”

The evidence before the trial court clearly establishes that the relationship between Kelly and Kim had deteriorated and was unsatisfactory even prior to Kim and Pete’s romantic relationship. (R. 2535 at 1031:8-22, 1032:21 to 1033:20, 1035:1-23.) Further, although Kim agreed to try to save the marriage, on the assumption that Kelly would not punish either her or Zachary, it quickly became clear that a continued relationship with

Kelly was not possible. (R. 2535 at 1065:4-22.)

Even from the beginning of the tentative reconciliation, Kelly placed restrictions and rules on Kim's ability to communicate with Pete. Kelly placed these restrictions even though he had previously agreed to "do whatever I can to help him [Pete] have as much of a role as he wants with the baby." (R. 2535 at 1056:25; 1057:6.) Due to Kelly's restrictive behavior and his obvious attempts to punish Kim and Zachary, the parties separated in May of 2000 when Zachary was approximately eight months old. (R. 2533 at 452:9-11, 581:18-21.) Kelly filed for divorce in December of 2000 and Pete filed his Motion to Intervene one month later. (R. 1-5; R. 37-41.)

Subsequent to Kelly and Kim's separation, Pete and Kim's relationship continued to strengthen and deepen. This was clearly expressed in pleadings filed with the court asserting their intention to solidify their relationship with marriage once the divorce between Kelly and Kim was final. (R. 28, ¶ 9 and R. 76, ¶5.) Furthermore, at the time of the final hearing on the Motion to Intervene, Pete and Kim were married. (R. 983, ¶21.) These facts lead the trial court to find that Kim and Kelly's marriage has effectively ended prior to the time of Pete's filing of is Motion (R. 983, ¶ 2.1.) The trial court appropriately found that "the interest in preserving the stability of marriage is not a consideration due to the fact that there is no marriage to preserve. The stability was shattered with the parties separated and Zachary was approximately nine months of age." (R.983, ¶ 21.) Furthermore, Judge Medley, mindful of the policy consideration outlined in Schoolcraft, made a specific finding that Pete was not responsible for, or the primary cause of the break-up of, Kelly and Kim's marriage. (Finding. 57(d) R. 2463; See

Addendum 16.)

Despite these detailed findings based upon the clear evidence available to Judge Medley at the time of the Motion To Intervene and at trial, the Court of Appeals rejected the trial court's decision and, without any support from the record, substituted its own findings to determine that a stable marriage existed, justifying a denial of Pete's right to challenge the presumption. The Court of Appeals substituted its own findings are found in ¶ 21 of its Opinion stating that Zachary's birth was a stabilizing effect in the marriage and Pete's challenge to Zachary's paternity had "some undermining effect." (Addendum 18 pg 7 ¶ 21.) The Court of Appeals made this unsubstantiated finding despite the fact that Pete's challenge occurred after Kelly and Kim had been separated for seven months and divorce proceedings had been filed. The Court of Appeals substituted its own findings, despite the clear record that Zachary's birth was not a stabilizing effect in the marriage and that the period during Kim's pregnancy and after the birth of Zachary was rife with tumult and recriminations. (R. 2535 at 1061:15 to 1062:15, 1064:11-19.)

This Court has previously warned against the Appellate Court's substituting of findings made by a trial court, stating that the Court of Appeals must not "usurp the prerogative of the trial court and make its own independent determinations" unless there are extraordinary circumstances. Willey v. Willey, 951 P.2d 226, 234 (Utah 1997). Even under extraordinary circumstances, this court has stated that substitutions of findings can only be made if "the appellate court is in an equal position with the trial court with respect to the facts and evidence at issue." Id. at 231. In Owen v. Owen, 579 P.2d 911 (Utah 1978), this court held that the appellate court may exercise equitable powers and

take upon itself the responsibility of weighing the evidence and making its own findings in certain circumstances. However, “there are substantial institutional reasons why appellate courts refrain from substituting their judgment for that of an agency or trial court on mixed questions of fact and law in any particular area, even if they have the power to do so.” Alta Pacific Assocs. v. State Tax Comm’n, 931 P.2d 103, 117 (Utah 1997) (emphasis added) (quoting State v. Pena, 869 P.2d 932, 938-40 (Utah 1994).)

In the instant case, the Court of Appeals made a finding that Pete was responsible for the break-up of Kelly and Kim’s marriage and therefore undermined the stability of their “marriage.” (Addendum 18 pg 7 ¶ 21). This finding was made without support of the record and is contrary to the specific findings of the trial court.

Moreover, The Court of Appeals stated in footnote 5 of its Opinion:

We note that the public policy in favor of preserving the stability of marriage, always strong in Utah, may even be stronger in light of Utah’s enshrinement of so-called traditional marriage into its constitution in 2004.

Pearson v. Pearson, (Addendum 18 pg 7.)

The Court of Appeals Opinion is contrary to this Court’s previous Motion in Schoolcraft and its preceding cases, as well as this Court’s clear language prohibiting the Court of Appeals from making findings without being in an equal position with the trial court to review the evidence.

2. The Court of Appeals has further restricted the definition of “intact marriage” by adding in a factor of fault.

In paragraphs 19-21 of its Opinion, the Court of Appeals states that the “Pearsons’ efforts to maintain their marriage after [Zachary’s] birth would have been undermined by

a potential challenge to paternity.” This “fact” lead the court to state that Pete’s “challenge to [Zachary’s] paternity can be said to have had some undermining effect on the stability of the Pearsons’ marriage,” ultimately leading the court to conclude that Pete was at “fault” in undermining the Pearsons’ marital relationship. (Addendum 18 pg 7 ¶ 21). The Court of Appeals approach is tantamount to creating a new factor, analogous to contributory fault, for people who seek standing in cases similar to this case. If the Court of Appeals standard is adopted and this new rule is used to determine the standing of an intervenor, then any finding that an intervenor had any part in the break-up of a marital relationship would prohibit a court from finding the marriage to be unstable for purposes of the first prong of the Schoolcraft test. An adoption of such a factor would make Utah the only state in the country with such a rigid and inflexible fault standard.

3. The Court of Appeals’ interpretation of what constitutes an “intact marriage” disregards previous judicial interpretation.

In making its erroneous conclusion, the Court of Appeals completely disregarded the precedent noted by this Court in Schoolcraft to determine whether an intact marriage existed. In note 1 of Schoolcraft, this Court stated:

Three cases dealing with standing to challenge a child’s legitimacy are consistent with this approach. In Teece v. Teece, 715 P.2d 106 (Utah 1986), Roods v. Roods, 645 P.2d 640 (1982), and Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687 (1974), the Court allowed both the husband and wife to challenge the presumption of legitimacy, but in each of these cases, no reason existed to deny them standing because the stability of the marriage had already been shaken.

Schoolcraft at 713.

Schoolcraft and the above cited cases provide factual examples and precedent of

circumstances which have led the Court to find unstable or fractured marriages. For example, it was clear from the facts in the Schoolcraft case that the marriage was a marriage “in name only.” Similarly, in this case, at the time that the Court considered Pete’s challenge and request that he be granted standing, Kelly and Kim remained husband and wife in name only.

The instant case is also similar to the three cases cited by this Court in Schoolcraft. In Lopes, 518 P.2d at 688, the natural father of Theodore Lopes initiated divorce proceedings against the defendant Shana G. Lopes. The finding of the trial court was: “that during the marriage there has been one child born of the Defendant, Shana Lopes.” In Lopes, given the initiation of the divorce proceedings, the marriage had been sufficiently shaken. As in the instant case, the marriage was sufficiently shaken at the time Pete asserted his right to intervene because the divorce action between Kelly and Kim was already pending. (R. 1-5; R. 37-41.)

In Teece the husband and wife married in 1973. The child was born in 1981. Subsequent to the child’s birth, the mother initiated divorce proceedings. The child had been born during an eight year marriage, and the parties did not initiate divorce proceedings until after the birth of the child. This Court in Schoolcraft again cited Teece as a case in which the marital status of the parties had become sufficiently shaken to meet the first factor of the Schoolcraft analysis.

In Roods the husband and wife married in 1973 and divorced in 1976. A few months prior to the divorce the wife became pregnant. The child was born six months after the divorce was final. Prior, to the child’s birth, the mother had married a man

named Craig Green, whose surname was given to the child and who had supported the child while Mr. Green was married to the mother. The mother and Mr. Green were divorced in 1978. As with the instant case, the husband and wife in the Roods case were also married during the time of gestation and birth of the minor child and the child was supported by Mr. Green and resided with the child as his own; however, subsequent to the birth of that child, the parties began having trouble with their marriage and had filed for divorce. This Court in Schoolcraft cited this case as an example of a marriage of sufficient instability that no offense would be given to its policy consideration of “preserving the stability of the marriage.” Schoolcraft, 799 P.2d 713.

*The facts of the above-referenced cases cited by this Court as examples of marriages of sufficient instability to overcome the policy consideration of “preserving the stability of marriage” cannot be distinguished from the facts of the case at bar.* Furthermore, when considering the policy issues, this Court stated that a trial court must examine the facts of each case, on a case-by-case basis to determine if there were a functional, intact marriage. The trial court did so in this case. After careful consideration of the evidence before it, Judge Medley specifically found that the “stability of the marriage had been shattered at the time of separation and when [Zachary] was none months of age.” (R.983, ¶ 21.)

4. The Court of Appeals’ interpretation of what constitutes an “intact marriage” is unreasonable and unfairly restricts a putative fathers’ ability to assert his rights.

Other states have grappled with the issue of the presumption of paternity and found, similar to Schoolcraft, that whether an intact marriage exists is an element to

consider. However, the policy consideration, preservation of marriage, is an element to be tempered. “Although a state has a legitimate interest in promoting marriage, and in furtherance of the policy of not impugning a family unit, that policy cannot be served when the family unit has been dissolved[.]” In re R., 13 Cal. 3d 636, 650 (Cal. 1975). In that case the putative father was asserting rights to his daughter, who was born while her mother was married to, but not living with, another man. He did so to obtain his paternal rights when his daughter was in foster care due to drug use by both the mother and the mother’s husband. The California Supreme Court held that “ a presumption which precludes to appellant in the instant circumstances a right to offer evidence to prove that he is the father of the minor child is unreasonable, arbitrary and capricious” and therefore recognized his standing to establish his parenting. Id. at 651.

Using a similar approach, the Supreme Court of Pennsylvania opined:

[W]e must first determine if the presumption of paternity applies to the instant case. The policy underlying the presumption of paternity is the preservation of marriages. The presumption *only* applies in cases where that policy would be advanced by the application; otherwise it does not apply. In this case, there is no longer an intact family or marriage to preserve. Appellant and her husband have been divorced since 1993. Accordingly, the presumption of paternity is not applicable.

Fish v. Behers, 741 A.2d 721, 723 (Pa.1999) (emphasis added.)

Moreover, it is increasingly apparent that the presumption of paternity rule is being further eroded and limited. Many states are enacting legislation or interpreting existing law allowing alleged biological fathers the right to “establish their paternity to children born during the mother’s marriage to another man despite the presumption of the husband’s paternity.” Mouret v. Godeaux 886 So. 2d 1217 (La. Ct. App. 2004) (quoting



Smith v. Jones, 566 So. 2d 408, 411 (La. Ct. App. 1990).) In the case of Mouret the mother gave birth within 300 days of the dissolution of marriage, so ex-husband was considered the legal father. The biological father filed a petition two years and twelve days after the child's birth to ensure his parental rights were not terminated. The Louisiana Court of Appeals held that the trial Court had improperly terminated the biological father's rights because of codified case law allowing a putative father to establish his rights despite the existence of the mother's marriage to another man.

Our sister state of Colorado has also enacted similar legislation that has been upheld by the Colorado Supreme Court. In People ex rel. M.P.R., 723 P.2d 743 (Colo. Ct. App. 1986), the Colorado Supreme Court held that a "man claiming to be a child's biological father has standing to bring an action to determine paternity under the Uniform Parentage Act § 19-6-101, et. seq." Id. at 744. In that case the mother of a child was married to another man, but was separated at the time of conception. The mother and her husband then reconciled. Blood tests proved the husband was not the biological father and showed the likelihood the putative father was the biological father at 99.1742%. The putative father attempted to see his child, however, the mother and her husband refused him access. The putative father commenced paternity proceedings eleven months after the birth of the child and was allowed standing under the statute which allows such even when a mother is married to another man. Id. at 745.

"[A]pproximately two thirds of the states, either by statute or judicial interpretation, now give putative fathers a right to rebut the presumption that a child born in wedlock is the issue of the marriage." Weidenbacher v. Duclos, 661 A.2d 988, 999

(Conn. 1995). The Weidenbacher Court further cautioned that “[P]aternity actions that call into question the paternity of a child who was born in wedlock... are no place for an *immutable legal standard that is bordered by bright lines.*” Id. at 1000. (emphasis added.)

In the instant case, Pete and Kim both provided copious evidence and testimony to the trial court showing that Pete had financially supported Zachary as well as established, maintained, and continued to foster a relationship with Zachary. Pete and Kim also provided testimony that they planned on marrying each other as soon as the divorce between Kim and Kelly was finalized. Not only was it apparent at the initial and later objection hearings that no intact marriage existed between Kelly and Kim, there was evidence to show Pete’s personal stake in the outcome of the divorce and custody was substantial and compelling evidence to show Pete’s personal stake in the outcome of the divorce and custody was “more than sufficient to confer standing.”

Despite this, the Court of Appeals narrowly interpreted Schoolcraft in a way that establishes “an immutable legal standard that is bordered by bright lines.” Such “bright lines” established by the Court of Appeals create a legal standard in Utah that is so archaic that most states have diminished or proscribed it, either legislatively or by judicial interpretation.

**B. The Utah Court of Appeals’ Analysis of the Second Prong of the Schoolcraft Test was Flawed Because it Misinterpreted the “Necessity” Test and Disregarded the Undisputed Findings of the Trial Court.**

The second prong of the Schoolcraft test for challenging the presumption of legitimacy is that the challenge may not pose a “disruptive and unnecessary attack upon [a child’s] paternity.” Id. at 710. The Court of Appeals concluded that Pete’s “challenge to Zachary’s presumed paternity became disruptive and unnecessary when he allowed Zachary to form paternal bonds with [Kelly].” (Addendum 18, at ¶ 32.) In support of this conclusion the Court of Appeals found that “so long as that relationship [between Kelly and Zachary] continues, it cannot be said for Schoolcraft purposes that Zachary has any particular need for his paternity to be established in another man.” (Id. at ¶ 31.) As it relates to the second prong of the Schoolcraft case, the Court of Appeals decision suffers from the dual weaknesses of misinterpreting Schoolcraft and substituting the court’s own findings for those of the trial court.

1. The Court of Appeals Misinterpreted the Second Prong of the Schoolcraft Test.

This court’s decision in Schoolcraft does not offer guidelines for determining whether the challenge to a child’s paternity represents an “unnecessary attack.” The Court of Appeals sought to do so by focusing on what it called “the child’s perspective...” (Addendum 18, at ¶ 29.) In particular, the Court of Appeals has adopted a rule that the challenge to a child’s paternity was unnecessary under the second prong of the Schoolcraft case if there were already a father figure in the child’s life other than the challenger. It stated, “So long as that relationship [a paternal relationship between Kelly and Zachary] continues, it cannot be said for Schoolcraft purposes that Zachary has any particular need for his paternity to be established in another man.” (Addendum 18, at ¶

31.) Thus, according to the Court of Appeals, if a child has developed a paternal relationship with a non-biological father by the time the biological father's challenge to paternity is adjudicated, that challenge to paternity must be rejected. It is a "mechanistic" view reminiscent of the approach taken by the Court of Appeals in the Schoolcraft case which this Court rejected: Id. at 713 ("We find the Court of Appeals' analysis on this point to be too mechanistic.")

By contrast, the approach of the trial court and of the custody evaluator was to focus on the issue of whether Pete's involvement in Zachary's life was "necessary" to Zachary's well-being. Thus, Judge Medley found in his Finding 17:

As Dr. Sanders reported, the relationship between parents and their biological children is psychologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and his biological parent is generally a personal one, but the relationship between intervenor and Zachary is essential to Zachary and that no one can place this role in Zachary's life except intervenor, Pete Thanos. Dr. Sanders also stated that, based upon the quality of the relationship between Zachary and intervenor and the likelihood that intervenor, Pete Thanos, and Zachary would have continuing extensive contact, their attachment would be likely to deepen and become more significant over time.

(R. 2441-2442.)

Judge Medley also found in Finding 15 as follows:

As proffered at the time of hearing before the Commissioner and stated in pleadings and as set forth in the affidavits of Respondent and intervenor, Zachary's physical resemblance to intervenor was such that Zachary would soon recognize that intervenor was his father. Further, the biological relationship between Zachary and intervenor, Pete Thanos, cannot and should not be hidden from the child, as intervenor, Pete Thanos, will continue to be an integral part of Zachary's

life. Respondent, Kimberlee Thanos, and intervenor, Pete Thanos, have an intact family unit to provide care and security to Zachary. Further, Petitioner and Respondent, Kimberlee Thanos, has, in one form or another, informed dozens of individuals in their circle of family, friends and acquaintances that intervenor, Pete Thanos, is Zachary's biological father. It is impossible to keep the "secret" of Zachary's parentage hidden from him.

(R. 2440-2441.)

The underlying theme of the Schoolcraft decision is that a "mechanistic" approach to a challenge to paternity—one which permits or rejects such challenges according to the class of individuals in which the challenger falls—should be rejected in favor of one which focuses on the benefits to the child of the challenge. The Court of Appeals would dispose of Pete's challenge to Kelly's paternity by merely placing Pete in the class of individuals who have not provided parent-like services to the child by the time of the hearing on intervention and to dismiss his challenge as "unnecessary". But it is the approach of the trial court—one which recognizes on a case-by-case basis that such a challenge may be beneficial to the child—which this court should adopt under the second prong of the Schoolcraft case.

2. The Court of Appeals Opinion Should be Reversed Because the Court Rejected the Unchallenged Findings of the Trial Court and Made Findings of its Own.

Based upon two detailed reports produced by the custody evaluator, Judge Medley adopted extensive findings complying with the requirements of the two-pronged Schoolcraft test. (R. 975-985, See Addendum 12.) As contained in the trial court's

Findings of Fact and Conclusions of Law In Re: Motion for Intervention dated

November 7, 2002, Judge Medley found, inter alia:

“Dr. Sanders’ summary opinion was that from a developmental and psychological perspective, Zachary’s functioning is not inherently disrupted by Peter Thanos’ involvement. Further, Dr. Sanders found that Peter Thanos’ relationship with Zachary was necessary to Zachary’s normal and positive development.”

(Finding 12: R. 980.)

“Dr. Sanders reported that the primary disruption in Zachary’s relationship [with Kelly] occurred at the parties’ separation when Zachary was approximately nine months of age. She found that by 18 months Zachary was firmly established in a loving, secure, and relatively predictable relationship with Mr. Pearson, Mrs. Pearson (now Thanos), and Mr. Thanos. Dr. Sanders indicated that there was no inherent reason why the presence of Mr. Thanos as another loving caretaker should have any further disruptive impact.”

(Finding 14: R. 980-81.)

“Dr. Sanders did not believe Zachary had lost his relationship with Mr. Pearson or that there was a basis to believe that further disruption to the relationship between Zachary and [Kelly] was intrinsically linked to Mr. Thanos’ presence in Zachary’s life...she indicated that the emotional meaning of these relationships is unlikely to have much impact on Zachary for quite some time. Again, Dr. Sanders noted that Zachary has a loving relationship with [Kelly] and with Mr. Thanos.”

(Finding 16: R. 981.)

“The relationship between parents and their biological children is physiologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and their [sic] biological parent is generally a personal one and that the relationship between Peter Thanos and

Zachary is essential and that no one can play this role in Zachary's life but Peter...."

(Finding 18: R. 982.)

Based in part on the foregoing findings, the trial court concluded that the two-prong test of Schoolcraft did not preclude Pete's intervention. (R. 983.)

For reasons which it did not explain, the Court of Appeals disregarded the trial court's findings and made its own. Thus, for example, the Court of Appeals found that "the Pearsons made substantial efforts to maintain their marriage even though both parties knew midway through Zachary's gestation that Thanos was the likely biological father." (Addendum 18 at ¶19.) By contrast the evidence at trial was that after disclosing to Kelly that her expected child was fathered by Pete, Kim initially agreed "to at least try to make this work" (R. 2535 at 1052: 18-22), but soon realized that the marriage was broken beyond repair. Following an ultrasound. for example, Kim told Kelly "I don't think this is going to work." (R. 2535 at 1061: 15-24; 1062: 7-9.) Kelly also refused to participate in marital counseling and admitted that he suspected that Kim was not committed to continuing their marriage. (R. 2535 at 1064: 2-19 and R. 2532 at 437: 4-19.)

Another new "finding" of the Court of Appeals was that

Pearson's shared parentage of Zachary represented the stabilizing force in their then-existing marriage, and...the potential of a paternity challenge would diminish that stabilizing affect. Thus, even after the Pearsons filed for divorce, Thanos' challenge to Zachary's paternity can be said to have had some undermining affect on the stability of the Pearsons' marriage...

(Addendum 18, at ¶ 21.)

It is a statement corresponding to no finding by the trial court and for which no evidence exists.

The Court of Appeals also found that “Thanos had little interest or involvement in Zachary’s life until he was approximately sixteen months of age.” (Addendum 18 at ¶ 25.) In point of fact, the evidence showed both Pete’s interest in Zachary’s development and his involvement in Zachary’s life after the Pearsons separated when Zachary was eight months old. The evidence also showed that Kelly prevented Pete from visiting Zachary prior to the date of separation. (R. 77, ¶ 8.)

Similarly, the Court of Appeals “finding” that “Zachary had a father and was not in need of a different one” (Addendum 18 at ¶ 30) has no support in the record and appears to be more a moral judgment than an evidence-based finding. Indeed, the custody evaluator concluded, and the trial court found, that Pete’s relationship with Zachary “was necessary to Zachary’s normal and positive development.” (R. 2441, ¶ 16.)

Finally, the Court of Appeals finding that “an attack on Zachary’s paternity at this point would be disruptive of Zachary’s strong paternal relationship with his father...” (Addendum 18 at ¶ 33) is not supported by the record. It is, again, a mere assumption for which no corresponding finding by the trial court exists.

This Court has ruled that an appellate court should only make findings of fact in the most extraordinary of circumstances. Willey v. Willey, 951 P.2d 226, 235 (Utah 1997). The Court of Appeals erred in making the above-described findings. To a significant extent those findings form the basis for the Court of Appeals’ analysis of the Schoolcraft case. The Opinion therefore, should be reversed.



3. The Court of Appeals Analysis of Standing was Restrictive and Mechanistic and Contrary to Schoolcraft.

This Court has recently addressed the issue of standing, in T.H. v. R.C. (In re E.H.), 2006 UT 36 (Utah 2006), saying:

In order to determine who may appear before the court, we must look to the law of standing and, its procedural cousin, intervention. The doctrine of standing ensures that the court will have the benefit of truly adverse parties in resolving a case. A plaintiff who has not been granted standing to sue by statute must either show that he has or would suffer a "distinct and palpable injury that gives rise to a personal stake in the outcome" of the case or meet one of the two exceptions to standing recognized in cases involving "important public issues." Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, P17, 82 P.3d 1125. In courts of general jurisdiction, *standing is not a rigid or dogmatic rule, but one that must be applied with some view to realities as well as practicalities.* See Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 317 (Wyo. 1980),

Id. at ¶ 49. (Emphasis added).

The clear meaning of the discussion in In re E.H., supra is that a trial court must to take into account, and be sensitive to the particular facts of a given case. It was not enough, for example, in this case, for the Court of Appeals to merely state that Zachary already has a father with whom he is bonded. The Court of Appeals should have also recognized that Zachary is bonded to Pete, lives with his mother Kim, biological father Pete, and his natural sister Madelaine in an intact family unit. (Findings 7, 8, 9, and 10 R. 2337-38, 2437). Based upon all of the facts that existed at the time Judge Medley considered the matter, the only person that would potentially be disrupted by the granting of standing was Kelly. The Court of Appeals wrongly focused on Zachary and Kelly's

relationship, and primarily upon Kelly. The Court of Appeals decision should be reversed.

4. The Court of Appeals improperly applied a “Necessity” test to Zachary, rather than Pete.

Pete is a necessary part of Zachary’s life. Judge Medley found this to be the case. (R. 1437, ¶ 19). Again, any analysis must consider the practicalities and situation of his family at the time the court decided the issue of Pete’s standing. Again, Kim and Pete were married and living together and Pete had become an integral part of Zachary’s life. (R. 2444, ¶ 21.) Pete and Respondent had another child, Madelaine Thanos, on July 13, 2003, and lived together with Zachary in the family home in Portland, Oregon. (R. 2437-38, ¶¶ 8, 9 and 10.)

The Court of Appeals analysis seems to focus solely on whether Zachary had “need” of a father at the time Pete attempted to intervene. Paragraphs 29-31 of the Opinion, discuss whether Pete’s paternity challenge should be deemed “necessary”. The Court of Appeals “[p]resume[s] that, like the disruption element, the necessity element must be analyzed primarily from the child’s perspective rather than from the Father’s or Thanos’s.” *Id.* at ¶ 29. The Court of Appeals assumed “[t]hat Schoolcraft standing always exists at birth and can only be lost thereafter.” *Id.* Further, the Court of Appeals states:

Had the Pearson marriage succeeded, Father would have likely remained Zachary’s father in all regards throughout the foreseeable future. Dr. Sanders found that, even when the Pearsons’ marriage failed, Zachary continued to identify Father as his father and enjoy[ed] a strong paternal relationship with him. Thus, at

the time of the trial court's intervention order, Zachary had a father and was not in need of a different one.

Id. at ¶ 30.

The Court of Appeals has created a “necessity” test, with the above quoted language, that looks only to whether a child born into a marriage has a father that he is bonded to in determining whether another father is needed. This strict “necessity” test is made even stricter when the Court of Appeals stated “ Despite the evolving circumstances of this case, we conclude that since that time Thanos has not met, and to our knowledge still does not meet, the Schoolcraft factors.” (Addendum 18 at 36.) This conclusion, is made even more confusing when compared to note 10 of the Opinion wherein they state “ We express no opinion on the separate question of whether Schoolcraft standing, once lost, can ever be regained due to changed circumstances.” (See Addendum 18, note 10.)

Further, the Court of Appeals has relied heavily on the language from Commissioner Evan's vacated recommendation, as discussed infra, as if it was a ruling from Judge Medley to support their position regarding the “necessity” component of the analysis of standing. Paragraph 30 of the Opinion states: “[w]e cannot see how Thanos's ability to challenge Zachary's paternity remained necessary after he voluntarily absented himself from Zachary's life.” This finding is based on the Court of Appeals finding in paragraph 25 wherein they erroneously relied on a vacated recommendation of Commissioner Evans and stated:

[T]he undisputed facts of the case are that Thanos had little interest or involvement in Zachary's life until he was approximately sixteen months of age. The trial court recognized as much in its October 2001 order initially denying Thanos's motion to

intervene: "Mr. Thanos was completely absent from [Zachary's] first year of life, was absent for the first half of his second year of life, and has had incidental contact during the second half of the second year of [Zachary's] life." As a result of this intentional absence, Zachary developed a paternal relationship exclusively with Father over the first two years of his life, a relationship that both Father and Zachary apparently continue to foster to the present.

As discussed below, Judge Medley did not make this finding; it is the finding of District Court Commissioner Michael S. Evans, which was later overturned on objection by Judge Medley.

The above shows that the Court of Appeals has both ignored and created findings that do not exist. The Court of Appeals ability to make new findings is very limited, as discussed, supra. This error led to the Court of Appeals to find that Zachary does not need Pete in his life. Clearly, this is contrary to the findings of the trial court and stipulated expert Dr. Sanders. The Court of Appeals has, therefore, made a new necessity test that looks only at the child at one time in the child's life- shortly after birth, to determine whether an outsider's attempt to make a claim for paternity and establish paternal rights is unnecessary or not. This narrow and inflexible view of Schoolcraft and its policy considerations are inconsistent with the clear intent of Schoolcraft, and is not supported by statute, or other case law.

5. The Court of Appeals Misinterpretation of the Schoolcraft test has created an artificial statute of limitations.

Judge Medley granted Pete standing to intervene to assert paternity in November of 2002. (R. 971-72.) Judge Medley carefully looked at the facts and circumstances as they existed, not only at the time Zachary was born, but also prior to and subsequent to

his birth. The trial court correctly considered the evolving circumstances in Zachary's life in determining that Pete's challenge to his paternity was not unnecessary or disruptive. The circumstances considered by Judge Medley included the fact that Zachary had similar physical features to that of Pete, that Zachary had developed a bond with Pete which, according to Dr Sanders was "not only not disruptive but necessary for his [Zachary's] psychological development," that Pete was in a committed long-term relationship with Kim; and that Zachary was living in an intact and stable familial home with his biological mother and father as well as his half brother and full sister. (R. 1730, ¶ 18; R. 2437 ¶ 7; R. 2437, ¶ 8.)

The Court of Appeals disregarded those facts and adopted a rule which appears to require an analysis be made at the time of the child's birth, or "sometime shortly thereafter." (See also paragraph 36 of the Opinion of the Court of Appeals which states "Thanos lost his standing to contest Zachary's paternity sometime during the early months of Zachary's life"). The effect of the Court of Appeals Opinion is to create a narrow statute of limitations for putative fathers which is mechanistic and factually insensitive.

As discussed, *supra*, over "two-thirds of the states, either by statute or judicial interpretation, [...] give putative fathers a right to rebut the presumption that a child born in wedlock is the issue of the marriage." Weidenbacher v. Duclos, at 73, 999 (Conn. 1995). Other state's statutes and judicial interpretations allow standing to rebut a presumption to occur within a less restrictive time frame. See In re M.P.R., 723 P.2d 743 (Colo. Ct. App.1986) (court held action commenced when child was eleven months old

was timely); Mouret v. Godeaux, 886 So.2d 1217 (La. Ct. App. 2004) (affirmed a two-year statute of limitation); Witso v. Overby, 627 N.W.2d 63, 67 (Minn. 2001) (holding gave standing to putative father beyond the three-year statute of limitations); In re Paternity of S.R.I., 602 N.E. 2d 1014 (Ind. 1992) (allowed putative father standing after child was several years of age).

In paragraph 34 of its Opinion, the Court of Appeals analogized Pete’s status to that of “an unmarried father seeking to establish paternity rights in the face of a mother’s intent to have the child adopted” under Utah Code Ann. § 78-30-4.14(2). [Utah Code Ann. §78-30-4.19 gives a putative father only 24 hours to establish or preserve his rights of the mother consents to adoption 24 hours after the birth of the child.] the Court of Appeals time restrictions, if adopted, would make it the most restrictive limitation of action in the nation for any states who have legislatively proscribed a statute of limitations. See e.g, Cal.Fam.Code § 7575 (b)(3)(A). (2 year statute of limitations); C.R.S. § 19-4-107 (1)(b) (5 year statute of limitations); IC 31-14-5-3 (b) (2 year statute of limitations); LSA-C.C. Art. 198 (1 year statute of limitations); M.S.A. § 257.57 (1)(b) (2 year statute of limitations); RI ST § 15-8-6 (4 year statute of limitations)

Moreover, the Court of Appeals employs a different interpretation of timing for each prong of the Schoolcraft test. When analyzing the issue of “intact marriage,” the Court of Appeals looked at the time that Pete’s Motion to Intervene was filed. In footnote 4 of its Opinion, the court makes specific note that Pete’s Motion to Intervene was filed “within the duration of the Pearsons’ marriage” even though Pete intervened within the divorce proceedings. In paragraphs 19-21 of the Opinion, the Court of Appeals states

ultimately that “[t]he Pearson’s shared parentage of Zachary represented a stabilizing force the their then-existing marriage, and that the potential of a paternity challenge would diminish that stabilizing effect.” Id. at 21. Thus the Court of Appeals looked at when Pete filed his Motion to Intervene, and although it was filed within a divorce proceeding, and found an “intact marriage,” thereby denying Pete standing.

It is clear that in its analysis of Schoolcraft’s second-prong that the Court of Appeals required Pete to have filed a paternity action to preserve his rights “at the time of the child’s birth, or sometime shortly thereafter” (Addendum 18 at ¶ 36) in order to protect his paternal rights. It is also clear, however, that in so doing, Pete would have been deemed to have run afoul of the policies of the first prong of the Schoolcraft test, as articulated by the Court of Appeals in its Opinion which is preserving the stability of the marriage. Such an incongruous interpretation leaves a rule that would never allow an intervenor to establish his paternity. The result, if adopted, would effectively prohibit anyone from establishing standing to challenge paternity once a child is born into a marriage, whether or not it is an intact marriage and whether or not it was unnecessary or would disrupt the child. Such circular reasoning by the Court of Appeals, if adopted, completely eviscerates the Schoolcraft decision.

**C. The Utah Court of Appeals’ Opinion and Misinterpretation of Schoolcraft Deny Intervenor Due Process Rights under the Utah and United States Constitutions.**

The Court of Appeals’ restrictive and narrow interpretation of the Schoolcraft analysis, as applied to this case, denies Pete due process. Biological fathers have a liberty interest in their children regardless of whether or not those children are born to a mother

during an intact marriage to another man. Two-thirds of the states are now recognizing the rights of biological fathers in situations similar to the case at bar. This fact was discussed in State ex rel. Roy Allen S. v. Stone, 474 S.E.2d 554 (1996 W. Va.), which stated, in joining the majority of states:

By this decision, we join an increasing number of states that have upheld the rights of putative fathers. See Ban v. Quigley, 168 Ariz. 196, 812 P.2d 1014 (1990), review dismissed by 169 Ariz. 477, 820 P.2d 643 (1991); In Interest of J.W.T., 872 S.W.2d 189 (Tex. 1994); Smith v. Jones, 566 So. 2d 408 (La. App.1 Cir.), writ denied sub nom., Kemph v. Nolan, 569 So. 2d 981 (1990); J.W.P. v. W.W., 255 N.J. Super. 185, 604 A.2d 695 (1991), aff'd, 255 N.J. Super. 1, 604 A.2d 603 (\_\_\_\_); M.J.C. v. D.J., 410 Mass. 389, 572 N.E.2d 562 (1991); Van Nostrand v. Olivieri, 427 So. 2d 374 (Fla. App., 2D.3 1983); C.C. v. A.B., 406 Mass. 679, 550 N.E.2d 365 (1990); Jansma, Family Law at 834 (see also n.45). Indeed, one court recently noted that "approximately two-thirds of the states, either by statute or judicial interpretation, now give putative fathers a right to rebut the presumption that a child born in wedlock is the issue of the marriage." Weidenbacher v. Duclos, 234 Conn. at 73, 661 A.2d at 999, citing Traci Dallas, Rebutting the Marital Presumption: A Developed Relationship Test, 88 Colum. L. Rev. 369, 373-74 (1988).

Id. at 637.

In Stone, a West Virginia man (Thomas) sought standing to pursue parental rights to his child (Jennifer) who was born to a woman (Tina) during the term of the mother's marriage to another man, (Roy). Tina gave birth to Thomas's child, Jennifer, on June 1, 1987. During the next three years, Roy's and Tina's already tumultuous relationship further deteriorated. Id. at 627-628. During this time, Tina maintained contact with Thomas and Thomas frequently visited with Jennifer. Tina eventually filed for divorce and started cohabiting with Thomas. Tina had custody of her two children. Thomas participated in the caretaking responsibilities and the children developed a strong bond with him during this period. Id.



Sometime thereafter both Tina and Roy became embroiled in respective lawsuits to change custody. At the full evidentiary hearing, that took place in December, 1992 both Roy and Tina testified that both children were natural children of their marriage. Ultimately, Roy prevailed and was awarded custody of his two children, including Jennifer, Thomas' biological child. Id. After the final decree had been entered, the mother filed a modification action requesting a change in custody. Her request was denied, and on December 14, 1992, custody of both children, including Jennifer, the putative father's child, was awarded to the ex-husband, Roy. Id. at 628.

On April 15, 1994, Thomas filed a paternity action against Tina and her ex-husband, Roy, who had custody of the children, asserting that he, and not Roy, was the biological father of Jennifer. Id. The minor child, Jennifer, was now almost eight years of age.

Standing was denied to the biological father at the circuit court level. The West Virginia Supreme Court held, however, that fathers have a liberty interest in their children that, when balanced against the rights of other family members and the best interests of the child, should be protected. The Virginia Supreme Court stated:

In this case, we must decide whether a putative biological father has a liberty interest in maintaining a relationship with a child who was born while the child's mother was married to another man. A longstanding line of cases at the federal level and in West Virginia, as well as in other state courts, recognizes that "liberty" within the meaning of the Due Process Clause embraces the rights of parenthood, n13 and that umbrella includes a parent's right to establish and preserve relationships with his or her children, even if they are born outside the traditional family. E.g., Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); McGuire v. Farley, 179 W. Va. 480, 370 S.E.2d 136 (1988); J.M.S. v. H.A., 161 W. Va. 433, 242 S.E.2d 696 (1978).

Id. at 631.

The Virginia Supreme Court in Stone recognized, however, that its decision ran against the majority in the case of Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989). The Stone court explained its reason for rejecting the plurality decision of Michael H., as follows:

We are well aware that the United States Supreme Court in Michael H. v. Gerald D., supra, upheld a California law that precluded a putative father from establishing paternity over a child born into another man's marriage. We decline to follow Michael H. v. Gerald D., supra, however, in construing our own Due Process Clause. We do so for two reasons. First, the split on the Michael H. v. Gerald D. Court weakened the case's precedential authority. The central holding of the plurality--that the putative father did not have an affected liberty interest--was joined in by only four justices. Four other justices expressly disagreed and insisted the putative father had a liberty interest in his relationship with the child in question. A fifth, Justice Stevens, cast the decisive vote, while concurring only in the judgment; he assumed the father could have a protected liberty interest in the child, even though the "mother was married to, and cohabiting with, another man at the time of the child's conception and birth." 491 U.S. at 133, 109 S. Ct. at 2347, 105 L. Ed. 2d at 112 (Stevens, J., concurring in the judgment).<sup>14</sup> Thus, even as a matter of federal constitutional law, Michael H. v. Gerald D., supra, does not preclude recognition of a liberty interest in this case.

Furthermore:

[I]n our view, the federal and state decisions cited above<sup>15</sup> regarding the liberty interests of fathers of illegitimate children were not premised, as the Michael H. v. Gerald D. plurality insists, on the maintenance of rights within the traditional family unit. 491 U.S. at 121-24, 109 S. Ct. at 2341-42, 105 L. Ed. 2d at 1040. Rather, they focus on the personal stakes of fathers in their relationships with their children, regardless of whether the setting is traditional. E.g., Lehr v. Robertson, supra; Stanley v. Illinois, supra. As the Court said in Stanley, "the law [has not] refused to recognize . . . family relationships unlegitimized by a marriage ceremony. . . . 'To say that the test of . . . [constitutionality] should be the "legal" rather than the biological relationship is to avoid the issue. For the . . . [Constitution] necessarily limits the authority of a State to draw such "legal" lines as it chooses.'" 405 U.S. at 651-52, 92 S. Ct. at 1213, 31 L. Ed. 2d at 559. See also Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (grandmother had substantive due process interest in maintaining unitary

household that included extended family). In our opinion, the strength of a parent's bond with his or her child is not dependent upon some official or traditional arrangement; rather, the strength derives from the parent's personal and emotional investment and the relationship that develops from that investment...The enjoyment of life and liberty, with the means . . . of pursuing and obtaining happiness and safety"); Women's Health Center v. Panepinto, 191 W. Va. 436, 446 S.E.2d 658 (1993).

Much like the father in the Stone decision, Pete has established a strong bond with his natural child Zachary. The policy considerations of Schoolcraft vary little from those that the Stone, supra court used in analyzing the question of standing. The Stone court stated:

An additional governmental interest, however, does have considerable validity in this context. Clearly, the government has a substantial interest in preserving the integrity of traditional family units and in discouraging vexatious or even good-faith suits that have a high likelihood of disrupting family life and possibly causing confusion and emotional harm to affected children. Not all petitions challenging the paternity of marital children threaten those interests, however. In the present facts, for example, the marriage into which Jennifer was born long since has been dissolved, so Thomas's suit could hardly damage its stability or integrity.

Id. at 635.

The Schoolcraft two-prong test seeks to protect the integrity of the family unit, as well as protect children from disruptive and unnecessary attacks on their paternity. The Stone court arrived at the correct decision to grant the putative father standing using a similar test to the Schoolcraft test, and did so without adopting an arbitrary, undefined time period by which an action must be filed by a putative father seeking standing to establish parental rights to his natural child, as the Court of Appeals did in this case. However, the court in Stone limited its decision, saying that the trial court still had to

determine what, if any, rights the putative father should have, and that the best interests of the child should still be a paramount concern in deciding that issue.<sup>1</sup>

This court should follow the reasoning of Justice Brennan, where he states:

We are not an assimilative, homogenous society, but a facilitative pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies. Even if we agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

Michael H., 491 U.S. at 141, 109 S. Ct. at 2351, 105 L. Ed. 2d at 117 ( Brennan, J., dissenting).

Iowa's Supreme Court followed the Stone decision in Callendar v. Skiles, 591 N.W.2d 182 (Iowa 1999). In that case, a woman, Rebecca became pregnant by a co-worker, Charles while still married, but physically separated from her husband, Rick. Id. at 184. Later, Rebecca and Rick reconciled. Id. Rebecca gave birth to a child that was fathered by Charles. Id. Six months after the child was born, Charles filed suit to

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<sup>1</sup>Finally, permitting a putative father to have standing does not end the matter. Even if he proves paternity, he still is not necessarily entitled to intrude further into the marital family (if it has survived) or into existing child-parent relationships, including any relationship that has developed between the presumed father and the child. These factors may be considered in both the standing and paternity determinations. They also may have an impact on other issues the circuit court must decide. A finding of paternity would only entitle the natural father to an opportunity to request to invoke his parental rights; in response, it would remain for the circuit court to determine issues of visitation, custody, etc., based on the best interests of the child. Id. at 637.

establish visitation rights with the child. Rick moved to dismiss claiming Charles had no standing to make such a request under the Iowa paternity statutes. Id.

The Callendar court agreed with Rick that Iowa's statute prevented Charles from being granted standing. Id. at 186. However, the Iowa Supreme Court found that statute to be unconstitutional, as it denied Charles Due Process under the Iowa State

Constitution:

In balancing the important considerations at issue in this case, we acknowledge the policy of promoting the sanctity and stability of the family. This is clearly an important value in our society, which engenders a desire to protect the family in this case, and the child, from challenges to something as basic as paternity. Yet, this policy as applied in this case is far from absolute and, in truth, is used only to exclude the putative father from challenging paternity. The mother, the established father, and even the child, are permitted to file a petition to challenge paternity. Thus, while the overall policy of promoting stability of the family remains strong, the ability of family members to challenge paternity, and disrupt the family unit, reveals the interests of the state in depriving the same procedures to a putative father outside the family are diminished. In balancing the multitude of compelling interests which permeate this case, we conclude the due process rights of the putative father must prevail.

Id. at 191-192..

Judge Medley recognized that Pete had rights afforded him under the United States and Utah Constitutions. (R. 983 at ¶ 23.) The Utah Court of Appeals' Opinion unconstitutionally restricts and narrows the Schoolcraft decision, as crafted by this Court, and denies Pete his liberty interest, under the United States and Utah Constitutions.

**II. THE COURT OF APPEALS RELIANCE UPON AN OCTOBER, 2001, RECOMMENDATION FROM A COURT COMMISSIONER IS IN ERROR AND VIOLATES BOTH THE UTAH AND UNITED STATES CONSTITUTIONS.**

In its Opinion, the Court of Appeals erroneously relied upon the recommendation of Commissioner Michael S. Evans, rather than the Findings and Order of the Honorable Tyrone E. Medley, which vacated those findings and granted Pete standing to intervene. The Court of Appeals stated in paragraph 26 of its Opinion:

Here, *the Trial Court found in its October 2001 order* that Father was the "psychological father of [Zachary]," that Zachary had "become closely bonded with [Father]," and that those bonds were "critical." The Trial Court further found as a factual matter that to permit Thanos "to establish his paternity of [Zachary] and to be introduced at this point as a father figure in [Zachary's] life would be immediately disruptive to the child's stability." These facts leave little doubt that, at least as of October 2001, Thanos's paternity challenge would have been disruptive to Zachary's existing paternal relationship with Father and Zachary's expectations as to who his father was.

(Emphasis added.) (Addendum 18.)

Further, in paragraph 25 the Court of Appeals stated:

We have no reason to question the trial court's findings as they relate to the contents of Dr. Sanders's report or the existence of some relationship between Thanos and Zachary in November 2002. However, despite the paternal role that Thanos may eventually have attempted to take, the undisputed facts of the case are that Thanos had little interest or involvement in Zachary 's life until he was approximately sixteen months of age. *The trial court recognized as much in its October 2001 order initially denying Thanos's motion to intervene:* "Mr. Thanos was completely absent from [Zachary 's] first year of life, was absent for the first half of his second year of life, and has had incidental contact during the second half of the second year of Zachary's ] life." As a result of this intentional absence, Zachary developed a paternal relationship exclusively with Father over the first two years of his life, a relationship that both Father and Zachary apparently continue to foster to the present.

(Emphasis added.) (Addendum 18.)

Judge Medley made no such findings. Commissioner Michael S. Evans made those recommendations. That recommended order was later signed, as a matter of course, by Judge Tyrone Medley (R. 675) but vacated subsequent to the Objection of Intervenor and

Respondent (R. 971-72, See Addendum 20.) The “findings” contained in the Commissioner’s Recommendation, but later vacated, were critical to the Court of Appeals’ Motion that Pete’s involvement was both unnecessary and disruptive to Zachary and Kelly’s relationship. Paragraph 28 of the Opinion states “In light of those findings, (referring to the October, 2001, Order) we cannot say that Thanos's attack on Zachary's paternity would not have been disruptive to Zachary's paternal relationship with Father and his expectations about whom his father was” (emphasis added.)

Judge Medley’s signature on the October 17, 2001, Order, which arose from a hearing before Commissioner Evans, is qualified with the interlineated phrase next to Judge Medley’s signature: “[s]ubject to the objections which are pending, J. Medley,” in Judge Medley’s handwriting. (R. 675, See Addendum 20.) The mere fact that Judge Medley signed the order that arose from a Commissioner’s recommendation does not undermine, nor should it in any way impact upon, his later granting of the objection to that recommendation.

The October 17, 2001, Order should not have been considered by the Court of Appeals, much less favorably cited to in support of its Opinion. Judges regularly sign orders arising from hearings before commissioners, but then vacate or modify the order, subsequent to an objection to the commissioner’s recommendation. U.R.C.P. 7(g) as discussed, supra, requires that until the objection is resolved, the judge should sign the order, as it is the order of the court until modified by the court. While some judges may wait until the objection is resolved prior to signing an order based upon a Commissioner’s recommendation, no procedural rule exists to provide guidance. In the absence of an

order being entered based upon a Commissioner's recommendation, many parties would be left without any interim relief or clear direction until such time as the matter can be addressed by the Judge on the objection.

Judge Medley did not make those very critical findings, which the Court of Appeals has clearly relied upon in its Opinion. Furthermore, the Order Granting Intervention of Peter Thanos, which arose from the Objection to Commissioner's Recommendation clearly states, "[t]he Order of Intervention, dated October 17, 2001, is hereby vacated." (R. 972, ¶ 1.) These facts directly contradict and refute the erroneous claims of Kelly Pearson that, "[t]he October 2001 Order was not a recommendation, but an order, signed by Judge Medley and part of the record below. It was not vacated." (Brief in Opposition to Petitioner's Writ of Certiorari filed by Kelly Pearson 7.)

The October 17, 2001, Order arose from a hearing that was conducted entirely by proffers, before Commissioner Michael S. Evans, without the benefit of the information Judge Medley had before him during his consideration of the Motion to Intervene. The error made by the Court of Appeals is that it believed the "recommendation" of Commissioner Evans were the "Findings" of Judge Medley. Given the Court of Appeals' Motion regarding the timing of Pete's involvement in Zachary's life, this reliance created confusion with the Court of Appeals. It is not possible, in fact, to understand how the Court of Appeals reconciled what they clearly believed to be Judge Medley's findings in October of 2001, with Judge Medley's Order of November 7, 2002, granting Pete standing.



In relying upon the October, 2001, Order, the Court of Appeals has elevated the recommendation of a commissioner above the reasoned decision of Judge Medley. This is in direct violation of the U.S. and Utah constitutional provisions cited infra, and prevented the Court of Appeals from correctly applying the Schoolcraft test.

Utah Const. Art. VIII, § 1 provides:

The judicial power of the state shall be vested in a Supreme Court, in a Trial Court of general jurisdiction known as the District Court, and in such other courts as the Legislature by statute may establish.

Utah Const. Art. VIII, § 5 of the Utah Constitution provides: “The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute[.]” Article III of the United States Constitution provides in pertinent part: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

Utah Code Ann. §78-3-31 (as amended) establishes the qualifications, appointment, and functions of court commissioners. It states, in relevant part:

(1) (a) Court commissioners are quasi-judicial officers of courts of record and have limited judicial authority as provided by this section and rules of the Judicial Council.

\* \* \* \* \*

(8) The Judicial Council shall make uniform statewide rules defining the duties and authority of court commissioners for each level of court they serve. The rules shall not exceed constitutional limitations upon the delegation of judicial authority. The rules shall at a minimum establish:

(a) types of cases and matters commissioners may hear;

(b) types of orders commissioners may recommend;

(c) types of relief commissioners may recommend; and

(d) procedure for timely judicial review of recommendations and orders made by court commissioners.

It is notable that U.C.A. §78-3-31 (as amended) does not provide that commissioners may enter final orders. Furthermore, the URCP Rule 7(g) states:

Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

The rule does not state that a judge should not sign a proposed order arising from a hearing held before a court commissioner until such time as any outstanding objections to the recommendation have been fully resolved. The language clearly implies or requires the opposite: “A recommendation of a court commissioner is the order of the court until modified by the court.” *Id.* Therefore, judges can and do sign proposed orders arising from hearings before commissioners, though a judge may later sustain the objection and change or vacate the recommendation.

Commissioners are quasi-judicial officers, but have no real judicial power. The lead case on point is Salt Lake City v. Ohms, 881 P.2d 844, 850 (Utah 1994), in which the criminal defendant, Ohms, signed a waiver and consent form prior to being tried for class B and C misdemeanor charges which, among other things, consented to him being tried before a Circuit Court Commissioner. Ohms was convicted at that trial by then

Circuit Court Commissioner Sandra Peuler. Ohms appealed that conviction on the basis that the commissioner lacked authority to enter final judgement against him. The Court of Appeals agreed with Ohms and dismissed the conviction. On certiorari to the Supreme Court, this Court upheld that decision, stating that “[w]hile court commissioners, as ‘quasi-judicial officers,’ under Utah Code Ann. §78-3-31(1)(a) (1992), may perform many important functions in assistance to courts of record, they are not duly appointed judges and thus may not exercise core judicial functions without violating article VIII of the Utah Constitution.” Commissioners’ roles are limited to select functions which include being allowed to “[c]onduct hearings with parties and their counsel present . . . for the purpose of submitting recommendations to the court.” Id. at 852.

Further, as stated in Holm v. Smilowitz, 840 P.2d 157, 167 (Utah Ct. App. 1992), “Utah commissioners have no authority to exercise ultimate judicial power[.]” Holm, further states, “Utah Code Ann. §78-3-31(9) (Supp. 1990) expressly provides that the rules governing commissioners shall establish the ‘types of orders commissioners may recommend,’ and the ‘types of relief commissioners may recommend,’ and also provide a ‘procedure for timely judicial review of the recommendations and orders made by court commissioners.” Id. at 167.

More recently, this court stated in Jones v. Utah Bd. of Pardons & Parole, 2004 Ut 53, ¶14 (Utah 2004), “In Ohms, we held that court commissioners in courts of record did not have the power to enter final judgments and to impose sentences on defendants in criminal misdemeanor cases.” Id. at 851. We characterized that power as a "core judicial function" and held that, in courts of record, only judicial officers appointed pursuant to

article VIII could exercise it” and further: “The statutory grant of authority to court commissioners exceeds constitutional limits “to the extent that it purports to vest ultimate judicial power in courts of record in persons who have not been duly appointed as article VIII judges.” State v. Thomas, 961 P.2d at 299, 302 (quoting Ohms, 881 P.2d at 855).” Id at Jones, 2004 Ut at ¶ 17.

Many of the core elements that are critical to an accurate Schoolcraft analysis were contained in the vacated recommendation of Commissioner Michael S. Evans. The Court of Appeals relied heavily upon the Commissioner’s recommendations, which was vacated by Judge Medley. Those recommendations and vacated order included a finding that Pete’s presence was disruptive to Zachary’s stability. The Court of Appeals discusses that and other findings of the Commissioner at length. Clearly it significantly impacted their opinion. Upon Subsequent to Pete and Kim’s filing of the Objection to Commissioner’s Evans recommendation, Judge Medley made a careful analysis of the Schoolcraft factors. With the assistance of Dr. Jill Sanders, Judge Medley found contrary to the Commissioner’s recommendation, that Pete’s presence in Zachary’s life was not disruptive to Zachary’s stability. (R. 1730, ¶ 18.) Nowhere does the analysis on the Court of Appeals recognize this distinction between the recommendations of the Commissioner, which were vacated, and those of Judge Medley. The Court of Appeals, has mistakenly attributed the Commissioner’s recommendations to that Judge Medley. That mistake was critical to their decision. Judge Medley never found that the “Father was the “psychological father of [Zachary],” that Zachary had “become closely bonded with [Father],” and that those bonds were “critical.” Judge Medley never “found as a factual

matter that to permit Thanos "to establish his paternity of [Zachary] and to be introduced at this point as a father figure in [Zachary's] life would be immediately disruptive to the child's stability." as was stated in Paragraph 26 of the Pearson v. Pearson decision.

Because the Court of Appeals has relied, erroneously, on a vacated Recommendation of a Commissioner, and elevated those recommendations above the reasoned Findings of Judge Medley, the Court of Appeals decision is unconstitutional and contrary to the statutory law of the State of Utah and should be reversed.

### **III. THE COURT OF APPEALS OPINION WAS AMBIGUOUS AND THE COURT SHOULD HAVE GRANTED THANOSES' PETITION FOR REHEARING.**

The issues considered by the Court of Appeals were essentially (1) whether Pete should be allowed to intervene in this case in order to assert his parental rights in Zachary and (2) whether the trial court's awards of custody and parent-time should be sustained on appeal. The Court of Appeals ruled that Pete did not have standing to intervene. The Opinion is almost entirely devoted to that issue. The Court said practically nothing about the propriety of the trial court's decision concerning custody and parent-time. Because of the lack of direction the Thanoses petitioned the Court of Appeals to modify its Opinion to inform the trial court whether Judge Medley's Findings, Conclusions and Decree, as they relate to custody and parent-time, were proper and, if they were not, to inform the trial court whether it could even consider Zachary's biological relationship to his sister and his father in fashioning new custody and parent-time rules.

The Opinion, as it stands, lends itself to two interpretations concerning the

admissibility of evidence regarding the biological relationship between the Pete and Zachary: (a) the evidence was not admissible for any purpose, including the determination of custody and parent-time or (b) the evidence was only inadmissible as to the issue of whether Pete would be permitted to intervene.

The Court of Appeals should have granted the Petition for Rehearing and ruled that it was proper for the trial court to have considered Pete's relationship to Zachary in awarding primary custody of the child to Kim and Pete. The Court of Appeals denied that petition. As a result the Opinion remains ambiguous on this critical issue.

**A. It was Proper for the Trial Court to Consider the Biological Relationship of Zachary to His Father and His Sister in Awarding Custody and Parent-Time.**

The trial court found that Pete is the biological father of Zachary (R. 1746, ¶ 1.) Kelly did not propose a contrary finding to the trial court or assign that finding as error in his Docketing Statement to the Court of Appeals. Neither did Kelly contest that finding in his brief to that court. Thus, the finding of a biological relationship between Zachary and his father is an established fact in this case. Coon v. Utah Construction Co., 228 P.2d 997, 998 (Utah 1951) (where findings of fact are not asserted only conclusions of law are reviewed); Dumas v. Gagner, 971 P.2d 17, 24 (Wash. 1999) (because appellant assigned no error to any findings, they are accepted as verities); and Doe IV v. Roe IV, 535. 544 (Haw. Ct. App. 1985) (failure of appellant to assign particular finding as error makes it binding on him).

What is unclear is whether the Court of Appeals intended to rule that the trial court erred in taking biological relationships into account in apportioning custody and parent-time rights between Kelly and Kim. To put the matter differently, the Opinion does not inform the trial court whether the fact that Kim is married to Zachary's biological father or whether Zachary's biological sister lives with the Thanoses, may be considered by the trial court in awarding custody and parent-time.

The Court of Appeals stated, at footnote 8 of its Opinion, that its conclusion that Zachary has no particular need for the establishment of paternity by Mr. Thanos is not "inconsistent with Dr. Sanders' assessment that Thanos has a potentially valuable role to play in Zachary's life." (Addendum 18.) The quoted language implies that the trial court could consider the biological relationship between Zachary and Pete. By contrast, the Court of Appeals appears to have rejected the importance of Pete's paternity when it stated that "[o]ther aspects of the trial court's supplemental decree of divorce also rely, explicitly or implicitly, on Thanos' paternity of Zachary and these aspects of the final order are also erroneous and must be reversed, as appropriate." (Addendum 18, ¶ 14)

The Opinion is largely based upon the Court of Appeals' determination that the Judge Medley misapplied Schoolcraft in granting Pete leave to intervene; however, the Court of Appeals did not determine that any of the trial court's findings were "clearly erroneous" or so "flagrantly unjust as to be an abuse of discretion," the standards which must be met to overturn Judge Medley's findings in the case. Thus the Opinion implies that the finding of paternity was proper, but fails to inform the trial court whether that finding is relevant to its custody determination. This Court should remedy the ambiguity

of the Opinion by ruling that the trial court properly relied upon its findings and upon the Child Custody Evaluation of Dr. Jill Sanders in the award of custody and parent-time.

**B. It was Proper for the Custody Evaluator to Consider the Biological Relationship of Zachary to His Father and His Sister.**

The trial court relied heavily on the Child Custody Evaluation (hereafter “the Evaluation”) (Addendum 14) prepared by Dr. Jill D. Sanders. It referred to Dr. Sanders’ Evaluation with approval in its findings. (See Findings 33 and 34. R. 2448-2450.) Judge Medley rejected an attack on the Evaluation by Mr. Pearson’s experts (Findings 36, 37; R. 2453-2454 ¶ 37) and it adopted most of Dr. Sanders’ recommendations. (See Findings 44 and 47, R. 2456, ¶ 44, 2458-59. ¶47). Evaluation recommendations 1 and 2, Exhibit P-5, pp. 12-13).

The Evaluation addresses the biological relationship of Pete and Zachary in its introductory paragraph:

Kelly Pearson, Kimberlee Thanos (formerly Pearson) and Peter Thanos have been unable to come to agreement regarding a parenting plan for Nicholas and Zachary Pearson. Nicholas is Kimberlee and Kelly’s biological child. *Zachary is Peter and Kimberlee’s biological child* born during her marriage to Kelly Pearson. Kimberlee and Peter Thanos are now married, reside in Oregon and *have an infant daughter together...*

(Emphasis added.)

As required by C.J.A. Rule 4-903(5)(E)(vii) Dr. Sanders considered “kinship” in her report. Accordingly, she states at page 10 of her Evaluation:

Kinship, including, in extraordinary circumstances, stepparent status: Peter and Kimberlee are Zachary’s biological parents. Kelly and Kimberlee are Nicholas’ biological parents. Kelly



is Zachary's psychological father at present, Nicholas and Zachary have a very strong attachment to Peter.

(Exhibit P-5, p. 10, Addendum 14.)

In this case, Dr. Sanders prepared three reports for the trial court. They are dated, respectively, May 13, 2002, August 26, 2002 and November 3, 2003. The first two reports (Addenda 10 and 11) addressed only the issue of Pete's intervention and have been referred to as the Schoolcraft reports. The last of Dr. Sanders' reports is the Child Custody Evaluation, dated November 3, 2003. It addresses the issues of custody and parent-time and is the type of report contemplated by C.J.A. Rule 4-903. (See Addendum 14.)

The Opinion refers to Dr. Sanders' two Schoolcraft reports, but makes no mention of her Custody Evaluation. It is therefore unclear whether the Court of Appeals direction to Judge Medley is that he should disregard all or any portion of Dr. Sanders' testimony and evaluation concerning custody and parent-time or even order a new evaluation.

If the Opinion rejects Dr. Sanders' report and recommendation, based upon her consideration of the kinship between Zachary and Pete or Zachary and his sister, it does so in contradiction to C.J.A. Rule 4-903 and to the decision of this court in the case of Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982), which states that "kinship" is one of those factors to be considered in determining the best interest of a child.<sup>2</sup> Rule 4-903 and Hutchison support the conclusion that it was proper for the custody evaluator to take the biological relationships between Zachary and Pete and between Zachary and his sister

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<sup>2</sup> BLACK'S LAW DICTIONARY (8<sup>th</sup> 2004) at p. 887 defines "kinship" as meaning a "[r]elationship by blood, marriage or adoption."

into account in the formulating of her recommendations concerning custody and parent-time.

**C. The Trial Court’s Determination of Custody and Parent-Time Should be Based Upon the Best Interests of Nicholas and Zachary.**

The Court of Appeals Opinion might be read as a rejection of the “best interests” test for determining custody and parent-time. Utah Code Ann. §30-3-10(1)(a) mandates the consideration of the “best interests of the child” in determining custody. Utah Code Ann. §30-3-34(1) requires the consideration of the “best interests of the child” in the allocation of parent-time. In its decision in Hutchison v. Hutchison, *supra*, this Court stated that “kinship” could be considered in the “best interests” analysis. 649 P.2d at 41. Neither §30-3-10 and §30-3-34 nor Hutchison require the trial court to balance the “best interests” of the children against the rights of the parents. Nonetheless, footnote 7 of the Opinion appears to adopt such a balancing test. That footnote reads as follows:

We are aware that disregarding Dr. Sanders’ conclusions regarding Zachary’s best interests seems counterintuitive in the central role that the best interests standard plays in every case involving juveniles. Nevertheless, in the context of determining standing to contest paternity, the Schoolcraft test is the standard set by the Supreme Court to measure the child’s best interests as those interests balance against the rights of others.

(Emphasis added.)

There are two problems with the footnote: first, it mischaracterizes Schoolcraft. That decision did not deal with the best interests of the child in a custody or parent-time dispute. The issue in the case was whether J.W.F.’s mother’s husband at the time of the child’s birth, Mr. Schoolcraft, had standing to assert the claim that it was in the child’s

best interests that he have custody. This Court concluded that Mr. Schoolcraft had standing to assert a claim for custody and remanded the case to the trial court “for a hearing to determine whether it would be in the best interest of J.W.F. for Schoolcraft to have custody.” Schoolcraft at 716. The “best interests” of the child were not considered by this Court in the determination of standing in Schoolcraft; rather, the factors which it considered were preservation of the stability of the marriage and protection of the child from a disruptive and unnecessary attack upon his paternity, the standards discussed by the Court of Appeals in its Opinion.

Second, this Court did not apply a balancing test or a best interest test in the decision. Once it determined that Mr. Schoolcraft had standing to seek custody of the child, it remanded the case to the trial court to determine “whether it would be in the best interest of J.W.F. for Schoolcraft to have custody,” not to balance the best interests of J.W.F. against the rights of Schoolcraft.

Simply put, the Court of Appeals Opinion is wrong. Schoolcraft doesn’t require that the trial court base its decision concerning intervention on a comparison of the rights of Pete with the rights of others, be they those of Zachary or Kelly. The Opinion is also wrong insofar as it disregards the undisputed findings of the trial court concerning the best interests of Zachary and Nicholas.

### CONCLUSION

The Court of Appeals has deviated substantially from accepted law in the State of Utah regarding the rights of a putative biological father to have standing to establish

protect those paternity rights. The Court of Appeals has misapplied and substantially deviated from the holding in In re J.W.F., which states that “in determining who can challenge the presumption of legitimacy, a paramount consideration should be preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks upon their paternity.” This Court stated in Schoolcraft that that analysis is not to be too mechanistic or insensitive to the policy considerations that arise from a challenge to paternity. The Court of Appeals, however, restrictively, mechanistically and insensitively interpreted both the first and second prong of the Schoolcraft test and by doing so, has created an artificial statute of limitations and stripped Pete of the constitutional rights guaranteed to him under the Utah and United States Constitutions. The Court of Appeals has also substituted its own findings for the carefully considered and supported findings of the trial court. Further, it has done so by erroneously relying upon a vacated order which was the recommendation of the Commissioner and not the findings of the trial court. If this Court upholds the Court of Appeals opinion, it will eviscerate the holding of Schoolcraft, deny Pete his constitutional rights and leave other putative fathers and their children without a means to establish, nurture and maintain that parent/ child relationship.

Based upon the foregoing, Pete and Kim Thanos respectfully request that this Court reverse the opinion of the Utah Court of Appeals and reinstate the decision of the Honorable Tyrone E. Medley.

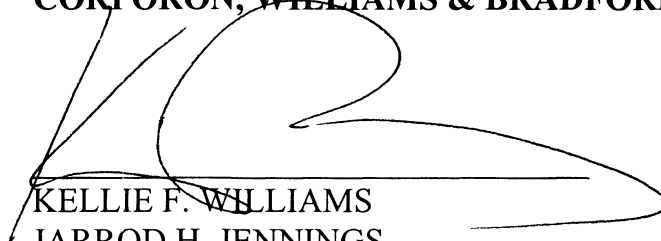
## ADDENDUM

- (1.) Order
- (2.) Constitution of United States, Article III, Section 1
- (3.) Constitution of United States, Amendment V
- (4.) Constitution of Utah, Article I, Section 7
- (5.) Constitution of Utah Article VIII, Sections 1, 4
- (6.) Utah Code Ann. §30-3-10(1)(b)
- (7.) Utah Code Ann. §78-45a-10(3)(a)(Repealed 2005)
- (8.) Utah Code Ann. §78-45a-10.5 (2002) (Repealed 2005)\
- (9.) In re J.W.F., 799 P.2d 710 (Utah 1990)
- (10.) Dr. Sanders' Report - 5/13/2002
- (11.) Dr. Sanders' Report - 8/26/2002
- (12.) Findings of Fact and Conclusions of Law in re: Motion for Intervention
- (13.) Order Granting Intervention of Peter Thanos
- (14.) Findings of Fact and Conclusions on Petitioner's Motion for Summary Judgment and Intervenor's Motion for Partial Summary Judgment
- (15.) Dr. Sanders' Custody Evaluation
- (16.) Findings of Fact and Conclusions of Law
- (17.) Supplemental Decree of Divorce
- (18.) Court of Appeals Opinion
- (19.) Order

(20.) Order on Motion to Intervene


DATED this 7<sup>th</sup> day of September 2006.

**CORPORON, WILLIAMS & BRADFORD, P.C.**



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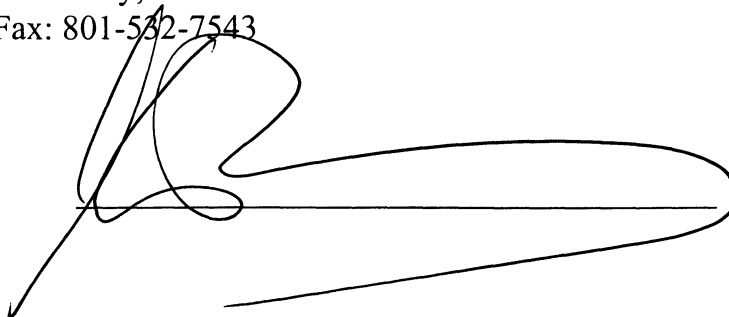
STEVEN H. GUNN  
Attorney for Respondent/Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of September 2006, I caused a true and correct copy of the foregoing to be [ ] mailed, postage prepaid, ☒ hand-delivered, [ ] sent via facsimile to:

PAIGE BIGELOW  
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A large, stylized handwritten signature in black ink, likely belonging to Steven Gunn, is written over a horizontal line.

Tab 1



IN THE SUPREME COURT OF THE STATE OF UTAH  
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FILED  
UTAH APPELLATE COURTS

JUL 21 2006

Kelly F. Pearson,

Respondent,

v.

Case No. 20060563-SC  
20040677-CA

Kimberlee Y. Pearson,

Petitioner.

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Pete S. Thanos,

Intervenor and Petitioner.

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**ORDER**

This matter is before the court upon a Petition for Writ of certiorari, filed on June 19, 2006.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the court of appeals erred in its interpretation and application of the "Schoolcraft" analysis set forth by this Court in In re J.W.F., 799 P.2d 710 (Utah 1990).

2. Whether the court of appeals inappropriately relied on the district court commissioner's recommendations.

3. Whether the court of appeals erred in denying the petition for rehearing.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits.

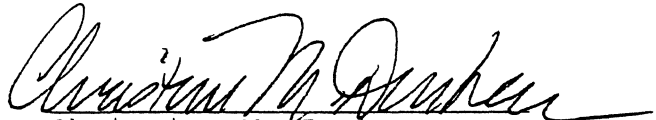
The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

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For The Court:

Dated

July 21, 2006

  
Christine M. Durham  
Chief Justice

Tab 2

CONSTITUTION OF THE UNITED STATES OF AMERICA  
ARTICLE III. JUDICIAL POWER

USCS Const. Art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Tab 3

CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tab 4

**Article I, Section 7. [Due process of law.]**

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

No History for Constitution

Download Code Section Zipped WP 6/7/8 CO 02008.ZIP 1,567 Bytes

[Sections in this Chapter](#)[|Chapters in this Title](#)[|All Titles](#)[|Legislative Home Page](#)

*Last revised: Monday, May 16, 2005*



## Tab 5

**Article VIII, Section 1. [Judicial powers -- Courts.]**

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

No History for Constitution

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*Last revised: Monday, May 16, 2005*

**Article VIII, Section 4. [Rulemaking power of Supreme Court -- Judges pro tempore -- Regulation of practice of law.]**

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

No History for Constitution

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*Last revised: Monday, May 16, 2005*

Tab 6

**30-3-10. Custody of children in case of separation or divorce -- Custody consideration.**

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent;

(iii) the extent of bonding between the parent and child, meaning the depth, quality, and nature of the relationship between a parent and child; and

(iv) those factors outlined in Section 30-3-10.2.

(b) The court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child.

(c) The children may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the children be heard and there is no other reasonable method to present their testimony.

(d) The court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the children's custody or parent-time otherwise. The desires of a child 16 years of age or older shall be given added weight, but is not the single controlling factor.

(e) If interviews with the children are conducted by the court pursuant to Subsection (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with the children is the only method to ascertain the child's desires regarding custody.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) Except as provided in Subsection (4)(b), a court may not discriminate against a parent due to a disability, as defined in Section 57-21-2, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising from the disability by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the

child at issue.

(c) Nothing in this section may be construed to apply to adoption proceedings under Title 78, Chapter 30, Adoption.

(5) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

Amended by Chapter 314, 2006 General Session

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[Sections in this Chapter](#)[|](#)[Chapters in this Title](#)[|](#)[All Titles](#)[|](#)[Legislative Home Page](#)

*Last revised: Thursday, June 15, 2006*

Tab 7

## Utah Code Ann. § 78-45a-10

4 of 6 DOCUMENTS

## UTAH CODE ANNOTATED

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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 \*\*\*

\*\*\* AND JANUARY 27, 2005 (FEDERAL CASES) \*\*\*

TITLE 78. JUDICIAL CODE  
PART IV. PARTICULAR PROCEEDINGS  
CHAPTER 45a. UNIFORM ACT ON PATERNITY

*Utah Code Ann. § 78-45a-10 (2004)*

## § 78-45a-10. Effect of genetic test results

(1) Genetic test results shall be admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy if:

(a) of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of Health and Human Services;

(b) performed by a laboratory approved by such an accreditation body; and

(c) not objected to with particularity and in writing within 15 days after the written test results being sent to the parties.

(2) (a) Upon a motion of a party, a court may receive testimony from genetic testing experts and others involved in conducting the genetic tests if the testimony:

(i) is based on a genetic test performed in accordance with Subsection 78-45a-7(3)(a) or 78-45a-7(4); and

(ii) is useful to the court in determining paternity.

(b) Unless a party objects with particularity and in writing within 15 days after the written test results are sent to the last-known address of that party on file under Section 78-45a-2, testimony received under Subsection (2)(a) shall be in affidavit form.

(3) (a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150.

(b) A presumption under Subsection (3)(a) may only be rebutted by a second genetic test:

(i) that complies with Subsection 78-45a-7(4); and

(ii) results in an exclusion.

(4) If a presumption of paternity established under Subsection (1) is not rebutted by a second genetic test under Subsection (2), the court shall issue an order establishing paternity.

(5) Bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

**HISTORY:** C. 1953, 78-45a-10, enacted by L. 1997, ch. 232, § 78.

**NOTES:**



## Utah Code Ann. § 78-45a-10

REPEALS AND REENACTMENTS. --Laws 1997, ch. 232, § 78 repeals former § 78-45a-10, as amended by Laws 1992, ch. 160, § 4, prescribing the effect of genetic test results, and enacts the present section, effective July 1, 1997.

CROSS-REFERENCES. --Court appointment of expert witnesses, U.R.E. 706.

## NOTES TO DECISIONS

## ANALYSIS

Human leukocyte antigen test.

-- Admissibility.

-- Expert witness.

-- Standards.

Right to tests.

-- Divorce action.

## HUMAN LEUKOCYTE ANTIGEN TEST.

## -- ADMISSIBILITY.

Former section did not preclude the admissibility of human leukocyte antigen (HLA) test results if the test otherwise met the relevant legal standards for the admission of scientific evidence; such test results were not admitted as evidence when the party submitting the test results failed to establish an adequate foundation at trial for their admissibility. *Phillips ex rel. Utah State Dep't of Social Servs. v. Jackson*, 615 P.2d 1228 (Utah 1980).

The basic principles upon which human leukocyte antigen tests for determining paternity are founded have now received general acceptance in the scientific community and are admissible if specified standards are met. *Kofford v. Flora*, 744 P.2d 1343 (Utah 1987).

## -- EXPERT WITNESS.

To assist the trier-of-fact in understanding the highly technical human leukocyte antigen test results and the accompanying statistical probabilities the results generate, the testimony of a qualified expert witness is required, and the proper foundation must be laid in order to qualify this witness and permit his testimony and the test to be admitted. *State ex rel. State Dep't of Social Servs. v. Woods*, 744 P.2d 315 (Utah Ct. App. 1987) (holding proper foundation shown).

## -- STANDARDS.

Standards for admission of human leukocyte antigen tests held not to have been satisfied. See *Martinez v. Lovato*, 744 P.2d 1364 (Utah 1987); *Salzetti v. Nichols*, 744 P.2d 1362 (Utah 1987).

## RIGHT TO TESTS.

## -- DIVORCE ACTION.

Husband denying paternity of child born during marriage was entitled to blood tests in divorce action. *Teece v. Teece*, 715 P.2d 106 (Utah 1986).

## COLLATERAL REFERENCES

UTAH LAW REVIEW. --Note, Establishing Paternity Through HLA Testing: Utah Standards for Admissibility, 1988 Utah L. Rev. 717. *Teece v. Teece*, 715 P.2d 106 (Utah 1986).

BRIGHAM YOUNG LAW REVIEW. --Note, *J.W.F. v. Schoolcraft*: The Husband's Rights to His Wife's Illegitimate Child Under Utah Law, 1989 B.Y.U. L. Rev. 955.

A.L.R. --Blood grouping tests, 43 A.L.R.4th 579.

## Tab 8

Utah Code Ann. § 78-45a-10.5

1 of 1 DOCUMENT

UTAH CODE ANNOTATED

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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 \*\*\*

\*\*\* AND JANUARY 27, 2005 (FEDERAL CASES) \*\*\*

TITLE 78. JUDICIAL CODE  
PART IV. PARTICULAR PROCEEDINGS  
CHAPTER 45a. UNIFORM ACT ON PATERNITY

*Utah Code Ann. § 78-45a-10.5 (2004)*

§ 78-45a-10.5. Parent-time rights of father

(1) If the court determines that the alleged father is the father, it may upon its own motion or upon motion of the father, order parent-time rights in accordance with Sections 30-3-32 through 30-3-37 as it considers appropriate under the circumstances.

(2) Parent-time rights may not be granted to a father if the child has been subsequently adopted.

**HISTORY:** C. 1953, 78-45a-10.5, enacted by L. 1994, ch. 29, § 1; 2001, ch. 255, § 35.

**NOTES:**

AMENDMENT NOTES. --The 2001 amendment, effective April 30, 2001, substituted "parent-time" for "visitation" throughout the section.

Tab 9

799 P.2d 710, \*; 145 Utah Adv. Rep. 17;  
1990 Utah LEXIS 76, \*\*

LEXSEE 799 P2D 710

**State of Utah in the Interest of J.W.F., a person under eighteen years of age. Winfield  
D. Schoolcraft, Petitioner**

**No. 890001**

**Supreme Court of Utah**

**799 P.2d 710; 145 Utah Adv. Rep. 17; 1990 Utah LEXIS 76**

**October 19, 1990, Filed**

**SUBSEQUENT HISTORY:**

[\*\*1] Released for Publication November 13, 1990.  
As Corrected.

**PRIOR HISTORY:** Second District, Weber County;  
The Honorable Robert L. Newey.

**DISPOSITION:**

The court of appeals' decision is reversed insofar as it states that Schoolcraft has no standing to petition for custody of J.W.F. We remand for a hearing to determine whether it would be in the best interest of J.W.F. for Schoolcraft to have custody.

**COUNSEL:**

Richard W. Jones, Ogden, for petitioner.

Martin W. Custen, Jane A. Marquardt, Ogden, for J.W.F.

R. Paul Van Dam, Sandra Sjogren, Paul M. Tinker, Diane Wilkins, Salt Lake City, for State of Utah.

**JUDGES:**

Zimmerman, Justice. Gordon R. Hall, Chief Justice, Richard C. Howe, Associate Chief Justice, I. Daniel Stewart, Justice, Christine M. Durham, Justice, concur.

**OPINIONBY:**

ZIMMERMAN

**OPINION:** [\*712]

On Certiorari to the Utah Court of Appeals

Winfield Schoolcraft seeks review of a decision of the court of appeals which held that the juvenile court acted correctly when it (i) determined that he has no parental rights in a child born to his wife during their marriage because he is not the biological father of the

child and (ii) declined to hold a hearing to determine whether it would be in the best interests of the child, J.W.F., [\*\*2] to place him in Schoolcraft's custody. We reverse the court of appeals' decision insofar as it indicates that Schoolcraft has no standing to petition for custody of J.W.F. and remand to the trial court for a hearing to determine whether it would be in the best interests of J.W.F. for Schoolcraft to have custody.

Winfield and Linda Schoolcraft were married on October 6, 1984. They lived together for approximately eight months after their marriage. The record is unclear as to the exact date on which Linda left Winfield, but it was seven months to one year prior to her giving birth to a son, J.W.F., in Utah on November 5, 1985. Linda abandoned J.W.F. on or about December 5, 1985.

A petition was filed by the State in the juvenile court on December 13, 1985, alleging neglect and abandonment by Michael Ford, the alleged natural father, and Linda Schoolcraft, the mother. The court appointed a lawyer, Jane Marquardt, as guardian ad litem on December 24, 1985. On February 19, 1986, the court found J.W.F. to be neglected and abandoned and placed him in the custody of the State Division of Family Services, where he has been ever since.

Winfield, who is still technically married to Linda, was living [\*\*3] in California and was unaware of the pregnancy. He found out about J.W.F.'s birth in August of 1986, when he learned of the neglect and abandonment petition that had been filed by that state in juvenile court in 1985. J.W.F. was about nine months old at the time. Winfield then promptly filed a petition for custody in juvenile court on August 28, 1986, alleging that he was the presumed father because he was married to Linda and was living with her at the time of conception.

A petition for permanent termination of the parental rights of Michael Ford and Linda Schoolcraft was filed on September 5, 1986, and on December 16, 1986, the guardian ad litem filed another petition, alleging that Winfield Schoolcraft had no legal rights to J.W.F. This

799 P.2d 710, \*; 145 Utah Adv. Rep. 17;  
1990 Utah LEXIS 76, \*\*

petition, seeking a determination that Winfield Schoolcraft had no rights in J.W.F., was based on an allegation by the guardian ad litem that Winfield was not the biological father of J.W.F. or, alternatively, that he was an unfit parent or had abandoned the child. After a hearing held on the two petitions, the court entered an order permanently depriving Michael Ford and Linda Schoolcraft of their parental rights. Both Winfield Schoolcraft's petition [\*\*4] for custody and the guardian ad litem's petition to terminate Winfield's legal rights were continued to February 10, 1987.

On February 10th, the trial court entered a memorandum decision finding that Winfield Schoolcraft was not the biological father of J.W.F. and concluding that he had no right to custody. In essence, because Schoolcraft was not the child's natural father, the trial court denied Schoolcraft standing to assert a claim that it was in the child's best interests that he have custody. The court continued J.W.F.'s placement in the Utah State Division of Family Services for the purpose of finding suitable adoptive parents. Nothing in the record indicates that anyone is waiting to adopt J.W.F. at this time. The court of appeals affirmed the trial court's decision. We granted certiorari to review the court of appeals' decision.

The central question before us is what rights, including custodial rights, a husband has in a child born into his marriage who is not his biological offspring. Before addressing this question, several preliminary issues must be dealt with.

First, the court of appeals held that the trial court properly permitted the guardian ad litem to challenge the [\*\*5] presumption that a child born during a marriage is the husband's natural child, relying on our decision [\*713] in *Teece v. Teece*, 715 P.2d 106, 107 (Utah 1986), and *Holder v. Holder*, 9 Utah 2d 163, 164-66, 340 P.2d 761, 762-63 (1959). The court of appeals reasoned that the guardian is the representative of the child and the child is an indispensable party to the proceeding with independent interests to assert. *In re J.W.F.*, 763 P.2d 1217, 1221 (Utah Ct. App. 1988). Schoolcraft attacks this ruling. He argues that in order to preserve the sanctity of the marriage relationship, only the wife and the husband should be permitted to challenge the legitimacy of a child born into their marriage. If Schoolcraft is correct, then the trial court erred in permitting the guardian ad litem to challenge Schoolcraft's paternity and Schoolcraft is entitled to a legal presumption that he is J.W.F.'s father.

We find the court of appeals' analysis on this point to be too mechanistic and, consequently, insufficiently sensitive to the legitimate policy considerations Schoolcraft raises. However, we find Schoolcraft's approach similarly flawed. We agree that, as a general matter, the class of persons [\*\*6] permitted to challenge the presumption of paternity should be limited, as he argues, but we reject the notion that the legal status of the

prospective challenger is the only relevant factor, as the court of appeals held. In determining who can challenge the presumption of legitimacy, a paramount consideration should be preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks upon their paternity. See *Lopes v. Lopes*, 30 Utah 2d 393, 395, 518 P.2d 687, 689 (1974); *Holder v. Holder*, 9 Utah 2d at 165, 340 P.2d at 763. This leads us to conclude that whether individuals can challenge the presumption of legitimacy should depend not on their legal status alone, but on a case-by-case determination of whether the above-stated policies would be undermined by permitting the challenge. n1

n1 Three Utah cases dealing with standing to challenge a child's legitimacy are consistent with this approach. In *Teece v. Teece*, 715 P.2d 106 (Utah 1986), *Roods v. Roods*, 645 P.2d 640 (1982), and *Lopes v. Lopes*, 30 Utah 2d 393, 518 P.2d 687 (1974), the court allowed both the husband and the wife to challenge the presumption of legitimacy, but in each of these cases, no reason existed to deny them standing because the stability of their marriage had already been shaken.

[\*\*7]

Applying these criteria to the present case, we reach the same result as the court of appeals, albeit for different reasons. The guardian ad litem was representing the child, one not disinterested in the issue, because his custody, rather than his mere technical legitimacy, is at issue. Moreover, allowing the State or J.W.F. to challenge the presumption of legitimacy is not inconsistent with the relevant policy considerations. The stability of the marriage between Winfield and Linda Schoolcraft was shaken long ago, and their marriage is one in name only. Similarly, J.W.F.'s expectations as to who his father is cannot be shaken by permitting a challenge to the presumption of legitimacy. The child has never had a relationship with Schoolcraft, Michael Ford, or even his mother, so he has no expectations as to who his father is. Having considered the legal status of the challenger and the relevant policies that bear on the question, we conclude that the guardian ad litem was properly granted standing to challenge the presumption of legitimacy in this case.

A second claim Schoolcraft raises is that the court of appeals improperly found the presumption of legitimacy to have been rebutted [\*\*8] in this case. In Utah, "the presumption of legitimacy will prevail unless the contrary is proved beyond a reasonable doubt." *Holder*, 9 Utah 2d at 166, 340 P.2d at 763. And, consistent with the historically strong policies that underlie that presumption, the form of proof admissible to rebut the

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1990 Utah LEXIS 76, \*\*

presumption is limited. One of these limits that is part of our common law is "Lord Mansfield's rule." n2 As stated by this court, the rule is that "spouses themselves may not give testimony which would [\*714] tend to illegitimize the child." *Lopes*, 30 Utah 2d at 395, 518 P.2d at 689. "The proof of such facts where necessary [must] come from other sources." *Id.* at 396, 518 P.2d at 689.

In Utah, the legislature has not abrogated Lord Mansfield's rule, but has specified that certain nontraditional evidence is capable of conclusively rebutting the presumption of legitimacy. In *Teece v. Teece*, 715 P.2d 106, 107 (Utah 1986), the court observed that Lord Mansfield's rule has been substantially eroded by the enactment of section 78-25-18 of the code, which expressly mandates that courts utilize blood tests to assist in making a determination of paternity. Section 78-25-18 provides: "In [\*9] any civil action or in bastardy proceedings in which the parentage of a person is a relevant fact, the court shall order the child and alleged parents to submit to blood tests." *Utah Code Ann.* § 78-25-18 (1987). Section 78-25-21 states: "The results of the [blood] tests shall be received in evidence where the conclusion of all examiners, as disclosed by the tests, is that the alleged father is not the actual father of the child, and the question of paternity shall be so resolved." *Utah Code Ann.* § 78-25-21 (1987 & Supp. 1990).

n2 *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Reprint 1257 (1777), wherein 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."

The trial court found that it was scientifically impossible for Schoolcraft to be J.W.F.'s father based on blood tests and testimony by Dr. Charles DeWitt regarding the results of the blood tests. This is consistent with sections 78-25-18 [\*10] and 78-25-21. The court also relied on the fact that J.W.F. is partly of African ancestry while Winfield and Linda Schoolcraft are both of Anglo-Saxon ancestry.

The court of appeals, however, affirmed the trial court's paternity finding on alternate grounds, i.e., Schoolcraft's concession on appeal that he is not the biological father of J.W.F. This was error because in relying on Schoolcraft's concession, the court relied on evidence that contravenes Lord Mansfield's rule. n3 This does not mean that the presumption of legitimacy was not effectively rebutted, however. We conclude that the evidence before the trial court was sufficient to support its conclusion that the presumption of paternity was

rebutted beyond a reasonable doubt. We therefore affirm that portion of the court of appeals' ruling for the reasons given [\*11] by the trial court.

n3 See Note, *J.W.F. v. Schoolcraft: The Husband's Rights to His Wife's Illegitimate Child Under Utah Law*, 1989 B.Y.U. L. Rev. 955, for a reflective and instructive analysis of court of appeals' decision.

Having found that the guardian ad litem had standing to raise the issue and that the presumption of paternity was successfully rebutted, we next consider the question of whether Schoolcraft has any protectable custodial interest with respect to J.W.F., a child not biologically his, born to his wife during their marriage. Schoolcraft argues that he is J.W.F.'s legal father because of his relationship with Linda. Therefore, his parental rights, including his right to custody, cannot be terminated without a showing of unfitness. The court of appeals rejected this argument. It stated that once the presumption that a child born during a marriage is the husband's child is rebutted, the husband is not the child's legal father. In such a circumstance, the court of appeals reasoned, the husband has no financial obligation of support toward the child and therefore has no rights with respect to the child, including custodial rights. *In re J.W.F.*, 763 P.2d 1217, 1222 (Utah Ct. App. 1988).

Again, we find this analytical approach to be too mechanical. It may be that no one has the same rights toward a child as his or her parents. See *Wilson v. Family Services Div., Region Two*, 554 P.2d 227, 230 (Utah 1976). [\*12] However, the fact that a person is not a child's natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned. Certain people, because of their relationship to a child, are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody. See *id.*

[\*715] We conclude that several factors may justify granting a person standing to petition for custody of a child. As the court of appeals noted, the legally enforceable financial obligations that a person has toward a child may suffice to give that person standing to seek custody. However, the grant of standing cannot be determined solely by reference to legal support obligations. Equally important is the person's status or relationship to the child. Even if a person has no legal duty of support to a child, that person's legal relationship to the child may suffice for standing. Examples include close relatives, who, although lacking a duty of support, may be perceived by reason of that relationship to have the child's best interests at heart. Such a relationship would seem to warrant [\*13] a grant of standing. n4

799 P.2d 710, \*; 145 Utah Adv. Rep. 17;  
1990 Utah LEXIS 76, \*\*

n4 In addition, it is conceivable that persons who are not related by blood or marriage, although not presumptively entitled to standing, could show that they had a relationship with the child that would warrant a grant of standing. We have no such situation before us today.

Our cases recognize the right of relatives other than parents to have standing to seek custody. In *Wilson v. Family Services Division Region Two*, 554 P.2d 227 (Utah 1976), a grandmother sought to restrain family services from placing her grandchild, who was parentless, out for adoption until she could have a hearing on her own fitness as custodian and/or adoptive parent. The court stated that while only parents have vested rights to the custody of children, "next of kin, such as this grandmother, do have some dormant or inchoate right or interest in the custody and welfare of the children who become parentless, so that they may come forward and assert their claim." *Wilson*, 554 P.2d at 231. According to *Wilson*, [\*\*14] inchoate rights entitle the relative to standing to such a hearing to determine custodial fitness.

A similar standing result obtained in a Utah divorce case, where this court held that a stepparent has the right to have a hearing to determine whether it is in the child's best interest to grant the stepparent visitation rights. *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). n5 In a custody case, we stated that in "custody matters, all things else being equal, near relatives should generally be given preference over non-relatives." *In re Cooper*, 17 Utah 2d 296, 298, 410 P.2d 475, 476 (1966). And in yet another case, this court said that when determining the best interests of the child, a court may consider stepparent status. *Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982).

N5 The court in *Gribble* actually required that the stepparent stand in loco parentis to the child before he would be granted a hearing. The court was interpreting *Utah Code Ann. § 30-3-5* (1953), as amended, which stated that, "visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child." The court said that in order for a stepparent to get visitation rights, he must, therefore, "stand in the relationship of parent, grandparent, or other relative to this child." *Gribble*, 583 P.2d at 66. The court indicated that if Utah had a statutory provision obligating the stepparent to support the child, the stepparent would have the same status as a parent or at least a relative and would be entitled to a hearing on

visitation. However, because no such statute existed at the time, the court required the stepparent to stand in loco parentis to the child.

Utah has since enacted the Uniform Civil Liability for Support Act, section 78-45-4.1, which requires a stepparent to support his or her spouse's children. See *Utah Code Ann. § 78-45-4.1* (1987). According to the court's rationale, then, a stepparent, regardless of whether he or she stands in loco parentis to the child, is to be treated as a relative of the child and is entitled to a hearing to determine whether it would be in the best interests of the child to grant the stepparent visitation rights.

[\*\*15]

Utah statutes also support the right of relatives other than parents to standing to seek custody. The legislature has allowed visitation rights for grandparents and other relatives. Section 30-5-2 of the code states that the court "may grant grandparents reasonable rights of visitation to grandchildren, if it is in the best interest of the grandchildren." *Utah Code Ann. § 30-5-2* (1989). In addition, in divorce decrees, when "determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child." *Utah Code Ann. § 30-3-5(4)* (1989). [\*716]

Based on the foregoing, we conclude that Schoolcraft has standing to seek custody of J.W.F. First, he is J.W.F.'s stepparent. A stepparent is defined as "a person ceremonially married to the child's natural or adoptive custodial parent who is not the child's natural or adoptive parent." *Utah Code Ann. § 78-45-2(6)* (Supp. 1990). Our case law indicates that the stepparent relationship Schoolcraft shares with J.W.F. is sufficient to entitle him to a hearing on custody. *Hutchison*, 649 P.2d at 41; see also *Gribble*, 583 P.2d at 64.

In addition, Schoolcraft has the legal obligation of support that [\*\*16] the court of appeals thought indispensable to confer standing. The court of appeals was incorrect when it said that Schoolcraft has no legal obligation to J.W.F. As a stepparent, Schoolcraft has the obligation to "support a stepchild to the same extent that a natural . . . parent is required to support a child" so long as the stepparent's marriage to the natural parent continues. *Utah Code Ann. § 78-45-4.1* (1987). In light of Schoolcraft's stepparent relationship with J.W.F. and his legal support obligation, we find dual grounds for granting him standing to seek a hearing on whether it would be in the best interests of J.W.F. for him to have custody.

There is no reason to narrowly restrict participation in custodial proceedings. Indeed, our case law and the legislature's pronouncements indicate that the interests of



799 P.2d 710, \*; 145 Utah Adv. Rep. 17;  
1990 Utah LEXIS 76, \*\*

the child are best served when those interested in the child are permitted to assert that interest. The question of who should have custody of the child is too important to exclude participants on narrowly drawn technical grounds, as did the court of appeals. Those who have legal or personal connections with the child should not be precluded from being heard on best interests. [\*\*17] Of course, granting Schoolcraft a hearing on best interests does not mean that he has any presumption of entitlement of custody. The court still must determine what custody arrangement would serve the best interests of J.W.F. and act accordingly. Utah Code Ann. § 78-3a-39(13)(b) (Supp. 1990); accord *Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1250-51 (Utah 1987); *Hutchison*, 649 P.2d at 40; *Gribble*, 583 P.2d at 66.

Schoolcraft raises two other issues: whether the presumption of paternity is irrebuttable and whether the juvenile court had jurisdiction to determine the issue of Schoolcraft's paternity. Both of these issues have been addressed adequately by the court of appeals and will not be discussed here. *In re J.W.F.*, 763 P.2d 1217, 1219-22 (Utah Ct. App. 1988).

The court of appeals' decision is reversed insofar as it states that Schoolcraft has no standing to petition for custody of J.W.F. We remand for a hearing to determine whether it would be in the best interest of J.W.F. for Schoolcraft to have custody.

Tab 10

**EVALUATION REPORT – Pearson v. Pearson/Thanos**  
**Schoolcraft (State of Utah, Supreme Court Case No. 890001) Policy Considerations**

**IDENTIFYING INFORMATION:**

Kelly F. Pearson (Petitioner) vs. Kimberlee Y. Pearson (Respondent)/  
Peter D. Thanos (Intervenor)  
Case No. 004907881  
Judge Tyrone Medley  
Third Judicial District Court, Salt Lake County, State of Utah

Child in Question: Zachary Pearson (DOB: 9-14-99)

Attorneys: Paige Bigelow (Petitioner), Steven H. Gunn (Respondent), Kellie F. Williams  
(Intervenor)

Evaluator: Jill D. Sanders, Ph.D., Clinical Psychologist

Dates of Evaluation: 4-9-02, 4-12-02, 5-6-02, 5-10-02

Date of Report: May 13, 2002

**REASON FOR REFERRAL:**

Judge Medley has requested me to provide information and opinions to assist the Court in ruling on Mr. Thanos' intervention to establish paternity. Specifically, the Court has determined that the criteria outlined in State of Utah in the Interest of J.W.F., a person under eighteen years of age, Winfield D. Schoolcraft are applicable to this case. The Court has requested an evaluation (independent of the previously ordered custody evaluation involving these parties) related to the Schoolcraft policy of "protecting children from disruptive and unnecessary attacks on their paternity".

**METHODS OF EVALUATION:**

Kelly Pearson and Peter Thanos were interviewed in person on one occasion. They were each observed in the presence of Zachary on one occasion. Two telephone interviews were conducted with Kimberlee Pearson. All three parties were fully informed as to the limits of confidentiality associated with court-ordered evaluations, as well as payment obligations, and indicated their informed consent by signing a Forensic Warning and a Payment Agreement. Stormie Tisdale (Zachary's nanny) was interviewed by telephone. Documents submitted by all three parties were reviewed. The following Court documents were reviewed: Order on Objection to Recommendation (March 7, 2001), Supreme Court of Utah Opinion No. 890001, Affidavit of Denise F. Goldsmith, Ph.D. (August 28, 2001) and Transcript of Hearing (January 10, 2002).

Jill D. Sanders, Ph.D.  
Clinical Psychologist

### **CASE SUMMARY:**

Kelly and Kimberlee Pearson married in August 1992. Their first child, Nicholas, was born in July 1997. Peter Thanos and Kimberlee met in December 1996 and began a romantic relationship in February 1998. In April 1999 Kimberlee told Kelly that she was pregnant with Peter's child and requested a divorce. The Pearsons separated in May 2000. Since that time Nicholas and Zachary have spent equal amounts of time with Kelly and Kimberlee. Since Kimberlee's separation from Kelly, Peter has visited Kimberlee, Nicholas and Zachary in Utah and they have traveled to visit Peter in Oregon numerous times.

### **CHILD IN QUESTION:**

Zachary is a normal, high functioning three-year-old boy. No developmental delays or physical or emotional handicaps were observed. He has no known need for special care of any type. There is no indication that Zachary has a less than normal capacity for adjustment to novel places or persons. Zachary is an active, articulate three-year-old who is initially shy with strangers. He is very competent at gaining comfort from his caregivers. His attachments to Kelly Pearson and Kimberlee Pearson, who have functioned as his primary caregivers since birth, appear secure, strong and healthy. His attachment to Peter Thanos is also secure and healthy. Zachary has a strong bond with his brother, Nicholas. Zachary's nanny reported that she believes the current access schedule and the continuing conflict between Kelly and Kimberlee are negatively affecting Zachary and his brother in terms of emotional stability though both boys are currently functioning well within the normal range in all areas.

### **INFORMATION RELATED TO THE SCHOOLCRAFT ISSUES:**

#### **1. Protecting children from disruption:**

For the past two years of Zachary's life he has enjoyed consistent primary caregiving by Kimberlee and Kelly Pearson, as well as consistent daycare provided by Stormie Tisdale. The basic routines in both households are relatively similar. Both parents work outside the home, though currently Kimberlee does not work outside the home while the children are in her care. During his first year of life Zachary had limited contact (approximately four visits) with Peter. Since January 2001 Zachary and Peter have seen each other once or twice each month for periods ranging from one to four days per visit. Kimberlee typically travels to Peter's home in Oregon once a month with the children. To some degree this disrupts their normal schedules, however, this travel pattern has been in place for almost one year and is part of their typical routine. In August 2001 Peter and Kimberlee selected a home together in Oregon and the children reside in this home during their visits there.

Zachary and his brother are accustomed to a frequently changing schedule. Since May 2000 they typically transfer between their parents' homes twice a week. They spend equal amounts of time with both parents. Some holidays are always spent with one parent and some holidays are rotated. Peter's contact with Zachary does not significantly add to or subtract from the disruption associated with the current arrangement.

## **2. Unnecessary attacks on paternity:**

Kelly Pearson functioned as Zachary's father prior to and following his birth in September 1999. Since the Pearsons separated in May 2000, Zachary and his brother have spent equal amounts of time with both parents. Kelly employs a nanny but is completely involved in Zachary's daily care during his periods of access. Zachary identifies Kelly as his father and their attachment is secure, strong and healthy.

Peter Thanos is Zachary's biological father. His contact with Zachary during Zachary's first year of life was minimal due to various circumstances including the fact that the Pearsons continued to reside together until May 2000, Peter works and resides in Oregon, and Peter cared for his wife until her death in December 2000. Since January of 2001 Peter has seen Zachary at least once a month, more typically twice a month for periods lasting between one and four days. Zachary identifies Peter as "Peter". Observation of their interaction suggests that Zachary has a healthy, positive attachment to Peter. Zachary perceives Peter to be a familiar, competent, and comforting caregiver. The biological relationship between Peter and Zachary is obvious in terms of appearance, temperament and mannerisms.

## **CONCLUSIONS:**

The Court must determine "whether Mr. Thanos has standing to intervene to establish paternity of Zachary Pearson and to rebut the presumption that Zachary Pearson is the legitimate son of Mr. and Mrs. Pearson". The Court has ordered this evaluator to gather and report information related to the policies set forth in Schoolcraft, primarily the policy related to protecting children from disruptive and unnecessary attacks on their paternity, and to offer opinions based on the information gained.

**Disruption:**

Peter Thanos has gradually developed a relationship with Zachary over the past three years. Since January 2001 he has had contact with Zachary an average of twice a month. Since January 2002 they have had contact an average of three times per month. Observation suggests that Peter and Zachary have a positive, loving relationship. Zachary is relaxed in Peter's presence, allows Peter to comfort him, and easily engages in activities with Peter, including play and routine care. I found no information to suggest that Peter's involvement in Zachary's life is a disruption to Zachary's normal and positive development. Peter has no history of substance abuse, criminal behavior or abusive behavior that would suggest that he poses a current or future risk to Zachary's emotional or physical health. Kimberlee and Peter plan to marry as soon her divorce from Kelly is final. Based on the relatively long and evolving relationship between Peter and Zachary, the level of disruption related to Peter's intervention in this case is minimal.

**Unnecessary attacks on Paternity:**

Peter Thanos is Zachary's biological father. Kimberlee and Peter plan to marry as soon as possible. If they do marry Peter will have no less than the role of a stepfather. However, his status as Zachary's biological father inherently escalates the importance of their relationship. Peter is committed to a positive and significant relationship with Zachary regardless of his marital relationship to Kimberlee. Peter claims that he recognizes Kelly's importance to Zachary and intends to support their relationship.

Kelly Pearson has functioned as Zachary's father since his birth. Despite Zachary's paternity, Kelly is committed to raising Zachary as his son. Zachary recognizes Kelly as his father and their attachment is secure and healthy. Kelly does not believe Peter's relationship with Zachary is beneficial or significant. If Peter were not interested in a relationship with Zachary, Zachary would function well in the parent-child relationship he has with Kelly. In regard to basic care and general well being, establishing Peter as a father to Zachary is unnecessary.

However, the relationship between parents and their biological children is psychologically extremely important. Most adopted children spend considerable time and energy thinking about their biological parents, if not actively seeking to locate them. Psychologically speaking, some relationship between a biological parent and their child is necessary for the child's normal development. Sometimes this relationship can only occur through fantasy, sometimes only through information. But the most satisfying type of relationship between a child and their biological parent is generally a personal one. In this sense, the relationship between Peter and Zachary is essential. No one can play this role in Zachary's life but Peter.

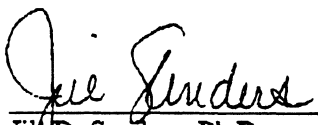
Based on the quality of their current relationship and the likelihood that Zachary and Peter will have extensive contact in the future, their attachment is likely to deepen and become more significant over time. If Kelly were not interested in continuing to parent Zachary, Zachary would likely develop a full father-son attachment to Peter because Zachary is so young and because they have had contact since infancy.

Zachary has the opportunity to experience two positive, important relationships with the two fathers in his life. Zachary has already established a meaningful relationship with both men. It is yet to be seen whether his fathers can establish a tolerant relationship with each other and allow Zachary to benefit from both relationships. There is no research that I am aware of that suggests having two positive father figures has a detrimental impact on a child.

But the outcome is in the hands of Kelly and Peter. If they can support Zachary's need to participate in both relationships, there will be little if any disruption for Zachary. If Kelly and Peter are in constant conflict the potential for damage to Zachary is considerable.

#### **SUMMARY OPINION:**

From 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.

  
Jill D. Sanders, Ph.D  
Clinical Psychologist  
May 13, 2002

Tab 11



August 26, 2002

The Honorable Tyrone E. Medley  
Third Judicial District Court  
450 South State Street  
Salt Lake City, UT 84111

Re: Pearson v. Pearson, Thanos  
Case No. 004907881

Dear Judge Medley,

Your clerk has informed me that you wish me to address the issues raised by Ms. Bigelow in her letter dated June 13, 2002. To the best of my knowledge there are two specific issues that she felt should have been covered in my original evaluation report dated May 13, 2002. The first issue is the impact of a disruption in Zachary's relationship with Mr. Pearson. The second issue is Zachary's ability to understand his biological relationship to these parties.

As I stated in my letter to the Court dated July 22, 2002, these issues will be explored in more depth in my remaining interviews with the parties and will bear significantly on the parenting plan I develop. However, I can offer preliminary opinions on these two issues based on the interviews and observations I have conducted to date.

1. Impact of Disruption in Zachary's Relationship with Mr. Pearson.

The primary disruption in Zachary's relationship with Mr. Pearson occurred when Mr. and Mrs. Pearson separated. The separation reduced Zachary's exposure to Mr. Pearson by half. At that point in time, Zachary surely experienced some sense of loss and upheaval though it is highly unlikely that he has any verbal memory of those sensations. Zachary was nine months old at the time. He is now almost three years old. It is unlikely that Zachary has cognitively registered any further sense of disruption in his relationship with Mr. Pearson though he surely experiences the normal emotional difficulties and inconveniences that any child of divorce experiences. For more than two years Zachary has lived within the current parenting arrangement. His time with Mr. Pearson is not interrupted by the presence of Mr. Thanos. It is probable that Zachary experiences this schedule and the division of caretaking between parents as "normal"; it is really the only life he has ever known.

Referring to Dr. Denise Goldsmith's Affidavit dated August 28<sup>th</sup> 2001, I agree with her general comments about the importance of the first three years of life related to establishing psychological security through secure parent-child relationships. I particularly agree with her opinion that the period between eighteen and thirty-six months is critical to mastering the balance between emotional independence and dependence.

Jill D. Sanders, Ph.D.  
Clinical Psychologist

Zachary and Mr. Pearson's primary disruption occurred at nine months. By eighteen months Zachary was firmly established in a loving, secure and relatively predictable relationship with Mr. Pearson, Mrs. Pearson and Mr. Thanos. Dr. Goldsmith states, "In order to successfully move through this developmental phase, it is imperative that the child be with trusted caregivers with whom they have already developed a close attachment." My observation of Zachary with Mr. Pearson and with Mr. Thanos leads me to conclude that Zachary enjoys close, though not necessarily equal, attachments with both men which were in place throughout the crucial eighteen to thirty-six month developmental phase.

There 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. Further disruption could occur under two conditions: 1) if any of these parents choose not to support Zachary's relationship with the other parties. A detrimental effect is created when and if caregivers compete with each other for the child's attention, affection and allegiance. Under those conditions Zachary's relationship with all three parties will be seriously disrupted; and 2) if Zachary's time with Mr. Pearson is drastically reduced. Zachary's emotional security would likely be significantly disrupted in the case of severely limited or complete loss of contact with Mr. Pearson.

Children's reactions to severely restricted or complete loss of contact with a loved and trusted caregiver vary dramatically from child to child. It is impossible to predict any child's specific response to such a disruption. Reactions may range from mild and transient symptoms of grief or depression to severe mood and behavior disruption including self-destructive behaviors. Obviously the way to protect Zachary from additional disruption is to maintain his relationship with Mr. Pearson. How much time is required to maintain the relationship is unknown. I am aware of no research that demonstrates some finite amount of time as necessary to maintain a significant relationship with a father figure. The requirements are idiosyncratic to each specific child and parent. Zachary's needs in this regard will be carefully considered as a part of the formal custody evaluation.

Based on the interviews I have conducted all three parties are dedicated to maintaining Zachary's relationship with the other parties. Whether or not they are able to behave according to their intentions is yet to be seen.

In summary, I do not believe Zachary has "lost" his relationship with Mr. Pearson. To the contrary, their relationship is a strong and positive parent-child attachment. Mr. Pearson's actual time with Zachary was disrupted by the separation but has been stable and significant for more than two years. There is no basis to believe that further disruption to the relationship between Zachary and Mr. Pearson is intrinsically linked to

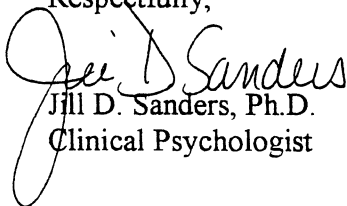
Mr. Thanos' presence in Zachary's life. Further disruption could occur if Mr. Pearson, Mr. Thanos and Mrs. Pearson choose to compete with each other for Zachary's affection and fail to provide Zachary with genuine permission to have a full and loving relationship with all parties, or if Zachary's time with Mr. Pearson is drastically reduced.

2. Zachary's Ability to Understand His Relationship With the Parties.

Zachary's cognitive ability at the age of three to understand the complexities of his parents' relationships is extremely limited. He can understand simple descriptions of the biological facts of his parentage in the same way that a three year old adopted child can understand the biological facts of his/her parentage. However, the emotional meaning of these relationships is unlikely to have much impact on Zachary for a quite some time. What Zachary currently understands is that he has a loving relationship with Mr. Pearson, whom he considers his father and a loving relationship with Mr. Thanos, whom he considers an additional caregiver. Whether or not Mr. Thanos' presence becomes a "replacement" or an "addition" depends entirely upon the parties' attitudes and behaviors towards each other and the natural evolution of Zachary's attachment to both men.

It is my hope that these parties handle Zachary's intellectual understanding of these relationships in the same way that parents who adopt handle the explanation of an adopted child's circumstances. It is never too soon to be open about the facts of the relationship, the child's questions must be openly and objectively addressed as they arise, and the child must be given permission to explore all parental relationships to their fullest conclusion without competition between the parents.

Respectfully,



Jill D. Sanders, Ph.D.  
Clinical Psychologist

cc:

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Pearson v. Pearson, Thanos  
August 26, 2002  
Page 4


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Tab 12

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FILED DISTRICT COURT  
Third Judicial District

NOV - 7 2001  
SALT LAKE COUNTY  
By  Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

---

KELLY F. PEARSON,

Petitioner,

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW IN RE:  
MOTION FOR INTERVENTION**

-VS-

Civil No. 004907881

KIMBERLEE Y. PEARSON,

Judge Tyrone E. Medley

Respondent.

Commissioner Michael S. Evans

---

PETER D. THANOS,

Intervenor.

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THE ABOVE CAPTIONED MATTER having come on regularly for hearing before the above-entitled court on December 3, 2001, at the hour of 1:30 p.m., on Peter D Thanos' Objection to the Commissioner's Recommendation, the Honorable Tyrone E. Medley, Third District Court Judge presiding, and Petitioner being present in person and being represented by counsel, Paige Bigelow, and Respondent being present in person

and being represented by counsel, Steven H. Gunn, and movant, Peter D. Thanos, being represented by counsel, Kellie F. Williams; the court having heard the arguments and proffers of counsel, and having reviewed the file and memorandum and considered the law of this case, and having taken the matter under advisement in order to receive a "Schoolcraft" evaluation from the court appointed custody evaluator, Dr. Jill Sanders; the court having received a report from Dr. Sanders dated May 13, 2002, and an addendum to report dated August 26, 2002; the matter having come before the court again on October 1, 2002, at the hour 2:00 p.m. for the court to consider the arguments and proffers of counsel and to review the reports of Dr. Sanders and again consider the applicable law, based thereon; and the court now makes and enters the following:

### **FINDINGS OF FACT**

1. Petitioner, Kelly Pearson, and Respondent, Kimberlee Pearson, were married to one another on August 17, 1992. A child was born as their issue, Nicolas Browning Pearson, whose date of birth is July 6, 1997. Also, during the marriage, Respondent conceived a child, namely, Zachary Andrew Pearson, whose date of birth is September 14, 1999. According to DNA test results from the University of Utah, dated March 6, 2001, the prospective intervenor is the biological father of the child. Further, Petitioner has admitted that he is not the biological father of the minor child, Zachary. It is important to note that paternity is yet to be determined.
2. During the time that Respondent was pregnant with the child, she informed Petitioner of Mr. Thanos' fathering of the child. Approximately two weeks after the

birth of the child, the Respondent and Mr. Thanos approached Petitioner and again informed him that Mr. Thanos was Zachary's father. Petitioner and Respondent attempted to reconcile the marriage for a short period of time after Zachary's birth, which reconciliation was unsuccessful. Petitioner and Respondent ceased residing as husband and wife on or about May 1, 2000, when Zachary was approximately eight and one-half months old.

3. Mr. Thanos and Respondent were involved in a relationship subsequent to the separation of the Petitioner and Respondent, which resulted in a marriage on July 1, 2002.
4. At the time of Zachary's conception and birth, Mr. Thanos was also married. His wife died December, 2000.
5. Mr. Thanos filed a Motion for Intervention in January, 2001. The matter was originally scheduled for hearing but all parties agreed to attend mediation. The parties and Mr. Thanos consulted with Dr. Jay Thomas and engaged in mediation with Marcie Keck. The mediation was unsuccessful and prospective intervenor renewed his motion to intervene, which motion was heard by the assigned commissioner, Michael S. Evans, August 30, 2001.
6. Prior to that time, within this divorce action, Petitioner and Respondent obtained an order which granted Petitioner and Respondent joint legal custody and 50/50 joint physical custody of Zachary and his brother Nicolas on a temporary basis.



7. Mr. Thanos resides in the State of Oregon and the Petitioner and Respondent and children reside in the State of Utah. Mr. Thanos had ongoing contact with the child commencing February, 2001, however, which contact has included day long contacts and the periods of vacation, which included both Zachary and Nicolas.
8. At the time of hearing before the Commissioner on the original Motion to Intervene, Petitioner offered an affidavit from Dr. Denise Goldsmith which outlines the stages of development of children from birth through their third year of life. Dr. Goldsmith is not acquainted with Mr. Thanos, the parties, or the minor children, but offered an opinion of potential psychological implications of disruption to a child at particular ages.
9. The Commissioner analyzed the case of State of Utah in the Interest of J.W.F., 799 P.2d 710 (Utah 1990), which is known as the Schoolcraft case and recommended that Peter Thanos' Motion to Intervene should be denied. The Commissioner reasoned Mr. Thanos lacks standing to challenge the presumption of paternity that exists in favor of Petitioner, given the consideration which should be given to preserving the stability of marriage and to ensure that children are protected from disruptive and unnecessary attacks on their paternity.
10. The Order on Motion to Intervene was signed by this court October 17, 2001. Mr. Thanos had already filed an Objection to Recommendation in a timely fashion. After the initial briefing and argument of this case on December 3, 2001, an Order on Objection to Recommendation was entered by this court dated March 7, 2002.

The court found that the criterion outlined in the case of In Re: J.W.F., 799 P.2d 710 (Utah 1990) (" the Schoolcraft case") applies to this case and sets forth the framework to determine whether Mr. Thanos' Motion to Intervene may be granted. The court found that in order for this court to determine whether Mr. Thanos has standing to intervene to establish paternity of Zachary Pearson and to rebut the presumption that Zachary Pearson is the legitimate son of Mr. and Mrs. Pearson, the court must first consider the policy set forth in Schoolcraft. The court named the policy as preserving the stability of marriage and protecting children from disruptive and unnecessary attacks on their paternity.

11. The court found that the second of the policy considerations - protecting children from disruptive and unnecessary attacks - was most applicable in this particular case, but that the record was insufficient to adequately address that policy consideration as it applied to the circumstances in this case. The court found that the affidavit of Dr. Goldsmith was not case specific and was of little help to the court in this regard. Therefore, in order for the court to adequately address the second Schoolcraft policy consideration, the court appointed Dr. Jill Sanders to provide an independent "Schoolcraft" evaluation. Petitioner and Respondent had previously stipulated to Dr. Sanders conducting the custody evaluation in this matter. The court then reserved judgment on Mr. Thanos' standing in order to allow Dr. Sanders to conduct a separate preliminary evaluation.

12. Dr. Sanders submitted an evaluation report to the court and counsel dated May 13, 2002. Dr. Sanders' summary opinion was that from a developmental and psychological prospective, Zachary's functioning was not inherently disrupted by Peter Thanos' involvement. Further, Dr. Sanders found that Peter Thanos' relationship with Zachary was necessary to Zachary's normal and positive development.
13. Upon receipt of the evaluation report, Petitioner requested further clarification from the court as to its intention with regard to the Schoolcraft evaluation. By telephone conference dated May 28, 2002, the court permitted Petitioner's counsel to address the court with a letter outlining her concerns and further requests regarding Dr. Sanders' analysis. Based upon Petitioner's motion and letter, the court directed Dr. Sanders to further analyze issues relating to the child, to-wit: the impact of a disruption in Zachary's relationship with Mr. Thanos and Zachary's ability to understand his biological relationship.
14. Dr. Sanders submitted a supplemental report to the court dated August 26, 2002, in which Dr. Sanders reported that the primary disruption in Zachary's relationship with Petitioner occurred at the parties' separation when Zachary was approximately nine months of age. She found that by 18 months Zachary was firmly established in a loving, secure, and relatively predictable relationship with Mr. Pearson, Mrs. Pearson (now Thanos), and Mr. Thanos. Dr. Sanders indicated that there was no

inherent reason why the presence of Mr. Thanos as another loving care taker should have any further disruptive impact.

15. The parties recognize that the way to protect Zachary from additional disruption is to maintain his relationship with Petitioner. How much time is required to maintain the relationship is unknown and Zachary's needs in this regard would be carefully considered as part of the formal custody evaluation.
16. Dr. Sanders did not believe Zachary had lost his relationship with Mr. Pearson or that there was a basis to believe that further disruption to the relationship between Zachary and Petitioner was intrinsically linked to Mr. Thanos' presence in Zachary's life. Dr. Sanders found that given Zachary's cognitive ability at the age of 3, he can understand simple description of biological facts of his parentage in the same way that a three year-old adopted child can understand the biological facts of his or her parentage. She indicated that the emotional meaning of these relationships is unlikely to have much impact on Zachary for quite some time. Again, Dr. Sanders noted that Zachary has a loving relationship with Petitioner and with Mr. Thanos.
17. In Dr. Sanders' earlier evaluation, dated May 13, 2002, Dr. Sanders had noted that Respondent and Mr. Thanos planned to marry and that if they did marry, Peter Thanos would have a role as stepfather, but that his status as Zachary's biological father inherently escalates the importance of that relationship. Petitioner has functioned as Zachary's father since his birth; and if Mr. Thanos was not interested

in a relationship with Zachary, Zachary would function well in the parent/child relationship that he has with Petitioner.

18. However, the relationship between parents and their biological children is physiologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and their biological parent is generally a personal one and that the relationship between Peter Thanos and Zachary is essential and that no one can play this role in Zachary's life but Peter. Dr. Sanders noted that, based upon the quality of their relationship and the likelihood that Zachary and Mr. Thanos would have extensive contact in the future, their attachment is likely to deepen and become more significant over time. Dr. Sanders noted that if Petitioner was not interested in continuing to parent Zachary, Zachary would likely develop a full father/son attachment to Peter because Zachary is still young and because they have had contact since infancy.
19. In considering the criteria applicable to the facts of this case as set forth in the case of Schoolcraft, the court finds that it is appropriate to sustain the objection to recommendation of Mr. Thanos and give standing to Mr. Thanos to allow intervention.
20. In applying those criteria the court finds that intervention is appropriate based upon Dr. Sanders review and report to this court in regard to the parties and children in this action. The court finds that Dr. Sanders has carefully set forth to the court, to

the court's satisfaction, an articulation of the policy considerations that this court must make under the case of Schoolcraft.

21. As to the first prong of the Schoolcraft analysis, the court finds 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. The stability was shattered when the parties separated and Zachary was approximately nine months of age. The Respondent and Mr. Thanos are now married.
22. The court cannot find that granting Mr. Thanos the standing to intervene would be disruptive to Zachary or an unnecessary attack on his paternity. In this case, as indicated by Dr. Sanders in her report, Mr. Thanos has an established relationship with the child and there is nothing in the reports of Dr. Sanders that would suggest allowing Mr. Thanos to intervene would be adverse to the best interests of the child or disruptive to him. The report of Dr. Sanders, to the contrary, indicates that it is in the best interests of the child to allow Mr. Thanos to intervene.
23. Utah Code Annotated, Section 78-45a-1, the Uniform Paternity Act, provides Peter Thanos with paternity rights which entitle him to intervention. Both the U.S. and Utah Constitutions grant Peter Thanos constitutional rights afforded to a natural parent. It is important to note that paternity is yet to be determined.
24. Based upon the limited information and the reports of Dr. Sanders, the Petitioner is a significant person in the child's life and it is the court's responsibility to address the criterion established by Schoolcraft. There is no competent evidence before the

court to suggest that allowing Mr. Thanos to intervene would be disruptive. While the court cannot track litigation, Dr. Sanders may ultimately recommend to the court, or the court may find that Mr. Thanos' intervention has been disruptive, however, the court cannot use speculation as to future results as a basis to deny the intervention of Mr. Thanos.

BASED UPON the foregoing, the court now makes and enters the following:

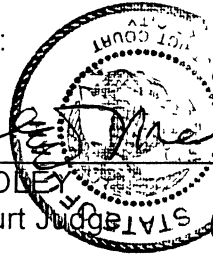
**CONCLUSIONS OF LAW**

1. The court has jurisdiction over the parties to this action and the subject matter of this action.
2. An order granting intervention to Peter Thanos should be entered by this court pursuant to the foregoing Findings of Fact.

DATED this 7 day of Nov, 2002.

BY THE COURT:

  
TYRONE E. MEDLEY  
Third District Court Judge



Approved by:

\_\_\_\_\_  
Paige Bigelow  
Attorney for Petitioner  
DATED: \_\_\_\_\_

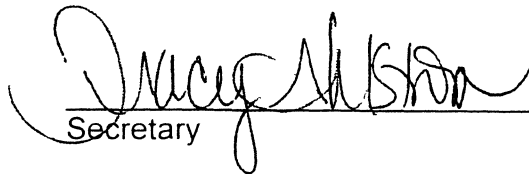
\_\_\_\_\_  
Steven H. Gunn  
Attorney for Respondent  
DATED: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1 day of November, 2002, I caused a true and correct copy of the foregoing to be [☒] mailed, postage prepaid, [☐] hand-delivered, [☐] sent via facsimile to:

Steven H. Gunn  
Attorney at Law  
Ray, Quinney & Nebeker  
79 South Main Street  
PO Box 45385  
Salt Lake City, Utah 84145-0385  
Fax: 532-7543

Paige Bigelow  
Attorney at Law  
Kruse, Landa & Maycock  
8th Floor, Bank One Tower  
50 West Broadway  
PO Box 45561  
Salt Lake City, Utah 84145-0561  
Fax: 531-7091


  
Secretary



## Tab 13

FILED DISTRICT COURT  
Third Judicial District

NOV - 7 2002

By  SALT LAKE COUNTY  
Deputy Clerk

KELLIE F. WILLIAMS #3493  
Attorney for Intervenor  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: 801-328-1162  
Facsimile: 801-363-8243

---

IN THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

---

KELLY F. PEARSON,  
Petitioner,

**ORDER GRANTING  
INTERVENTION OF PETER THANOS**

-vs-

Civil No. 004907881

KIMBERLEE Y. PEARSON,  
Respondent.

Judge Tyrone E. Medley

Commissioner Michael S. Evans

---

PETER D. THANOS,  
Intervenor.

---

THE ABOVE CAPTIONED MATTER having come on regularly for hearing before the above-entitled court on December 3, 2001, at the hour of 1:30 p.m., on Peter D. Thanos' Objection to the Commissioner's Recommendation, the Honorable Tyrone E. Medley, Third District Court Judge presiding; Petitioner being present in person and being represented by counsel, Paige Bigelow; Respondent being present in person and being represented by counsel, Steven H. Gunn; movant, Peter D. Thanos, being represented by

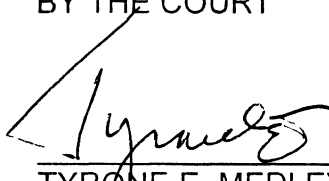
counsel, Kellie F. Williams; the court having heard the arguments and proffers of counsel; having reviewed the file and memorandum and considered the law of this case; having taken the matter under advisement in order to receive a "Schoolcraft" evaluation from the court appointed custody evaluator, Dr. Jill Sanders; the court having received a report from Dr. Sanders dated May 13, 2002, and an addendum to report dated August 26, 2002; the matter having come before the court again on October 1, 2002, at the hour 2:00 p.m. for the court to consider the arguments and proffers counsel and review the reports of Dr. Sanders and again consider the applicable law; the court having previously entered its Findings of Fact and Conclusions of Law; based thereon and for good cause appearing, therefore;

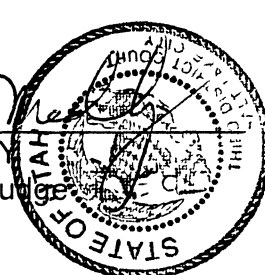
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The objection to recommendation of Peter D. Thanos is sustained. The Order of Intervention, dated October 17, 2001, is hereby vacated.
2. The Motion to Intervene previously filed by Peter Thanos is hereby granted and he shall be permitted to intervene in this action.

DATED this 7 day of Nov, 2002.

BY THE COURT

  
TYRONE E. MEDLEY  
Third District Court Judge



Approved by:

\_\_\_\_\_  
Paige Bigelow  
Attorney for Petitioner  
DATED: \_\_\_\_\_

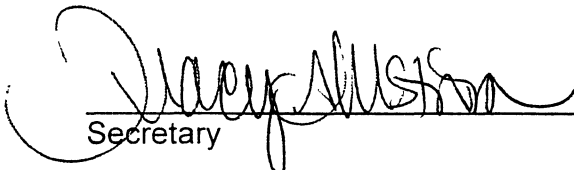
\_\_\_\_\_  
Steven H. Gunn  
Attorney for Respondent  
DATED: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1 day of November, 2002, I caused a true and correct copy of the foregoing to be ☒ mailed, postage prepaid, ☐ hand-delivered, ☐ sent via facsimile to:

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Fax: 531-7091

  
\_\_\_\_\_  
Secretary

Tab 14

KELLIE F. WILLIAMS #3493  
Attorney for Intervenor  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: 801-328-1162  
Facsimile: 801-363-8243

**FILED DISTRICT COURT**  
Third Judicial District

**MAY - 8 2003**

**SALT LAKE COUNTY**  
By \_\_\_\_\_ Deputy Clerk

---

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

---

KELLY F. PEARSON,

Petitioner,

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
PETITIONER'S MOTION FOR  
SUMMARY JUDGMENT AND  
INTERVENOR'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

-vs-

Civil No. 004907881

KIMBERLEE Y. PEARSON,

Judge Tyrone E. Medley

Respondent.

Commissioner Michael S. Evans

---

PETER D. THANOS,

Intervenor.

---

THE ABOVE CAPTIONED MATTER having come on regularly for hearing before the above-entitled court on March 5, 2003, at the hour of 9:00 a.m., the Honorable Tyrone E. Medley, Third District Court Judge presiding, on Petitioner's Motion for Summary Judgment and Intervenor's Motion for Partial Summary Judgment, and Petitioner being

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present in person and being represented by counsel, Paige Bigelow, and Respondent being present in person and being represented by counsel, Steven H. Gunn, and Intervenor being present in person and being represented by counsel, Kellie F. Williams; the court having heard the arguments of counsel, and having reviewed the file and pleadings contained therein, and having considered the applicable law, and, further, having provided the Petitioner with an opportunity to supplement the file with a case cited by Petitioner in argument and having given Respondent and Intervenor an opportunity to comment and having taken the matter under advisement, and the matter having further been scheduled for a telephonic conference for ruling on March 5, 2003, at the hour of 9:00 a.m., and Petitioner's counsel, Paige Bigelow, being present by telephone and Intervenor's counsel, Kellie F. Williams, being present telephonically, and Steven Gunn, counsel for Respondent, having been excused from participating in the telephonic conference, and the court having issued its ruling, the court now makes and enters the following:

#### **FINDINGS OF FACT**

1. Petitioner and Respondent, Kimberlee Thanos, were married on August 17, 1992 and were divorced on June 5, 2002 by a decree which terminated their marriage, but reserved custody and visitation issues for later disposition. Petitioner and Respondent, Kimberlee Thanos, conceived a child that was born on July 6, 1997, named Nicholas Browning Pearson.



2. Also during their marriage, Respondent, Kimberlee Thanos, conceived a child, Zachary Andrew Pearson ("Zachary"), who was born on September 14, 1999. However, approximately four months after Respondent, Kimberlee Thanos, became pregnant with Zachary, Respondent, Kimberlee Thanos, informed Petitioner that Intervenor, Pete Thanos, was Zachary's natural father. Approximately two weeks after Zachary's birth, Respondent, Kimberlee Thanos, and Intervenor, Pete Thanos, again informed Petitioner that Intervenor, Pete Thanos, was Zachary's father.
3. Intervenor, Pete Thanos, obtained DNA paternity test results when he later filed with the District Court. The paternity index for Intervenor is 98011 and the probability of paternity is 99.999%.
4. Respondent, Kimberlee Thanos, filed various affidavits with the Court, commencing January 2001, stating under oath that Intervenor, Pete Thanos, is the natural father of the minor child.
5. Petitioner and Respondent, Kimberlee Thanos, separated when Zachary was nine months of age. In his first filed Affidavit, Petitioner acknowledged that Respondent, Kimberlee Thanos, had become pregnant with Zachary and disclosed to Petitioner that Zachary was Intervenor, Pete Thanos' son and not Petitioner's biological child. Other like statements are contained in various pleadings. In his Affidavit dated September 28, 2001, Petitioner admitted that he was aware that Intervenor, Pete Thanos, was the child's biological father, although he alleged that he was the child's

“psychological” parent. In paragraph 15 of that affidavit, Petitioner acknowledged that he does not advocate secrecy regarding the biological facts of Zachary's conception (implicitly acknowledging that Pete is the biological father). In paragraph 16, page 11 of that document, Petitioner states that, “I have at all times known that he [Zachary] was conceived of Mr. Thanos.”

6. At the time of Zachary's conception and birth, Intervenor, Pete Thanos, was married to another woman. Intervenor, Pete Thanos' prior wife died from cancer in December, 2000. Intervenor, Pete Thanos, has set forth in his affidavits and in argument that he did not inform his prior wife of Zachary's birth because he did not want to further damage her already fragile health or cause her further emotional trauma, and that he wished to remain with her to assist her through her final months of life. Based on Intervenor's affidavits, it appears that out of compassion for his then-wife, Intervenor did not file a paternity action regarding Zachary until after her death.
7. Petitioner and Respondent, Kimberlee Thanos, separated and later divorced. As part of their divorce action, they stipulated to a temporary order which granted them joint legal physical custody of Zachary and his brother Nicholas. Intervenor, Pete Thanos, and Respondent, Kimberlee Thanos, continued their relationship, and married, after the Pearson divorce was finalized, on July 1, 2002.

8. Intervenor, Pete Thanos, filed a Verified Motion for Intervention in January, 2001. The matter was scheduled for hearing, but all parties agreed to attend mediation. Petitioner, Respondent, Kimberlee Thanos, and Intervenor also consulted with Dr. Jay Thomas and engaged in mediation with Marcie Keck. Dr. Thomas participated in three mediation sessions as Zachary's psychologist. The parties attended seven mediation sessions which, unfortunately, did not resolve the issues relating to Zachary.
9. Upon cessation of the unsuccessful mediation, Intervenor, Pete Thanos, renewed his motion to intervene and the motion was heard by Commissioner Michael S. Evans August 30, 2001.
10. Beginning in February, 2001, Intervenor, Pete Thanos, had ongoing contact with Zachary, which included day long visits and periods of vacation, although he was precluded from having overnight visits until he married Respondent, Kimberlee Thanos. The contact has been frequent and consistent since February 2001.
11. Intervenor, Pete Thanos, informed other family members of his paternity of Zachary, including Intervenor, Pete Thanos' son from Intervenor, Pete Thanos' prior marriage, over a period of time from April 2001 through August 2001. Also, commencing with his February 2001 contact with Zachary, Intervenor, Pete Thanos, developed a loving relationship with Zachary. That relationship developed prior to Intervenor, Pete Thanos' marriage to Respondent, Kimberlee Thanos. Prior to the



Thanos' marriage and at the hearing before Commissioner Evans, proffers were made regarding the bonding between Zachary and Intervenor, Pete Thanos, and an affidavit of Respondent, Kimberlee Thanos, set forth the strong bond and relationship that had grown between Zachary and Intervenor, Pete Thanos.

12. At the time of the hearing before Commissioner Evans, Petitioner offered a "generic" affidavit from Dr. Denise Goldsmith. Dr. Goldsmith was not acquainted with Intervenor, Pete Thanos, Respondent, Kimberlee Thanos, or the minor children, although she offered an opinion of the potential psychological implications of a "disruption" to a child at particular ages.
13. At the time of hearing before Commissioner Evans on the Motion to Intervene on August 30, 2001, the Commissioner analyzed the case of State of Utah in the Interest of J.W.F., 799 P.2d 710 (Utah 1990), known as the Schoolcraft case, and recommended that Intervenor, Pete Thanos' Motion to Intervene be denied. The Commissioner reasoned that Intervenor, Pete Thanos, lacked standing to challenge the presumption of paternity that existed in favor of Petitioner, given the consideration that should be given to preserving the stability of marriage and to ensure that the children are protected from disruptive and unnecessary attacks on their paternity.
14. After briefing and argument of the case on December 3, 2001, an Order on Objection to Recommendation was entered by this Court. At the time of the initial

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hearing, this court found that the criteria outlined in the case of In Re: J.W.F., 799 P.2d 710 (Utah 1990) (“the Schoolcraft case”) apply to this case and set forth the framework to determine whether Intervenor, Pete Thanos’ Motion to Intervene should be granted.

15. The Court found that in order to determine whether Intervenor, Pete Thanos, had standing to intervene to establish Zachary’s paternity and to rebut the presumption that Zachary was the legitimate son of Petitioner and Respondent, Kimberlee Thanos, the Court must first consider the policies set forth in Schoolcraft. The two-prong analysis of Schoolcraft included (1) preserving the stability of the marriage and (2) protecting children from disruptive and unnecessary attacks on their paternity. The Court found that the second of the policy considerations—protecting children from disruptive and unnecessary attacks—was most applicable in this particular case, but that the record was insufficient to adequately address that policy consideration as it applied to the circumstances in this case.
16. The court found that the affidavit of Dr. Goldsmith was not case-specific and was of little help to the Court in this regard. Therefore, in order for the Court to adequately address the second Schoolcraft policy consideration, the Court appointed Dr. Jill Sanders to provide an independent “Schoolcraft” evaluation. Petitioner and Respondent, Kimberlee Thanos, had previously stipulated to Dr. Sanders conducting the custody evaluation in this matter. The Court then reserved

judgment on Intervenor, Pete Thanos' standing in order to allow Dr. Sanders to conduct a separate preliminary evaluation.

17. As proffered at the time of hearing before the Commissioner and stated in pleadings and as set forth in the affidavits of Respondent and Intervenor. Zachary's physical resemblance to Intervenor, Pete Thanos, is such that Zachary will soon recognize that Intervenor, Pete Thanos, is his father. The biological relationship between Zachary and Intervenor, Pete Thanos, cannot and should not be hidden from the child, as Intervenor, Pete Thanos, will continue to be an integral part of Zachary's life. Respondent, Kimberlee Thanos, and Intervenor, Pete Thanos, have an intact family unit to provide care and security to Zachary. Further, Petitioner and Respondent, Kimberlee Thanos, have, in one form or another, informed dozens of individuals in their circle of family, friends and acquaintances that Intervenor, Pete Thanos, is Zachary's biological father Zachary. It is impossible to keep the "secret" of Zachary's parentage hidden from him.
18. Dr. Sanders submitted an evaluation report to the Court and counsel dated May 13, 2002. Dr. Sanders' summary opinion was that from a developmental and psychological prospective, Zachary's functioning was not inherently disrupted by Intervenor, Pete Thanos' involvement. Further, Dr. Sanders found that Intervenor, Pete Thanos' relationship with Zachary was not only not disruptive, but was necessary to Zachary's normal and positive development.

19. In addition, Dr. Sanders noted that Respondent, Kimberlee Thanos, and Intervenor, Pete Thanos, planned to marry and that if they did marry, Intervenor, Pete Thanos, would, at the least, have a role as stepfather, and that his status as Zachary's biological father inherently escalates the importance of the relationship between Zachary and Intervenor. As Dr. Sanders reported, the relationship between parents and their biological children is psychologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and their biological parent is generally a personal one, that the relationship between Intervenor and Zachary is essential to Zachary and that no one can play this role in Zachary's life except Intervenor, Pete Thanos. Dr. Sanders also stated that, based upon the quality of the relationship between Zachary and Intervenor and the likelihood that Intervenor, Pete Thanos, and Zachary would have continuing extensive contact, their attachment would be likely to deepen and become more significant over time. Dr. Sanders opined that if Petitioner was not interested in continuing to parent Zachary, he would likely develop a full father/son attachment to Intervenor, Pete Thanos, because Zachary was still young and because Intervenor and Zachary have had contact since Zachary's infancy.
20. Upon receipt of the report, Petitioner did not object to the report, nor did he object to the Court receiving the report. Instead, Petitioner requested further clarification with regard to the Schoolcraft evaluation by Dr. Sanders. Pursuant to a telephone

conference requested by Petitioner on May 28, 2002, the Court permitted Petitioner to supplement his concerns and address the Court with a letter outlining his concerns and his further requests regarding Dr. Sanders' further analysis. Based upon Petitioner's motion and letter, the Court directed Dr. Sanders to make further analysis, to-wit: the impact on the child of a disruption in Zachary's relationship with Petitioner, and Zachary's ability to understand his biological relationship.

21. In response, Dr. Sanders submitted a supplemental report dated August 26, 2002. Dr. Sanders found that the primary disruption in Zachary's relationship with Petitioner occurred at the parties' separation when Zachary was approximately nine months of age. Dr. Sanders concluded that by 18 months Zachary was firmly established in a loving, secure, and relatively predictable relationship with Petitioner, Respondent and Intervenor. Dr. Sanders indicated that there was no inherent reason why Intervenor's presence as another loving care giver should have any further disruptive impact.
22. In addition, Dr. Sanders stated that she did not believe that Zachary had lost his relationship with Petitioner or that there was a basis to believe that further disruption to the relationship between Zachary and Petitioner was intrinsically linked to Intervenor, Pete Thanos' presence in Zachary's life. Dr. Sanders found that given Zachary's cognitive ability at the age of 3, Zachary can understand simple descriptions of biological facts of his parentage in the same way that a three year-



old adopted child can understand the biological facts of his or her parentage. She indicated that the emotional meaning of these relationships is unlikely to have much impact on Zachary for quite some time. Again, Dr. Sanders noted that Zachary has a loving relationship with Petitioner and with Intervenor.

23. After considering both of Dr. Sanders' reports, the criteria applicable to the facts in this case, and the Schoolcraft criteria, the court previously found that it was appropriate to sustain Intervenor's objection to recommendation of Commissioner Evans and grant the Motion to Intervene. Judge Medley found that Dr. Sanders had very carefully articulated, to the court's satisfaction, the policy considerations that the court must make and find under Schoolcraft. As previously found, the first prong of the Schoolcraft analysis—relating to preserving the stability of the marriage—was not a consideration in this case, due to the fact that there was no marriage between Petitioner and Respondent, Kimberlee Thanos, to be preserved, and that the stability was shattered when the parties separated when Zachary was approximately nine months of age. The Court also noted that Intervenor, Pete Thanos, and Respondent, Kimberlee Thanos, are now married. Further, pursuant to the report of Dr. Sanders Intervenor has established a relationship with Zachary, and there was nothing that would be adverse to the best interests of the child or disruptive to him and the court previously found it was in the best interest of Zachary to allow Pete Thanos to intervene. The Findings of Fact and Conclusions of Law

in Re: Motion for Intervention and Order Granting Intervention of Intervenor, Pete Thanos, were signed by the court November 7, 2002.

24. On October 10, 2002, the Petitioner filed a Motion to Bifurcate, to Stay Proceedings, and to Set Date for Response to Motion for Summary Judgment. That matter came on for hearing before the Honorable Tyrone E. Medley on November 1, 2002, and an Order on Motion to Bifurcate and to Stay Proceedings was signed December 16, 2002.
25. On November 12, 2002, the Petitioner filed an Answer to the Intervenor's Verified Petition for Paternity.
26. The Petitioner filed another Motion for Stay and For Expedited Disposition on or about November 20, 2002. That was heard by the court on November 27, 2002, and denied by the court and the Order Denying Petitioner's Motion for Stay Order was signed December 20, 2002.
27. On November 15, 2002, Pete Thanos, as Intervenor in the divorce action, filed a Motion for Partial Summary Judgment with a supporting memorandum and Affidavit, seeking a declaration by the court that Intervenor, Pete Thanos, is Zachary's biological father.
28. The Petitioner filed a Motion for Stay with the Utah Court of Appeals on or about November 27, 2002, requesting that the Court of Appeals stay the paternity and custody proceedings in the District Court pending resolution of the Petitioner's

Petition for Extraordinary Relief. Petitioner filed his Petition for Extraordinary Relief with the Utah Supreme Court on or about November 14, 2002, and the matter was transferred to the Utah Court of Appeals by the Supreme Court of the State of Utah, given the misfiling. The Petitioner's Motion for Stay was summarily denied by the Utah Court of Appeals by an Order dated December 4, 2002.

29. The Petitioner also filed an Objection to Admissibility of Genetic Test Results and Motion to Strike, dated November 27, 2002. Intervenor filed his Response to Objection to Admissibility of Genetic Tests on December 9, 2002, and amended the same due to an error in the title of said pleading on December 23, 2002.
30. On or about December 9, 2002, the Petitioner filed a Motion for Summary Judgment and Memorandum in Opposition to Intervenor's Motion for Partial Summary Judgment and In Support of Petitioner's Motion for Summary Judgment. Petitioner requested in his Motion for Summary Judgment that he be declared the legal father of Zachary on the basis of his controlling presumption of paternity or, alternatively, on the basis of the equitable parent doctrine or, alternatively, barring Intervenor and Respondent from challenging Zachary's parentage on the basis of equitable estoppel.
31. Subsequent to receiving the Respondent and Intervenor's response to the Petitioner's Motion for Summary Judgment, Petitioner filed a reply memorandum and affidavits of Douglas Goldsmith and Kelly Pearson. Intervenor filed motions to

strike the affidavits and Petitioner filed a responsive memorandum thereto to which Intervenor replied. The Petitioner's Objection to Admissibility of Genetic Test Results and Motion to Strike and the Intervenor's motions to strike were heard simultaneous with Intervenor's Motion for Partial Summary Judgment and Petitioner's Motion for Summary Judgment.

32. Utah Code Annotated, Section 78-3a-105(b) establishes concurrent jurisdiction between the District Court and the Juvenile Court in an action to establish paternity. This case is, in part, a paternity action. The court finds, however, that this is not a termination of parental rights action which precludes the District Court from exercising jurisdiction.
33. The standard of proof in a paternity action is a preponderance of the evidence. However, the court finds that Intervenor has established, beyond a reasonable doubt, that he is Zachary's biological father and that paternity should be established in Intervenor pursuant to Utah Code Annotated, Section 78-45a-10. The DNA Diagnostic Laboratory findings from the University of Utah DNA Paternity Laboratory summarize that the paternity index is 98,011 and that the probability of Intervenor being the biological father of Zachary Pearson is 99.999%. This genetic test result is of a type generally acknowledged as reliable by accreditation bodies designated by the Federal Secretary of Health and Human Services and, further, was performed by a laboratory approved by such an accreditation body. Pursuant to

Utah Code Annotated, Section 78-45a-10(3)(a), a man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150. Utah Code Annotated, Section 78-45a-10(4), states that if a presumption of paternity is established under subsection (1) and is not rebutted by a second genetic test under subsection (2), then the court shall issue an order establishing paternity. Based upon the establishment of paternity in Intervenor beyond a reasonable doubt, Petitioner's presumed status as biological father is rebutted.

34. The Petitioner has not provided the court with a second genetic test and, further, the Petitioner has made admissions in various pleadings and affidavits herein indicating that he was aware that the Intervenor was the biological father of Zachary. Further, various affidavits filed by the Respondent and Intervenor further establish that Zachary was conceived of the Intervenor and that the Intervenor is the biological father.
35. The paternity act does apply in this case and is not applicable simply to child support. The clear and express language of our statute provides a process to establish paternity and determine parent time rights.
36. This court carefully considered Intervenor's position in the life of Zachary prior to granting him standing. The court's order granting intervention of Peter Thanos and the supporting Findings of Fact constitute the law of this case in regard to the court's decision to permit Intervenor to establish paternity and the court's findings

that it was in the best interest of Zachary to permit Intervenor to intervene for the purposes of paternity being established. The court's previous consideration of Zachary's best interests and the rights of the Petitioner in granting of the Intervenor's Motion for Intervention is the law of the case and there is no need to revisit these issues.

37. There is no legal authority in the State of Utah which adopts the doctrine of equitable parent. Furthermore, the court is not persuaded by the Petitioner that the doctrine of equitable parent applies to the facts of this case. This court recognizes, however, that the Utah Supreme Court has recognized that non-parents may have standing to seek custody or rights of parent time and, indeed, issues of custody and parent time are not determined only by biology, but also by a consideration of what is in the best interests of the child.
38. The court finds that the doctrine of equitable estoppel is inapplicable. The essential elements in order to invoke the doctrine of equitable estoppel are: (1) a statement, admission, act or failure to act by one party inconsistent with the claim later asserted; (2) reasonable action or inaction by the other party take or not taken on the basis of the first party's statement, admission, act or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act. State v. Irizarry, 945 P.2d 676, 680 (Utah 1997).

39. As set forth in the statement of facts, Intervenor and Respondent approached Petitioner two weeks after Zachary's birth to inform him that the Intervenor was Zachary's father. Petitioner and Respondent ceased residing as husband and wife when Zachary was less than nine months of age. Intervenor's wife died December, 2000, and Intervenor filed a motion for intervention in January, 2001. While the matter was originally scheduled for hearing, all parties agreed to attend mediation and the parties and Intervenor consulted with Dr. Jay Thomas and engaged in mediation with Marcie Keck.
40. The case law cited by the Petitioner is factually inapplicable. In the case of Kristen D. v. Stephen D., 719 N.Y.S.2d 771 (NY Appellate Div. 2001), the biological father's filing of a paternity petition and the discovery by husband that the child was not his, did not occur until the child was over four years of age. In the case of Richard W. v. Roberta Y., 658 N.Y.S.2d 506 (NY Appellate Div. 1997), the court relied heavily upon the reliance of the husband upon the fact that he believed he was the biological father of the child. This is a substantial factual distinction from the case at hand. Further, the court in Richard W. specifically stated that the best interest of the child is the guiding concern in cases of this type." Id. at 814.
41. Petitioner's argument must fail in that, ultimately, the child's best interests must be determined by this court. Given the information that this court has before it via Dr. Jill Sanders' reports to the court, this court is well aware that Intervenor's

relationship with Zachary is extremely important to the child and is substantial. The facts of this particular case must be considered in applying equitable estoppel and to apply equitable estoppel to the facts of this case would abrogate what is in the best interests of the minor child.

BASED UPON the foregoing Findings of Fact, the court now makes and enters the following:

#### **CONCLUSIONS OF LAW**

1. Intervenor has established beyond a reasonable doubt that he is the biological father of Zachary and should be declared to be the biological father of Zachary pursuant to Utah Code Annotated, Section 78-45a-10. The presumption of Petitioner being the biological father has been rebutted by Intervenor pursuant to Utah Code Annotated, Section 78-45a-10, sections (1) through (3). Intervenor's Motion for Partial Summary Judgment should be granted.
2. This court has jurisdiction over the above-captioned matter and the subject matter of this action pursuant to Utah Code Annotated, Sections 78-3a-105 and 78-45a-5(1)(a). This action is not in the nature of a Petition for Termination of Parental Rights over which Juvenile Court has exclusive jurisdiction pursuant to Utah Code Annotated, Section 78-3a-104(f).
3. The equitable parent doctrine is inapplicable to the facts of this case and has not been adopted as the legal authority in the State of Utah.

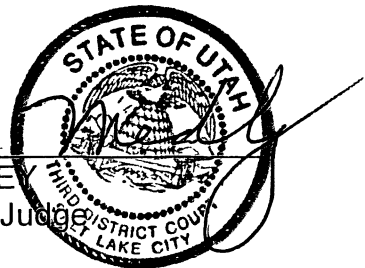


4. The doctrine of equitable estoppel is inapplicable to the facts of this case.
5. The court has previously granted the Intervenor's motion to intervene based upon it being established that it was in the best interests of Zachary to permit Intervenor to intervene for purposes of establishing paternity and the court's previous findings and order continues to act as the law of this case.
6. Based upon the foregoing, the Petitioner's Motion for Summary Judgment should be denied.
7. In considering the foregoing, the court considered all of the documents and affidavits submitted and therefore, the motions to strike are moot and there is no need for the court to address those motions separately.
8. An Order of Partial Summary Judgment and Order Denying Petitioner's Motion for Summary Judgment should issue pursuant to the foregoing Findings of Fact and Conclusions of Law.

DATED this 8 day of May, 2003.

BY THE COURT:

  
TYRONE E. MEDLEY  
Third District Court Judge



Approved by:

\_\_\_\_\_  
Paige Bigelow  
Attorney for Petitioner  
DATED: \_\_\_\_\_

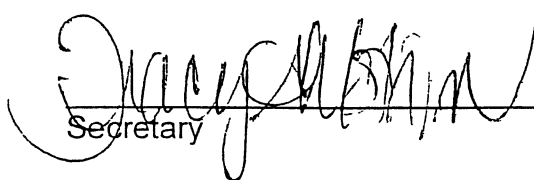
\_\_\_\_\_  
Steven H. Gunn  
Attorney for Respondent  
DATED: \_\_\_\_\_

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of April, 2003, I caused a true and correct copy of the foregoing to be ☒ mailed, postage prepaid, ☐ hand-delivered, ☐ sent via facsimile to:

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Salt Lake City, Utah 84145-0385  
Fax: 532-7543

Paige Bigelow  
Attorney at Law  
Kruse, Landa & Maycock  
8th Floor, Bank One Tower  
50 West Broadway  
PO Box 45561  
Salt Lake City, Utah 84145-0561  
Fax: 531-7091

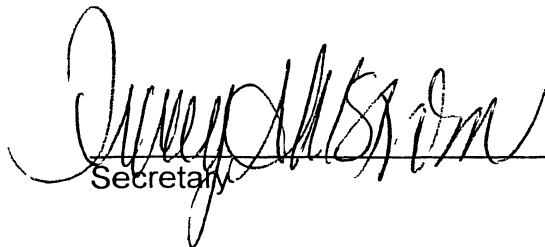
  
Secretary

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Secretary

FILED DISTRICT COURT  
Third Judicial District

MAY - 8 2003

By  SALT LAKE COUNTY  
Deputy Clerk

KELLIE F. WILLIAMS #3493  
Attorney for Intervenor  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
Telephone: 801-328-1162  
Facsimile: 801-363-8243

---

IN THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

---

KELLY F. PEARSON,  
Petitioner,

**ORDER ON MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND ORDER  
DENYING PETITIONER'S MOTION  
FOR SUMMARY JUDGMENT**

-vs-

Civil No. 004907881

KIMBERLEE Y. PEARSON,  
Respondent.

Judge Tyrone E. Medley

Commissioner Michael S. Evans

---

PETER D. THANOS,  
Intervenor.

---

THE ABOVE CAPTIONED MATTER having come on regularly for hearing before  
the above-entitled court on March 5, 2003, at the hour of 9:00 a.m., the Honorable Tyrone  
E. Medley, Third District Court Judge presiding, on Petitioner's Motion for Summary

1745

Judgment and Intervenor's Motion for Partial Summary Judgment, and Petitioner being present in person and being represented by counsel, Paige Bigelow, and Respondent being present in person and being represented by counsel, Steven H. Gunn, and Intervenor being present in person and being represented by counsel, Kellie F. Williams; the court having heard the arguments of counsel, and having reviewed the file and pleadings contained therein, and having considered the applicable law, and, further, having provided the Petitioner with an opportunity to supplement the file with a case cited by Petitioner in argument and having given Respondent and Intervenor an opportunity to comment and having taken the matter under advisement, and the matter having further been scheduled for a telephonic conference for ruling on March 5, 2003, at the hour of 9:00 a.m., and Petitioner's counsel, Paige Bigelow, being present by telephone and Intervenor's counsel, Kellie F. Williams, being present telephonically, and Steven Gunn, counsel for Respondent, having been excused from participating in the telephonic conference, and the court having issued its ruling, and the court having previously entered its Findings of Fact and Conclusions of Law, based thereon and for good cause of appearing, therefore;

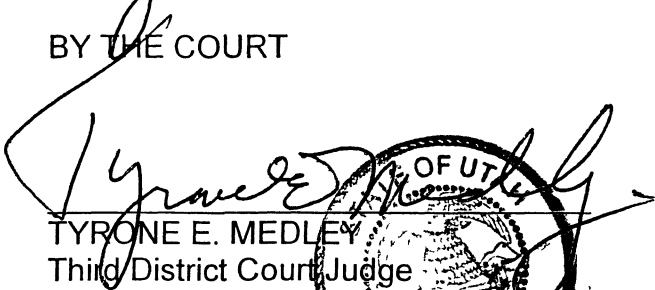
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

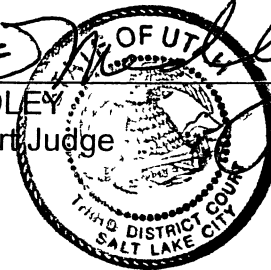
1. Intervenor's Motion for Partial Summary Judgment is hereby granted. Intervenor is declared to be the biological and natural father of Zachary Andrew Pearson, whose date of birth is September 14, 1999.

2. Petitioner's Motion for Summary Judgment, dated December 9, 2002, is denied.

DATED this 8 day of May, 2003.

BY THE COURT

  
TYRONE E. MEDLEY  
Third District Court Judge



Approved by:

\_\_\_\_\_  
Paige Bigelow  
Attorney for Petitioner  
DATED: \_\_\_\_\_

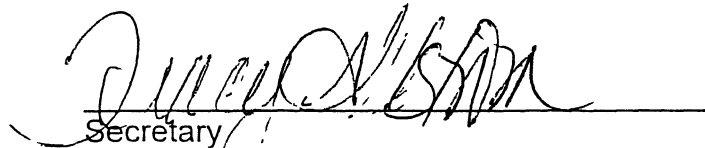
\_\_\_\_\_  
Steven H. Gunn  
Attorney for Respondent  
DATED: \_\_\_\_\_

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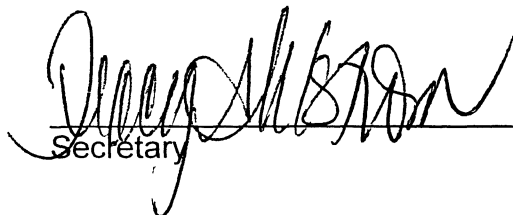


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Secretary

Tab 15

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

---

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Kelly Pearson  
Petitioner

**vs.**

Kimberlee Y. Pearson  
Respondent  
and

Peter D. Thanos  
Intervenor

Case No. 004907881

Judge Tyrone E. Medley

Commissioner Michael S. Evans

---

APPOINTED CUSTODY EVALUATOR: Jill D. Sanders, Ph.D., Clinical Psychologist

DATE OF SETTLEMENT CONFERENCE: August 13, 2003

DATE REPORT PERFORMED: November 3, 2003

MINOR CHILDREN & DATES OF BIRTH: Nicholas (7/6/97) and Zachary (9/14/99)

MOTHER: Kimberlee Thanos (f.k.a. Kimberlee Pearson)

FATHER: Kelly Pearson

OTHER PARTIES EVALUATED AND RELATIONSHIP TO CHILDREN:

Peter Thanos, now married to Kimberlee Thanos; biological father of Zachary Pearson and step-father to Nicholas Pearson

MOTHER'S COUNSEL: Steven H. Gunn

FATHER'S COUNSEL: Paige Bigelow

INTERVENOR'S COUNSEL: Kellie Williams

---



Pearson v. Pearson and Thanos

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## CHILD CUSTODY EVALUATION

### IDENTIFYING INFORMATION:

Pearson v. Pearson and Thanos  
Case No. 004907881  
Judge Tyrone E. Medley  
Commissioner Michael S. Evans  
Evaluator: Jill D. Sanders, Ph.D.  
Date of Settlement Conference: August 13, 2003  
Date of Final Report: November 3, 2003

### REASON FOR EVALUATION:

Kelly Pearson, Kimberlee Thanos (formerly Pearson) and Peter Thanos have been unable to come to agreement regarding a parenting plan for Nicholas and Zachary Pearson. Nicholas is Kimberlee and Kelly's biological child. Zachary is Peter and Kimberlee's biological child, born during her marriage to Kelly Pearson. Kimberlee and Peter Thanos are now married, reside in Oregon, and have an infant daughter together. Kelly is unmarried and resides in Utah. Nicholas and Zachary have shared equal time with Kelly and Kimberlee since the Pearsons separated in May 2000.

### METHODS OF EVALUATION:

Multiple individual interviews were conducted with Nicholas and Zachary's biological mother, Kimberlee; Nicholas' biological father, Kelly; and Zachary's biological father, Peter. The children were observed in the presence of each parent and in the presence of Peter and Kimberlee jointly. The boys were interviewed individually on two separate dates, once accompanied by Kelly and once by Kimberlee. Each parent completed psychological testing including the Minnesota Multiphasic Personality Inventory II, the Beck Depression Inventory, the Sentence Completion and a parenting questionnaire. The following collateral sources were contacted: Stormie Tisdale (former nanny), Sonja Traub, Ph.D. (Peter's therapist), Christopher Thanos (Peter's adult son), Vanessa Tomazini (nanny), Wendy Boyle (friend of Kimberlee and Kelly), Kristina Farrar (friend of Kimberlee and Kelly), and Jay Thomas, Ph.D. (consulting psychologist). Multiple court and personal documents were reviewed, including email between the parties. All documents were provided to counsel in October 2003 per a Subpoena Duces Tecum from Kelly's attorney, Paige Bigelow.

Jill D. Sanders, Ph.D.  
Clinical Psychologist

## CASE BACKGROUND:

Kelly and Kimberlee began dating in May 1992 and married three months later. From Kelly's perspective the first two or three years of the marriage were very good as both partners focused on career development. He believes tension began to build as his desire to begin a family clashed with her career plans. According to Kelly, Kimberlee never truly focused on their relationship. From Kimberlee's perspective the marriage was difficult to begin with due to Kelly's controlling and angry demeanor in combination with her passive style. In 1995 Kimberlee developed a strong friendship with her co-worker, Peter Thanos. Because they were both married they attempted to limit their relationship in various ways and were committed to remaining married to their spouses. Peter's wife was diagnosed with cancer in 1996, which further complicated his decision making regarding Kimberlee. Kimberlee and Kelly had Nicholas in 1997. The relationship between Peter and Kimberlee grew and they started a sexual relationship in early 1998. In April 1999 Kimberlee told Kelly that she was pregnant with Peter's child and requested a divorce. Peter's wife was in the final stages of cancer and despite his desire to be with Kimberlee and Zachary he did not leave Sharlene during her final months. Zachary was born in September 1999 the Pearsons separated in May 2000 and Sharlene Thanos died in December 2000. Nicholas and Zachary have spent equal amounts of time with Kimberlee and Kelly since the separation. In July 2002 Kimberlee and Peter Thanos married and purchased a home in Oregon. Their daughter, Madelaine, was born July 13, 2003. Kimberlee has been returning to Utah from Oregon for her parent time with Nicholas and Zachary, maintaining a home in Utah for that purpose. Whenever possible she travels home to Oregon with the boys. Madelaine currently accompanies Kimberlee on her trips to Utah. Kelly has not remarried and resides in Salt Lake City.

The current access schedule is a one week/one week rotation with transitions occurring on Friday afternoons. Kimberlee flies from Portland, Oregon with her infant daughter, Madelaine, and lives in Salt Lake City during her access periods. She returns to her home with Peter in Oregon with the boys as much as possible. The boys are very comfortable in all three homes but this arrangement has no future. Nicholas and Zachary are fast approaching the time when geographical stability will be necessary for their normal development. Madelaine will soon reach the age when so much travel is disruptive to her need for routine and security of environment.

Kelly continues to live in the marital home in Salt Lake City. He has not remarried but retains a nanny when the boys are with him. He lives alone when Nicholas and Zachary are not in Utah. Kimberlee and Peter live in Portland, Oregon with Madelaine and the boys visit that home as often as possible.

### CLINICAL SUMMARIES:

Kelly Pearson is forty-two years old. He comes from a close, supportive family. He gained an MBA from Brigham Young University in 1993 and has been steadily employed since that time. Presently he is a computer systems consultant for Agilent and works from home. Kelly has no history of psychiatric, legal or substance abuse problems. He had a limited relationship history before meeting and marrying Kimberlee. Despite the knowledge of Kimberlee's relationship with Peter Thanos, Kelly persisted in believing that the marriage would survive. He was willing to remain married and raise both Nicholas and Zachary. Kimberlee pursued the divorce. Kelly has not remarried. Kelly was an involved parent with Nicholas and earnestly assumed the role of father to Zachary. Psychological testing was within normal limits, suggesting that Kelly does not experience psychological or psychiatric problems that interfere with his overall ability to function.

Kimberlee Thanos is thirty-six years old. She maintains good relationships with her diverse family members. Since gaining an MBA from Brigham Young University in 1993, Kimberlee has been steadily employed as a computer systems consultant. Presently she works part time from home for a Utah based company. Kimberlee has no history of legal or substance abuse problems. She was treated for Generalized Anxiety Disorder by Lynda Steele, LCSW beginning in 1999 but has never been medicated for this or any other psychiatric disorder. According to Ms. Steele, Kimberlee's symptoms were primarily related to marital distress, the stress of having two very young children and occupational stress. Kimberlee's relationship with Kelly was her first significant relationship. She reported being unhappy very early in the marriage. Her relationship with a co-worker, Peter Thanos, evolved over a period of six years and they are now happily married. Kimberlee has consistently been a primary parent to Nicholas, Zachary and now Madelaine, age four months. Psychological testing was within normal limits, suggesting that Kimberlee does not experience psychological or psychiatric problems that interfere with her overall ability to function.

Peter Thanos is fifty-three years old. He maintains close relationships with his mother and sister, his father is deceased. Peter attended college but did not complete a degree. He was employed by HP/Agilent for twenty-four years and is now the Director of Operations for Cascade Microtech/Pyramid Probe Division. Peter had two serious relationships, including one brief marriage, before marrying Sharlene Gordon when he was twenty-three years old. Their twenty-five year marriage ended when Sharlene died of cancer in December 2000. Their one child, Christopher, is twenty-eight years old, married, and recently completed a Ph.D. from Brown University. Christopher described Peter as a very loving, involved and supportive father. Peter is eager and willing to parent Nicholas as well as his two biological children with Kimberlee, Zachary and

Madelaine. Psychological testing was within normal limits, suggesting that Peter does not experience psychological or psychiatric problems that interfere with his overall ability to function.

#### CHILDREN AT ISSUE:

Nicholas Pearson, age six, DOB: 7/6/97:

Nicholas is a bright, articulate and socially outgoing six-year-old boy. He is sensitive, vigilant and somewhat anxious, but he typically externalizes these characteristics rather than becoming withdrawn. He is a very good, curious and compliant student and is well liked by his peers. Organization and information help him feel in control so he actively seeks to gain and/or provoke information from others. He can become irritable and whiny or sad when his attempts to manage his environment and other people are thwarted. Nicholas will do well academically and socially. He responds very well to structure and reasoning and is highly unlikely to become a behavior problem. Nicholas' most significant needs fall in the emotional category. He is worried and confused about the future. I suspect that he often feels on the verge of chaos. He wonders if he will be able to manage all these relationships in his life and feels responsible for making his loved ones happy.

Nicholas requires some emotional supports which are easy to identify and not so easy to deliver:

- He needs consistent and predictable access to the important people in his life. He is a "counter" – he emotionally tracks the amount of time he spends with people and comes to internal conclusions as to whether he and they "got enough".
- Nicholas does not perceive flexibility of schedule or plan as a good thing. He needs consistency and predictability. He needs information and he needs to know when the information he has becomes obsolete.
- Nicholas worries about the people he loves. He needs to be told where people stand with each other and he needs to observe people acting in accordance with their words. He is very busy trying to figure out how to keep people happy and make these complex relationships work. He may actually be working harder at this than anyone else. He needs help from his parents through their role modeling of positive relationships and productive problem solving.
- Nicholas needs stable and consistent daily routines as a foundation for a less anxious view of the world.
- Nicholas' attachment to Kimberlee is very strong and his time with her should not be reduced below present levels.



Zachary Pearson, age four, DOB: 9/14/99:

Zachary is an active, curious, loving four-year-old boy. He is inquisitive, but somewhat reserved. He likes to take stock of situations before he dives in. He interacts with the world in a very physical manner, a characteristic that he will need to learn to manage. Based on his current developmental path it is unlikely that Zachary will have academic, social or behavioral problems. He is less guarded emotionally than Nicholas and seems less worried. The current situation does not appear to confuse Zachary; he treats all three parents as loved and trusted caregivers. He is a physical child and requires physical attention, play and nurturing to feel secure. Zachary also requires consistent attention to his skin condition. He will thrive under a high level of intellectual and physical stimulation. His attachment to Kelly is very strong and he would be traumatized if that relationship were to suddenly change. Kelly is clearly Zachary's psychological father at present and Peter is clearly his biological father and growing in importance. Zachary's relationship with Kelly must continue and his relationship with Peter must grow.

These boys have an exceptional sibling relationship. They are best friends. They need to reside together. They also now have an infant sister to whom they will no doubt become much attached. Separating these three siblings is not an option.

They are also developing a need for a well-coordinated explanation of their circumstance that is not contaminated by judgment and resentment. Failure to provide this will leave both boys on shaky ground in terms of their sense of origin, belonging and most importantly, their sense of being wanted, loved and accepted.

#### PARENTING INFORMATION:

**Parenting Strengths** - Kimberlee's parenting skills are excellent. She is very loving, well organized, and invested in education – even at home. When communicating with her children she uses clear, age appropriate language and is able to guide their behavior very effectively without becoming negative. Her parenting style is responsible and responsive. She recognizes the uniqueness of each child and understands her children's strengths and weaknesses.

Kelly's parenting skills are also excellent. He is highly involved with the children in all areas. He emphasizes play and companionship, along with education. He also communicates very clearly with the children and has no need or desire to be authoritarian in his attempts to manage their behavior. His love and devotion to both children is tangible and authentic. He is attuned to the boys' emotional needs and they sense his unconditional love.

Peter is the third excellent parent in this case. His gentle, calm demeanor makes him instantly available to the boys, both emotionally and physically. He is funny, creative and enjoys physical play. Under these unusual circumstances he has shown much patience and an understanding of the complex emotional environment the boys live in. His discipline style is slightly more authoritarian than Kimberlee or Kelly's style but this is a benefit to the boys under the circumstances. Peter has the advantage of having successfully raised another child to adulthood.

### **Parenting Weaknesses –**

It is nearly impossible to talk about parenting weaknesses related to these three parents. The deficits are very minor in all three cases.

Kimberlee's primary weakness is probably her natural desire to do everything too well, sometimes failing to set reasonable limits for herself and thereby reducing her accessibility to others, including her children. As she overextends herself her preoccupation, irritability and stress increases.

Kelly's primary weakness is a tendency to overindulge the boys at times. He may give in too often to the demands of these children. He needs to be more diligent at controlling Zachary's eczema through daily treatment.

Peter's primary weakness may be his tendency to underestimate his own impact. Any firmness of tone or angry body posture is so in contrast with Peter's general demeanor that the boys will take even the slightest negativity and exaggerate it in their own minds. Peter must be aware of his impact on the children and factor it into his behavior, especially when disciplining the children.

The greatest difficulty in this case lies not in the individual parenting deficits of these people, but in the complicated and tension filled interaction between the three of them. Kim experiences Kelly as controlling and emotionally abusive; Kelly experiences Kim as manipulative and insincere; Peter experiences Kelly as possessive and inattentive; and Kelly experiences Peter as angry and aloof.

Despite the negative tone of this triangular interaction, a generally positive decision making process has always existed between them, and they have managed quite well at keeping the children out of the fray. Nevertheless, the suspiciousness and sense of disapproval between Kelly and Kimberlee and Peter is high and the children sense it and react to it. The damage to the children will become more pronounced if these conflicts are not resolved.

**Impairment** – None of these parents has a history of impairment that impacts parenting.

**Availability** – Kelly currently works full time from home with limited business travel. Kimberlee currently works part time from home with very limited travel. Peter works full time outside the home with limited travel.

**Facilitating a Relationship With the Other Parent** - Kimberlee, Kelly and Peter have done an excellent job of maintaining the children's relationships with the other parents. There has been relatively little negative talk in front of the children. Kelly has a tendency to ask too many questions of the boys regarding Kimberlee and Peter. Peter and Kimberlee have the tendency to proceed with their parenting agenda, sometimes without fully considering Kelly's position. However, compared to other cases all three parents have done an exceptional job of promoting the worth of all relationships for the boys.

**Unique Fit Between Child's Needs and Parents' Capacities** –Individually, or in pairs, these three parents have the capacity to effectively parent Nicholas and Zachary. Each has minor weaknesses that scarcely dent the strong resources they have to offer these children. Their parenting styles are complimentary. They have similar major values and they recognize the importance of each other in the children's lives. Kimberlee and Peter offer the benefit of a parenting team, but it is likely that Kelly will remarry in the near future and offer a similar benefit to the boys.

#### **Parents' Perception of Issues –**

##### **Kelly:**

In an email dated July 31, 2003 Kelly wrote, "My concern since litigation began has always been that Peter and Kimberlee want to define my relationship with Zachary as one that is not a father son relationship when it clearly currently is a father son relationship." Kelly maintains that he is Nicholas and Zachary's real father despite the fact that Peter Thanos is Zachary's biological father. Kelly points to his hands on, fifty percent parenting of Zachary since Zachary's birth. He maintains that Peter's relationship with Zachary was slow in developing and that he has been the most consistent father. While he recognizes Peter's importance to both boys, he believes their best interests will be served by his being allowed to be their legal and joint custodial father. He worries that his relationship with Zachary will be diminished if Peter is allowed legal custody of Zachary. Kelly stresses Peter's unwillingness to forge a relationship with him, and sees that as a huge impediment to co-parenting. He worries that if his time with either child is reduced below fifty percent that he will lose his emotional and psychological place in their lives. Kelly worries that Peter and Kimberlee are sabotaging his relationship with Zachary by emphasizing the importance of the

biological relationship between Zachary and Peter. Though Kelly has offered at various times to move to Oregon to facilitate a joint access schedule, he is worried that he will not find suitable employment or potential marital partners there and worries about the lack of support from his extended family in Utah.

**Peter:**

In an email dated July 24, 2003 Peter wrote, "...the current roles that Kim and Kelly occupy exclude me from parenting Zacky, except for what time I get during Kim's time with the boys" and wrote on May 2, 2003, "I just can't understand how Zacky's natural parents, who are married, shouldn't have primary care of their son." Peter is worried that his limited time with Zachary will prevent the development of a healthy, normal father-son relationship. He is concerned that though Zachary is his biological child, his influence over Zachary and his right to make decisions will be severely limited. Peter wonders about the negative effect of Kelly's rigid ideas and positions on the boys' ability to establish relationships with each parent as they see fit. Peter is stumped by Kelly's unwillingness to recognize the importance of the biological bond between him and Zachary. He does not perceive Kelly as having attempted to establish any real relationship with him, and does not believe that Kelly is sincere in his protestations to the contrary. Peter sees Kelly as working harder to maintain his relationship with Zachary than with Nicholas; an effort that strikes Peter as misguided, unrealistic and unfair to Nicholas. He is also concerned about what he perceives as parenting deficits on Kelly's part - primarily related to health care and supervision issues. Peter is very concerned about his ability to gain equivalent employment in Utah if he is forced to relocate. He is very worried about his precarious financial position that is a result of supporting two homes in two different states as well as the ongoing costs of travel and litigation.

**Kimberlee:**

Kimberlee maintains that she has gone to great lengths to recognize, support and accommodate Kelly's position with the children. She feels she has been more willing to compromise from the very beginning than has Kelly. Kimberlee struggles with what she perceives to be Kelly's negative and intimidating attitude toward her and worries about the effect of this attitude on the children. Kimberlee points to her complete compliance with the court order regarding joint custody as evidence of her willingness to co-parent but stresses the extreme emotional and financial hardships that this places on her. Kimberlee worries about Kelly's ability to supervise the boys, his ability to manage Zachary's skin condition, his inability to isolate his anger and his "rigid" decision making process and its effect on Nicolas and Zachary. On January 21, 2003 Kimberlee stated "I think he (Kelly) legitimately hates me and Peter" and worries about the impact of his negative talk on the boys and their relationships with her and Peter. Kimberlee is concerned about the impact of time spent away from Oregon on both their marriage and Peter's relationship with Madelaine. She is concerned

that the lack of a stable, productive routine in one place will rob the boys of the stability they need and deserve. But more than anything, Kimberlee is concerned about Nicholas. She stated "I'm not worried about Zacky. The person who's losing in all this is Nicky" because Nicholas "has to pretend he doesn't like Peter". She perceives Nicholas as emotionally vulnerable because "Kelly's a better Dad to Zach than he ever was to Nick" and sees Nicholas as getting a lesser share of Kelly's attention and effort. She is also worried about the financial impact of continued travel and litigation.

**Looking Ahead** – The current access plan which requires Kimberlee to travel between Utah and Oregon is not sustainable on any level for anyone. The financial, emotional and physical costs are too high. Nicholas and Zachary have only a few more years where they are socially and academically "portable" and need to be established in one primary community soon. By fourth grade Nicholas will be making friends that could transition with him into junior high school. Both boys will be expanding their extracurricular activities and making long term activity commitments. Their exceptional relationship with each other will become even more important and their relationship with their sister will have a significant influence on their development as boys. Their relationships with each of their three parents will grow and evolve to suit their individual needs.

RULE 4-903:

1. Child's preference: Nicholas and Zachary are too young to assess their custodial options.
2. Benefit of keeping siblings together: These children are very best friends and it is likely that their sister will join their unusually strong relationship. They should not be separated.
3. Relative strength of the child's bond with one or both of the prospective custodians: Nicholas and Zachary have excellent relationships with all three parents.
4. General interest in continuing previously determined custody arrangements where the child is happy and well adjusted: Kelly and Kimberlee established a 50-50 parenting time arrangement that has worked relatively well but is not feasible over the long term if all parties do not reside in the same area.
5. Factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

- i. Moral character and emotional stability: All three parents are of high moral character and exhibit emotional stability.
- ii. Duration and depth of desire for custody: Equal
- iii. Ability to provide personal rather than surrogate care: Generally equal
- iv. Significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes: None
- v. Reasons for having relinquished custody in the past: Not applicable
- vi. Religious compatibility with the child: Kelly is a practicing Mormon; Kimberlee no longer practices the Mormon religion; Kimberlee and Peter support the boys' participation in religious training and activities.
- vii. Kinship, including, in extraordinary circumstances, stepparent status: Peter and Kimberlee are Zachary's biological parents. Kelly and Kimberlee are Nicholas' biological parents. Kelly is Zachary's psychological father at present. Nicholas and Zachary have a very strong attachment to Peter.
- viii. Financial condition: All parties have the capacity to support these children.
- ix. Evidence of abuse of the subject child, another child, or spouse: None

#### F. Special Considerations/Recommendations:

Proximity to Parents: Zachary and Nicholas need to live in close proximity to Kimberlee, Kelly and Peter. This requires that either Kelly relocates to Oregon or Peter, Kimberlee and their infant daughter relocate to Salt Lake City. The benefits to the children remaining in Salt Lake City include stability of social, family and academic networks. Kimberlee's current job is headquartered in Salt Lake City though she works from home. The disadvantage is that Peter does not have adequate employment opportunities in Salt Lake City and he is the primary financial provider for their family. Additionally, Kelly's Salt Lake employment status could change in the very near future, requiring him to relocate. Being single, Kelly is more transportable and during negotiations, he offered to move to Oregon. Maintaining extended family, social and academic networks are of less concern than creating geographical and financial stability for the children at this

point in their development. Developmentally speaking, both boys are in a transportable stage. They have the capacity to positively adjust to a permanent move to Oregon.

If these parents can not make a realistic assessment of the options and come to a mutual decision an independent vocational advisor could assess the employment options in both locations for Peter and Kelly and choose which location offers the best options for both. Kelly has consistently made offers to move to Portland to maintain his relationship with the Nicholas and Zachary.

### CONCLUSIONS:

This complicated case has no simple solution. As in all complicated cases it is tempting to focus on the provocative, and often times, negative aspects of a case and link recommendations to those high profile issues. In this case the provocative issues include a long term affair, a father eager to raise a son fathered by another man, a man unable to leave a dying wife to the detriment of his true love and new baby, and a mother reduced to making the very best of bad choices. These issues are part of the history of these children, but they have very little to do with their future and consequently, should have little bearing on a plan that takes Nicholas and Zachary forward from here.

Instead of relying on historical issues, these recommendations focus on present realities. Like all parents, these three have strengths and they have weaknesses. Like all parents, they could each improve. But any attempt to magnify their small personal foibles or minor parenting missteps into major differences is stretching far beyond the data. Worse, it would leave a legacy of misinformation for Nicholas and Zachary. Kelly Pearson, Kimberlee Thanos and Peter Thanos are fine people and excellent parents. Period.

What remains is a logistical problem. What arrangement will allow Nicholas and Zachary to have a significant relationship with all three of their parents and allow them to develop a relationship with their sister, Madelaine? What arrangement provides the most stability over the long term?

I am pivoting my conclusions around Kimberlee's role as the biological mother of both boys and their sister. She is the parent with the strongest inherent responsibility to all of these children, and it is a responsibility that she fully recognizes and embraces. She has honored the Court Order currently in place and bears the bulk of the physical, emotional and financial discomfort associated with it. She has done an exemplary job of facilitating Kelly's relationship with both boys. Meanwhile she has established a life in Oregon with Peter and Madelaine that fully incorporates Nicholas and Zachary.

Given her unequalled role in the lives of these children I recommend that the solution be centered on allowing Kimberlee to parent in an optimum manner. She has chosen to establish a life for herself and her family in Oregon. This choice did not diminish her earning potential and maintains Peter's employment. It is a location familiar to Kelly and an area with probable strong employment options for him. The children consider Oregon to be one of their homes and are very comfortable in that environment. Currently single and working from his home, Kelly is the most portable of the three parents.

I am convinced that these parents will be able to create a good life for themselves and their children in Oregon and urge that Kelly relocate to Oregon in time for Nicholas to begin the second half of this school year there. Specific recommendations regarding legal responsibilities and access schedules are detailed in the following section.

#### RECOMMENDATIONS:

1. Legal custody. Kimberlee and Peter should be named joint legal custodians of Zachary. Kimberlee and Kelly should be named joint legal custodians of Nicholas. (During the Settlement Conference, Kimberlee and Peter proposed a three-way joint legal custody of Zachary. I am not opposed to this option as it ultimately gives Kimberlee and Peter a majority position). Kelly's special relationship with Zachary should be legally protected in the form of third party access with the responsibility to make daily decisions on Zachary's behalf when Zachary is in his care. Kimberlee and Peter will make school placement decisions for both boys if the children reside in Oregon. The choice of Utah school should be based on a comparison of test scores for each parent's neighborhood school. Both biological parents of each child must agree upon any elective medical or dental treatment. It would be best if decisions regarding any extracurricular activities would be jointly made by all three parents so that the boys' schedules are manageable. If this is not possible, Kelly and Kimberlee will jointly decide on Nicholas' activities and Kimberlee and Peter will jointly decide on Zachary's activities.
2. Access schedule. Regardless of whether this "extended family" lives in Salt Lake City or in Oregon the following schedule is recommended. However, my strong recommendation is that Kelly relocate to Oregon so that Nicholas can begin the second school term in Oregon:
  - a. Continuation of the present seven day/seven day rotation. The children have been on this schedule since September and appear to be able to tolerate the amount of time away from the other parent.
  - b. During the summer months Kimberlee/Peter and Kelly would have the option of a ten-day period of uninterrupted access to both



boys. Kelly will have first choice of that period in even years and Kimberlee/Peter will have the first choice in odd years. These periods may not be combined with regular access to form a block longer than ten days.

- c. Beginning in the school year of 2004/2005 Nicholas will continue on the weekly rotation. Transitions would occur Sunday evening. Zachary will spend five nights with Kelly and either return to Kimberlee/Peter for the last two nights of the seven-day period or remain with them for the first two nights of Kelly's period (rotating each time). Nicholas would join Zachary at Kimberlee/Peter's on Sunday for his continuous seven-day period in that home. This arrangement keeps the boys on a highly predictable schedule, allows them to spend the vast majority of their time together, allows each of them some time alone with their biological fathers, and coincides with Peter's greater availability on the weekends.
  - d. Holidays may be rotated according to Utah guidelines, or according to mutual agreement, with only major holidays being included (i.e. UEA, Thanksgiving, Christmas, Spring Break, July 4<sup>th</sup>).
3. Transportation. Each parent will be responsible for picking up the children at the beginning of that parent's access period.
  4. Review. This schedule will be reviewed in August 2005 and a revised schedule may be recommended at that time based on current circumstances.
  5. Relocation. Once the decision is made to have the children reside in Oregon or Utah, which ever parent chooses to relocate there after agrees to not attempt to relocate the children but will propose a reasonable long-distance access plan.
  6. Renaming. Zachary's first name should not be altered; his last name may be changed to reflect his biological parentage.
  7. Religion. Both children may participate in religious activities as any of the three parties chooses during their access time. However, Zachary should not be confirmed or baptized or prepared for such events without the complete agreement of Peter and Kimberlee.
  8. Attendance at school and extracurricular events. To whatever extent possible all three parents should be welcomed to attend all events for both children. If this becomes problematic, rather than expose the boys to toxic conflict, Kimberlee will develop an attendance rotation reflecting 50% attendance at all events for Kelly. Any or all three parents may volunteer in either boy's classroom.

9. Parenting Coordinator. Sandra Foster, LCSW, is recommended as a parenting coordinator to facilitate the relationship between Peter and Kelly and serve as an advisor for any parenting disagreements. If the parties reside in Oregon a similar professional should be identified to assist these parties.
10. Explanation. It is important that an explanation regarding the circumstances of each child's conception, birth and circumstances be crafted with the help of a child psychologist and provided to the boys in a united manner. Nicholas and Zachary need to hear a consistent presentation regarding these issues.
11. Phone access. Each parent may call the children once a day while they are in the other parents' care but phone calls initiated by the children should be unlimited.

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

Jill D. Sanders, Ph.D.  
Clinical Psychologist  
November 3, 2003

Tab 16

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

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KELLY F. PEARSON,	:	FINDINGS OF FACT AND
Petitioner,	:	CONCLUSIONS OF LAW
vs.	:	CASE NO. 004907881
KIMBERLEE Y. PEARSON,	:	
Respondent.	:	
-----	:	
PETER D. THANOS,	:	
Intervenor.	:	

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The above-entitled matter was tried to the Court on April 1, 2, 5, 6, 7 and 8, 2004. Petitioner was present and represented by Paige Bigelow, respondent was present and represented by Steven H. Gunn, and intervenor was present and represented by Kellie Williams. The Court having heard the testimony of the witnesses, having considered the evidence presented and the argument of counsel, and being otherwise fully informed enters the following Findings of Fact and Conclusions of Law.

To the extent any of the following Findings of Fact should be considered as Conclusions of Law, they shall be considered a Conclusion of Law.

**FINDINGS OF FACT****Fact and Procedural History**

1. Petitioner and respondent, Kimberlee Thanos, were married on August 17, 1992 and were divorced on June 5, 2002 by a Decree which terminated their marriage, but reserved custody and visitation issues for later disposition. Petitioner and respondent, Kimberlee Thanos, conceived a child that was born on July 6, 1997, named Nicholas Browning Pearson.

2. Also during their marriage, respondent, Kimberlee Thanos, conceived a child, Zachary Andrew Pearson ("Zachary"), who was born on September 14, 1999. However, approximately four months after respondent, Kimberlee Thanos, became pregnant with Zachary, respondent, Kimberlee Thanos, informed petitioner that intervenor, Pete Thanos, was Zachary's natural father. Approximately two weeks after Zachary's birth, respondent, Kimberlee Thanos, and intervenor, Pete Thanos, again informed petitioner that intervenor, Pete Thanos, was Zachary's father.

3. Intervenor, Pete Thanos, obtained DNA paternity test results which he later filed with the District Court. The paternity index for intervenor is 98011 and the probability of paternity is 99.999%.

4. Respondent, Kimberlee Thanos, filed various affidavits with the Court, commencing January 2001, stating under oath that intervenor, Pete Thanos, was the natural father of the minor child.

5. Petitioner and respondent, Kimberlee Thanos, separated when Zachary was nine months of age. In his first filed Affidavit, petitioner acknowledged that respondent, Kimberlee Thanos, had become pregnant with Zachary and disclosed to petitioner that Zachary was intervenor, Pete Thanos' son and not petitioner's biological child. Other like statements are contained in various pleadings. In his Affidavit dated September 28, 2001, petitioner admitted that he was aware that intervenor, Pete Thanos, was the child's biological father, although he alleged that he was the child's "psychological" parent. In paragraph 15 of that affidavit, petitioner acknowledged that he does not advocate secrecy regarding the biological facts of Zachary's conception (implicitly acknowledging that Pete is the biological father). In paragraph 16, page 11 of that document, petitioner states that, "I have at all times known that he [Zachary] was conceived of Mr. Thanos."

6. At the time of Zachary's conception and birth, intervenor, Pete Thanos, was married to another woman. Intervenor, Pete Thanos' prior wife died from cancer in December, 2000. Intervenor, Pete Thanos, has set forth in his affidavits and in argument that he did not inform his prior wife of Zachary's birth

because he did not want to further damage her already fragile health or cause her further emotional trauma, and that he wished to remain with her to assist her through her final months of life. Based on intervenor's affidavits, it appears that out of compassion for his then-wife, intervenor did not file a paternity action regarding Zachary until after her death.

7. Petitioner and respondent, Kimberlee Thanos, separated and later divorced. As part of their divorce action, they stipulated to a temporary order which granted them joint legal physical custody of Zachary and his brother Nicholas. Intervenor, Pete Thanos, and respondent, Kimberlee Thanos, continued their relationship, and married on July 1, 2002, after the Pearson divorce was finalized.

8. The respondent and intervenor have since had a child as issue of their marriage, namely Madelaine, whose date of birth is July 13, 2003. Respondent and intervenor purchased a home in Oregon in July of 2001. Intervenor has at all times since the filing of his Motion for Intervention and Petition for Paternity been a resident of the State of Oregon.

9. Beginning in February, 2001, intervenor, Pete Thanos, had ongoing contact with Zachary, which included day long visits and periods of vacation, although he was precluded from having overnight visits until he married respondent, Kimberlee Thanos.

The contact has been frequent and consistent since February 2001. As the petitioner and respondent share joint custody, the respondent has been traveling to Utah from Oregon for her parent time with Nicholas and Zachary, and has maintained a home in Utah for that purpose and also the children, Nicholas and Zachary, are transported to Oregon during the respondent's parent time. Madelaine typically accompanies respondent on her trips to Utah. petitioner has not remarried and resides in Salt Lake City.

10. The current access schedule is one week/one week rotation with transitions occurring on Friday mornings. The respondent flies from Portland, Oregon with Madelaine and then returns to her home with intervenor in Oregon and, again, with Zachary and Nicholas as frequently as possible.

11. As to the procedural history of this case, at the time of hearing before Commissioner Evans on the Motion to Intervene on August 30, 2001, the Commissioner analyzed the case of State of Utah in the Interest of J.W.F., 799 P.2d 710 (Utah 1990), known as the Schoolcraft case, and recommended that intervenor, Pete Thanos' Motion to Intervene be denied. The Commissioner reasoned that intervenor, Pete Thanos, lacked standing to challenge the presumption of paternity that existed in favor of petitioner, given the consideration that should be given to preserving the stability



of marriage and to ensure that the children are protected from disruptive and unnecessary attacks on their paternity.

12. After briefing and argument of the case on December 3, 2001, an Order on Objection to Recommendation was entered by this Court. At the time of the initial hearing, this Court found that the criteria outlined in the case of In re: J.W.F., 799 P.2d 710 (Utah 1990) ("the Schoolcraft case") apply to this case and set forth the framework to determine whether intervenor, Pete Thanos' Motion to Intervene should be granted.

13. The Court found that in order to determine whether intervenor, Pete Thanos, had standing to intervene to establish Zachary's paternity and to rebut the presumption that Zachary was the legitimate son of petitioner and respondent, Kimberlee Thanos, the Court must first consider the policies set forth in Schoolcraft. The two-prong analysis of Schoolcraft included (1) preserving the stability of the marriage and (2) protecting children from disruptive and unnecessary attacks on their paternity. The Court found that the second of the policy considerations—protecting children from disruptive and unnecessary attacks—was most applicable in this particular case, but that the record was insufficient to adequately address that policy consideration as it applied to the circumstances in this case.

14. The Court found that the affidavit of Dr. Goldsmith was not case-specific and was of little help to the Court in this regard. Therefore, in order for the Court to adequately address the second Schoolcraft policy consideration, the Court appointed Dr. Jill Sanders to provide an independent "Schoolcraft" evaluation. Petitioner and respondent, Kimberlee Thanos, had previously stipulated to Dr. Sanders conducting the custody evaluation in this matter. The Court then reserved judgment on intervenor, Pete Thanos' standing in order to allow Dr. Sanders to conduct a separate preliminary evaluation.

15. As proffered at the time of hearing before the Commissioner and stated in pleadings and as set forth in the affidavits of respondent and intervenor Zachary's physical resemblance to intervenor was such that Zachary would soon recognize that intervenor was his father. Further, the biological relationship between Zachary and intervenor, Pete Thanos, cannot and should not be hidden from the child, as intervenor, Pete Thanos, will continue to be an integral part of Zachary's life. Respondent, Kimberlee Thanos, and intervenor, Pete Thanos, have an intact family unit to provide care and security to Zachary. Further, petitioner and respondent, Kimberlee Thanos, have, in one form or another, informed dozens of individuals in their circle of family, friends and acquaintances that intervenor, Pete Thanos, is

Zachary's biological father. It is impossible to keep the "secret" of Zachary's parentage hidden from him.

16. Dr. Sanders submitted an evaluation report to the Court and counsel dated May 13, 2002. Dr. Sanders' summary opinion was that from a developmental and psychological prospective, Zachary's functioning was not inherently disrupted by intervenor, Pete Thanos' involvement. Further, Dr. Sanders found that intervenor, Pete Thanos' relationship with Zachary was not only not disruptive, but was necessary to Zachary's normal and positive development.

17. In addition, Dr. Sanders noted that respondent, Kimberlee Thanos, and intervenor, Pete Thanos, planned to marry and that if they did marry, intervenor, Pete Thanos, would, at the least, have a role as stepfather, and that his status as Zachary's biological father inherently escalates the importance of the relationship between Zachary and intervenor. As Dr. Sanders reported, the relationship between parents and their biological children is psychologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and his biological parent is generally a personal one, that the relationship between intervenor and Zachary is essential to Zachary and that no one can play this role in Zachary's life except intervenor, Pete Thanos. Dr. Sanders also stated that, based upon the quality of the relationship between Zachary and intervenor and

the likelihood that intervenor, Pete Thanos, and Zachary would have continuing extensive contact, their attachment would be likely to deepen and become more significant over time. Dr. Sanders opined that if petitioner was not interested in continuing to parent Zachary, he would likely develop a full father/son attachment to intervenor, Pete Thanos, because Zachary was still young and because intervenor and Zachary have had contact since Zachary's infancy.

18. Upon receipt of the report, petitioner did not object to the report, nor did he object to the Court receiving the report. Instead, petitioner requested further clarification with regard to the Schoolcraft evaluation by Dr. Sanders. Pursuant to a telephone conference requested by petitioner on May 28, 2002, the Court permitted petitioner to supplement his concerns and address the Court with a letter outlining his concerns and his further requests regarding Dr. Sanders' further analysis. Based upon petitioner's motion and letter, the Court directed Dr. Sanders to make further analysis, to-wit: the impact on the child of a disruption in Zachary's relationship with petitioner, and Zachary's ability to understand his biological relationship.

19. In response, Dr. Sanders submitted a supplemental report dated August 26, 2002. Dr. Sanders found that the primary disruption in Zachary's relationship with petitioner occurred at

the parties' separation when Zachary was approximately nine months of age. Dr. Sanders concluded that by age 18 months Zachary was firmly established in a loving, secure, and relatively predictable relationship with petitioner, respondent and intervenor. Dr. Sanders indicated that there was no inherent reason why intervenor's presence as another loving caregiver should have any further disruptive impact.

20. In addition, Dr. Sanders stated that she did not believe that Zachary had lost his relationship with petitioner or that there was a basis to believe that further disruption to the relationship between Zachary and petitioner was intrinsically linked to intervenor, Pete Thanos' presence in Zachary's life. Dr. Sanders found that given Zachary's cognitive ability at the age of 3, Zachary can understand simple descriptions of biological facts of his parentage in the same way that a three-year-old adopted child can understand the biological facts of his or her parentage. She indicated that the emotional meaning of these relationships is unlikely to have much impact on Zachary for quite some time. Again, Dr. Sanders noted that Zachary has a loving relationship with petitioner and with intervenor.

21. After considering both of Dr. Sanders' reports, the criteria applicable to the facts in this case, and the Schoolcraft criteria, the Court previously found that it was appropriate to

sustain intervenor's objection to the recommendation of Commissioner Evans and grant the Motion to Intervene. The Court found that Dr. Sanders had very carefully articulated, to the Court's satisfaction, the policy considerations that the Court must make and find under Schoolcraft. As previously found, the first prong of the Schoolcraft analysis—relating to preserving the stability of the marriage—was not a consideration in this case, due to the fact that there was no marriage between petitioner and respondent, Kimberlee Thanos, to be preserved, and that the stability was shattered when the parties separated when Zachary was approximately nine months of age. The Court also noted that intervenor, Pete Thanos, and respondent, Kimberlee Thanos, are now married. Further, pursuant to the report of Dr. Sanders intervenor has established a relationship with Zachary, and there was nothing that would be adverse to the best interests of the child or disruptive to him and the Court previously found it was in the best interest of Zachary to allow Pete Thanos to intervene. The Findings of Fact and Conclusions of Law in Re: Motion for Intervention and Order Granting Intervention of Intervenor, Pete Thanos, were signed by the Court November 7, 2002.

22. On October 10, 2002, the petitioner filed a Motion to Bifurcate, to Stay Proceedings, and to Set Date for Response to Motion for Summary Judgment. That matter came on for hearing

before the Honorable Tyrone E. Medley on November 1, 2002, and an Order on Motion to Bifurcate and to Stay Proceedings was signed December 16, 2002.

23. On November 12, 2002, the petitioner filed an Answer to the Intervenor's Verified Petition for Paternity.

24. The petitioner filed another Motion for Stay and For Expedited Disposition on or about November 20, 2002. That was heard by the Court on November 27, 2002, and denied by the Court and the Order Denying Petitioner's Motion for Stay Order was signed December 20, 2002.

25. On November 15, 2002, Pete Thanos, as intervenor in the divorce action, filed a Motion for Partial Summary Judgment with a supporting memorandum and Affidavit, seeking a declaration by the Court that intervenor, Pete Thanos, is Zachary's biological father.

26. The petitioner filed a Motion for Stay with the Utah Court of Appeals on or about November 27, 2002, requesting that the Court of Appeals stay the paternity and custody proceedings in the District Court pending resolution of the petitioner's Petition for Extraordinary Relief. Petitioner filed his Petition for Extraordinary Relief with the Utah Supreme Court on or about November 14, 2002, and the matter was transferred to the Utah Court of Appeals by the Supreme Court of the State of Utah, given the

misfiling. The petitioner's Motion for Stay was summarily denied by the Utah Court of Appeals by an Order dated December 4, 2002.

27. The petitioner also filed an Objection to Admissibility of Genetic Test Results and Motion to Strike, dated November 27, 2002. Intervenor filed his Response to Objection to Admissibility of Genetic Tests on December 9, 2002, and amended the same due to an error in the title of said pleading on December 23, 2002.

28. On or about December 9, 2002, the petitioner filed a Motion for Summary Judgment and Memorandum in Opposition to Intervenor's Motion for Partial Summary Judgment and In Support of Petitioner's Motion for Summary Judgment. Petitioner requested in his Motion for Summary Judgment that he be declared the legal father of Zachary on the basis of his controlling presumption of paternity or, alternatively, on the basis of the equitable parent doctrine or, alternatively, barring intervenor and respondent from challenging Zachary's parentage on the basis of equitable estoppel.

29. Subsequent to receiving the respondent and intervenor's response to the Petitioner's Motion for Summary Judgment, Petitioner filed a reply memorandum and affidavits of Douglas Goldsmith and Kelly Pearson. Intervenor filed motions to strike the affidavits and petitioner filed a responsive memorandum thereto to which intervenor replied. The petitioner's Objection to Admissibility of Genetic Test Results and Motion to Strike and the



intervenor's motions to strike were heard simultaneous with intervenor's Motion for Partial Summary Judgment and petitioner's Motion for Summary Judgment.

30. After hearing on intervenor's Motion for Partial Summary Judgment and petitioner's Motion for Summary Judgment, this Court found that Utah Code Annotated, Section 78-3a-105(b), establishes concurrent jurisdiction between the District Court and the Juvenile Court in an action to establish paternity. This case is, in part, a paternity action. The Court found, however, that this is not a termination of parental rights action which precludes the District Court from exercising jurisdiction.

31. Subsequent to the Court's consideration of all arguments made by petitioner, respondent and intervenor, an Order on Motion for Partial Summary Judgment and Order Denying Petitioner's Motion for Summary Judgment was entered by the Court on May 8, 2003. Intervenor was declared to be the biological and natural father of Zachary Andrew Pearson on May 8, 2003, and the petitioner's Motion for Summary Judgment, dated December 9, 2002, was denied.

32. The petitioner filed a Petition for Permission to Appeal Interlocutory Orders on or about May 28, 2003, with the Utah Court of Appeals. On July 3, 2003, the Petition for Permission to Appeal was denied by the Utah Court of Appeals.

Custody Evaluation

33. Dr. Jill Sanders completed her child custody evaluation and a settlement conference was held before Commissioner Michael S. Evans, the parties and Dr. Sanders on August 13, 2003. That did not result in a settlement of this matter and a final report was issued by Dr. Sanders dated November 3, 2003.

34. Dr. Jill Sanders is a licensed psychologist who this Court finds is a qualified expert in the performance of custody evaluations and is well respected and recognized in the community for that expertise. Dr. Sanders, prior to issuing her final report of November 3, 2003, conducted multiple interviews, a battery of psychological testing and reviewed documents presented to her by the parties and their counsel, and contacted collaterals as she deemed appropriate. The Court finds that Dr. Sanders' child custody evaluation was thoroughly performed and that the report issued complied with and addressed the requirements of Rule 4-903 of the Code of Judicial Administration. Pursuant to that Rule and the requirements that the evaluator consider and, therefore, which the Court should consider, the Court finds the following:

a. Nicholas and Zachary are too young to consider the child's preference.

b. Zachary and Nicholas are very best friends and it is likely that their sister, Madelaine, will join their unusually

strong relationship. Madelaine is Nicholas' half-sister and Zachary's full-sister. Those three children should not be separated absent some compelling circumstances not present here. There is a substantial benefit of keeping these siblings together.

c. Nicholas and Zachary have excellent relationships with petitioner, respondent and intervenor.

d. The petitioner and respondent have established a 50/50 parent time arrangement with Nicholas and Zachary, which has worked relatively well.

e. Petitioner, respondent and intervenor all are of high moral character and exhibit strong emotional stability.

f. Petitioner, respondent and intervenor each have exhibited a deep desire for custody of the children. Contrary to the allegations and representations of the petitioner, intervenor has stepped in to assume the role of parent to Zachary and did so although delayed, given the circumstances present in this case.

g. The intervenor is employed full-time out of the home. Respondent is employed in a part-time position and petitioner is employed full-time. Both petitioner and respondent can work from home, to a large degree. Their ability to provide personal rather than surrogate care is generally equal though the respondent is in a somewhat superior position to provide that personal care, given her current part-time position.

h. None of the parties exhibit significant impairment of ability to function as a parent due to drug abuse, excessive drinking or other related causes.

i. The petitioner is a practicing member of the LDS Church. Respondent is no longer a practicing member of the LDS Church. The respondent and intervenor support Nicholas and Zachary's participation in religious training and activities. Religious compatibility is not of substantial importance in this case.

j. The petitioner and respondent are Nicholas' biological parents. The respondent and intervenor are Zachary's biological parents; however, Nicholas and Zachary have a strong attachment to both intervenor and petitioner.

k. All three parties have the capacity financially to support these children.

l. There is no evidence of abuse of either of the children or of any domestic violence involving the children.

#### Parental Presumption

35. The Parental Presumption recognizes the natural right and authority of a parent to the child's custody where one party to the controversy is a non-parent. The Parental Presumption is a rebuttable presumption and can be rebutted by evidence establishing that a particular parent at a particular time generally lacked all

three of the characteristics that give rise to the presumption: (1) that no strong mutual bond exists; (2) that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child; and (3) that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

There is no Parental Presumption as to Nicholas because petitioner and respondent are both the natural parents of Nicholas. Therefore, a best interests analysis as to Nicholas is controlling.

The Parental Presumption has application to petitioner's respondent's and intervenor's claims for custody of Zachary. As to Zachary, between petitioner and respondent and intervenor, it has been established beyond a reasonable doubt that petitioner is not the biological parent of Zachary. Consequently, the presumption of legitimacy regarding Zachary, who was born during the marriage of petitioner and respondent, has been rebutted. Based upon the evidence as set forth in these Findings of Fact and Conclusions of Law, petitioner cannot and has not established that respondent at any time had no strong mutual bond with Zachary, that respondent at any time has not demonstrated a willingness to sacrifice her own interests and welfare for Zachary, or that at any time respondent lacked the sympathy for and understanding of Zachary that is

characteristic of parents generally. In fact, the Court finds the opposite to be true, that respondent and Zachary have a strong mutual bond, that she has sacrificed her interests and welfare for Zachary, and has an abundance of sympathy and understanding of Zachary that is characteristic of parents generally. Respondent benefits from the Parental Presumption on her claim for custody of Zachary against petitioner. Consequently, respondent and petitioner are not on equal footing. The Parental Presumption has been rebutted regarding intervenor's claim for custody of Zachary. During approximately the first 15 months of Zachary's life, intervenor, with the assistance of petitioner and respondent, kept intervenor's parentage of Zachary a secret resulting in minimal contact between Zachary and intervenor during this period. During this critical 15 month period of time, intervenor and Zachary generally did not have a strong mutual bond, during this time intervenor generally 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, petitioner and intervenor stand on equal footing and Zachary's custody between them is determined solely by the best interests of the child. In the context of the Parental Presumption Analysis, it is ironic at best to conclude that petitioner is a non-parent of Zachary when in real terms

petitioner 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 petitioner'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, this Court ruled accordingly.

**Petitioner's Experts**

36. Dr. Douglas Goldsmith's testimony is of little assistance or weight in the Court's determination of custody. Dr. Goldsmith has not met with the respondent, intervenor or children nor has he conducted a custody evaluation. His testimony is generic and not case specific and the Court finds that Dr. Goldsmith misapprehends Dr. Sanders' opinions regarding the importance of biological relationships to children. In particular, Dr. Goldsmith has no factual basis with which to offer an opinion regarding whether Dr. Sanders' recommendations regarding custody of Zachary Pearson are potentially damaging to Zachary.

37. The testimony of Dr. Heather Walker is of no benefit to the Court. The petitioner offers her as an expert in an effort to discredit or call into question the quality and methodology of the evaluation of Dr. Sanders. The Court is not persuaded by Dr.

Walker's testimony that Dr. Sanders' recommendations, opinions or conclusions are not consistent with the data or not within the scope of her expertise. This Court is not persuaded that Dr. Sanders' statements and opinions are not supported by current psychological literature, though the Court believes that is of little weight in this Court's determination of custody. The Court is not persuaded by Dr. Walker that Dr. Sanders' methods are not consistent with the guidelines for conducting custody evaluations. Dr. Sanders has performed her evaluation consistent with the guidelines and Rule 4-903 of the Code of Judicial Administration. The Court finds that Dr. Sanders has assigned appropriate weight to the best interests of the children in her evaluation and recommendations and has conducted a child-centered evaluation according to the guidelines and consistent with the data and literature. Nothing in the testimony of Dr. Walker leads this Court to believe that a different result, conclusion or recommendation would be made in the event that another evaluator evaluated this matter. Indeed, Dr. Sanders has a long history with this case, having been involved with the parties and children for a period of time between April, 2002 and November 3, 2003.

#### Custody

38. The Court finds that there are some benefits to the children remaining in Salt Lake City, due to the social, family and



academic networks. However, given the ages of the children and the other considerations, as set forth in these findings, maintaining extended family, social and academic networks are of less concern than creating relationship, geographical and financial stability of the children at this point in their development. Both boys are in a transportable stage and the Court finds that they have the capacity positively to adjust to a permanent move to Oregon.

39. The Court cannot order any party to this action to relocate. Although the respondent's current employer is headquartered in Salt Lake City, she works from home and so her employment is portable. She works from her home in Oregon. Petitioner also works from his home. He is capable of continuing his present employment, if he were to move to Oregon. In addition, there are job openings in Portland for individuals who have skills like those possessed by petitioner.

40. The intervenor is the primary financial provider for the Thanos family. Unlike petitioner and respondent he could not continue to work for his present employer if he were to move to Salt Lake City. It is likely that if he were to move to Utah he would experience a significant reduction in income. It would be far more burdensome for respondent and intervenor to move to Salt Lake City, than for petitioner to move to Portland.

41. In making a custody determination in this matter it is appropriate to rely on present realities and focus on what is in the best interest of the children today. It is not helpful to rely on historical issues or to assign fault for the breakup of the Pearson marriage.

42. The respondent is pivotal in this case in that she is the biological mother of both boys and their sister, Madelaine. The respondent has the strongest inherent responsibility for all three of these children. At considerable inconvenience to herself and her husband respondent has obeyed the Court orders currently in place and borne the bulk of the physical, emotional and financial discomfort associated with it. She has performed in an exemplary manner in facilitating the petitioner's relationship with both boys. At the same time, she has established a stable home life in Oregon with intervenor and with their child Madelaine, which fully incorporates both Nicholas and Zachary. Further, intervenor has fully accepted and supported both boys and their relationship with petitioner. The respondent has chosen to establish a life for herself and her family in Oregon and she has done so with logic and reason. In order for her to increase her earning potential she would have to work outside the home and to hire daycare providers to take care of her three small children. It is not in the best interest of any of the children to require her to do so, the more

so since her present income is comparable to that of petitioner. The children consider Oregon to be one of their homes and are very comfortable in that environment.

43. There is a sufficient level of trust between petitioner and the Thanoses in that all three are excellent parents which is a view generally shared by each party. Communications between them at times are tense. However, in the past and currently they have consistently reached a consensus concerning decisions relating to the upbringing of the boys. A joint legal custody relationship therefore does appear to be feasible and in the best interest of Nicholas and Zachary as further defined below.

44. It is in the best interests of Nicholas that joint legal custody of Nicolas be awarded to petitioner and respondent, and that joint legal custody of Zachary be awarded to respondent and intervenor. Joint legal custody shall be further defined as set forth at page 12, paragraph numbered 1, of the Child Custody Evaluation, as follows:

1. Legal Custody. Kimberlee and Peter should be named joint legal custodians of Zachary. Kimberlee and Kelly should be named joint legal custodians of Nicholas. Kelly's special relationship with Zachary should be legally protected in the form of third party access with the responsibility to make daily decisions on Zachary's behalf when Zachary is in his care. Kimberlee and Peter will make school placement decisions for both boys if the children reside in Oregon. Both biological parents of each child must agree upon any elective medical or dental treatment. It would be best if decisions regarding any

extracurricular activities would be jointly made by all three parents so that the boys' schedules are manageable. If this is not possible, Kelly and Kimberlee will jointly decide on Nicholas' activities and Kimberlee and Peter will jointly decide on Zachary's activities.

45. The following factors support the conclusion that joint legal custody of the boys divided between petitioner and respondent for Nicholas and between respondent and intervenor for Zachary is in the boys' best interest:

a. The emotional needs of the children will be met by joint legal custody. A generally positive decision making process has always existed between the parties and they have managed quite well at keeping the children out of the fray.

b. The parenting skills and abilities of all three parents are excellent and complimentary.

c. All three parties have similar major values and they recognize the importance of each other in the children's lives.

d. The primary physical custody of Nicholas is awarded to respondent. The primary physical custody of Zachary is awarded to respondent and intervenor. All of the evidence, including petitioner's testimony indicates that petitioner will move to Oregon. Therefore, all three parties will live in close proximity to one another, which makes joint legal custody workable.

e. This legal custody determination is consistent with the custody evaluation, said custody evaluation is incorporated herein in full by this reference.

46. It is in the best interests of Nicholas that respondent be designated the primary physical custodian of Nicholas and that she not be required to obtain petitioner's permission to move to Oregon. It is in the best interest of Zachary that respondent and intervenor be designated the primary physical custodians of Zachary and that they not be required to obtain petitioner's permission to move to Oregon. It should be noted that while the Court cannot order any party to move to another state, the evidence is undisputed that the parties will relocate and will live within 100 miles of one another because it is in the best interests and needs of Nicholas and Zachary to live in close proximity to petitioner, respondent and intervenor.

47. It is in the best interests of Nicholas and Zachary that there be a joint physical custody arrangement. The joint physical custody arrangement or access schedule for Nicholas and Zachary shall be as described and set forth in the Access Schedule recommendation of Dr. Jill D. Sanders at pages 12-13, paragraphs numbered 2, 2a, 2b, 2c and 2d, of the Child Custody Evaluation, as follows:

2. Access schedule. Regardless of whether this "extended family" lives in Salt Lake City or in Oregon the following schedule is recommended. However, my strong recommendation is that Kelly relocate to Oregon so that Nicholas can begin the second school term in Oregon:

a. Continuation of the present seven day/seven day rotation. The children have been on this schedule since September and appear to be able to tolerate the amount of time away from the other parent.

b. During the summer months Kimberlee/Peter and Kelly would have the option of a ten-day period of uninterrupted access to both boys. Kelly will have the first choice of that period in even years and Kimberlee/Peter will have the first choice in odd years. These periods may not be combined with regular access to form a block longer than ten days.

c. Beginning in the school year of 2004/2005 Nicholas will continue on the weekly rotation. Transitions would occur Sunday evening. Zachary will spend five nights with Kelly and either return to Kimberlee/Peter for the last two nights of the seven-day period or remain with them for the first two nights of Kelly's period (rotating each time). Nicholas would join Zachary at Kimberlee/Peter's on Sunday for his continuous seven-day period in that home. This arrangement keeps the boys on a highly predictable schedule, allows them to spend the vast majority of their time together, allows each of them some time alone with their biological fathers, and coincides with Peter's greater availability on the weekends.

d. Holidays may be rotated according to Utah guidelines, or according to mutual agreement, with only major holidays being included (i.e. UEA, Thanksgiving, Christmas, Spring Break, July 4<sup>th</sup>).

48. For purposes of transportation, each party should be responsible for picking up the children at the beginning of that parent's access

49. It is reasonable and in the best interest of Zachary that his surname be changed to "Thanos." It is reasonable that an

explanation regarding the circumstances of each child's conception, birth and circumstances be crafted with the help of Dr. Jay Thomas and that it be provided to the boys in a unified manner. It is in their best interest that the boys hear a consistent presentation regarding these issues.

50. It is reasonable that the petitioner, respondent and intervenor be able to attend events for both boys and any of the three parties should be permitted to perform volunteer work in either of the boys' school classrooms.

51. In the event that the parties are unable to facilitate a parenting plan or in the event that petitioner and Thanoses reach an impasse regarding major issues concerning the boys, it is reasonable that a parenting coordinator be utilized to facilitate resolution of parenting disagreements. Each party should pay one-half of the cost of that coordinator.

#### Child Support

52. The intervenor's income is approximately \$11,747 gross per month. Petitioner's gross monthly income is \$7,750 per month. Respondent's monthly gross income is \$7,440. The combined adjusted gross incomes of petitioner and respondent exceeds the guidelines, therefore, the amount of child support is determined on a case by case basis and the Court must determine what is reasonable.

53. The current gross monthly incomes of petitioner and respondent are substantially the same. The standard of living currently enjoyed by petitioner and respondent is consistent with that which was enjoyed during the course of petitioner's and respondent's marriage, except currently respondent benefits from the income and earning capacity of intervenor. Petitioner and respondent's earning capacity is similar based upon their education, training and work experience. There is a seven year age difference between petitioner and respondent which does not impact their respective incomes or earning capacity. Based upon the joint physical custody arrangement or access schedule as to Nicholas, petitioner will have 182 overnights and respondent will have 183 overnights, or vice versa. Based upon the foregoing, both petitioner and respondent each have adequate resources to adequately support Nicholas without child support from the other. Therefore, zero child support is awarded for either petitioner or respondent regarding Nicholas, which is reasonable under the facts set forth hereinbefore. Respondent and intervenor have agreed or the Court finds that petitioner should not be required to pay child support for Zachary. Petitioner's claim for retroactive child support is denied.



**Medical, Dental Insurance/Daycare**

54. Through their employment the Thanoses are capable of obtaining medical and dental insurance for Nicholas and Zachary. They should be required to obtain such insurance. The Thanoses have agreed to pay all insurance expenses for Zachary. Petitioner should be ordered to reimburse them for one-half of the cost of obtaining such medical and dental insurance for Nicholas. The Thanoses should be ordered to provide petitioner with documentary proof that they have obtained medical and dental insurance coverage for Nicholas. Petitioner should be ordered to pay his one-half share of the premium for Nicholas' medical and dental insurance on the 5<sup>th</sup> day of each month beginning with the first month following his receipt from Thanoses of confirmation of the said medical and dental insurance coverage.

55. Neither petitioner nor the Thanoses should be required to pay any daycare expenses incurred by the other party in the providing of care for the boys.

56. Petitioner should be required to pay one-half of all medical or dental insurance co-pays or deductibles and one-half of all dental and medical expenses incurred by either petitioner or the Thanoses on behalf of or for the benefit of Nicholas. The Thanoses have agreed to pay all such expenses and all school

expenses incurred on behalf or for the benefit of Zachary. It is reasonable that they be required to pay all of such expenses.

Alimony

57. For the following reasons neither petitioner or respondent should be awarded alimony:

a. The financial conditions of petitioner and respondent are similar. The standards of living of petitioner and respondent as of the date of their separation has not changed significantly. Neither will be required to accept a lower standard of living if he or she does not receive alimony from the other.

b. The incomes of petitioner and respondent are nearly identical. Each has the ability to produce significant income in the future.

c. Neither petitioner nor respondent directly contributed to any increase in the skill or earning capacity of the other during their marriage.

d. Although respondent's affair with intervenor was a contributing cause of the disintegration of the marriage of petitioner and respondent, the ultimate cause of the termination of their marriage was their irreconcilable differences. The parties made a good faith effort to reconcile after respondent's affair with intervenor became known to petitioner. The Court is therefore of the view that fault should not be considered in the awarding of

alimony. As is often the case in marital relationships, the Court finds petitioner and respondent both responsible for the irreconcilable differences that ended their marriage.

58. Petitioner and respondent have executed and filed with this Court a Stipulation which resolves all remaining differences between them concerning the division of their marital property. The Stipulation is reasonable and should be incorporated into this Court's Decree of Divorce.

**Contempt/Work-Related Child Care Expenses**

59. By a motion for an Order to Show Cause dated November 13, 2003, petitioner asked this Court to hold respondent in contempt for her failure to reimburse him for certain expenses which he had incurred on behalf of Nicholas and Zachary. The motion was based upon an interim order entered by this Court on March 28, 2001, which required the parties equally to divide expenses related to the rearing of the boys. Following a hearing before Commissioner Michael S. Evans on January 22, 2004, the Commissioner recommended that respondent be held in contempt for her failure to reimburse petitioner and that this Court enter a judgment against respondent in the approximate sum of \$12,000. Respondent objected to that recommendation. This Court determined that respondent's objection to the Commissioner's recommendation be heard at the trial of this matter.

60. At the time of trial petitioner and respondent informed the Court that they had reached an agreement with regard to the sums which each had paid before the trial for medical insurance and uninsured medical expenses. The parties stipulated that in the Decree the Court should award petitioner the sum of \$1,911.41 representing net expenditures by petitioner for medical insurance premiums and uninsured medical expenses after offsetting payments made by respondent for those categories of expenses.

61. Petitioner and respondent were unable to reach an agreement concerning work-related childcare expenses incurred by each of them. The Court received evidence concerning those expenses and determined that prior to trial petitioner had incurred work-related childcare expenses of \$8,811.20 and respondent had incurred work-related childcare expenses of \$2,315.00. The net amount owing to petitioner is therefore \$6,496.20. The Decree of Divorce should award petitioner that amount for pretrial work-related childcare expenses.

62. There is no evidence that respondent deliberately violated the interim order. At the time the Order to Show Cause was issued petitioner and respondent were communicating about the sums which each had expended for the boys. Respondent had requested additional financial information which petitioner had not provided. Respondent had potential offsets which she had not yet

computed or documented. Under the circumstances, holding respondent in contempt would be inappropriate.

**Attorney's Fees**

63. The attorney fees incurred by petitioner, respondent and intervenor are substantial and comparable in amount. Each party has the ability to pay their respective attorney fees based upon their annual incomes. Additionally, in a case of this nature and complexity, determining who is the prevailing party is next to impossible. Therefore, each party is required to assume responsibility for their respective attorney fees without contribution.

**Transition**

64. The fifty/fifty shared temporary custody arrangement shall continue until petitioner's anticipated relocation to Oregon. It is in the best interests of the minor children that petitioner, respondent and intervenor relocate to Oregon simultaneously in order to reduce any period of separation necessitated by the transition. In any event, respondent and intervenor's relocation to Oregon must occur prior to Nicholas starting the school term in Oregon.

Based upon the preceding Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. Petitioner and respondent are awarded joint legal custody of Nicholas. Respondent and intervenor are awarded joint legal custody of Zachary as further described in the Court's Findings.

2. Respondent is designated the primary physical custodian of Nicholas. Respondent and intervenor are designated the primary physical custodians of Zachary.

3. Petitioner should be awarded joint physical custody time with Nicholas and Zachary in the manner described in the Court's Findings.

4. Petitioner and respondent should be ordered each to pay one-half of Nicholas' uninsured medical and dental insurance premiums, co-pays and deductibles and one-half of the cost of health and dental insurance for him. Respondent and intervenor should be ordered to pay all such expenses of Zachary.

5. None of the parties should be ordered to pay alimony or for the cost of work-related childcare.

6. Respondent should be ordered to pay petitioner the sum of \$6,496.20 as reimbursement for expenses incurred by him on behalf of Nicholas and Zachary for work-related childcare prior to the date of trial.

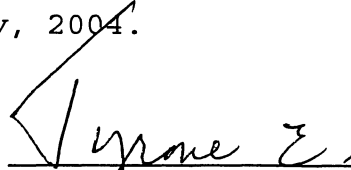
7. The property of petitioner and respondent should be divided according to the division described in their Stipulation for Property Division dated December 10, 2003.

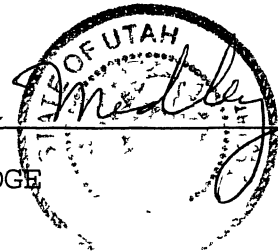
8. Respondent should not be held in contempt for failure to reimburse petitioner for childcare and medical expenses he incurred prior to November 13, 2003.

9. The parties are ordered to share in thirds equally the costs of Dr. Sanders' custody evaluation.

10. Counsel for respondent and intervenor are instructed to submit a Decree consistent with the Court's Findings of Fact, Conclusions of Law, and Rule 7, Utah Rules of Civil Procedure.

Dated this 11 day of May, 2004.

  
TYRONE E. MEDLEY  
DISTRICT COURT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to the following, this 11 day of May, 2004:

Paige Bigelow — *Hand delivered/picked up by Mr. Pearson*  
Attorney for Petitioner  
50 West Broadway, 8<sup>th</sup> Floor  
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808 E. South Temple  
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J. Ashley



Tab 17

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Facsimile: (801) 532-7543  
Attorneys for Respondent

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JUL 12 2004  
IMAGED

FILED DECEMBER 12  
Third Judicial District

JUL 12 2004

By AS SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

KELLY F. PEARSON,

Petitioner,

vs.

KIMBERLEE Y. PEARSON,

Respondent.

PETER D. THANOS,

Intervenor.

SUPPLEMENTAL DECREE  
OF DIVORCE

Civil No. 004907881

Judge Tyrone E. Medley  
Commissioner Michael S. Evans

The above-captioned case was tried to the Court on April 1, 2, 5, 6, 7 and 8, 2004. Petitioner was present and was represented by Paige Bigelow; Respondent was present and represented by Steven H. Gunn; and Intervenor was present and represented by Kellie F. Williams. The Court having heard the testimony of the witnesses, having considered the evidence presented and the arguments of counsel, having considered the Stipulation of the parties relating to certain property division issues, having previously entered its Decree of Divorce Terminating Marriage and having entered its Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

Supplemental Decree of Divorce @J



JD16138859

004907881

PEARSON KIMBERLEE Y

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1. Petitioner Kelly F. Pearson and Respondent, Kimberlee Y. Thanos (f/k/a Kimberlee Y. Pearson) are awarded joint legal custody of the minor child Nicholas Browning Pearson ("Nicholas").

2. Respondent and Intervenor (sometimes referred to herein collectively as "Thanoses") shall make school placement decisions for Nicholas if he resides in Oregon. Petitioner and Respondent must agree upon any elective medical or dental treatment for Nicholas. Petitioner, Respondent and Intervenor shall make decisions concerning Nicholas' extracurricular activities and shall be guided by the principle of manageability of that schedule. If Petitioner, Respondent and Intervenor cannot agree upon Nicholas' extracurricular activities, Petitioner and Respondent shall make such decisions.

3. Joint legal custody of the minor child Zachary Andrew Pearson is awarded to Respondent and Intervenor.

4. Petitioner's special relationship with Zachary should be protected by means of third party access. Petitioner is awarded the responsibility and right to make daily decisions on Zachary's behalf when Zachary is in Petitioner's care. Respondent and Intervenor shall have the responsibility and right to make daily decisions for Zachary when he is in their care. Respondent and Intervenor shall make school placement decisions for Zachary if he resides in Oregon. The Thanoses shall have the right to make decisions concerning the elective medical or dental treatment of Zachary. Decisions concerning Zachary's extracurricular activities shall be made jointly by Petitioner, Respondent and Intervenor and shall be guided by the principle of manageability of that schedule. If Petitioner, Respondent and Intervenor cannot agree upon Zachary's extracurricular activities, the Thanoses shall make such decisions.

5. Respondent is designated the primary physical custodian of Nicholas. Respondent and Intervenor are designated the primary physical custodians of Zachary.

6. If the parties live in close proximity to one another, the parties shall observe the following joint physical custody arrangement: until the beginning of the 2004/2005 school year the seven-day rotation described in this Court's Order on Motion for Order to Show Cause, Motion for Leave to Amend Complaint for Divorce, and Motion for Temporary Relief dated March 28, 2001 ("Interim Order") shall apply:

a. Beginning with the 2004-2005 school year Nicholas will continue on the weekly rotation. Transitions shall occur Sunday evening. Zachary will spend five nights with Petitioner and either return to Respondent and Intervenor for the last two nights of the seven-day period or remain with them for the first two nights of Petitioner's period (rotating each time). Nicholas will join Zachary at the home of Respondent and Intervenor on Sunday for his continuous seven-day period in their home.

b. During the summer months the Thanoses and Petitioner shall have the option of a ten-day period of uninterrupted access to both boys. Petitioner will have the first choice of that period in even years and the Thanoses will have the first choice in odd years. These periods of uninterrupted access may not be combined with regular access to form a block of time longer than ten days.

c. Respondent and Intervenor shall be entitled to the following holidays in years ending in an even number, and Petitioner shall be entitled to the following holidays in years ending in an odd number:

(1) The children's birthdays on the day before or after the actual birthday beginning at 3:00 p.m. until 9.00 p.m.;

(2) Martin Luther King, Jr. Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m.;

(3) Spring Break or Easter holiday beginning at 6:00 p.m. on the day school lets out for the holiday until 7:00 p.m. on the day before school resumes;

(4) Memorial Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m.;

(5) July 24th beginning at 6:00 p.m. on the day before the holiday until 11:00 p.m. on the holiday;

(6) Veterans Day holiday beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and

(7) The first portion of the Christmas school vacation (defined as the time period beginning on the evening school lets out for the Christmas school break until the evening before school resumes, except for Christmas Eve and Christmas Day), plus Christmas Eve and Christmas Day until 1:00 p.m.

d. Respondent and Intervenor shall be entitled to the following holidays in years ending in an odd number, and petitioner shall be entitled to the following holidays in years ending in an even number:

(1) The children's birthdays on the actual birthday beginning at 3:00 p.m. until 9:00 p.m.;

(2) Washington and Lincoln Day beginning at 6:00 p.m. on Friday until 7:00 p.m. on Monday;

(3) July 4th beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(4) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m. on Monday;

(5) Fall Break, if applicable, beginning at 6:00 p.m. on the day school lets out for the holiday until 7:00 p.m. on the day before school resumes;

(6) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(7) Thanksgiving holiday beginning Wednesday at 7:00 p.m. until Sunday at 7:00 p.m.;

(8) The second portion of the Christmas school vacation, including New Year's Day, (defined as the time period beginning on the evening school lets out for the Christmas school break until the evening before school resumes, except for Christmas Eve and Christmas Day) plus Christmas Day beginning at 1:00 p.m. until 9:00 p.m.

e. Unless otherwise agreed to in writing by the parties, Nicholas shall spend Father's Day with Petitioner and Zachary shall spend Father's Day with Intervenor. The parenting time on Father's Day shall be 9:00 a.m. until 7:00 p.m.

f. Each parent shall be responsible for picking up the children at the beginning of that parent's access time.

7. If Petitioner does not move to Oregon, he is awarded the following monthly access to both boys:

a. The Petitioner should have monthly parent time for a period of five days of which no more than one day should be a day when the child is, or would otherwise be, in school.

b. Petitioner is awarded the Thanksgiving holiday and school spring break in even-numbered years and the entire Christmas school break in odd-numbered years. He is awarded the fall school break, if such a break is taken in Oregon. Further,

Petitioner is awarded parent time each year on Columbus Day, Memorial Day, Martin Luther King Day and Presidents Day each year to maximize long weekends.

c. The Petitioner is awarded summer parenting time with Zachary for a period of six weeks each summer coincident with the exercise of parenting time with Nicholas. Such parenting time will be divided into three 2-week blocks of time which are separated by at least seven days. Only one of three 2-week blocks of parenting time will be uninterrupted.

8. Petitioner and the Thanoses shall be entitled to call the children once a day when the children are residing in the other party's or parties' household. Phone calls initiated by the children to the other household shall be unlimited and neither Petitioner nor the Thanoses shall take steps to restrict such child-initiated calls.

9. At the discretion of Respondent and Intervenor Zachary's surname may be changed to "Thanos". Any of the parties may disclose to the children the circumstances of either child's conception and birth; however, such explanation shall be made consistent with the recommendations of Dr. Jay Thomas and in a manner that is consistent between the parties.

10. Petitioner and the Thanoses may, if they desire, attend events for both boys and each shall be permitted to perform volunteer work in either of the boys' school classrooms.

11. In the event that the parties are unable to facilitate a parenting plan or in the event that Petitioner and Mr. and Mrs. Thanos reach an impasse regarding major issues concerning the boys, a parenting coordinator shall be utilized to facilitate resolution of such disagreements. In the event that the use of a parenting coordinator becomes necessary, Petitioner shall pay one-half of the costs of retaining that coordinator and Mr. and Mrs. Thanos shall pay the other half.

12. Neither Petitioner nor Respondent is awarded child support for Nicholas. Petitioner shall not be required to pay child support for Zachary.

13. Respondent and Intervenor shall purchase and maintain appropriate health, hospital and dental care insurance for Nicholas and Zachary. Petitioner shall reimburse them for one-half the cost of obtaining and maintaining such insurance for Nicholas. Nicholas' share of the insurance will be a per capita share of the premium actually paid. Respondent and Intervenor shall provide Petitioner with documentary proof that they have obtained health, hospital and dental care insurance for Nicholas. Petitioner shall pay his one-half share of the insurance costs on the fifth day of each month beginning with the first month following his receipt from Respondent and Intervenor of confirmation of said insurance.

14. Neither Petitioner nor Mr. and Mrs. Thanos are required to pay any daycare expenses incurred by the other party in the providing of care for Nicholas and Zachary.

15. Petitioner shall pay one-half and Respondent shall pay one-half of all reasonable and necessary uninsured medical expenses, including deductibles and co-payments, incurred on behalf, or for the benefit, of Nicholas. Petitioner is not required to pay such expenses for Zachary. The parent who incurs medical expenses shall provide written verification of the cost and payment of those expenses to the other parent within thirty days of payment. A parent failing to provide written verification may be denied the right to recover the other parent's share of the expenses.

16. The ultimate cause of the termination of the marriage of Petitioner and Respondent was their irreconcilable differences. Petitioner and Respondent are both responsible for those irreconcilable differences. Neither Petitioner nor Respondent is awarded alimony.



17. Petitioner and Respondent are awarded marital property in accordance with their Stipulation for Property Division dated November 24, 2003. In particular the following division of property is ordered:

a. Each of the parties is awarded the personal property in his or her possession as of November 24, 2003.

b. Petitioner is awarded the marital residence located at 1988 South 1800 East in Salt Lake City. Petitioner is ordered to pay or satisfy all obligations, payment of which is secured by any lien, mortgage or trust deed on the said property.

c. Petitioner is awarded ownership of the 1997 Ford Taurus and the 1993 Mazda MX6 automobiles. Respondent is awarded ownership of the 1997 Ford Explorer and the 1999 SeaRay ski boat. The party to whom a motor vehicle or boat is awarded shall be responsible for paying any obligation secured by a security interest in that vehicle or boat and shall hold the other party harmless from any loss or damages with which he or she may incur as a result of the failure of the responsible party to pay one of the debts described in this paragraph.

d. Each party is awarded all funds currently held in his or her Agilent Technologies Defined Benefit Plan account.

e. Each party is awarded all cash in his or her possession as of November 24, 2003, including all cash which is part of the marital estate.

f. Respondent is awarded all assets contained in her 401(k) account, as well as \$10,000 in value of assets held in Petitioner's 401(k) account. The Court shall enter a Qualified Domestic Relations Order (QDRO) ordering that Petitioner's 401(k) account be divided as stated above.

g. The securities owned by the parties are divided as follows:

(1) Petitioner is awarded 10,277 shares and Respondent 10,278 shares of the Campus Pipeline stock which on November 24, 2003 was controlled or owned by Respondent.

(2) Petitioner is awarded 25 shares and Respondent is awarded 25 shares of the Agilent Technologies, Inc. stock which, as of November 24, 2003, was owned or controlled by Petitioner.

(3) Petitioner is awarded 32 shares and Respondent is awarded 32 shares of Hewlett-Packard Company stock which, as of November 24, 2003, was in the control or ownership of Petitioner in a Charles Schwab account.

(4) Petitioner is awarded 207 and Respondent 206 stock options in Agilent Technologies, Inc., which, as of November 24, 2003, were in the control of or owned by Petitioner.

h. The following guidelines shall apply to the division of the stock and of the options:

(1) Upon entry of this Decree of Divorce, the Hewlett-Packard and Agilent Technologies stock shall be withdrawn from the Charles Schwab joint account and distributed to the parties. If any fees or costs are owed to Charles Schwab the Petitioner and Respondent shall equally divide and pay those fees and costs.

(2) The division of stock ordered by this Decree shall take into account differences in the tax basis of particular blocks of stock. The division shall be carried out in such a manner as to equalize the potential capital gains tax treatment of the stock awarded to each party.

(3) All taxable losses and cash proceeds from the sale of Campus Pipeline stock shall be distributed evenly between Petitioner and Respondent.

(4) The division of stock options shall be made in a manner which will equalize the potential capital gains tax obligations of Petitioner and Respondent.

i. Any securities or options obtained by either party after May 1, 2000 are awarded to that party.

j. Within a reasonable time Petitioner and Respondent shall each pay \$6,500 to Glen and Joan Young as repayment of the \$13,000 loan which Mr. and Mrs. Young made to the parties during their marriage.

k. Petitioner and Respondent shall execute and deliver to one another such documents, including deeds and certificates of title, as shall be necessary to effectuate the terms of the property division described in this Decree.

18. Within a reasonable length of time after the entry of this Decree Respondent shall pay Petitioner the sum of \$1,911.41 which represents the net amount Respondent owes Petitioner, after offsets, for her one-half share of the medical insurance premiums and uninsured medical expenses paid or incurred by Petitioner for Nicholas and Zachary through March 30, 2004. Within a reasonable length of time after entry of this Decree Respondent shall pay Petitioner the sum of \$7,653.70 which represents the net amount Respondent owes Petitioner, after offsets, for her one-half share of the work-related childcare expenses paid or incurred by Petitioner for Nicholas and Zachary through March 30, 2004.

19. Petitioner's motion seeking to have Respondent held in contempt for violation of the Interim Order is denied.

20. Petitioner is awarded the right to claim Nicholas as a dependent on his state and federal income tax returns in odd-numbered tax years. The Thanoses are awarded the right to

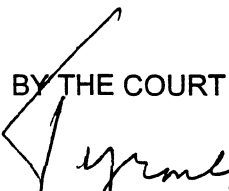
claim Nicholas as a dependent in even-numbered years. The Thanoses are awarded the right to claim Zachary as a dependent.

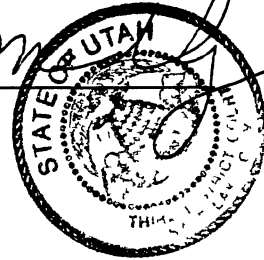
21. Each party is required to assume responsibility for the fees of that party's attorney. Neither party is awarded court costs incurred by that party.

22. Petitioner, Respondent and Intervenor shall each pay one-third of all fees and costs of the custody evaluator, Dr. Jill Sanders, including Dr. Sanders' fees arising from her testimony at trial.

DATED this 12 day of July, 2004.

BY THE COURT

  
Tyrone E. Medley  
District Court Judge

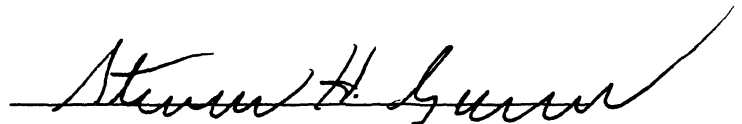


**CERTIFICATE OF SERVICE**

This is to certify that on the 2<sup>nd</sup> day of July, 2004 a true and correct copy of the foregoing  
SUPPLEMENTAL DECREE OF DIVORCE was mailed, postage prepaid, to:

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A handwritten signature in black ink, appearing to read "Steven H. Gurn", written over a horizontal line.

Tab 18

MAR 30 2006

This opinion is subject to revision before  
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Kelly F. Pearson,	)	OPINION
	)	(For Official Publication)
Petitioner and Appellant,	)	
	)	Case No. 20040677-CA
v.	)	
	)	
Kimberlee Y. Pearson,	)	F I L E D
	)	(March 30, 2006)
Respondent and Appellee.	)	
	)	2006 UT App 128
_____	)	
Peter D. Thanos,	)	
	)	
Intervenor and Appellee.	)	

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Third District, Salt Lake Department, 004907881  
The Honorable Tyrone Medley

Attorneys: Paige Bigelow, Salt Lake City, for Appellant  
Steven H. Gunn, Kellie F. Williams, and Jarrod H.  
Jennings, Salt Lake City, for Appellees

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Before Judges Greenwood, Orme, and Thorne.

THORNE, Judge:

¶1 Kelly F. Pearson (Father) appeals from the trial court's supplemental decree of divorce awarding joint legal custody of the minor child Z.P. to Kimberlee Y. Pearson (Mother) and intervenor Peter D. Thanos. We reverse.

BACKGROUND

¶2 Father and Mother (collectively the Pearsons) married in 1992. In July 1997, the couple had their first child, N.P. In late 1998, Mother became pregnant again, and a second son, Z.P., was born in September 1999.

¶3 Unbeknownst to Father, Mother had been involved in a romantic relationship with Thanos beginning sometime in 1996. Mother believed from early on in her pregnancy with Z.P. that

Thanos was Z.P.'s biological father. She informed Father about her affair with Thanos and her belief about Z.P.'s paternity in March 1999. Despite Mother's infidelity, the Pearsons stayed together in an attempt to make their marriage work. Father agreed to raise Z.P. as his own, and Mother agreed to treat Father as Z.P.'s natural father. Z.P. was born in September 1999, and Father was named as Z.P.'s father on his birth certificate. Father and Mother raised Z.P. together until they separated in May 2000. After separation and until the trial court's custody determination, the Pearsons voluntarily shared physical custody of Z.P. on a fifty-fifty basis.<sup>1</sup>

¶4 Mother informed Thanos in January 1999 that she believed him to be Z.P.'s biological father. Thanos was unwilling to be known or recognized as the child's father and did not provide any monetary support toward Z.P.'s prenatal care or birth costs. Thanos acquiesced in Father's role as Z.P.'s father. From birth until about January 2001, the first sixteen months of Z.P.'s life, Thanos did not provide any care or support for Z.P. and only saw him about half a dozen times.

¶5 In December 2000, Father initiated divorce proceedings. Thanos moved to intervene in the proceedings in January 2001, claiming that he was Z.P.'s biological father. Concurrently, Mother denied Father's paternity of Z.P. in her answer and asked the trial court to declare that Father was not Z.P.'s biological father and that he had no rights of custody or visitation with Z.P. Father opposed both motions. The commissioner hearing the matter determined that Thanos lacked standing to contest Z.P.'s paternity.

¶6 Thanos and Mother objected to the commissioner's standing decision. The trial court determined that the issue was governed by In re J.W.F., 799 P.2d 710 (Utah 1990), and that it needed additional information to adequately address the policy considerations set forth in that case. The trial court appointed Dr. Jill Sanders to provide the court with an independent

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1. Thanos and Mother married in July 2002, shortly after the trial court granted Mother's request to bifurcate this case and entered a decree of divorce between the Pearsons. Thanos and Mother subsequently had another child, daughter M.T., whose custody is not implicated in this case. Also, despite the relationship between Mother and Thanos prior to N.P.'s birth, there is no suggestion that Thanos is N.P.'s biological father.



Thanos was Z.P.'s biological father. She informed Father about her affair with Thanos and her belief about Z.P.'s paternity in March 1999. Despite Mother's infidelity, the Pearsons stayed together in an attempt to make their marriage work. Father agreed to raise Z.P. as his own, and Mother agreed to treat Father as Z.P.'s natural father. Z.P. was born in September 1999, and Father was named as Z.P.'s father on his birth certificate. Father and Mother raised Z.P. together until they separated in May 2000. After separation and until the trial court's custody determination, the Pearsons voluntarily shared physical custody of Z.P. on a fifty-fifty basis.<sup>1</sup>

¶4 Mother informed Thanos in January 1999 that she believed him to be Z.P.'s biological father. Thanos was unwilling to be known or recognized as the child's father and did not provide any monetary support toward Z.P.'s prenatal care or birth costs. Thanos acquiesced in Father's role as Z.P.'s father. From birth until about January 2001, the first sixteen months of Z.P.'s life, Thanos did not provide any care or support for Z.P. and only saw him about half a dozen times.

¶5 In December 2000, Father initiated divorce proceedings. Thanos moved to intervene in the proceedings in January 2001, claiming that he was Z.P.'s biological father. Concurrently, Mother denied Father's paternity of Z.P. in her answer and asked the trial court to declare that Father was not Z.P.'s biological father and that he had no rights of custody or visitation with Z.P. Father opposed both motions. The commissioner hearing the matter determined that Thanos lacked standing to contest Z.P.'s paternity.

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Schoolcraft analysis.<sup>2</sup> Sanders was to address the second prong of the Schoolcraft test--whether permitting Thanos to seek paternity of Z.P. would be disruptive to Z.P.'s relationship with Father. She concluded that Thanos's presence in Z.P.'s life would not be inherently harmful to Z.P. or to Z.P.'s relationship with Father.

¶7 After considering Sanders's conclusions and the Schoolcraft factors, the trial court granted Thanos's motion to intervene in November 2002. Addressing the first prong of the Schoolcraft analysis, the trial court concluded that "the interest in preserving the stability of the [Pearsons'] marriage is not a consideration, due to the fact that there is no marriage to preserve. The stability was shattered when the parties separated and [Z.P.] was approximately nine months of age." As to the second prong, the court relied on Sanders's report to conclude that Thanos's challenge would not be "disruptive to Z.P. or an unnecessary attack on his paternity," and was "in the best interests of the child."

¶8 Father and Thanos both filed motions for summary judgment on the issue of Z.P.'s paternity. On May 8, 2003, the trial court granted Thanos's motion and denied Father's motion. The court's ruling determined Thanos to be the natural, biological, and legal father of Z.P.

¶9 The trial court issued its custody decision on May 11, 2004. Relying on its previous paternity determination, the court applied the parental presumption<sup>3</sup> in favor of Mother over Father as regards to Z.P. The trial court next determined that Thanos's parental presumption over Father had been rebutted, finding that for the first fifteen months of Z.P.'s life, Thanos "did not have a strong mutual bond" with Z.P., "did not demonstrate a willingness to sacrifice his own interests and welfare for [Z.P.], and generally lacked the sympathy for and understanding

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<sup>2</sup>The term "Schoolcraft analysis" refers to the analysis set forth in In re J.W.F., 799 P.2d 710 (Utah 1990), and is named for the petitioner in that case. A Schoolcraft analysis determines a person's standing to challenge the presumption of legitimacy of a child born into a marriage, based primarily on two policy considerations: "preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks upon their paternity." Id. at 713.

<sup>3</sup>The parental presumption is "the presumption in favor of awarding custody to a natural parent over a nonparent." Davis v. Davis, 2001 UT App 225, ¶1, 29 P.3d 676.

of [Z.P.] that is characteristic of parents generally." See Hutchinson v. Hutchinson, 649 P.2d 38, 41 (Utah 1982) (listing factors for rebuttal of parental presumption). Accordingly, the trial court placed Father and Thanos on an equal footing and made its custody determination between them based solely on the best interests of Z.P. See id.

¶10 The trial court granted Mother and Thanos joint legal custody and primary physical custody of Z.P. Mother and Father were granted joint legal custody of N.P., with primary physical custody in Mother. Father was granted "joint physical custody time" with N.P. and Z.P. The boys rotated between households on a weekly basis, resulting in an approximately equal amount of physical custody in each household.

¶11 Father appeals from the trial court's order allowing Thanos to intervene, its grant of summary judgment to Thanos on the issue of Z.P.'s paternity, and its custody determinations to the extent that they relied on Thanos's paternity, and Father's non-paternity, of Z.P.

#### ISSUES AND STANDARDS OF REVIEW

¶12 Father raises multiple issues on appeal, but our decision rests on the question of Thanos's standing to challenge Z.P.'s paternity. Generally, a person's standing to request particular relief presents a question of law. See Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶18, 82 P.3d 1125. To the extent that factual findings inform the issue of standing, "[w]e review such factual determinations made by a trial court with deference." Id. (quoting Kearns-Tribune Corp. v. Wilkinson, 946 P.2d 372, 373-74 (Utah 1997)). "'Because of the important policy considerations involved in granting or denying standing, we closely review trial court determinations of whether a given set of facts fits the legal requirements for standing, granting minimal discretion to the trial court.'" Id. (quoting Kearns-Tribune Corp., 946 P.2d at 374).

#### ANALYSIS

##### I. The Schoolcraft Test

¶13 The trial court determined that, as of November 2002, Thanos's challenge to Z.P.'s paternity would not affect the stability of the Pearsons' failed marriage and would not constitute a disruptive and unnecessary attack on Z.P.'s paternity. See In re J.W.F., 799 P.2d 710 (Utah 1990).

Accordingly, the trial court found that Thanos had standing to challenge Z.P.'s paternity under the Schoolcraft test.

¶14 While we do not necessarily disagree with the trial court's factual findings regarding the evolution of the relationships between Z.P. and the various parties, we determine that Thanos wholly lacked Schoolcraft standing for a substantial period of time prior to his establishment of a relationship with Z.P. Even with the breakup of the Pearsons' marriage and the development of a relationship between Z.P. and Thanos, we cannot agree with the trial court's conclusion that Thanos satisfied the Schoolcraft test by November 2002. See id. at 713. Accordingly, we determine that the trial court erred in allowing Thanos to intervene in this action.

#### A. Preservation of the Stability of Marriage

¶15 The trial court found that "the first prong of the Schoolcraft analysis--relating to preserving the stability of the marriage--was not a consideration in this case, due to the fact that there was no marriage between [Father] and [Mother] to be preserved." Although we recognize that a divorce terminates any particular marriage and leaves nothing to preserve, we still disagree with the trial court's assumption that the first Schoolcraft prong loses all relevance upon divorce. Rather, we review the totality of the circumstances to determine whether a particular paternity challenge conflicts with the policy goal of preserving the stability of the marriage.

¶16 The trial court apparently relied on In re J.W.F., 799 P.2d 710 (Utah 1990), to reach its finding that preservation of marriage becomes moot upon the divorce or separation of the parties. In that case, Winfield and Linda Schoolcraft were married in 1984 and lived together for approximately eight months before Linda left Winfield. See id. at 712. In November 1985, some seven months to a year after the parties separated, Linda gave birth to J.W.F. Linda abandoned J.W.F. shortly thereafter, and the State initiated abandonment proceedings in December 1985. Upon learning of the child's birth and the abandonment proceedings in August 1986, Winfield filed a petition for custody of J.W.F., arguing that he was married to Linda and living with her at the time of conception. At this time, the parties had still not obtained a formal divorce. See id.

¶17 The standing issue in In re J.W.F. was whether a guardian ad litem could challenge Winfield's custody petition and presumed paternity of J.W.F. The supreme court noted that "the class of persons permitted to challenge the presumption of paternity should be limited." Id. at 713. The court then identified two

"paramount consideration[s]" that must guide standing decisions in this context: "preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks upon their paternity." Id. "[W]hether individuals can challenge the presumption of legitimacy should depend not on their legal status alone, but on a case-by-case determination of whether the above-stated policies would be undermined by permitting the challenge." Id.

¶18 In In re J.W.F., the parties' long separation prior to the birth of J.W.F. led the supreme court to conclude that "[t]he stability of the marriage between Winfield and Linda Schoolcraft was shaken long ago, and their marriage is one in name only." Id. The supreme court permitted a challenge to Winfield's paternity in these circumstances, deeming it "not inconsistent" with the stated policy of preserving the stability of the marriage. Id. Notably, each of the three cases cited in Schoolcraft in support of this conclusion also involved situations where divorce or separation occurred prior to or nearly concurrent with the birth of the child. See Teece v. Teece, 715 P.2d 106, 106 (Utah 1986) ("In May of 1981, plaintiff gave birth to a child. Soon thereafter, she filed this action for divorce."); Roods v. Roods, 645 P.2d 640, 641 (Utah 1982) (addressing first husband's attempt to deny paternity where child was conceived during his marriage but born into a subsequent marriage between mother and another man); Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687, 688 (1974) (addressing paternity question when child was yet "to be born" at the time divorce pleadings were filed).

¶19 By contrast, the Pearsons made substantial efforts to maintain their marriage even though both parties knew midway through Z.P.'s gestation that Thanos was the likely biological father. The Pearsons disagree about their intent regarding Father's relationship to Z.P. Father contends that both he and Mother agreed that Father would raise Z.P. as his child in all respects, while Mother asserts only that she agreed to stay and try to make the marriage work so long as Father would not punish her or Z.P. for her infidelity. The trial court made no findings on the issue, but did find that the Pearsons did not separate until Z.P. was approximately nine months old.

¶20 While not dispositive of Thanos's standing, we determine that the Pearsons' efforts to maintain their marriage after Z.P.'s birth remain relevant to the Schoolcraft analysis, even post-divorce. The question is not whether the Pearsons' marriage ultimately failed, but rather whether the potential of a challenge to Z.P.'s paternity would have undermined the Pearsons'

marriage while it was still in existence.<sup>4</sup> Under Father's version of events, the possibility of raising Z.P. as his own child without interference from Thanos was perhaps the central issue motivating him to make the marriage work. While Mother's version is substantially different, even her recollection indicates the importance of the issue to Father, and her own willingness to make the marriage work.

¶21 In any event, the Pearsons stayed together in marriage for over a year after Father first became aware of Thanos's paternity of Z.P. The trial court erred in failing to recognize that the Pearsons' shared parentage of Z.P. represented a stabilizing force in their then-existing marriage, and that the potential of a paternity challenge would diminish that stabilizing effect. Thus, even after the Pearsons filed for divorce, Thanos's challenge to Z.P.'s paternity can be said to have had some undermining effect on the stability of the Pearsons' marriage within the meaning of Schoolcraft's public policy analysis.<sup>5</sup> While the reality of the Pearsons' ultimate divorce may minimize the importance of the first Schoolcraft prong, we cannot say on the facts of this case that it obviates that prong altogether.

#### B. Protection of Children from Attacks on Paternity

¶22 The second, and in this case more problematic, policy consideration under the Schoolcraft test is "protecting children from disruptive and unnecessary attacks upon their paternity." In re J.W.F., 799 P.2d 710, 713 (Utah 1990). There are crucial distinctions between the Pearsons' case and In re J.W.F. that lead us to conclude that Thanos's challenge to Z.P.'s paternity is both disruptive and unnecessary.

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<sup>4</sup>We note that Thanos's paternity challenge arose entirely within the duration of the Pearsons' marriage, and that Thanos filed his motion to intervene concurrently with Mother's responsive pleading in the Pearsons' divorce case, prior to the actual decree of divorce.

<sup>5</sup>We note that the public policy in favor of preserving the stability of marriage, always strong in Utah, may be even stronger in light of Utah's enshrinement of so-called traditional marriage into its constitution in 2004. See Utah Const. art. I, § 29 (Supp. 2005); but see Citizens for Equal Prot. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (declaring a similar state constitutional amendment invalid on various grounds including free association and equal protection).

¶23 In In re J.W.F., J.W.F. was promptly abandoned by his mother at birth, his natural father apparently never sought or enjoyed any parental role whatsoever, and his mother's husband, Winfield, never had custody of J.W.F. or a relationship with him. See id. at 712-13. J.W.F. was a little more than one year old at the time of the initial standing dispute. Not surprisingly, the supreme court had no trouble in determining that allowing J.W.F.'s guardian ad litem standing to litigate his paternity would not constitute an "unnecessary and disruptive attack[]" on J.W.F.'s paternity. Id. at 713. The court stated that "J.W.F.'s expectations as to who his father is cannot be shaken by permitting a challenge to the presumption of legitimacy. The child has never had a relationship with [Winfield] Schoolcraft, [or his biological father], or even his mother, so he has no expectations as to who his father is." Id.

¶24 Clearly, the present case does not involve a lack of paternal relationships. Rather, the trial court was presented with an undisputed and ongoing paternal relationship between Father and Z.P., as well as Thanos's evolving relationship with Z.P. as a stepfather, and as the father of one of Z.P.'s siblings. In its November 2002 order granting Thanos's motion to intervene, the trial court explained its ultimate rationale on the unnecessary and disruptive prong:

The court cannot find that granting Mr. Thanos the standing to intervene would be disruptive to [Z.P.] or an unnecessary attack on his paternity. In this case, as indicated by Dr. Sanders in her report, Mr. Thanos has an established relationship with the child and there is nothing in the reports of Dr. Sanders that would suggest allowing Mr. Thanos to intervene would be adverse to the best interests of the child. The report of Dr. Sanders, to the contrary, indicates that it is in the best interests of the child to allow Mr. Thanos to intervene.<sup>[6]</sup>

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<sup>6</sup>Dr. Sanders's May 13, 2002 report concluded that "[f]rom a developmental and psychological perspective, [Z.P.]'s functioning is not inherently disrupted by [Thanos's] involvement and [Thanos's] relationship with [Z.P.] is necessary to [Z.P.]'s normal and positive development." Dr. Sanders's supplemental report of August 26, 2002, further concluded that "[t]here is no reason to believe that further disruption to the relationship  
(continued...)

The November order also recognized that Father had "functioned as Z.P.'s father since his birth."

¶25 We have no reason to question the trial court's findings as they relate to the contents of Dr. Sanders's report or the existence of some relationship between Thanos and Z.P. in November 2002. However, despite the paternal role that Thanos may eventually have attempted to take, the undisputed facts of the case are that Thanos had little interest or involvement in Z.P.'s life until he was approximately sixteen months of age. The trial court recognized as much in its October 2001 order initially denying Thanos's motion to intervene: "Mr. Thanos was completely absent from [Z.P.'s] first year of life, was absent for the first half of his second year of life, and has had incidental contact during the second half of the second year of [Z.P.'s] life." As a result of this intentional absence, Z.P. developed a paternal relationship exclusively with Father over the first two years of his life, a relationship that both Father and Z.P. apparently continue to foster to the present.

¶26 The Schoolcraft analysis is not intended to protect children from all attacks on their paternity, but only those that are disruptive and unnecessary. See id. In evaluating the disruptiveness of a paternity challenge, the supreme court focused on the child's relationship with the existing father figure and the child's "expectations as to who his father is." Id. Here, the trial court found in its October 2001 order that Father was the "psychological father of [Z.P.]," that Z.P. had "become closely bonded with [Father]," and that those bonds were "critical." The trial court further found as a factual matter that to permit Thanos "to establish his paternity of [Z.P.] and to be introduced at this point as a father figure in [Z.P.'s] life would be immediately disruptive to the child's stability." These facts leave little doubt that, at least as of October 2001, Thanos's paternity challenge would have been disruptive to Z.P.'s existing paternal relationship with Father and Z.P.'s expectations as to who his father was.

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<sup>6</sup>(...continued)  
between [Z.P.] and [Father] is intrinsically linked to Mr. Thanos'[s] presence in [Z.P.]'s life."

Mere involvement or presence in a child's life is a very different thing than a legal challenge to the child's paternity. Thus, we do not see Dr. Sanders's reports as being responsive to the Schoolcraft goal of "protecting [Z.P.] from disruptive and unnecessary attacks upon [his] paternity." In re J.W.F., 799 P.2d at 713 (emphasis added).



¶27 We see nothing in the record to indicate that the mere passage of time, or the integration of Thanos into Z.P.'s life as Mother's husband, destroyed or even diminished Z.P.'s paternal relationship with Father or his expectations as to who his father was. To the contrary, Dr. Sanders's May 13, 2002 report found that "[Z.P.] identifies [Father] as his father and their attachment is secure, strong and healthy." Her supplemental report of August 26, 2002 confirmed that Z.P. and Father shared a "strong and positive parent-child attachment." Despite Dr. Sanders's other conclusions regarding Z.P.'s best interests,<sup>7</sup> her findings of a continuing paternal relationship between Z.P. and Father should have been the central focus of the trial court's Schoolcraft analysis.

¶28 In light of those findings, we cannot say that Thanos's attack on Z.P.'s paternity would not have been disruptive to Z.P.'s paternal relationship with Father and his expectations about whom his father was. The entire motivation for Thanos's attempt to intervene was to establish that he, rather than Father, was to fulfill the paternal role in Z.P.'s life. Whatever other effects Thanos's challenge might ultimately have on Z.P., his direct attack on Father's paternity of Z.P. certainly fails the Schoolcraft directive of avoiding disruption of existing paternal relationships.

¶29 We must also examine whether Thanos's paternity challenge can be deemed "necessary." Id. In re J.W.F. did not provide guidance on distinguishing between necessary and unnecessary paternity challenges, and the trial court did not expressly address the issue. We presume that, like the disruption element, the necessity element must be analyzed primarily from the child's perspective rather than from Father's or Thanos's. See id. (emphasizing a policy of "protecting children" and analyzing disruption from the child's perspective). We also assume, without deciding, that Schoolcraft standing always exists at birth and can be lost only thereafter. Cf. Utah Code Ann. § 78-30-4.14(2) (2002) (establishing standards by which unmarried

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<sup>7</sup>We are aware that disregarding Dr. Sanders's conclusions regarding Z.P.'s best interests seems counterintuitive given the central role that the best interests standard plays in every case involving juveniles. Nevertheless, in the context of determining standing to contest paternity, the Schoolcraft test is the standard set by the supreme court to measure the child's best interests as those interests balance against the rights of others.

biological father can establish paternity so as to defeat adoption of his child by another at birth).

¶30 Proceeding under these assumptions, we cannot see how Thanos's ability to challenge Z.P.'s paternity remained necessary after he voluntarily absented himself from Z.P.'s life. From Z.P.'s perspective, he had a father in Father from his earliest ability to form paternal bonds. Had the Pearson marriage succeeded, Father would likely have remained Z.P.'s father in all regards throughout the foreseeable future. Dr. Sanders found that, even when the Pearsons' marriage failed, Z.P. continued to identify Father as his father and enjoy a strong paternal relationship with him. Thus, at the time of the trial court's intervention order, Z.P. had a father and was not in need of a different one.

¶31 We need not determine the exact point at which Thanos's paternity challenge became unnecessary for Schoolcraft purposes. It is sufficient in this case to determine that there existed a period of many months during which Z.P. developed a strong paternal relationship with a loving and willing presumed father. So long as that relationship continues, it cannot be said for Schoolcraft purposes that Z.P. has any particular need for his paternity to be established in another man.<sup>8</sup>

¶32 Looking at the circumstances of this case as a whole, we conclude that the trial court should have deemed Thanos's attack on Z.P.'s paternity both disruptive and unnecessary. Thanos's challenge to Z.P.'s presumed paternity became disruptive and unnecessary when he allowed Z.P. to form paternal bonds with Father, and will likely remain so, for Schoolcraft purposes, as long as those bonds continue.

#### C. The Trial Court Erred in Allowing Thanos to Intervene

¶33 In light of our conclusions regarding the application of the Schoolcraft factors to this case, we determine that Thanos lacks standing to challenge Z.P.'s paternity and that the trial court erred by allowing him to intervene in the Pearsons' divorce action. While the Pearsons' marriage may be long dissolved, we must give some weight to the fact that the Pearsons attempted to save their marriage, and that Father's intent and ability to raise Z.P. as his own were significant factors in that decision.

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<sup>8</sup>This is not inconsistent with Dr. Sanders's assessment that Thanos has a potentially valuable role to play in Z.P.'s life. That role, however, need not be as the primary father figure.

Most significantly, however, an attack on Z.P.'s paternity at this point would be disruptive of Z.P.'s strong paternal relationship with Father, a relationship that renders Thanos's challenge unnecessary from Z.P.'s perspective. Under these circumstances, Thanos does not have Schoolcraft standing, and the trial court erred in allowing him to intervene.

¶34 We analogize Thanos's status to that of an unmarried father seeking to establish parental rights to his child in the face of the mother's intent to have the child adopted. See Utah Code Ann. § 78-30-4.14(2). Section 78-30-4.14(2) sets out various requirements that an unmarried biological father<sup>9</sup> must comply with in order to establish his paternity. See id. When the adoption involves a child under six months of age, section 78-30-4.14(2) establishes specific acts, including initiating a paternity action, that the father must take prior to the mother executing her consent to the adoption. See id. § 78-30-4.14(2)(b). The mother's consent to adoption can be executed as little as twenty-four hours after the child's birth. See id. § 78-30-4.19 (2002). A father who fails to comply with the requirements of section 78-30-14(2) has no standing to object to the adoption and permanently loses his parental rights to the child. See id. § 78-30-4.14(5); In re adoption of B.B.D., 1999 UT 70, ¶¶10-12, 984 P.2d 967 ("Under Utah law, '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.'" (quoting Utah Code Ann. § 78-30-4.12(2)(e) (1996))).

¶35 By holding Thanos to a similar, if somewhat more generous, standard, we recognize that a husband is presumed to be the legal father of a child born into his marriage. See Utah Code Ann. § 30-1-17.2(2) (Supp. 2005). In the vast majority of marital births, the husband is also the natural, biological father of the child. However, in the hopefully rare instance where a child born into a marriage is fathered by another man, the husband is nevertheless deemed the father of the child, with all concomitant rights and responsibilities, unless and until his paternity is successfully challenged under the Utah Uniform Parentage Act.

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<sup>9</sup>"Unmarried biological father" for purposes of Utah Code section 78-30-4.14(2) means a man not married to the child's mother, without regard to whether the man is married to another. See Utah Code Ann. § 78-30-4.11 (2002) (repealed 2005) (defining "unmarried biological father"); id. § 78-30-1.1(5) (Supp. 2005) (same).

See id. §§ 78-45g-101 to -902 (Supp. 2005); id. § 30-1-17.2(4) ("A presumption of paternity established under this section may only be rebutted in accordance with Section 78-45g-607."). Essentially, an illegitimate child born into a marriage is immediately subject to a de facto adoption by the mother's husband. We see 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 facto 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.

¶36 Like any other unmarried father who fails to perfect his inchoate parental rights, Thanos lost his standing to contest Z.P.'s paternity sometime during the early months of Z.P.'s life. Despite the evolving circumstances of this case, we conclude that since that time Thanos has not met, and to our knowledge still does not meet, the Schoolcraft factors.<sup>10</sup> Accordingly, the trial court erred in granting Thanos's January 2001 motion to intervene and his subsequent motion for summary judgment establishing his paternity of Z.P.

## II. Z.P.'s Paternity and Custody

¶37 Our determination that it was error to allow Thanos to intervene in the Pearsons' divorce action has inescapable consequences for the trial court's paternity and custody orders. With Thanos improperly joined in this litigation, the trial court's consideration of Thanos's motion for summary judgment to establish paternity, and the genetic evidence in support thereof, was error. And, of course, the court's May 2003 order granting Thanos's summary judgment on the issue of his fatherhood of Z.P. was also erroneous and is reversed.

¶38 With Thanos and all of his various pleadings and evidence out of the litigation, Father remains the presumed and legal father of Z.P. See Utah Code Ann. § 30-1-17.2(2). Accordingly, the trial court erred in applying the parental presumption in favor of Mother<sup>11</sup> and against Father in making its ultimate

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<sup>10</sup>We express no opinion on the separate question of whether Schoolcraft standing, once lost, can ever be regained due to changed circumstances.

<sup>11</sup>We recognize that Mother asserted Father's non-paternity of Z.P. in her answer and in a simultaneous motion to show cause,  
(continued...)

custody decision 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.

¶39 We reverse the trial court's orders below to the extent that they rely on Thanos's paternity of Z.P., and remand this matter to the trial court for the issuance of a new custody order, taking into account Father's legal paternity of Z.P.

#### CONCLUSION

¶40 Thanos should not have been allowed to intervene in this matter due to a lack of Schoolcraft standing. Accordingly, the presumption of Father's legitimate parentage of Z.P. remains

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<sup>11</sup>(...continued)

and that she could have litigated Z.P.'s paternity on identical evidence in Thanos's absence. Regardless of this possibility, Z.P.'s paternity was actually litigated almost exclusively between Father and Thanos, an improper party. We rule today solely on the issues before us, and neither Mother nor Thanos argue on appeal that Mother's pleadings provide an independent ground to affirm the trial court's paternity finding.

More importantly, for all of the reasons set forth in this opinion, Mother would also appear to be barred from challenging Z.P.'s paternity on the facts and posture of this case. She too would lack Schoolcraft standing, see In re J.W.F., 799 P.2d 710, 713 (Utah 1990), and her actions prior to the initiation of divorce proceedings might support a determination that her challenge was barred by equitable estoppel. See Dahl Inv. Co. v. Hughes, 2004 UT App 391, ¶14, 101 P.3d 830 (listing elements of equitable estoppel); see also Kristen D. v. Stephen D., 719 N.Y.S.2d 771, 772-73 (App. Div. 2001) ("Courts have long recognized the availability of the doctrine of equitable estoppel as a defense in a paternity proceeding." (citations omitted)); Richard W. v. Roberta Y., 658 N.Y.S.2d 506 (App. Div. 1997) (applying equitable estoppel principles to bar a paternity challenge). For the same reasons, Father would also appear to be barred from seeking to disestablish paternity of Z.P. should he ever choose to do so.

We express no opinion on whether Z.P. himself, the state of Utah, or any other person or entity could ever challenge Father's paternity, or the circumstances that might permit such a challenge.

Tab 19

FILED  
UTAH APPELLATE COURTS  
MAY 19 2006

IN THE UTAH COURT OF APPEALS

---oo0oo---

Kelly F. Pearson,	)	
	)	ORDER
Petitioner and Appellant,	)	
	)	Case No. 20040677-CA
v.	)	
	)	
Kimberlee Y. Pearson,	)	
	)	
Respondent and Appellee.	)	
_____	)	
	)	
Peter D. Thanos,	)	
	)	
Intervenor and Appellee.	)	

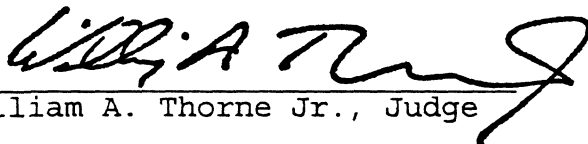
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This matter is before the court upon Appellee's petition for rehearing, filed April 12, 2006.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 19 day of May, 2006.

FOR THE COURT:

  
\_\_\_\_\_  
William A. Thorne Jr., Judge

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

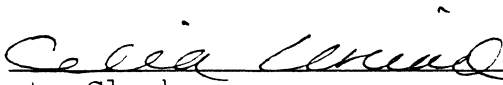
STEVEN H GUNN  
RAY QUINNEY & NEBEKER  
36 S STATE ST STE 1400  
PO BOX 45385  
SALT LAKE CITY UT 84111

PAIGE BIGELOW  
KRUSE LANDA MAYCOCK & RICKS LLC  
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PO BOX 45561  
SALT LAKE CITY UT 84145-0561

KELLIE F. WILLIAMS  
JARROD H JENNINGS  
CORPORON WILLIAMS & BRADFORD  
405 S MAIN ST STE 700  
SALT LAKE CITY UT 84111

Dated this May 19, 2006.

By

  
Deputy Clerk

Case No. 20040677

District Court No. 004907881



FILED DISTRICT COURT  
Third Judicial District

OCT 17 2001

BY  SALT LAKE COUNTY  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

KELLY F. PEARSON,	)	
	)	<b>ORDER ON MOTION</b>
Petitioner,	)	<b>TO INTERVENE</b>
vs.	)	
	)	
KIMBERLEE Y. PEARSON,	)	Civil No. 004907881
	)	Judge Tyrone E. Medley
Respondent.	)	Commissioner Michael S. Evans

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PETER THANOS'S motion to intervene came on regularly before the court on the 30<sup>th</sup> day of August, 2001, the Honorable Michael S. Evans, District Court Commissioner, presiding. Peter Thanos was present in person and represented by counsel, Kellie Williams. Petitioner was present in person, and represented by counsel, Paige Bigelow. Respondent was present in person and represented by counsel, Steven H. Gunn. The court heard the arguments and proffers of Mr. Thanos and each of the parties, and reviewed the affidavits and memorandums submitted in support and opposition to the motion. Based thereon, and for good cause appearing, the court now makes and enters the following:

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### FINDINGS OF FACT

1. The parties, petitioner Kelly Pearson and respondent Kimberly Pearson were married on August 17, 1992.
2. Their first son Nicholas was born on July 6, 1997. His paternity is not in dispute.
3. In 1996, Mr. Thanos, a married man, began an intimate relationship with respondent, Mrs. Pearson. This relationship was hidden from Mr. Pearson and Mr. Thanos's wife, Mrs. Thanos, and ultimately resulted in the conception of the second child born during the Pearsons' marriage, Zachary Pearson.
4. Mr. Thanos was aware of and believed that he was Zachary's natural father from January of 1999, soon after Zachary's conception.
5. Zachary was born on September 14, 1999. Mr. and Mrs. Pearson treated him as their son in all respects, making no distinction whatsoever between him and his elder brother, Nicholas. Zachary's birth certificate lists Mr. Pearson as Zachary's father.
6. The Pearson's marriage was intact at the time of Zachary's birth and remained intact and continued as a stable relationship, at least from the child's perspective, until May of 2000, at which time Zachary was approximately 7 1/2 months old.
7. Mr. Thanos is the natural, biological father of Zachary.
8. Petitioner Kelly Pearson is the presumptive and psychological father of Zachary.
9. Though being aware of his biological relationship to Zachary from approximately January of 1999, Mr. Thanos did nothing to acknowledge his paternity for more than two years,

until as late as August of 2001, just prior to the hearing herein. With the exception of the parties herein, Mr. Thanos kept his biological connection to Zachary hidden from others, including his family members, and including his wife of twenty-six years. Despite his belief and knowledge that he was Zachary's natural father, Mr. Thanos allowed Zachary to be regarded in every way as Mr. Pearson's son and to become closely bonded with Mr. Pearson during critical stages of Zachary's development.

10. Mr. Thanos has not had substantial contact with Zachary prior to the initiation of this action, and the contact he has had has been incidental to his continuing relationship with Mrs. Pearson. At all times, Mr. Thanos has continued to live in Oregon, whereas Zachary, Nicholas, and the Pearsons live in Utah. At no time has Mr. Thanos lived with Zachary, nor established a parent-child bond. Mr. Thanos is not a psychological parent to Zachary. Mr. Thanos's failure to act as a father to Zachary was due to his choice to remain with his wife in Oregon and to keep his affair with Mrs. Pearson, and his biological connection to Zachary, hidden from his wife. Mr. Thanos waited until his wife's death to initiate this proceeding. In reviewing the choices Mr. Thanos made, which the court acknowledges were difficult choices, the court finds that in each instance Mr. Thanos subordinated Zachary's best interest to what he believed to be his own best interest.

11. The court has reviewed the affidavit of Dr. Denise Goldsmith, which outlines the stages of development of children from birth through the first, second, and third year of life. Zachary has now entered his third year of life. It is acknowledged that Mr. Thanos was

completely absent from his first year of life, was absent for the first half of his second year of life, and has had incidental contact during the second half of the second year of Zachary's life. During Mr. Thanos's absence Zachary has developed critical bonds with his primary caregivers, Mr. and Mrs. Pearson, and the court finds that for Mr. Thanos to be permitted to establish his paternity of Zachary and to be introduced at this point as a father figure in Zachary's life would be immediately disruptive to the child's stability and in the long-term would be emotionally damaging to the child.

The court makes and enters the following:

#### CONCLUSIONS OF LAW

1. The court concludes that the cases cited by Mr. Thanos and the parties are helpful, though not determinative, as they are factually distinguishable from this case. The court finds that a particular distinction between this case and the cases cited is that Zachary has a brother, Nicholas, whose paternity is not in question, who is close in age to Zachary, and who Mr. Thanos and the parties all acknowledge should not be separated from Zachary.

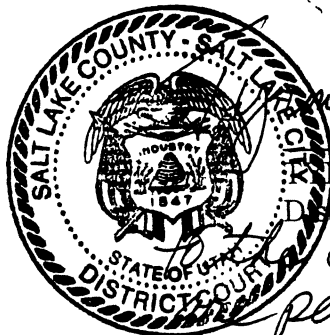
2. The court concludes that the cases are in agreement that biological status or legal status alone does not dictate a specific result in regard to who should be allowed to challenge a presumption of paternity, in this case, the presumption of paternity that is present in favor of Mr. Pearson. In re. Michael H., the U.S. Supreme Court case addressing the constitutional rights of a biological father of a child born into wedlock, specifically states that a biological link must be considered only when such a link is combined with a substantial parent-child relationship. The Schoolcraft case talks specifically about standing and who should be allowed to challenge the presumption of paternity, in this matter in favor of Mr. Pearson. The case states that paramount consideration must be given not only to preserving the stability of marriage, but also to ensuring that children are protected from disruptive and unnecessary attacks on their paternity.

3. The court concludes that the procedure that Mr. Thanos has chosen is not determinative of the result, and that the result would be the same whether Mr. Thanos chose to pursue his attempt to adjudicate his paternity of Zachary in a separate paternity action, or by seeking to intervene in the Pearson's divorce action as he has done.

5. Applying the foregoing findings of fact to the principles of law as set forth herein, the court concludes that Peter Thanos's motion to intervene should be denied as Mr. Thanos lacks standing to challenge the presumption of paternity that exists in favor of Mr. Pearson as Zachary's father.

DATED this 17 day of Oct, 2001.

BY THE COURT:



*Kyrone E. Medley, subject*  
\_\_\_\_\_  
KYRONE E. MEDLEY  
District Court Judge  
*Objections which  
pending. J. Medley*

RECOMMENDED BY:

*Michael S. Evans 10/17/01*  
\_\_\_\_\_  
MICHAEL S. EVANS  
District Court Commissioner

APPROVED AS TO FORM:

\_\_\_\_\_  
STEVEN H. GUNN  
Attorney for Respondent

APPROVED AS TO FORM:

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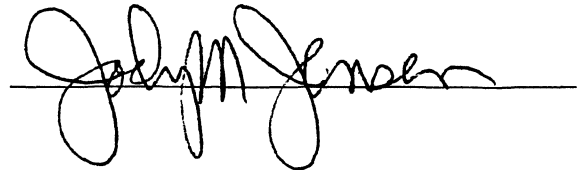
KELLIE WILLIAMS  
Attorney for Peter Thanos

**CERTIFICATE OF MAILING**

I hereby certify that I caused a true and correct duplicate original of the foregoing  
ORDER ON MOTION TO INTERVENE to be mailed, by United States mail, postage prepaid,  
to the following this 1 day of October, 2001.

Steven H. Gunn  
RAY, QUINNEY & NEBEKER  
400 Deseret Building  
79 South Main Street  
P. O. Box 45385  
Salt Lake City, Utah 84145-0385

Kellie Williams  
CORPORAN & WILLIAMS  
808 East South Temple  
Salt Lake City, UT 84102

A handwritten signature in cursive script, appearing to read "John M. Jensen", is written over a horizontal line.