

2010

# Gayle M. Burns and I.M.B. v. Michael Astrue : Appellant's Responsive Brief

Utah Supreme Court

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GAYLE M. BURNS and I.M.B.,  
a minor child,

VS.

**Defendant/Appellee.**

2:09cv00926 DAK

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**IN THE UTAH SUPREME COURT**

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GAYLE M. BURNS and I.M.B.,  
a minor child,  
  
Plaintiffs/Appellants,

vs.

MICHAEL ASTRUE,  
Commissioner of Social Security,  
  
Defendant/Appellee.

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**APPELLANTS'  
RESPONSIVE BRIEF**

No. 20100435-SC

2:09cv00926 DAK

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**CERTIFIED QUESTION FROM THE  
UNITED STATES FEDERAL DISTRICT COURT,  
DISTRICT OF UTAH,  
JUDGE DALE A. KIMBALL PRESIDING**

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## I.

### PARTIES TO THE APPEAL

The parties to this certified question are the Plaintiffs/Appellants, Gayle Burns, and I.M.B, a minor (hereinafter “Burns” or “Appellants”), and the defendant Michael J. Astrue, Commissioner of Social Security (hereinafter “Agency”).

## II.

### TABLE OF CONTENTS

	<u>Page No.</u>
PARTIES TO THE APPEAL .....	i
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii - iv
OPENING BRIEF .....	1
JURISDICTION .....	1
STATEMENT OF ISSUE AND STANDARD OF REVIEW .....	1
DETERMINATIVE STATUTES .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	5
SUMMARY OF THE ARGUMENT .....	8
RESPONSIVE ARGUMENT .....	8
CONCLUSION AND REQUEST FOR RELIEF .....	17

CERTIFICATE OF SERVICE .....	18
------------------------------	----

## ADDENDUM

### III.

#### TABLE OF AUTHORITIES

#### Page No.

#### Cases:

<u>Bonner County vs. Panhandle Rodeo Association, Inc.</u> , 101 Idaho 772, 620 P.2d 1102, 1106, 1980 .....	11
<u>Egbert v. Nissan North America, Inc.</u> , 2007, 167 P3d. 1058, 585 Ut. Adv. Rep. 2007 UT 64 .....	2
<u>Gilmore v. Macy</u> , 121 P.3rd 57, 2005 Ut.App.351 .....	12
<u>Gray vs. Zurich Insurance Company</u> , 65 Cal.2d 263, 54 Cal.Rptr. 104, 107, 419 P.2d 168, 171 (1966) .....	11
<u>Hoffman v. Life Ins. Co. of N. America</u> , 669 P.2d 410, 417 (Utah 1983) .....	15
<u>In the Matter of [I.M.B.] (DOB 12/23/03), a minor child</u> , Case No. 074904953, Third Judicial District Court, Salt Lake County, Utah (2007) .....	7
<u>In the Matter of the Estate of Michael Burns (DOD 3/24/01)</u> , Case No. 083900243, Third Judicial District Court, Salt Lake County, Utah (2008) .....	7
<u>Nielson v. Gold's Gym</u> , 78 P.3rd 600, 2003 UT 37, para 7 .....	12
<u>Wagner vs. Farmers Insurance Exchange</u> , 786 P.2d 763, Ut.Ct.App 1990 .....	10, 11
<u>Ward v. Intermountain Farmers Ass'n</u> , 907 P.2d 264, 268, UT 1995 .....	12

**Statutes and Rules:**

20 CFR 404.988 .....	4
20 CFR 404.989 .....	4
Utah Code Annotated §68-3-2 .....	16
Utah Code Annotated §78B-15-102(1)(3)(5)(6)(9)(18)(22) and (26) .....	2
Utah Code Annotated §78B-15-104 .....	2
Utah Code Annotated §78B-15-201(2) .....	3
Utah Code Annotated §78B-15-202 .....	3
Utah Code Annotated §78B-15-703 .....	3
Utah Code Annotated §78B-15-704(1) .....	3, 8
Utah Code Annotated §78B-15-707 .....	1, 3, 8, 9, 16, 17
Utah Rules of Appellate Procedure 41(a) .....	1, 4
Utah Rules of Appellate Procedure 41(c) .....	1

**Other:**

Black's Law Dictionary 561 (9 <sup>th</sup> ed. 2009) .....	10
Black's Law Dictionary 757 (9 <sup>th</sup> ed. 2009) .....	10
Black's Law Dictionary 847 (9 <sup>th</sup> ed. 2009) .....	10

## OPENING BRIEF

### IV.

#### JURISDICTION

Original jurisdiction upon this matter is vested in the Utah Supreme Court pursuant to Rule 41, Utah R.App.(a) and (c), Utah Code Annotated 1953.

Rule 41, Utah R.App.P. (a). **Authorization to answer questions of law.** The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

Rule 41 Utah R.App.P.(c). **Certification order.**

(c)(1) A certification order shall be directed to the Utah Supreme Court and shall state:

- (c)(1)(A) the question of law to be answered;
- (c)(1)(B) that the question certified is a controlling issue of law in a proceeding pending before the certifying court; and
- (c)(1)(C) that there appears to be no controlling Utah law.

### V.

#### STATEMENT OF ISSUE AND STANDARD OF REVIEW

The question certified to the Utah Supreme Court:

**Is a signed agreement to donate preserved sperm to the donor's wife in the event of his death sufficient to constitute 'consent' in a record to being the 'parent' of a child conceived by artificial means after the donor's death under Utah intestacy law, Utah Code Ann. §78B-15-707**

Traditional standards of review do not apply to certified questions from the Federal District Court to the Utah Supreme Court, if there is no decision to affirm or reverse a

lower court's decision. Egbert v. Nissan North America, Inc., 2007, 167 P.3d 1058, 585

Ut. Adv. Rep. 16, 2007 UT 64.

## VI.

### DETERMINATIVE STATUTES

#### **78B-15-102. Definitions**

(1) "Adjudicated father" means a man who has been **adjudicated by a tribunal** to be the father of a child. (Bold not in original)

(3) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes:

- (a) intrauterine insemination;
- (b) donation of eggs;
- (c) donation of embryos;
- (d) in vitro fertilization and transfer of embryos; and
- (e) intracytoplasmic sperm injection.

(5) "Birth mother" means the biological mother of a child

(6) "Child" means an individual of any age whose parentage may be determined under this chapter.

(9) "**Determination of parentage**" means the establishment of the parent-child relationship by the signing of a valid declaration of paternity under Part 3, Voluntary Declaration of Paternity Act, or **adjudication by a tribunal**. (Bold not in original)

(18) "Parent-child relationship" means the legal relationship between a child and a parent of the child. The term includes the mother-child relationship and the father-child relationship.

(22) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) "Tribunal" means a court of law, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

#### **78B-15-104. Adjudication – Jurisdiction**

(2) The district court and the juvenile court have jurisdiction over proceedings under Parts 7 (Assisted Reproduction) and 8.



**78B-15-201(2).** The father-child relationship is established between a man and a child by (e) the man having consented to assisted reproduction by a woman under Part 7, Assisted Reproduction, which resulted in the birth of the child:

**78B-15-202. No discrimination based on marital status.** A child born to parents who are not married to each other whose paternity has been determined under this chapter has the same rights under the law as a child born to parents who are married to each other.

**78B-15-703. Husband's paternity of child of assisted reproduction.** If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in Section 78B-15-704, he is the father of the resulting child born to his wife.

**78B-15-704. Consent to assisted reproduction.** (1) A consent to assisted reproduction by a married woman must be in a record signed by the woman and her husband.

**78B-15-707. Parental status of deceased spouse.** If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

## **VII.**

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case.**

Appellants brought this action to obtain surviving child's and mother's benefits through the Social Security Act upon the death of their father/husband, Michael Burns and his Social Security earnings record.

#### **B. Course of Proceedings and Disposition Below.**

In September, 2005, Appellant applied for two types of Social Security Survivor's

benefits – surviving child’s insurance benefits on behalf of the minor child, I.M.B, and surviving mother’s insurance benefits based upon the earnings records of Michael Burns, the deceased father/husband. (tr 50-55). The Agency denied the claims initially and upon reconsideration found that Appellants had not shown that I.M.B. was Mr. Burns’ “dependent child” as defined in the Social Security Act. (tr 56-60, 64-66). A hearing was held on October 3, 2007 with Administrative Law Judge Donald R. Jensen presiding and issuing a decision on August 22, 2008 reversing the denial of benefits, and finding that based on the record evidence the Appellants were entitled to surviving child’s and mother’s benefits on Mr. Burns’ earnings records. (tr 28-39). On February 6, 2009, the Agency’s Appeals Council found “good cause to reopen the case pursuant to 20 CFR §404.988 and 404.989 due to legal errors in the ALJ’s decision” (tr 17-25) and issued a decision on August 18, 2009 alleging errors in the ALJ’s decision and concluded that the Appellants had not shown that I.M.B. was “the dependent child” of Mr. Burns as defined under the Social Security Act and that the Appellants were not entitled to surviving child’s and mother’s benefits on Mr. Burns’ earnings record. (tr 4-16). Thereafter Appellants filed a Complaint in the United States District Court to be heard de novo on October 14, 2009 with a redacted amended copy filed on October 16, 2009 (not in transcript). The Agency filed a timely Answer to said Complaint (not in transcript). Thereafter the United States Federal District Court did certify the question to the Utah Supreme Court pursuant to Utah R.App.P., 41(a), and the Utah Supreme Court issued an

Order of Acceptance on August 5, 2010.

### VIII.

#### STATEMENT OF FACTS

1. Michael Burns married Appellant Gayle Burns on August 24, 1997. (tr 68).
2. In April 2000, Mr. Burns was told by his doctors that he had Non Hodgkins Lymphoma, and a tumor behind his sternum, and he would require chemotherapy and radiation therapy. He was told that he had a 95% chance of survival with chemotherapy and radiation treatments, which treatment would most likely leave Mr. Burns sterile. (tr 231).
3. Mr. Burns and his wife, Appellant Gayle M. Burns, signed a Semen Storage Agreement on May 30, 2000. Thereafter, Mr. Burns deposited samples of his semen for cryopreservation. (tr 69-72, 108-111).
4. The Semen Storage Agreement, Section 1 stated: "The Donor has consulted with a doctor and it has been determined that the Donor may be an appropriate candidate to have his semen collected, evaluated, frozen and stored for his future use **or other possible uses as hereinafter set forth.** (Bold not in original.) Semen is desired by the donor for one more of the following reasons:

- A. Prior to vasectomy;

- B. Prior to irradiation and/or chemotherapy;<sup>1</sup>
- C. Prior to exposure to potentially toxic medications;
- D. Prior to exposure to potentially toxic environmental conditions;
- E. Prior to travel or extended absence of the donor;
- F. Prior to artificial insemination;
- G. Prior to shipment of the semen to another location;
- H. Or other reasons deemed appropriate by my Doctor. (tr 69, 108).

5. Mr. Burns also signed in the Semen Storage Agreement a statement:

In the event of the death of the donor, the donor would like his vials of semen (initial 1 of the items below):

- (A) Destroyed \_\_\_\_\_
- (B) Maintained in storage for future donation to **Gayle Burns** (fill in name and relationship)<sup>2</sup> will assume all obligations and terms described in this contract. MB [Mr. Burns' initials]. (tr 70-71, 109-110).

6. On March 24, 2001, Mr. Burns died of cancer-related complications in Salt Lake County, Utah. (tr 78).

7. On May 3, 2003, Appellant had herself artificially inseminated with Mr. Burns' cryopreserved semen. (tr 113-14).

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<sup>1</sup>Please note that no instructions were in the document to sign, circle, check or initial to any of these "reasons." Someone, most likely Mr. Burns, circled choice "B, Prior to irradiation and/or chemotherapy."

<sup>2</sup>Filled in by Mr. Burns.

8. Appellant gave birth to I.M.B. in Salt Lake County, Utah on December 23, 2003 as a result of the artificial insemination. (tr 113).

9. Initially I.M.B.'s birth certificate did not reflect the name of his father, Michael Burns. (tr 117). However, a request by Appellant for an amended birth certificate (tr 116) reflecting Michael Burns as I.M.B.'s father was granted on September 3, 2004 by the Utah Department of Health, Office of Vital Records and Statistics. (tr 79-83, 118-20).

10. The Social Security denials and approvals process then occurred as outlined in Appellants' Statement of the Case (B), "Course of Proceedings and Dispositions," brief, p. 3-4.

11. Elizabeth Park, the deceased wage earner's sister, was appointed as a special administrator **In the Matter of the Estate of Michael Burns (DOD 3/24/01)**, Case No. 083900243 in the Third Judicial District Court, Salt Lake Division, Utah. (tr 174-75). (Signed copies of formal probate documents not in transcript but in Appellants' Addendum.)

12. Appellant filed a Petition for Determination of Paternity **In the Matter of I.M.B. (DOB 12/23/03, a minor child)**, on November 9, 2007 in the Third Judicial District Court for Salt Lake County, Utah, Case No. 074904953 before the Honorable Anthony B. Quinn. (tr 104-121).

13. A hearing was held on March 18, 2008, with testimony being taken from

Mrs. Burns and Elizabeth Park, Special Administrator, and Findings of Facts, Conclusions of Law and an Order submitted and signed by the court on April 15, 2008. (tr 167-75).

14. In said Conclusions of Law it indicated that Petitioner had met their burden of proof and there was clear and convincing evidence that I.M.B. was the son of Michael A. Burns. Specifically in said Order, Judge Quinn stated, **“That all rights arising from said parent/child relationship, including those of care, custody, support and inheritance are hereby granted for the benefit of I.M.B., a minor.”** (tr 168-9). (Bold not in original.)

## **IX.**

### **SUMMARY OF THE ARGUMENT**

Appellants opine that the Semen Storage Agreement was sufficient under §78B-15-704(1) and §78B-15-707 to show that Michael Burns “consented in a record” that if a child were to be born by assisted reproduction from his cryopreserved semen after his death, the child would be considered his child and eligible as his heir under Utah intestacy law, and thus eligible for surviving child Social Security benefits.

## **X.**

### **RESPONSIVE ARGUMENT**

The Appellant and her husband, when they signed the Semen Storage Agreement, did not know the significant Utah or federal laws that would later play out in this case. The relevant

Utah statute is:

“If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.” Utah Code Annotated 78B-15-707.

The University of Utah School of Medicine, Division of Urology, submitted this Semen Storage Agreement to Mr. and Mrs. Burns in May 2000. With Mr. Burns believing that he was successfully going to come back strong from irradiation and chemotherapy, he had to trust in the University of Utah School of Medicine that all of his bases were covered.

In Section 1 of the Agreement, it states:

**Semen is desired by the donor for one more of the following reasons:**

- A. Prior to vasectomy;
- B. Prior to irradiation and/or chemotherapy;
- C. Prior to exposure to potentially toxic medications;
- D. Prior to exposure to potentially toxic environmental conditions;
- E. Prior to travel or extended absence of the donor;
- F. Prior to artificial insemination;**
- G. Prior to shipment of the semen to another location;
- H. Or other reasons deemed appropriate by my Doctor. (Bold not in original)

Mr. Burns, by signing the Agreement, was requesting his cryopreserved semen be used for one of eight specific reasons.

Mr. Burns did not have to circle B, “Prior to irradiation and/or chemotherapy.” He was not instructed to circle any of the “following reasons” in the contract, yet he did so only knowing his present facts and his expected 95% chance of total recovery from his disease.

The Burnses did rely upon paragraph 3(I), “In the event of the death of the donor, the

donor would like his vials of semen (B) Maintained in storage for future donation<sup>3, 4</sup> to Gayle Burns, who will assume all obligations and terms described in this contract.”<sup>5</sup> Thus, we must look at the “terms” in the contract that apply. Clearly, Mr. Burns, by his gifting the cryopreserved semen to his wife, understood that the cryopreserved semen would be saved “prior to artificial insemination” and could be used to “contribute to a future pregnancy” and create “offspring resulting from artificial insemination” and “achieve pregnancy with insemination” and “that may be able to result in a pregnancy.” Thus, the Burnses had this signed document that indicated, by reasonable inference,<sup>6</sup> that Gayle Burns could artificially inseminate herself even if her husband passed away.

There was also a “reasonable expectation” by the couple that Gayle would later be able to use the vials of cryopreserved semen to achieve pregnancy, even if her husband died before artificial insemination and birth of the child.

Unfortunately, most contracts dealing with the “reasonable expectation doctrine” generally involve automobile insurance policies. However, Wagner vs. Farmers Insurance Exchange, 786 P.2d 763, Ut.Ct.App 1990, does give us some guidance to the “reasonable expectation doctrine” when reading the Semen Storage Agreement and extrinsic evidence that

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<sup>3</sup>Donation: A gift, esp. to a charity. Black’s Law Dictionary 561 (9<sup>th</sup> ed. 2009)

<sup>4</sup>Gift: The voluntary transfer of property to another without compensation. Black’s Law Dictionary 757 (9<sup>th</sup> ed. 2009)

<sup>5</sup>Mr. Burns did not initial the box to have the vials of cryopreserved semen “destroyed” upon his death.

<sup>6</sup>Inference: A conclusion reached by considering other facts and deducing a logical consequence from them. Black’s Law Dictionary 847 (9<sup>th</sup> ed. 2009)



bolsters their reasonable expectations.

Three factors that a Utah court must look at in making a judicial determination of reasonable expectations are “the following interrelated factors: First, whether the insurer [University of Utah] knew or should have known of the insureds’ [the Burns’] expectations; second, whether the insurer [University of Utah] created or helped create those expectations; and third, whether the insureds’ [the Burns’] expectations are reasonable.” Wagner at 766<sup>7</sup>,<sup>8</sup>.

The first factor is met in that the Burnses discussed the “donation upon death” clause with the hospital representative before signing the agreement. They went home that night and specifically discussed the clause about what would happen to the cryopreserved semen if Mr. Burns passed away prior to artificial insemination. Tr at 232-236 and full quote at pages 12-13 of this brief.

The second factor is that the University of Utah did draft this contract and submitted it to the Burnses. With all the references to pregnancy, offspring, artificial insemination and the clause wherein Appellant would receive by donation the vials of cryopreserved semen in the event of the death of Michael Burns, the Appellants’ expectations of being able to use the

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<sup>7</sup>Reasonable expectations include “what the weaker contracting party could legitimately expect by way of services according to the enterpriser’s “calling,” [sic] and to what extent the stronger party disappointed reasonable expectations based upon the typical life situation. Wagner quoting Gray vs. Zurich Insurance Company, 65 Cal.2d 263, 54 Cal.Rptr. 104, 107, 419 P.2d 168, 171 (1966).

<sup>8</sup>To accomplish this determination, we examine, in addition to the wording of the contract, “extrinsic matters such as the intent of the parties, the purpose sought to be accomplished, the subject matter of the contract, and the circumstances surrounding the issuance of the policy.” Wagner at 768, citing Bonner County vs. Panhandle Rodeo Association, Inc., 101 Idaho 772, 620 P.2d 1102, 1106, 1980.

cryopreserved semen at any time for artificial insemination were very reasonable.

The very reasonable expectation of the Burnses were that Ms. Burns, with the “future donation” to her of her husband’s cryopreserved semen, was that a child could be conceived posthumously by assisted reproduction, satisfying the third factor.

This court must again look at the contract clause, “In the event of the death of the donor, the donor would like his vials of cryopreserved semen maintained in storage for future donation to Gayle Burns, who will assume all obligations and terms described in this contract.” This court then must look for any relevant extrinsic evidence in determining whether that phrase and the contract is ambiguous regarding Mr. Burns’ future intent, and should consider any credible, extrinsic evidence offered to show the parties’ intentions (and their reasonable expectations).

Nielson v. Gold’s Gym, 78 P.3rd 600, 2003 UT 37, para 7. See also Gilmore v. Macy, 121 P.3rd 57, 2005 Ut.App.351; Ward vs. Intermountain Farmers Ass’n, 907 P.2d 264, 268 (UT 1995). Tying together the reasonable expectations of the Burnses and the ambiguities in the contract results in only one interpretation: Mr. Burns intended his cryopreserved semen to be used to artificially inseminate his wife even after his death.

There is clearly a “record” with one of the parties being the Social Security Administration in the original administrative proceeding before the U.S. Administrative Law Judge Donald R. Jensen. When questioning Ms. Burns under oath, Judge Jensen queried:

Q (by Social Security ALJ Jensen) To the best of your recollection, at the time that this semen sample was taken, had you or he discussed the possibility that he would not survive the chemo and radiation, that he would die and whether or not he wanted to leave you with a child that he was not going to be able to support?

A (by Ms. Burns) We hadn’t discussed it until we actually signed

this agreement where he had to notate what happened what happened [sic] if he did die, what he wanted. And before we signed the agreement we went home that night and had a discussion about if he did pass away he wanted the sperm to go to me so that a piece of him would be be - - a piece of him and I would be on the earth. He wanted me to have his kids.

Q So you did not sign that immediately when they presented you with that option?

A No, we didn't.

Q Were you there with him when it was first presented to him, that question?

A I was, yes.

Q And the two of you wanted to go home and talk about it?

A We did. Because of his survival rate, the 95 percent we hadn't really even considered him not surviving, so that's the matter of discussion that night.

Q And he decided he wanted a piece of him - - see, there are two competing interests here, a piece of me going on or he's saddling you with a burden that I can't help you support, two competing interests going on here - -

A Right.

Q - - that needed to be resolved. And he resolved that to the best of your recollection here, and I know you're not a disinterested party here.

A Right.

Q To this conversation. To the best of your recollection he said that he wanted a piece of him to go on even if he should die before the child was conceived?

A He did. He wanted a child of his on the earth.

Q The next day he signed that?

A He did. The next day he went in to do the deposit.  
(tr 232-233).

Q (By attorney Hadley) And Ian [sic] [Michael] signed this on May 30, 2000 and he passed away on March 24, 2001. When did he actually get worse where he started discussing this?

A (By Ms. Burns) He went through two rounds of chemo and we had to go through a bone marrow transplant and at that point his chances were 50/50 and we had to discuss more of what was going to happen if he passed away.

Q When approximately was that?

A That was, let's see, he went for bone marrow of 2000, December of 2000, toward the end.

Q Did either of you think about going back and looking at this contract and making any changes on it that would indicate that the saved sperm would be being used for artificial insemination?

A I don't think we thought about the agreement at that time because it was quite a trying time for us. I think what we as lay people had thought of as the agreement was that it would have taken care of it because we didn't see any reason not to think it would.

Q So it was you and Michael's understanding that if he passed away the contract that you'd signed seven months before gave you the right to use that semen to impregnate yourself?

A It was my understanding, yes, and Michael's.  
(tr 236).

Further, Elizabeth Park, the sister of the deceased and special administrator of his estate, testified that herself and Michael's three brothers recognize I.M.B. as their nephew, and all of their children recognize him as their cousin, and Grandma and

Grandpa Burns recognized I.M.B. as their grandchild. (tr 172 para. 14 and 173 para. 7).

Further, Ms. Park states on the Social Security record that she discussed this with her brother Michael, stating:

Q (By Attorney Hadley) Prior to your brother's death, did you ever happen to have any conversations with him about this semen storage he had with his wife?

A (Ms. Park) Yes, I did.

Q What was said?

A Well, he let me know that they were going to be storing his semen and at that point it was for when he recovered. And we also talked about if he happened to not recover what he would do and he talked about having Gayle have his child after he died.

Q He wanted Gayle to have his child if he did not survive the treatment and cancer?

A Yes, he did.  
(tr 242).

Thus, this extrinsic evidence at the administrative hearing by the Social Security's own Administrative Law Judge clearly indicates that Michael wished for there to be "a piece of him and I....on the earth. He wanted me to have his kids." And his sister also agreed, in that "he talked about having Gayle have his child after he died."

The Burnses made a reasonable inference that Michael was donating or gifting his cryopreserved semen to his wife, "who will assume all of the...terms described in this contract." Again, these terms include "artificial insemination," "contribution to a future pregnancy," "offspring resulting from the artificial insemination," "trying to achieve pregnancy with

insemination,” “and be able to result in pregnancy.” Thus, by inference and extrinsic evidence and resolving doubts in the party’s favor who did not draft the contract, Hoffman v. Life Ins. Co. of N. America, 669 P.2d 410, 417 (Utah 1983), there is no other logical conclusion but that “the deceased spouse [Mr. Burns] consented in a record that if assisted reproduction were to occur after his death, the deceased spouse would be a parent of the child.” U.C.A. 78B-15-707.

The Appellee argues that Mr. Burns did not sign a specific document stating unequivocally that he would be the father of any child born after his death by means of artificial insemination with his own cryopreserved semen. But the statutes of Utah “are to be liberally construed with a view to effect the objects of the statute and to promote justice.” U.C.A. 68-3-2.

As a matter of equity and justice, Mr. Burns fulfilled the terms of the statute in question. This court and Appellants could reasonably infer and expect that the cryopreserved semen could be used for artificial insemination even after his death. To rule otherwise would contravene fair play, equity and justice. With this being a case of first impression in Utah, there were no real guidelines for the University of Utah or the Burnses to understand the ramifications of the terms of the contract and their signing such.

Further, this case will have a very limited impact in Utah. This is only one case that presents itself with vague and questionable terms and it is unlikely that this will effect numerous cases in Utah and other states as alleged by the Appellee. Certainly the legal and the medical community will get wind of this decision and in the future revise their own semen storage agreements and incorporate terms similar to the statute in question.

This court should reject the “plain language” argument of the Appellee as a matter of equity and justice. This court would not be defeating the legislative intent but rather interpreting

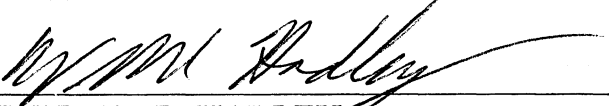
this specific contract as fitting into the framework of the statute in question and fulfilling the intent of the statute and the legislature. This court would not be writing new law but simply interpreting the present facts to help define this emerging area of medical technology.

## **XI.**

### **CONCLUSION AND REQUEST FOR RELIEF**

Therefore, based on the record and the arguments as above, the Appellants request that this court answer the question of law certified by the United States District Court in the affirmative, and conclude that this particular signed semen storage agreement to donate cryopreserved semen to the donor's wife in the event of his death is a "consent in a record" to being the parent of a child conceived by artificial means after the donor's death under Utah Intestacy Law, U.C.A. 78B-15-1707.


RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of August, 2011.

  
\_\_\_\_\_  
WILLIAM R. HADLEY  
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 8<sup>th</sup> day of August, 2011, I served two true and correct copies of the foregoing APPELLANTS' RESPONSIVE BRIEF to the persons on the address listed below by depositing a copy in the United States Mail, postage prepaid. I also certify that a disk containing the APPELLANTS' RESPONSIVE BRIEF was included in said mailing.

CARLIE CHRISTENSEN  
AMY J. OLIVER  
ALEXESS REA  
Office of the United States Attorney  
185 South State Street, #300  
Salt Lake City, UT 84111-1506

  
\_\_\_\_\_  
WILLIAM R. HADLEY  
Attorney for Appellants



UNIVERSITY OF UTAH SCHOOL OF MEDICINE  
SALT LAKE CITY, UTAH  
DIVISION OF UROLOGY

SEMEN STORAGE AGREEMENT

The purpose of the document is to act as an agreement to store semen for the purpose of short and/or long term storage in liquid nitrogen. This Agreement is made and entered into at the time and place hereinafter stated, by and between the University of Utah School of Medicine, Division of Urology, Salt Lake City, Utah, hereinafter sometimes referred to as "The University" and MICHAEL BUCK whose address is hereafter given and who is sometimes referred to as the "Donor".

AGREEMENT

1. The Donor has consulted with a doctor and it has been determined that the Donor may be an appropriate candidate to have his semen collected, evaluated, frozen and stored for his future use or other possible uses as hereinafter set forth. Semen is desired by the donor for one or more of the following reasons:
  - A. Prior to vasectomy;
  - ☒ B. Prior to irradiation and/or chemotherapy;
  - C. Prior to exposure to potentially toxic medications;
  - D. Prior to exposure to potentially toxic environmental conditions;
  - E. Prior to travel or extended absence of the donor;
  - F. Prior to artificial insemination;
  - G. Prior to shipment of the semen to another location;
  - H. Or other reasons deemed appropriate by my Doctor.
2. I hereby request that the University of Utah store my semen by cryopreservation (storage in liquid nitrogen).
3. I (donor) understand and agree to the follow conditions:
  - A. To have a current semen analysis of my semen by the University of Utah Andrology laboratory to determine if my semen quality is sufficient to consider preservation by freezing. A written report will be sent to the Donor or Donor's Doctor evaluating the quality of the semen. I understand that it is impossible to determine with absolute certainty if my semen will freeze and thaw well enough to contribute to a future pregnancy. If it is determined that sperm quality is altered enough to make the technique of freezing and thawing unlikely to result in live sperm upon future thawing, the donor will be discouraged from cryopreserving sperm. If the donor still chooses to preserve the sperm then his desires will be followed by the University even though the Donor understands the technique of cryopreservation is unlikely to result in viable sperm.
  - B. Sperm will be frozen in small plastic vials. Usually 1-3 vials can be frozen from one semen sample.

It is suggested that at least 12-15 vials be frozen for long term storage. The donor understands that the use of frozen-thawed sperm results in a much lower chance of pregnancy compared to fresh sperm. It is currently estimated that fresh sperm results in a three fold higher chance of pregnancy compared to frozen-thawed sperm. Storage of 12-15 vials should result in 4-6 months of trying to achieve pregnancy with inseminations. The donor understands that it is impossible to determine if a given individual's semen will be able to result in a pregnancy even under ideal conditions. The more vials that are stored the higher the chance that the semen will be able to eventually result in a pregnancy if all conditions are ideal.

- C. The storage of any semen samples from the Donor shall be for a six-month period. At the end of the six month period the agreement shall be automatically renewed for additional six month periods, assuming all of the obligations have been met as contained herein, and until terminated pursuant to the provisions of this agreement.
- D. The donor agrees to pay all costs associated with semen analyses, freezing, test-thaws and storage of his semen. These charges will be billed in advance for the following six-month period. In the event that the agreement is automatically renewed the Donor agrees to pay in advance the storage fee for each sample held in frozen storage by the University. Currently the fee for a semen analysis is \$70; the cost for freezing is \$70 and the cost for freezing and test-thaw is \$70. The cost for long term storage is currently \$1.25/vial/month or a minimum charge of \$85/year.
- E. The Donor understands that the University has the right to increase any of the above fees without prior notice to the Donor.
- F. Any charge for storage shall be paid within thirty (30) days of the date of billing, otherwise such charges shall be deemed delinquent.
- G. The University shall release the vial(s) of Donor's frozen semen only upon written notice by the Donor and only to a licensed medical doctor or authorized agent during the lifetime of the Donor and upon compliance with reasonable procedures and policies which the University may from time to time establish, including payment of a shipping and/or transfer fee.
- H. This agreement shall terminate, and the University's responsibility for storage shall cease, upon the occurrence of one or more of the following events:
- Release of all the semen samples according to the terms of this agreement and payment of the applicable transfer fee;
  - Written direction by the Donor to the University authorizing destruction of all semen samples retained in storage;
  - The Donor's death;
  - Failure of the Donor to pay storage charges within the time provided in paragraph 3(F);
  - Upon thirty (30) days written notification by the University to the Donor of the University's intention to discontinue storage operations.
- I. In the event of the death of the donor the donor would like his vials of semen (initial one of the items below):
- Destroyed \_\_\_\_\_
  - Maintained in storage for future donation to GAIL BURNS (fill in name)

and relationship) who will assume all of the obligations and terms described in this contract

- MS*
- J. In the event of termination of the agreement, for any of the reasons above, the University will destroy the vial(s) of semen held in storage.
  - K. The Donor acknowledges that he understands that there is an inherent risk in the process of collecting, freezing, storage and thawing of semen which may render it ineffective for insemination and Donor agrees to assume this risk.
  - L. It is agreed that in the event of loss, damage or destruction of any sample of Donor's semen for any reason whatsoever, that any damage which may result to the Donor or any third party is speculative and impossible to determine. Accordingly, in the event of loss, damage or destruction during the process of collecting, freezing, storage, thawing, transferring or other procedures, the Donor will accept and the University will pay as liquidated damages an amount equal to the storage charges which have been paid for the year in which the loss, damage or destruction occurs, plus the sum of \$100.00.
  - M. Donor covenants and agrees, without a reservation of rights, in law or equity, to indemnify, hold harmless and release the University and its employees and agents, including but without limitation, the doctor, those persons who collect, examine, evaluate, collect, store, preserve, transfer or manipulate the semen samples from any and all liability or obligation of any kind or manner, including attorney's fees, connected with said procedures or related thereto, and any other adverse consequences of any kind that may arise to be connected directly or indirectly to, or in any manner with, the offspring resulting from the artificial insemination utilizing said semen samples and/or procedures connected therewith, except to the extent and under the circumstances set forth in the next preceding paragraph.
  - N. Any notices provided hereunder shall be sent to the address as set forth below, and it shall be the responsibility of the Donor to provide his current address to the University, if different from that as stated below and any notice, correspondence or billing directed to that address shall be presumed to have been received in the regular course of mail by the Donor.
  - O. Either party may terminate this agreement upon thirty (30) days written notice to the other, any provision to the contrary notwithstanding. In the event such a termination notice to the Donor is given by the University, any unused portion of the storage charges for the then current six month period, shall be returned to Donor and the Donor shall have the responsibility, following payment of applicable transfer fees, to arrange the transfer, use or disposition of the vial(s) of semen then in the possession of the University. In the event the Donor terminates this agreement written notice must be received and acknowledged by the University.
  - P. The Donor acknowledges that the University of Utah, the University School of Medicine, the Division of Urology, and all officers and employees, including our doctor, are subject to the provisions of the Utah Government Immunity Act, Section 63-30-1, et seq., U.C.A., 1953 as amended, which Act controls all procedures and limitations with respect to claims of liability.
  - Q. This agreement shall be binding upon the administrators, heirs and successors of the parties.
  - R. This instrument and all issues arising incident thereto shall be controlled by and construed in

accordance with the laws of the State of Utah, and jurisdiction and venue shall be exclusively vested in the Third Judicial District Court in and for said State.

- S. This agreement represents the entire agreement between parties and there are no understandings, agreements, or representations other than as set forth herein. The printed portion of this contract is the contract between the Donor and the University. Crossouts, written additions, notes or otherwise do not alter or become part of this contract. Written date and signatures do become part of this contract.

IN WITNESS WHEREOF, the parties hereto have affixed their hands and seals this 20 day of May 2000 in Salt Lake City, Utah.

[Signature]  
DONOR (signature)

[Signature]  
DONOR'S WIFE (signature)

MICHAEL A. BURNS  
DONOR (please print)

1492 S. ROSEMA ST.  
ADDRESS SLC, UT 84115

(801) 474-3777  
TELEPHONE NUMBER

THE UNIVERSITY OF UTAH, DIVISION  
OF UROLOGY

By [Signature]

ADDRESS

Rev. 04/97

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.

Laws 2008, c. 3, § 1443, eff. Feb. 7, 2008.

#### Historical and Statutory Notes

##### Uniform Law

This section is similar to § 637 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

##### Prior Laws:

Laws 2005, c. 150, § 81.

C. 1953, § 78-45g-623.

#### Library References

Children Out of Wedlock § 64  
Westlaw Topic No. 76H

C.I.S., Children Out of Wedlock §§ 121 to 127

### PART 7. ASSISTED REPRODUCTION

#### Law Review and Journal Commentaries

Caveat vendor, Potential progeny, paternity, and product liability. Dawn R. Swink, J. Brad Reich, 2007 BYULR 857.

**§ 78B-15-701. Scope**

This part does not apply to the birth of a child conceived by means of sexual intercourse, or as result of a gestational agreement as provided in Part 8, Gestational Agreement.

Laws 2008, c. 3, § 1444, eff. Feb. 7, 2008.

**Historical and Statutory Notes****Uniform Law**

This section is similar to § 701 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

**Prior Laws**

Laws 2005, c. 150, § 82.

C. 1953, § 78-45g-701.

**Law Review and Journal Commentaries**

Caveat vendor: Potential progeny, paternity, and J. Brad Reich, 2007 B.Y.U. L. Rev. 857 and product liability online. Dawn R. Swink (2007).

**§ 78B-15-702. Parental status of donor**

A donor is not a parent of a child conceived by means of assisted reproduction.

Laws 2008, c. 3, § 1445, eff. Feb. 7, 2008.

**Historical and Statutory Notes****Uniform Law**

This section is similar to § 702 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

**Prior Laws**

Laws 2005, c. 150, § 83.

C. 1953, § 78-45g-702.

**Law Review and Journal Commentaries**

Caveat vendor: Potential progeny, paternity, and J. Brad Reich, 2007 B.Y.U. L. Rev. 857 and product liability online. Dawn R. Swink (2007).

**§ 78B-15-703. Husband's paternity of child of assisted reproduction**

If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in Section 78B-15-704, he is the father of a resulting child born to his wife.

Laws 2008, c. 3, § 1446, eff. Feb. 7, 2008.

**Historical and Statutory Notes****Uniform Law**

This section is similar to § 703 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

**Prior Laws**

Laws 2005, c. 150, § 84.

C. 1953, § 78-45g-703.

**Law Review and Journal Commentaries**

Caveat vendor: Potential progeny, paternity, and J. Brad Reich, 2007 B.Y.U. L. Rev. 857 and product liability online. Dawn R. Swink (2007).

## Historical and Statutory Notes

## Uniform Law

This section is similar to § 705 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

## Prior Laws

Laws 2005, c. 150, § 86; Laws 2005, c. 200, § 2 (2005); L.A. 1953, § 78-45g-705.

## Law Review and Journal Commentaries

Caveat vendor: Potential progeny, paternity, and product liability online. Dawn R. Swink and J. Brad Reich, 2007 B.Y.U. L. Rev. 857 (2007).

## Library References

Children Out-of-Wedlock — 15;  
Westlaw Topic No. 76H.

## § 78B-15-706. Effect of dissolution of marriage

(1) If a marriage is dissolved before placement of eggs, sperm, or an embryo, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

(2) The consent of the former spouse to assisted reproduction may be revoked by that individual in a record at any time before placement of eggs, sperm, or embryos.

Laws 2008, c. 3, § 1449, eff. Feb. 7, 2008.

## Historical and Statutory Notes

## Uniform Law

This section is similar to § 706 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

## Prior Laws

Laws 2005, c. 150, § 87; Laws 2005, c. 200, § 3 (2005); L.A. 1953, § 78-45g-706.

## Law Review and Journal Commentaries

Caveat vendor: Potential progeny, paternity, and product liability online. Dawn R. Swink and J. Brad Reich, 2007 B.Y.U. L. Rev. 857 (2007).

## Library References

Children Out-of-Wedlock — 15;  
Westlaw Topic No. 76H.

## § 78B-15-707. Parental status of deceased spouse

If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

Laws 2008, c. 3, § 1450, eff. Feb. 7, 2008.



## Historical and Statutory Notes

## Uniform Law

This section is similar to § 707 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

## Prior Laws:

Laws 2005, c. 150, § 88;  
C. 1953, § 78-45g-707.

## Law Review and Journal Commentaries

Caveat vendor: Potential progeny, paternity, and product liability online. Dawn R. Swink and J. Brad Reich, 2007 B.Y.U. L. Rev. 85 (2007).

## Library References

Children Out of Wedlock c-15.

Westlaw Topic No. 76H.

## PART 8. GESTATIONAL AGREEMENT

~~§ 78B-15-801. Gestational agreement authorized.~~

~~(1) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:~~

~~(a) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;~~

~~(b) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and~~

~~(c) the intended parents become the parents of the child.~~

~~(2) The intended gestational mother may not currently be receiving Medicaid or any other state assistance.~~

~~(3) The intended parents shall be married, and both spouses must be parties to the gestational agreement.~~

~~(4) A gestational agreement is enforceable only if validated as provided in Section 78B-15-803.~~

~~(5) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse or if neither intended parent is a donor.~~

~~(6) The parties to a gestational agreement shall be 21 years of age or older.~~

~~(7) The gestational mother's eggs may not be used in the assisted reproduction procedure.~~

~~(8) If the gestational mother is married, her husband's sperm may not be used in the assisted reproduction procedure.~~

Laws 2008, c. 3, § 1451, eff. Feb. 7, 2008.



## Library References

Children Out-of-Wedlock c. 20.2, 20.9  
Westlaw Topic No. 76H.

C.T.S. Children Out-of-Wedlock §§ 37 to 38.

**§ 78B-15-114. Social Security number in tribunal records**

The Social Security number of any individual who is subject to a paternity determination shall be placed in the records relating to the matter.

Laws 2008, c. 3, § 1381, eff. Feb. 7, 2008.

## Historical and Statutory Notes

## Prior Laws:

Laws 1997, c. 232, § 79.

Laws 2005, c. 150, § 19.

C. 1953, §§ 78-45a-11.5, 78-45g-114.

**§ 78B-15-115. Settlement agreements**

An agreement of settlement with the alleged father is binding only when approved by the tribunal.

Laws 2008, c. 3, § 1382, eff. Feb. 7, 2008.

## Historical and Statutory Notes

## Prior Laws:

Laws 1965, c. 158, § 13.

Laws 2005, c. 150, § 20.

C. 1953, §§ 78-45a-13, 78-45g-115.

**PART 2. PARENT AND CHILD RELATIONSHIP****§ 78B-15-201. 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;

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- (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.

Laws 2008, c. 3, § 1383, eff. Feb. 7, 2008.

#### Historical and Statutory Notes

##### Uniform Law

This section is similar to § 201 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

##### Prior Laws

Laws 2005, c. 150, § 21.

C. 1953, § 78-45g-201.

#### Notes of Decisions

In general, the legislature intended that the doctrine could be easily and uniformly applied in all cases, adopting doctrine would not be a natural development of the common law but rather a legislative act in derogation of recognized common law principles and doctrine conflicted with state statutory law. Jones v. Barlow, 2007-154 P.3d 808, 571 Utah Adv. Rep. 20, 2007 UT 20, Children Out-of-wedlock

Supreme Court would decline to adopt a de facto parent or psychological parent doctrine to allow former domestic partner to seek visitation with child who was born to other partner during parties relationship; a de facto parent doctrine would not provide an identifiable jurisdictional basis for the court to exercise its jurisdiction. Jones v. Barlow, 2007-154 P.3d 808, 571 Utah Adv. Rep. 20, 2007 UT 20, Children Out-of-wedlock

### § 78B-15-202. No discrimination based on marital status

A child born to parents who are not married to each other whose paternity has been determined under this chapter has the same rights under the law as a child born to parents who are married to each other.

Laws 2008, c. 3, § 1384, eff. Feb. 7, 2008.

#### Historical and Statutory Notes

##### Uniform Law

This section is similar to § 202 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

##### Prior Laws

Laws 2005, c. 150, § 22.

C. 1953, § 78-45g-202.

### § 78B-15-203. Consequences of establishment of parentage

Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise specifically provided by other law of this state.

Laws 2008, c. 3, § 1385, eff. Feb. 7, 2008.

#### Historical and Statutory Notes

##### Uniform Law

This section is identical to § 203 of the Uniform Parentage Act (2000). See Volume 9B, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

##### Prior Laws

Laws 2005, c. 150, § 23.

C. 1953, § 78-45g-203.