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Micah John Reller v. Karine Anesia Schlager Toledo Reller v. Francis J. Argenziano : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Micah John Reller,

Petitioner/Appellee,

vs.

Karine Anesia Schlagel Toledo
Reller,

Respondent/Appellee,

vs.

Francis J. Argenziano,

Intervenor/Appellant.

APPELLANT'S REPLY BRIEF

Court of Appeals Case No. 20110457

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, WEST JORDAN
DEPARTMENT, SALT LAKE COUNTY, UTAH JUDGE TERRY CHRISTIANSEN

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UTAH APPELLATE COURTS**

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ARGUMENT

I. Argenziano Has Statutory Standing.

The Rellers argue Argenziano does not have standing, citing three tests from *Wade v. Burke*, 131 Utah Adv. Rep. 94, 800 P.2d 1106 (Utah App. 1990). Appellees' Br. p.p. 6 - 9. However, it is those “who [have] not been granted standing to sue by statute” that must show standing under these common law tests. *T.H. v. R.C. (In re E.H.)*, 2006 UT 36, ¶49, 137 P.3d 809, citing *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶17, 82 P.3d 1125. The Rellers ironically claim Argenziano is the Child's biological father and can be adjudicated as her legal father, yet at the same time assert he has no standing. That argument fails because the Utah Uniform Paternity Act (“UPA”) grants Argenziano standing to sue. Therefore, the three tests the Rellers rely on are irrelevant.

The Rellers neglect to direct this Court to Section 602 of the UPA, which is entitled “Standing to maintain proceeding.” It provides that “a proceeding to adjudicate parentage may be maintained by . . . (3) a man whose paternity of the child is to be adjudicated.” Utah Code Ann. §78B-15-602 (2011).¹ On October 23, 2007, Karine Reller filed her Petition to Modify and sought to re-adjudicate parentage to name

¹As part of a 2008 recodification of the Judicial Code, the UPA was renumbered to Chapter 15 of Title 78B, with section numbers remaining unchanged. For example §78-45g-602 has been renumbered and is now located at Utah Code Ann. §78B-15-602 (2011). Because there are no significant changes, citations to the UPA are to the current 2011 version.

Argenziano as the father. R. 139 -141; *see* R. 267, ¶ 5 (Trial Court finding that “[r]espondent seeks to undo the adjudication of paternity . . .”). Thus, Karine Reller made Argenziano a “man whose paternity of the child is to be adjudicated” under Section 602, which gave him standing. By then, Micah Reller had long been adjudicated the Child’s father (R. 266 ¶2), but *if* the Trial Court still had jurisdiction to redetermine parentage, the UPA specified that Argenziano “*shall* be joined as [a party].” Utah Code Ann. §78B-15-603 (2011) (emphasis added).

Both Rellers re-upped that basis when they tried to set aside the Adjudication of parentage contained in their Decree of Divorce by stipulating to set that Decree aside. While Argenziano has always maintained that the Rellers could not re-adjudicate the Child’s paternity, it is clear that since 2007, the Rellers have been trying to do just that, by having Argenziano adjudicated as the “Child’s” father. *See* Appellees’ Br. p. 17 (still arguing for Argenziano’s adjudication as the father). As a result, Argenziano intervened in this case, which intervention has not been appealed. *See* R. 420, 602 - 608.

The existence of statutory standing is a question of statutory interpretation. *Strauss v. Tuschman*, 2009 UT App 215, ¶7, 216 P.3d 370. Here the statute is clear. Argenziano is a “man whose paternity of the child is to be adjudicated” and he has standing. If one has statutory standing, the common law standing tests are inapplicable.

II. Argenziano Also Has Standing Under the Common Law.²

Argenziano also has standing under the *Wade* case the Rellers cite, as well as more recent case law on standing:

On appeal, a party whose standing is challenged must show that he or she had standing under the traditional test in the original proceeding before the district court. In addition, an appellant generally must show both that he or she was a party . . . to the action below and that he or she is aggrieved by that court's judgment.

Chen v. Stewart, ¶50, 2005 UT 68, 123 P.3d 416, 431.

First, Argenziano was a party below by virtue of his joinder by Karine Reller and then later by his intervention. Second, Argenziano is aggrieved because, initially, the Trial Court adjudicated Micah Reller as the father of the Child as part of the Rellers' divorce decree. R. 266 - 267. This precluded Argenziano from being adjudicated the father. Argenziano is aggrieved by the orders he appeals from because, on their face, they overrule that prior Adjudication. This aggrieves Argenziano by exposing him to being adjudicated as the father. Thus, Argenziano has standing to bring this appeal if he can demonstrate standing in the court below. *Chen, supra*.

In addition to a key statute, the Rellers overlook more recent case law. The Rellers cite *Wade v. Burke*, 800 P.2d 1106 (Utah App. 1990) for its three tests for standing. But any one of the tests is sufficient (*Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*,

²Out of an abundance of caution, and because the Rellers standing analysis is sparse, Argenziano feels he must also address the Rellers' common law standing arguments.

2006 UT 74, ¶41, 148 P.3d 960) and Argenziano has standing under the first test.

The first test requires showing “a distinct and palpable injury that gives him or her a personal stake in the outcome of the legal dispute.” Appellees’ Br. p. 7 *quoting Wade*, 1991 [sic] UT App 60, ¶9. However, an injury need not be actual, or even imminent, to establish standing. *Brown v. Div. of Water Rights of the Dep’t of Natural Res. of Utah*, 2010 UT 14, ¶18, 228 P.3d 747. A “potential” injury - one with a reasonable probability of future injury - is sufficient. *Brown*, 2010 UT ¶¶ 18 -19 (*quoting Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, ¶ 9, 214 P.3d 95). Argenziano’s injuries are much greater than just a reasonable probability. If the September 12, 2006. Adjudication of parentage can be properly set aside, Argenziano could be adjudicated the Child’s father. That is a potential injury, it is very likely, and it amply satisfies the injury prong.

The Rellers then assert Argenziano “does not claim a statutory or common law protectable [sic] interest.” Appellees’ Br. p. 8, *citing Jones v. Barlow*, 2007 UT 26, 154 P.3d 808. The UPA of course says otherwise. Even if its grant of standing were not explicit, Section 602 and 603 make Argenziano’s interest a statutorily protectible one by giving him the right to bring an action and providing that he must be joined if an action is going to determine paternity. Utah Code Ann. §§78B-15-602, 603 (2011).

The Rellers’ divorce encompassed a parentage adjudication. Where a child is born into a marriage, if parentage had not been previously adjudicated, the UPA requires it be

done in the divorce. Utah Code Ann. §78B-15-607(1) (2011). Furthermore, if a man's paternity of a child is going to be adjudicated, he "*shall* be joined as part[y] in a proceeding to adjudicate parentage." Utah Code Ann. §78B-15-603 (2011) (emphasis added). Thus, the UPA itself seems to make Argenziano a necessary party in the Rellers' divorce if either of them were going to assert Argenziano is the father. Clearly this gives Argenziano a statutory "legally protectible interest" under *Jones v. Barlow*.

The Rellers also argue Argenziano's interest is not a protectible one because "[n]o statute confers a right to a third party to seek *readjudication* of paternity . . . or that an outsider may set aside a Decree of Divorce." Appellees' Br. p. 8 (emphasis added). This argument is made of whole cloth because neither Argenziano, nor the Rellers have a right to re-adjudicate paternity. But, it is the Rellers, not Argenziano that would *re-adjudicate* paternity. Argenziano has always maintained that Micah Reller was and is the Child's adjudicated father.

The Rellers argue Argenziano lost his protectible interest because he objected to his joinder and claimed he had no interest in this matter. Appellees' Br. p. 8. Yet nothing supports the contention that Argenziano asserted he had no interest in this matter. The Trial Court did vacate Argenziano's joinder, but his motion to vacate was based on the prior adjudication of parentage, that the Child already had a father, that the UPA barred re-adjudicating parentage after so long, and that genetic testing was now inadmissible. R. 161 - 167. Nowhere did Argenziano assert he did not have an interest.

As to not later seeking an interest in this case, what the Rellers omit is that they *never* gave notice to Argenziano when they filed their Stipulation to Set Aside Decree of Divorce and their Order Setting Aside Decree of Divorce. R. 260 - 265. They did this before the trial judge signed the order vacating Argenziano's joinder.³ Compare R. 206 - 265 with R. 268. So Argenziano did not know of their activities. But, *if* the Order Setting Aside Decree of Divorce had the effect of setting aside the Adjudication, parentage was again at issue in the Rellers' divorce. At that point, the Rellers were arguably obligated to join Argenziano back into the divorce. Utah Code Ann. §78B-15-603 (2011) *supra*.

The Rellers' argument that Argenziano claimed no interest sounds like a waiver argument. But standing triggers subject matter jurisdiction. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶13. Generally subject matter jurisdiction may not be waived by the court or the parties. *Utah Dep't of Business Regulation, Div. of Pub. Utils. v. Public Serv. Comm'n*, 602 P.2d 696, 699 (Utah 1979). So, even if the Rellers' contentions were true, it is difficult to see how standing was waived.

In sum, Argenziano has standing. He was and is a party here with a legally protectible interest. If the September 12, 2006 Adjudication of parentage were set aside, Argenziano could be adjudicated the father, giving him a personal stake in the matter.

³August 14, 2008 is the date the Trial Court Docket shows Argenziano was removed as a party and the date the Trial Court signed the order vacating Argenziano's joinder.

III. The Trial Court Did Not Have Jurisdiction to Set Aside a Parentage Adjudication That Was Made Years Ago in a Divorce Decree.

The recurring theme in the Rellers' arguments is that parentage was not adjudicated in their Decree. This premise is incorrect and so the Rellers' arguments fail.

A. The Rellers' Divorce Decree Adjudicated the Child's Parentage.

The Rellers argue that "[a]n adjudication by a Court requires more than mere adoption of a stipulation, it requires the receipt of evidence and fact finding by the Court." Appellees' Br. p.10, relying on *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980). But the Rellers greatly misconstrue *Phillips*, which simply does not stand for that proposition. *Phillips* was actually referring to adjudication as the process of taking and weighing conflicting evidence in a context far removed from the facts here. From that misconception they come to the conclusion that "[a] stipulated Default Decree of Divorce does not constitute an adjudication." Appellees' Br. p. 10.

Phillips was a pre-UPA case involving the evidentiary foundation for the HLA test, a new test at the time whose admissibility had only been addressed by a few courts. *Phillips*, 615 P.2d at 1232. The Utah Supreme Court was most concerned that the HLA test would be widely used without adequate foundation, and held that it had been admitted "without proper foundation." *Phillips*, 615 P.2d at 1238.

The Rellers apparently rely on *Phillips* because it uses the terms "adjudication" and "paternity," but they do so out of context. The actual sentence is: "Adjudication means fact finding, and while speculation is not legitimate in that process, a trier of fact

should not be deprived of scientific data because some controversy attaches to it.”

Phillips, 615 P.2d at 1235. *Phillips* was talking about adjudication in the sense of litigating and trying a case in the fact-finding stage of a trial. The Rellers morph this language, about the admissibility of scientific evidence at trial, to conclude that a default decree of divorce cannot be an adjudication. *Phillips*, however, had nothing to do with whether paternity can be adjudicated by default or stipulation without the taking of evidence.

In fact, the UPA specifically provides that paternity can be adjudicated without the taking of evidence. It provides that defaults in paternity actions fall under Utah R. Civ. P. 55. Utah Code Ann. §78B-15-111 (2011). It also mandates that a court “shall issue an order adjudicating the paternity of a man who . . . is in default.” *Id.* §78B-15-620(1). So the UPA uses the term “adjudicating” in the sense of entering judgment, rather than the process of trial. *See* Black’s Law Dictionary 20 (Abridged 5th ed. 1987) (defining adjudication as “the formal giving or pronouncing a judgment . . .”). Both the UPA and the Trial Court below use “adjudication” in the entry of judgment sense, not the process by which a judgment is arrived. *See Larsen v. Collina*, 684 P.2d 52, 56 (Utah 1984) (a pre - UPA case in which the Court discussed the advisability of tests, but stated “[w]e do not mean to suggest that default judgments cannot be entered in paternity cases without blood tests”).

The Rellers then cite *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989) for the proposition

that stipulated divorce decrees and default decrees “are not to be considered adjudicated for a myriad of reasons.” Appellees’ Br. p. 10. That, however, misapplies *Elmer*, which was specifically addressing a stipulated custody order. *Elmer* does not stand for the proposition that default decrees are not adjudications. In *Elmer* (and *Phillips*) Justice Stewart was using the term “adjudicated” in the sense of the adjudicatory or trial process, and noted that “custody decrees are not always adjudicated, and when they are not, the res judicata policy underlying the changed-circumstances rule is at a particularly low ebb.” *Elmer v. Elmer*, 776 P.2d at 603. He did not say that custody decrees that result from stipulations are not adjudications. Here, there are no “changed circumstances” and *Elmer* does not stand for the proposition that a default paternity adjudication is not an adjudication.

Egan v. Egan, 560 P.2d 704 (UT 1977), for example, shows that default decrees do adjudicate paternity. There, the parties were divorced by stipulated default while the wife was expecting a child. The decree determined the now ex-husband was the father of that expected child. After the child was born, a test, which was not available pre-birth, established he was not the father. The ex-husband had to bring an independent action to set aside that part of the decree that had adjudicated paternity. Relief was granted because in 1977, pre -UPA, mistake of fact was a possible grounds for relief. But he had to bring that action because the default decree was an adjudication of paternity.

The Rellers’ position also directly contradicts the Rellers’ Decree, which uses the

language “it is hereby ORDERED, ADJUDGED AND DECREED: . . . ” R. 77

(emphasis in original, attached as Appendix A). It also contradicts the Trial Court’s later ruling, made after the issue was briefed and argued, which stated:

Petitioner [Micah Reller] was adjudicated as the child’s father at the entry of the parties’ Decree of Divorce on or about September 12, 2006, pursuant to §78-45g-623(3) of the Utah Code.

R. 266-267 (Appendix B).

The Rellers’ position is also directly refuted by Utah Code Ann. §78B-15-620 (2011), which specifically provides for a default adjudications of paternity as well as Section 111, which applies “Utah Rule of Civil Procedure 55, Default Judgment” to paternity actions. *Id.* §78B-15-111; *see also Id.* §78B-15-201(2)(a) (“father-child relationship is established . . . by: (a) an un rebutted presumption of the man's paternity of the child under Section 78B-15-204”).

Finally, the Rellers argue “[t]he Court merely applied the marital presumption of paternity set forth in Utah Code Ann. §78B-15-201 (2008), adopted the agreement of the parties and signed the Decree of Divorce without adjudicating said issue.” Appellees’ Br. p. 11. But Micah Reller filed a petition for divorce claiming the Child was “born of this marriage.” The UPA mandates that a court “shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.” Utah Code Ann. §78B-15-622 (2011). The Trial Court did just that on September 12, 2006, in its Decree of Divorce, which adjudicated Micah Reller as the Child’s father. R. 265 - 267.

B. Appellees Erroneously Claim They Were Not Estopped From Challenging Parentage Because There Was No Adjudication Under the UPA.

The Rellers concede they would be estopped if the issue of parentage had been adjudicated, but deny it was. This time, the Rellers argue the UPA requires the tribunal to “adjudicate[] according to Part 6 ‘Adjudication of Parentage’, of the UPA.” Appellees’ Br. p. 11. But the Rellers focus only on Section 617, which relates to genetic testing, and Section 112. From this the Rellers infer that “fact finding is necessary to constitute an adjudication.” Appellees’ Br. p. 12. The analytical error is that, although such adjudications of paternity must be made according to Part 6, not all its provisions apply in every case.

The Rellers argue that “[a]t the time the original Decree was set aside, there had been no evidence of genetic testing presented to the court proving or disproving Appellee Micah Reller as father.” Appellees’ Br. p. 12. But Section 617 does not require proof here. It states that “paternity of a child having a presumed . . . father may be *disproved only* by admissible results of genetic testing excluding [him].” Utah Code Ann. §78B-15-617(1)(a) (2011) (emphasis added). Section 617 does not require genetic testing to *prove* parentage, especially where the husband has alleged he is the father. Nothing more than the presumption is needed. *See* Utah R. Evid. 301(a) and Comment (fact is established if “[i]f evidence to rebut a presumption has not been admitted”).

The Rellers’ reliance on Section 112’s clear and convincing evidence standard is

also misplaced. Part 6 specifically permits default adjudications and so default adjudications are made according to Part 6. Utah Code Ann. §78B-15-620 (2011). Section 112, however, sets “the standard of proof *in a trial* to determine paternity.” *Id.* §78B-15-112 (emphasis added). It does not apply to defaults under Part 6.

What the Rellers ignore is Section 607, which applies to children born to married couples. It specifies that “[t]he presumption may be rebutted by genetic test results that exclude the presumed father.” *Id.* §78B-15-607(3). But “[i]f the question of paternity has been raised in the pleadings in a divorce and the tribunal addresses the issue and enters an order, the parties are estopped from raising the issue again, and the order of the tribunal may not be challenged on the basis of material mistake of fact.” Utah Code Ann. §78B-15-607(1)(a) (2011).

Moreover, Section 607 sets out procedural routes the Rellers could have followed, but did not. It provides that “[i]f the issue is raised prior to the adjudication, genetic testing may be ordered by the tribunal.” Utah Code Ann. §78B-15-607(1)(a) (2011). But Micah Reller never requested genetic testing before the Adjudication. Once the Adjudication entered on September 12, 2006. Micah Reller was faced with Section 607's provision that there was no presumption to rebut. *Id.* §607(4). At that stage, both Rellers were also faced with Section 607's estoppel provision, and their review options were limited to appeal or vacation of the default judgment. Utah Code Ann. §78B-15-623(1) and (6) (2011).

The Rellers have little choice but to argue that their later challenge of the Adjudication was not based on mistake of fact. They apparently contend that parties can agree to do anything they want. Appellees' Br. p. 11. That, of course, is incorrect. But the natural question is still "on what basis was the judgment being challenged?" Micah Reller's verified petition alleged essentially that he was the Child's father. He prevailed on that assertion. Judicial estoppel should preclude Micah from claiming non parentage now. *Café Rio, Inc. v. Larkin-Gifford-Overton*, 2009 UT 27, ¶42, 207 P.3d 1235.

C. The Trial Court Could Not Properly Set Aside the Original Adjudication in the Rellers' Divorce Decree.

The Rellers argue the Trial Court retained jurisdiction to set aside its Adjudication of parentage as "requested in Appellees' Stipulation to Set Aside Decree of Divorce" by citing an unpublished memorandum decision, *Bryner v. Bryner*, 2009 Ut App. 217 (Attached as Appendix C). Appellees' Br. p. 13. But *Bryner* does not involve setting aside a parentage adjudication. *Bryner* holds that parties may not "stipulate away a court's jurisdiction." That parallels the rule that lack of subject matter jurisdiction may not be cured by stipulation. *Barton v. Barton*, 2001 UT App 199, ¶12, 29 P.3d 13. Those concepts, however, support Argenziano's assertion that the Trial Court did not have jurisdiction in 2007 to set aside the Adjudication in the Rellers' Decree.

Next the Rellers improperly invoke Utah R. Civ. P. Rule 60(b)(6). Appellees' Br. p.p. 13 -15. "Improperly" because, although they argue it, the Rellers never filed a Rule 60(b) motion of any kind - ever. And they never hinted to the Trial Court that Rule 60(b)

was the basis for their stipulation to set aside the Decree. *See* R. generally.

Recently in *WCF v. Argonaut Insurance*, 2011 UT 61, 261 P.3d 102, the Utah Supreme Court addressed similar claims that a 60(b) motion had been filed. In that case, Argonaut filed an “objection” seeking relief from a judgment, but never referred to the rules on which it relied. The trial court denied relief. On appeal, the Utah Supreme Court rejected Argonaut’s claim that its objection could be treated as a Rule 59 or 60(b) motion. It held that where 60(b) motions were concerned, form matters and failure to specify the rule was fatal. Argonaut’s objection was not a 60(b) motion, because it “was neither captioned as a rule 60(b) motion nor did it cite to rule 60 or any other authority.” *Argonaut*, ¶14. Moreover, it did not refer to any of the Rule 60(b) circumstances that would justify relief. *Id.* The Rellers’ stipulation suffers similar deficiencies. R. 260. It refers to no basis in Rule 60(b) that would justify relief. Like Argonaut, the Rellers “did not file a rule 60(b) motion.” *Argonaut*, ¶ 15.

The Rellers reliance on *Richins v. Delbert, Chipman, & Sons*, 817 P. 2d 382 (Utah App. 1991) is completely misplaced. *See* Appellees’ Br. p. 14. *Richins* stands for the proposition that a trial court *cannot* revisit its own decisions after the time limits of Rule 60(b) have passed. In *Richins*, one of the parties (Chipman) claimed “he mistakenly entered into an ill-advised stipulation without fully understanding its consequences” and so 15 months after judgment entered he sought relief under Rule 60(b). *Richins*, 817 P. 2d at 386. The trial court ruled that it “lacked jurisdiction to consider the motion because

it was not filed until long after the three month period prescribed by Rule 60(b)(1).”

Richins, 817 P.2d at 384. On appeal, Chipman argued Rule 60(b) (5-7) applied because relief on those bases could be brought within a “reasonable time.” The strategy did not escape notice and this Court rejected Chipman’s arguments. It held that Chipman could not invoke the “residuary clause,” to circumvent other specific applicable provisions of Rule 60(b). *Richins*, 817 P.2d at 387. Consequently, the trial court lacked jurisdiction to consider an untimely Rule 60(b) motion “and would have erred had it done so.” *Id.*

Argonaut and *Richins* suggest the same result here. The Rellers never advised the Trial Court that they were seeking relief under Rule 60(b). So their stipulation was not a 60(b) motion. In fact, their stipulation avoided even mentioning their real purpose - setting aside the Adjudication of paternity. They only admit this in their brief on appeal, when they state “Micah believed Appellee Karine’s conduct to constitute a fraud upon him and the Court.” Appellees’ Br. p. 14. But even if that were a valid basis for relief, it had to be brought within three months under Rule 60(b)(3), which covers “fraud . . . misrepresentation or other misconduct of an adverse party.” Utah R. Civ. P. 60(b)(3). As in *Richins*, the Trial Court lost jurisdiction after three months, well before the Rellers filed their stipulation.

D. Subject Matter Jurisdiction to Set Aside or Re-Adjudicate an
Adjudication of Paternity Does not Exist Forever.

The Rellers’ fundamental error is assuming that a court has jurisdiction to revisit an issue years later if it once had jurisdiction to initially enter a judgment. Here the

Rellers quote, but misunderstand *Johnson v. Johnson*, 2010 UT 28, 234 P.3d 1100.

Appellees' Br. p. 15.)

In *Johnson*, the parties believed they were married and filed for divorce, which was granted. Years later the respondent filed a Rule 60(b) motion, asserting the district court did not have jurisdiction to divorce them because the parties were never married. The trial court agreed, but ruled the respondent estopped because his actions prevented the petitioner from timely filing a "common law" marriage action.

On appeal, the Utah Supreme Court ruled that the district court did have jurisdiction even though the parties were never married. It noted that "the concept of subject matter jurisdiction relates to 'the relationship between the claim and the forum that allows for the exercise of jurisdiction.'" *Johnson*, 2010 UT 28, ¶9 (quoting *Chen v. Stewart*, 2004 UT 82, ¶ 35). The claim involved marriage, the district court had the power to decide that class of cases and so it had jurisdiction. The question here though is not whether, but *how long* a court has jurisdiction over a case it has already decided. The Rellers do not analyze it and so miss the mark.

District courts are vested with jurisdiction to decide divorces under the Utah Constitution. That is a class of case, and jurisdiction exists apart from the specifics of the case. Contracts for example are also a class of case. A district court does not lose subject matter jurisdiction over a contract case merely because it turns out there was no contract. *E.g. Johnson*, 2010 UT 28 ¶ 12. Utah's district courts are also vested by the UPA with

jurisdiction to decide another class of cases known as parentage adjudications.

But in none of those instances are district courts vested with unfettered never-ending jurisdiction to revise those decisions after judgments enter. Re-adjudication or redetermination of final judgments is simply a different class of case and that is not a matter of general jurisdiction. For example, a trial court cannot come back and re-adjudicate a contract case years later simply because it originally had jurisdiction to (and did) adjudicate it earlier. If that were so, the jurisdictional lines dividing our appellate courts and the district courts would become hopelessly blurred. Rule 60(b) and 59 would be meaningless, and *Richins*, for example, could not have been decided as it was.

True, there are circumstances where statute confers continuing jurisdiction. For example, in divorces, statute grants district courts some “continuing jurisdiction” regarding the custody of children and their support. Utah Code Ann. §30-3-5(3) (2011). But these grants of continuing jurisdiction make the point. Jurisdiction to initially adjudicate a class of case is not jurisdiction to re-determine them. That is a different class of case, which requires a specific grant of jurisdiction.

No such grant exists for adjudications of parentage. In fact, the UPA specifically sets forth the parameters for re-adjudicating parentage. *See* Utah Code Ann. §78B-15-623(6) (2011) (party to parentage adjudication may then challenge it only under laws “relating to appeal, vacation of judgments, or other judicial review”); *see also Richins, supra*. (court loses jurisdiction to reconsider after Rule 60(b) time limits pass).

Johnson v. Johnson, cites a Texas case, *Johnson v. Ventling*, 132 S.W.3d 173 (Tex. App. 2004). *Johnson*, 2010 UT 28, ¶11. *Ventling* explains that jurisdiction to re-decide a judgment does not extend indefinitely. In *Ventling* the parties stipulated to a divorce. Several years later, as part of a motion for judicial rescission of the decree, the parties entered into a “judicial stipulation . . . that the parties were never married” and the trial court dismissed the case. *Ventling*, 132 S.W.3d at 176. Months later Johnson asked the trial court to vacate that dismissal.

On appeal, a key issue was whether the trial court had lost jurisdiction (“plenary power”) to redetermine its first judgment and dismiss the case. The Court of Appeals of Texas held that the trial court lost jurisdiction shortly after the decree entered:

A trial court retains plenary power to grant a new trial or to vacate, modify, correct, or reform a judgment within thirty days after the judgment is signed . . . If no party to a judgment files a motion that extends the trial court’s plenary power, the trial court loses plenary power over the judgment thirty days after the judgment is signed.

Ventling, 132 S.W.3d at 178 (internal citations omitted). Neither party did anything to “extend[] the trial court’s plenary power” and so after 30 days the trial court lost the power to alter or modify the original decree. *Id.* at 179.

In *Butler v. Brownlee*, 152 Mont. 453, 451 P.2d 836 (1969) (Appendix D), the state of Montana addressed a case very similar to the one here, and found that a trial court’s “jurisdiction on the issue of parentage of the minor children became exhausted upon entry of the original divorce decree.” In *Butler*, the plaintiff husband was granted a

default divorce with the decree naming two children born as issue of the marriage. Years later the husband alleged the children were not his. The trial court enter a modified decree that “there were no children born as issue of subject marriage;” the Montana Supreme Court reversed. *Butler*, 451 P.2d at 837 (Mont 1969); *id.* at 838 - 839

Ventling and *Butler* are strikingly similar to this case. After the Rellers’ Decree entered on September 12, 2006, if they wanted to modify its Adjudication of parentage, the Rellers could appeal, or act through the Trial Court. But either route required timely action and they did neither. Critically here, they took no action that would extend the Trial Court’s jurisdiction, such as a motion under Rule 59 or Rule 60(b). Consequently, the Trial Court lost jurisdiction. *Richins, supra*. That lack of jurisdiction was not cured by the parties’ stipulation. *Barton v. Barton*, 2001 UT App. 199 ¶12.

Utah subscribes to the concepts set forth in *Ventling* and *Butler* - that is that trial courts lose jurisdiction if Rules 59 or 60 are not invoked. *National Advertising Co. v. Murray City Corporation*, 2006 UT App 75, 131 P. 3d 872. In *National* this Court had earlier affirmed the defendant’s counterclaim judgment and remanded the case. After remand, the defendant asked to amend its counterclaim without first seeking relief from the affirmed judgment under Rule 59 or 60(b). The trial court allowed amendment and the defendant obtained judgment on the amended counterclaim. On the second appeal, this Court vacated that judgment, holding that the trial court was without jurisdiction to allow the amendment:

[B]ecause the defendant's Motion for Leave to Amend was untimely under rules 59 and 60 of the Utah Rules of Civil Procedure, we hold the trial court was without jurisdiction to grant the Crawfords' Motion for Leave to Amend and thus lacked the authority to enter judgment based on the Crawfords' amended counterclaim.

National Advertising, 2006 UT App 75, ¶27.

National Advertising, *Butler* and *Ventling* demonstrate similar (and universal) concepts. A trial court's jurisdiction ends when judgment enters, or shortly thereafter. That jurisdiction may be extended by timely filing an appropriate motion. In Utah, however, absent a statute granting continuing jurisdiction, or the filing of a *timely* motion under Rule 59 or 60(b), the trial court loses jurisdiction after judgment enters. The Rellers never took timely action in the Trial Court and it lost jurisdiction to modify or re-adjudicate the Adjudication of parentage.

For the same reasons, the Rellers' are not helped by *Baby E.Z v. T.I.Z*, which holds that "[a] court has subject matter jurisdiction when it has the authority . . . to decide the case," Appellees' Br p. 15 (*quoting Baby E.Z.*, 2011 UT 38, ¶30, 687 Utah Adv. Rep. 17). Likewise, they are not helped by the UPA's vesting the district courts with the authority to decide parentage matters. The competence to *decide* that class of case does not *ipso facto* confer a perpetual jurisdiction to *re-decide* that case later.

Indeed, the UPA specifically limits how, when, and by whom parentage adjudications may be challenged - especially where married parents are involved. *E.g.* Utah Code Ann. §§78B-15- 607(1)(a) and 623(6) (2011). So the Rellers miss the point when they state "[n]o statute, including the Utah Parentage Act, limits the authority to

decide paternity matters.” Appellees’ Br. p. 16. Once an adjudication has been made, redeterminations of paternity matters are very much limited by the UPA- especially where the child is born to a married couple.

In short, the Rellers confuse the divorce court’s jurisdiction to adjudicate parentage in the first instance with jurisdiction to revise that adjudication. The two are not the same. Jurisdiction to first adjudicate parentage is granted by the UPA, whereas jurisdiction to revise that adjudication is subject to the time constraints of Rule 60(b). The Rellers did not file a 60(b) motion (or anything else) timely, and the Trial Court lost jurisdiction.

E. The Rellers’ Argument That They Were Not Estopped is Based on a False Premise.

The Rellers apparently concede that if there was an adjudication of paternity as a part of the Decree of Divorce, they would be barred by *res judicata* from raising the issue again. Appellees’ Br. p. 16 -17. But rather than address that doctrine directly they simply reargue their claim that there never was an adjudication. Here *res judicata* results from the interplay between the pleadings filed by Micah Reller, the provisions of the UPA and the final Decree of Divorce entered on September 12, 2006.

Clearly, however, *res judicata* applies. The case of *Campos v. Campos*, 523 P.2d 1235 (Utah 1974) (Appendix E) is illustrative. In *Campos* the wife filed for divorce and the husband did not answer. A hearing was held, after which the court awarded custody of the two children to the wife. Much later the husband filed a petition to modify,

alleging one of the children had been fathered by another man. That petition was denied and the husband appealed. Although the Utah Supreme Court did not use the term *res judicata*, it did deny the husband's appeal, noting that he was attempting to set aside the decree long after the time for appeal had run. *Campos*, 523 P.2d at 1236. The salient point is that, before the decree had entered, the husband had not raised the issue of paternity, but had acquiesced on that issue. *Campos*, 523 P.2d at 1236. Accordingly, in the sense of taking evidence on the issue, court's paternity determination in *Campos* was akin to the stipulated or default adjudication at issue here. That is, paternity was not "adjudicated" as the Rellers would have this Court apply the term. Nonetheless, the Utah Supreme Court held the trial court's determination of paternity was final. Obviously paternity was "adjudicated" by the entry of an order establishing parentage. *Egan v. Egan*, 560 P.2d 704 (UT 1977) (*supra.*, independent action required to set aside default paternity determination); *see also Butler v. Brownlee*, 152 Mont. 453, 451 P.2d 836 (1968) (*supra.*, where default decree stated children were born as issue of the marriage, "paternity becomes *res judicata* . . . under the original divorce decree").

Here absent rebuttal, UPA Section 201(2)(a) mandates the establishment of the father child relationship between the man and the child. *See Utah Code Ann. §§78B-15-201, -204, 607* (2011). Micah did not timely rebut the marital presumption of paternity and the issue of parentage was decided. R. 266 - 267. Micah (and theoretically Karine) Reller had limited options to appeal or challenge that adjudication. But none of those

were pursued and so the Trial Court lost jurisdiction to set aside the Decree's Adjudication of parentage.

IV. The Rellers' Public Policy Argument is Misplaced.

Without authority or analysis, Rellers argue that this court should reverse centuries of public policy. Their policy position is narrowly about this case. They argue that parentage policy should be about "innocent spouses" or someone "invading a marriage."⁴ But their argument is not about what the law is, but rather about what the law should be and they do not adequately brief that issue.

Utah's policy has always been otherwise. It favors legitimacy as well as stability of parentage determinations. So it is simply not good policy to allow married parents to illegitimize a child years after an adjudication legitimated that child. Perhaps Justice Crockett has said it best:

If there ever is a situation where the rules of law, the interests of justice, and sound considerations of policy combine to require the application of the rules of *res judicata*, it should be especially so as to the adjudication on the parenthood of a child.

Roche v. Roche, 596 P.2d 647, 649 (Utah 1979) (Crockett, J., concurring) (citations omitted). Policy interests have long "favor[ed] legitimacy." *See Pearson v. Pearson*, 2008 UT 24, ¶17, 182 P.3d 353 *citing Holder v. Holder*, 9 Utah 2d 163, 340 P.2d 761,

⁴Argenziano objects to the Rellers' characterizations of him, as there is no evidence that he knew Karine Reller was married (he did not). But no party is a "shiny penny." Karine Reller was married and knew it. *See* R. 267. Micah Reller portrays himself as not having a relationship with the Child but that was a choice he made.

763 (1959); *see Lopes v. Lopes*, 30 Utah 2d 393, 518 P.2d 687 (1974) (citing Lord Mansfield's Rule); *see also United States v. Snow*, 4 Utah 313, 320 (Utah 1886) ("legitimacy of offspring born during wedlock is presumed").

The UPA preserves "the historic common law presumption in favor of the legitimacy of children born within marriage." *Pearson*, 2008 UT 24, ¶44 (*supra*, Durham, J. dissenting). The other policy consideration is stability. Historically, courts have "been very circumspect about permitting a father to illegitimize a child presumed to be his." *Garcia v. Garcia*, 1984 Utah LEXIS 983 (Utah Oct. 25, 1984) *citing Lopes* (*supra*). That is all the more true once paternity is established in a marital context. *See Campos*, (addressed *supra.*, declining to set aside divorce decree adjudicating the husband as father).

The Rellers argue that the Utah Legislature could not have intended to make it more difficult for married parents to challenge paternity. Appellees' Brief p. 20.⁵ In fact though, the UPA *does* make it more difficult for married parents to dispute the legitimacy of their children - especially once parentage has been adjudicated. First the UPA imposes a marital presumption. Utah Code Ann. §78B-15-204 (2011). Essentially, do nothing and the husband will be established as the father. *See* Utah Code Ann. §§78B-15-111, -

⁵The Rellers allude to a constitutional claim under the Fourteenth Amendment. This fails because "the party challenging a statute bears the burden of proving its invalidity" and they offer no argument. *State v. Angilau*, 2011 UT 3, ¶7, 245 P.3d 745; *see State v. Smith*, 2010 Utah App 231, ¶2, 238 P.3d 1103 (appellate courts not a depository in which to "dump the burden of argument and research").

204(2), - 620 and Arguments *supra*. Second, once a divorce adjudicates parentage, the UPA greatly restricts who may challenge those adjudications and how, with the greater restrictions falling on the married parents. In fact, Section 607, applies largely if not almost exclusively to parentage determinations involving married couples. Utah Code Ann. §78B-15-607 (2011). In short, the UPA does make it more difficult for the married to illegitimize their children.


The Rellers simply ignore existing policy and focus on its consequences to them. Policy rightly focuses on society as a whole and not on the individual. Without meaningful analysis this Court should not reverse public policy.

CONCLUSION

The Stipulated Order Resolving All Outstanding Issues in the Parties' Divorce (the final order in this case) should be reversed and remanded. This Court should enter rulings clarifying that on July 11, 2008, when the Trial Court set aside the Rellers' Decree of Divorce, it did not have subject matter jurisdiction to set aside the adjudication of parentage. The remand should direct the Trial Court to enter an order that Micah Reller is confirmed as the Child's adjudicated father.

DATED this 14th day of November, 2011.

McINTYRE & GOLDEN, P.C.




RICHARD R. GOLDEN
JAMES A. McINTYRE
Attorneys for Appellant,
Francis J. Argenziano

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 15TH day of November, 2011, I hand-delivered a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to the following:

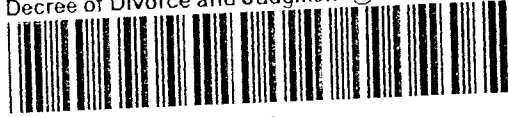
Nathan B. Wall
Cobie Spevac
Wall & Wall, P.C.
2168 East Fort Union Boulevard
Salt Lake City, Utah 84121

Laura Hansen-Pelcastre
Just Law, PLLC
1537 S. Main Street
Salt Lake City, Utah 84115

A handwritten signature in cursive script, reading "Holly McIntyre", written over a horizontal line.

APPENDIX A: Decree of Divorce and Judgment

Decree of Divorce and Judgment @ J



JD20593925
064401133 RELLER, KARINE ANESIA SCHLAG

FILED
THIRD DISTRICT COURT
SEP 12 2006
WEST JORDAN DEPT.

Name: Micah John Reller
Address: 6254 South 5130 West
West Jordan, Ut 84084
Phone: 801-633-9689
Pro Se

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
West Jordan District Court, 8080 S. Redwood Road, Suite 1701, West Jordan, UT 84088

Micah John Reller,
Petitioner,

vs.

Karine Anesia Schlagel Toledo Reller,
Respondent.

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**DECREE OF DIVORCE
AND JUDGMENT**

Case No. 064401133

Commissioner: _____

Judge: TLC

The above-entitled matter came on before the court on Petitioner's Affidavit for Entry of Divorce Decree in accordance with Rule 104, Utah Rules of Civil Procedure. The parties have completed the class entitled, "Shared Parenting for Divorcing Parents" or have a signed order waiving the class on file with the court. The Court, having found and entered its Findings of Fact and Conclusions of Law and being otherwise fully advised, it is hereby,

ORDERED, ADJUDGED AND DECREED:

That the Petitioner is awarded a Decree of Divorce from the Respondent, to become final upon signature and entry.

1. The personal property of the parties is distributed as follows:

Description of Item	Item Becomes Sole Property of
1999 Jeep Cherokee	Respondent
2000 Toyota Echo	Petitioner
Kitchen Table	Respondent
Red Sofa Set	Respondent
Green Sofa Set	Respondent
2 Small TVs	Respondent
Toshiba Laptop	Respondent
3 picture and video cameras	Respondent
Washer and Dryer	Respondent
All Game and Game systems, DVD Movies	Petitioner

All other personal property is divided as the parties have already divided it.

2. Each party is ordered to assume and pay debts and hold the other harmless from liability as follows:

To Whom Debt is Owed	Description of Debt	Petitioner Will Pay	Respondent Will Pay
All Debt and profit will be divided %50 among the both of us			

All other debts are the responsibility of the person incurring the debt.

3. During the course of the marriage, the parties acquired the following real property:

a. A home located at 6245 South 5130 West, West Jordan, UTAH 84084 more particularly described by the following legal description: *3 bedroom, 2 bath, 2 family rooms white House with green grass*

b. The real property is divided between the parties as follows: *We are going to live in the house for at least 6 months. Paying off some of the debt and saving money. When both parties are ready to leave then we will sell the house and pay off the debt the we have aquired throughout the marriage.*

4. Neither party is awarded alimony from the other.

5. The parties have not acquired any interest in any retirement program (including military retirement), nor have they acquired any interest in any pension or profit sharing plan during the course of the marriage.

6. There has/have been 1 child(ren) born of this marriage:

NAME	DATE OF BIRTH
Anna-Elise Schlagel Toledo Reller	4/12/2005

6.1 Both parents are awarded the joint legal custody of the minor children, but the Respondent is awarded the sole physical custody of the children, subject to the Petitioner's right to parent-time with the children at reasonable times and places. Pursuant to Utah Code Ann. § 30-3-10.1 et seq., the following parenting plan is ordered by the court:

a. The parents will discuss with each other and mutually decide the significant decisions regarding the child(ren), including, but not limited to, the child(ren)'s education, health care, and religious upbringing. Either parent may make emergency decisions regarding the health or safety of the child(ren).

b. Day to day decisions regarding the care, control and discipline of the parties' child(ren) will be made by the parent with whom the child(ren) resides/are residing at the time.

c. Any parental duties or rights not specifically addressed in this plan shall be discussed and mutually decided by both parents.

d. Should the parties have a dispute regarding parenting of the child(ren), the Respondent will make the final decision.

e. Should either parent feel that a decision made under paragraphs a, b, c, and d above is contrary to the best interests of the child(ren), that parent may arrange for mediation of the matter through a mutually agreed upon mediator or mediation service. Should the parties be unable to agree upon a mediator or mediation service, the parent requesting mediation will arrange for mediation through a court-approved mediation service. A written record shall be prepared of any agreement reached in mediation and a copy provided to each party. The parent requesting mediation is responsible for the costs of mediation, unless no agreement is reached in the mediation process, in which case the parents shall share the costs of mediation equally. No dispute may be presented to the Court in this matter without a good faith attempt by both parents to resolve the issue through mediation. If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court may award attorney's fees and financial sanctions to the prevailing parent. The Court has the right of review from the mediation process.

f. In addition to the terms set out in paragraphs a. through e. above, the court orders the following provisions be part of the parties' parenting plan: *No additional provisions.*

g. If a parent fails to comply with a provision of this parenting plan, the other parent's obligations under the parenting plan are not affected.

7. If the parties reside in the same state and within 150 miles of each other, reasonable parent-time shall be as the parties agree. If the parties do not agree, the following schedule shall be considered the minimum parent-time to which the noncustodial parent and the child shall be entitled:

FOR CHILDREN UNDER 5 MONTHS OF AGE:

Weekly:	Six hours of parent-time per week, specified by the court or the noncustodial parent preferably, divided into three parent-time periods and to take place in the custodial home, established child care setting or other environment familiar to the child.
Holidays:	Two hours on the holidays indicated on Holiday Schedule below, to take place preferably in the custodial home, established child care setting or other environment familiar to the child.

FOR CHILDREN 5 MONTHS TO UNDER 10 MONTHS OF AGE:

- Weekly:** Nine hours of parent-time per week, specified by the court or the noncustodial parent preferably, divided into three parent-time periods and to take place in the custodial home, established child care setting or other environment familiar to the child.
- Holidays:** Two hours on the holidays indicated on Holiday Schedule below, to take place preferably in the custodial home, established child care setting or other environment familiar to the child.

FOR CHILDREN 10 MONTHS TO UNDER 18 MONTHS OF AGE:

- Weekly:** One 8 hour visit per week to be specified by the noncustodial parent or the court; and
One 3 hour visit per week to be specified by the noncustodial parent or the court.
- Holidays:** Eight hours on the holidays indicated on Holiday Schedule below, and
- Telephone contact:** Brief phone contact with noncustodial parent at least two times per week.

FOR CHILDREN 18 MONTHS TO UNDER 3 YEARS OF AGE:

- Midweek:** One weekday evening for two hours between 5:30 - 8:30 p.m. to be specified by the noncustodial parent or the court.
- Alternate Weekends:** Beginning on the first weekend after the entry of the decree from 6:00 p.m. Friday until 7:00 p.m. Sunday continuing each year.
- Holiday Parent-time:** Holidays as specified on Holiday Schedule below.
- Extended Parent-time:** Two one-week periods, separated by at least four weeks, at the option of the noncustodial parent;
- a. one week shall be uninterrupted time for the noncustodial parent;
 - b. the remaining week shall be subject to parent-time for the custodial parent consistent with these guidelines; and
 - c. the custodial parent shall have an identical one-week period of uninterrupted time for vacation.
- Notification of extended parent-time or vacation weeks with the child shall be provided at least 30 days in advance to the other parent.
- Telephone contact:** Brief phone contact with noncustodial parent at least two times per week.

FOR CHILDREN 3 YEARS TO UNDER 5 YEARS OF AGE:

- Midweek:** One weekday evening from 5:30 - 8:30 p.m. to be specified by the noncustodial parent or court.
- Alternate Weekends:** Beginning on the first weekend after the entry of the decree from 6:00 p.m. on Friday until 7:00 p.m. on Sunday continuing each year.
- Holiday Parent-time:** Holidays as specified on Holiday Schedule below.
- Extended Parent-time:** Two two-week periods, separated by at least four weeks, at the option of the

noncustodial parent;

- a. one two-week period shall be uninterrupted time for the noncustodial parent;
- b. the remaining two-week period shall be subject to parent-time for the custodial parent consistent to these guidelines; and
- c. the custodial parent shall have an identical two-week period of uninterrupted time for vacation.

A parent shall notify the other parent at least 30 days in advance of extended parent-time or vacation weeks.

Telephone contact: Shall be at reasonable hours and for reasonable duration.

FOR CHILDREN 5 YEARS TO 18 YEARS OF AGE:

Midweek: One weekday evening to be specified by the noncustodial parent or the court from 5:30 - 8:30 p.m.

Alternate Weekends: Beginning on the first weekend after the entry of the decree from 6:00 p.m. on Friday until 7:00 p.m. on Sunday continuing each year.

Holiday Parent-time: Holidays as specified on Holiday Schedule below.

Extended Parent-time: Extended parent-time with the noncustodial parent may be up to four weeks consecutive at the option of the noncustodial parent;

- a. two weeks shall be uninterrupted time for the noncustodial parent;
- b. the remaining two weeks shall be subject to parent-time for the custodial parent consistent to these guidelines; and
- c. the custodial parent shall have an identical two-week period of uninterrupted time during the children's summer vacation from school for purposes of vacation.

If the child is enrolled in **year-round school**, the noncustodial parent's extended parent-time shall be ½ of the vacation time for year-round school breaks, provided the custodial parent has holiday and phone visits;

Notification of extended parent-time or vacation weeks with the child shall be provided at least 30 days in advance to the other parent.

Telephone contact: Shall be at reasonable hours and for reasonable duration.

HOLIDAY SCHEDULE FOR NONCUSTODIAL PARENTS

- Holidays take precedence over the weekend parent-time, and changes shall not be made in the regular rotation of the alternating weekend parent-time schedule.
- If a holiday falls on a regular scheduled school day, the noncustodial parent shall be responsible for the

child's attendance at school for that school day.

- If a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the child is free from school and the parent is free from work, the noncustodial parent is entitled to this lengthier holiday period.

Odd Numbered Years

Child's birthday, on the day before or after the actual birthdate from 3 p.m. to 9 p.m.

Note: At the discretion of the noncustodial parent, that parent may take other siblings along for the birthday.

Human Rights Day - 6 p.m. the day before until 7 p.m. on the holiday

Easter – from 6 p.m. Fri. until Sun. 7 p.m. unless holiday extends for lengthier period of time to which parent is completely entitled

Memorial Day – from 6 p.m. Fri. until Mon. 7 p.m. unless holiday extends for lengthier period of time to which parent is completely entitled

July 24th – from 6 p.m. day before until 11 p.m. on the holiday

Veterans Day – from 6 p.m. the day before until 11 p.m. on the holiday

Even Numbered Years

Child's birthday on the actual birthdate from 3 p.m. to 9 p.m.

Presidents Day – from 6 p.m. day before until 7 p.m. on the holiday

July 4th – from 6 p.m. day before until 11:00 p.m. on the holiday

Labor Day – from 6 p.m. Fri. until Mon. at 7 p.m. unless the holiday extends for lengthier period of time to which parent is entitled

UEA weekend (Fall break) – from 6 p.m. Wed. until Sun. 7 p.m. unless holiday extends for lengthier period of time to which parent is entitled

Columbus Day – from 6 p.m. day before until 7 p.m. on the holiday

Thanksgiving – from Wed. 7 p.m. to Sun. 7 p.m.

Christmas School Vacation: means the time period beginning on the evening the child gets out of school for the Christmas school break until the evening before the children return to school, except for Christmas Eve, Christmas Day and New Year's Day:

Christmas - first portion of school vacation plus Christmas Eve and Christmas Day until 1 p.m. so that entire holiday is equally divided

Christmas Vacation - second portion of school vacation plus Christmas day from 1 p.m. until 9 p.m. the day before children return to school so that entire holiday is equally divided

Father's Day: with natural or adoptive father every year from 9 a.m. to 7 p.m. on holiday

Mother's Day: with natural or adoptive mother every year from 9 a.m. to 7 p.m. on holiday

FOR ALL CHILDREN:

- Special consideration shall be given by each parent to make the child(ren) available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child(ren) or in the life of either parent which may inadvertently conflict with the parent-time schedule.
- The noncustodial parent shall pick up the child(ren) at the times specified and return the child(ren) at the times specified, and the child's regular school hours shall not be interrupted.
- The custodial parent shall have the child ready for parent-time at the time the child(ren) are to be picked up and shall be present at the custodial home or shall make reasonable alternate arrangements to receive the child(ren) at the time they are returned.
- Neither parent-time nor child support is to be withheld due to either parent's failure to comply with a court-ordered parent-time schedule.
- The custodial parent shall notify the noncustodial parent within 24 hours of receiving notice of all significant school, social, sports, and community functions in which the child is participating or being honored, and the noncustodial parent shall be entitled to attend and participate fully.
- The noncustodial parent shall have access directly to all school reports including preschool and daycare reports and medical records and shall be notified immediately by the custodial parent in the event of a medical emergency.
- Each parent shall provide the other with his or her current address and telephone number within 24 hours of any change.
- Each parent shall permit and encourage liberal telephone contact during reasonable hours and uncensored mail privileges with the child.
- Each parent shall be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate shall have the right to be together with the child on the religious holiday.
- When parent-time has not taken place for an extended period of time and the child(ren) lack an appropriate bond with the noncustodial parent, both parents shall consider the possible adverse effects on the child(ren) and gradually reintroduce an appropriate parent-time plan for the noncustodial parent.
- For emergency purposes, whenever the child(ren) travel with either parent, all of the following will be provided to the other parent:

- a. an itinerary of travel dates;
- b. ~~destinations~~ ^{destinations} Edward W. Hunter Law Library, J. Reuben Clark Law School, BYU.

- c. places where the child or traveling parent can be reached; and
- d. the name and telephone number of an available third person who would be knowledgeable of the child(ren)'s location.

- A child under the age of five shall not travel unchaperoned.

FOR DAY CARE:

- Parental care shall be presumed to be better care for the child than surrogate care and the parties shall cooperate in allowing the noncustodial parent, if willing and able, to provide child care.
- Each parent shall provide all surrogate care providers with the name, current address, and telephone number of the other parent and shall provide the noncustodial parent with the name, current address, and telephone number of all surrogate care providers.

7.1. Petitioner will pick up, deliver and return the children for all parent time unless the parties make other arrangements.

7.2 If either party moves from the state of Utah or 150 miles or more from their residence specified in the Court's Decree, that parent shall provide if possible 60 days advance written notice of the intended relocation to the other parent. The written notice of relocation shall contain statements affirming that:

- a. the parent-time provisions in Utah Code § 30-3-37(5) or a schedule approved by both parties will be followed; and
- b. neither parent will interfere with the other's parental rights pursuant to court ordered parent-time arrangements, or the schedule approved by both parties.

A parent who fails to comply with the notice of relocation shall be in contempt of the Court's order.

7.3 If either parent lives more than 150 miles away from the other parent or if both parents live in separate states or countries, parent time shall be as the parties agree. If they are unable to agree, the following shall be the minimum parent-time allowed to the non-custodial parent:

Micah can pick up, see and be with her anytime or anyday. Unless Karine has plans that day. Karine or Micah can move to a different state or country with the permission of the other when taking the child over state borders.

7.4 If either parent lives more than 150 miles away from the other parent or if both parents live in separate states, costs for their child(ren)'s travel expenses for parent-time shall be shared equally by the parents.

a. If the noncustodial parent has been found in contempt for not being current on all support obligations, that parent shall be responsible for all of the child's travel expenses relating to the parent time schedule in this order.

b. Reimbursement by either responsible party to the other for the child's travel expenses shall be made within 30 days of receipt of documents detailing those expenses.

8. Pursuant to Utah Code § 78-45-7.5 Petitioner's total countable gross monthly income for child support purposes is \$4,000.00. Petitioner's base child support amount using the sole custody calculation is \$373.62 per month. The Petitioner receives the following gross monthly income from all sources:

a. The Petitioner is employed at Johnny Carinos Breckenridge Group and grosses \$4,000.00 per month working the equivalent of one full-time 40-hour a week job or less.

8.1 Pursuant to Utah Code § 78-45-7.5 Respondent's total countable gross monthly income for child support purposes is \$936.00. Respondent's base child support amount using the sole custody calculation is \$105.38 per month. The Respondent receives the following gross monthly income from all sources:

a. The Respondent is employed at Self Employed Reller Cleaning and grosses \$936.00 per month working the equivalent of one full-time 40-hour a week job or less.

8.2 Pursuant to U.C.A. § 78-45-7 et seq. (1953 as amended) the Petitioner is ordered to pay to the Respondent as and for child support:

a. A sum of not less than \$373.62 per month as base support for the minor child(ren) of the parties, pursuant to the Uniform Child Support Guidelines until said child(ren) become 18 years of age, or have graduated from high school during the child(ren)'s normal and expected year of graduation, whichever occurs later.

b. Child support payments shall begin the month immediately following the entry of the order for child support. The monthly child support shall be paid one half on or before the 5th day of each month, and the other half on or before the 20th day of each month, unless the custodial parent uses the Office of Recovery Services to collect support. Child support due and not paid on or before the 5th day of the month is delinquent on the 6th day of the month. Child support due and not paid on or before the 20th day of the month is delinquent on the 21st day of the month.

c. The sole custody worksheet was used in calculating the child support in this matter. Petitioner's base child support amount is \$373.62 per month. Respondent's base child support amount is \$105.38 per month. If the physical living arrangements of a child changes from what is ordered (not including temporary changes for parent-time or visitation), then pursuant to Utah Code § 78-45-4.4 a parent whom the child is not residing with is required to pay to whoever the child is residing with the amount of support set out above for that parent and described as "the base child support amount." The parent shall automatically begin paying this base support amount without the need to modify this child support order.

d. The sole physical custody worksheet was used in calculating the base child support award. The base child support award shall be reduced by 50% for each minor child for time periods during which such minor child is with the non-custodial parent by court order or written agreement signed by the parties for at least 25 of any 30 consecutive days.

The base child support award shall be reduced by 25% for each minor child for time periods during which such minor child is with the non-custodial parent by court order or written agreement signed by the parties for at least 12 of any 30 consecutive days. Normal parent-time and holiday parent-time with the custodial parent shall not be considered an interruption of the consecutive day requirement for the non-custodial parent. If the dependent child is a recipient of cash assistance from the state of Utah through the T.A.N.F. or F.E.P. programs, any agreement by the parties for reduction of child support during extended parent-time shall be approved by the Office of Recovery Services.

e. The person entitled to receive child support shall be entitled to mandatory income withholding relief pursuant to U.C.A. § 62A-11 parts 4 and 5 (1953 as amended), and any Federal and State tax refunds or rebates due the non-custodial parent may be intercepted by the State of Utah and applied to existing child support arrearages. This income withholding procedure shall apply to existing and future payors. All withheld income shall be submitted to the Office of Recovery Services until such time as the non-custodial parent no longer owes child support to the person entitled to receive child support. All child support payments shall be made to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, UT 84145-011, unless the Office of Recovery Services gives notice that payments should be sent elsewhere. Should mandatory income withholding be implemented by the Office of Recovery Services, child support shall be due on the first day of each month and delinquent on the first day of the following month. All administrative fees and costs of income withholding assessed by the Office of Recovery Services shall be paid by the non-custodial parent in addition to the base child support obligation.

f. The issue of child support arrearages may be determined by further judicial or administrative process.

g. Each of the parties is under mutual obligation to notify the other within ten (10) days of any change in monthly income.

h. Under Utah Code §§ 78-45-7.2(6) and (8), the parties have a right to modify this child support order after three years from the date of its entry if upon review there is a difference of 10% or more between the amount previously ordered and the new amount of child support, calculated using the appropriate child support worksheet, and the difference is not of a temporary nature.

i. Under Utah Code §§ 78-45-7.2(7) and (8), the parties have a right to modify this child support order at any time if there has been a substantial change in circumstances because of: (i) material changes in custody; (ii) material changes in the relative wealth or assets of the parties; (iii) material changes of 30% or more in the income of a parent; (iv) material changes in the ability of a parent to earn; (v) material changes in the medical needs of the child; and (vi) material changes in the legal responsibilities of either parent for the support of others, and, the change in (i) through (vi) results in a 15% or more difference between the amount previously ordered and the new amount of child support, calculated using the appropriate child support worksheet, and the difference is not of a temporary nature. In a proceeding to modify an existing award, consideration of natural or adoptive children other than those in common to both parties may be applied to mitigate an increase in the child support award, but may not be applied to justify a decrease in the award.

8.3 The Respondent is entitled to claim the parties' minor child(ren) as dependent(s) for tax purposes.

8.4 Pursuant to U.C.A. § 78-45-7.15 (1953) as amended:

a. Petitioner is required to maintain insurance for medical expenses for the benefit of the minor children where available at reasonable cost.

b. Both parties shall share equally the out-of-pocket costs of the premium actually paid by a parent for the children's portion of the insurance.

c. Both parties shall share equally all reasonable and necessary uninsured medical

expenses, including deductibles and co-payments, incurred for the minor children and actually paid by the parties.

d. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment.

e. A parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with the Subparagraph "d" above.

9. Both parties are ordered to sign and fully execute whatever documents are necessary for the implementation of the provisions of this divorce decree. Should a party fail to execute a document within 60 days of the entry of this divorce decree, the other party may bring an Order to Show Cause at the expense of the disobedient party and seek that the Court appoint some other person to execute the document pursuant to Rule 70 of the Utah Rules of Civil Procedure. Any document executed pursuant to Rule 70 has the same effect as if executed by the disobedient party.

10. Prior to any Petition being filed to change any provision of the final Decree of Divorce, the parties must attempt to resolve the issue through mediation.

DATED this 12 day of Sept., 2006

BY THE COURT

DISTRICT COURT JUDGE

Approved as to form:

Karine Reller

Respondent's Signature

CERTIFICATE OF MAILING/DELIVERY

On this 30 day of August, 2006 a true and correct copy of the foregoing Decree of Divorce and Judgment was mailed, postage prepaid or delivered to Respondent at:

Karine Anesia Schlagel Toledo Reller
6254 South 5130 West
West Jordan, Ut 84084

Petitioner Signature

APPENDIX B: Recommendation Hearing March 13, 2008

FILED
THIRD DISTRICT COURT
AUG 14 2008
WEST JORDAN DEPT.

3RD DISTRICT CT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

MICAH JOHN RELLER,	:	
	:	RECOMMENDATION
Petitioner,	:	HEARING March 13, 2008
	:	
vs.	:	Case No: 064401133
	:	
KARINE ANESIA SCHLAGEL,	:	Judge: Terry Christiansen
	:	
Respondent and Third	:	Commissioner: MICHELLE TACK
Party Petitioner,	:	
	:	
FRANCIS J. ARGENZIANO,	:	
	:	
Third Party Respondent.	:	
	:	

After the hearing on March 13, 2008, the court took under advisement the Third Party Respondent's Motion to Vacate the Order Joining Francis Joseph Argenziano and to Dismiss Respondent's Amended Petition to Modify. Having reviewed the pleadings and the relevant case law and statutes and adopting the undisputed facts as stated by the Third Party Respondent in his Memorandum of January 3, 2008, the Commissioner makes the following recommendations:

1. Petitioner is presumed to be the father of Anna-Elise Schlagel Toledo Reller pursuant to §78-45g-204 of the Utah Code because Petitioner and Respondent were married to each other when the child was born on April 12, 2005.
2. Petitioner was adjudicated as the child's father at the entry of the parties' Decree

of Divorce on or about September 12, 2006, pursuant to §78-45g-623(3) of the Utah Code.


3. Pursuant to §78-45g-623(6) of the Utah Code, “a party to an adjudication of paternity may challenge the adjudication only under the law of this state relating to appeal, vacation of judgments, or other judicial review.”
4. The question currently before the court is limited only to whether Respondent’s Amended Petition to Modify is properly before the Court and whether the Order Joining the Third Party Respondent should be vacated.
5. Respondent seeks to undo the adjudication of paternity of the minor child Anna-Elise Schlagel Toledo Reller by means of a Petition to Modify alleging a change of circumstance. There has been no change of circumstance and the Respondent, who knew of the existence of this issue at the time of the parties’ divorce and failed to raise the issue, is now estopped from challenging the adjudication of paternity.
6. Based upon the adjudication of paternity within the parties’ Decree of Divorce, the issue of paternity is not properly before this court and therefore this court currently lacks jurisdiction over the Third Party Respondent, Francis Joseph Argenziano.
7. Unless and until the court grants relief from the judgment adjudicating paternity, the Petitioner and Respondent are bound by the existing order of this court.
8. The Third Party Respondent’s Motion to Dismiss Respondent’s Amended Petition to Modify is granted as Respondent is estopped from raising the issue of paternity under the current order and therefore has failed to state a claim upon which relief

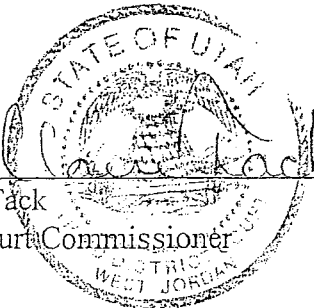
may be granted .

9. Based upon the recommendation to dismiss the Respondent's Amended Petition to Modify, this court currently lacks jurisdiction over the Third Party Respondent and the Order Joining Francis Joseph Argenziano is vacated.
10. If the existing adjudication of paternity was vacated, set aside, terminated, or dissolved in any manner under the laws of this state, then this court would have jurisdiction under the Utah Uniform Parentage Act to consider the issue of paternity and the respective rights and obligations of all parties under the relevant provisions of the Utah Code.

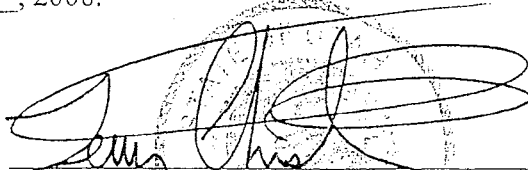
This recommendation is the Order of the Court until modified by the Court. Parties may object to this recommendation within ten days after service pursuant to Rule 7 of the Utah Rules of Civil Procedure.

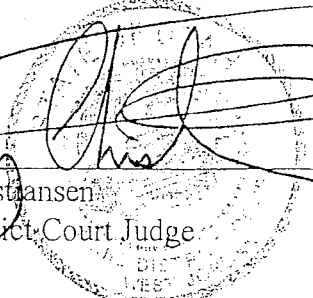
Recommended this 26th day of May, 2008.


Michelle Claire Tack
Third District Court Commissioner



Order this 14 day of August, 2008.


Terry Christiansen
Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 064401133 by the method and on the date specified.

METHOD NAME

Mail	KARINE ANESIA SCHLAG RELLER Respondent 6254 S 5130 W WEST JORDAN, UT 84084
Mail	JAMES A MCINTYRE Attorney 3838 S W TEMPLE STE 3 SALT LAKE CITY UT 84115
Mail	TIMOTHY W STEWART Attorney PET 5295 S COMMERCE DR STE 200 MURRAY UT 84107

Dated this _____ day of MAY 21 2008, 20____.


Deputy Court Clerk

APPENDIX C: *Bryner vs. Bryner*

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
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Case No. 20080510-CA

COURT OF APPEALS OF UTAH

2009 UT App 217; 2009 Utah App. LEXIS 228

August 6, 2009, Filed

NOTICE: NOT FOR OFFICIAL PUBLICATION**SUBSEQUENT HISTORY:** Writ of certiorari denied **Bryner v. Bryner**, 221 P.3d 837, 2009 Utah LEXIS 240 (Utah, 2009)Subsequent appeal at **Bryner v. Bryner**, 2010 UT App 163, 2010 Utah App. LEXIS 165 (2010)**PRIOR HISTORY: [*1]**


Third District, Salt Lake Department, 044904183. The Honorable Denise P. Lindberg.


Bryner v. Bryner, 2008 UT App 238, 2008 Utah App. LEXIS 237 (2008)**CASE SUMMARY****PROCEDURAL POSTURE:** In child custody proceedings, appellant father appealed the judgment entered in the Third District, Salt Lake Department, Utah, regarding cross-motions for enforcement of a settlement agreement.**OVERVIEW:** The parties engaged in mediation and agreed to a settlement. Both the father and mother filed cross-motions to enforce their versions of the settlement agreement. The district court discovered that the father had obtained a civil stalking injunction against the mother, and that it could not enforce the parties' stipulated joint legal and physical custody arrangement without receiving additional evidence regarding the children's best interests. The district court found that it would violate public policy to adopt an arbitration clause that allow an arbitrator to determine child custody. On appeal, the father claimed that because the arbitration clause was unenforceable, none of the other agreements reached by the parties could be enforced. Because the issue was not raised in the district court, it was not preserved for appeal. Even so, the Court of Appeals of Utah held that the district court acted within its discretion to adopt some but not all, of the parties' agreements.**OUTCOME:** The judgment was affirmed.


CORE TERMS: settlement agreement, child custody, cross-motions, custody issues, arbitration, preserved, custody, partial, final judgment, stipulated settlement, trial brief, selective, divorce, best interests, physical custody


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Civil Procedure > Appeals > Reviewability > Preservation for Review 


HN1  As a general rule, claims not raised before the trial court may not be raised on appeal. More Like This Headnote


Civil Procedure > Settlements > Settlement Agreements > Enforcement > General Overview 


Family Law > Child Custody > General Overview 


Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > General Overview 


HN2  A stipulation pertaining to matters of divorce, custody and property rights therein, though advisory upon the court will usually be adopted unless the trial court determines that it is unfair or unreasonable, but it is not binding on the court. It is only a recommendation to be adhered to if the court believes it to be fair and reasonable. More Like This Headnote


Civil Procedure > Judgments > Entry of Judgments > General Overview 


Contracts Law > Types of Contracts > Settlement Agreements 


Family Law > Child Custody > General Overview 


Family Law > Child Support > Obligations > Modification > General Overview 

Governments > Courts > Authority to Adjudicate 


HN3  The parties may not remove an issue from the court hearing a divorce or custody matter by contract. A district court has authority to enter a judgment for child support as appears reasonable and to modify such judgments regardless of attempts by the parties to control the matter by contract. More Like This Headnote




Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview 

Family Law > Child Support > Jurisdiction > Subject Matter Jurisdiction 

HN4  The parties cannot stipulate away a court's subject matter jurisdiction. More Like This Headnote

COUNSEL: Roger **Bryner**, Midvale, Appellant, Pro se.

Thomas J. Burns , Salt Lake City, for Appellee.

JUDGES: Pamela T. Greenwood , Presiding Judge, Gregory K. Orme , Judge, Carolyn B. McHugh , Judge.

OPINION

MEMORANDUM DECISION

PER CURIAM:

This appeal is taken following a final judgment in the child custody proceedings involving Roger **Bryner** (Father) and Svetlana **Bryner** (Mother). Father appeals a May 8, 2006 judgment regarding cross-motions for enforcement of a settlement agreement. He does not, however, challenge the child custody determination made by the district court in the final judgment entered on May 8, 2008. Therefore, he has neither argued nor demonstrated that the district court's decision on child custody is not supported by sufficient evidence or is not in the children's best interests.

On November 10, 2005, the parties engaged in mediation and agreed to a settlement. The settlement agreement was not reduced to writing, and the recording equipment malfunctioned. The parties met again on December 8, 2005, in an effort to reconstitute the settlement agreement. After efforts to agree on all issues were unsuccessful, both Father [*2] and Mother filed cross-motions to enforce their versions of the settlement agreement. At a February 28, 2006 evidentiary hearing on the cross-motions, the parties reached a number of agreements on the record. On May 8, 2006, the district court entered its Findings of Fact, Conclusions of Law, and Judgment on Cross-Motions.

After the February 28 hearing but before entry of the May 8, 2006 judgment, the district court discovered that Father obtained an ex parte civil stalking injunction against Mother on the day before the hearing but had failed to inform Mother or the district court of that fact. Based on that information, the district court determined that it could not determine the advisability of enforcing the parties' stipulated joint legal and physical custody arrangement without receiving additional evidence regarding the children's best interests. Therefore, the district court ordered that the issue of child custody would proceed to trial. The district court adopted the parties' other agreements as stated on the record at the February 28, 2006 hearing. Additionally, the district court found that it would violate public policy to adopt an arbitration clause that would substitute [*3] an arbitrator for the district court to determine child custody. Accordingly, the district court ruled that any requirement to arbitrate would be limited to issues that did not pertain to the children. The district court entered a final judgment on May 8, 2008, after a trial on the remaining child custody issues. In that judgment, the district court granted sole legal custody of the children to Mother but granted joint physical custody to Mother and Father.

The focus of Father's brief on appeal is an alleged agreement within the settlement agreement to submit child custody issues to arbitration. Father claims that because such an agreement would be unenforceable, none of the other agreements reached by the parties can be enforced. The issue Father raises on appeal--that either all or none of the stipulations reached by the parties must be enforced--was not preserved in the district court. Father cites his trial brief, prepared in advance of the February 28, 2006 hearing, for preservation of the issue regarding selective or partial enforcement of the stipulated settlement. However, while the trial brief opposed the arbitration of child custody issues, it did not raise any issue regarding [*4] partial enforcement of the stipulated settlement. In addition, Father did not raise any issue regarding partial or selective enforcement of the agreement through a timely objection in the district court following the May 8, 2006 judgment. Because the issue raised on appeal was not first raised in the district court, it was not preserved for appeal. ^{HN1} "[A]s a general rule, claims not raised before the trial court may not be raised on appeal." *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, P20, 163 P.3d 615.

Even assuming that the issue had been preserved, the district court was within its discretion to adopt some but not all, of the parties' agreements. ^{HN2} "[A] stipulation pertaining to matters of divorce, custody and property rights therein, though advisory upon the court" will usually be adopted by the court, but determines that it is "unfair or unworkable," but it is not binding on

the court. *Klein v. Klein*, 544 P.2d 472, 476 (Utah 1975). "It is only a recommendation to be adhered to if the court believes it to be fair and reasonable." *Id.* Father's argument is simply that, as a matter of contract law, the agreement of the parties cannot be enforced except as a complete agreement. [*5] However, ^{HN3} the parties may not remove an issue from the court hearing a divorce or custody matter by contract. See *Diener v. Diener*, 2004 UT App 314, P 5, 98 P.3d 1178 (stating that a district court had authority to enter judgment for child support as appears reasonable and to modify such judgments "regardless of attempts by the parties to control the matter by contract"); see also *Sill v. Sill*, 2007 UT App 173, P 9, 164 P.3d 415 (ruling that a non-modification provision of a settlement agreement did not divest the district court of statutory continuing jurisdiction to make orders based upon a material change of circumstances); *id.* P 23 (Orme, J., concurring) (stating that ^{HN4} "the parties cannot stipulate away a court's subject matter jurisdiction").

Accordingly, we affirm.

Pamela T. Greenwood ▼,

Presiding Judge

Gregory K. Orme ▼, Judge

Carolyn B. McHugh ▼, Judge







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APPENDIX D: *Butler v. Brownlee*

Butler v. Brownlee, 152 Mont. 453, 451 P.2d 836 (Mont. 1969)

152 Mont. 453 (Mont. 1969)

451 P.2d 836

Beverly Jeanne BUTLER, Petitioner,

v.

Honorable E. Gardner BROWNLEE, Judge of the District Court

of the 4th Judicial District, In and For the

County of Missoula, Respondent.

No. 11628.

Supreme Court of Montana.

March 20, 1969

Submitted Feb. 17, 1969.

[451 P.2d 837]

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E. F. Gianotti (argued), Great Falls, for petitioner.

Leonard J. Haxby (argued), Butte, for respondent.

HASWELL, Justice.

This is an application for a writ of review of proceedings resulting in modification of a divorce decree in the district court of Missoula County.

All proceedings herein questioned were taken in civil cause #27420, a divorce action in the district court. The district court file discloses that the husband filed a complaint for divorce against his wife alleging, among other things, that two named minor children were born as issue of the marriage. The husband was granted a default divorce by decree dated July 6, 1964. In that decree the court found that the two named minor children were born as issue of the marriage, awarded their custody to the wife, and ordered the husband to pay the wife \$100.00 per month for their support.

More than four years later the husband, following attempts to collect child support from him, filed a 'Motion for Modification of Divorce Decree' alleging that he 'now has satisfactory proof that the two children as noted in the decree' are not his issue. The motion requested 'that a modification of said divorce decree be entered and that it shall be noted that there were no children born as issue of subject marriage and that from henceforth the plaintiff be freed from paying the sum of One Hundred Dollars (\$100.00) per month or any support to the defendant herein.'

The motion was set for hearing on September 27, 1968, the wife did not appear, her default was entered, and testimony was received in support of the motion. On October 3, 1968, the district court entered its order finding that the two named minor children were not issue of the marriage and absolved the husband from making any further support payment for them.

On October 14, 1968, the wife filed her motion to set aside the order of October 3. The husband moved to quash the wife's motion. The district court ordered 'a full hearing on the facts to determine whether or not the order made on the 3rd day of October, 1968 should remain as entered.'

This hearing was held on February 3, 1969 with both parties appearing personally with their respective attorneys. Testimony was taken, the matter taken under advisement, and on February 10 the district court entered its final order.

This order recited that the husband presented proof at the February 3 hearing showing that the two minor children involved were not his children and that the wife presented no proof whatever on this subject. The court concluded that nothing had been presented to it which would justify any change in its previous order of October 3 except that the husband should be required to pay past due and delinquent child support payments provided in the original divorce decree at the rate of \$40.00 per month for five years.

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The wife then filed a petition for writ of review with this Court. Following ex parte presentation, an order to show cause was issued. On the day set for hearing and immediately prior thereto, the husband filed a motion to quash and an answer to the wife's petition.

Although the husband's answer categorically denied every allegation in the wife's petition except the status of the presiding district court judge, the husband's attorney advised this Court upon oral argument that the factual allegations regarding events that transpired in the district court were not denied but only the legal conclusions contained in the wife's petition. We will treat the answer accordingly.

[451 P.2d 838] The gist of the wife's argument is that a writ of review is an available remedy here because the district court exceeded its jurisdiction in determining the paternity of the two minor children, and that the remedy by appeal is neither speedy nor adequate. The husband, on the other hand, contends that a writ of review will not lie because the district court did not exceed its jurisdiction in determining paternity, and the wife's remedy by appeal precludes issuance of a writ of review.

Initially we must determine whether the district court exceeded its jurisdiction in determining the paternity of the two minor children upon the husband's motion for modification of the original divorce decree.

We note that the paternity of the two minor children was placed in issue by the husband's own allegations in his divorce complaint. He alleged therein that these children were born as issue of the marriage. He alone testified in support of the allegations of his complaint. The divorce decree recited that it appeared to the court 'that two children have been born as a result of said marriage' naming them, and that the husband 'sustained the allegations of his complaint by competent evidence * * *'. The divorce decree provided, among other things, 'that the defendant is hereby awarded the care, custody and control of the minor children of the parties hereto' and named them. The husband was ordered to pay a sum certain

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for their support. There was no appeal from the divorce decree.

It is undoubtedly true that a district court which enters a divorce decree retains continuing jurisdiction to modify child custody and child support awards contained therein. Section 21-138, R.C.M. 1947; *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093. The purpose of this continuing jurisdiction is to enable the court to adjust custody and child support provisions to meet changing conditions that develop after entry of the original award; and it is on the basis of a material change in conditions from those existing at the time of the original award that modifications are made. *Trudgen v. Trudgen*, 134 Mont. 174, 329 P.2d 225. Common examples of such changing conditions are the remarriage of one or both parents, changes in health or financial circumstances of the parents, and the changing needs and desires of the minor children.

In the instant case, however, the modification of the original child support award is not based on any change in conditions that has occurred since the original decree. On the contrary it is based on an alleged fact that predated the original decree. In essence the husband seeks to relitigate an issue adjudicated in the original decree, viz. the paternity of the minor children.

A judgment not appealed from is conclusive between the parties as to all issues raised by pleadings actually litigated and adjudged as shown on the face of the judgment and reasonably determined in order to reach the conclusion announced. *Doull v. Wohlschlager*, 141 Mont. 354, 377 P.2d 758; *Missoula Light & Water Co. v. Hughes*, 106 Mont. 355, 77 P.2d 1041. Although this rule has not heretofore been directly applied by this Court to determination of paternity of minor children in a divorce decree, other jurisdictions hold that under such circumstances the issue of paternity becomes res judicata between the husband and wife under the original divorce decree. *Johns v. Johns*, 64 Wash.2d 696, 393 P.2d 948; *Limberg v.*

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Limberg, 10 Wis.2d 63, 102 N.W.2d 103; *Dornfeld v. Dornfeld*, 200 A.D. 38, 192 N.Y.S. 497; 65 A.L.R.2d 1395; 24 Am.Jur.2d, Divorce and Separation, Sec. 877, p. 998. Still other jurisdictions prevent relitigation of the issue of paternity of minor children under the guise of modification of the original divorce decree for a variety of reasons without directly using the language of res judicata. *Peercy v. Peercy*, 154 Colo. 575, 392 P.2d 609; *Peck v. Superior Court of Los Angeles County*, 185 Cal.App.2d 573, 8 Cal.Rptr. 561; *Sorenson v. Sorenson*, 254 Iowa 817, 119 N.W.2d 129.

In our view under the circumstances disclosed here, the court's jurisdiction on [451 P.2d 839] the issue of parentage of the minor children became exhausted upon entry of the original divorce decree, and until that decree is reversed on appeal, or regularly amended or vacated for the reasons set forth in and pursuant to

Rules 59 and 60, M.R.Civ.P., the court cannot again hear or determine the issue of paternity. As there has been no appeal from the original decree and as the instant 'Petition for Modification of Divorce Decree' on its face does not purport to seek relief under Rules 59 or 60, M.R.Civ.P., the district court exceeded its jurisdiction in hearing and determining the issue of paternity of the two named minor children at the hearings of September 27, 1968 and February 3, 1969, and its resulting orders of October 3, 1968 and February 10, 1969.

We must next determine whether a writ of review is an available remedy to correct the errors of which the wife complains. At the outset it is abundantly clear that the wife herein has a remedy by appeal. Rule 1 of the Montana Rules of Appellate Civil Procedure provides in material parts that 'a party aggrieved may appeal from * * * any special order made after final judgment * * *.' Its forerunner, section 93-8003, R.C.M.1947, and its predecessors, provided to like effect. An order modifying a child custody and support award in a divorce decree is a 'special order made after final judgment'

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within the meaning of the appeal statute. *State ex rel. Gates v. District Court*, 69 Mont. 322, 221 P. 543; *McVay v. McVay*, 128 Mont. 31, 270 P.2d 393.

This Court has previously held that a writ of review will not lie to correct orders modifying child custody and support provisions in a divorce decree even though made in excess of jurisdiction because the remedy by appeal is available. *State ex rel. Gates v. District Court*, supra.

But must we close our eyes to the need for immediate relief under the circumstances disclosed here? Not at all.

Looking to substance rather than form, it is apparent that the orders of the district court have rendered the children illegitimate and cut off their support. The district court exceeded its jurisdiction in entering these orders. These children are wards of the court. *Barbour v. Barbour*, supra; *State ex rel. Lay v. District Court*, 122 Mont. 61, 198 P.2d 761; *Wolz v. Wolz*, 110 Mont. 458, 102 P.2d 22. The state, as well as the parties to the divorce action, has an interest in their welfare and in their support. To promote this paramount interest, the state must act through the instrumentality of the court.

Art. VIII, Sec. 3 of the Montana Constitution grants to this Court the 'power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction.' (Emphasis supplied.) Rule 17(a) of the Montana Rules of Appellate Civil Procedure provides:

'The Supreme Court is an appellate court but it is empowered by the Constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the Supreme Court is sometimes justified by circumstances of an emergency nature, as when

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a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other

necessary or proper.' (Emphasis supplied.)

In our view the foregoing constitutes a grant of power to this Court sufficient to authorize the issuance of an original and remedial writ vacating and setting aside the orders of the district court dated October 3, 1968 and February 10, 1969. Let such writ issue. It is so ordered.

JAMES T. HARRISON, C. J., and CASTLES, JOHN C. HARRISON and BONNER, JJ., concur.

APPENDIX E: *Campos vs. Campos*

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No. 13602

Supreme Court of **Utah****523 P.2d 1235; 1974 Utah LEXIS 577**

June 24, 1974

CASE SUMMARY**PROCEDURAL POSTURE:** Defendant former husband appealed an order of a district court (**Utah**) denying his petition for a modification of a decree of divorce entered in a divorce action brought by plaintiff wife.**OVERVIEW:** The district court found in the divorce action that the wife was entitled to a divorce and that the custody of two children of the marriage should be awarded to the wife. The district court also awarded the wife support for children. The husband did not appeal the decree. The husband's petition for modification of the decree alleged that the older child was another man's son and that he should be relieved of the obligation to further support the child. On appeal, the court found that the record did not support such a change of circumstances that would have entitled the husband to have the original decree modified and that it appeared that the husband was attempting to have the court review the decree of divorce originally entered after the time for appeal from that decree had expired.**OUTCOME:** The court affirmed the judgment of the district court.**CORE TERMS:** divorce, decree, modification, custody, decree of divorce, minor children, marriage, modified**COUNSEL:** **[**1]** Paul N. Cotro-Manes of Cotro-Manes, Warr, Fankhouser & Beasley, Salt Lake City, for Defendant and Appellant.

JUDGES: Tuckett, Justice, wrote the opinion. Callister, C.J., and Henriod, J., concur. Ellett, Justice concurring specially. Crockett, J., concurs in the concurring opinion of Ellett, J.

OPINION BY: TUCKETT

OPINION

[*1235] The defendant appeals from an order of the district court denying his petition for a modification of the decree of divorce entered in the case. The plaintiff filed her complaint for a divorce on November 2, 1972, and the defendant did not answer. A hearing was had on December 8, 1972, at which time the defendant was represented by counsel. The court found that the plaintiff was entitled to a divorce, and further found that the custody of two children of the marriage, Christian H., two years, and Derek H., one year, should be awarded [*1236] to the plaintiff subject to the right of the defendant to visit the children at reasonable times. The court also awarded to the plaintiff support for the minor children. No appeal was taken from the decree entered.

On March 22, [**2] 1973, the defendant petitioned the court that the plaintiff be deprived of the custody of the minor children, claiming that the plaintiff was emotionally unstable, and that it would be in the best interests of the children if custody were awarded to him. After a hearing the court denied the defendant's petition. On October 3, 1973, the defendant filed a petition for modification of the decree wherein he alleged that the child Christian was the son of another man and that he, the defendant, should be relieved of the obligation to further support the child. After a hearing, the court denied defendant's petition for modification. While there was some evidence to support the defendant's contention that the child Christian was not his natural child, still the record does not support such a change of circumstances which would entitle the defendant to have the original decree modified. It should be noted that the defendant raised no issue of paternity at the time these proceedings were initiated, nor did the defendant make any such contention when he sought to have the decree modified so as to award to him the custody of Christian as well as the other child. It appears to us that the [**3] defendant is attempting in these proceedings for a modification to have this court review the decree of divorce originally entered after the time for appeal from that decree has long since expired. The defendant attempts to have this court review the record in the case of *Benevidez v. Zimmerman*, which matter appears to have been tried in the district court. It does not appear from the record that the file in that case was before the district court in these proceedings, and it has not been made a part of the record here. That matter cannot be considered by this court.

The decision of the court below is affirmed. Respondent is entitled to costs.

CALLISTER, C.J., and HENRIOD, J., concur.

CONCUR BY: ELLETT


CONCUR

ELLETT, Justice (concurring specially).

I concur, but with the observation that the failure of the defendant to include the *Zimmerman* record does not affect this decision. ¹ It would have been proper evidence in the divorce action, but it would not give any proof of a "change in circumstances" so as to justify a modification of the original divorce decree.

1 It is claimed that the case of Zimmerman established that he was the father of the illegitimate child born to plaintiff prior to her second marriage to the defendant. No issue was raised at the divorce trial as to legitimacy, and the court there found that defendant was the father of the child. No appeal was taken from that ruling, and the defendant cannot under the claim of a change in circumstances relitigate the divorce case.

[**4] CROCKETT, J., concurs in the concurring opinion of ELLETT, J.







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