

2011

Micah John Reller v. Karine Anesia Scholagei Reller v. Francis J. Argenziano : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICAH JOHN RELLER,
Petitioner/Appellee,

vs.

KARINE ANESIA SCHOLAGEI
RELLER,
Respondent/Appellee,

vs.

Francis J. Argenziano,
Intervenor/Appellant.

**JOINT RESPONSIVE BRIEF OF
APPELLEES**

Case No. 20110457

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

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**FILED
UTAH APPELLATE COURTS**

OCT 03 2011

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ISSUES AND STANDARDS OF REVIEW

Issue 1: Whether, after more than year had passed since an adjudication of parentage had been made in a divorce decree, the trial court had subject matter jurisdiction to set aside a default Decree of Divorce.

Standard of Review: Whether the lower court had subject matter jurisdiction to set aside its own previous judgment presents a question of law, which is reviewed for correctness. Case v. Case, 2004 UT App 423, ¶ 5, 103 P.3d 171; Lilly v. Lilly, 2011 UT App 53, 250 P.3d 994.

Issue 2: Whether the Divorce Decree was res judicata on the issue of parentage.

Standard of Review: Whether res judicata bars an action is a question of law that is reviewed for correctness. Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶19, 44 P.3d 663 (citing Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶ 17, 16 P.3d 1214).

Issue 3: Whether the parties to an adjudication of parentage that was made in their decree of divorce are estopped from raising the issue of parentage more than a year after the decree of divorce was entered.

Standard of Review: Estoppel is generally a mixed question of fact and law with differing degrees of deference given to the trial court, depending on several considerations. See Dep't of Human Servs. ex rel. Parker v. Irizarry, 1997 Utah 84, 945 P.2d 676, 678. However, where the estoppel arises as a matter of statute and the facts are undisputed, as here, the matter should be treated as one of statutory construction. "The interpretation of a statute is a question of law," which is reviewed for correctness.

General Constr. & Dev., Inc. v. Peterson Plumbing Supply, 2011 UT 1, ¶5, 248 P.3d 972.

Issue 4: Whether an Intervenor, who has no legally protectable interest in the subject matter of the case, and who was not a party to the marriage, has standing to appeal a final Divorce Decree and Order in which he is not referenced in or bound by.

Standard of Review: Standing is an issue that may be raised for the first time upon appeal. Blodgett v. Zions First Nat'l Bank, 1988 Utah App. 61, ¶6, 752 P.2d 901.

DETERMINATIVE LAW

Determinative Law: U.S. CONST. amend. XIV

See, Addendum A

Determinative Law: UT. CONST. art. VIII, §5

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute.

Determinative Law: UTAH R. CIV. P. 60 (b)

See, Addendum A

Determinative Law: UTAH CODE ANN. § 78B-15-607 (2008).

See, Addendum A

Determinative Law: UTAH CODE ANN. § 78B-15-617 (2008).

See, Addendum A

Determinative Law: UTAH CODE ANN. § 78B-15-623 (2008).

See, Addendum A

STATEMENT OF THE CASE

1. The Appellees were divorced by a Decree of Divorce dated September 12, 2006. (R. at 77-91) Said divorce was a default divorce, reached pursuant to an Agreement of the Appellees.

2. Appellee Micah filed a Petition to Modify the Decree of Divorce seeking a change in primary physical custody of the child on or about July 16, 2007. (R. at 98)

3. In her Answer to that Petition to Modify, Appellee Karine filed a Motion to Dismiss the Petition, which alleged for the first time, that Appellee Micah was not the biological father of the minor child. (R. at 140)

4. On or about October 23, 2007, a motion was filed by Appellee Karine to join Appellant in the action. (R. at 143) The motion was granted, and an order was signed by the Court, joining Appellant on November 2, 2007. (R. at 145)

5. On January 3, 2008, Appellant filed a Motion to Vacate the order joining him as a party to the action. A hearing was held on said motion on March 13, 2008, and Appellant's motion was granted on May 21, 2008, excusing him from the action. (R. at 154-155, 245-248)

6. On July 11, 2008, the Court set aside the Decree of Divorce based upon a stipulation of the Appellees. (R. at 264)

7. Appellee Micah then filed a Motion to Admit Genetic Testing, that had been conducted by the Office of Recovery Services, on or about October 27, 2008. (R. at 271)

8. At a hearing on December 4, 2011, the Court found that the genetic testing was sufficient to exclude Appellee Micah as the father of said child and ordered that it be admitted. (R. at 298)

9. On or about September 3, 2009, the State of Utah commenced a child support/paternity action against Appellant in civil court no. 094903937.

10. For the next two years, there was no action in this divorce case, while Appellant attempted to defend the separate paternity action against him brought by the State of Utah.

11. After the Assistant Attorney General filed the paternity case in the District Court, Appellant filed a Motion to Dismiss, arguing that paternity had already been adjudicated in the present action. That motion was denied by the Commissioner. Subsequently, Appellant objected and the Commissioner's decision was then sustained by the Honorable Judge Peuler. (R. at 476) Judge Peuler entered a minute entry and order which addressed the relevant law and cited this divorce action's proceedings, finding that paternity in this divorce action had been properly adjudicated. (R. at 473-476)

12. In the paternity action, genetic testing was stipulated to by Appellant and Appellee Reller, and results, identifying Appellant as the biological father were filed by the State of Utah on July 13, 2010. (R. at 468, 480, 484 – 489)

13. In the paternity action, temporary orders of custody and support were entered against Appellant. (R. at 528)

14. In the paternity action, September of 2010, Appellant and Appellee Karine reached a settlement agreement wherein Appellant acknowledged and stipulated that *inter alia*, the Court may adjudicate the Appellant as the minor child's father, and awarded Appellant and Appellee Karine joint legal custody of the parties' daughter. (R. at 519-525)

15. A Decree of Paternity was drafted by Appellant attempting to settle the case. (R. at 508-509) However as parent time was not resolved, the Decree was not signed by the Court. Id.

16. Appellant was ordered to pay significant child support and subsequently has vehemently attempted to obtain relief from paying the ordered child support. (R. at 527-530)

17. Approximately two years after the Decree of Bifurcated Divorce was entered, Appellant filed a motion to intervene in this divorce case. (R. at 313-315)

SUMMARY OF THE ARGUMENT

The Appellant lacks standing to bring this case in that there is no stated or argued legally protectable interest that the Appellant has in the outcome of the Divorce Case. Additionally, the Appellant is barred from bringing this case under the doctrine of Res Judicata since the exact same issue and argument were presented, argued and ruled upon in the paternity case.

The entry of the original Decree on September 12, 2006 was not an adjudication of paternity based on statute and corresponding case law. The issue of paternity was not

adjudicated until genetic testing results were admitted into evidence and the court made an evidence based finding that Appellee Micah was excluded as the father of the child. The original Decree was properly set aside and subsequently, the paternity of the child was then properly adjudicated.

If a true adjudication had occurred prior to, or with, the original decree being entered, the Appellant would be correct, however it did not. A clear reading of the entire statute upon which the Appellant relies in his adjudication argument shows that an adjudication of paternity does not occur when a default judgment in a divorce is entered by the Court.

Subject matter for the District Court to hear this matter exists and is incorrectly argued and applied by the Appellant.

The Appellant's attempt to unscrupulously run around the State of Utah's efforts to establish him as the legal father of a child to which he is unquestionably the biological father should not be allowed. Appellant is simply attempting to attack the correct adjudication of paternity in this divorce case to dispute his own paternity. The proper avenue for disputing his paternity is in the paternity case to which he is a party.

ARGUMENT ON APPEAL

I. APPELLANT LACKS STANDING TO BRING THIS APPEAL.

The appellant lacks standing in the present case; accordingly, the appeal should be dismissed. Standing is a threshold issue the Court must address prior to looking at any of

the substantive issues on appeal. “Utah law required that the parties to a lawsuit have a sufficient interest in the subject matter of the dispute in order to confer standing upon them” Terracor v. Utah Bd. Of State Lands & Forestry, 1986 Utah 761, ¶9, 716 P.2d 796. This issue may be raised for the first time upon appeal. Blodgett v. Zions First Nat’l Bank, 1988 Utah App. 61, ¶6, 752 P.2d 901. In the present case the Appellant does not have standing because his own actions preclude him having an interest in this case, and there is no statutory or common law legally protectable interest that Appellant has in Appellees’ divorce.

Wade v. Burke sets forth the three general standards under which standing can be awarded. “[1]The party must be able to show that he or she has suffered some distinct and palpable injury that gives him or her a personal stake in the outcome of the legal dispute. [2] If the party does not have standing under the first criterion, he or she may have standing if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular party has standing to raise the issue. [3] Even though the party may not have standing under the first two criteria, he or she may, nevertheless, have standing if the issues are unique and of such great public importance that they ought to be decided in furtherance of the public interest. . . If the party does not qualify under any of these there tests, we will not render an advisory opinion but will dismiss the action.” Wade v. Burke, 1991 Utah App. 60, ¶9, 800 P.2d 1106.

The Supreme Court has given additional clarification on the issue of standing. In *Jones v. Barlow*, the Court held that “[under] the traditional test for standing, ‘the

interests of the parties must be adverse' and 'the parties must have a legally protectable interest in the controversy'." And that the interest must be "legally protectable under either a statute or the common law." Jones v. Barlow, 2007 Utah 26, 154 P. 3d 808.

The parties attempted to join Appellant in this divorce case, and he objected and asserted that he did not have an interest in the present matter and subsequently as a result of his objection; the order joining him was vacated. (R. at 154-237, 266-270) Commissioner Tack entered a minute entry order vacating his joinder on May 21, 2008. (R. at 268) From that point on, he was not a party and did not seek an interest in this case until nearly two years later when he filed a Motion to Intervene. (R. at 313-315) In fact, a timely objection to the Commissioner's recommendation allowing his recent intervention has been filed, but as a result of this appeal the District Court has declined to hear said objection. (R. at 432)

In the present case, the appellant does not claim a statutory or common law protectable interest. Even if he did state an interest, it is not a protectable one. No statute confers a right to a third party to seek a re-adjudication of paternity to an outsider or that an outsider may set aside a Decree of Divorce. Additionally, Appellant does not claim, nor is there, a legally protectable interest under common law. While Appellant Argenziano does not have standing here, he does have clear standing in the ongoing paternity action, and that is the case in which his rights and responsibilities regarding the minor child should be decided.

In this case the appellant claims no interest in the marital assets, or obligations or custody or visitation of the child, which are the interests addressed by the divorce. The

child is not a subject of the divorce orders and the Appellant did not, and will not, lose any legally protectable interest as a result of the divorce action being finalized. Thus, he does not have a personal stake in the outcome of the divorce under the first prong. Second, he does not have a greater interest in the outcome of the divorce proceeding than the parties. He has no interest in whether or not the parties are divorced or what the terms of the divorce are. Third, similar to the *Wade v. Burke* case where the Court held that “this case is a private dispute without sufficient public importance to confer standing” and without uniqueness or public importance enough that standing ought to be conferred, this case also does not have uniqueness or importance enough to confer standing on the Appellant. Wade at ¶12.

The Utah Supreme Court has indicated that “[t]he purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible.” Gardner v. Gardner, 1988 Utah 15, 748 P.2d 1076. The divorce action is to establish the rights and responsibilities of the Appellees in respect to the dissolution of their marriage. No rights or responsibilities of the Appellant are addressed or established. He is not even referred to in any of the orders that are the subject of the appeal. In fact, in the paternity case, Appellant has been awarded not only visitation rights to the minor child but also joint legal custody of the minor child and is allowed to be actively involved in his 6 year old daughter’s life. His failures to assert or exercise his rights are of his own accord and his rights have not been negatively impacted by the paternity adjudication that occurred in this Divorce. The Court in the present case did not

order or address the issue of support of the child or any other issue regarding the Appellant and thus, Appellant's standing should be denied.

II. THE TRIAL COURT HAD JURISDICTION TO SET ASIDE THE DECREE OF DIVORCE AND TO SUBSEQUENTLY ADJUDICATE APPELLEE MICAH RELLER TO NOT BE THE FATHER OF THE MINOR CHILD.

A. A Stipulated Default Decree of Divorce Does Not Constitute an Adjudication.

An adjudication by a Court requires more than a mere adoption of a stipulation, it requires the receipt of evidence and fact finding by the Court. Phillips ex rel. Utah State Dep't of Soc. Servs. v. Jackson, 1980 Utah 1001, ¶18, 615 P.2d 1228. The parties in this matter stipulated to an entry of a Decree of Divorce, by Respondent's signing of an acceptance of service, appearance, consent and waiver. (R. at 35-37) By consenting to entry of her default, the tribunal or Court, never addressed the issue of paternity of the minor child.

Our Supreme Court has ruled on the issue, and found that stipulated Decrees of Divorce and Decrees of Divorce entered pursuant to a default judgment of one of the parties pursuant to Rule 55 of the Utah Rules of Civil Procedure, are not to be considered adjudicated for a myriad of reasons. See, Elmer v. Elmer, 1989 Utah 33, ¶12, 776 P.2d 599.

In *Elmer*, the Court addressed the issue of child custody, and indicated that the best interests of the minor child were never visited by the Court as it took no evidence, but merely adopted the agreement reached by the parties. Id. In the present case, the same principal holds true, as the Court never addressed or took evidence as pertaining to the issue of a determination of paternity. The Court merely applied the marital presumption of paternity set forth in UTAH CODE ANN. § 78B-15-201, adopted the agreement of the parties and signed the Decree of Divorce without the Court adjudicating said issue.

B. The Appellees Were Not Estopped From Raising the Issue of Parentage under the Utah Parentage Act.

The parties were not estopped from raising the issue of parentage. If the issue of parentage has been raised in divorce pleadings and the tribunal has addressed the issue and entered 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). However, in this case the matter had not been adjudicated by the tribunal and the issue was not challenged on the basis of material mistake of fact.

In a proceeding to dissolve marriage, the tribunal is considered to have made an adjudication of parentage if the question of parentage is raised and the tribunal adjudicates according to Part 6, “Adjudication of Parentage”, of the Utah Parentage Act and the final order either expressly identifies a child as a child of the marriage or provides support. UTAH CODE ANN. § 78B-15-623(3). Part 6 of the Utah Parentage Act consists of Utah Code sections 78B-15-601 through 78B-15-623, and more specifically Utah Code

sections 78B-15-617 through 78B-15-621, which are titled “Adjudication of Parentage.” To adjudicate the paternity of a child, a presumed or declared father may be disproved only by admissible results of genetic testing excluding that man as the father or identifying another man as the father. UTAH CODE ANN. § 78B-15-617(1). Additionally, the Utah Uniform Parentage Act sets the standard of proof to establish paternity as by “clear and convincing evidence,” inferring that fact finding is necessary to constitute an adjudication. See, UTAH CODE ANN. § 78B-15-112.

At 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. Appellant argues that the original stipulated Decree was adjudicated, and in setting out the applicable law, truncates the statute, leaving out crucial language thereby, misstating the law: “The divorce court is deemed to have adjudicated paternity if “the final order: (a) expressly identifies a child as a ‘child of the marriage...; or (b) provides for support by the husband.” (Br. for Appellant at 15) Appellant inadvertently or intentionally leaves out the statutory language that also requires the tribunal adjudicate according to Part 6 of the Act. A complete reading of the statute, as set out above, reveals that the issue of parentage had not, in fact, been adjudicated in the original Decree as Appellant argues. In fact, after the original Decree was set aside, the Court then received evidence in the form of genetic testing results excluding Appellee Micah Reller as father. (R. at 298) Only then was the issue of parentage adjudicated according to the statute.

Furthermore, Appellant’s argument is misguided in that Appellees did not have to challenge paternity based on mistake of fact. Instead, the original stipulated Decree was

properly set aside, and the issue of paternity was raised by the parties' for the first time in accordance with the Utah Parentage Act.

C. The Trial Court Properly Set Aside the Original Decree of Divorce According to Relevant Case Law and the Utah Rules of Civil Procedure.

The Court had jurisdiction to order the relief requested in Appellees' Stipulation to Set Aside Decree of Divorce. Stipulation agreements pertaining to matters of divorce, custody, and property rights will usually be adopted unless the court determines that the agreement is unfair or unreasonable. Bryner v. Bryner, 2009 Utah App. 217, ¶2. Courts may, in the furtherance of justice, and by motion or on its own accord, relieve a party from a final judgment and order for a variety of reasons, including any reason justifying relief from the judgment or order and or fraud. See, UTAH R. CIV. P. 60(b)(6). Furthermore, there is no time limit on the court's ability to set aside a judgment under UTAH R. CIV. P. 60(b)(6). See Id.

In this case, the trial court, being fully advised and for good cause, entered the Order Setting Aside the Decree of Divorce on July 11, 2008. (R. at 264) In fact, in an earlier minute entry and order, the Commissioner indicated that the issue of paternity would be properly before the court in accordance with 78B-15-623(6), if the original Decree was set aside. (See R. 268 at ¶10) Based on that order of the Court, and considering a range of intimate facts surrounding Appellee's divorce, Appellees agreed it was in their interest, and the interest of the child, to set aside the default Decree. Some of those facts may have included that Appellee Karine was aware prior to her divorce from

Appellee Micah that he was not the father of the minor child and did not disclose that to the Court or to Appellee Micah. (R. at 139-142) In as much, Appellee Micah believed Appellee Karine's conduct to constitute a fraud upon him and the Court. Accordingly, Appellees realized there was a basis in law and fact, and entered into settlement negotiations, which resulted in the stipulation setting aside the original decree. Appellee Micah, wishing to properly adjudicate his paternity, he motioned the Court to admit genetic testing excluding him as the father of the minor child. (R. at 301-303)

Requests to set aside a judgment or decree pursuant to Rule 60(b) must be made within a reasonable time. See, Richens v. Delbert, Chipman, & Sons, 1991 Utah App. 124, 817 P. 2d 382. Appellee Micah first received the news that he may not be the father of the minor child in early November of 2007. (R. at 139-142) Appellee Karine attempted to join Appellant in this matter in late October 2007. (R. at 143-144) Appellant sought to vacate the order joining him as a party to this matter. (R. at 154-156, 157-237) Appellant prevailed on his motion to vacate the order joining him as a party at a hearing held on March 13, 2008. (R. at 245-248) Appellant was, on his own motion, excused from this case on May 21, 2008. (R. at 245-247) Subsequently, upon receipt of genetic testing result which by clear and convincing evidence excluded Appellee Micah as the biological father of the minor child, the parties sought entry of the Bifurcated Decree of Divorce as Appellees had remaining personal property and financial issues which were not yet resolved between them. The Bifurcated Decree of Divorce *inter alia*, disposed of the issue of paternity of the minor child and divorced the parties upon appropriate grounds

and within a reasonable time after Appellee Micah learned of the paternity issue. (R. at 308-310)

The fact that the original Decree was set aside, invalidates Appellant's argument that Appellees were estopped from raising the issue of paternity. Appellant provides a lengthy argument that the parties were estopped from "modifying" "challenging" or "collaterally attacking" paternity. (See Br. for Appellant at Sections I-III) None of these arguments are relevant if the court properly set aside the original Decree. Once the Decree was set aside, whether under the Utah Parentage Act, Utah Rule of Civil Procedure 60(b), or relevant case law, the issue of paternity was properly before the court.

D. The Court Had Subject Matter Jurisdiction to Set Aside, and Then Properly Adjudicate Paternity.

Appellant bases his subject matter argument on the underlying argument that the trial court's order setting aside the original decree was in error. However, in *Johnson v. Johnson*, the Supreme Court rejected such a broad view of subject matter jurisdiction challenge and held that "[t]he concept of subject matter jurisdiction does not embrace all cases where the court's competence is at issue." Johnson v. Johnson, 2010 UT 28, ¶9, 234 P.3d 1100.

In *Baby E.Z. v. T.I.Z.*, the Court held that "[a] court has subject matter jurisdiction when it has "the authority . . . to decide the case." Baby E.Z. v. T.I.Z., 2011 UT 38, ¶30. And that "[t]he Utah Constitution vests the judicial power of the state in the....district court" and "[t]he district court shall have original jurisdiction in all matters except as

limited by this constitution or by the statute.” Id. at ¶31. No statute, including the Utah Parentage Act, limits the authority the district court has to decide paternity matters. The Court has “limited the concept of subject matter jurisdiction to those cases in which the court lacks authority to hear a class of cases, rather than when it simply lacks authority to grant relief in an individual case.” Id.

Appellant argues that because the case had been previously adjudicated, this divested the District Court from the authority to set aside the Decree or enter into a new Decree that disestablished appellee Micah as the presumed legal father. This does not hold. Even if the Court had misinterpreted the statute or not followed the law, the Court would still have subject matter jurisdiction to make decisions and orders in the divorce case. Appellant’s argument that the trial court did not have subject matter jurisdiction is actually an attack on the trial court’s competence. Since the District Court clearly has the authority to decide matters of parentage and paternity, subject matter jurisdiction over the present matter exists in this case.

Furthermore, the issue of subject matter jurisdiction was previously addressed and ruled on by the Honorable Judge Sandra Peuler in the paternity case. (R. at 473-476) Appellant is seeking a second bite at the apple by intervening in this action for the purpose of filing this appeal.

E. The Appellees Were Not Estopped From Raising the Issue of Paternity under the Doctrine of *Res Judicata*.

The doctrine of *res judicata* is not applicable because the issue of paternity was not adjudicated. When there has been an adjudication, it becomes *res judicata* as to those

issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present an issue and have it determined. Jacobsen v Jacobsen, 1985 Utah 860, ¶4, 703 P.2d 303 (citing Mendenhall v Kingston, 1980 Utah 919, 610 P.2d 1090). In a proceeding to dissolve marriage, the tribunal is considered to have made an adjudication of parentage if the question of parentage is raised and the tribunal adjudicates according to Part 6, “Adjudication of Parentage”, of the Utah Parentage Act and the final order either expressly identifies a child as a child of the marriage or provides support. UTAH CODE ANN. § 78B-15-623(3).

As demonstrated above, the original default Decree of Divorce was not adjudicated. Both case law and the Utah Parentage Act support the conclusion that a stipulated default divorce decree does not constitute an adjudication of paternity. Therefore, the issue was not barred by the doctrine of *res judicata*.

III. IF THE COURT WERE TO RULE IN FAVOR OF APPELLANT, IT WOULD SET A DANGEROUS PUBLIC POLICY THAT WOULD BE INEQUITABLE AND WOULD NOT CONFORM TO THE MORALS AND STANDARDS OF THIS STATE/COMMUNITY.

The most poignant statement made by Appellant in his entire brief is “Micah Reller may not be the child’s father.” (Br. of Appellant at 26) Appellee Micah Reller is not the minor child’s father. As stated here and above, Appellee Micah was twice excluded as the father of the minor child by genetic testing.

Appellant is the father of the minor child. This was established by genetic testing which the Appellant stipulated to and was provided to the court. (R. at 378 – 478) The

results of the genetic testing established him as the father by 99.99% probability. (R. at 378)

Appellant correctly cites in his brief the argument that the presumption of legitimacy is so strong that to rebut it requires proof to the contrary beyond a reasonable doubt. Lopes v. Lopes, 1974 Utah 676, ¶1, 518 P. 2d 687. Such a presumption has been rebutted in the instant case pursuant to genetic testing of the minor child, Appellee Micah and the Appellant. (R. at 304-307)

The only party who is attempting to illegitimatize the minor child is the child's biological father, the Appellant. Appellant has even signed a stipulation and been awarded parent time rights with the minor child in the paternity action. (R. at 496-506, 512) Appellee Micah Reller has no relationship with the minor child, and has not had a relationship with the minor child for almost the entirety of her life; nor will he ever have one. The child is not his, regardless of how the Court rules. This Court has held that:

...where one party to the controversy is a nonparent, there is a presumption in favor of the natural parent. The presumption recognizes the natural right and authority of the parent to the child's custody. It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else. Marchand v. Marchand, 2006 Utah App. 429.

The net effect of the Court's ruling will impact this child. Appellee Micah Reller will not form a bond with a child that is not his, and with whom he has never had a significant relationship. Appellant, being the child's biological father will be more likely to share a strong attachment with the minor child. Appellee Micah Reller has not

established a parent-child relationship with the minor child, because the child was an infant when the parties' separated, and he has not seen her since. Accordingly, for the Court to continue to enforce the current and final order of the Court would not be disruptive or unnecessary as the Court sets forth in *Pearson* as cited by Appellant. See, Pearson v. Pearson, 2008 Utah 53, 182 P. 3d 353.

Probably the most prejudicial argument and inequitable policy that would be adopted if the Court were to rule in favor of Appellant, would be that the Court would create a precedent that would permit an individual to in bad faith, invade a marriage, engage in extramarital sexual relations with a party to the marriage which results in pregnancy, and then require the innocent spouse to provide financial support to a child not his own for the remainder of that child's minority, while permitting the party who engaged in the bad faith conduct to escape any responsibility for his child. The same just cannot stand, and smacks against the very policy of the Utah Uniform Parentage Act. Appellees argue that it was never the intent of the legislature to create such a precedent. Appellee Karine did not pursue child support from Appellant due to him being "a more wealthy man," as argued by Appellant. (Br. for Appellant at 19) She pursued child support from the biological father of the child. Appellant's argument is in bad faith, and should permit the Appellees of limited resources and means to recover attorney's fees and costs of Court against Appellant, especially in light of the repeated attempts to litigate and re-litigate the same issues in two (2) different civil court cases.

Appellees believe that it was not the intent of the Legislature to make it less difficult for parties who are not married, and conceive or father children, to determine


appropriate parentage than for married couples. See, UTAH CODE ANN. § 78B-15-306 through § 307; and UTAH CODE ANN. § 78B-15-607. The same would have the effect of discriminating against married versus unmarried potential parents by placing additional restrictions and making it more difficult for parties who have been married to challenge paternity of a child who may not be their biological child. The same may be construed as a violation of the Equal Protection Clause. See also, U.S. CONST. amend. XIV.

CONCLUSION

A stipulated default entry of a Decree of Divorce does not constitute an adjudicated, finding of paternity. The Court appropriately set aside the Decree of Divorce in the matter pursuant to either Rule 60(b) of the Utah Rules of Civil Procedure or pursuant to the Utah Uniform Parentage Act, or both. The Court also appropriately ordered genetic testing and entered findings after evidence was presented as to whether or not Appellee Micah Reller was the father of the minor child. Additionally, Appellant lacks standing to bring this appeal and should be barred by the doctrines of collateral estoppel and *res judicata* as he has already had a full and fair opportunity to litigate all issues within this appeal in another matter, has done so, and is attempting to re-litigate the issues here and now. Accordingly, as Appellant has presented these arguments in bad faith, Appellees should be awarded their costs and attorney's fees for having to defend against this appeal.

DATED this 3rd day of October, 2011.

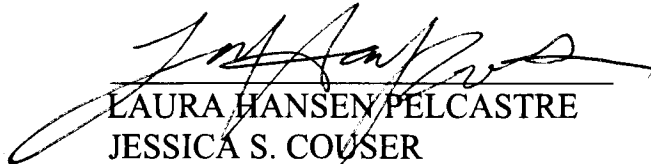
WALL & WALL



NATHAN B. WALL
Attorney for Appellee,
Micah Reller

DATED this 3rd day of October, 2011.

JUST LAW, PLLC



LAURA HANSEN PELCASTRE
JESSICA S. COUSER
Attorney for Appellee,
Karine Anesia Schlagei Reller

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 3rd day of October, 2011, I hand-delivered a true and correct copy of the foregoing **JOINT RESPONSIVE BRIEF OF APPELLEES** to the following:

James A. McIntyre
Richard R. Golden
McIntyre & Golden, P.C.
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Jessy Ken

ADDENDUM A

U.S. CONST. amend. XIV

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UTAH CODE ANN. §78B-15-112 (2008)

Standard of proof.

The standard of proof in a trial to determine paternity is "by clear and convincing evidence."

UTAH CODE ANN. §78B-15-201 (2008)

Establishment of parent-child relationship.

(1) The mother-child relationship is established between a woman and a child by:

(a) the woman's having given birth to the child, except as otherwise provided in

Part 8, Gestational Agreement;

(b) an adjudication of the woman's maternity;

(c) adoption of the child by the woman; or

(d) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under Part 8, Gestational Agreement, or is enforceable under other law.

(2) The father-child relationship is established between a man and a child by:

(a) an un rebutted presumption of the man's paternity of the child under

Section 78B-15-204;

(b) an effective declaration of paternity by the man under Part 3, Voluntary Declaration of Paternity, unless the declaration has been rescinded or successfully challenged;

(c) an adjudication of the man's paternity;

(d) adoption of the child by the man;

(e) the man having consented to assisted reproduction by a woman under Part 7, Assisted Reproduction, which resulted in the birth of the child; or

(f) an adjudication confirming the man as a parent of a child born to a gestational

mother if the agreement was validated under Part 8, Gestational Agreement, or is enforceable under other law.

UTAH CODE ANN. §78B-15-306 (2008)

Proceeding for rescission.

(1) A signatory may rescind a declaration of paternity or denial of paternity by filing a voluntary rescission document with the Office of Vital Records in a form prescribed by the office before the earlier of:

(a) 60 days after the effective date of the declaration or denial, as provided in Sections 78B-15-303 and 78B-15-304; or

(b) the date of notice of the first adjudicative proceeding to which the signatory is a party, before a tribunal to adjudicate an issue relating to the child, including a proceeding that establishes support.

(2) Upon receiving a voluntary rescission document from a signatory under Subsection (1), the Office of Vital Records shall provide notice of the rescission, by mail, to the other signatory at the last-known address of that signatory.

UTAH CODE ANN. §78B-15-307 (2008)

Challenge after expiration of period for rescission.

(1) After the period for rescission under Section 78B-15-306 has expired, a

signatory of a declaration of paternity or denial of paternity, or a support-enforcement agency, may commence a proceeding to challenge the declaration or denial only on the basis of fraud, duress, or material mistake of fact.

(2) A party challenging a declaration of paternity or denial of paternity has the burden of proof.

(3) A challenge brought on the basis of fraud or duress may be commenced at any time.

(4) A challenge brought on the basis of a material mistake of fact may be commenced within four years after the declaration is filed with the Office of Vital Records. For the purposes of this Subsection (4), if the declaration of paternity was filed with the Office of Vital Records prior to May 1, 2005, a challenge may be brought within four years after May 1, 2005.

(5) For purposes of Subsection (4), genetic test results that exclude a declarant father or that rebuttably identify another man as the father in accordance with Section 78B-15-505 constitute a material mistake of fact.

UTAH CODE ANN. §78B-15-601 (2008)

Proceeding authorized -- Definition

(1) An adjudicative proceeding may be maintained to determine the parentage of a child. A judicial proceeding is governed by the rules of civil procedure. An administrative proceeding is governed by Title 63G, Chapter 4, Administrative

Procedures Act.

(2) For the purposes of this part, "divorce" also includes an annulment.

UTAH CODE ANN. §78B-15-602 (2008)

Standing to maintain proceeding.

Subject to Part 3, Voluntary Declaration of Paternity, and Sections 78B-15-607 and 78B-15-609, a proceeding to adjudicate parentage may be maintained by:

- (1) the child;
- (2) the mother of the child;
- (3) a man whose paternity of the child is to be adjudicated;
- (4) the support-enforcement agency or other governmental agency authorized by other law;
- (5) an authorized adoption agency or licensed child-placing agency;
- (6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; or
- (7) an intended parent under Part 8, Gestational Agreement.

UTAH CODE ANN. §78B-15-603 (2008)

Parties to proceeding.

The following individuals shall be joined as parties in a proceeding to adjudicate parentage:

- (1) the mother of the child;
- (2) a man whose paternity of the child is to be adjudicated; and
- (3) the state pursuant to Section 78B-12-113.

UTAH CODE ANN. §78B-15-604 (2008)

Personal jurisdiction.

(1) An individual may not be adjudicated to be a parent unless the tribunal has personal jurisdiction over the individual.

(2) A tribunal of this state having jurisdiction to adjudicate parentage may exercise personal jurisdiction over a nonresident individual, or the guardian or conservator of the individual, if the conditions prescribed in Section 78B-14-201 are fulfilled, or the individual has signed a declaration of paternity.

(3) Lack of jurisdiction over one individual does not preclude the tribunal from making an adjudication of parentage binding on another individual over whom the tribunal has personal jurisdiction.

UTAH CODE ANN. §78B-15-605 (2008)

Venue.

Venue for a judicial proceeding to adjudicate parentage is in the county of this state in which:

- (1) the child resides or is found;
- (2) the respondent resides or is found if the child does not reside in this state; or
- (3) a proceeding for probate or administration of the presumed or alleged father's estate has been commenced.

UTAH CODE ANN. §78B-15-606 (2008)

No limitation -- Child having no declarant or adjudicated father.

A proceeding to adjudicate the parentage of a child having no declarant or adjudicated father may be commenced at any time. If initiated after the child becomes an adult, only the child may initiate the proceeding.

UTAH CODE ANN. §78B-15-607 (2008)

Limitation -- Child having presumed father.

(1) Paternity of a child conceived or born during a marriage with a presumed father as described in Subsection 78B-15-204(1)(a),(b), or (c), may be raised by the

presumed father or the mother at any time prior to filing an action for divorce or in the pleadings at the time of the divorce of the parents.

(a) If the issue is raised prior to the adjudication, genetic testing may be ordered by the tribunal in accordance with Section 78B-15-608. Failure of the mother of the child to appear for testing may result in an order allowing a motherless calculation of paternity. Failure of the mother to make the child available may not result in a determination that the presumed father is not the father, but shall allow for appropriate proceedings to compel the cooperation of the mother. If 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.

(b) If the presumed father seeks to rebut the presumption of paternity, then denial of a motion seeking an order for genetic testing or a decision to disregard genetic test results shall be based on a preponderance of the evidence.

(c) If the mother seeks to rebut the presumption of paternity, the mother has the burden to show by a preponderance of the evidence that it would be in the best interests of the child to disestablish the parent-child relationship.

(2) For the presumption outside of marriage described in Subsection 78B-15-204(1)(d), the presumption may be rebutted at any time if the tribunal determines that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception.

(3) The presumption may be rebutted by:

- (a) genetic test results that exclude the presumed father;
 - (b) genetic test results that rebuttably identify another man as the father in accordance with Section 78B-15-505;
 - (c) evidence that the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; or
 - (d) an adjudication under this part.
- (4) There is no presumption to rebut if the presumed father was properly served and there has been a final adjudication of the issue.

UTAH CODE ANN. §78B-15-608 (2008)

Authority to deny motion for genetic testing or disregard test results.

(1) In a proceeding to adjudicate the parentage of a child having a presumed father or to challenge the paternity of a child having a declarant father, the tribunal may deny a motion seeking an order for genetic testing of the mother, the child, and the presumed or declarant father, or if testing has been completed, the tribunal may disregard genetic test results that exclude the presumed or declarant father if the tribunal determines that:

- (a) the conduct of the mother or the presumed or declarant father estops that party from denying parentage; and
- (b) it would be inequitable to disrupt the father-child relationship between the

child and the presumed or declarant father.

(2) In determining whether to deny a motion seeking an order for genetic testing or to disregard genetic test results under this section, the tribunal shall consider the best interest of the child, including the following factors:

(a) the length of time between the proceeding to adjudicate parentage and the time that the presumed or declarant father was placed on notice that he might not be the genetic father;

(b) the length of time during which the presumed or declarant father has assumed the role of father of the child;

(c) the facts surrounding the presumed or declarant father's discovery of his possible nonpaternity;

(d) the nature of the relationship between the child and the presumed or declarant father;

(e) the age of the child;

(f) the harm that may result to the child if presumed or declared paternity is successfully disestablished;

(g) the nature of the relationship between the child and any alleged father;

(h) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and

(i) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or declarant father or the chance of other harm to the child.

(3) If the tribunal denies a motion seeking an order for genetic testing or disregards genetic test results that exclude the presumed or declarant father, it shall issue an order adjudicating the presumed or declarant father to be the father of the child.

UTAH CODE ANN. §78B-15-609 (2008)

Limitation -- Child having declarant father.

(1) If a child has a declarant father, a signatory to the declaration of paternity or denial of paternity or a support-enforcement agency may commence a proceeding seeking to rescind the declaration or denial or challenge the paternity of the child only within the time allowed under Section 78B-15-306 or 78B-15-307.

(2) A proceeding under this section is subject to the application of the principles of estoppel established in Section 78B-15-608.

UTAH CODE ANN. §78B-15-610 (2008)

Joinder of judicial proceedings.

(1) Except as otherwise provided in Subsection (2), a judicial proceeding to adjudicate parentage may be joined with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, divorce, annulment, legal separation or separate maintenance, probate or administration of an estate, or other

appropriate proceeding.

(2) A respondent may not join a proceeding described in Subsection (1) with a proceeding to adjudicate parentage brought under Title 78B, Chapter 14, Uniform Interstate Family Support Act.

UTAH CODE ANN. §78B-15-611 (2008)

Proceeding before birth.

A proceeding to determine parentage may be commenced before the birth of the child, but may not be concluded until after the birth of the child. The following actions may be taken before the birth of the child:

- (1) service of process;
- (2) discovery; and
- (3) except as prohibited by Section 78B-15-502, collection of specimens for genetic testing.

UTAH CODE ANN. §78B-15-612 (2008)

Child as party -- Representation.

(1) A minor child is a permissible party, but is not a necessary party to a proceeding under this part.

(2) The tribunal may appoint a guardian ad litem to represent a minor or

incapacitated child if the child is a party or the tribunal finds that the interests of the child are not adequately represented.

UTAH CODE ANN. §78B-15-613 (2008)

Admissibility of results of genetic testing -- Expenses.

(1) Except as otherwise provided in Subsection (3), a record of a genetic-testing expert is admissible as evidence of the truth of the facts asserted in the report unless a party objects to its admission within 14 days after its receipt by the objecting party and cites specific grounds for exclusion. Unless a party files a timely objection, testimony shall be in affidavit form. The admissibility of the report is not affected by whether the testing was performed:

- (a) voluntarily or pursuant to an order of the tribunal; or
- (b) before or after the commencement of the proceeding.

(2) A party objecting to the results of genetic testing may call one or more genetic-testing experts to testify in person or by telephone, video conference, deposition, or another method approved by the tribunal. Unless otherwise ordered by the tribunal, the party offering the testimony bears the expense for the expert testifying.

(3) If a child has a presumed or declarant father, the results of genetic testing are inadmissible to adjudicate parentage unless performed:

- (a) pursuant to Section 78B-15-503;
- (b) within the time periods set forth in this chapter; and

(c) pursuant to a tribunal order or administrative process; or

(d) with the consent of both the mother and the presumed or declarant father.

(4) If a child has an adjudicated father, the results of genetic testing are inadmissible to challenge paternity except as set forth in Sections 78B-15-607 and 78B-15-608.

(5) Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and child which are furnished to the adverse party not less than 10 days before the date of a hearing are admissible to establish:

(a) the amount of the charges billed; and

(b) that the charges were reasonable, necessary, and customary.

UTAH CODE ANN. §78B-15-614 (2008)

Consequences of failing to submit to genetic testing.

(1) An order for genetic testing is enforceable by contempt.

(2) If an individual whose paternity is being determined fails to submit to genetic testing ordered by the tribunal, the tribunal for that reason may adjudicate parentage contrary to the position of that individual.

(3) Genetic testing of the mother of a child is not a condition precedent to testing the child and a man whose paternity is being determined. If the mother is unavailable or

fails to submit to genetic testing, the tribunal may order the testing of the child and every man who is potentially the father of the child.

UTAH CODE ANN. §78B-15-615 (2008)

Admission of paternity authorized.

(1) A respondent in a proceeding to adjudicate parentage may admit to the paternity of a child by filing a pleading to that effect or by admitting paternity under penalty of perjury when making an appearance or during a hearing.

(2) If the tribunal finds that the admission of paternity satisfies the requirements of this section and finds that there is no reason to question the admission, the tribunal shall issue an order adjudicating the child to be the child of the man admitting paternity.

UTAH CODE ANN. §78B-15-616 (2008)

Temporary order.

(1) In a proceeding under this part, the tribunal shall issue a temporary order for support of a child if the order is appropriate and the individual ordered to pay support is:

- (a) a presumed father of the child;
- (b) petitioning to have his paternity adjudicated;
- (c) identified as the father through genetic testing under Section 78B-15-505;

- (d) an alleged father who has failed to submit to genetic testing;
- (e) shown by clear and convincing evidence to be the father of the child; or
- (f) the mother of the child.

(2) A temporary tribunal order may include provisions for custody and visitation as provided by other laws of this state.

UTAH CODE ANN. §78B-15-617 (2008)

Rules for adjudication of paternity

The tribunal shall apply the following rules to adjudicate the paternity of a child:

(1) The paternity of a child having a presumed, declarant, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.

(2) Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man identified as the father of a child under Section 78B-15-505 must be adjudicated the father of the child, unless an exception is granted under Section 78B-15-608.

(3) If the tribunal finds that genetic testing under Section 78B-15-505 neither identifies nor excludes a man as the father of a child, the tribunal may not dismiss the proceeding. In that event, the tribunal shall order further testing.

(4) Unless the results of genetic testing are admitted to rebut other results of

genetic testing, a man properly excluded as the father of a child by genetic testing must be adjudicated not to be the father of the child.

UTAH CODE ANN. §78B-15-618 (2008)

Adjudication of parentage -- Jury trial prohibited.

A jury trial is prohibited to adjudicate paternity of a child.

UTAH CODE ANN. §78B-15-619 (2008)

Adjudication of parentage -- Hearings -- Inspection of records.

(1) On request of a party and for good cause shown, the tribunal may close a proceeding under this part.

(2) A final order in a proceeding under this part is available for public inspection. Other papers and records are available only with the consent of the parties or on order of the tribunal for good cause.

UTAH CODE ANN. §78B-15-620 (2008)

Adjudication of parentage -- Order on default.

The tribunal shall issue an order adjudicating the paternity of a man who:

- (1) after service of process, is in default; and
- (2) is found by the tribunal to be the father of a child.

UTAH CODE ANN. §78B-15-621 (2008)

Adjudication of parentage -- Dismissal for want of prosecution.

The tribunal may issue an order dismissing a proceeding commenced under this chapter for want of prosecution only without prejudice. An order of dismissal for want of prosecution purportedly with prejudice is void and has only the effect of a dismissal without prejudice.

UTAH CODE ANN. §78B-15-622 (2008)

Order adjudicating parentage.

- (1) The tribunal shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.
- (2) An order adjudicating parentage must identify the child by name and date of birth.
- (3) Except as otherwise provided in Subsection (4), the tribunal may assess filing fees, reasonable attorney fees, fees for genetic testing, other costs, necessary travel, and other reasonable expenses incurred in a proceeding under this part. The tribunal may

award attorney fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

(4) The tribunal may not assess fees, costs, or expenses against the support-enforcement agency of this state or another state, except as provided by law.

(5) On request of a party and for good cause shown, the tribunal may order that the name of the child be changed.

(6) If the order of the tribunal is at variance with the child's birth certificate, the tribunal shall order the Office of Vital Records to issue an amended birth registration.

UTAH CODE ANN. §78B-15-623 (2008)

Binding effect of determination of parentage.

(1) Except as otherwise provided in Subsection (2), a determination of parentage is binding on:

(a) all signatories to a declaration or denial of paternity as provided in Part 3, Voluntary Declaration of Paternity; and

(b) all parties to an adjudication by a tribunal acting under circumstances that satisfy the jurisdictional requirements of Section 78B-14-201.

(2) A child is not bound by a determination of parentage under this chapter unless:

(a) the determination was based on an un-rescinded declaration of paternity and the declaration is consistent with the results of genetic testing;

(b) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or

(c) the child was a party or was represented in the proceeding determining parentage by a guardian ad litem.

(3) In a proceeding to dissolve a marriage, the tribunal is considered to have made an adjudication of the parentage of a child if the question of paternity is raised and the tribunal adjudicates according to Part 6, Adjudication of Parentage, and the final order:

(a) expressly identifies a child as a "child of the marriage," "issue of the marriage," or similar words indicating that the husband is the father of the child; or

(b) provides for support of the child by the husband unless paternity is specifically disclaimed in the order.

(4) The tribunal is not considered to have made an adjudication of the parentage of a child if the child was born at the time of entry of the order and other children are named as children of the marriage, but that child is specifically not named.

(5) Once the paternity of a child has been adjudicated, an individual who was not a party to the paternity proceeding may not challenge the paternity, unless:

(a) the party seeking to challenge can demonstrate a fraud upon the tribunal;

(b) the challenger can demonstrate by clear and convincing evidence that the challenger did not know about the adjudicatory proceeding or did not have a reasonable opportunity to know of the proceeding; and

(c) there would be harm to the child to leave the order in place.

(6) A party to an adjudication of paternity may challenge the adjudication only under law of this state relating to appeal, vacation of judgments, or other judicial review.

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Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior

judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.