

2004

Kelly F. Pearson v. Kimberlee Y. Pearson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KELLY F. PEARSON,
Petitioner/Appellant,

vs.

KIMBERLEE Y. PEARSON,
Respondent/Appellee.

)
)
)
) Case No. 20040677-CA

PETER D. THANOS,
Intervenor/Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the Third District Court, Salt Lake County
Honorable Tyrone E. Medley

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING INTERVENOR STANDING TO DISESTABLISH PETITIONER AS ZACHARY'S LEGAL FATHER

A. Schoolcraft Analysis

Intervenor and respondent assert that State in re J.W.F., 799 P.2d 710 (Utah 1990) ("Schoolcraft") resolved a conflict in the holdings of Teece v. Teece, 715 P.2d 106 (Utah 1986) and Lopes v. Lopes, 518 P.2d 687 (Utah 1974). In fact there was no conflict in the holdings of these cases. Lopes adopts Lord Mansfield's rule, which simply bars testimony from parents that would illegitimize their child, while acknowledging that "[i]n this case, as it seems would be true in practically all cases, there should be no difficulty in such independent proof as to the paternity of the child." Lopes, 518 P.2d at 691, n.5. In Teece, the trial court improperly invoked Lord Mansfield's rule to deny a husband's request for blood tests. The Utah Supreme Court reversed, noting: "Nothing in [Lord Mansfield's] rule, which bars *testimony* from either parent that would illegitimize their child, prohibits the introduction of the results of blood or tissue typing tests or of witnesses other than the putative parents on the issue of paternity." Teece, 715 P.2d at 107 (citing Hales v. Hales, 656 P.2d 423 (Utah 1982) (emphasis in original)).

As both the Teece court and the Lopes court recognized, by the time these cases were decided the advent of blood tests had changed the landscape with respect to parentage determinations, substantially eroding the practical effect of Lord Mansfield's rule.

Moreover, scientific advances in blood testing had been given legal effect by the enactment of sections 78-25-18 and -21 of the Utah Code, which mandated that courts use blood tests to assist in paternity determinations. See Teece, 715 P.2d at 107; Schoolcraft, 799 P.2d at 714 (quoting Utah Code Ann. §§ 78-25-18 & -21).

It was in this context that the Utah Supreme Court decided Schoolcraft. The effect of the Schoolcraft decision was to affirm the continued importance of the *policy considerations* informing Lord Mansfield's rule and the presumption of legitimacy, despite advances in paternity testing in the century or more that these rules had been in place. In so doing, the Utah Supreme Court was in line with courts in other states which similarly recognized the need for legal principles to address complexities arising from social and scientific developments. See Ira Mark Ellman, Thinking about Custody and Support in Ambiguous-Father Families, 36 Fam. L. Q. 49, 51-55 (2002). These developments resulted in an increased need to assign legal paternity where there is knowledge of a divergence between social and biological paternity. Id. at 55. Professor Ellman states: "Legal paternity and biological paternity have never been identical. That was once inevitable; today it is a matter of choice. Particularly as policymakers have become more determined to enforce child support obligations, the choice becomes more important. Even though the law's historic emphasis on social paternity owed much to scientific ignorance, it often produced sensible results. Those results should not be displaced by our new-found ability to establish biological paternity." Id. at 77.

That sentiment is echoed by the Michigan Supreme Court in In re CAW, 665 N.W.2d 475 (Mich. 2003), in which the court held that a biological father did not have standing to intervene in a child protective proceeding in which the child involved had a legal father. The court stated: "There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage."

Hence, different legal principles have developed to address the question of legal paternity where the social father and the biological father are the not the same. "The key things we learn from all these cases . . . is that the rights and obligations of parentage appropriately arise from relationships, not just from biology." Ellman, supra, at 65.

Schoolcraft, by application of a standing analysis that mandates attention to policy considerations protecting marriage and children before paternity of a child who has a legal father may be contested, simply makes use of one such legal tool. Other states have also employed standing analyses, see, e.g., Ex parte Presse, 554 So. 2d 406 (Ala. 1989); Nostrand v. Olivieri, 427 So. 2d 374 (Fla. Dist. Ct. App. 1983); Family Independence Agency v. Jefferson, 677 N.W.2d 800 (Mich. 2004); Girard v. Wagenmaker, 470 N.W.2d 372 (Mich. 1991); Evans v. Bisson, 970 S.W.2d 431 (Tenn. 1998), have required that a full evidentiary hearing be conducted prior to blood tests being ordered or considered or paternity being determined, see, e.g., N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000); Fernandez v. McKenney, 776 So. 2d 1118 (Fla. Dist. Ct. App. 2001), have weighed the competing interests at stake per their statutory schemes, see, e.g., In re Jesusa V., 85 P.3d 2 (Cal.

2004) or have employed estoppel principles, see, e.g., In re Marriage of Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996).

While respondent and intervenor do not appear to contend that Schoolcraft was not an appropriate analytical tool to be applied in this case, they nevertheless argue that intervenor's affidavit, improperly filed August 1, 2001, prior to intervenor's motion to intervene having been granted and before he had been made a party to the case, was admissible and conclusively proved that he was Zachary's father. The notion that a person, not a party to a case, may file blood tests with the court at any time and thereby establish paternity, runs directly counter to Schoolcraft.

Respondent and intervenor also take issue with the concept that the policy of protecting marriage may have broader application than to the Pearsons marriage in particular, and that rules of law may promote – or not – the stability of marriage in general. Nevertheless, this concept is evident in our laws. An example is Rule 502 of the Utah Rules of Evidence, which protects spousal confidential communications after divorce, and even after death. See Edward Kimball & Ronald Boyce, Utah Evidence Law, 5-148 (2nd ed. 2004). The survival of the privilege, though a particular marriage has dissolved, encourages open communication between spouses in marriage in general, while having no positive benefit in application to the particular marriage that has already dissolved.

Similarly, it is clear that the Pearsons marriage has dissolved. However, the stability of marriages in general, as distinct from the Pearsons marriage in particular, is promoted by

giving legal protection to parent-child relationships that develop within marriages, and ensuring that that legal protection survives subsequent separation or divorce. The dissolution of the marriage between the legal father and the mother “does not change the preferred principle, which is to preserve the child’s relationship with the social father, if there is one.” Ellman, supra, at 64; see also Susan H. v. Jack S., 30 Cal. App. 4th 1435, 1442-43 (1994) (Steven W. v. Matthew S., 33 Cal. App. 4th 1108, 1116-17 (1995) (holding that extant father-child relationship should be preserved at cost of biological ties, though presumed father’s relationship with mother had ended). Petitioner merely urges that these broader implications are legitimately considered when analyzing the first policy consideration identified in Schoolcraft.

In their focus on the fact that petitioner’s marriage with respondent has dissolved, respondent and intervenor almost wholly fail to address the second policy consideration identified in Schoolcraft, that of protecting children from disruptive attacks on their paternity, except to note that Dr. Sanders opined that “[t]here is no inherent reason why the presence of Mr. Thanos as another loving caretaker should have any further disruptive impact on Zachary’s relationship with Mr. Pearson.” Add. “D” to Brief of Appellees, at 2, ¶ 2.

Reliance on this opinion of Dr. Sanders’ in addressing the second policy consideration set forth in Schoolcraft is problematic for several reasons. First, Dr. Sanders has no credentials that qualify her to decide questions of public policy. Secondly, while there may be no “inherent reason” that the presence of intervenor in Zachary’s life should

have any disruptive impact on Zachary's relationship with petitioner, the question that needed to be answered was whether intervenor's presence in this case, for the express purpose of establishing himself as Zachary's legal father and terminating the legal relationship of father and child that existed to that time, would be disruptive to Zachary. It is impossible to reconcile the court's conclusion that it would not with Dr. Sanders' statement that "Zachary's emotional security would likely be significantly disrupted in the case of severely limited or complete loss of contact with Mr. Pearson," id. and the court's ultimate conclusion – stemming entirely from the court's prior standing determination – that petitioner must be deemed a "non-parent" to Zachary with no legal rights of custody vis-à-vis respondent due to the dictates of Hutchison. Finding No. 35.

As the court finds, petitioner is Zachary's father "in real terms". Finding No. 35. The standing analysis of Schoolcraft provides a mechanism by which the courts can ensure that the individual who is a child's father "in real terms" is also identified as the child's father in legal terms, and that social and legal realities thus remain aligned. It should have been so employed by the trial court in this case.

Respondent and intervenor place much emphasis on the fact that they subsequently married and formed an "intact family relationship", apparently contending that these facts should be determinative in the standing analysis. However, as the Supreme Court of North Dakota pointed out in B.H. v. K.D., 506 N.W.2d 368 (N.D. 1993), "One must have standing

to commence an action. . . . One cannot commence an action without standing, based only on the hope that standing may later materialize.” Id. at 375.

Intervenor petitioned to intervene in the Pearsons divorce action in January 2001, when Zachary was 16 months old. He had extremely limited contact with Zachary to that point, had participated in keeping his parentage of Zachary secret, had not demonstrated a willingness to sacrifice his own interests for those of Zachary's, and had not developed a strong mutual bond with Zachary. Finding Nos. 6 & 35. These facts, as found by the court after trial, are exactly as Commissioner Evans found them to be at the initial standing hearing in August 2001. (R.671 & Add. “A”).

Standing is not a moving target, but must be determined on the facts as they exist when the petition is commenced. Here, those facts properly led Commissioner Evans to conclude that intervenor's “motion to intervene should be denied as Mr. Thanos lacks standing to challenge the presumption of paternity that exists in favor of Mr. Pearson as Zachary's father.” Id. ¶ 5. Those facts are also what has resulted in the reality that existed at trial and continues to exist today, namely, that Zachary and Nicholas continue to view petitioner as their father and intervenor as their step-father. See Ex. I-2, at 3; Ex. I-4, at 3, R.2434, at 19, R. 2534, at 711:17, 715-16, R.2535, at 950. As much as intervenor and respondent may wish it to be otherwise, their formation of a “unitary family”, after Zachary had already established parental ties with petitioner in the family into which he was born, does not result in those ties disappearing. Commissioner Evans' conclusion that intervenor

did not have standing to interfere with that established relationship should not have been overruled and should be reinstated now.

B. Constitutional Analysis

Respondent and intervenor do not present a substantive due process analysis in their brief, nor do they respond to petitioner's, except to attempt to distinguish some of the cases cited by petitioner. They make broad, sweeping statements without reference to constitutional analysis or legal authority of any kind, such as: "Controlling and constitutionally accepted authority supports the principle that in certain circumstances a biological parent's right is preeminent or has priority over that of a presumptive legal parent." Brief of Appellees, at 34. Such conclusory statements, without benefit of citation to which "controlling and constitutionally accepted authority" respondent and intervenor may have in mind, does not substitute for constitutional analysis.

Nor does the trial court's adoption of Dr. Sanders' written opinion – which the trial court did not allow to be challenged nor contradictory evidence adduced to rebut – about the generic importance of biological relationships to children in general suffice as constitutional analysis. It should go without saying that Dr. Sanders is not qualified to weigh the rights and interests at stake in matters of constitutional dimension, nor are her unchallenged views regarding the importance of biology to children in general of any particular significance to that inquiry.

It is not incredible, but a simple fact that the trial court concluded without constitutional or statutory analysis of any kind, that “Utah Code Annotated, Section 78-45a-1, the Uniform Paternity Act, provides Peter Thanos with paternity rights which entitle him to intervention. Both the U.S. and Utah Constitutions grant Peter Thanos constitutional rights afforded to a natural parent.” R.975, ¶ 23. The trial court’s conclusions are erroneous for the reasons set forth in petitioner’s opening brief. The trial court’s flawed standing analysis flowed from these erroneous conclusions.

The trial court’s erroneous conclusion that intervenor had a constitutionally and statutorily protected right to establish his paternity of Zachary was made November 7, 2002 (R.975), over a year before the custody trial, which took place April 1, 2004 through April 8, 2004 (R.2417-24). Therefore, it is inaccurate to claim, as petitioner and intervenor do, that petitioner was afforded due process when the trial court permitted intervenor standing to contest Zachary’s paternity because “[t]he trial court heard many days of trial testimony, including the testimony of various expert witnesses regarding what was in the best interest of Zachary.” Brief of Appellees, at 33. The issue at trial was custody, not paternity. Petitioner competed for custody of Zachary as a “non-parent” (Finding No. 35) because his status as Zachary’s legal parent had previously been terminated without the benefit of a trial or evidentiary hearing of any kind, petitioner’s request for an evidentiary hearing having been summarily denied (R.869).

Respondent and intervenor's response to petitioner's constitutional analysis again places much weight on the fact that they are now married, while petitioner and respondent's marriage has dissolved. They go so far as to apparently conclude that this is the single determinative factor, stating: "The trial court in the case at bar fully analyzed whether there was an intact marriage. It was not necessary for the court to extend the analysis beyond the finding that at the time of trial the Petitioner and Respondent were 'separated and later divorced.'" Brief of Appellees, at 40.

It is no doubt true that the interests of the marital family are and should be constitutionally protected. As previously discussed, however, protections afforded the marital family survive the dissolution of the marriage. Thus, cases in which the biological father seeks to intervene as against husband and wife, who are aligned, appropriately emphasize the importance of the integrity of the marriage. However, cases in which the biological father and the mother are aligned against the husband also emphasize the importance of the marital family and the protection of parent-child relationships developed within it. See, e.g., Ex parte Presse, 554 So. 2d 406 (Ala. 1989); Nostrand v. Olivieri, 427 So. 2d 374 (Fla. Dist. Ct. App. 1983) (remanding for determination of standing where mother and biological father, now married, petitioned to establish biological father's paternity of child born during mother's marriage to husband); Ghrist v. Fricks, 465 S.E. 2d 501, 506 (Ga. Ct. App. 1995) (reversing trial court's declaration of biological father as child's legal father where mother and biological father, now married, petitioned to establish paternity in

biological father, stating: “[P]ublic policy will not permit a mother and an alleged father to enlist the aid of the courts to disturb the emotional ties existing between a child and his legal father after sitting on their rights for the first three years of the child’s life.”); In re D.B.S., 888 P.2d 875 (Kan. Ct. App. 1995) (affirming trial court’s dismissal of paternity petition brought by biological father who was living with mother and had developed “parent-like” relationship with child born during mother’s marriage to husband).

Particular instructive, in light of petitioner and intervenor’s argument that the constitutional analysis, and apparently the standing analysis, turns entirely on the factual question, To whom is the mother currently married? is the case of Ex parte Presse, decided in 1989 by the Alabama Supreme Court and subsequently re-affirmed in several cases. See Foster v. Whitley, 564 So. 2d 990 (Ala. Civ. App. 1990); Ex parte C.A.P., 683 So. 2d 1010 (Ala. 1996); B.N.P. v. D.M.P., 896 So. 2d 503 (Ala. Civ. App. 2004).

In Ex Parte Presse, 554 So. 2d 406 (Ala. 1989), the husband and the mother were divorced when the child was approximately three years old. The mother married the biological father of the child two months later, and the mother and biological father subsequently filed a complaint seeking a declaratory judgment of paternity. Based on blood test results introduced into evidence, the trial court declared the biological father to be the child’s father, ordered the birth certificate to be amended, and curtailed the husband’s visitation privileges. Id. at 408. The Court of Civil Appeals affirmed.

The Supreme Court of Alabama reversed. Recognizing that the biological father's claims were not barred by res judicata, though the mother's were, the court conducted statutory, policy, and constitutional analyses of these issues. The court stated:

Being mindful that the UPA espouses principles that seek to protect the sanctity of family relationships by providing a comprehensive statutory network through which a child may enforce its right of support against the presumed father, and because in this case the presumed father ardently wishes to fulfill that objection, we are constrained to hold that [the husband's] presumption of fatherhood takes precedent over any presumption that [the biological father] might possess. . . . It is quite apparent that the public policy considerations causing Presse, the husband of the child's mother, to be considered as her father, are much weightier than any considerations causing the biological father (who years later married the child's mother and received the child into his home) to be considered a 'presumed father'. Thus, even if we accepted [the biological father's] argument that he literally fits within the category of 'presumed father', it is clear that that presumption in his favor would be transcended by the 'weightier' presumption in favor of [the husband]. . . . The presumption in favor of [the husband] is an ancient one, supported by logic, common sense, and justice.

Id. at 412.

The court went on to analyze the constitutional aspects of the case in view of Michael H. v. Gerald D., 491 U.S. 110 (1989), which at the time had been recently decided.

The court stated:

Admittedly, this case and the case of Michael H. v. Gerald D., supra, have some factual differences, notably the fact that Michael was not married to and living with the mother and child when he brought his suit seeking visitation rights. Nevertheless, the applicable rules of law are the same. In this case, as in Michael H., the legal question is whether a man has standing to bring an action seeking to declare a child illegitimate and to have himself declared the father of that child. This is not permitted under the UPA, as long as there is a presumed father, pursuant to § 26-17-5(a)(1), who has not disclaimed his status as the child's father; consequently, another man, though he later marries the mother and lives with the mother and child,

has no standing to challenge the presumed paternity of that child. Put another way, so long as the presumed father persists in maintaining his parental status, not even the subsequent marriage of the child's mother to another man can create standing in the other man to challenge the presumed father's parental relationship.

Id. at 417-18.

In this case, like the Presse case, parent-child relationships were established during the Pearsons marriage, and those relationships persisted after the Pearson's separation and divorce. The fact that Mrs. Pearson became Mrs. Thanos, marrying the man with whom she procreated a child during her marriage to Mr. Pearson, is not conclusive of the inquiry as to whom the legal father of the child should be. The fact is that a family system exists in which Nicholas and Zachary view petitioner as their father, intervenor as their step-father, and themselves as brothers. This fact flows from the family that these children experienced from the time that they were infants, in real terms. It has nothing to do with the lurid details of Zachary's conception. It was error for the trial court to elevate Zachary's conception over the reality of these children's family by allowing intervenor standing to sever the legal ties that had to that point protected the family. The error was of constitutional magnitude and should be reversed.¹

¹ It is instructive to note that the Uniform Parentage Act , enacted in Utah effective May 2, 2005, permits only the mother and the presumed father of a child born during a marriage to raise the issue of paternity of the child. Utah Code Ann. § 78-45g-607(1) (2005). If the mother seeks to contest paternity of the child, the Act places on her the burden of showing that it would be in the best interests of the child to disestablish the parent-child relationship between the presumed father and the child. Id. § 78-45g-607(1)(c).

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE DOCTRINE OF
EQUITABLE ESTOPPEL IS INAPPLICABLE TO THE FACTS OF THIS CASE

Respondent and intervenor apply an incorrect standard of review in their argument that the trial court “acted within its permissible discretion” in concluding that the doctrine of equitable estoppel is inapplicable to the facts of this case. The court denied petitioner’s motion for summary judgment on the issue of equitable estoppel, though the facts as set forth in petitioner’s statement of material facts and supporting affidavit were not controverted by respondent and intervenor in their responsive memoranda pursuant to Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. See R.1302, R.1570, R. 1376, R. 1427. The facts were thus deemed admitted for purposes of the motion. See Utah R. Civ. P. 7(c)(3)(A); Fennell v. Green, 2003 UT App 291, ¶¶ 7-9, 77 P.3d 339, 341-42. Whether the trial court correctly applied legal principles to uncontroverted facts on a motion for summary judgment is purely a question of law, as to which the appellate court affords the trial court no deference. See Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987). Hence, there is no “permissible discretion”, as respondent and intervenor contend.

Nor is it accurate to state that Utah has not recognized the use of equitable estoppel in contested paternity cases. Utah has enacted the Uniform Parentage Act, Utah Code Ann. § 78-45g-101 et seq., effective May 2, 2005, which provides that the doctrine of estoppel is applicable in precisely the circumstances that pertain here, i.e., “[i]n a proceeding to adjudicate the parentage of a child having a presumed father.” Id. § 78-45g-608(1). The statute states:

[T]he tribunal may disregard genetic test results that exclude the presumed or declarant father if the tribunal determines that: (a) the conduct of the mother or the presumed or declarant father estops that party from denying parentage; and (b) it would be inequitable to disrupt the father-child relationship between the child and the presumed or declarant father.”

Id. The Uniform Parentage Act does not overturn existing law. Rather, it simply clarifies that the doctrine of equitable estoppel is applicable in this particular legal situation. This is no substantive difference from the law as stated by the Utah Supreme Court in State v. Irizarry, 945 P.2d 676 (Utah 1997), namely, that “[t]he doctrine of equitable estoppel is simply stated, yet it is applicable to a wide variety of factual and legal situations.” Id.

Respondent and intervenor also argue that the doctrine of equitable estoppel “should not be invoked against a natural parent for the purpose of awarding custody and visitation to a nonparent,” Brief of Appellees, at 43, citing cases from Michigan and California in support of that proposition. This argument is not helpful to respondent and intervenor. This case does not involve a “nonparent” attempting to invoke estoppel against a natural parent. Petitioner was Zachary's legal parent when he filed his motion for summary judgment, and had been exercising joint custodial privileges as such pursuant to court order for nearly two years. Intervenor, on the other hand, was a “nonparent” when the motion was filed, having no legal relationship to Zachary at all prior to May 8, 2003, when the trial court entered its order establishing paternity of Zachary in intervenor.

Thus, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991), a case involving a lesbian with no legal relationship to a child born to her partner, is not on point. It

has, in any case, been overruled both by case law and statute in California. See Kristine H. v. Lisa R., 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).² In factual scenarios that are on point with this case, California jurisprudence has consistently recognized the paramount importance of persons in petitioner's position, as opposed to intervenor's position, in cases involving competing paternity claims. See In re Jesusa V., 85 P.3d 2, 15 (Cal. 2204) (holding husband's presumptive father status outweighed biological father's presumptive father status and affirming juvenile court's reasoning that "[t]he state interests rest on the policy to preserve and protect developing parent/child relationships which give young children social and emotional strength and stability. This is more important than establishing biological ties.").

The Michigan case cited by intervenor and respondent is even less helpful to their position and runs directly counter to it. In Van v. Zahorik, 575 N.W.2d 566 (Mich. Ct. App. 1997), the court reconfirmed the continued viability of the equitable parent doctrine, id. 569, as well as the continued viability of equitable estoppel, id. 571, as doctrines by which one who is not the biological parent of a child may be legally considered to be the parent of the child, but only in cases in which the parties are married and the husband is not the biological father of the child born during the marriage. Stating, "[t]he public policy of this state favors the institution of marriage," id. at 569, the court declined to expand the

² In re Marriage of Arenz-Roper is equally inapplicable and is an unpublished opinion that may not be cited or relied on by parties or courts. It should not have been used by respondent and intervenor as supportive authority of any kind.

doctrines to situations in which a man who was never married to the mother but cohabited with her subsequently request visitation rights with children born during the period of cohabitation that are not biologically his.

Clearly, petitioner and respondent were married, not cohabitating, when Zachary was born, and petitioner is not requesting expansion of the doctrine of equitable estoppel to a cohabitating relationship. Van v. Zahorik does not support the argument that equitable estoppel should not have been applied here to bar intervenor's paternity claim.

Respondent and intervenor next argue that the doctrine of equitable estoppel should not apply in this case because respondent knew that he was not Zachary's biological father. The husband's knowledge should not be a determinative factor, and contrary to respondent and intervenor's contention, has generally not been. In the Comment to Section 608 of the Uniform Parentage Act, it is noted:

The most common situation in which estoppel should be applied arises when a man knows that a child is not, or may not be, his genetic child, but the man has affirmatively accepted his role as child's father and both the mother and the child have relied on that acceptance. Similarly, the man may have relied on the mother's acceptance of him as the child's father, and the mother is then estopped to deny the man's presumed parentage.

Amendments to the Uniform Parentage Act as Last Amended in 2002 With Prefatory Note and Comments, 37 Fam. L. Q. 5, 22 (2003). Whether petitioner knew or did not know that he was the biological father of Zachary is irrelevant to Zachary's interests – which respondent and intervenor argue and petitioner agrees – should be paramount. Equitable

estoppel should not be narrowly circumscribed to focus on such factors, which make no difference to the child.

This same argument was advanced by the mother in Soumis v. Soumis, 553 N.W.2d 619 (Mich. Ct. App. 1996), who like respondent, attempted to extinguish her husband's parental rights in a child born during their marriage at divorce. She argued that the trial court erred in applying the equitable parent doctrine in favor of the husband because he knew before the child's birth that he might not be the father. Id. at 622. The Court of Appeals of Michigan disagreed, reasoning: "[T]here is no additional factor in the Atkinson test requiring that the husband have no knowledge of the fact that his paternity may be in question. Rather, the Atkinson test analogized the doctrine of equitable parent to that of equitable adoption. Clearly, in adoption cases, the adoptive parents know they are not the biological parents. Therefore, the established law is exactly the opposite of what defendant contends." Id.; see also Ellman, supra, at 61-62 (arguing that in applying estoppel principles in paternity cases, courts should not focus on factors irrelevant to the child's interests, "such as whether the husband knew that he was not the children's biological father when he treated them as his own.").

Respondent and intervenor's reliance on Crouse v. Crouse, 552 N.W. 2d 413 (S.D. 1996), is misguided both factually and legally. Crouse did not involve a presumed father, but a stepfather who did not marry the child's mother until the child was 6 months old. Unlike Crouse, petitioner never stood in the shoes of step-father to Zachary, but only in the

shoes of father, from before his birth. Cf. Wiese v. Wiese, 699 P.2d 700, 707 (Utah 1985), Durham, J., dissenting (noting that the situation in which a man who knows he is not a child's biological father but marries the mother and "knowingly assumes the responsibility of acting as the child's father from birth is qualitatively different from the typical stepparent situation where a person, previously unknown to the child, enters the family relationship and offers support to the stepchildren. In the former situation, there is a greater potential for psychological bonding and financial reliance since the parent/child relationship begins prior to birth. . . . In essence, the act of marrying a pregnant woman is comparable to adoption.").

Additionally, respondent did far more than merely "encourage a close relationship" between Zachary and petitioner, as established by the uncontested facts set forth in petitioner's fact statement and affidavit supporting his motion for summary judgment. See R.1570, R.1302.

Finally, respondent and intervenor contend that the court's determination at the custody trial – made long after petitioner's parental rights had already been terminated – was a best interests determination that should nullify the court's prior, erroneous conclusion that "the doctrine of equitable estoppel is inapplicable to the facts of this case." R.1723, at 19, ¶ 4. This argument fails. The court in fact made no best interests determination regarding Zachary, concluding instead that Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982) mandated application of the parental presumption against petitioner. See Finding No.

35. This determination, in turn, flowed from the trial court's erroneous denial of petitioner's motion for summary judgment. A non-existent "best interests" finding cannot be used to bolster the court's estoppel ruling.

The doctrine of estoppel in the paternity context is intended to, and does, further the best interests of children. It has long been recognized that it is in the best interests of children for the individuals who will function as their parents to be identified early on, and to ensure that, once identified, uninterrupted bonding takes place and is protected. See, e.g., Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984). Applying estoppel to prevent the disruption of established parent-child relationships furthers those interests. There is nothing germane to Zachary's best interests – including speculation as to the future importance to Zachary of his biological connection with intervenor – that favors disrupting the established relationship between Zachary and petitioner.

The trial court's denial of petitioner's motion for summary judgment should be reversed, and intervenor and respondent should be estopped from asserting that petitioner is not Zachary's legal father.

III. THE PARENTAL PRESUMPTION SHOULD NOT HAVE BEEN APPLIED AGAINST PETITIONER

Respondent and intervenor argue, once again, that the trial court determined Zachary's custody based on a best interests analysis. This is simply not the case. The trial court's Finding No. 35 made quite clear that "[r]espondent benefits from the parental presumption on her claim for custody of Zachary against Petitioner." Finding No. 35.

It cannot be said that court's application of an erroneous analysis to the determination of custody is harmless error. It resulted in a custody determination that elevated respondent's custody claim over petitioner's. This is contrary to the best interests analysis, which subordinates both parents' interests to that of the child. The court's custody determinations are necessarily flawed as a result and should be reversed.

IV. THE TRIAL COURT'S AWARD OF CUSTODY RIGHTS IN NICHOLAS TO INTERVENOR WAS PLAIN ERROR AND SHOULD BE REVERSED

Respondent and intervenor argue that petitioner has failed to marshal the evidence supporting the trial court's award of custody rights in Nicholas to intervenor. Petitioner was not required to marshal the evidence because there was no evidence adduced on this issue. No evidence was adduced on this issue because it was never pleaded or otherwise raised by any party at any time. "It is well established that the law does not require litigants to do a futile or vain act." Beltran v. Allan, 926 P.2d 892, 901 (Utah Ct. App. 1996) (Billings, J., dissenting). Clearly, marshalling non-existent evidence is a futile act.

The trial court plainly erred in awarding custody rights in Nicholas to intervenor when that issue was not before the court. No after-the-fact attempt by respondent and intervenor to justify it remedies the problem. "In our judicial system . . . all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision. Plumb v. State, 809 P.2d 734, 743 (Utah 1990) (citing Nelson v. Jacobsen, 669 P.2d 1207, 1211-12 (Utah 1983)). That was

not done here. The trial court overstepped its bounds in awarding intervenor rights of custody in Nicholas that were never sought. The award should be reversed.

V. THE TRIAL COURT'S FINDINGS OF FACTS ARE LEGALLY INSUFFICIENT TO SUPPORT ITS CONCLUSIONS REGARDING CUSTODY

Respondent and intervenor argue that petitioner has failed to marshal the evidence and that his attack on the trial court's findings of fact must therefore fail. Petitioner is not required to marshal the evidence where the legal, not factual, sufficiency of the findings is at issue. See Williamson v. Williamson, 1999 UT App 219, 983 P.2d 1103, 1107 n.2 (1999). Petitioner contends that the findings of fact as framed by the trial court are legally insufficient to support its custody awards. Marshalling is therefore not required.

Contrary to respondent and intervenor's claim, the court did not find "consistent with Dr. Sanders' report" that if petitioner chooses to remain in Utah, he should be awarded more limited parent-time with Nicholas and Zachary. Such a recommendation is nowhere in Dr. Sanders' report, and such a finding is nowhere in the court's findings. Nowhere does the court find, even conclusorily, that it would be in the best interests of the children for their time with petitioner to be reduced below the parent-time schedule set forth in the court's findings, namely, 50/50 with Nicholas and somewhat less than that with Zachary. Instead, the court simply concludes, inconsistent with the parent-time schedule that it finds is in the best interests of the children, that respondent should be permitted to relocate the children to Oregon, several hundred miles from petitioner.

Respondent and intervenor misapprehend petitioner's argument with respect to the court's finding that the "three children should not be separated absent some compelling circumstances not present here. There is substantial benefit of keeping these siblings together." Finding No. 34.c. This finding is inconsistent with the court's parent-time award, which separates Nicholas and Zachary from each other for some time each month, though they had never before been separated at all. Thus, two of the siblings are not kept together. As to Madelaine, with whom the boys had never been together for more than half the time, the court increased Zachary's time with Madelaine, while keeping Nicholas's the same. the court did not keep Zachary and Madelaine together, but imposed on them a new togetherness that they had not previously experienced.

Moreover, this finding does not support the trial court's conclusion that respondent should be permitted to relocate Nicholas and Zachary to Oregon. Dr. Jill Sanders testified unequivocally that Nicholas and Zachary's contact with Madeleine was not more significant to them than their contact with petitioner, R.2534, 859:5-8. Permitting removal of the children from petitioner to support a relationship of less import to the children than their relationship with petitioner cannot be said to be in the children's best interests.

Respondent and intervenor take issue with petitioner's argument that the trial court was required to make factual findings linking the factors deemed important in its best interests analysis to each of the parents, not just one, i.e., to conduct a comparative analysis of the factors identified. This is the law, as set forth in the appellate opinions of this

state. See, e.g., Sukin v. Sukin, 842 P.2d 922, 925 (Utah Ct. App. 1992) (stating appellate court must have supporting findings linking custody factors to the children's best interests and each parent's abilities to meet the children's needs) (emphasis added). The trial court's focus on respondent's ability to meet the children's needs, without comparing it with petitioner's ability to do so, was error.

Respondent and intervenor's argument that the trial court made "twelve full paragraphs of findings directly on point" to the issue of custody of Zachary misses the fact that no findings distinguished between Zachary and Nicholas, except as to the parental presumption. It therefore logically follows that if this court determines that the parental presumption was erroneously applied against petitioner in the custody determination, then there should be no distinction permitted between the boys in the parent-time schedule.

Respondent and intervenor argue that it was optional for the court to address the factors identified by petitioner as key to properly determining custody in this case. Contrary to respondent and intervenor's assertion, the court is statutorily required to consider which parent is most likely to act in the best interest of the child. See Utah Code Ann. § 30-3-10(1)(a)(ii).

Case law mandates consideration of other factors. This court has held that trial courts "must examine a child's need for stability." Paryzek v. Paryzek, 776 P.2d 78, 82 (Utah Ct. App. 1989). Especially where respondent made explicit her intention to relocate the children from petitioner and their home in the State of Utah, it was necessary for the

court to address the relative ability of the parties to provide continuity of environment and stability for the children.

The court's finding that "it is not helpful to rely on historical issues" does not suffice as a finding on the "past conduct and demonstrated moral standards of each of the parties", another statutorily mandated factor. This factor is particularly relevant in this case, where the custody evaluator has recommended that the parties and the children relocate from this state in part due to the stigma that she perceives may attach to Zachary from respondent and intervenor's conduct during the Pearson's marriage. R.2535, at 881-82.

CONCLUSION

The trial court's determination that petitioner is not Zachary's father was error and should be reversed. That determination informed the trial court's custody determinations, which should also be reversed and a proper analysis conducted that focuses on factors relevant to the best interests of Nicholas and Zachary.

DATED this 15 day of June, 2005.

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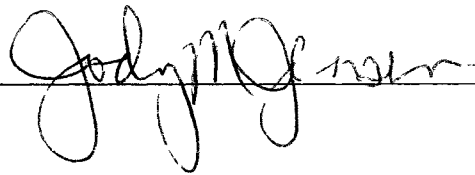
PAIGE BIGELOW
Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of June, 2005, I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT to be sent by United States mail, postage prepaid, to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KELLY F. PEARSON,)	
)	ORDER ON MOTION
Petitioner,)	TO INTERVENE
vs.)	
)	
KIMBERLEE Y. PEARSON,)	Civil No. 004907881
)	Judge Tyrone E. Medley
Respondent.)	Commissioner Michael S. Evans

PETER THANOS'S motion to intervene came on regularly before the court on the 30th day of August, 2001, the Honorable Michael S. Evans, District Court Commissioner, presiding. Peter Thanos was present in person and represented by counsel, Kellie Williams. Petitioner was present in person, and represented by counsel, Paige Bigelow. Respondent was present in person and represented by counsel, Steven H. Gunn. The court heard the arguments and proffers of Mr. Thanos and each of the parties, and reviewed the affidavits and memorandums submitted in support and opposition to the motion. Based thereon, and for good cause appearing, the court now makes and enters the following:

•FINDINGS OF FACT

1. The parties, petitioner Kelly Pearson and respondent Kimberly Pearson were married on August 17, 1992.
2. Their first son Nicholas was born on July 6, 1997. His paternity is not in dispute.
3. In 1996, Mr. Thanos, a married man, began an intimate relationship with respondent, Mrs. Pearson. This relationship was hidden from Mr. Pearson and Mr. Thanos's wife, Mrs. Thanos, and ultimately resulted in the conception of the second child born during the Pearsons' marriage, Zachary Pearson.
4. Mr. Thanos was aware of and believed that he was Zachary's natural father from January of 1999, soon after Zachary's conception.
5. Zachary was born on September 14, 1999. Mr. and Mrs. Pearson treated him as their son in all respects, making no distinction whatsoever between him and his elder brother, Nicholas. Zachary's birth certificate lists Mr. Pearson as Zachary's father.
6. The Pearson's marriage was intact at the time of Zachary's birth and remained intact and continued as a stable relationship, at least from the child's perspective, until May of 2000, at which time Zachary was approximately 7 1/2 months old.
7. Mr. Thanos is the natural, biological father of Zachary.
8. Petitioner Kelly Pearson is the presumptive and psychological father of Zachary.
9. Though being aware of his biological relationship to Zachary from approximately January of 1999, Mr. Thanos did nothing to acknowledge his paternity for more than two years.

until as late as August of 2001, just prior to the hearing herein. With the exception of the parties herein, Mr. Thanos kept his biological connection to Zachary hidden from others, including his family members, and including his wife of twenty-six years. Despite his belief and knowledge that he was Zachary's natural father, Mr. Thanos allowed Zachary to be regarded in every way as Mr. Pearson's son and to become closely bonded with Mr. Pearson during critical stages of Zachary's development.

10. Mr. Thanos has not had substantial contact with Zachary prior to the initiation of this action, and the contact he has had has been incidental to his continuing relationship with Mrs. Pearson. At all times, Mr. Thanos has continued to live in Oregon, whereas Zachary, Nicholas, and the Pearsons live in Utah. At no time has Mr. Thanos lived with Zachary, nor established a parent-child bond. Mr. Thanos is not a psychological parent to Zachary. Mr. Thanos's failure to act as a father to Zachary was due to his choice to remain with his wife in Oregon and to keep his affair with Mrs. Pearson, and his biological connection to Zachary, hidden from his wife. Mr. Thanos waited until his wife's death to initiate this proceeding. In reviewing the choices Mr. Thanos made, which the court acknowledges were difficult choices, the court finds that in each instance Mr. Thanos subordinated Zachary's best interest to what he believed to be his own best interest.

11. The court has reviewed the affidavit of Dr. Denise Goldsmith, which outlines the stages of development of children from birth through the first, second, and third year of life. Zachary has now entered his third year of life. It is acknowledged that Mr. Thanos was

completely absent from his first year of life, was absent for the first half of his second year of life, and has had incidental contact during the second half of the second year of Zachary's life. During Mr. Thanos's absence Zachary has developed critical bonds with his primary caregivers, Mr. and Mrs. Pearson, and the court finds that for Mr. Thanos to be permitted to establish his paternity of Zachary and to be introduced at this point as a father figure in Zachary's life would be immediately disruptive to the child's stability and in the long-term would be emotionally damaging to the child.

The court makes and enters the following

CONCLUSIONS OF LAW

1. The court concludes that the cases cited by Mr. Thanos and the parties are helpful, though not determinative, as they are factually distinguishable from this case. The court finds that a particular distinction between this case and the cases cited is that Zachary has a brother, Nicholas, whose paternity is not in question, who is close in age to Zachary, and who Mr. Thanos and the parties all acknowledge should not be separated from Zachary.

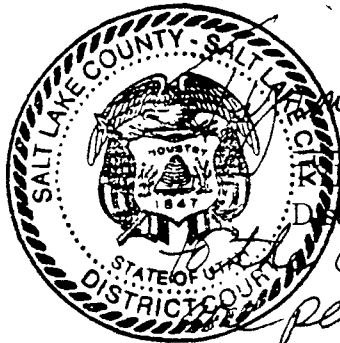
2. The court concludes that the cases are in agreement that biological status or legal status alone does not dictate a specific result in regard to who should be allowed to challenge a presumption of paternity, in this case, the presumption of paternity that is present in favor of Mr. Pearson. In re Michael H., the U.S. Supreme Court case addressing the constitutional rights of a biological father of a child born into wedlock, specifically states that a biological link must be considered only when such a link is combined with a substantial parent-child relationship. The Schoolcraft case talks specifically about standing and who should be allowed to challenge the presumption of paternity, in this matter in favor of Mr. Pearson. The case states that paramount consideration must be given not only to preserving the stability of marriage, but also to ensuring that children are protected from disruptive and unnecessary attacks on their paternity.

3. The court concludes that the procedure that Mr. Thanos has chosen is not determinative of the result, and that the result would be the same whether Mr. Thanos chose to pursue his attempt to adjudicate his paternity of Zachary in a separate paternity action, or by seeking to intervene in the Pearson's divorce action as he has done.

5. Applying the foregoing findings of fact to the principles of law as set forth herein, the court concludes that Peter Thanos's motion to intervene should be denied as Mr. Thanos lacks standing to challenge the presumption of paternity that exists in favor of Mr. Pearson as Zachary's father.

DATED this 17 day of Oct, 2001.

BY THE COURT:



Kyrone E. Medley, subject
KYRONE E. MEDLEY
District Court Judge
Objections which
pending J. Medley

RECOMMENDED BY:

Michael S. Evans 10/17/01
MICHAEL S. EVANS
District Court Commissioner

APPROVED AS TO FORM:

STEVEN H. GUNN
Attorney for Respondent

APPROVED AS TO FORM:

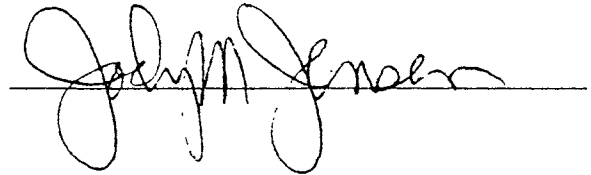
KELLIE WILLIAMS
Attorney for Peter Thanos

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct duplicate original of the foregoing
ORDER ON MOTION TO INTERVENE to be mailed, by United States mail, postage prepaid,
to the following this 1 day of October, 2001.

Steven H. Gunn
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Kellie Williams
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Salt Lake City, UT 84102

A handwritten signature in black ink, appearing to read "John M. Jensen", is written over a horizontal line.