

2006

Kelly F. Pearson v. Kimberlee Y. Pearson; Pete D. Thanos : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

KELLY F. PEARSON,
Petitioner/Appellee,

vs.

KIMBERLEE Y. PEARSON,
Respondent /Appellant.

PETE D. THANOS,
Intervenor/Appellant.

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

APPEAL FROM THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. THE UTAH COURT OF APPEALS IMPROPERLY APPLIED THE POLICY CONSIDERATIONS OF <u>SCHOOLCRAFT</u>	1
A. The Court of Appeals Erred in its Review of the Facts Bearing on Standing	1
B. The Court of Appeals Erroneously Interpreted the First Prong of the <u>Schoolcraft</u> Test Regarding the Policy of Preserving an Intact Marriage ..	3
1. Appellee's Broad View of the Policy Goal of Preserving the Stability of the Marriage is Not Support by <u>Schoolcraft</u>	3
2. The Court of Appeals Interpretation of Preserving a Marriage is Inconsistent with the Policies Expressed in Uniform Parentage Act ..	7
C. The Court of Appeals Erred in its Application of the Policy of Protecting Children from Disruptive and Unnecessary Attacks upon Their Paternity	11
D. The Court of Appeals Erred in Preventing Pete from Intervening in the Divorce Case to Protect his Liberty Right as a Parent	14
1. As Zachary's Biological Father Pete had the Right to Seek Custodial and Parent-Time Rights	15
2. The Court of Appeals Refusal to Allow Pete to Intervene Prevented him from Protecting his Liberty Right in Zachary	18
II. THE COURT OF APPEALS REFERENCES TO THE TRIAL COURT'S OCTOBER, 2001 ORDER WERE CRITICAL TO ITS OPINION	19
III THE COURT OF APPEALS SHOULD HAVE GRANTED THE PETITION FOR REHEARING BECAUSE ITS OPINION DOES NOT PROVIDE CLEAR GUIDANCE TO THE TRIAL COURT CONCERNING CUSTODY.....	21
A. If The Court of Appeals' Opinion Directs the Trial Court not to Consider	

the Kinship of Pete and Madelaine to Zachary, it Should be Reversed . .	21
B. The Trial Court, Rather than the Appellate Court, Should Decide Whether the Kinship, as Well as the Family’s Complicated History, is Relevant to the Award of Custody	23
CONCLUSION	25
CERTIFICATE OF SERVICE	26
ADDENDA	27

TABLE OF AUTHORITIES

CASES

<u>Ball v. Peterson</u> , 912 P.2d1006 (Utah Ct. App. 1996)	9
<u>Brown and Root Indus. Serv. v. Industrial Comm’n</u> , 947 P.2d 671 (Utah 1997)	9
<u>Childs v. Childs</u> , 967 P.2d 942 (Utah Ct. App. 1998)	24
<u>Hutchison v. Hutchison</u> , 649 P.2d 38 (Utah 1982)	22, 23
<u>In Interest of J.W.T.</u> , 872 S.W.2d 189 (Tex. 1994)	6
<u>In re CAW</u> , 665 N.W. 2d 475 (Mich 2003)	8
<u>In re Cooper</u> , 17 Utah 2d 296 P.2d 475 (1966)	22, 23
<u>In re J.M and N.P.</u> , 940 P.2d 527 (Utah Ct. App. 1997)	14
<u>In re J.P.</u> , 648 P.2d 1364 (Utah 1982)	16
<u>In re J.W.F.</u> , 799 P.2d 710 (Utah 1990)	2-4, 6-8, 12-14, 16, 19, 24, 25
<u>In re Marriage of Freeman</u> , 53 Cal. Rptr. 439 (Cal. Ct. App. 1996)	5, 6
<u>J.W. v. State ex rel S. H.</u> , 2005 UT App 324, 119 P.3d 309 (Utah 2005)	18
<u>Lehr v. Robertson</u> , 463 U.S. 248, 102 S.Ct. 2985(1983)	18, 25
<u>Michael H. v. Gerald D.</u> , 491 US 110 (1989) (Brennan, J. dissenting)	16
<u>Pearson v. Pearson</u> , 2006 UT App 128, 134 P.3d at 173	12, 17, 20, 22
<u>Roy Allen S. v. Stone</u> , 196 W.V. 624, 474 S.E. 2d 554, 561, 562 (W. V. 1996)	16
<u>S.G. v. A.G. and J.G.</u> , 764 So.2d 807, 810 (Fla. Ct. App. 2000)	5
<u>T.H v. R.C. (In re E.H.)</u> , 2006 UT 36 137 P.3d 101	12
<u>Wells v. Children Aid Society</u> , 681 P.2d 199 (Utah 1984)	14, 17

<u>Willey v. Willey</u> , 951 P.2d 226 (Utah 1997)	2, 3
--	------

RULES

C.J.A. Rule 4-903	22, 23
Rule 24 of the Utah Rules of Appellate Procedure	1, 19
Utah Rules of Civil Procedure	18

STATUTES

Utah Uniform Parentage Act	8-11, 13, 15, 16
Utah Code Annotated § 30-3-5(5)(a)	23
Utah Code Annotated § 30-3-32	16
Utah Code Annotated § 30-3-37	15
Utah Code Annotated § 78-30-4.14(1)(e)	17
Utah Code Annotated § 78-45a-1	15
Utah Code Annotated § 78-45a-10.5	15
Utah Code Annotated § 78-45a-2(1)	15
Utah Code Annotated § 78-45g-101	9
Utah Code Annotated § 78-45g-201(2)	10
Utah Code Annotated § 78-45g-204	10
Utah Code Annotated § 78-45g-204.2	10
Utah Code Annotated § 78-45g-602	10
Utah Code Annotated § 78-45g-602(3)	10

Utah Code Annotated § 78-45g-607	10, 11
--	--------

OTHER

Black’s Law Dictionary 887 (8 th ed. 2004)	23
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Floor Debate, 56 th Leg. Gen. Sess. [Utah June 25, 2005]	9, 11
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REPLY BRIEF OF APPELLANTS

APPELLANTS, Kimberlee Y. Thanos (“Kim”) and Pete D. Thanos, (“Pete”), by and through counsel, hereby submit the following as their Reply Brief pursuant to Rule 24 of the Utah Rules of Appellate Procedure.

ARGUMENT

I. THE UTAH COURT OF APPEALS IMPROPERLY APPLIED THE POLICY CONSIDERATIONS OF SCHOOLCRAFT.

A. The Court of Appeals Erred in its Review of the Facts Bearing on Standing.

The Utah Court of Appeals decision squarely conflicts with the controlling policy considerations articulated by this Court in In re J.W.F., 799 P.2d 710 (Utah 1990) (“Schoolcraft”). The Court of Appeals’ decision should be reversed, in part, due to the

fact that it erroneously substituted its own findings of fact for the findings of the trial court prior to applying the Schoolcraft analysis. Contrary to Appellee's assertion, Appellants reliance upon the case of Willey v. Willey, 951 P.2d 226 (Utah 1997), which warned against the appellate court substituting its own findings for findings made by the trial court, is not misplaced. (Brief of Respondent at 15-16.) This Court, in Schoolcraft, concluded that whether an individual has standing to challenge the presumption of legitimacy depends not on legal status alone, but on a case-by-case determination. 799 P.2d at 713. This Court found that the Court of Appeals analysis in Schoolcraft had been "too mechanistic and, consequently insufficiently sensitive to the legitimate policy consideration Schoolcraft raises." 799 P.2d at 713.

The determination of standing in cases like this one is not a mechanistic question that makes it solely a question of law, as the factual findings directly bear on the question of standing. Given the need to be factually sensitive in applying the particular facts to the Schoolcraft analysis, the admonitions of Willey are wholly applicable. This court has admonished the Court of Appeals that it should only make findings of fact in the most extraordinary of circumstances. Willey, 951 P.2d at 235. Those extraordinary circumstances do not exist in this case.

Unlike the cases cited by Appellee, Judge Medley received and considered substantial independent factual information from the court-appointed custody evaluator, Dr. Jill Sanders. (Brief of Appellants at 10-14.)

The Court of Appeals was in a inferior position to examine the evidence, given

the heavy reliance upon the vacated October 17, 2001 Order. This court in Willey, addressed both the question of whether an appellate court was in an equal position with the trial court with respect of the facts at issue and the appropriateness of the Court of Appeals rejecting the trial courts findings and accepting other evidence, despite a lack of supporting evidence, in modifying the trial judge's award. In that case, this court concluded that the Court of Appeals erred in making its own findings and substituting its own judgment for that of the trial court. 951 P.2d at 234.

In considering the facts of this particular case and applying the same to Schoolcraft, Judge Medley had substantial factual evidence and extensive reports by Dr. Jill Sanders. Despite this, the Court of Appeals rejected Judge Medley's findings and adopted the vacated findings of Commissioner Evans. Those erroneous findings were absolutely critical to the Court of Appeals' decision.

Based upon the Court of Appeals inappropriate substitution of its own findings, as well as their reliance upon erroneous facts set forth by a commissioner in a vacated Order, the Court of Appeals did err in its review of the facts bearing on the issue of standing to challenge Zachary's paternity.

B. The Court of Appeals Erroneously Interpreted the First Prong of the Schoolcraft Test Regarding the Policy of Preserving an Intact Marriage

1. Appellee's "Broad View" of the Policy Goal of Preserving the Stability of the Marriage is Not Supported by Schoolcraft

Appellee asserts that the Court of Appeals has not made a finding that the Pearsons' marriage was intact or that Thanos was "at fault" in undermining the Pearsons'

marital relationship. (Brief of Respondent at 17.)

Paragraph 21 of the Court of Appeals' Opinion states,

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' 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.

The Court of Appeals' finding - one not found among those of the trial court - that Pete destabilized the marriage, is made in support of its holding that Pete lacked standing to intervene in this case. As has been previously argued, such a fault-based analysis is not part of the Schoolcraft test. Furthermore, the Court of Appeals' finding is inconsistent with the trial court's finding that "the ultimate cause of the termination of their [the Pearsons'] marriage was their irreconcilable differences." (R. 2463.)

In effect the Court of Appeals has added a new element to the "intact marriage" test: that who seeks to assert rights in a child must prove that he did not interfere with the possible reconciliation between the putative father and the mother.

Contrary to the finding of the Court of Appeals, Kim and Kelly's marriage was a marriage in name only at the time the challenge to the child's paternity was made by Pete. (R. 2533 at 465: 7-11; 452: 9-11; R. 982, ¶ 18; R. 983, ¶ 21.) Kelly Pearson had filed for divorce and initially named Pete Thanos as an Intervenor in the pleadings. (R. 2 ¶ 7.) Further, the trial court made a specific finding that it was not Pete's fault that the parties

got divorced, but a product of irreconcilable differences. (Finding 57(d); R. 2463.)

Appellee's reliance on S.G. v. A.G. and J.G., 764 So.2d 807, 810 (Fla. Ct. App. 2000) misapprehends the purpose of the quoted text. The statement that "although divorce may separate and strain a family with children, divorce does not end the important child-rearing functions of the family," is merely a description of the continuation of rights post-divorce and post-separation, concerning all children and parents in divorce and marital relationships. The quoted language does not address the question of standing, but the rights and liberty interests parents have in their children after divorce.

Appellee quoted the following language from In re Marriage of Freeman, 53 Cal. Rptr. 439 (Cal. Ct. App. 1996):

[T]he state has a well-recognized interest in preserving and protecting the dignity of parental relationships, especially where a marriage is being dissolved and instability is being introduced into a child's life.

Id. at 448.

While the State does have an interest in protecting parental relationships, that interest must be balanced against the interest of the biological parent. The Schoolcraft test requires an analysis of whether there is a stable or intact marriage in order to balance that interest. In this case, at the date Pete filed for intervention, the divorce action had been commenced by Kelly. (R.2 ¶ 7.) Further, Kelly and Kim were divorced on June 7, 2002 (R. 855-856) which was prior to the date the court granted Pete leave to intervene on November 7, 2002. (R. 971- 972.)

The Appellee cites to Freeman, but ignores the decision of the Supreme Court of Texas, which, in defining the interest a state has in preserving the stability of a marriage from outside attacks, stated in In Interest of J.W.T., 872 S.W.2d 189 (Tex. 1994):

The State has a legitimate interest in minimizing familial disruptions that are harmful to the child. But as the court of appeals observed, this marital unit was clearly disrupted before Larry [biological father] ever filed this suit:

[T]hat the biological mother, for whatever reason, has chosen to engage in sexual relations outside of marriage is proof itself that the "integrity and solemnity of the family unit" has been damaged at least to some degree. *[Resolution of these difficulties by the husband and wife] does not, we feel, give license to the state to perpetuate the myth of "presumption of paternity" so as to deprive the biological father of at least a chance of being able to exercise those rights, duties, privileges, and responsibilities that all civilized societies have recognized to be fundamentally ingrained in the concept of parenthood.*

Id. at 197 (emphasis added).

For the J.W.T. court, the fact that mother engaged in illicit affairs outside of the marriage was enough to undermine the policy of preservation of the stability of the marriage, irrespective of the subsequent attempts to reconcile. No fault was attributed to the biological father for any role in destabilizing the marriage of the putative father and mother. Stability is merely a factor to be considered as it relates to the potential negative impact it may have on a child to have his life disrupted by an outsider attacking a stable and intact family environment that exists *for the child*. That policy does not extend to preserving the solemnity of the marriage institution as it relates to the State's interests in preserving the institution of marriage itself.

Appellee pontificates at length that a child's psychological tie to parents is

important and in need of protection, and that the stability of parent-child relationships that are formed within the marriage are significant to the well-being of society. (*See*, generally, Brief of Appellee at 18-22.) Appellants do not dispute this. In light of the Schoolcraft test, however, all of those policies are balanced against the importance of biological parents' rights. Appellee does nothing to demonstrate why Kelly should have heightened protection for the child when the marriage was clearly broken prior to the issue of Pete's intervention being considered by the trial court. The only question that the trial court must consider is whether there is a stable, intact marriage that requires heightened protection from the assault of a third party.

The Court of Appeals and Appellee would have this Court adopt a standard which requires not only that the stability of a marriage be considered, but also the possibility of reconciliation after separation or even divorce. This result would prevent any person in Pete's position from ever having standing to assert his rights as a biological father. Contrary to Appellee's novel theory, under Schoolcraft the Court should only have given the marriage protection if the marriage was intact. This heightened protection was lost when Kim and Kelly separated and Kelly filed for divorce.

2. The Court of Appeals' Interpretation of Preserving a Marriage is Inconsistent with the Policies Expressed in the Uniform Parentage Act.

Appellee cites the Model Uniform Parentage Act that was drafted by the National Conference on Commissioners in 2000, and amended in 2002, in arguing that there is a trend among states to limit or disallow a biological father from intervening to assert

paternity. The Model Act has a two year window in which a putative father can assert his paternal rights. Though not enacted as part of Utah's Parentage Act, this window would not be inconsistent with the trial court's decision in this case, because Pete's motion to intervene was made within fifteen (15) months of Zachary's birth.

Appellee also cites In re CAW, 665 N.W. 2d 475, 478 (Mich 2003) for the proposition that a biological father does not have standing to intervene in a child's protective proceedings. The opinion in that case was based upon the fact that there had been no finding that the child was not an issue of the marriage; implying that had such a finding been made, the biological father would have been permitted to intervene.

Appellee further argues that Utah's Uniform Parentage Act, Utah Code Ann. §78-45g-101 et seq. enacted in 2005, supports the Court of Appeals' opinion. The Act is substantive, rather than procedural, because it substantially effects parental rights or duties relating to children. This court has previously found that a statute effecting or establishing a primary right and duty not in existence at the time that a claim arises may not be applied retroactively. Brown and Root Indus. Serv. v. Industrial Comm'n, 947 P.2d 671 (Utah 1997) (citing Ball v. Peterson, 912 P.2d 1006 (Utah Ct. App 1996)). Pete filed his Motion to Intervene in the divorce proceedings in January, 2001, four years before the Act was enacted. Judge Medley granted Pete's Motion to Intervene in 2002. Therefore, this statute does not apply in this case.

Further, when introducing the bill in the 2005 Legislative Session, the sponsor, Senator Hillyard, specifically stated that the policy reasoning behind the Act was to

follow a nationwide move toward every child knowing the identity of his or her parents. (Floor Debate, 56th Leg. Gen. Sess. [Utah June 25, 2005]), Addendum 1. Senator Hillyard and others emphasized that the Act provides a framework for judges to follow, not precise answers. (Floor Debate, 56th Leg. Gen. Sess. [Utah June 25, 2005]).

Senator Hillyard stated that although the bill was family-oriented and structured so that a biological parent could not intervene in an intact marriage, that instances of divorce should be viewed differently. Senator Hillyard's statements infer that the policy considerations behind the bill were not specific to a biological father's intervention in a divorce action. (Floor Debate, 56th Leg. Gen. Sess. [Utah June 25, 2005]).

Although Utah's Parentage Act does not provide a statute of limitations, it does create a procedure to rebut a presumed fathers paternity. Utah Code Ann. § 78-45g-201(2), provides in relevant part, that "the father-child relationship is established by a man and child by (a) an un rebutted presumption of the man's paternity under § 78-45g-204... [or]... (c) an adjudication of the man's paternity." Pursuant to §78-45g-204 Appellee is the presumed father of Zachary. While the Act creates a presumption that Appellee is Zachary's father, that presumption is rebuttable. Utah Code Ann. § 78-45g-204.2, specifically states that a presumption of paternity established under that section may be rebutted in accordance with § 78-45g-607. Moreover, the Act provides that a proceeding to adjudicate parentage may be maintained by a man whose paternity of the child is to be adjudicated. Utah Code Ann. § 78-45g-602(3).

Appellee argues in his brief that the Act, § 78-45g-607, sets forth a policy that

establishes a “strict limitations period and the doctrine of estoppel to the paternity of children having a presumed father.” (Brief of Respondent at 22.) In point of fact, § 78-45g-607 only limits the time in which a mother or presumed father may bring a parentage action. It does not provide a limitation on the other entities who can declare paternity. The Act states that “paternity of a child conceived or born during the marriage with a presumed father may be raised by the presumed father or the mother at any time prior to filing an action of divorce or in the pleadings at the time of the divorce of the parents.” Utah Code Ann. § 78-45g-607 (2006). With the exception of a mother and presumed father § 78-45g-607 does not prevent those listed in § 78-45g-602 including an “alleged father” from initiating a paternity action.

The Legislative history makes clear that the purpose of § 78-45g-607 was to require divorcing parents to raise any paternity issues prior to or as part of a divorce proceeding, so that a mother or presumed father would be precluded from later using paternity issues to impact child support or parenting time. (Floor Debate, 56th Leg. Gen. Sess. [Utah June 25, 2005]). Consequently, § 78-45g-607 requires that the issue of paternity to be raised within the pleadings at the time of the divorce of the parents.

Zachary’s parentage and recognition that Pete is Zachary’s biological father is contained throughout the entire record of proceedings. Appellee stated within his pleadings in the divorce action that Pete is the biological father of Zachary. (*See*, Complaint R. 2 ¶ 7.) Kimberlee denied, Kelly’s biological relationship with Zachary and affirmed that Pete was Zachary’s biological father. (R. 20 ¶ 7.) Furthermore, in Pete’s

Motion for Intervention and subsequent paternity action, which was consolidated with the divorce action, Pete established that he was the biological father of Zachary through genetic testing. (R. 37-41; 992-999.)

Kim raised the issue of paternity in the divorce case. Pete had no similar requirement. Nonetheless, Pete filed a paternity action which was consolidated into the divorce action. Thus, even if the Utah Uniform Parentage Act had been enacted at the time of commencement of this case, Pete's challenge to Kelly's paternity was timely.

C. The Court of Appeals Erred in its Application of the Policy of Protecting Children from Disruptive and Unnecessary Attacks upon Their Paternity.

This court, in Schoolcraft, stated that in determining whether an individual has standing to challenge the presumption of legitimacy depends on a factually sensitive and case-by-case analysis. In the instant case, the Court of Appeals did not consider the facts found by Judge Medley in making its determination that the challenge to Zachary's paternity was disruptive and unnecessary. The Court of Appeals relied primarily upon vacated findings contained in the Commissioner's recommendation of October, 2001. Basing its opinion on this vacated recommendation, the Court of Appeals found that Pete had little interest or involvement in Zachary's life until he was approximately 16 months of age. This is contrary to the record, which evidences that Pete wanted to be involved in Zachary's life and that he had multiple interactions with Zachary after his birth. The evidence also shows that upon Kim's separation from Kelly, Pete was able to significantly increase his interaction with Zachary. (R. 637-640, R. 2553.)

The Court of Appeals made further findings that Zachary had a father and was not in need of a different one (Pearson v. Pearson, 2006 UT App 128 ¶ 30) and that an attack on Zachary's paternity at this point "would be disruptive to Zachary's strong paternal relationship with his father." (Id. at ¶ 33.) Neither of these findings is supported by any portion of the record and appear to be a moral judgment rather than one based on a factually sensitive assessment of the child and parties in this case.

In his reply, Appellee glosses over the arguments presented by Appellants. Appellee, merely reiterates the Court of Appeals opinion. Based upon this Court's opinion in T.H v. R.C. (In re E.H.), 2006 UT 36 137 P.3d 809 trial courts must take into account and be sensitive to the particular facts of a given case. In the instant case, Judge Medley employed various tools and mechanisms for acquiring factual information in order to ensure that he and complied with the directive of Schoolcraft.

The Court of Appeals, wholly ignored much of the findings and evidence of the trial court in their Opinion and merely stated that Zachary already had a father with whom he was bonded. Pearson, 2006 Ut App 128 ¶ 30, 134 P.3d at 179. The court refused to recognize that Zachary was also bonded with Pete and that he later lived with Pete and Kim in an intact family unit. (Findings 7, 8, 9 and 10, R. 2337-38, 2473.) By relying primarily upon the vacated findings of the Commissioner and rejecting the substantial evidence that was before Judge Medley, the Court of Appeals improperly applied the necessity test.

Further, Appellee has not responded to Appellants argument that by ignoring a

substantial portion of the record and the findings of Judge Medley, the Court of Appeals has substantially limited and/ or created a new “necessity” test that only looks at the child at one time, in the first few months after birth to determine whether a claim for paternity and establish paternal rights in unnecessary or not. This is an inflexible and inconsistent view of Schoolcraft and is not supported by statute or any other case law. In fact, this strict interpretation is contrary to the policy considerations of the Uniform Parentage Act, as discussed, *supra*, in section I.B.2. When the Act was adopted in Utah, the articulated purpose was to ensure that a child’s best interests would be considered in determining whether or not a biological father could intervene or adjudicate his paternity.

The Court of Appeals’ strict interpretation of the policy considerations in Schoolcraft also deny any consideration of what is in the best interest of Zachary. Zachary’s best interests were specifically examined by Dr. Jill Sanders when Judge Medley asked Dr. Sanders whether or not Pete’s intervention was unnecessary to Zachary. Dr. Sanders stated that Pete’s involvement in Zachary’s life was not only not disruptive, but necessary to his psychological well being. (Finding 12: R.980.) Such emphasis by Dr. Sanders and by Judge Medley as to the best interests of Zachary, is consistent with the policy considerations of Schoolcraft as well as general policy considerations of this state.

The Appellee argues that the Court of Appeals’ approach in the instant case was consistent with the policy consideration of Wells v. Children Aid Society, 681 P.2d 199 (Utah 1984) and In re J.M and N.P., 940 P.2d 527, 539 (Utah Ct. App. 1997). However, both of these cases dealt with children who were born outside of a marriage, and involved

the issue of adoption and the need for permanent home. Neither are applicable.

As evidenced by the record, Judge Medley used calculated and comprehensive steps to ensure Zachary's best interests were served. Based upon the evidence before him, Judge Medley found that granting Pete's intervention was not only "not disruptive, but necessary" to Zachary's psychological well being. The Court of Appeals wholly disregarded the trial courts thorough examination of Schoolcraft's policy considerations.

D. The Court of Appeals Erred in Preventing Pete from Intervening in the Divorce Case to Protect his Liberty Right as a Parent.

On December 22, 2000 Appellee commenced this case by filing a Complaint for Divorce and Custody Order. (R. 1-5.) On approximately January 15, 2001 Pete filed his Motion for Intervention (R. 37-41) in which he sought to intervene in order to obtain a judicial determination of his parentage of Zachary and for the purpose of protecting his "liberty interest provided for by the Fifth and Fourteenth Amendments of the United States Constitution and by the Utah State Constitution." (Verified Motion for Intervention, ¶ 3, R. 37-41.) By ruling that Pete could not intervene in the case, the Court of Appeals effectively prevented him from protecting his parental rights in Zachary.

Appellee argues that the Opinion should be affirmed because Pete had no constitutionally protected interest in Zachary at the time of the filing of his Motion to Intervene. The argument should be rejected because as a matter of constitutional law and state statute Pete's undisputed paternity gives him certain rights in Zachary.

1. As Zachary's Biological Father Pete had the Right to Seek Custodial and Parent-Time Rights.

At all relevant times, including the date upon which Pete filed his Verified Motion and the date of the trial, the Uniform Act on Paternity, Utah Code Ann. §§ 78-45a-1 *et seq.* was in effect.¹ Section 78-45a-2(1) provided that “[p]aternity may be determined upon: (a) the petition of the mother, child, putative father, or the public authority chargeable by law with the support of the child....” Section 78-45a-10.5 stated:

(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 visitation rights in accordance with Sections 30-3-32 through 30-3-37 [concerning parent-time awards in divorce cases] as it considers appropriate under the circumstances.

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

Thus, under Utah law Pete as the “alleged” father, had the right to seek the award of parent-time, even if he were precluded from attacking Appellee’s paternity.

In addition, this court in Schoolcraft recognized that because of their special relationship to a child, individuals other than natural or legal parents may seek custody of that child. 799 P.2d at 714-715. By definition Pete, is a “close relative” to Zachary, as he is Zachary’s biological father and the husband of Zachary’s mother.

The relationship between a parent and a child is constitutionally protected as a fundamental constitutional right and is often referred to as a “parental liberty right”. See In re J.P., 648 P.2d 1364, 1375 (Utah 1982); State ex rel. Roy Allen S. v. Stone, 196 W.V. 624, 474 S.E. 2d 554, 561, 562 (W. V. 1996); and Michael H. v. Gerald D., 491 US

¹ The Act was repealed in 2005 and replaced by the Utah Uniform Parentage Act.

110, 136 (1989) (Brennan, J. dissenting).

Pete sought leave to intervene both to protect his rights under the Uniform Act on Paternity and his constitutional rights. For the most part, the Opinion deals only with Pete's attempt to establish paternity under the Act. In its Opinion the Court relied heavily on the two-part test for standing in Schoolcraft which focuses on the question of who may challenge the presumption of paternity. In doing so it overlooked the second reason for Pete's Verified Petition: to establish the boundaries of his liberty right in Zachary.

Though acknowledging that Pete is Zachary's biological father, the Court of Appeals adopted what amounts to a laches concluding that by failing to "perfect his inchoate parental rights" during the first sixteen months of Zachary's life, Pete lost those rights. Pearson, 2006 UT App 128, ¶ 36, 134 P.3d at 180. The Court's analysis concerning the loss of Pete's liberty interest in Zachary and its reference to an "inchoate parental right" are based upon its analogizing this case to a situation in which a biological father fails to assert his rights in the child in a timely fashion. Pearson, 2006 UT App 128, ¶ 34, 134 P.3d at 180.

Appellee, too, relies heavily on this analogy in his defense of the Opinion. (Brief of Respondent at 35-39.) The problem with this analysis is that the need for a speedy acknowledgment of paternity by a father whose illegitimate child has no legal father is not present in the situation where a child is born to a mother who is married. In the case of an adoption this Court has described the state's interest in obtaining a speedy determination of paternity as follows:

The state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents.... To serve its purpose for the welfare of the child, a determination that a child can be adopted must be final as well as immediate.

Wells v. Children's Aid Society of Utah, 681 P.2d 199, 203 (Utah 1984).

In light of that policy, Utah law requires that a father of an illegitimate child who wishes to preserve his liberty right in the child must do so before the child is adopted. Utah Code Ann. § 78-30-4.14(1)(e). By contrast, no Utah statute requires that a father in Pete's position take any particular steps in order to preserve his liberty right.

In this case there is no public policy similar to that found in the divorce setting which would require Pete, even if he had been able to do so, to have more than occasional contacts with Zachary until Kim and Kelly had separated. In point of fact, however, once the Pearsons were separated, Pete established what the trial court found to be "frequent and consistent" contact with Zachary. (Findings ¶ 9; R. 2438.)

The U.S. Supreme Court has made it clear that biology, standing alone, is not enough to create a liberty interest between a biological father and his child born out of wedlock. Where, however, a relationship between the father and the child has been established, the liberty right is entitled to constitutional protection.

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," [citation omitted] his interest in personal contact with his child requires substantial protection under the due process clause.

Lehr v. Robertson, 463 U.S. 248, 261, 102 S.Ct. 2985, 2993 (1983); J.W. v. State ex rel S. H., 2005 UT App 324, ¶ 17, 119 P.3d 309, 313 (Utah 2005) (father's failure to register in New York's putative father registry coupled with failure to cultivate his relationship with his child demonstrated a failure to commit to the responsibilities of parenthood).

In this case the trial court found that Pete had not only established his paternity, but had proven the existence of a strong personal relationship between him and Zachary. Pete therefore had established a liberty right entitling him to exercise parent-time and custody. Such an award was made by the trial court based upon a finding that the granting of parent time and custody to Pete and Kim jointly was in the best interest of Zachary.²

2. The Court of Appeals Refusal to Allow Pete To Intervene Prevented Him From Protecting His Liberty Right in Zachary.

Utah R.Civ.P 24(a) defines the circumstances under which a person may intervene as a matter of right in a pending lawsuit. *See*, Addendum 2.

The Court of Appeals held that Pete should not have been granted leave to intervene; however, rather than applying the criteria for determining the appropriateness of intervention found in Rule 24, it relied solely upon the two-prong test of Schoolcraft concerning standing. But Schoolcraft is not a case about intervention; it is a case about standing to question the paternity of the husband of the mother of a child born during their marriage.

² Contrary to the impression left by Appellee's brief, he was awarded substantial parent-time with Zachary. *See* Supplemental Decree of Divorce, Paragraphs 6 and 7. (R. 2505 – 2508.)

It is beyond question that Pete has a potential liberty right to maintain his relationship with Zachary and that he was entitled to intervene in the case to present evidence, not only of his paternity, but of his past relationship with Zachary. Appellee initially states that Pete has no protected liberty interest in Zachary (Brief of Respondent 32-34), but later contradicts himself by discussing the clear parameters of the liberty interest that Pete does not have in Zachary and criticizes how Pete went about perfecting those liberty interests (Brief of Respondent 35-38.) The Court of Appeals' Opinion would prevent Pete from protecting his constitutional right and should be overruled.

II. THE COURT OF APPEALS REFERENCES TO THE TRIAL COURT'S OCTOBER, 2001 ORDER WERE CRITICAL TO ITS OPINION.

In his Brief, Appellee asserts that the Court of Appeals' references to the October, 2001 Order were immaterial to the decision. That statement is incorrect in two aspects. First, it was not the "trial court's" Order that was relied upon, but the recommendation of a domestic relations commissioner, which was contained in that October, 2001, Order. Second, the Court of Appeals did indeed rely heavily upon the "facts" that the Commissioner articulated in that vacated October, 2001 Order. The Court of Appeals' reliance on that Order and the findings contained therein, fundamentally altered the court's reasoning and substantially undermined Judge Medley's Findings of Fact and Conclusions of Law and the resulting Order of November 7, 2002, granting intervention, as well as the court's May 8, 2003 Findings and Order on Intervenor's Motion for Partial Summary Judgment.

The Court of Appeals specifically referred to the 2001 Order, and stated, “In light of those findings, we cannot say that Thanos’ attack on Zachary’s paternity would not have been disruptive to Zachary’s paternal relationship with the father and expectations about whom his father was.” Pearson, 2006 UT App 128, ¶ 28, 134 P.3d at 179.

Appellee argues that the Court of Appeals’ reference to “findings” refers to Dr. Sanders’ findings in her May 13, 2002 and August 26, 2002 reports. (Brief of Appellee at 40.) Even a cursory review of the Opinion reveals that its reference to “those findings” in paragraph 28, refers to the findings contained in paragraphs 25, 26 and 27. Those paragraphs specifically refer to and rely upon the vacated findings of the October, 2001 Order. (*See*, Addendum 3, ¶¶ 25-28). Appellee has attempted to minimize the importance of the Court of Appeals reliance and references to the October, 2001 Order. Furthermore, Appellee failed to issue the question of the Court of Appeals’ unconstitutional reliance upon and elevation of the recommendation of the Commissioner over the detailed findings of the Judge Medley.

Appellee’s argument, as set forth in Section II of his Brief, also contains the erroneous and conclusory statement that “the trial Court did not ‘vacate’ those facts, and did not vacate its findings.” This statement is patently incorrect and contradicted by the clear language of the trial court’s order of intervention, which stated in paragraph 1: “The Objection to Recommendation of Peter D. Thanos is sustained. The Order of Intervention, dated October 17, 2001, is hereby vacated.” (Emphasis added.) (R. 972.)

It is illogical and insupportable for the Appellee to argue that the Court of Appeals

could have included language from the October, 2001 Recommendation of Commissioner Michael S. Evans, in two full pages of its analysis (*See*, Paragraphs 25 through 28, Addendum 3), and yet conclude that it would have no effect on the Court of Appeals decision to overturn the trial court's granting of standing to Pete Thanos.

III. THE COURT OF APPEALS SHOULD HAVE GRANTED THE PETITION FOR REHEARING BECAUSE ITS OPINION DOES NOT PROVIDE CLEAR GUIDANCE TO THE TRIAL COURT CONCERNING CUSTODY.

The Court of Appeals should have granted the petition for rehearing to clearly state that the trial court may consider Pete's kinship relationship to his biological son. Appellee argues that Zachary's relationship to Pete, who is both his biological father and a current "functional" father, may be considered so long as that relationship is what Appellee calls "function-related" but not "biological." (Brief of Respondent at 48.) This biological/function-based dichotomy is not workable and is nowhere found in the Opinion. Similarly, Appellee's argument that the trial court should order a new trial and a new custody evaluation (Brief of Respondent at 43) is contrary to the Opinion which remanded the case for entry "of a new custody order." Pearson, 2006 UT App 128, ¶ 39, 134 P.3d at 181. Appellee's proposals are a tacit admission that the Opinion is flawed.

A. If The Court of Appeals' Opinion Directs The Trial Court Not To Consider The Kinship Of Pete And Madeline To Zachary, It Should Be Reversed.

If the Opinion is read as prohibiting the trial court from considering Zachary's biological relationship to Pete in awarding parent-time or custody, the decision should be reversed by this Court. Appellee argues that "biology plays no role in the custody

determination, and is not a factor to be considered in assessing [Appellee's] and Mother's respective custody claims in their two children". (Brief of Respondent at 45.) This claim is inconsistent with this court's decision in Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982) and with C.J.A. Rule 4-903 (5)(E)(vii) which require the consideration of "kinship" in the awarding of custody.

Appellee fails to explain why C.J.A. Rule 4-903 should be disregarded, but attempts to distinguish Hutchison by noting that when Hutchison listed "kinship" as a factor to be considered, 649 P.2d at 41, it cited as authority In re Cooper, 17 Utah 2d 296, 410 P.2d 475 (1966). Thus, argues Appellee, the kinship requirement applies only in cases involving the fact pattern in Cooper: namely, a situation in which a relative of a birth parent petitions for adoption after a child is taken permanently from the custody of the natural parents. There are two problems with this argument. First, this Court in Hutchison did not limit the kinship requirement to the very narrow fact pattern found in Cooper. Second, the decision in Cooper specifically states that "in custody matters, all things else being equal, near relatives should generally be given preference over non-relatives..." 410 P.2d at 476. Thus the Court recognized that kinship is a factor "generally" to be considered.

While it is true that both Hutchison and C.J.A. Rule 4-903 recognize that step-parent status may be considered as a factor in a custody determination, the inclusion of that additional factor does not in any way diminish the primary meaning of "kinship" which is a "[r]elationship by blood, marriage or adoption." Black's Law Dictionary 887,

(8th ed. 2004). Rather, the language of both Hutchison and the C.J.A. Rule 4-903 is simply an indication that an additional factor “in extraordinary circumstances” may be step- parenthood. Pete unequivocally fulfills two of the three categories of “kinship.” He is related to Zachary by both blood and marriage.

B. The Trial Court, Rather Than An Appellate Court, Should Decide Whether the Kinship As Well As The Family’s Complicated History, is Relevant to the Award of Custody.

It is the trial court, not an appellate court, which is charged with determining what is in “the best interest of the child”. Utah Code Ann. § 30-3-5(5)(a). Trial courts are given wide latitude in determining a child’s best interest and their findings are only to be set aside by courts of appeal if it is so flagrantly unjust as to constitute an abuse of discretion. Childs v. Childs, 967 P.2d 942, 945 (Utah Ct. App. 1998) This principle is consistent with the Schoolcraft rule, which only addresses a putative father’s standing to attack a de jure father’s paternity. The Schoolcraft analysis can be applied to the issue of whether Pete has standing to attack Kelly’s paternity, but not his right to seek custody or parent-time of his biological son. In Schoolcraft this court stated, “[T]he 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.” 799 P.2d at 714.

Appellee argues that the Court of Appeals intended to exclude all evidence of the biological relationship of Zachary to his biological parents and sister. Thus in Appellee’s view it is irrelevant that Zachary’s mother is living with his biological father and sister and that the evaluator and the trial judge found that the three children should not be

separated (Finding 34.b., R. 2449), and unimportant that the evaluator testified that “the relationship between parents and their biological children is psychologically extremely important.” (Finding 17, R. 2441.) Appellee contends that as the trial court considers how to apportion custody, it may not consider that Zachary is living in his own biologically intact family. Instead, says the Appellee, the trial court should be instructed that it may only consider “function-related factors”: i.e. the children’s functioning in the home of Appellee and the Appellants. (Brief of Respondent at 48.)

This proposed “function-related” rule—at least in the form proposed by Appellee—is unworkable. It is not realistic to suppose that a trial judge or a custody evaluator can separate the biological component of a child’s relationship with his father, mother or sibling from the sociological component.³ Pete is not Zachary’s step-father; nor is he a complete stranger who arrived sometime during Zachary’s childhood. Pete is a biological parent, who has been a part of Zachary’s life. Zachary looks like Pete. The trial court should not be instructed to overlook this kinship relationship or Pete’s relationship with Zachary up to the time of trial in determining what type of custody arrangement is in Zachary’s best interest. The exclusion of evidence of kinship and of the Thanoses’ efforts to establish an intact family unit proposed by Appellee should be rejected. The correct rule, is to reaffirm that the trial judge is in the best position to

³ “The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.” Lehr v. Robertson, 463 U.S. at 262.

decide to what degree kinship should be taken into account in deciding what is in the best interest of Zachary.

CONCLUSION


The Court of Appeals has rendered an opinion that has substantially modified the Schoolcraft test. The Court's mechanistic and insensitive Opinion has created an artificial statute of limitations that is inharmonious and inconsistent with Utah policy outlined by this court in Schoolcraft.


Further, the Court of Appeals based its Opinion on substituted facts by erroneously relying on the recommendation of the Commissioner, which was later vacated by the careful findings of the trial court. If upheld, the Court of Appeals decision, will deny Pete his constitutional rights and leave biological fathers and their children without means to establish, nurture and maintain a parent-child relationship.

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.

DATED this 13th day of November, 2006.

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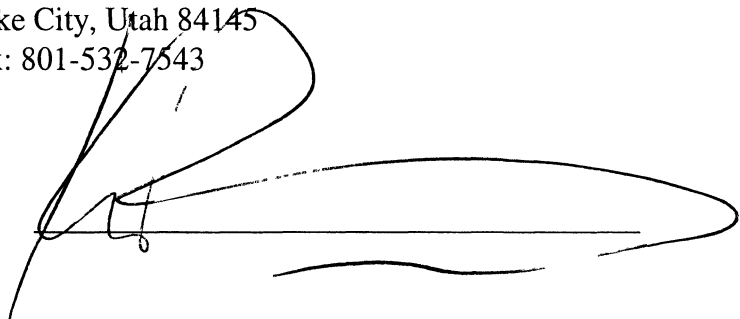

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Kimberlee Thanos

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2006, 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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A large, stylized handwritten signature in black ink, likely belonging to Steven Gunn, is written over the printed name and address of the recipient.

ADDENDUM

1. Transcript - Floor Debate 56th Legislative General Session [Utah June 25, 2005]
2. Utah Rules of Civil Procedure - Rule 24
3. Court of Appeals Decision

Tab 1

Senate Bill 14, Uniform Heritage Act, Senator Hillard

Senator Hillard, I am sure there is no question about this bill.

1 Thank you Mr. President. I told Senator Chris Butters that I grew up in cache valley that
2 after boy scouts there for any period of time, you heard the old Ephraim story so many
3 times, that you could repeat it, and so this bill has been here before and I have explained it
4 before and there were a lot of questions raised and interest in this bill and let me just
5 explain to you that sometimes when we focus on the surrogate part of it we miss the two
6 most important parts of the bill and really why it was done. The first part of the bill, deals
7 with an effort that really started nationally and in every state and I am glad to say that it is
8 not as big an issue in Utah as in many states and that's with the prowess that every child
9 who is born ought to know who the parents are and so often times we have unwed
10 mothers giving birth to children and we have never really taken the step, well we can now
11 with DNA tests, to determine the parentage and have not only the issue of financial
12 responsibility but health issues as well so that we know some of the things inherited by
13 that. But what this great (in audible) of DNA we can make that identification, we have
14 opened up areas of the law that really have not been adequately addressed by the
15 legislature and I really think there is a need for us to do that in this regard, because if we
16 don't, then the courts will be forced to make the decision. That is really the challenge in
17 Utah law right now is that different judges make different rulings. The first part of this
18 bill really deals with parentage, and what it creates a little bit ago somebody asked what
19 the difference was with the uniform that I was on the committee that drafted, here in Utah
20 we have given even greater emphasis as to what I will call the social father. Senator Hale
21 gave me a letter that was pretty touching of a woman who married into a family the
22 husbands wife had just died with three little children and she was the mother as a I recall
23 for 8 years for that time period. There was a divorce and there was an immediate marriage
24 3 days after and married another woman and blocked her from having her have any
25 contact with any of these children because she was not the biological mother. When you
26 see some of those things happen in children's lives, you often see often times see a step
27 mother or step father can be even a better father than the biological parent. So this court
28 this bill doesn't answer the question precisely in every case, but it gives guidelines to the
29 courts to create consistency across our state so that these biological situations, while very
30 important, may be overridden in certain cases taking into concern the best interests of the
31 children. I can imagine the trauma for those children and the mother after 8 eight years of
32 being in all sense the mother of these children, being barred because she is not
33 biologically the mother. So this bill would give some relief in that area and give the court
34 some guidelines and protection. I can tell you that this bill is very family oriented and
35 family privy. We followed the president of a California case where if you have an
36 attacked marriage, for example, that the biological parent could not interfere with that
37 intact marriage. A California case involved a husband and wife they separated, and the

1 wife lived with another man, and became pregnant at that point in time the husband
2 accepted her back. So she moved back and the resumed their marriage relationship and
3 then the baby was born and the biological wanted visitation. And the court in this bill says
4 the same thing, that parents together create the family. Now if they were getting divorced
5 there would be a different situation involved. There is also different guidelines (in
6 audible) tells me that a constant problem that they have is that people get divorced, 5-10
7 years later the father now is not having visitation with his children, I mean a bad situation,
8 he then has a DNA test, which can now be taken fairly simply, discovers that he is not the
9 biological father, so he want r4s to not only terminate the child support, which would go
10 retroactive back to the time of the divorce and pay the money back, and again we address
11 this issue mainly on the person having reasonable notice, now I say that because I could
12 answer some questions on this. One of the difficult things in doing family law cases
13 before the legislature is the fact that all of us have had a niece who got a divorce 4 years
14 ago and it turned out bad and we want to make sure that the law protects here. It is sad to
15 say most of us have been touche with divorce in our immediate families which I guess for
16 my parents and grandparents did not turn out the same. But with the divorce, visitation,
17 DNA testing these factors I think are important. I presented this bill at the midwinter
18 meeting of the Utah State Bar and there were a number of district court judges who came
19 up and said please, please get this bill passed, because it does give some guidelines to
20 help up us in some very difficult areas. The second part of the bill is really part of the
21 adoption counsel. We have been very careful in this bill to protect biological fathers who
22 want to maintain a relationship with the children that they helped to have born. And we
23 have also put some pretty strict guidelines that if they done adhere to these procedures,
24 their parental rights can be terminated. One of the issues that the adoption counsel told me
25 is that our current law has different mechanisms in which you file notice of paternity of
26 claim. The trouble for the adoption agency is that when they to perceive the claim, they
27 have to check the registry to make sure no father has filed a claim and it is not technically
28 that registry then they can proceed with that adoption without his consent and so some
29 fathers have actually filed some claims that have not been properly registered and they
30 have been failed to be protected. I cannot think of a more horrible circumstance for any
31 lawyer of family than to place the child for adoption, to have the adoption done and for
32 someone to come back four of five years later somebody comes back with a legal
33 technicality problem and that makes the adoption not valid and now you are faced with
34 losing your child. So I really appreciate the help of the adoption counsel and again this
35 law is slightly different in that regard because of unique Utah Circumstances. The third
36 thing that has the most publicity, and I'll tell you, when we started talking about this on
37 the committee, about a surrogacy law, I said that there is no way that I will ever carry a
38 bill that is initially proposed in Utah. I knew the Utah over ten years passed a law,
39 outlawing surrogate parenting, so that you understand that law doesn't make it a crime,
40 that law simply makes it that the agreements cannot be enforced. So that you and your
41 wife are contracted with a third person, a surrogate, a woman to carry your child and she

1 got the to the end of the birth period and said “ no I am going to keep the child” under
2 Utah law you could not enforce the agreement, because we just made it illegal to do that.
3 Also, since I have filed this bill and some of the publicity, I am sure that it is going on in
4 Utah right now. Many of the people who want the protection of the law have to leave
5 Utah and go outside of Utah to have it done in their protection. What really brought this,
6 and you will know this when you see the draft as we did as a commission, we bracketed
7 this part, which meant you could adopt the uniform law and not do anything gestational
8 agreements and still have uniform laws. It was really an optional part of it. I will tell you
9 the thing that really changed my mind, were two things, I was really impressed to be there
10 with that committee we had a number of the supreme court of Montana, we had a court of
11 appeals justice from Minnesota, who severed in the legislature, we have several law
12 professors, we had lawyer from Texas, we had a former state senator who was a lawyer
13 out of Kansas, we had the head the head of the Office of Recovery Services from
14 Massachusetts, all working on drafting this bill, and when we started talking about the
15 matter it became our goal in drafting this bill, to make it family, marriage privy. As you
16 read in the papers this morning, the main people who criticize this bill say that I don’t go
17 far enough. We agreed as a committee, it was not just something that was drafted up in
18 my office in Logan, it took a number of meetings from people from all over, and when
19 people say that it’s unconstitutional, I guess anything can be unconstitutional, but we feel
20 that this law is very clear, because what we have allowed is god forbidden, you now have
21 an area, if you do something that does not follow this law, you don’t have the protection
22 of the law, we say meeting these categories: No. 1, you have to be a married couple, No.
23 2. The intended mother has to have a serious health problem, so that to do the surrogacy
24 she has to have some medical evidence that she just doesn’t want to be bothered with the
25 pregnancy, No. 3. The surrogate mother has to have gone through a pregnancy before, so
26 she understands physically what she is going through and that it is all pre approved by the
27 court. If the court that the surrogate mother needs more counseling if there are parts of it
28 that the compensation agreed to is too high or too low, we have the protection of the
29 courts to do that. Then that becomes the argument, should we let everybody? I don’t think
30 so. Quite frankly, if the amended bill provides that anyone should do this to non married
31 couples, I would take that part out of that bill. I will not sponsor a bill that has that
32 provision. There may be areas that can be expanded, but I want to take this first step into
33 it, so that we have further protection. What really the second thing, besides the fact that I
34 feel, is the final draft in this bill was something that I could defend and that I could
35 represent and I could feel good about was the fact that we had a federal district court
36 decision here a year or so ago, where the federal district court held that our law banning it
37 made it unconstitutional, excuse me making it unlawful, in that particular case if you read
38 the facts of the court, you have a couple in California, who hired a surrogate mother and
39 took his sperm and her egg and then planted it in the surrogate mother. They were they
40 intended parents but also the biological parents. Then the woman came to Utah gave birth
41 to the baby and they went to get a birth certificate. Our state law is that the birth mother is

1 the biological mother, and so the presumption was that they had to have a birth certificate
2 with the birth mother on. The law suit was filed saying “no that is unconstitutional
3 because they are the biological parents and they should be on the birth certificate”. The
4 irony is when you read judge Jenkins decision, although he says that our proposition
5 making it unlawful violates their constitutional rights, those circumstances, he never
6 solved the problem of the birth certificate. And actually our department of health issued a
7 new birth certificate and that is really one of the protections of this bill. So let me just
8 touch what this bill does. It would be easier to say what it doesn’t do, but what it does do,
9 is it provides for a married couple, who meet these criteria, to go to the court and get an
10 agreement and once that agreement is approved then when the baby is born, the birth
11 mother says “no, I don’t want to give the child up”, tough, she made an agreement, about
12 the adoption then the baby is delivered back. It provides a birth certificate that the
13 intended parents, it may be a situation where they have purchased a egg and it is the
14 man’s sperm, or some other criteria to do this, the birth of the intended parents by this
15 court, would then show up on the birth certificate as the parents. So it would deal with
16 that issue as well. You may have the intended parents who say the child was born
17 handicapped and they don’t want the child, tough, they for all intense the parents of this
18 handicapped child, and they cant back out either. One of the things that I like about this
19 bill, is I also have a provision here that says , that if you do this without court approval,
20 and a baby is born in this world, and you are not talking about adoption, you are creating
21 a child, you are not talking about a child that is already here, it is about you creating a
22 child, if that child is born and you do not have a legal binding agreement, then the court
23 can step in and order appropriate child support. The court ought to make that
24 determination on a case by case basis. The way that we have it now, I would assume, that
25 the birth mother give birth to the baby, and the intended parents say that I do not want the
26 child, or I want a boy and it’s a girl, I wanted a blonde not brunette so I do not want the
27 child. The way it is, there is no way to force it one way or another. I would assume that
28 child will probably end up in an adoption agency to be placed for adoption. Or the mother
29 may feel that she will keep the child, or whatever may go on. So, I say that with this
30 regard because there are groups who say I.... I want to address a letter that I received the
31 morning of our hearing in the committee from the ACLU, I almost cheered when I got it,
32 because I know that it is not really an issue that is going to destroy my bill. But you know
33 it always kind of concerns me when I get a letter the morning of a hearing when a bill has
34 been around for 2 years. They could have told me before hand, but let me just address
35 this. They have four concerns about my bill. First of all, they say that it too narrowly
36 draws the provision for termination of gestational agreement. Their concern is that they
37 think the gestational mother should be able to terminate this agreement at any time up to
38 what they say at least 24 hours after the birth of her child. They have not heard my bill.
39 Because the bill says once approved by the judge, it is a binding agreement, and the
40 gestational mother cannot come in three months later into the pregnancy and say “gosh, I
41 have decided that I do not want to give this child up.” I mean that is what the court

1 procedure that I will go through, so she loses that right when she goes before the court
2 and she signs the agreement and agrees to be the gestational mother, she has agreed to do
3 that. Now, I guess the judge would have to say if the woman did not know, to say "well
4 do not sign the agreement." I cannot give her what they want, number 2 and number one
5 because it would destroy the whole intent of the bill, and the whole purpose of having it.
6 Number 2, it says the intended mother, ok they were concerned because I require the
7 intended mother to have a health problem before getting into this contract. I thought that
8 it was really interesting, I would like to read this, the us supreme court has made a
9 fundamental right to chose whether to bear or begat a child they then moved and moved
10 this one step further and say that woman have a fundamental right to chose when the
11 contract with the gestational mother..... whether they can have an abortion. I don't really
12 understand how that gets to be a fundamental right, and I would like to see the court case
13 fight for that. So, that is their concern that we are violating the intended mother's right if
14 she decides not to have children for whatever reason she wants to (in audible) this
15 agreement, that we have violated her rights. Again I would say that what we are doing
16 here is authorizing under certain circumstances for it to be done. The third thing is the
17 requirement for this couple to be married. They think that is unconstitutional. I'll let
18 senator Chris Butters bring up that issue. And the fourth one is we provided here that the
19 gestational mother here for her health to be able to have an abortion if that is her choice,
20 to do that. I have had some people say that you should limit that and I say listen, you have
21 got a gestational mother who has been through a pregnancy before, she has come before
22 the court and gone through all of that, I cannot for the life of me imagine, if she asks to
23 have an abortion, it is a very serious health problem to her. I don't want to try and get into
24 and define all of that, I think that is optional thing. Since I have filed this bill and had
25 committee hearings, I have not asked, but I have had a number of surrogate mothers come
26 up to you and it just touches your heart. Some of the people who very much want to have
27 children, cant. But through this process of surrogacy, they can even take their own egg or
28 sperm from the husband and can create a child that they not only know theirs emotionally
29 but biologically and so I say this maybe I am doing well because we have groups on both
30 sides that say I go too far and I don't go far enough, I really feel comfortable with the
31 work that we did on a committee of certainly as diverse as you will ever find that worked
32 on this parenting bill on a national level to come up with this proposal. I think in light if
33 we don't pass the surrogacy part of this bill then I will submit to where we were when
34 Judge Jenkins decision of absolute no mans land in what we are doing in this area. I think
35 anyone can feel comfortable with how far we have come. Does anyone have any
36 questions? Thank you Senator.

37
38 Thank you Mr. President, I do have a question of the sponsor.

39
40 Thank you.

1 Correct me if I am wrong, Senator, did I hear you say that towards the end of your
2 presentation that this bill authorizing abortion on demand.
3
4 No. What I said... I will read you that part of the bill. The bill provides the gestational
5 mother for her health to make her own health decisions as to what's going on. So if the
6 issue got to be that the doctor said, this woman is going to die with this pregnancy, she
7 makes the decision as to whether to keep the pregnancy.
8
9 Well isn't that the case now. Please make it clear.
10
11 See, I need to understand Mr. President if you don't mind if I could follow up. I just
12 want to make sure that I understand that the bill requires the same level of medical
13 involvement for lack of a better term that we currently have that is only in the case where
14 the mother's health of the baby's health is in jeopardy. I want to make sure that we are
15 not softening that position by this bill and if you can assure me that is the case, then that
16 would be fine.
17
18 I feel comfortable saying yes it does.
19
20 The concern we have is when we did this agreement starting out, the whole emphasis is to
21 give everyone protection in you know what you have . So the concern of what may
22 happen (in audible).
23
24 One more, you indicated in your comment that the mother will make the decision as to
25 whether she wants to carry the child based on her opinion as to the impact that it might
26 have on her health and I want to know specifically if the bill addresses specifically
27 addresses the involvement of her doctor in that decision.
28
29 Though the gestational agreement may not limit the right of the gestational mother to
30 make the decision to safeguard her health and that of the unborn fetus. So it leaves it open
31 as a gestational agreement as to what exactly what those terms would be, that you could
32 not (in audible) choose to do something for her own health that would jeopardize the fetus.
33
34 I have not spelled out that, and I will tell you the reason that you don't want to do that is
35 the Supreme Court could change those decisions you don't want (in audible) the statute. It
36 will be the gestational agreement. That the gestational agreement cannot grant any right
37 under that agreement that is currently prohibited by the law. Senator butters?
38
39 I don't know where it is, but I think that we ought to find it. Senator Hilliard you know
40 we never have a bill under 1000 lines this is one is right on edge at 1475. Having said that

1 my committee the last couple of years. (in audible) all over senator Hilliard about the
2 gestational agreement. I believe that you have done a wonderful job.

3
4 Senator walker?

5
6 Thank you Mr. President. I guess speaking is only what 5 of us in here can . I look at this
7 as a mother and a grandmother I think how hard it would be to do this. My question is,
8 does the mother have legal counsel when she goes to court separate from the parents. I
9 would suspect that the trial judge when he approves this has a lot of different
10 expressionary things that he could do. I think that if the judge felt any uncomfortable
11 position with the mother that he could advise her to get an attorney, a psychologist,
12 counseling whatever that is really the intent to do that. So we have not required it but we
13 have required the court approval and so I think that will cover your issue.

14
15 I wonder, there are a million different scenarios who goes through pregnancy and who
16 gives that child up for adoption and then she needs money and she decides that she wants
17 to be a surrogate mother. I wonder if we shouldn't have more specificity in there about a
18 mother. You know I have been reading the articles that they have had in the tribune on
19 surrogacy. That woman, I mean, it does sound like a wonderful and beautiful thing for her
20 and what a blessing that it is tot hat Japanese family who is going to receive that baby. I
21 do worry about, and I guess because I have never been a surrogate mother, I have only
22 been a mother of my own child and I can't imagine giving up a baby and I worry about a
23 mother who thinks that she can do this and who has not fully considered the ramifications
24 whether you talk about a mother that gives up a child for adoption or a woman has an
25 abortion and I just worry about that birth mother because when you have a child within
26 you, and you feel that life, it would be difficult to give that up.

27
28 I would agree. I have seen adoptions where moms have given up children and I know
29 how difficult that would be from viewing that. Senator Walker I will give you the
30 commitment that I gave Senator Butters, he raised the issue about the money. I really
31 want to monitor this with the courts and see what happens because I may have judges
32 come back to me and say, you know you ought to make this change or that change,
33 because you know again, I have met some marvelous surrogate mothers who do this and I
34 mean they take it as almost a mission in life that they can give life to a couple who so
35 desperately need it and cannot do it themselves. I want to compliment Kristen Stewart for
36 the article she wrote in the Tribune I didn't have anything to do with it, but I am trying to.
37 But I think that those articles put light to this deal that in a way that for many of us,
38 especially us men, who don't really understand what you must go through, but again,
39 there are such marvelous things that are happening now in science. Just think back a few
40 years ago there were some woman who could never ever have a hope of having a child
41 and now have one because of what they have been able to do. So I appreciate your

1 concern and I give you that commitment that I will follow what the courts are doing and if
2 I sense your concern at all, I understand what you are talking about. Thank you Senator
3 Walker.

4
5 Thank you Mr. President. I want to compliment you for the amount of work that has gone
6 into this bill for many years. It is important legislation and something that we all need to
7 consider very seriously. I will be supporting the legislation, but I am still left with some
8 questions. I agree with the thoughts here that we certainly don't want to allow woman
9 who are so busy doing other things that they do not want to go through pregnancy to be
10 able to enter into a contract for a surrogate mother. On the hand, I have had doctors call
11 me and ask how did they determine what is unreasonable to the physical or mental health
12 of the surrogate mom. That is a difficult thing to determine and there are some concerns
13 there. I also had a mother call and leave a voice mail for me that really tore at my heart.
14 She was not able to have a child because of problems with her uterus. So after saving
15 money and a consultation with medical experts she went in with her husband and donated
16 her eggs and his sperm and after quite a period of time, they were able to find a surrogate
17 who was able to deliver for them their first child. After that, after many years, her
18 husband passed away and they still have eggs and they still have sperm and that she
19 would like to use those to have another child so that her child would not be an only child
20 but under this bill, she is now a single mother, and she would not be given the protection
21 of Utah law, no she will not be criminally prosecuted, but she would not be able to get a
22 Utah birth certificate for this second child and I wonder if really want to exclude a
23 situation like that. I understand that there a lot of different examples that we could all
24 come up with and we certainly do not want to take things too far. But I think that we need
25 to look at this in the future, that maybe there some other concerns for protection.

26
27 Senator Peters: Thank you Mr. President. When you see a bill like this, I think that
28 everyone takes a pause because of the sensitive nature of these things. So I want you to
29 know that I am taking this bill very seriously. I believe that I have softened on most of
30 the issues that make me nervous. Just on one, on line 1432, as I read that it says that in a
31 nonbinding gestational agreement it goes from 1432 to 1435, if you are a surrogate
32 mother and you are not in a binding agreement with someone and you decide to keep the
33 child, it looks to me like this language makes you liable for some of these expenses of this
34 child. Am I reading that correctly?

35
36 That is right.

37
38 Could you just give me basis. Maybe I agree with you philosophically with you, but you
39 know we had a couple who was denied the ability to raise the child and I am just
40 wondering the logic behind it. Do you understand the question?

1 I do, Senator Peters. I appreciate the question. Let me explain. The real emphasis of that
2 section is the intended parents who have this, go through this gestational agreement that is
3 non binding because of whatever reasons, it wasn't approved by court , they are taking
4 advantage of her, whatever the case might be, and then the baby is born. The question is if
5 she keeps the child I would assume that would be treated by DCFS, just as if a single
6 woman had gotten pregnant and now wanted to raise the baby. She cannot name the
7 father or the father was killed or the father has gone away. Then DCFS has a problem. I
8 think in this particular case I think that at that point in time, not only would she accept the
9 (in audible), she would accept the responsibility of the child and part of that would be is
10 that she would have to care for the child as her own. The other issue, she would have the
11 right to go back to court and say you know that I don't want this child, then will place this
12 child with DCFS for placing. DCFS, then with our state tax dollars, could go after the
13 intended parents and say, even though you didn't take the child, you didn't want the child
14 because the child was handicapped, we are going to deem you as the parents and you are
15 going to have to pay child support obligation to the cost of the tax payers of the state of
16 Utah. The concern that I have right now, is that if this bill doesn't pass, you have got the
17 wide open question that if the surrogate mother keeps the child, I think we treat it just like
18 a single mother having a child, assuming that she is single. Surrogate mothers can be
19 married. But on the other hand, you would have a chance that to go back to the intended
20 parents and say that started this ship down the river, which now has no pilot on the ship,
21 but you have got to pay for some of the fuel to get it down to the end.

22
23 In that case we get some difference of those natural parents to that placement of the child
24 once DCFS takes custody. Again I hope that question makes sense, but it seems like there
25 should be quite a bit of difference to the natural parents as to where the child should end
26 up. I think any lawyer can figure out a way to do that.

27
28 Do you just tell the intended parents to take the child as though the child were yours and
29 then place the child for adoption. I cannot solve the problem about the birth certificate
30 until we go one step further, but in that particular, if you had an unintended it is going to
31 show the birth mother as the biological birth mother and her name is going to be on the
32 birth certificate. I think that at that particular point, I think that if the birth mother doesn't
33 want the child, I suspect then the intended parents could take the child and through an
34 attorney do a private placement of that child in a way that the child can then be handled. I
35 do not know an agency that would not accept the child, even handicapped, even a mixed
36 racial, that would not take the child to place the child for adoption. I just think that it is
37 important, that if you are going to create a life, you are going to be instrumental in
38 creating a life, not only are there blessings but there are responsibilities. Now, I think that
39 is what this bill does. Thank you senator.

40
41 Lets see if anyone else wants to be recognized.

1 It is really hard to summarize this bill. There is really one thing that I want to point out.
2 When I started this bill, a couple of years ago, I brought together what I thought to be
3 some of the best what I thought to be some of the best family practitioner lawyers in the
4 state. We worked through this bill, and that is why the emphasis on the social parent is
5 different. Harry (in audible), who chaired our committee, a very prominent family lawyer
6 in Houston Texas, has been following to say, he's given me his blessing that they deem
7 this to be the inner court law if we pass it as drafted now. So, I would certainly be glad to
8 answer further questions. In fact, DCFS, or excuse me Office of Recovery Services, has
9 prepared a summary for me of every section of this bill showing current Utah law as a
10 guess it summary because it is unsettled, and you just kind of have to guess which judge
11 will do, what they think the opinion is, what's statutory and what this changes, and I
12 would be glad to give that to anyone who wants this single section of our section and see
13 exactly the changes in Utah law and the clarifications made. With that I call for questions
14 on the bill.
15
16 When a question has been called should Senate Bill 14 be read for the third time
17
18 Senator Allen, Aaron, Bill, Randall, Christensen, Davis, Evans, (in audible), Hales,
19 Hatch, (in audible), Inkman, Billiard, Jenkins, Brandon, Kilpack, Knudson, Madsen,
20 Mansell, Maine, Peterson, Stevenson, Thomas, Blanik, Walker, Valentine.
21
22 I have two. Senate Bill 14 received 24 yes votes, 0 nay votes, with 5 being absent, will be
23 read for the third time.

Tab 2

UTAH RULES OF CIVIL PROCEDURE - RULE 24

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Tab 3

2006 UT App 128, *, 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

LEXSEE 2006 UT APP 128

**Kelly F. Pearson, Petitioner and Appellant, v. Kimberlee Y. Pearson, Respondent
and Appellee. Peter D. Thanos, Intervenor and Appellee.**

Case No. 20040677-CA

COURT OF APPEALS OF UTAH

2006 UT App 128; 134 P.3d 173; 2006 Utah App. LEXIS 130

March 30, 2006, Filed

SUBSEQUENT HISTORY: Writ of certiorari granted *Pearson v. Pearson*, 2006 Utah LEXIS 185 (Utah, July 21, 2006)

PRIOR HISTORY: [***1] Third District, Salt Lake Department, 004907881. The Honorable Tyrone Medley. *Pearson v. Third Dist. Court*, 2003 UT App 6, 2003 Utah App. LEXIS 276 (2003)

COUNSEL: Paige Bigelow, Salt Lake City, for Appellant.

Steven H. Gunn, Kellie F. Williams, and Jarrod H. Jennings, Salt Lake City, for Appellees.

JUDGES: William A. Thorne Jr., Judge. WE CONCUR: Pamela T. Greenwood, Associate Presiding Judge, Gregory K. Orme, Judge.

OPINION BY: William A. Thorne Jr.

OPINION: [*174] THORNE, Judge:

[*P1] 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

[*P2] 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.

[*P3] 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 [***2] 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. n1

n1 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.

[*P4] [***3] 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.

[*P5] 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

2006 UT App 128, *, 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

the matter determined that Thanos lacked standing to contest Z.P.'s paternity.

[*P6] 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 [***4] 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 Schoolcraft analysis. n2 Sanders was to address the second prong of the Schoolcraft test--whether permitting Thanos to seek paternity of Z.P. [**175] 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.

n2 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.

[***5]

[*P7] 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."

[*P8] 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.

[*P9] The trial court issued its custody decision on May 11, 2004. Relying on its previous paternity determination, the court applied the parental presumption n3 in favor of Mother over Father [***6] 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 of [Z.P.] that is characteristic of parents generally." See *Hutchison v. Hutchison*, 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.*

n3 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, P1, 29 P.3d 676.

[*P10] The trial court granted Mother and Thanos joint legal custody and primary physical custody [***7] 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.

[*P11] 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

[*P12] 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, P18, 82 P.3d 1125. To the extent that factual findings inform the issue of standing, "we 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)). [***8] "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

[*P13] The trial court determined that, as of November 2002, Thanos's challenge to Z.P.'s paternity

2006 UT App 128, *, 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

would not affect the stability of the Pearsons' failed marriage and would not constitute a disruptive and unnecessary attack [**176] 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.

[*P14] 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 [***9] 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

[*P15] 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.

[*P16] 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 [***10] 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.*

[*P17] 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 considerations" that must guide standing decisions in this context: "preserving the stability of the marriage and protecting [***11] children from disruptive and unnecessary attacks upon their paternity." *Id.* "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." *Id.*

[*P18] 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 "the 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) [***12] (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 [**177] born" at the time divorce pleadings were filed).

[*P19] 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.

[*P20] 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 [***13] 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. n4 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

2006 UT App 128, *, 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

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.

n4 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.

[*P21] 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. [***14] 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. n5 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.

N5 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).

[***15]

B. Protection of Children from Attacks on Paternity

[*P22] 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.

[*P23] 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 [***16] 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], [**178] or even his mother, so he has no expectations as to who his father is." *Id.*

[*P24] 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 [***17] contrary, indicates that it is in the best interests of the child to allow Mr. Thanos to intervene. n6

The November order also recognized that Father had "functioned as Z.P.'s father since his birth."

n6 Dr. Sanders's May 13, 2002 report concluded that "from 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 "there is no reason to believe that further disruption to the relationship between [Z.P.] and [Father] is intrinsically linked to Mr. Thanos[s] presence in [Z.P.]'s life."

2006 UT App 128, *; 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

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).

[***18]

[*P25] 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.

[*P26] 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 [***19] 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.

[*P27] 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] [***20] as his father and their attachment is secure, strong and healthy." Her

supplemental report [**179] 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, n7 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.

n7 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.

[*P28] 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 [***21] 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.

[*P29] 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 [***22] which unmarried biological father can establish paternity so as to defeat adoption of his child by another at birth).

[*P30] 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.

2006 UT App 128, *, 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

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.

[*P31] 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 [***23] said for *Schoolcraft* purposes that Z.P. has any particular need for his paternity to be established in another man. n8

n8 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.

[*P32] 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

[*P33] 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 [***24] in the Pearsons' divorce action. [**180] 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. 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.

[*P34] 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 n9 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, [***25] 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 78-30-4.14(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, PP10-12, 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)).

n9 "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).

[***26]

[*P35] 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. 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 [***27] 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.

2006 UT App 128, *; 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***

[*P36] 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. n10 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.

n10 We express no opinion on the separate question of whether *Schoolcraft* standing, once lost, can ever be regained due to changed circumstances.

II. Z.P.'s Paternity and Custody

[*P37] Our determination that it was error to allow Thanos to intervene in the Pearsons' [*181] divorce action has inescapable consequences for the trial court's [***28] 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.

[*P38] 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 n11 and against Father in making its ultimate 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.

n11 We recognize that Mother asserted Father's non-paternity of Z.P. in her answer and in a simultaneous motion to show cause, 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, P14, 101 P.3d 830 (listing elements of equitable estoppel); see also *Kristen D. v. Stephen D.*, 280 A.D.2d 717, 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.*, 240 A.D.2d 812, 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.

[***29]

[*P39] 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

[*P40] 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 un rebutted, and Father remains the legal parent of Z.P. The trial court's supplemental decree of divorce, as well as any other order entered below, is reversed to the extent that it conflicts with Father's legal status as Z.P.'s parent or was premised on Thanos's paternity. This matter is remanded for further proceedings consistent with this opinion.

William A. Thorne Jr., Judge

[*P41] WE CONCUR:

Pamela T. Greenwood,

Associate Presiding Judge

Gregory K. Orme, Judge

2006 UT App 128, *; 134 P.3d 173, **;
2006 Utah App. LEXIS 130, ***