

2016

**Emmanuel Nuno, Petitioner - Appellant, vs. Kimberly Hart Lane
and Brian J. Hart Respondents - Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EMMANUEL NUNO,

Petitioner/Appellant,

v.

KIMBERLY LANE HART and BRIAN J.
HART,

Respondents/Appellees.

Case No. 20150421-CA

BRIEF OF APPELLEES KIMBERLY LANE HART AND BRIAN J. HART

Appeal from the Fourth District Court, Utah County
Honorable Christine S. Johnson

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction pursuant to Utah Code § 78A-4-103(2)(h).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

Issue No. 1: Did Judge Christine Johnson err in treating Judge Samuel McVey's order as an order and not as a commissioner's recommendation subject to a Utah Rules of Civil Procedure 108 objection when he was presiding in court instead of a domestic relations commissioner?

Standard of Review: A trial court's interpretation of the rules of civil procedure presents a question of law which is reviewed for correctness. Lewis v. Nelson, 2015 UT App 262, ¶8.

Preservation Below. Mr. Nuno did preserve this issue below.

Issue No. 2: Did the trial court err in holding that the father had failed to properly raise the issue of the constitutionality of the Utah Uniform Parentage Act (UUPA)?

Standard of Review: A trial court's conclusions of law are reviewed for correctness. Howell v. Howell, 806 P.2d 1209, 1211 (Utah App.1991).

Preservation Below. Mr. Nuno preserved this limited issue below, but did not preserve the underlying constitutional issue presented in the following Issue No. 3.

Issue No. 3: Do the provisions of the UUPA, as applied to the facts of this case, violate the due process provisions of the Utah and United States Constitutions?

Standard of Review: "A constitutional challenge to a statute presents a question of

law, which [this Court] review[s] for correctness. When addressing such a challenge, this Court presumes that the statute is valid, and [] resolve[s] any reasonable doubts in favor of constitutionality.” State v. Garner, 2008 UT App 32, ¶10 (internal citations and quotation marks omitted).

Preservation Below. This issue was not adequately preserved below, as explained in the Argument section of this brief.

Issue No. 4: Did the trial court commit error in failing to allow Mr. Nuno to conduct discovery related to the allegations in the Amended Petition?

Standard of Review: The denial of a motion to conduct discovery is reviewed under an abuse of discretion standard. Pinder v. State, 2015 UT 56, ¶ 20.

Preservation Below. Mr. Nuno did not preserve this issue below as he never submitted a motion or obtained a hearing on the issue, and he never attempted to undertake any form of discovery.

Issue No. 5: Did the trial court fail to make sufficient findings of fact to support its conclusion that the provisions of UUPA precluded the exercise of jurisdiction in this matter?

Standard of Review: A challenge to the sufficiency of the findings is reviewed for clear error. *See* Parduhn v. Bennett, 2005 UT 22, ¶ 24.

Preservation Below. Mr. Nuno did not preserve this issue below and does not brief or even address this issue in his Argument. The Court “generally do[es] not address unpreserved arguments raised for the first time on appeal.” State v. Pham, 2015 UT App 233, ¶ 7. “If an appellant fails to adequately brief an issue on appeal, the appellate court

may decline to consider the argument.” Jacob v. Cross, 2012 UT App 190, ¶ 2.

Therefore, this issue should be rejected by the Court and not be considered.

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES
OF CENTRAL IMPORTANCE TO THE APPEAL**

1. UTAH CONST. art. I, § 7. “No person shall be deprived of life, liberty or property, without due process of law.”
2. U.S. CONST. amend. XIV, § 1. “...nor shall any State deprive any person of life, liberty, or property, without due process of law...”
3. Utah Code § 78B-15-602, “Standing to maintain proceeding.” *See Brief of Appellant*, Addendum E.
4. Utah Code § 78B-15-607, “Limitation – Child having presumed father.” *See Brief of Appellant*, Addendum F.
5. Utah Code § 30-5a-101, *et seq.* “Custody and Visitation for Persons Other than Parents Act.” *See Addendum A.*
6. Utah Rules of Civil Procedure 108., “Objection to court commissioner’s recommendation.” *See Addendum B.*

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This case involves an individual, Emmanuel Nuno, an alleged biological father, who claims to have parental rights to two minor children, G.L.H. and H.H., who were conceived and born to their Mother, Kimberly Lane Hart, and their presumed Father, Brian J. Hart, during the marriage of Mr. and Mrs. Hart. Mr. Nuno appeals the orders issued by Judge Samuel McVey and Judge Christine S. Johnson, of the Fourth District Court, Utah County, dismissing Mr. Nuno's paternity action for lack of standing, and declining to find the Utah Uniform Paternity Act unconstitutional.

Mr. Nuno filed a paternity action in the Fifth District Court, Washington County, on July 18, 2014. R. 1. The case was transferred by Judge Eric A. Ludlow to the Fourth District Court, Utah County, where the Mother and the children resided. R. 89. After the case was transferred, on September 23, 2014, Mother filed a Motion to Dismiss the petition for lack of standing based on limitations set forth in the UUPA, Utah Code § 78B-15-607. R. 109, 111. On October 7, 2014, Mr. Nuno requested 14 additional days to supplement his pleadings with constitutional claims. R. 246. The hearing was continued from November 5, 2014 to November 12, 2014. R. 298. A hearing was held before Commissioner Thomas Patton on November 12, 2014, at which time the proceedings were stayed in order to join Mr. Hart as an indispensable party. R. 307. The hearing on the Motion to Dismiss was then continued two more times until January 22, 2015. R. 307, 336.

Mr. Nuno filed an Amended Petition, joining Mr. Hart as a party. R. 309. Mr. and Mrs. Hart each filed an Answer to the Amended Petition. R. 347, 358. On January 22, 2015, the Motion to Dismiss was heard and granted by Judge Samuel McVey, who was filling in due to Commissioner Patton's illness. R. 513. Mr. Nuno objected to Judge McVey's decision, R. 379, and Judge Christine S. Johnson denied the objection. R. 513. Mr. Nuno filed Petitioner's Rules 52 and 59 Motion to Amend Judgment on March 11, 2015, R. 430, which was denied by Judge Johnson. R. 499. Then, on May 21, 2015, Mr. Nuno timely filed this appeal from the orders issued by Judge McVey and Judge Johnson. R. 522.

DISPOSITION OF TRIAL COURT

Judge McVey granted the Hart's Motion to Dismiss on January 22, 2015 and an Amended Order on Motion to Dismiss Petition for Paternity was signed by Judge McVey on May 6, 2015. R. 513. Judge Johnson denied Mr. Nuno's Objection to Commissioner's Recommendation by issuing a Ruling and Order on Petitioner's Objection to Commissioner's Recommendations, on March 4, 2015. R. 427. Judge Johnson denied Mr. Nuno's Motion to Amend by issuing a Ruling and Order on Petitioner's Motion to Amend Order on April 30, 2015. R. 499.

STATEMENT OF FACTS

1. Mr. Nuno alleged many facts in his Petition, Amended Petition, Affidavit in Support of Motion for Temporary Orders, and Declaration of Emmanuel Nuno, which he has set forth in his brief. R. 1, 46, 142, 309.

2. Mr. Nuno incorrectly asserts on pages 24 and 27 of his Brief that the children were “admittedly fathered by Mr. Nuno.” That is not true and is not found in the record. Neither of the Harts acknowledged or admitted on the record that the children were fathered by Mr. Nuno.

3. The Harts denied the factual allegations and filed a Motion to Dismiss based on Mr. Nuno’s lack of standing. R. 109, 347, 358.

4. Mrs. Hart at no time was married to Mr. Nuno. R. 266.

5. Kimberly Lane and Brian J. Hart were married on July 7, 2007 and had two minor children, not the subject of this action. R. 266, 276.

6. The Harts divorced on March 26, 2012 and remarried one another on August 21, 2012. R. 266, 276.

7. Their third minor child, G.L.H., was born on August 23, 2012 in Coconino County, Arizona. R. 266, 276.

8. Their fourth minor child, H.H., was born on December 4, 2013 in Utah County, Utah. R. 266, 276.

9. Both of the subject children were born as issue of the Hart’s marriage. R. 276.

10. Mr. Hart was present at the births of both G.L.H. and H.H. R. 276.

11. Mr. Hart is listed as the Father on both children’s birth certificates. R. 266, 276.

12. The children have always had the last name of Hart. R. 266.

13. The Harts intend to remain married and raise all four of their children together as children of their marriage. R. 266, 276.

14. Neither Mr. nor Mrs. Hart have challenged the paternity of their children. R. 266, 276.

SUMMARY OF ARGUMENTS

The Court should AFFIRM the Order dismissing Mr. Nuno's paternity petition and action for lack of standing and should not create a new constitutional right

Objection to Commissioner's Recommendation. Judge Johnson was correct in denying Mr. Nuno's Objection to Commissioner's Recommendation because Judge McVey is a sitting district court judge whose decisions cannot be objected to pursuant to Rule 108 of the Utah Rules of Civil Procedure. A domestic relations commissioner and a district court judge are two distinct judicial officers and a judge cannot sit or act as a domestic relations commissioner. In proceeding before Judge McVey, Mr. Nuno did not justifiably rely on any representations that Judge McVey's decision could be objected to.

Discovery and Rule 56(f). The trial court did not abuse its discretion in declining to allow Mr. Nuno to conduct further discovery prior to the Court determining that he lacked standing to contest the paternity of the minor children. Mr. Nuno failed to preserve this issue as he never attempted any method of discovery, failed to provide his required initial disclosures pursuant to Rule 26 of the Utah Rules of Civil Procedure—which must be satisfied before requesting any other discovery—and he never noticed the issue for hearing. Further, Rule 56(f) does not apply to a motion to dismiss on a jurisdictional basis. Yet Mr. Nuno still received the benefit provided for in the rule: he

received a continuance and additional time before the hearing during which time he could have conducted additional discovery.

Constitutionality of the UUPA. Mr. Nuno did not adequately raise or contest the constitutionality of the UUPA in the trial court, and therefore did not preserve the issue for appeal. Mr. Nuno failed to specifically raise his constitutional argument, making only a general invocation that the UUPA violated his constitutional rights. He did not introduce any relevant legal authority or provide any analysis or application of the alleged facts to any specific constitutional right.

Even if the issue was adequately raised and preserved for appeal, the UUPA does not violate the due process provisions of the Utah or United States Constitutions as applied to Mr. Nuno's alleged facts of this case. The Supreme Court, in Michael H. v. Gerald D., 491 U.S. 110 (1989), has already declined to find constitutional rights or protections for biological fathers of children born within a marriage.

Despite the fact that Mr. Nuno does not have constitutional rights he asserts, Utah Code still satisfies the due process that he claims. The Utah Adoption Act provides strict requirements for unwed biological fathers to follow to preserve the opportunity to be heard, and Mr. Nuno failed to strictly comply. Utah's Custody and Visitation for Persons Other than Parents Act also provides an opportunity to be heard on custody and visitation for persons other than those legally defined as parents. Utah Code § 30-5a-101, et. seq. Since Mr. Nuno is legally not a parent to the children, he had an opportunity to proceed pursuant to this chapter, but failed to do so.

To allow Mr. Nuno to continue this case, pursue discovery, require court

involvement and hold trial on the issues would be an unconstitutional violation of the Harts' right to privacy within their marriage and family. The attack would also violate the constitutional rights of Mr. and Mrs. Hart by interfering with their fundamental parental rights to raise their children.

ARGUMENT

The Court of Appeals should Affirm the trial court's dismissal for lack of standing because (1) the issues were not properly preserved; (2) Mr. Nuno has no substantive constitutional rights; (3) he is not entitled to due process protections; and (4) even if he were, the provisions of Utah Code § 30-5a-101 *et seq.* satisfy the demands of due process by granting him a reasonable opportunity to be heard regarding custody of and visitation with the minor children. Further, to allow Mr. Nuno to proceed would violate the constitutional rights of Mr. and Mrs. Hart and their entire family. Therefore, the Court should *affirm* the dismissal of Mr. Nuno's petition for paternity.

I. THE DECISION OF A DISTRICT COURT JUDGE IS NOT SUBJECT TO A RULE 108 OBJECTION TO COURT COMMISSIONER'S RECOMMENDATION

A. Judges are Distinct from Court Commissioners and May Serve Temporarily in a Commissioner's Court as a Judge, but Not as a Commissioner.

Rule 108 of the Utah Rules of Civil Procedure provides the opportunity for a party to object to the decision of a domestic relations commissioner and have the objection heard by a district court judge. Utah R. Civ. P. 108. The plain language of the rule indicates that this opportunity to object applies only to the recommendations of court commissioners and does not apply to any other judicial officers.

District court judges and domestic relations commissioners are separate and distinct positions created by different sections of Utah law. District court judges are authorized and provided for in Article VIII of the Utah Constitution and are governed in accordance with various sections of Title 78A, Chapters 2 and 5 of the Utah Code. Judges are selected from a judicial nominating committee, appointed by the governor, confirmed by the Senate, and retained by election. *See* Utah Code § 78A-10-101, et seq., and Utah Code § 20A-12-201. Court commissioners, on the other hand, are created by statute, Utah Code § 78A-5-107, and are “quasi-judicial officers of courts of record and have limited judicial authority...” Utah Code § 78A-5-107(1)(a). Court commissioners are appointed by the Judicial Council with the concurrence of a majority of judges in that district. *Id.* at 107(2)(a). Therefore, it is not possible to be both a judge and a commissioner at the same time.

Utah Code provides more direct clarification on this issue by stating that a “judge of a court of record may serve temporarily *as a judge* in another geographic division *or in another court of record...*” *Id.* at § 78A-2-225 (emphasis added). Court commissioners serve in “courts of record.” *Id.* at § 78A-5-107(1)(a). Therefore, a judge is authorized to serve temporarily in place of a court commissioner, but he or she does so as a judge and not as a limited court commissioner.

There is no dispute that Judge McVey heard and decided this matter while filling in for Commissioner Patton. Although at the conclusion of his ruling, Judge McVey made statements indicating his belief that his decision may be subject to an objection because he was filling in for Commissioner Patton, Judge McVey was incorrect, and Judge Johnson’s decision to decline the Objection was correct. Judge McVey was serving “as a judge ... in another court of record,” consistent with Utah Code § 78A-2-225. His decision was therefore not subject to a Rule 108

objection.

In addition to arguing that he simply has the right to object, Mr. Nuno appears to argue that it would be unjust to not allow an objection to Judge McVey's recommendation because he "justifiably relied on Judge McVey's statements made during the course of the hearing." *Brief of Appellant*, p. 20. However, Mr. Nuno fails to address the fact that Judge McVey did not make these statements until the conclusion of the hearing, and that Judge McVey did not make any promises, confirmed by his statement that Judge Johnson "may or may not agree with me..." R. 499. The record is clear that both parties consented to Judge McVey hearing the case and that neither party requested a continuance in order to appear first before the court commissioner. R. 427. Therefore, there could not have been any "justifiable reliance" on Judge McVey's statements at the conclusion of the hearing and Mr. Nuno waived any opportunity to have the decision objected to in accordance with Rule 108.

B. Proceedings Before a Commissioner Do Not Excuse Presenting All Evidence and Argument

While a court commissioner's recommendation may be objected to and taken to the judge for ultimate decision, "any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge." Utah R. Civ. P. 108(c). Therefore, any evidence that a party desires to be considered by the court must be presented to the commissioner.

Mr. Nuno asserts that "practicing attorneys know that normally proceedings before a commissioner are abbreviated..." and then implies that because of this, he should be excused from presenting complete evidence and argument for his case. *Brief of Appellant*, pp. 21-23. Certainly practicing attorneys in Utah County know that

commissioner practice follows Rule 101 and that evidence is presented by affidavit, attachments, and proffer. However, they also know that they must present and argue all facts and arguments that they want the court to consider because they will be excluded by the judge if they were not presented to the commissioner. Therefore, it cannot be an excuse for failure to present everything to a commissioner.

C. Complete Due Process Was Provided and Exercised by the Court

Finally, Mr. Nuno claims that not allowing a Rule 108 objection violates his due process rights, claiming that he was “denied the rights set by statute and rule that are attendant to filing an objection...” *Brief of Appellant*, p. 22. This is far from true. As outlined above, there is no right to object to a judge’s ruling. Further, the record indicates he had an opportunity to object to Judge McVey hearing the motion and request a continuance. Instead, he consented to having Judge McVey decide the case. By doing so, he cannot now claim there has been any violation of due process.

Therefore, Judge Johnson was correct in denying Mr. Nuno’s Objection to Commissioner’s Recommendation and the decision should be affirmed.

II. MR. NUNO WAIVED AND FAILED TO PRESERVE HIS CONTENTION THAT HE WAS ENTITLED TO ADDITIONAL DISCOVERY

The denial of a motion to conduct discovery is reviewed under an abuse of discretion standard. Pinder v. State, 2015 UT 56, ¶ 20.

A. Mr. Nuno Engaged in No Discovery and Failed to Comply With Rules 26 and 101.

For an issue to be preserved for appeal, “it must be (1) raised in a timely fashion,

(2) be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.” Hill v. Superior Property Management Svcs., 2013 UT 60, ¶ 46 (internal citations and quotation marks omitted).

In the context of discovery, a party must actually seek discovery below in order to preserve the issue on appeal. *See* Al-Ali v. Countrywide Home Loans, Inc., 2007 UT App 156 (not for official publication). In the Al-Ali case, the plaintiffs argued on appeal that discovery was necessary to fully prosecute their claim. However, the plaintiffs made “no discovery requests below, nor was discovery raised in any manner before the trial court.” Id. The Court then made the determination that “[b]ecause discovery was not sought below, this court cannot address the issue now.” Id.

Rule 26 of the Utah Rules of Civil Procedure provides the general governing provisions of discovery. This rule requires that initial disclosures must be completed before a party may engage in any other discovery: “[A] party may not seek discovery from any source before that party’s initial disclosure obligations are satisfied.” Utah R. Civ. P. 26(c)(2).

In domestic relations cases before a court commissioner, “An application to a court commissioner for an order shall be by motion...The moving party shall file the motion and attachments with the clerk of court and obtain a hearing date and time.” Id. at 101(a)-(b) (2014).

In this case, Mr. Nuno waived and failed to preserve his claim to a right to conduct additional discovery by failing to even make a discovery request. The record below indicates that no requests for discovery were made pursuant to any discovery rule from

26 to 36—no depositions, interrogatories, requests for documents or things, requests for admissions, depositions, etc. Importantly, Mr. Nuno failed to provide his own initial disclosures required by Rule 26(a). By failing to provide the disclosures, he was precluded by Rule 26(c)(2) from seeking any other discovery.

While Mr. Nuno did raise the issue of discovery in an Affidavit by requesting additional time, he did not preserve this issue as he failed to follow the requirements of Rule 101 by not filing a motion and by not obtaining a hearing date and time for the motion to be heard. R. 240. Because of this, the trial court never had a proper opportunity to rule on the issue. Despite raising the issue by affidavit, Mr. Nuno's failure to complete initial disclosures and attempt any discovery pursuant to the Rules of Civil Procedure matches the failure in the Al-Ali case, and his failure and waiver prevent him from arguing the need for discovery on appeal.

B. Rule 56(f) Does Not Apply in This Case, But Mr. Nuno Nonetheless Received the Benefit Contemplated by the Rule.

Mr. Nuno bases his claim for additional discovery on Rule 56 of the Utah Rules of Civil Procedure, which governs Summary Judgment. However, the Motion before the trial court was a motion to dismiss pursuant to Rule 12, and not one for summary judgment pursuant to Rule 56.

Rule 12 provides limited instances in which a motion to dismiss should be treated as a motion for summary judgment:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Utah R. Civ. P. 12(b). The language of the Rule clearly indicates that this applies only to a motion asserting defense number (6), failure to state a claim upon which relief can be granted. Id. Similarly, if the court considers matters outside the pleadings on a motion for judgment on the pleadings, it “shall be treated as one for summary judgment and disposed of as provided in Rule 56...” Id. at 12(c).

This matter involves neither a motion for judgment on the pleadings nor a motion asserting failure to state a claim upon which relief can be granted. The Harts’ motion was one to dismiss for *lack of standing*, which is a jurisdictional issue. *See Hogs R Us v. Town of Fairfield*, 2009 UT 21, ¶ 7 (“Because lack of standing is jurisdictional, parties may raise it as an issue at any time in the proceedings...”); *see also Osguthorpe v. Wolf Mountain Resorts, LC*, 2010 UT 29, ¶ 14. Therefore, Rule 56 and its discovery provisions do not apply to the case.

Even if Rule 56 applies, the applicable remedy sought by Mr. Nuno is that the court “may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” Utah R. Civ. P. 56(f) (2014). Although the request was never ruled on because of Mr. Nuno’s failure to follow Rule 101 in bringing the issue before the court, he still received the benefit that could have been ordered: the hearing on the motion to dismiss was continued three times and was not held until January 22, 2015, more than three months from the time he filed his Affidavit. R. 298, 307, 336. His choice not to conduct discovery within that time

period was his own. The trial court did not prevent him from doing so, and therefore there was no error.

III. MR. NUNO’S CONSTITUTIONAL CLAIMS WERE NOT PRESERVED AND THE UUPA IS CONSTITUTIONAL AND DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF MR. NUNO

“A constitutional challenge to a statute presents a question of law, which [this Court] review[s] for correctness. When addressing such a challenge, this Court presumes that the statute is valid, and [] resolve[s] any reasonable doubts in favor of constitutionality.” State v. Garner, 2008 UT App 32, ¶10 (internal citations and quotation marks omitted).

The Court of Appeals should uphold the constitutionality of the UUPA because (1) Mr. Nuno did not properly preserve the issue; (2) Mr. Nuno has no substantive constitutional rights; (3) he is not entitled to due process protections; and (4) even if he were, Utah Code satisfies due process by providing Mr. Nuno a reasonable opportunity to be heard, but he failed to appropriately do so.

A. Mr. Nuno Failed To Adequately Preserve By Not Briefing The Constitutional Issue or Citing to Legal Authority Below.

The Utah Supreme Court has held that it is “resolute in [its] refusal to take up constitutional issues which have not been properly preserved, framed and briefed...” Brigham City v. Stuart, 2005 UT 13, ¶ 14. To preserve an issue for appeal, it must be adequately raised in the trial court to afford the court a “meaningful opportunity to rule on the ground that is advanced on appeal.” Hill v. Superior Property Management Svcs., 2013 UT 60, ¶ 46. “The general invocation of a theory is insufficient. [T]o be preserved,

an issue must be (1) raised in a timely fashion, (2) be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority. Id. (internal citations and quotation marks omitted); *see also* State v. Earl, 2015 UT 12 ¶ 19 (“[Defendant’s] briefing in the Fourth District failed to present any constitutional analysis, and for that reason we decline to reach her arguments as applied to that case on grounds of preservation”).

In the trial court, Mr. Nuno did generally invoke the issue of due process rights. However, he did not do so specifically and failed to introduce any relevant legal authority or analysis. In his Memorandum in Opposition to Motion to Dismiss, filed October 7, 2014, he generally invoked the constitution and rights of a biological father, and requested an additional 14 days to brief the issue. R. 137. He filed a Motion requesting the additional time on the same day. R. 246. The hearing on the Motion to Dismiss was continued from November 5, 2014 to November 12, 2014. R. 298. Then Commissioner Patton continued the hearing from November 12 to December 10, 2014. R. 307. The hearing was continued again from December 10 to January 22, 2015. R. 336. Despite receiving more than 100 additional days from the time he requested 14 days to brief the constitutional issues, Mr. Nuno never submitted a brief with any constitutional analysis.

Prior to the hearing on the Motion to Dismiss, the only other reference to the constitutional issue was in paragraph 9 of Mr. Nuno’s prayer for judgment in his Amended Petition, in which he stated simply that to deny him paternity it would be a denial of his constitutional rights. R. 316. Mr. Nuno provided no analysis and no citation to any legal authority to support his general statement. When considering the issue at the

hearing, Judge McVey found that “there is no provision of the constitution referred to (40.25). Petitioner stated today that it is the Due Process clause” and that “the issue was never raised in a manner that would give enough notice to the Respondent to indicate precisely how it is facially unconstitutional, or unconstitutional as applied.” R. 516.

Not until after Judge McVey’s order dismissing and Judge Johnson’s Ruling and Order on Petitioner’s Objection to Commissioner’s Recommendation did he make any citation to constitutional legal authority. R. 443.

Because Mr. Nuno did not properly raise the issue of the constitutionality of the UUPA below, it was therefore not preserved and should not be considered by the Court on appeal.

B. Facts Viewed in Light Favorable to Mr. Nuno

“On appeal from a district court’s decision granting a motion to dismiss, [the court] view[s] the facts pled in the complaint and all reasonable inferences from them in the light most favorable to the plaintiff.” Scott v. Utah County, 2015 UT 64, ¶ 4.

However, the court need not accept the legal conclusions. Id. at 13.

Although the Harts have denied the factual allegations, it is recognized that for purposes of the motion to dismiss the court takes the facts in the light most favorable to Mr. Nuno. However, conclusory statements need not be considered true or given preference.

One such conclusory statement by Mr. Nuno is his allegation that the Harts’ marriage is a “sham marriage.” Mr. Nuno’s assertion is not true and should not be taken in a light favorable to him because it is not a factual allegation. Further, sham marriages

are addressed by courts almost exclusively in the context of immigration-motivated marriages. In Utah there is apparently only one case that mentions “sham marriage” and it is in the context of a false, immigration-motivated marriage. See In re Marriage of Kunz, 2006 UT App 151. In the Kunz case, the Court of Appeals determines that sham immigration marriages are voidable under Utah law, but not void, meaning the marriage “is valid for all purposes until voided or annulled in a proper proceeding...” Id. at ¶ 37 (citing Estate of Stefke, 538 F.2d 730, 736 (7th Cir. 1976)).

The record does not indicate any facts supporting the allegation that the Harts’ marriage is a sham marriage. The record does reflect that the Harts were married from 2007 to March 2007, then remarried in August 2012 and are presently married. R. 266, 276. During the course of their marriage the Harts have had four children conceived and born to their marriage. R. 266, 276. The Harts intend to remain married to each other and to raise their four children as a family. R. 266, 276.

Therefore, while the Court should certainly consider the facts alleged by Mr. Nuno in the light most favorable to him for purposes of the motion to dismiss, the Court should not consider his conclusory allegation of a sham marriage when the record clearly indicates otherwise.

C. The UUPA Does Not Violate Mr. Nuno’s Due Process Rights

“The Due Process Clause has been construed to encompass both a procedural and a substantive component. Under the procedural component, the courts have long recognized a general right to notice and an opportunity to be heard. Thus, for rights the law deems subject to formal process (in courts or other adjudicative bodies), due process

requires notice reasonably calculated to inform parties that their rights are in jeopardy and a meaningful opportunity to be heard in the course of such proceedings.” Bolden v. Does (In re Adoption of J.S.), 2014 UT 51, ¶ 20 (internal citations omitted).

“A procedural due process attack on a ... procedural bar would take the form of an assertion that such a limitation forecloses any meaningful opportunity for the plaintiff to protect its rights. A substantive challenge would take a different form. It would involve a broadside attack on the fairness of the procedural bar or limitation, on the ground that the right foreclosed is so fundamental or important that it is protected from extinguishment.” Id. at ¶ 22.

“Yet the promise of the Due Process Clause is limited. It is a protection against state action—not a charter aimed at regulating the actions of private parties.” In the Matter of the Adoption of B.Y., 2015 UT 67, ¶ 16.

Mr. Nuno does not argue that the UUPA is unconstitutional on its face. Instead Mr. Nuno argues first that he “was entitled to full constitutional protection” and second that he “was deprived of any mechanism to protect his rights and, therefore, section 607 of the UUPA is unconstitutional as applied to the facts of this case.” *Brief of Appellant*, pp. 39, 42. Because the substantive rights determine the standard of constitutional scrutiny used in analyzing the procedural issues, this brief will first address substantive due process.

1. *Mr. Nuno Is Not Entitled to Substantive Due Process.*

a. Substantive Due Process rights Must Be Deeply Rooted in the Nation's History and Tradition.

“Substantive due process concerns the content of the rules specifying when a right can be lost or impaired.” Wells v. Children’s Aid Soc. of Utah, 681 P. 2d 199, 204. It deals with the fairness of a procedural bar or limitation that is so fundamental that it is protected against extinguishment. *See Bolden*, 2014 UT 51, ¶ 22. However, “the Due Process Clause is not a license for the judicial fabrication of rights that judges might prefer, on reflection, to have been enshrined in the constitution. [The Court’s] role in interpreting the constitution is one of interpretation, not common-law-making. Thus, the judicial recognition of new fundamental rights of substantive due process is the exception, not the rule.” *Id.* at ¶ 30. To receive constitutional protection, substantive rights should be “deeply rooted in this Nation’s history and tradition, and in the history and culture of Western civilization.” *Id.* at ¶ 39 (internal quotation marks and citations omitted).

While parental rights have long been recognized as rights protected by the constitution, the full fundamental rights and protections are not automatic and available to every person simply claiming to be a parent. For example, an unwed father’s rights are not necessarily fundamental, and “the guarantee of due process recognizes only ‘an inchoate interest’ of an unwed biological father” that does not rise to the level of a fundamental right unless perfected by the actions of the unwed biological father. *Id.* at ¶ 44 (citing T.M. v. B.B. (In re Adoption of T.B.), 2010 UT 42, ¶ 31 n.19). To receive a

heightened standard of scrutiny, “the standard requires more than a broad, general assertion that parental rights are significant and traditionally respected. To trigger such a standard, a party would have to make the more specific showing ... that the *precise interest asserted by the parent is one that is ‘deeply rooted in this Nation’s history and tradition and in the history and culture of Western civilization.’*” Bolden, 2014 UT 51, ¶ 57 (Plurality opinion)(emphasis added).

b. Alleged Biological Fathers of Children Born Into a Marriage Do Not Have a Constitutional Right to Contest Paternity of Children.

The Supreme Court of the United States has already taken the opportunity to review the constitutionality of a state statute that prevented standing and foreclosed the opportunity of a biological father to establish his paternity of a child who was born to a married mother and her husband. Michael H. v. Gerald D., 491 U.S. 110 (1989). Under California law at the time, a child born during a marriage was presumed to be a child of the marriage and only the husband or wife, in limited circumstances, could rebut the presumption. Id. at 113.

In Michael H., a mother was married to husband but had an affair with biological father, resulting in the birth of a child. A few months after the child’s birth, the husband moved to New York and the mother and child remained in California. During the child’s first three years, she and mother resided for different extended periods of time with the biological father, another man, and husband. Biological father and mother completed blood tests that confirmed he was the biological father, signed a stipulation agreeing to such, and held the child out together as biological father’s. Finally, when the child was

three years old, mother and husband reconciled. Against the recommendation of the appointed guardian ad litem, the trial court granted summary judgment in favor of mother and husband, dismissing biological father's paternity action and request for custody and parent time.

In Michael H., the biological father unsuccessfully argued that the Supreme Court had already established that "a liberty interest is created by biological fatherhood plus an established parental relationship" with his child. Id. at 123. The Court disagreed and said the biological father's argument "distorts the rationale of those cases. As [the Court] view[s] them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationship that develop within the *unitary family*." Id. (emphasis added). The Court then went on to affirm the trial court's dismissal of the biological father's action, finding the statute constitutional.

The Supreme Court has considered the constitutional arguments of biological fathers of children born into a marriage, and has rejected the notion that there is any substantive constitutional right that warrants any procedural protection. Therefore, the UUPA cannot be held to violate the United States Constitution.

Similarly, the Alabama Court of Appeals has recently considered the constitutionality of a similar statute that prevents biological fathers from contesting the paternity of their children that are born with a presumed father. C.E.G. v. A.L.A. and T.E., 2130910 Ala. Court of Civil Appeals (2015). In C.E.G., the trial court dismissed a biological father's paternity action based on lack of standing to bring the action, because

such was foreclosed under the Alabama Uniform Parentage Act. Id. The Alabama Court of Appeals affirmed the decision, upholding the constitutionality of the law and finding that it did not violate substantive due process.

Section 607 of the UUPA is very similar to both the California statute in Michael H. and the Alabama statute in C.E.G. in that it contains an irrebuttable presumption against a biological father (or alleged biological father) of a child born to a mother with a presumed father. Section 607 limits standing to contest paternity to only the mother and presumed father “at any time prior to filing an action for divorce or in the pleadings at the time of the divorce of the parents.” Utah Code § 78B-15-607(1).

The basis of this standing limitation is a “fundamental” state policy reason related to the protection of marriage and children: “protecting the marriage, the child, and the relationship between the child and the presumed father [from] attack by outsiders to the marriage, an attack that might discourage the presumed father from staying married to the mother and assuming parental responsibilities for the child.” J.L.C. v. K.A.A., 2014 UT App 245, ¶ 7 (internal quotation marks omitted). This fundamental policy of the state suggests a compelling state interest in protecting marriage, families, and children from outsider attacks, even if—or perhaps especially if—that outsider claims to be or is the biological father.

Although Utah courts have not yet addressed the constitutionality of the UUPA and its limitation of standing, similar statutes have been upheld by the Supreme Court of the United States and by the state of Alabama. Therefore, Utah is not alone in preventing

attacks from outsiders to a marriage, and section 607 of the UUPA is not a violation of the Constitution of the United States or the State of Utah.

c. Mr. Nuno Has No Substantive Constitutional Rights and the Court Should Not Create Any New Ones.

In this matter, Mr. Nuno claims to be the biological father of two of the four minor children of Mr. and Mrs. Hart. He likewise claims to have an established relationship with the minor children. Even if both of these allegations were true, Mr. Nuno is not entitled to any substantive due process protections because the constitution does not recognize the right of a biological father to challenge or establish legal paternity of children born to a married couple.

To prevail on his claim that he is entitled to substantive due process protection of the Utah Constitution, and that the UUPA violates those rights, Mr. Nuno would have to do more than make a “broad, general assertion” that he is entitled to such rights. He must specifically show that “the precise interest asserted by the parent is one that is ‘deeply rooted in this Nation’s history and tradition and in the history and culture of Western civilization.’” Bolden, 2014 UT 51, ¶ 57. Mr. Nuno has not done so. Indeed, he cannot do so because the rights he claims are clearly not rooted in our Nation’s history and tradition, as they have been rejected time and again.

Likewise, Mr. Nuno cannot prevail on his argument that he is entitled to substantive due process rights based on the Constitution of the United States. The Supreme Court, having the opportunity to define, expand or create new rights for people in Mr. Nuno’s position, declined to do so. Mr. Nuno’s allegations are very similar to

those of the biological father in Michael H. However, the biological father in Michael H. also had a signed stipulation and a blood test confirming that he was the father. Even still, the Supreme Court rejected the due process argument and affirmed the dismissal of the father's case.

Therefore, Mr. Nuno is not entitled to substantive due process under either the Utah or United States constitutions and his claims should therefore be dismissed.

d. Mr. Nuno is Not an Unwed Biological Father

In his brief, Mr. Nuno claims that "the determination of his constitutional parental rights should be made on the assumption that Mother was in fact single when the two children, conceived with Mother, were born." *Brief of Appellant*, p. 38. This is not correct and Mr. Nuno cites absolutely no legal basis for that assumption. Mr. and Mrs. Hart were legally married at all relevant times in this action. We cannot simply pretend that they are not. Mr. and Mrs. Hart were married at the time their third child G.L.H., was conceived and born, and at the time their fourth and youngest child, H.H., was conceived and born. The Court cannot simply ignore this fact, which is the most essential and relevant fact in determining standing in this case. Further, Mr. Nuno never objected to the authenticity of or contested the evidence or the fact of the Harts' marriage. He only made a conclusive assertion that it was a "sham" marriage.

Mr. Nuno's assertion also does not make sense in light of what he is requesting. He requests to be treated as an unwed biological father within the meaning of the Utah Adoption Act because Mr. Nuno "cannot be held to a standard that makes him responsible for Mother and Husband's tortious and improper conduct described herein."

Brief of Appellant, p. 38. However, the same Adoption Act provides that a parent “is not excused from strict compliance with the provisions of this chapter based upon any action, statement, or omission of the other parent or third parties. Any person injured by fraudulent representations or actions in connection with an adoption is entitled to pursue civil or criminal penalties in accordance with existing law.” Utah Code § 78B-6-106(1)-(2). The Utah Supreme Court upheld this provision in Adoption of B.Y. 2015 UT 67, ¶ 16 (“Yet the promise of the Due Process Clause is limited. It is a protection against state action—not a charter aimed at regulating the actions of private parties.”).

Mr. Nuno’s argument that he should be held to a different standard based on the Harts’ actions therefore cannot be accepted.

Regardless, by Mr. Nuno’s own admission, he was in fact aware of the Harts’ marriage and, presumably, that the conception of G.L.H. occurred during the marriage. He claims that he viewed the Decree of Divorce, dated March 2012. Therefore he knew that the Harts were married when G.L.H. was conceived. Even if he did not learn of the Harts’ remarriage a few months later, he could have and should have known. The Decree of Divorce referenced by Mr. Nuno states that Mrs. Hart was “restored the use of the former name of Kimberly Lane.” R. 173. However, the Gold’s Gym document filed by Mr. Nuno lists Mrs. Hart’s name as “Hart” and provides a Utah County address, not a Washington County address. R. 204. Further, Mr. Hart was present at both children’s births and is listed on both of their birth certificates, and the children have always had the last name of “Hart.” R. 266, 276. If Mr. Nuno truly did not know that Mr. and Mrs. Hart

were married, he at least could have known had he been present at the births or even simply taken a look at the birth certificates of the children.

Mr. Nuno also should not be considered an unwed biological father because he legally is not an unwed biological father. He is simply an *alleged* biological father of a child with a presumed and legal father. He does not have the same constitutional rights and protections as an unwed biological father in an adoption action. As shown above in parts b. and c., Mr. Nuno is not entitled to any constitutional right to contest the paternity of the minor children. He therefore should not be considered an unwed biological father.

2. There Was No Violation of Procedural Due Process

Because there is no substantive right enjoyed by Mr. Nuno, there is no need to address the procedures in place that would otherwise protect his rights. *See Michael H.*, 491 U.S. 110, 121 (the question of irrebuttable presumptions one of substance and “we therefore reject Michael’s procedural due process challenge and proceed to his substantive claim”); *see also Bolden*, 2014 UT 51, ¶ 20 (stating that procedural due process protections are “for rights the law deems subject to formal process”).

Although no procedural due process is necessary, the UUPA, along with other related statutory provisions, nevertheless do satisfy procedural due process by providing “a meaningful opportunity to be heard.” Because Utah courts have not considered the constitutional rights of an alleged biological father whose child is born to a married mother with a presumed father, the most similar type of case to draw from by analogy would be that of an unwed biological father in an adoption case, which is at least a step

above an alleged biological father of a child with a presumed father. For purposes of this section, the standard used in those cases will be adopted here for analysis.

a. Standard of Scrutiny

As Mr. Nuno set forth in his brief, in a case of an unwed biological father who contests an adoption, the standard of scrutiny under the federal and state Due Process Clauses is a highly deferential standard of arbitrariness or rationality. *See Brief of Appellant*, p. 40; *see also Bolden*, 2014 UT 51, ¶¶ 49, 53. For rights the law deems subject to formal process, due process requires notice and a “meaningful opportunity” to be heard. *Id.* at ¶ 20. Simply, if a statutory scheme provides a “meaningful chance” to protect an interest, a challenging party “may not complain of the termination of his interest when he fails to strictly comply with its procedures.” *In re Adoption of Baby Girl T.*, 2012 UT 78, ¶ 20. “Yet the promise of the Due Process Clause is limited. It is a protection against state action—not a charter aimed at regulating the actions of private parties.” *Adoption of B.Y.*, 2015 UT 67, ¶ 16.

b. Notice

Though he does not directly state it, Mr. Nuno essentially complains that he was not provided “notice” because he did not know and could not know that Mr. and Mrs. Hart were married when the children were conceived and born. This point has been addressed and refuted above. However, his complaint is against Mr. and Mrs. Hart, private parties, and not against “state action” as required in *Adoption of B.Y.* Mr. Nuno does not complain that the *government* failed to provide notice. “Nor could he...[T]here is no constitutional requirement under the Due Process Clause that the state give actual

notice of the statutory requirements for establishing parental rights.” Id. at ¶ 19 (citing Sanchez v. L.D.S. Soc. Servs., 680 P.2d 753, 755 (Utah 1984))(internal quotation marks omitted).

c. Opportunity to be Heard

“The due process right to an *opportunity* to be heard is by no means a blanket prohibition of procedural prerequisites to the preservation of a legal right.” Adoption of B.Y., 2015 UT 67, ¶ 26 (emphasis in original). On the other hand, that does not mean that procedural prerequisites are immune from due process scrutiny. “In past cases, [the Utah Supreme Court] found this standard to be met by a showing of *impossibility*.” Id. at ¶ 28 (emphasis in original). The Supreme Court in Adoption of B.Y. explained the applicability of the “impossibility” showing and the effect of not being able to make that showing:

The impossibility inquiry centers on the father's factual basis for anticipating the need to fulfill the requirements of Utah law to protect his legal rights.

....

[A] father who knows of a pregnancy and has reason to suspect that his child will be born in or placed for adoption in Utah must fulfill the requirements of the Utah Adoption Act. And such father has a "sufficient opportunity" to be heard and thus cannot establish impossibility.

....

For reasons explained above, a putative father who knows of a pregnancy and has reason to suspect that his child will be born in or placed for adoption in Utah is on notice of the applicability of Utah Code section 78B-6-106. *Supra* ¶ 34. And because that provision clearly states that a private representation is insufficient to excuse compliance with the Adoption Act, *a father who knows of a pregnancy and of a likely birth in Utah but ignores the Utah statute in reliance on a mother's representations has been given all the process that he is due*. Such a father proceeds at his peril if he relies on such representations. And if those representations are not fulfilled, his recourse is in a civil suit against the mother...

Id. at ¶¶ 33, 34, 39 (emphasis added).

Mr. Nuno complains that he did not have an opportunity to undertake effective steps to assert his claim for paternity and custody of the minor children, and therefore that he was denied a meaningful chance. *Brief of Appellant*, pp. 41-42. This is not true. Despite anything that Mr. and Mrs. Hart may have told him, Mr. Nuno claims he was aware of a pregnancy, but he failed to take any legal steps to follow the Utah statutes to protect the rights he claims to have. For example, he could have married Mrs. Hart during the brief period of divorce. He did not do so. He could have filed a paternity action and complied with Utah Code prior to the birth of the Harts' child. He did not do so. Instead Mr. Nuno allegedly relied on misrepresentations from the Harts and ignored the Utah statutes. He therefore was given "all the process that he is due." His remedy is not to now claim paternity, but to file a civil suit if he believes such is warranted.

d. Opportunity Through Utah Code § 30-5a-101

Utah's Custody and Visitation for Persons Other than Parents Act allows a person other than a parent to obtain "custodial or visitation rights" pursuant to the chapter. Utah Code § 30-5a-103(2). A "person other than a parent" means a person related to the child by marriage or blood..." Id. at 102(2). In Justice Stevens' concurring opinion in Michael H., he found that the California statutory scheme satisfied due process because of another section of California Civil Code which provided an opportunity for other interested persons to obtain visitation rights of children in limited circumstances. Michael H., 491

U.S. at 133-34 (Stevens, concurring). Utah Code provides a similar opportunity for persons who are not legally defined as a parent.

In addition to the Adoption and Paternity codes that Mr. Nuno did not attempt to follow until too late, Mr. Nuno also had an opportunity to proceed under Utah Code § 30-5a-101, et seq. to seek custodial and visitation rights. While Mr. Nuno claims to be the father of the minor children, as a matter of law he is not a “parent.” He therefore had an opportunity to proceed under this statute as he claims to be related by blood to the children. Mr. Nuno failed to seize the opportunity to proceed under this chapter despite having the opportunity to do so.

In summary, Mr. Nuno—an alleged biological father of a child born to a mother who is married to the child’s presumed father—is not entitled to substantive due process rights under the constitution. Even if he were, he had notice and an opportunity to assert those rights within the Adoption, Paternity, and Custody/Visitation codes, which satisfy procedural due process. Mr. Nuno was therefore given all process that was due, and his own failure to timely or appropriately do so cannot be found as a violation of whatever constitutional rights he may claim to have.

IV. ALLOWING MR. NUNO TO ATTACK THE MARRIAGE AND REQUIRE DISCOVERY AND TRIAL VIOLATES THE HART’S CONSTITUTIONAL RIGHTS TO PRIVACY AND TO DUE PROCESS

A. Allowing Mr. Nuno and the Courts to Attack the Harts’ Marriage and the Paternity of Their Children Would Violate Their Constitutional Rights

The Supreme Court has declared that “certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships

in safeguarding the individual freedom that is central to our constitutional scheme.”

Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). The “rights embodied in family relationships are inherent, natural, and retained rights as follows: The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.” In re JP, 648 P. 2d 1364, 1374 (Utah 1982)(citing Stanley v. Illinois, 405 U.S. 645 (1972)). “While the State has a legitimate interest in the creation and dissolution of the marriage contract, the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference.” Hodgson v. Minnesota, 497 U.S. 417, 446 (1990).

Because the constitution protects against government intrusion and not private intrusion, Mr. Nuno’s personal attack on the Harts’ marriage and family relations cannot in and of itself violate the constitutional rights of the Hart family. However, if a court endorses the attack by allowing it to proceed through additional discovery, court hearings, and trial with the court making the ultimate decision, the intrusion becomes governmental and not simply private action. This type of intrusion on the family not only violates the State’s public policy of protecting marriages and family from outside attacks, but also would constitute undue state interference.

The Harts’ privacy interest in the upbringing of their four children and the intimacies of their marital relationship should not be interfered with by requiring or authorizing the trial court to intrude and interfere further into their lives and decisions.

Even if Mr. Nuno's allegations were true, it is clear that Mr. and Mrs. Hart have made the decision to leave Mr. Nuno out of their lives and the lives of the minor children, and that they do not want him interfering or being involved with them. If the Court were to endorse his intrusion and require a full case, it would be an unconstitutional intrusion by the state.

B. Permitting Mr. Nuno to Proceed Would Violate Mr. Hart's Constitutional Rights as the Legal and Presumed Father of the Children

It is well established that the "interest of parents in the care, custody, and control of their children... is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." Jones v. Jones, 2013 UT App 174 ¶ 10. "When the court has recognized a due process right it deems 'fundamental,' it consistently has applied a standard of strict scrutiny to the protection of such a right... Under this standard, a fundamental right is protected except in the limited circumstance in which an infringement of it is shown to be 'narrowly tailored' to protect a 'compelling governmental interest.'" Jones v. Jones, 2015 UT 84, ¶¶ 26-27. The Utah Supreme Court has also held that "[p]arental rights are at their apex for parents who are married." In re J.P., 648 P. 2d at 1374-75.

In this matter, Mr. Hart is the father—both legal and presumed—of all four of the children born to him and Mrs. Hart. He and Mrs. Hart are married parents, placing his fundamental parental rights at their apex. The children were conceived and born during the marriage. Mr. Hart was present at the birth of both children, is listed on their birth certificates, loves both of them very much, and intends to remain married and continue to

raise them together with the Harts' two older children as children of the marriage. R. 276. Because of their fundamental nature, they are protected and the standard of strict scrutiny applies, necessitating a showing of a compelling state interest that is narrowly tailored.

If Mr. Nuno were allowed to proceed with a challenge to Mr. Hart's paternity to the children, it would unconstitutionally infringe on Mr. Hart's fundamental parental rights. There is no compelling state interest in providing an alleged biological father with parental rights when a presumed father exists. In fact, the UUPA indicates just the opposite—that there is a compelling state interest in preventing the alleged biological father from attacking the marriage and the presumed father's rights. *See R.P. v. K.S.W.*, 2014 UT App 38.

Therefore, allowing Mr. Nuno and other alleged biological fathers to pursue a paternity action against a presumed father married to the mother would be an unconstitutional infringement on the presumed father's fundamental rights to his children.

V. ATTORNEY FEES AND COSTS.

Mr. and Mrs. Hart respectfully request that the Court order Mr. Nuno to pay for their attorney fees and costs incurred litigating the present appeal. “[W]hen a party is entitled to attorney fees below and prevails on appeal, that party is also entitled to fees reasonably incurred on appeal.” *Dillon v. Southern Mgmt. Corp. Ret. Tr.*, 2014 UT 14, ¶ 61 (internal quotation marks omitted). The Harts requested attorney fees below based on Utah Code §30-3-3 (“in any action to establish an order of custody, parent-time, child support ... in a domestic case, the court may order a party to pay the costs, attorney fees,

and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action...[and] (2) In any action to enforce an order of custody, parent-time, child support ... in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense.”) and § 78B-5-825 (“In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.”). The trial court found that the Harts had substantially prevailed, but required that they file an Affidavit of Attorney’s Fees for Mr. Nuno to respond to. R. 517. The Affidavit and a Motion for Entry of Judgment on Attorney Fees were filed and responded to, but no final decision has been issued by the trial court. R. 565, 572.


The Harts should be awarded their attorney fees below and on appeal.

CONCLUSION

The Court of Appeals should Affirm the trial court’s dismissal because (1) the issues were not properly preserved; (2) Mr. Nuno has no substantive constitutional rights; (3) he is not entitled to due process protections; and (4) even if he were, the provisions of Utah Code § 30-5a-101 *et seq.* satisfy the demands of due process by granting him a reasonable opportunity to be heard regarding custody of and visitation with the minor children. Further, to allow Mr. Nuno to proceed would violate the constitutional rights of

Mr. and Mrs. Hart and their entire family. Therefore, the Court should AFFIRM the dismissal of Mr. Nuno's petition for paternity.

Dated December 11, 2015.




JUSTIN D. CAPLIN
D. GRANT DICKINSON
Attorneys for Appellees Mr. and Mrs. Hart

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Utah R. App. 24(f)(1).
The brief contains 10,118 words.

Dated December 11, 2015.



JUSTIN D. CAPLIN
D. GRANT DICKINSON
Attorneys for Appellees Mr. and Mrs. Hart

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to
the following on December 11, 2015:

Don R. Petersen
Leslie W. Slaugh
120 East 300 North
P.O. Box 1248
Provo, UT 84603



Addendum A

Utah Code § 30-5a-101, et seq.

30-5a-101 Title.

This chapter is known as the "Custody and Visitation for Persons Other than Parents Act."

Enacted by Chapter 272, 2008 General Session

30-5a-102 Definitions.

As used in this chapter:

- (1) "Parent" means a biological or adoptive parent.
- (2) "Person other than a parent" means a person related to the child by marriage or blood, including:
 - (a) siblings;
 - (b) aunts;
 - (c) uncles;
 - (d) grandparents; or
 - (e) current or former step-parents, or any of the persons in Subsections (2)(a) through (d) in a step relationship to the child.

Enacted by Chapter 272, 2008 General Session

30-5a-103 Custody and visitation for persons other than a parent.

- (1) In accordance with Section 62A-4a-201, it is the public policy of this state that parents retain the fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children. There is a rebuttable presumption that a parent's decisions are in the child's best interests.
- (2) A court may find the presumption in Subsection (1) rebutted and grant custodial or visitation rights to a person other than a parent who, by clear and convincing evidence, has established all of the following:
 - (a) the person has intentionally assumed the role and obligations of a parent;
 - (b) the person and the child have formed an emotional bond and created a parent-child type relationship;
 - (c) the person contributed emotionally or financially to the child's well being;
 - (d) assumption of the parental role is not the result of a financially compensated surrogate care arrangement;
 - (e) continuation of the relationship between the person and the child would be in the child's best interests;
 - (f) loss or cessation of the relationship between the person and the child would be detrimental to the child; and
 - (g) the parent:
 - (i) is absent; or
 - (ii) is found by a court to have abused or neglected the child.
- (3) A proceeding under this chapter may be commenced by filing a verified petition, or petition supported by an affidavit, in the juvenile court if a matter is pending, or in the district court in the county in which the child:
 - (a) currently resides; or
 - (b) lived with a parent or a person other than a parent who acted as a parent within six months before the commencement of the action.
- (4) A proceeding under this chapter may be filed in a pending divorce, parentage action, or other proceeding, including a proceeding in the juvenile court, involving custody of or visitation with a child.
- (5) The petition shall include detailed facts supporting the petitioner's right to file the petition including the criteria set forth in Subsection (2) and residency information as set forth in Section 78B-13-209.
- (6) A proceeding under this chapter may not be filed against a parent who is actively serving outside the state in any branch of the military.
- (7) Notice of a petition filed pursuant to this chapter shall be served in accordance with the rules of civil procedure on all of the following:
 - (a) the child's biological, adopted, presumed, declarant, and adjudicated parents;
 - (b) any person who has court-ordered custody or visitation rights;
 - (c) the child's guardian;
 - (d) the guardian ad litem, if one has been appointed;
 - (e) a person or agency that has physical custody of the child or that claims to have custody or visitation rights; and
 - (f) any other person or agency that has previously appeared in any action regarding custody of or visitation with the child.
- (8) The court may order a custody evaluation to be conducted in any action brought under this chapter.

(9) The court may enter temporary orders in an action brought under this chapter pending the entry of final orders.

Enacted by Chapter 272, 2008 General Session

30-5a-104 Exceptions.

This chapter may not be used to seek, obtain, maintain or continue custody of, or visitation with, a child who has been relinquished for adoption, or adopted pursuant to an order of a court of competent jurisdiction.

Enacted by Chapter 108, 2009 General Session

Addendum B

Utah Rules of Civil Procedure 108

Rule 108. Objection to court commissioner's recommendation.

(a) A recommendation of a court commissioner is the order of the court until modified by the court. A party may file a written objection to the recommendation within 14 days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's counter-signature on the commissioner's recommendation does not affect the review of an objection.

(b) The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect. The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(d)(1) The judge may hold a hearing on any objection.

(d)(2) If the hearing before the commissioner was held under Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact.

(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:

(d)(3)(A) to present testimony and other evidence on genuine issues of material fact relevant to custody; and

(d)(3)(B) to a hearing at which the judge may require testimony or proffers of testimony on genuine issues of material fact relevant to issues other than custody.

(e) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, whether by proffer, testimony or exhibit, before the commissioner.

(f) The judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.

Addendum C

Declaration of Brian J. Hart in Support of
Motion to Dismiss (R. 276)

Yaiko Osaki Carranza, No. 10068
MOODY BROWN LAW
Attorneys for Respondent
2525 N. Canyon Rd.
Provo, Utah 84604
Telephone: (801) 356-8300
Fax: (801) 356-8400

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
AMERICAN FORK DEPARTMENT, STATE OF UTAH
75 East 80 North, Suite 202, American Fork, UT 84003

EMMANUEL NUNO,
Petitioner,
v.

KIMBERLY LANE HART,
Respondent.

:
: **DECLARATION OF BRIAN J. HART**
: **IN SUPPORT OF MOTION TO**
: **DISMISS**
:
: Civil No. 144100205
: Judge Christine Johnson
: Commissioner Thomas R Patton

I, BRIAN J. HART, state as follows:

1. I am married to the Respondent in the above-entitled action. And the minor children of this case, G.L.H. (DOB August 2012) and H.H. (DOB December 2013) were born as issue of our marriage.

2. Respondent and I were first married on July 7, 2007 and we had two minor children as issue of that marriage. Respondent and I divorced on March 26, 2012. Respondent and I again remarried on August 22, 2012, and we have been married ever since (See Exhibit A – Copy of Marriage Certificate).

3. Both G.L.H., and H.H. were born while Respondent and I were married to each other. I am listed as the father on both children's birth certificates, and I have been present at both of

the children's births. I love both G.L.H. and H.H. very much, and it is my intent to remain married to Respondent and to raise G.L.H. and H.H., together with our older two children as children of our marriage.

4. Neither I nor Respondent have challenged the paternity of the children subject to this case.

Pursuant to Utah Code Ann. § 78B-5-705, I solemnly declare or affirm under criminal penalty of Perjury in the State of Utah that the foregoing is true to the best of my knowledge.

Dated this 29th day of October, 2014.

/s/ Brian J. Hart permission given via email on 10/29/14

BRIAN J. HART

CERTIFICATE OF SERVICE

I hereby certify that I am a member or and/or employed by the law firm of Moody Brown Law, 2525 North Canyon Rd., Provo, Utah 84604, and that in said capacity and pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **DECLARATION OF BRIAN J. HART IN SUPPORT OF MOTION TO DISMISS** was served upon the following on this 30th day of October, 2014:

Don Petersen

- ☒ e-Filing (UCJA Rule 4-503)
- ☐ U.S. Regular Mail
- ☐ Facsimile Transmission
- ☐ E-Mail

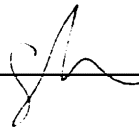


Exhibit A

Copy of Marriage Certificate

MARRIAGE LICENSE

COUNTY OF COCONINO

TO ANY REGULAR LICENSED OR ORDAINED MINISTER OF THE GOSPEL, ANY JUSTICE OF A COURT OF RECORD,
OR ANY JUSTICE OF THE PEACE WITHIN THIS COUNTY, OR STATE.

You Are Hereby Authorized To Solemnize The Rites of Matrimony

BETWEEN

BRIAN JEFFRY HART of PAGE COCONINO ARIZONA
08/05/1985 Town County State

AND

KIMBERLY HART of PAGE COCONINO ARIZONA
04/20/1988 Town County State

In Witness Whereof, I have hereunto set my hand and affixed my official seal
21st August 2012
this _____ day of _____

Deborah Young
Clerk of the Superior Court of the State of Arizona, in and for the County of Coconino.

By *[Signature]* Deputy Clerk
This marriage license will expire twelve months from date of issuance,
pursuant to A.R.S. 25-121(B).

Marriage Certificate

This Certifies That BRIAN JEFFRY HART and KIMBERLY HART
were united in marriage at _____ PAGE _____ according to the laws of Arizona
City _____
and by the authority of the foregoing License and by a legal official, in the presence of two witnesses of
lawful age, who have attached their signatures as witnesses to said ceremony.
In witness thereof, the said contracting parties, the said witnesses and the said
JUDGE DONALD G. ROBERTS, who solemnized such marriage ceremony, have
Print - Person Performing Ceremony
hereunto set their hands, this 21ST day of AUGUST, 2012

x *[Signature]* (Witness) x *Kimberly Hart* (Bride)
x *[Signature]* (Witness) x *[Signature]* (Groom)

Sign and return this license to the Clerk of Superior
Court, Flagstaff, Arizona within 10 days.

[Signature] (Officer, Minister, or Person Performing Ceremony)

Recorded this _____ day of _____ in Book _____ Page _____

By _____ Deputy Clerk

State of Arizona

Addendum D

Declaration of Respondent in Support of Motion to Dismiss (R. 266)

Yaiko Osaki Carranza, No. 10068
MOODY BROWN LAW
Attorneys for Respondent
2525 N. Canyon Rd.
Provo, Utah 84604
Telephone: (801) 356-8300
Fax: (801) 356-8400

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
AMERICAN FORK DEPARTMENT, STATE OF UTAH
75 East 80 North, Suite 202, American Fork, UT 84003

EMMANUEL NUNO,
Petitioner,

v.

KIMBERLY LANE HART,
Respondent.

:
: **DECLARATION OF RESPONDENT IN**
: **SUPPORT OF MOTION TO DISMISS**

:
: Civil No. 144100205
: Judge Christine Johnson
: Commissioner Thomas R Patton

I, KIMBERLY LANE HART, state as follows:

1. I am the Respondent in the above-entitled action.
2. At no time have Petitioner and I been married.
3. I am the Mother of the minor children of this case, G.L.H. (DOB August 2012) and H.H. (DOB December 2013).
4. I am married to Brian J. Hart and we were married on July 7, 2007, we had two minor children, and then we divorced on March 26, 2012. Brian J. Hart and I again remarried on August 22, 2012, and we have been married ever since (See Exhibit A – Copy of Marriage Certificate).
5. Both G.L.H., and H.H. were born while my husband and I were married to each other.

My husband is listed as the father on both children's birth certificates. G.L.H. was born in Redacted and I have requested a copy of the birth certificate from the state of Redacted I will present that to the court as soon as I receive it. However, I have a copy of G.L.H.'s vaccination records from Redacted which refer to G.L.H. as "Redacted" (See Exhibit B – G.L.H. vaccination record). From the day he was born, my son, G.L.H. has always had my husband's last name. My other child, H.H. was born in Redacted and as shown on his birth certificate, my husband, Brian Hart, is listed on the child's birth certificate, and the child also bears the "Redacted" last name (See Exhibit C – H.H. Birth Certificate).

6. My husband, Brian J. Hart, and I intend to remain married to each other and to raise our four children as children of our marriage.

7. Neither I nor Mr. Hart have challenged the paternity of the children subject to this case.

Pursuant to Utah Code Ann. § 78B-5-705, I solemnly declare or affirm under criminal penalty of Perjury in the State of Utah that the foregoing is true to the best of my knowledge.

Dated this 29th day of October, 2014.

/s/ Kimberly L. Hart permission given via email on 10/29/14

KIMBERLY LANE HART, Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member or and/or employed by the law firm of Moody Brown Law, 2525 North Canyon Rd., Provo, Utah 84604, and that in said capacity and pursuant to Rule 5(b), Utah Rules of Civil Procedure, a true and correct copy of the foregoing **DECLARATION OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS** was served upon the following on this 30th day of October, 2014:

Don Petersen

- ☒ e-Filing (UCJA Rule 4-503)
- ☐ U.S. Regular Mail
- ☐ Facsimile Transmission
- ☐ E-Mail

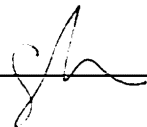



Exhibit A

Copy of Marriage Certificate



MARRIAGE LICENSE

COUNTY OF COCONINO

TO ANY REGULAR LICENSED OR ORDAINED MINISTER OF THE GOSPEL, ANY JUSTICE OF A COURT OF RECORD,
OR ANY JUSTICE OF THE PEACE WITHIN THIS COUNTY, OR STATE.

You Are Hereby Authorized To Solemnize The Rites of Matrimony

BETWEEN

BRIAN JEFFRY HART of PAGE COCONINO ARIZONA
08/05/1985 Town County State

AND
KIMBERLY HART of PAGE COCONINO ARIZONA
04/20/1988 Town County State

In Witness Whereof, I have hereunto set my hand and affixed my official seal
21st August 2012
this _____ day of _____

Deborah Young
Clerk of the Superior Court of the State of Arizona, in and for the County of Coconino.

By *[Signature]* Deputy Clerk

This marriage license will expire twelve months from date of issuance,
pursuant to A.R.S. 25-121(B).

Marriage Certificate

This Certifies That BRIAN JEFFRY HART and KIMBERLY HART
were united in marriage at _____ PAGE _____ according to the laws of Arizona
City _____
and by the authority of the foregoing License and by a legal official, in the presence of two witnesses of
lawful age, who have attached their signatures as witnesses to said ceremony.

In witness thereof, the said contracting parties, the said witnesses and the said
JUDGE DONALD G. ROBERTS, who solemnized such marriage ceremony, have
Print - Person Performing Ceremony

hereunto set their hands, this 21ST day of AUGUST, 2012

x *[Signature]* (Witness)
x *[Signature]* (Witness)

[Signature] (Bride)
[Signature] (Groom)

Sign and return this license to the Clerk of Superior
Court, Flagstaff, Arizona within 10 days.

[Signature] (Officer, Minister, or Person Performing Ceremony)

Recorded this _____ day of _____ in Book _____ Page _____

By _____ Deputy Clerk

State of Arizona

Exhibit B

G.L.H. vaccination record

Name: Redacted			Date of Birth: 08/23/2012			
Type of Vaccine	1st Mo/Day/Yr	2nd Mo/Day/Yr	3rd Mo/Day/Yr	4th Mo/Day/Yr	5th Mo/Day/Yr	
(DTaP/DT) Diphtheria, Tetanus, Pertussis	/ /	/ /	/ /	/ /	/ /	
Signature of Provider						
(IPV) Polio	/ /	/ /	/ /	/ /	/ /	
Signature of Provider						
(Hib) <i>Haemophilus Influenzae</i> type B	/ /	/ /	/ /	/ /		Notes:
Name of Hib Manufacturer						
Signature of Provider						
(PCV) Pneumococcal Conjugate	/ /	/ /	/ /	/ /		
Signature of Provider						
(Hep B) Hepatitis B	08/23/12	/ /	/ /	/ /		
Signature of Provider	Page Hospital					
(Hep A) Hepatitis A	/ /	/ /	/ /			
Signature of Provider						
(RV) Rotavirus	/ /	/ /	/ /			
Name of RV Manufacturer						
Signature of Provider						
(MMR) Measles, Mumps, Rubella	/ /	/ /	/ /			
Signature of Provider						
(VAR) varicella <input checked="" type="checkbox"/> box if Hx of chickenpox	/ /	/ /	/ /			
Signature of Provider						
(Flu) Influenza	/ /	/ /	/ /	/ /		
Print Live or Inactivated						
Signature of Provider						
(HPV) Human Papilloma Virus	/ /	/ /	/ /	/ /		
Name of HPV Manufacturer						
Signature of Provider						
(Td) Tetanus, Diphtheria	/ /	/ /	/ /	/ /		
Signature of Provider						
(Tdap) Tetanus, Diphtheria, Pertussis	/ /	/ /				
Signature of Provider						
(MCV) Meningococcal Conjugate	/ /	/ /				
Signature of Provider						
(PPV23) Pneumococcal Polysaccharide	/ /	/ /	Newborn Screen	Date	Result	Provider
Signature of Provider				8-24-12		Page Hospital
Other:	/ /	/ /	TB Skin Test			
Signature of Provider						
Other:	/ /	/ /				
Signature of Provider						

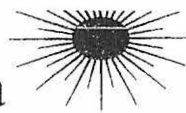
VACCINES FOR CHILDREN PROGRAM

The VFC program is a federally funded program that provides vaccines at no cost to children who might not otherwise be vaccinated because of inability to pay. Vaccines are distributed at no charge to those private physicians' offices and public health clinics registered as VFC providers.

Providers & Parents: Learn more about the VFC Program at <http://www.cdc.gov/vaccines/programs/vfc/>

Redacted

Arizona
Department of
Health Services



**BABY
SHOTS**
A HEALTHY DOSE OF LOVE


Newborn Hearing Screen				
P.H.	Initial Screen Complete by hospital discharge		Second Screen Complete by 1 month of age	
Date	8-24-12			
Right	<input checked="" type="checkbox"/> Pass	<input type="checkbox"/> Refer	<input type="checkbox"/> Pass	<input type="checkbox"/> Refer
Left	<input checked="" type="checkbox"/> Pass	<input type="checkbox"/> Refer	<input type="checkbox"/> Pass	<input type="checkbox"/> Refer
	Monitor for late onset and progressive losses	Refer for 2nd Screen (refer to pediatric audiologist if over 6 mo.)	Monitor for late onset and progressive losses	Refer to a pediatric audiologist for complete evaluation

Exhibit C

H.H. birth certificate

Redacted