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Steven H. Gunn; Ray, Quinney & Nebeker; Attorney for Respondent/Appellee; Kellie F. Williams; Corporon & Williams; Attorney for Intervenor/Appelleee.
Paige Bigelow; Kruse, Landa, Maycock & Ricks; Attorney for Petitioner/Appellant.

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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.	

BRIEF OF APPELLEES

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

PAIGE BIGELOW (6493)
KRUSE, LANDA, MAYCOCK & RICKS
Attorneys for Petitioner/Appellant
50 West Broadway, Eighth Floor
P.O. Box 45561
Salt Lake City UT 84145-0561
Telephone: (801) 531-7090

STEVEN H. GUNN (1272)
RAY QUINNEY & NEBEKER
Attorneys for Respondent/Appellee
Kimberly Y. Thanos
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500

KELLIE F. WILLIAMS (3493)
JARROD H. JENNINGS (8431)
CORPORON & WILLIAMS
Attorneys for Intervenor/Appellee,
Pete D. Thanos
808 East South Temple
Salt Lake City, UT 84103
Telephone: (801) 328-1162

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PAIGE BIGELOW (6493)
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Attorneys for Petitioner/Appellant
50 West Broadway, Eighth Floor
P.O. Box 45561
Salt Lake City UT 84145-0561
Telephone: (801) 531-7090

STEVEN H. GUNN (1272)
RAY QUINNEY & NEBEKER
Attorneys for Respondent/Appellee
Kimberly Y. Thanos
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, UT 84145-0385
Telephone: (801) 532-1500

KELLIE F. WILLIAMS (3493)
JARROD H. JENNINGS (8431)
CORPORON & WILLIAMS
Attorneys for Intervenor/Appellee,
Pete D. Thanos
808 East South Temple
Salt Lake City, UT 84103
Telephone: (801) 328-1162

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B. Supplemental Decree of Divorce dated July 12, 2004

C. Evaluation Report ("Schoolcraft Report") dated May 13, 2002

D. Supplement to Schoolcraft Report: Letter from Dr. Jill Sanders to Judge Medley dated August 26, 2002

E. Child Custody Evaluation dated November 3, 2003

F. Utah Code Ann. § 30-3-10 (1998 & 2004 Supp.)

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K. Utah Code Ann. § 78-45a-10.5 (2002)

JURISDICTION

This Court has jurisdiction of this appeal as provided in Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant's appeal and his brief raise the following issues for review by this Court:

1. Did the trial court err in finding that the presumption of paternity in favor of Petitioner had been rebutted and that custody of Zachary was to be determined solely on the basis of the child's best interests?

Standard of Review – Great deference is given to the trial court's findings of fact in divorce cases and appellate courts will not overturn them unless they are clearly erroneous. *See generally Kessimakis v. Kessimakis*, 1999 UT App 130 ¶ 8, 977, P.2d 1226, 1228; *see also State ex rel. M.W.*, 970 P.2d 284, 291 (Utah Ct. App. 1998) "Under the well-established standard of review for child custody proceedings, we do not set aside the trial court's factual findings unless clearly erroneous... A finding is clearly erroneous if it is against the great weight of the evidence or if we are otherwise definitely and firmly convinced that a mistake has been made."

2. Did the trial court err in denying Petitioner's motion for summary judgment seeking a declaration that he is the father of Zachary based upon the doctrine of equitable estoppel?

Standard of Review – A trial court's grant or denial of a motion for summary judgment is viewed for correctness. No deference is accorded to a trial court's

conclusions of law. *Malibu Investment Co. v. Sparks*, 2000 UT 30, ¶ 12, 996 P.2d 1043, 1047.

3. Did the trial court commit reversible error in finding that it would be in the best interests of Nicholas, the child of Petitioner and Respondent, and of Zachary, the child of Respondent and Intervenor, that primary physical custody of Nicholas be awarded to Respondent and primary physical custody of Zachary be awarded to Respondent and Intervenor?

Standard of Review – An appellate court will overturn the trial court's findings of fact only if they are clearly erroneous and so flagrantly unjust as to be an abuse of discretion. *Thomas v. Thomas*, 1999 UT App. 239, ¶ 3, 987 P.2d 603, 606.

4. Did the trial court commit reversible error in determining that Intervenor had standing to intervene in this case?

Standard of Review – Whether an individual has standing to request relief in a civil action will be reviewed for correctness with minimal discretion and with deference to the trial court. *See Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373-374 (Utah 1997). ("As to the standard of review the question of whether a given individual or association has standing to request a particular relief is primarily a question of law, although there may be factual findings that bear on the issue. We will review such factual determinations made by a trial court with deference.")

DETERMINATIVE STATUTES AND RULES

Statutes and rules which are of central importance to this appeal are as follows:

Utah R. App. P. 24(a)(9) ("Briefs") provides:

> The argument shall contain the contentions and the reasons of the Appellant with respect to the issues presented, including the ground for reviewing any issue not preserved in the trial court, with citations to the authorities, statues, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

(Emphasis added.)

Utah Code Ann. § 30-3-10 (1998 & 2004 Supp.) ("Custody of Children in Case of Separation or Divorce – Custody Consideration") provides in relevant part:

> (1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.
>
> (a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:
>
> (i) the past conduct and demonstrated moral standards of each of the parties;
>
> (ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the non-custodial parent; and
>
> (iii) those factors outlined in § 30-3-10.2.
>
> . . . .
>
> (2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the non-custodial parent as the court finds appropriate.

Utah Code Ann. § 30-3-10.1 (1998 & 2004 Supp.) ("Definitions – Joint Legal Custody – Joint Physical Custody") provides in relevant part:

> As used in this chapter:
>
> . . . .
>
> (2) "Joint physical custody":
>
> . . . .
>
> (c) may require that a primary physical residence for the child be designated; and

> (d) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

Utah Code Ann. § 30-3-10.2 (1998 & 2004 Supp.) ("Joint Custody Order – Factors for Court Determination – Public Assistance") provides in relevant part:

> . . . .
> (2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:
> . . . .
> (e) the geographical proximity of the homes of the parents;
> . . . .
> (j) any other factors the court finds relevant.
> (3) The determination of the best interest of the child shall be by a preponderance of the evidence.

Utah Code Ann. § 30-3-10.3 (1998 & 2004 Supp.) ("Terms of the Joint Legal Custody Order") provides in relevant part:

> . . . .
> (2) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:
> (a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child[.]

Utah Code Ann. § 78-45a-10 (2002) ("Effect of genetic test results") provides in relevant part:

> (1) Genetic test results shall be admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy if:
> (a) of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of Health and Human Services;
> (b) performed by a laboratory approved by such an accreditation body; and

> (c) not objected to with particularity and in writing with 15 days after the written test results being sent to the parties.
>
> . . . .
>
> (3) (a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150.
>
> (4) If a presumption of paternity established under Subsection (1) is not rebutted by a second genetic test under Subsection (2), the court shall issue an order establishing paternity.

Utah Code Ann. § 78-45a-10.5 (2002) ("Parent time rights of father") provides in relevant part:

> (1) If the court determines that the alleged father is the father, it may upon its own motion or upon motion of the father, order parent-time rights in accordance with Sections 30-3-32 through 30-3-37 as it considers appropriate under the circumstances.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case concerns the rights of two fathers in the two sons, Nicholas and Zachary, whom they fathered by the same woman, Appellee, Kimberly Y. Thanos (hereinafter referred to as "Respondent"). Both boys were born during Respondent's marriage to Appellant Kelly F. Pearson (hereinafter referred to as "Petitioner"); however, the second child, Zachary, was fathered by Pete D. Thanos ("Intervenor"). After Petitioner filed his Complaint for Divorce and Custody Order, Intervenor filed a motion for leave to intervene in the divorce case. Over Petitioner's strenuous objection the assigned trial judge, Judge Tyrone E. Medley of the Third Judicial District Court of Salt Lake County, granted Intervenor's motion. Pursuant to the stipulation of the parties, Dr. Jill D.

Sanders, a clinical psychologist, was appointed to prepare a custody evaluation. Dr. Sanders completed her evaluation and submitted her report on November 3, 2003.

On April 1, 2, 5, 6, 7 and 8, 2004 the case was tried before Judge Medley. On May 11, 2004 Judge Medley published his written findings of fact and conclusions of law which, in essence, found that it would be in the best interests of the children if Respondent were awarded primary physical custody of Nicholas, and Respondent and Intervenor were awarded primary physical custody of Zachary. The Court's conclusions were incorporated into a Supplement Decree of Divorce on July 12, 2004. (The Decree was designated as being "supplemental" because the case previously had been bifurcated in order to terminate the marriage of Petitioner and Respondent. The court entered a Decree of Divorce Terminating Marriage on June 25, 2002.) The Supplemental Decree of Divorce dealt with all other issues in the divorce case except the termination of the parties' marriage. (Hereinafter the Supplemental Decree of Divorce shall be referred to as the "Decree".)

Although Petitioner's Notice of Appeal indicates that the appeal is taken from "the entire judgment", it focuses only on the right of Intervenor to intervene in the case and on the award of custody of Nicholas and Zachary.

Copies of the trial court's Findings of Fact and Conclusions of Law, the Supplemental Decree of Divorce (R. 2503-2514), the Child Custody Evaluation and the custody evaluator's "Schoolcraft" evaluation, together with a supplement to it, are attached to this brief as addenda at tabs "A", "B", "C", "D" and "E".

STATEMENT OF FACTS

1. Petitioner and Respondent were married in Salt Lake City, Utah on August 17, 1992. (R. 2532 at 387:19, 388:24.) During their marriage they had a son, Nicholas, who was born on July 6, 1997. (R. 2434; Finding no. 1, R. 2435.)

2. A second child was born during the marriage on September 14, 1999. Approximately four months after Respondent became pregnant with the second child (later named "Zachary") she informed Petitioner that Intervenor was Zachary's father. (Finding no. 2, R. 2435; R. 2535 at 1050:17-20; R. 2532 at 433:1-9.)

3. Following Respondent's disclosure of the source of her pregnancy Petitioner asked Respondent if she "would be willing to stay?" He said that he would like her to stay and would "like to at least try to make this work." (R. 2535 at 1052:18-22.) A day later, after thinking about Petitioner's proposal that they not separate Respondent told Petitioner that she would stay and try to make the marriage work if he would not punish her and the unborn child for her indiscretion. (R. 2535 at 1056:4-22.)

4. Petitioner and Respondent also discussed the role which Intervenor would play in the raising of Zachary. Petitioner responded, "I will do whatever I can to help him have as much of a role as he wants with the baby." (R. 2535 at 1056:25 to 1057:6.)

5. A few days after the Pearson's initial discussion concerning Respondent's pregnancy Petitioner read to her a list of questions and rules which he had drafted. The rules which he announced set restrictions on Respondent's communications with Intervenor and her relationship with him. Respondent did not agree to the rules. (R. 2535 at 1058:6-12, 22.)

6. Prior to the birth of Zachary Respondent went to her pediatrician's office for an ultrasound. Petitioner attended the ultrasound session with Respondent. Following the ultrasound it became clear that Petitioner was very upset. Respondent asked him about his feelings. He said, "You know, it is the first time that it's hit me, that I just looked at that – I saw the child, the baby, and there is none of me there. There are none of my features; there is none of me." In reply Respondent said to him, "I don't think this is going to work." (R. 2535 at 1061:15-24; 1062:7-9.)

7. When it became apparent that Petitioner was struggling to forgive Respondent, she suggested that they participate in marital counseling. Petitioner refused saying that the problem was with Respondent and that he had no need for counseling. (R. 2535 at 1064:2-19.)

8. Soon after Zachary's birth Petitioner knew that Respondent frequently spoke to Intervenor. He suspected she was not committed to continuing the marriage. (R. 2532 at 437:4-19.)

9. During the period of time between the births of Nicholas and Zachary Petitioner and Respondent spent approximately equal amounts of time with Nicholas. (R. 2535 at 1043:14-16.) During the first ten weeks after his birth Respondent had full-time maternity leave and spent that time with Nicholas. She had three additional weeks of part-time maternity leave and spent her time off the job with him, as well. Typically Respondent took care of Nicholas at night and in the morning until she went to work; Petitioner took care of the child during the day and Respondent took over the childcare duties when she returned from work around 6:00 p.m. Respondent was the primary

caregiver on Saturdays and the Pearsons shared the time with Nicholas on Sundays. (R. 2535 at 1034-1043.)

10. After the birth of Zachary Respondent spent her eight weeks of full-time maternity and two weeks of part-time leave with the child. (R. 2535 at 1066:15-23.) At the end of that time, approximately December 1, 1999, Petitioner and Respondent used a nanny during the day while they were at work. (*Id.* at 1067:15 to 1068:19.) Respondent worked a forty-five hour week. (*Id.* at 1069:8-14.) During this time Petitioner would leave for work later and come home earlier than Respondent. As a consequence he tended to spend slightly more time during the week with Zachary than Respondent; however, both participated in the raising of the boys during this period of time. (*Id.* at 1070:10 to 1072:23.)

11. Petitioner and Respondent separated in May 2000, approximately eight months after the birth of Zachary. (R. 2533 at 581:18-21; R. 2533 at 452:9-11.)

12. At the time of Zachary's conception and birth Intervenor was married to another woman, who died from cancer in December 2000. Intervenor did not inform his prior wife of Zachary's birth because he did not want to further damage her already fragile health or cause her further emotional trauma and because he wished to remain with her to assist her with the final months of her life. (Finding no. 6, R. 2436-37.)

13. Petitioner filed his Complaint for Divorce and Custody Order in this case on December 27, 2000. (R. 1-5.) Respondent filed her Answer and Counterclaim on January 23, 2001. (R. 17-26.) Also on January 23, 2001 Intervenor filed his Verified Motion for Intervention. (R. 37-41.) On March 28, 2001 the trial court entered an Order

on Motion for Order to Show Cause, Motion for Leave to Amend Complaint for Divorce, and Motion for Temporary Relief which, *inter alia*, granted joint legal and physical custody of Nicholas and Zachary to Petitioner and Respondent. Under the Order Petitioner and Respondent were to have an equal amount of parent time with the boys. (R. 133-138, ¶¶ 1 and 2.)

14. Shortly after the filing of Intervenor's motion to intervene the Thanoses and Petitioner met several times with a mediator. The mediator, in turn involved a therapist, Dr. Jay Thomas, in three sessions of the mediation. (R. 2533 at 651:3 to 652:5; R. 2535 at 925:4 to 926:25.)

15. On August 29, 2001 Petitioner and Respondent stipulated to the appointment of Dr. Jill Sanders as a custody evaluator. (R. 249-250.) By an order dated September 6, 2001 the court ordered the appointment of Dr. Sanders. (R. 251-252.) Dr. Sanders is a well-known and well-respected custody evaluator who received her PhD in clinical psychology from the University of Utah in 1987. (R. 2534 at 672:3-6.) (Her professional resume was received in evidence by the trial court as Intervenor's Exhibit I-1.) She has performed custody evaluations in the State of Utah since 1983 or 1984 and has focused on that area of her practice since 1989 or 1990. (*Id.* at 674:13-16.) She has performed approximately 200 to 250 custody or parenting capacity evaluations. (*Id.* at 675:2-6.) She has testified in Utah courts approximately fifty times. (*Id.* at 765:17-21.)

16. Following the hearing on Intervenor's Motion to Intervene, by an Order dated March 7, 2002 the trial court expanded the assignment of Dr. Sanders to include the analysis of certain factors described *State In re J.W.F.*, 799 P.2d 710 (Utah 1990)

(commonly referred to as the "*Schoolcraft Case*") concerning the factors to be considered by the court in ruling on a motion to intervene. (R. 728-273.) Dr. Sanders produced that report on May 13, 2002. (Intervenor's Exhibit I-2; attached to this brief as Addendum Tab "C".) (Hereinafter the Evaluation Report of May 13, 2003 shall be referred to as the "Schoolcraft Report".) Thereafter, by a letter dated August 26, 2002, Dr. Sanders supplemented her Schoolcraft Report by providing additional information requested by Petitioner's attorney. (Intervenor's Exhibit I-4; attached to this brief as Addendum Tab "D".)

17. By an Order Granting Intervention of Peter Thanos dated November 7, 2002, the trial court granted leave to Mr. Thanos to intervene in this case. (R. 971-972.) Later, by a certain Intervenor's Motion For Partial Summary Judgment (R. 989-991) Mr. Thanos sought a declaration by the court that he is the biological and natural father of Zachary. Intervenor's motion was supported by a Verified Memorandum In Support Of Motion For Partial Summary Judgment. To that Memorandum Intervenor attached a report prepared by the DNA Diagnostic Laboratory of the University of Utah which certified that his probability of paternity of Zachary was 99.9999% and the Paternity Index was 98,011. (R. 992-999.)

18. Intervenor also presented evidence to the court that Petitioner and Respondent admitted that Intervenor is the child of Intervenor. (See Complaint for Divorce, and Custody Order, R. 1-5, ¶ ["Peter D. Thanos is the natural father of Zachary"] and Affidavit of Kimberlee Y. Pearson in Support of Motion for Order to Show Cause, R. 27-31 [identifying Intervenor as the father of Zachary].)

19. Petitioner replied to Intervenor's Motion and Verified Memorandum by objecting to the admissibility of the DNA test on legal grounds, but not to the accuracy of the test. (Objection To Admissibility Of Genetic Test Results And Motion To Strike dated November 27, 2002. (R. 1298-1300).) Petitioner also filed a Motion For Summary Judgment and a Memorandum Opposing Intervenor's Motion And Supporting Petitioner's Motion. (R. 1302-1326; 1361-1363.)

20. On May 5, 2003 the trial court granted Intervenor's motion for summary judgment and denied that of Petitioner. (R. 1745-1749.) By separate findings of fact and conclusions of law the court adopted the conclusions of Dr. Sanders contained in her Schoolcraft Report and found, *inter alia,* that "from a developmental and psychological prospective, Zachary's functioning was not inherently disrupted by Intervenor, Pete Thanos' involvement"... but, on the contrary, "was not only not disruptive, but necessary to Zachary's normal and positive development." (R. 1723, 1741, Finding no. 18.) The court declared Intervenor to be the "biological and natural father of Zachary Andrew Pearson." (R. 1746.)

21. On June 7, 2002 the Court granted Respondent's motion to bifurcate the case. (R. 848-851.) By a Decree of Divorce Terminating Marriage dated June 21, 2002, the Court ended the marriage of Respondent and Petitioner. (R. 855-856.) On July 1, 2002 Respondent and Intervenor were married. (Finding no. 7, R. 2437.) As of the date of the trial Petitioner had not remarried. (R. 2533 at 521:22-23.)

22. On July 13, 2003 a daughter, Madelaine, was born to Mr. and Mrs. Thanos. (Finding no. 8, R. 2437.)

23. Nicholas and Zachary are strongly attached to Madelaine. Nicholas likes to feed her and hold her. He enjoys the role of a nurturer for her. Zachary likes to play with her. When the children get ready for bed they all wrestle together. Madelaine loves the boys and interacts with them. (R. 2535 at 1077:4 to 1078:24.)

24. When Respondent picked Zachary up from his preschool he frequently said, "Mommy, I need to show all the kids Maddy." He would then try to introduce her to all of his schoolmates. (R. 2535 at 1079:5-11.) Nicholas likes to write stories for Madelaine. He prepared a book (Respondent's Exhibit 14) entitled "My Sister By Nick" for his preschool class. (R. 2535 at 1079:12 to 1081:19.) In viewing the relationship of Nicholas and Zachary with their sister the custody evaluator concluded, "These children [Nicholas and Zachary] are very best friends and it is likely that their sister will join their unusually strong relationship. They should not be separated." (Petitioner's Exhibit P-5 at 9, ¶ 3.) Similarly, the trial court found that "[t]here is a substantial benefit of keeping these siblings together." (Finding no. 34.b., R. 2449.)

25. As a result of the court's interim order granting equal parent time to Petitioner and Respondent, it became necessary for Respondent to divide her time between her Salt Lake home and her Portland home in order to maximize the amount of time she could spend with Nicholas and Zachary. (R. 2536 at 1073 to 1075:13.)

26. The expenses associated with her frequent travel between the two cities, and the maintaining of two residences cost her and Intervenor approximately $3,500 per month. (R. 2535 at 11-16.)

27. To help Nicholas and Zachary feel comfortable when they were living in the Portland home Respondent and Intervenor gave the boys a high-ceilinged front bedroom with a walk-in closet. They provided beds which were identical to those which the boys had in Salt Lake, including nearly identical sheets and identical comforters. The boys had duplicate toys in both residences. (R. 2535 at 1101:21 to 1103:1.) They have made friends in Portland. The Thanoses' home is located in a neighborhood which had several families with small children and a nearby school of known quality. (*Id.* at 1103:3 to 1106:24.) In Portland the boys participate in outings to the beach, sailing, hiking in nearby forests and other outdoor activities. (R. 1107:3 to 1109:9.) They are happy and comfortable in their Portland home. After reviewing these and other facts concerning the Portland home, the court-appointed custody evaluator in this case found:

> The children consider Oregon to be one of their homes and are very comfortable in that environment. Currently single and working from his home, Kelly is the most portable of the three parents. I am convinced that these parents will be able to create a good life for themselves and their children in Oregon and urge that Kelly relocate to Oregon in time for Nicholas to begin the second half of his school year there.

(Petitioner's Exhibit P-5 at 12.)

28. Petitioner is able to work from his home in Utah. He could just as easily be employed in Oregon at the same job that he performs in Utah because of the nature of his employment. (R. 2533 at 559:19-23.) By contrast, Intervenor would have a difficult time in Utah finding comparable work and, if he did, would likely take a pay cut. (R. 2533 at 643:10 to 645:11.) When he last looked for work in Utah Intervenor determined that his

reduction in pay, if he were to come to Utah, might be as great as 50%. (R. 2533 at 643:13-25.)

29. Intervenor's present employment position is secure. (R. 2533 at 645:17 to 646:20.) Petitioner's present employment is much more tenuous. At the time of trial his job was equally divided between two tasks. One of those tasks had the potential for long-term work. He testified that the other task was likely to end within a few months and admitted that his employment was "not necessarily secure." (R. 2532 at 420:1-10.) He also admitted that he would have to make a "job transition" in his career and that his company had reduced its work force from 47,000 to 28,000 employees during the prior four years. (*Id.*) It was unlikely that he would be able to find a job which would allow him to continue to work at home. (R. 2532 at 422:1-5.) He also conceded that if he were to lose his job he would likely have to live with his parents or siblings. (*Id.* at 422:7-14.) He acknowledged that he had considered moving to Portland and to the "Bay area". (R. 2532 at 430:19-24; 432:13-21.)

30. After the completion of her Schoolcraft Report, in June 2002, Dr. Sanders began preparing her custody evaluation. (R. 2534 at 699:21-24.) In preparing that report she interviewed Petitioner, Respondent and Intervenor, as well as, two former nannies, Intervenor's therapist, Intervenor's adult son, two friends of Petitioner and Respondent and Dr. Jay Thomas, a psychologist who participated in the mediation and consulted with the Thanoses. (Child Custody Evaluation, Petitioner's Exhibit P-5 at 1.) Dr. Sanders conducted "multiple individual interviews with Petitioner, Respondent and Intervenor. (*Id.*) She observed Nicholas and Zachary in the presence of Respondent, Petitioner and

Intervenor during four different observation periods before her report was prepared and three times after its preparation. (R. 2534 at 692:13-23.) She tested the parties using two different psychological tests and had them fill out a "parenting questionnaire". (Petitioner's Exhibit P-5 at 1.)

31. Dr. Sanders provided all of the information required in C.J.A. Rule 4-903. (R. 2534 at 707:18-20.) She also complied with guidelines for the preparation of custody evaluations promulgated by the American Psychological Association and The Association Of Family And Conciliatory Courts. (*Id.* at 745:23 to 746:17.)

32. As mandated by Rule 4-903 Dr. Sanders considered the factor of "biology" (referred to as "kinship" in Rule 4-903), but found it to be no more important than any other factors required to be considered under Rule 4-903. (*Id.* at 707 at 6-17.)

33. Dr. Sanders found the issue of "attachment" – which she described as "the relationship that develops between the child and the parent" – to be very important in her evaluation. (*Id.* at 708:5-7, 712 at 12-14.) (Rule 4-903 uses the word "bonding" which, according to Dr. Sanders, is a term of art referring to "the ability of a parent to bond to a child, typically during the early infancy period.") (*Id.* at 707:23 to 708:4.)

34. Dr. Sanders completed her report on November 3, 2003. (Petitioner's Exhibit P-5:cover page.) In it she recommended that Petitioner and Respondent be named as joint legal custodians of Nicholas, and that Respondent and Intervenor be named joint legal custodians of Zachary. (*Id.* at 12.) She did not specifically recommend the awarding of physical custody, be it as sole or joint custody, but did recommend what she called an "access schedule" which evenly divided parent time with Nicholas on the

same basis required by the interim order. (*Id.* at 12, ¶¶ 2.a., b., c. and d.) As to Zachary Dr. Sanders recommended that he spend five nights with Petitioner per week and that holidays be rotated between Petitioner, on the one hand, and Respondent and Intervenor, on the other, in the same manner as with Nicholas. (*Id.* at 13: ¶¶ 2.c. and d.) Dr. Sanders also voiced her "strong recommendation" that Petitioner relocate to Oregon. (*Id.* at 12:¶ 2 (introductory ¶).)

35. At trial Dr. Sanders testified concerning the preparation of the child custody evaluation and reconfirmed her recommendations, she stated that she had also conducted post-evaluation observations of the children. (R. 2534 at 749:7-19.)

36. The trial in this case was held on April 1, 2, 5, 6, 7 and 8, 2004. The case was tried before Judge Tyrone E. Medley. Judge Medley published his findings of facts and conclusions of law on May 11, 2004 (R. 2434-2469). His findings adopted the findings of Dr. Sanders. In particular, he accepted and followed Dr. Sanders' recommendations with regard to joint legal custody and parent time as being in the best interest of the children. He also found that it would be in the best interests of the children if Respondent were to be awarded primary legal custody of Nicholas and if Respondent and Intervenor were to be awarded primary legal custody of Zachary. (Findings nos. 43, 46 and 47, R. 2456, 2458.)

37. The court directed Respondent and Intervenor to submit a draft of a proposed decree. It signed that decree, over the objection of Petitioner, on July 12, 2004. (R. 2503-2513.)

SUMMARY OF ARGUMENTS

The central issue in this case, and the one from which all other issues flow, is whether the Petitioner, Mr. Pearson, or the Respondent and the Intervenor, Mr. and Mrs. Thanos, should be awarded the primary physical custody of Nicholas and Zachary. Because at the time of trial Petitioner lived in Salt Lake City, Utah, and the Thanoses lived in Portland, Oregon, it was not possible for the trial court to adopt a third alternative: the awarding of joint and mathematically equal physical custody. As to that fundamental issue – Who should have primary physical custody of the boys? – the trial court found for the Thanoses. The court's decision on that issue was made in the exercise of that broad discretion which is granted to trial courts in deciding what is in the best interests of children who are the subject of custody battles. That decision should not be overturned by this court because it is neither clearly erroneous nor flagrantly unjust.

Petitioner adopts the expedient approach of attacking the trial court's decision to allow Mr. Thanos to intervene in this case. His attack seeks to divert the court's attention from the fact that he cannot demonstrate that the trial court's findings concerning the best interests of the children were clearly erroneous and flagrantly unjust. Even Petitioner's attempted diversion must be rejected because the presumption of paternity in favor of Petitioner has been rebutted by overwhelming and uncontradicted evidence.

Flawed, too, are petitioner's arguments concerning the application of the doctrines of parental presumption and promissory estoppel. Those arguments are based upon a misunderstanding of the governing legal principles by Petitioner but, more importantly because those legal principles must ultimately give way to a determination of what is in

the best interests of the children. On that issue the trial court's ruling is unequivocal and unassailable.

ARGUMENT

I. THE GRANTING OF INTERVENOR'S MOTION TO INTERVENE IS WELL-SUPPORTED BY ESTABLISHED LEGAL PRINCIPLES AND THE EVIDENCE.

A. Schoolcraft Analysis

Respondent and Intervenor agree that Utah recognizes the ancient tradition of protection of a presumption of legitimacy of children born during a marriage. The doctrine, known as the "Lord Mansfield's Rule", was recognized in the case of *Lopes v. Lopes*, 518 P.2d 687 (Utah 1974). The rule of law of that case is simply that "spouses themselves may not give testimony which would tend to illegitimatize the child." *Id.* at 689. That somewhat vague standard was modified by the case of *Teece v. Teece,* 715 P.2d 106 (Utah 1986), which held that the Lord Mansfield's Rule had been "substantially eroded by the enactment of § 78-25-18 of the Code which expressly mandates that the trial utilize blood tests to assist in making determinations of paternity." *Id.* at 714. The Court, in *Teece*, stated that:

> Nothing in the Rule, which bars testimony from either parent that would illegitimatize their child, prohibits the introduction of the result of blood or tissue typing tests or of the testimony from witnesses other than the putative fathers on the issue of paternity.

Id. at 107, citing *Hales v. Hales*, 656 P.2d 423 (Utah, 1982).

The *Teece* decision ameliorates the inflexibility of the Lord Mansfield's Rule by allowing a court to receive evidence of paternity in the form of test results or the testimony of third parties.

The Rule is further modified and eroded by the language of Utah Code Ann. § 78-45a-1 (2002), which states as follows:

> The father of the child that is or may be born outside of marriage is liable to the same extent as the father of a child born within marriage, whether or not the child is born alive, for the reasonable expenses of the mother's pregnancy and confinement and for the education, necessary support, and any funeral expenses for the child. *For purposes of child support collection, a child born outside of marriage includes a child born to a married woman by a man other than her husband if that paternity has been established.*

(Emphasis added.)

Further, Utah Code Ann. § 78-45a-10, which addresses the effects of genetic test results, states as follows:

> (1) genetic test results shall be admissible as evidence of paternity *without the need for a foundation of testimony or other proof of authenticity or accuracy* if:
>
> (a) a type of generally acknowledged as reliable by accreditation bodies designated by the Federal Secretary of Health and Human Services;
>
> (b) performed by a laboratory approved by such an accreditation body;
>
> (c) not objected to with particularity and in writing within fifteen days after the written test result being sent to the parties . . .
>
> (2)(b) unless a party objects to particularity and in writing within fifteen days after the written test results are sent to the last known address of that party on file under § 78-45(a)-2, testimony received under subsection (2)(a) shall be received in affidavit form.

(Emphasis added.)

In the case at bar, Intervenor filed an affidavit on August 1, 2001 asserting his paternity and attaching conclusive paternity test results in compliance with Utah Code Ann. § 78-45a-10 (2002). There was no objection or rebuttal filed by petitioner or any other party subsequent to the filing of the notice and the DNA results within the 15 day period, as prescribed by statute. As stated in Utah Code Ann. § 78-45a-10(3)(a), "A man is presumed to be the natural father of a child of genetic resting result in a paternity index of at least 150." *Id.* The paternity index for the Intervenor was 98,011 and the probability was 99.999%, as compared to an unrelated Caucasian male. Pursuant to Utah law this evidence is (1) admissible in that it is not testimonial evidence and comports with the holding in *Teece, supra*, and (2) conclusive proof that the Intervenor is the natural father.

In addition to financial obligations, Utah statutes afford rights of parent time to an unmarried father. Utah Code Ann. § 78-45a-10.5 states as follows:

> Visitation rights of father. If the court determines that the alleged father is the father it may upon its own motion or upon motion of the father order visitation rights in accordance with sections 30-3-32 through 30-3-37, as it considered appropriate under the circumstances.

The Intervenor clearly had legal rights that would have been affected by the outcome of the litigation between the Petitioner and Respondent. Neither of the parties in the divorce were adequately positioned in a legal context to protect the interests of the Intervenor.

To resolve the dispute between the *Teece* holding, which gives the court a method to evaluate other evidence disputing paternity, and the *Lopes* holding, which supports the

Lord Mansfield's Rule's general policy considerations, in the *Schoolcraft Case* the Utah Supreme Court addressed the issue of who should be included in the class of persons permitted to challenge the presumption of paternity. In that case a petition was filed on December 13, 1985 in juvenile court by the State of Utah alleging neglect and abandonment by Michael Ford, the natural father of the minor child, J.W.F., and by Linda Schoolcraft, the mother. The guardian ad litem representing the minor child was granted standing to participate in those proceedings. The trial court found that J.W.F was neglected and abandoned. As a result he was placed in the custody of the Division of Child and Family Services. Winfield Schoolcraft and Linda Schoolcraft had been married and lived together for approximately eight months after their marriage. Seven months to one year after the parties separated Linda Schoolcraft gave birth to the minor child, J.W.F., in the State of Utah on November 5, 1985. Mr. Schoolcraft filed the petition for custody in juvenile court on August 28, 1986 stating that he was the father of the child and was living with the child's mother at the time of conception. The guardian ad litem filed a petition alleging that Winfield had no rights to J.W.F. based upon the fact that Michael Ford was the natural parent of J.W.F. and that Winfield Schoolcraft was not the biological father, or alternatively, that he was unfit or had abandoned the child. Following a hearing the trial court terminated Michael Ford's and Linda Schoolcraft's parental rights.

At trial the court found that Schoolcraft was not the biological father of J.W.F and that he had no right to custody. Since Schoolcraft was not the natural father of the child, he had no standing to claim custody. The Court of Appeals affirmed the trial court's

decision, which included upholding the lower court's decision to grant the guardian ad litem standing to participate in the case. The Utah Supreme Court granted certiorari to review that decision.

The Court held that the Court of Appeal's decision to allow the guardian ad litem standing was appropriate, as the guardian was an indispensable party to those proceedings and had an interest to protect the minor child. *Id.* at 713. Schoolcraft argued the opposite, stating that the court should have followed a strict reading of *Lopes* and *Holder v. Holder,* 9 Utah 2d 163, 340 P.2d 761 (1959) in preserving the sanctity of marriage and that the wife and husband should not be allowed to contest the legitimacy of the child, because such a challenge ultimately would have resulted in a decision that Schoolcraft was J.W.F.'s father.

The Supreme Court found the Court of Appeals' analysis to be "too mechanistic and, consequently, is insufficiently sensitive to the legitimate policy consideration Schoolcraft raises." *Id.* at 713. Citing *Lopes* and *Holder* the court stated, "In determining who can challenge the presumption of legitimacy, a paramount consideration should be preserving the stability of the marriage and protecting children from disruptive and unnecessary attacks on their paternity". This analysis led the Court to conclude that whether an individual can challenge the presumption of legitimacy should depend, not on the legal status alone, but on a case-by-case determination of whether the above stated policies would be undermined by permitting the challenge. In note 1 the Court stated:

> Three cases dealing with standing to challenge a child's legitimacy are consistent with this approach. In *Teece v. Teece,* 715 P.2d 106 (Utah 1986), *Roods v. Roods*, 645 P.2d 640 (1982), and *Lopes v.*

> *Lopes*, 30 Utah 2d 393, 518 P.2d 687 (1974), the court allowed both the husband and wife to challenge the presumption of legitimacy, but in each of these cases, no reason existed to deny them standing because the stability of the marriage had already been shaken.

Id. at 713.

Schoolcraft and the three cases cited in footnote 1 provide examples of unstable fractured marriages. It was clear from the facts in the *Schoolcraft* Case that the marriage, in that instance was a marriage "in name only". Similarly, in the case at bar, at the time of the Intervenor's challenge and request that he be granted standing, the Petitioner and Respondent remained husband and wife in name only, because there was a pending divorce action and Intervenor and Respondent were engaged in an ongoing romantic relationship. By the time of trial a bifurcated Decree of Divorce had been granted and Intervenor and Respondent had married.

In *Lopes* the natural father of Theodore Lopes initiated divorce proceedings against the defendant Shana G. Lopes. The finding of the trial court was as follows: "That during the marriage there has been one child born of the Defendant, Shana Lopes." 518 P.2d at 688. Clearly, in *Lopes,* given the initiation of divorce proceedings, the marriage had been sufficiently shaken.

In *Teece* the husband and wife married in 1973. The child was born in 1981. Subsequent to the child's birth, the mother initiated divorce proceedings. The child had been born during an eight year marriage, and the parties did not initiate divorce proceedings until after the birth of the child. The court in *Schoolcraft* again cited this as a

case in which the marital status of the parties had become sufficiently shaken to meet the first factor of the *Schoolcraft* analysis.

The third case referenced in *Schoolcraft* is *Roods v. Roods*, 645 P.2d 640 (1982), a case in which the husband and wife had been married in 1973 and divorced in June 1976. A few months prior to the divorce the wife became pregnant. The child was born in December 1976. *Id.* at 641. Prior to the child's birth in August 1976, the mother had married a man named Craig Green, whose surname was given to the child and who had supported the child while Mr. Green was married to the mother. The providing of support enabled Mr. Green to claim the child as a dependent for tax purposes. The mother and Mr. Green were divorced in 1978. As with this case, the husband and wife in the *Roods* case were also married during the time of conception and birth of the minor child and the child was supported by Mr. Green and resided with the child as his own; however, subsequent to the birth of that child, the parties began having trouble with their marriage and had filed for divorce. The Court in *Schoolcraft* cited this case as an example of a marriage of sufficient instability that no offense would be given to its policy consideration of "preserving the stability of the marriage." *See Schoolcraft*, 799 P.2d at 713.

Petitioner cannot distinguish between the facts of the above-referenced cases and the instant case. The applicable standard to apply pursuant to *Schoolcraft* is whether there is a stable, intact marriage, not whether the marriage had been dissolved or whether the "partners to the marriage jointly reared children together and continue to do so," as Petitioner argues. (Brief of App. at 26.) Further, pursuant to the decision in *Schoolcraft*,

the trial court must examine the facts of each case, on a case-by-case basis to determine if there was a functional, intact marriage. The trial did that in this case.

The length of time that the minor child, Zachary, actually spent within a two-parent household was only approximately 8 months and even during that time period the marriage was not stable. It is not relevant how long the parties remained married after, or how long the marriage existed prior to, the separation. Further, the stability of the parent/child relationships that are formed during the marriage are addressed in the *Schoolcraft* analysis by considering the question of protecting children from disruptive and unnecessary attacks on their paternity and considering the best interests of the child. It is clear, that the first requisite factor of the *Schoolcraft* analysis has been met in this case and that the trial court was correct in finding that the marriage of the Petitioner and Respondent was not an intact marriage and had been sufficiently shaken to disregard the presumption of paternity. (Finding no. 21, Addendum 1, R.2443-2444.)

Petitioner argues that the court of Florida appeals case *S.D. v. A.G. and J.G.,* 764 So. 2d 807 (Fla. Ct. App. 2000) supports his position. However, in the context of the direction provided in *Schoolcraft*, the phraseology used by the court that "although divorce may separate and strain a family with children, divorce does not end the important child-rearing functions of a family," certainly does not mean that marital strain cannot be sufficiently present to warrant intervention of a necessary party in divorce and custody proceedings; nor does that case assist the Court in this instance, given the particular and important facts present, which include the forming of a unitary family by Respondent and Intervenor.

In *S.D. v. A.G. and J.G.*, both parties in the divorce action opposed the intervention of the putative father who was seeking leave to intervene. *Id.* at 808. The court acknowledged that Florida case law states that a "putative father has no right to initiate a paternity action concerning the child of an intact marriage, *if both the married woman and her husband object.*" *Id.* at 809, citing *I.A v. H.H.*, 710 So. 2d 162 (Fla. 2d DCA 1988) (emphasis added). The Florida courts distinguish between cases where putative fathers are attempting to intervene and such intervention is resisted by both the woman and her legal husband, and those cases where one or both legal parents welcome the intervention of the putative father.

The court in *S.D. v. A.G. and J.G.* emphasize this point in the conclusion of its decision in stating, "We are probably suggesting that the traditional role of the family unit should not be interfered with by government or second guessed by judges absent some extraordinary circumstances, particularly when the legal parents object and show serious interest in fulfilling their child rearing functions." *Id.* at 810.

The case at bar differs dramatically from the case of *S.D. v. A.G. and J.G.* In this case the Respondent not only welcomed the Intervenor's intervention and involvement in the child's life, but actually married the Intervenor subsequent to the bifurcated decree of divorce being granted. (Finding no. 7, R. 2437.)

Petitioner has cited to California cases which are not factually on point or controlling. Petitioner relies upon the use of *In re Marriage of Freeman*, 53 Cal. Rptr. 2d 439 (Cal. Ct. App. 1996), in support of his position that the intervention of Intervenor Pete Thanos was clear error. (Brief of Pet. at 24.) However, that case actually supports

the trial court's decision. In the *Freeman* case the legal father tried to avoid paying child support for a child that was believed to be fathered by another man during the course of the marriage. Paternity tests were submitted to the court proving that the putative father was indeed the natural father of the child in question. The legal father challenged the strict reading of the California paternity statute in the lower court arguing that because he was sterile, the statute presumptively precluded the court from making a finding of paternity and from ordering him to pay child support. *Id.* at 443. The due process argument that would be applicable to the case at bar and which the Petitioner quotes in his brief at page 24 were not even addressed by the appellate court in that case, because it was raised for the first time on appeal. The court stated, "Here, if John [legal father and appellant] desired a ruling on his due process claim, he had ample opportunity to request one from the trial court before entering into the stipulated judgment...In sum, we reject John's constitutional challenges to the conclusive presumption [of legitimacy] because John abandoned his due process claim..." *Id.* at 449.

Furthermore, the court in that case joined the putative father as a party in dissolution action of the legal father and mother of the child (*Id.* at 443) and made a finding that the natural mother had presented evidence to show that during the marriage, the legal father had always treated the minor child as his own child. *Id.* The court's decision does not indicate that the biological father of the child, despite being joined as a party to the action, wanted to be responsible for the support of the child in question or that he ever sought to take custody or have any parental rights to the child in question.

To the contrary, the legal father sought to have those ties severed and to have the state look to the biological father for child support. *Id. at* 448.

The Petitioner also ignores the important distinguishing facts between this case and the case of *Susan H. v. Jack S.*, 30 Cal. App. 4th 1435 (1994). Relevant facts of that case are as follows:

> Susan H. married John A. on May 5, 1985. In September of 1987, Susan H. became pregnant and gave birth on June 23, 1988, to Michael, the minor who is the subject of the present paternity action. Susan H. and John A. lived apart from each other from approximately September 1989 to April 1990. At all other times they resided together during their marriage until September 8, 1991, when Michael was over three years old, and Susan H. and John A. permanently separated.
>
> When Michael was approximately four years old, Susan H. commenced a marital dissolution. Susan H. and John A. both alleged that Michael was a child of their marriage. They stipulated to an order awarding primary physical custody of the child to Susan H. and secondary physical custody to John A. The court also directed John A. to pay Susan H. family support.
>
> Susan H. filed the paternity action seeking to establish that another man, Jack S., was Michael's father. Susan H. did not join Jack S. as a party to the dissolution proceeding, nor did she name John A. as a party in the paternity action. Susan H. also did not seek to consolidate or coordinate the two actions, but prosecuted both actions concurrently, asserting John A.'s paternity in the dissolution proceeding and Jack S.'s paternity in the paternity action.

Id. at 1437-38.

The *Susan H.* case is completely distinct from the case at bar in that the child in the case was over four years of age and already the subject of a final order of custody and parent time when the biological father was brought into the child's life and the litigation. Furthermore, the biological father did not want to be involved in the child's life and

resisted the paternity suit brought by the mother. *Id. at* 1438. Given these facts, the court had little choice but to order that the legal father maintain custody, especially in view of the fact that the alternative was to permit a virtual stranger to become the father of the child.

Petitioner states "[T]he facts of this case require the court to consider a marriage in which the partners to the marriage jointly reared children together and continue to do so, though the marriage is dissolved." (Brief of Pet. at 26.) The court did, in fact, consider the fact that Petitioner and Respondent jointly parented the child for a period of approximately eight months and shared a custodial arrangement after separation. It also considered the fact that the Petitioner and Respondent's marriage had terminated and that the Respondent and Intervenor were then married and in an intact family. The policy considerations discussed by the Petitioner at pp. 24-26 of his Brief, actually support the conclusion that Zachary should reside with the Intervenor and Respondent rather than with the Petitioner, because the Intervenor and Respondent have an intact family relationship and are the natural parents of the minor child. The Petitioner wholly ignores the psychological impact it would have upon Zachary were he to reside with the Petitioner and only visit with his mother who is living with, and is married to, his natural father, the Intervenor.

The court-appointed custody evaluator, Dr. Jill Sanders, was the evaluator who was suggested by the Petitioner and mutually agreed to by both parties. Dr. Sanders indicated at the time of trial that there was a difference in this custody evaluation, as opposed to the normal custody evaluation where there are just two parties and perhaps a

stepparent involved. Dr. Sanders testified that while it was not unusual to have more than two parties to evaluate, such as in the case of stepparents, in this case the Intervenor was more than just a stepparent, but, also, the biological parent of the child (R. 2534 at 701:9-14.) Dr. Sanders' written custody evaluation was admitted into evidence at the time of trial. That evaluation, received as Petitioner's Exhibit P-5, is attached hereto at Tab "E" of the Addendum. That report clearly recites the Rule 4-903 considerations (see pp. 9-10 of the Report). One of the factors considered by Dr. Sanders is listed on page 10 of her report is as follows:

> Kinship, including, in extraordinary circumstances, step parent status: Pete and Kimberly are Zachary's biological parents. Kelly and Kimberly are Nicholas' biological parents. Kelly is Zachary's psychological father at present. Nicholas and Zachary have a very strong attachment to Pete.

The Petitioner largely ignores these unusual fact-based circumstances in his Brief and incorrectly focuses on policies which may pertain to a more traditional two parent family home and secure intact marital relationship, neither of which exist in the case at bar.

Dr. Sanders had previously prepared the requested *Schoolcraft* report, Addendum Tab C, and the supplement to *Schoolcraft* report, Addendum Tab D, both of which addressed the two-prong analysis of *Schoolcraft*, though the supplemental report was focused on the second prong: the protection of children from disruptive and unnecessary attacks on their paternity. (The Petitioner had requested further clarification from Dr. Sanders with regard to the *Schoolcraft* evaluation and the court permitted the Petitioner to supplement his concerns and address the court with a letter outlining his concerns and

further requests of Dr. Sanders.) Based upon that motion and Petitioner's letter, the trial court directed Dr. Sanders to make an analysis, to wit: "The impact on the child of a disruption in Zachary's relationship with Petitioner and Zachary's ability to understand his biological relationship." (Finding no. 8, R. 2442.)

In response, Dr. Sanders' supplemental report, dated August 26, 2002, found that the primary disruption in Zachary's relationship with Petitioner occurred at the parties' separation and that by age 18 months, Zachary had firmly established a loving, secure and relatively predictable relationship with Petitioner, Respondent and Intervenor. Dr. Sanders indicated that there was no inherent reason why Intervenor's presence as another loving care giver should have any further disruptive impact. (Finding no. 19, R. 2442-2443.)

In her supplemental *Schoolcraft* report Dr. Sanders stated that Zachary had not lost his relationship with Petitioner nor was there any basis to believe that further disruption to the relationship between Zachary and Petitioner was intrinsically linked to the Intervenor's presence in Zachary's life. Dr. Sanders also, noted that Zachary has a loving relationship with Petitioner and with Intervenor. (Petitioner's Exh. P-7 [Tab D] at 2.) The court adopted Dr. Sanders' conclusions on this issue in its Finding no. 20. (R. 2443.)

While the Petitioner had relied upon hired experts, the court found that the testimony of Dr. Douglas Goldsmith was of little assistance or weight, as Dr. Goldsmith had not met with the Respondent, Intervenor or children nor had he conducted an evaluation. The court found that Dr. Goldsmith's testimony was generic and not case-

specific and that he misunderstood Dr. Sanders' opinions regarding the importance of biological relationships to children. (Finding no. 36, R. 2453.)

The trial court's *Schoolcraft* analysis was thorough, was applied correctly to the facts of this case, and supports the ultimate conclusions of law and order of the court.

B. Response to Constitutional Analysis.

Petitioner argues in his Point I.B. that there has been a violation of due process and in support of that argument cites Part I § 7 of the Utah Constitution. Simultaneously, Petitioner has relied upon the *Schoolcraft Case* in arguing that Intervenor should not have been granted leave to intervene. It is clear, however, by virtue of the trial court's careful analysis of the facts of this case employing a *Schoolcraft* analysis, that Petitioner was afforded due process.

It is beyond dispute that Petitioner had his "day in court." There was a full hearing on Intervenor's motion to intervene, together with an interim "*Schoolcraft* evaluation" by the court-appointed custody evaluator. The trial court's order granting Intervenor's motion was then brought before this court by way of an interlocutory appeal. The trial court heard many days of trial testimony, including the testimony of various expert witnesses regarding what was in the best interest of Zachary, given his relationship with the various adults in his life.

Due process, as required by the Utah and United States Constitutions, requires that a deprivation of someone's rights shall not be ordered without his having been given a full and fair opportunity to have the issue litigated or some other equivalent process being undertaken to ensure that his rights are not deprived. Petitioner himself states on page 32

in his Brief, in quoting *In re Castillo,* 632 P.2d 855, 856 (Utah 1981), that a parent has a fundamental right protected by the constitution to sustain a relationship with his child. *Id.* This right has been mischaracterized by Petitioner as being enjoyed only by a presumed parent under Lord Mansfield's Rule.

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. This is the essence of the *Schoolcraft* analysis; but the presumptive right to be recognized as a legal parent is a rebutable presumption.

The Petitioner is misguided in his reliance on cases such as *G.F.C. v. S.G. and D.G.*, 686 So. 2d 1382, 1385 (Fla. Ct. App. 1997). These cases are not controlling authority in this state and are not helpful in the context in which they are being used: to support the proposition that a husband is a presumptive father where the child is born to an intact marriage, absent any other adjudication of paternity in favor of the biological father. A mere establishing of biological fatherhood without a coexistent establishment of a developed relationship will not allow a biological father to overcome the legal fathers' presumption of legitimacy. An adjudication of paternity exists in this case and no intact marriage exists; consequently Petitioner's reliance on *G.F.C.* is misplaced.

On its facts the *G.F.C.* case is distinguishable from the facts of this case in other respects, as well:

> G.F.C. appeals the trial court's order dismissing his petition to establish paternity. G.F.C. contends that pursuant to section 742.011, Florida Statutes (1995), he has the right to challenge the paternity of a child born during an existing marriage. We disagree and affirm.

> At the time of conception, the mother and her husband were living together and they have continued to live together since the birth of the child. At the time of birth, the husband's name was placed on the birth certificate as the child's father and he has at all times acknowledged the child to be his own. To this end, the husband also filed an affidavit acknowledging paternity.
>
> G.F.C. petitioned the trial court to adjudicate him the biological and legal father of the child. The petition alleged that G.F.C. was the biological father of the child but contained no allegations that the mother's husband was deficient in carrying out the responsibilities of a father or that G.F.C. had an established relationship with the child.

Id. at 1383.

The factors that are to be considered in an analysis under *Schoolcraft*, as discussed, *supra,* would lead to a similar conclusion to that the court in *G.F.C. v. S.G. and D.G.* arrived at in protecting the intact family. The natural mother and putative father had at all times been living together with the child in question in an intact marriage. *Id.* at 1383. G.F.C. made out no allegation indicating that the mother's husband was deficient in his responsibilities to the child. G.F.C. did not demonstrate that the minor child had established any kind of relationship with him. *Id.* Per the *Schoolcraft* analysis, Utah courts would likely also have found the natural father's intervention to be a "disruptive and unnecessary" attack on a child's paternity, in addition to being an assault on a clearly intact marriage. *See Lopes,* 518 P.2d at 689; *Holder*, 340 P.2d at 763.

Petitioner has also cited the case of *In re J.P.*, 648 P.2d 1364 (Utah 1982) for the principle that "[t]he rights of parents are at their apex for parents who are married. Some

variation exists amongst unwed fathers." *Id.* at 1374. The application of this rule of law and constitutional analysis, actually strengthens the argument that the rights of the Intervenor and the Respondent in Zachary should be protected and that it was a sound decision for this court to grant intervention, given that Intervenor and Respondent are married to one another, as well as being his biological parents.

Furthermore, Petitioner's reliance on *In re J.P.* 648 P.2d at 1374, is flawed, given the fact that in that case the court was analyzing the constitutionality of a statute that allowed the juvenile court to terminate a mother's parental right using only a "best interests" standard, without first determining that there has been abandonment, abuse, or neglect. *Id.* at 1374-78. It was not a case involving two or more parties, wherein one is a legal parent and another parent a biological parent coincident with strained marital relationships. The facts of that case are not remotely similar to the case at bar.

While it is true that parental rights are a fundamental liberty interest, recognizing that status does not mean that it is irrefutable, unrebuttable, or subject to nuance. Further, those same rights apply to natural parents as well as legal parents. Upon careful consideration of the facts of each case, both rights are afforded different levels of protection, as analyzed against the controlling case law of *Schoolcraft.*

In the case of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) a minor child, Victoria D., the natural child of Carol and Gerald D., was born during the term of Carol and Gerald D.'s marriage in California. Subsequent paternity testing revealed that Michael H., with whom Carol had had an affair, was the biological father of the child. During the first three years of her life, Victoria lived with the mother and spent time with

both Michael H. and Gerald D. Subsequent to June 1984, Carol and Gerald D. lived exclusively together, having reconciled their marriage. The biological father, Michael H., filed a paternity action against the natural mother and Gerald D., whose marriage was, in fact, an intact marriage. The Court, citing to the California Evidentiary Code, commented in the introduction of it's decision in the *Michael H. v. Gerald D.* case as follows:

> [A] child born to a married woman living with her husband is presumed to be a child of the marriage... the presumption of legitimacy may be rebutted only by the husband or wife, and then only in limited circumstances.

Id. at 113.

The facts of this case are distinguishable from those of *Michael H.* in at least two respects: (1) the case at bar has no intact marriage; (2) this case involves no similar statute.

Furthermore, the Supreme Court in *Michael H.,* both in the dissent and plurality, focused on the "unitary family" as being of paramount concern in regard to whether or not the biological parent has a liberty interest that is being impinged. *Id.* at 135. The plurality stated:

> Under the circumstances of the case before us, Michael was given a fair opportunity to show that he is Victoria's natural father, that he developed a relationship with her, and that her interest would be served in granting him visitation rights....
>
> [A]fter its rather shaky start, the marriage between Carol and Gerald developed a stability that now provides Victoria with a loving and harmonious family home.

Id. at 135-136.

The facts of *Michael H.* in which the parents after a "rather shaky start" reconciled and continued with an intact family are factually dissimilar and wholly inapplicable to this case. Due process has been afforded Petitioner in this case as he has had multiple experts, custody evaluators, and a request for an interlocutory appeal, as well as several hearings and a multi-day trial.

The Petitioner's reliance on policy protections discussed in non-controlling authority such as *In re D.B.S.*, 888 P.2d 875 (Kan. Ct. App. 1995) is, again, misguided, given the factual differences. Unlike the facts of *In re D.B.S.*, the Intervenor in this case provided support, did not wait four years to assert his legal rights or agree to "stay out of the picture." *Id.* at 884.

The case of *Dawn D. v. Superior Court of Riverside County*, 17 Cal. 4th 932 (Cal. 1998) supports this Court's permitting of intervention. There, the natural mother and her husband prevented the biological father from bringing his minor child into his home. The biological father argued that he had the constitutional right to establish such a relationship. The court rejected this assertion finding that the biological father had never established any social relationship with the child and as such, the state was well within it's rights in creating a statute which would bar the biological father from ever establishing such a relationship. Further, the case of *Dawn D.* was not one in which there was a divorce action pending.

Particular facts surrounding any denial of parental access are critical. In a case from California, *Craig L. v. Sandy S.*, 125 Cal. App. 4th 36 (Cal. Ct. App., 2004), the

biological father and mother had a brief sexual encounter while the mother was still married in an intact relationship. The product of the encounter was a minor child, Jeffrey, who neither party was aware was anything other than the natural child to the mother and her husband until a routine blood test taken immediately after delivery of the child in the hospital proved that the putative legal father could not be the natural father. The legal father and mother briefly separated due to the shock of this discovery, but thereafter began living together again as husband and wife. The biological father and his wife agreed to participate as fully as possible in the minor child's upbringing. The biological father made support payments to mother and legal father. When the child was a few months old he began to visit one overnight stay each week with the biological father and his wife. The biological father further alleged that he held Jeffrey out to his family and friends as his son. *Id.* at 44. When the mother and legal father began to resist the biological father's presence in their child's life, the biological father filed a petition to establish paternity and to maintain visitation rights under the terms of California Family Code section 7611, subdivision (d) the same statute that was relied upon in the case of *Dawn D.*, *supra,* to prevent the biological father from asserting any rights to his child. *Id.* at 935.

In *Craig L. v. Sandy S.*, the court analyzed the case of *Dawn D.* It compared the facts that were before it to the facts of *Dawn D.* and found the following:

> Craig's claim is of course markedly different than the claim considered in *Dawn D.* Most importantly, unlike the biological father in *Dawn D.*, Craig alleges facts which would give rise to the presumption provided by section 7611, subdivision (d). He alleges not only a great deal of physical contact with Jeffrey but a

> meaningful relationship with Jeffrey. As we discuss more fully below that relationship not only supports a statutory right under section 7611, subdivision (d), *but an interest which may well be subject to protection under the due process clause of the United States Constitution*...Thus Craig's claim under section 7611, subdivision (d), is not barred by either the conclusive presumption of section 7540 or the holding in *Dawn D.*

Id. at 47 (emphasis added).

Petitioner has also cited, as support for his appeal, the case of *In re J.W.T.,* 872 S.W. 2d 189, 195 (Tex. 1994). That case provided a constitutional analysis of the Texas paternity statutes in an action brought by a natural parent against parents of an intact marriage. Again, this case is inapplicable, as there was no analysis of the impact of fractured marriages, but a focus, once again, on an intact marriage.

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." (Finding no. 7, R. 2437.) (At the time the Intervenor's motion to intervene was granted by Judge Medley in November, 2002, the Petitioner and Respondent had been separated over two years.) Further, Judge Medley had the benefit of the careful analysis of Dr. Sanders, which focused on the *Schoolcraft* factors. (Tabs C and D.) Given that high level of judicial scrutiny, it is incredible that Petitioner would now come before this court and allege:

> The trial court erred in concluding, *without analysis,* that Intervenor had constitutionally protected rights as Zachary's biological father, and in failing to recognize the Petitioner's constitutionally protected right to retain his legal relationship with Zachary intact. Because of the trial courts erroneous views, it conducted the *Schoolcraft*

> analysis in an analytically flawed way, being *overly solicitous of Intervenor's biological connection with Zachary.*

(Brief of Pet. at 46) (emphasis added.)

Judge Medley's analysis and findings are certainly not "overly solicitous," given his careful consideration of the *Schoolcraft* factors and the separate *Schoolcraft* report conducted by Dr. Sanders. In light of the guidance provided to the trial court in the *Schoolcraft* case, as adhered to by the trial court, the granting of Intervenor's motion to intervene was not only proper, but required. The trial court's order should not be disturbed.

II. THE TRIAL COURT ACTED WITHIN ITS PERMISSIBLE DISCRETION IN DETERMINING THAT EQUITABLE ESTOPPEL IS INAPPLICABLE TO THIS CASE AND THAT CUSTODY OF ZACHARY SHOULD BE AWARDED TO RESPONDENT.

Petitioner argues that the trial court erred in denying his motion for summary judgment. The court concluded that the doctrine of equitable estoppel is inapplicable to the facts of this case. (R. 1741, ¶ 4.) (Petitioner had argued that Respondent and Intervenor were estopped from denying that he is Zachary's father.)

"The issue of whether equitable estoppel has been proven is a classic mixed question of fact and law," and an "appellate court will not overturn the trial court's application of equitable estoppel absent an abuse of discretion." *State v. Irizarry*, 945 P.2d 676, 680 (Utah 1997) (noting that appellate court grants trial courts "a fair degree of deference" when reviewing issues of equitable estoppel). In this case, Petitioner's arguments in favor of the application of equitable estoppel fail both factually and legally.

Utah, like many other states, has never recognized the use of this doctrine in the context of granting custody and visitation rights to a nonbiological parent. Additionally, even if equitable estoppel were legally applicable in this type of suit, the facts of this case do not warrant its exercise. Finally, even those states that have allowed for the application of equitable estoppel under similar circumstances have never done so in the absence of a determination of the best interests of the child. Inasmuch as the trial court has already determined in its discretion that it is in Zachary's best interest that his primary custody be awarded to Respondent, that decision should be upheld.

As Petitioner notes, some states have utilized the doctrine of equitable estoppel in conjunction with state-specific statutory and common law provisions to allow visitation or custody rights under certain circumstances. In Utah, however, although the Utah appellate courts have indicated that the doctrine of equitable estoppel may be appropriately applied in limited circumstances to estop a nonbiological father from denying his own paternity in an effort to avoid child support payments, the doctrine has never been invoked to grant custody or visitations rights to a nonbiological parent.[1] Indeed, courts of other states have specifically held that, although the doctrine may be

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[1] Even in the child support context, Utah courts have given the doctrine only limited application, holding that "the use of an estoppel theory to impose a support obligation on a man who is not the biological father of the child involved must be applied with caution." *Wiese v. Wiese*, 699 P.2d 700, 702 (Utah 1985). Indeed, even in this context, attempts to apply equitable estoppel often fail. *Id.* at 702-03 (finding nonbiological father not estopped from refusing child support where mother had failed to show any detrimental reliance); *Masters v. Worsley*, 777 P.2d 499, 502-03 (Utah Ct. App. 1989) (refusing to apply equitable estoppel where father had made no wrongful or negligent representations). In 2000 the Utah Legislature all but completely abolished the use of waiver and estoppel in paternity actions where support payments are at issue. *See* Utah Code Ann. § 78-45a-4.5(3) (2002).

used for the purpose of imposing support obligations, equitable estoppel should not be "invoked... against a natural parent for the purpose of awarding custody and visitation to a nonparent." *Nancy S. v. Michele G.*, 279 Cal. Rptr. 2d 212, 218 (Cal. Ct. App. 1991); *see also In re the Marriage of Arenz-Roper*, 2004 WL 859313, * 3 (Cal. Ct. App. April, 24, 2004) ("[T]he courts have refused to recognize or expand the doctrine[] of... equitable estoppel... to grant custody rights to a nonparent who was otherwise excluded by law from paternity rights."); *Van v. Zahorik*, 575 N.W.2d 566, 572 (Mich. Ct. App. 1998) (refusing to apply equitable estoppel "against a natural parent to allow a third party parental visitation rights"). In the present case, Petitioner seeks to equitably estop Zachary's mother and biological father from "challenging Zachary's paternity." (Brief of Pet. at 52.) The trial court was correct in refusing to apply the doctrine of equitable estoppel to the facts in this case.

> Even if equitable estoppel could be appropriately considered in this case, the facts presented by Petitioner do not warrant its application. "The elements essential to invoke the doctrine of equitable estoppel are: (1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act."

Irizarry, 945 P.2d at 680.

Even those jurisdictions that recognize the doctrine of equitable estoppel in custody disputes generally refuse to invoke the doctrine in cases where the nonbiological father knew all along that he was not the father of the child. For example, in a divorce action in *Crouse v. Crouse*, 552 N.W. 2d 413 (S.D. 1996), the husband was not the father

of his wife's oldest child who was born six months before their marriage. The husband argued that the wife should be equitably estopped from denying his paternity; but the court disagreed. It determined that since the husband had known from the beginning that he was not the biological father of the child, the wife had made no "concealment or false representation of material facts" that the husband could have relied on to his detriment. *Id.* at 417. Moreover, the court went on to state that the wife's "conduct in authorizing and encouraging the development of a father-son relationship, leading [the husband] to believe she would not enforce her superior right to custody," was not enough to support the husband's equitable estoppel argument. "If we adopted this expansive rationale," the court explained, "almost any stepparent could acquire parenthood by estoppel. This theory violates traditional equitable estoppel principles and might deter parents from encouraging a close relationship between their children and stepparents." *Id.*

Many other jurisdictions have similarly refused to apply equitable estoppel where the wife never represented to the husband that he was the biological father of the child. *See C.M. v. P.R.*, 649 N.E.2d 154, 156 (Mass. 1995); *In re Multari v. Sorrell*, 731 N.Y.S.2d 238, 241 (N.Y. App. Div. 2001); *see also Simmons v. Comer*, 438 S.E.2d 530, 537-38 (W. Va. 1993) (noting "common pattern" where "mother represent[s] to the putative father that he is the biological father of the child").

In the Petitioner's Statement of Undisputed Facts section of his memorandum filed in support of his motion Petitioner admits that Respondent told him in March of 1999 that she was pregnant and that the child was not his. (R. 1305, ¶ 2.) Thus, four months prior to Zachary's birth Petitioner knew that he was not Zachary's biological father. Although

Respondent acquiesced in Petitioner's decision to assume the role of Zachary's parent, she never represented to him that he was Zachary's biological father. This case is much like *Crouse*, in which the wife did nothing more than "encourage[] a close relationship" between the child and his nonbiological father. *Crouse*, 552 N.W.2d at 417. This behavior alone is not sufficient to support Petitioner's claim for equitable estoppel.

Finally, irrespective of whether equitable estoppel is applicable to the particular facts of this case, this doctrine has never been applied in contravention of the best interests of the child. Even those courts which apply equitable estoppel in "cases involving paternity, child custody, [or] visitation" hold that "the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy." *Charles v. Charles*, 745 N.Y.S.2d 572, 574 (N.Y. App. Div. 2002); *see also In re Shockley*, 123 S.W.3d 642, 652 (Tex. App. 2003) ("In determining whether the doctrine should be applied to a particular case, the child's best interests are of paramount concern."). The analysis is no different for the courts of states which have adopted the Uniform Parentage Act. *In re Shockley, supra.*[2]

The trial court determined in this case that it is in the best interests of Zachary for primary custody to be awarded to his mother and biological father. In making its

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[2] Section 608 of the Uniform Parentage Act provides that "[i]n a proceeding to adjudicate parentage… the court shall consider the best interest of the child…." Unif. Parentage Act §§ 608(a) and (b), 9B U.L.A. 342-343 (2001); see also Utah Uniform Parentage Act (codified as Utah Code Ann. §§ 78-45g-101 et seq, especially § 78-45g-608(1) and (2) (2002), (eff. May 2, 2005) (2005 Utah Laws Ch. 150, §66) ("tribunal shall consider the best interest of the child" in deciding whether to permit genetic testing).

evaluation, the court also determined that Petitioner should have significant parent time with Zachary.

The Utah Supreme Court has held that the "trial court is afforded particularly broad discretion in the area of child custody." *Alexander v. Alexander*, 737 P. 2d 221, 223 (Utah 1987). Further, "[a] determination of the 'best interests of the child' turns on factors which the trial court is best able to assess, and only when the action taken by the trial court is so unjust as to constitute an abuse of discretion should this Court substitute its own judgment." *Id.*

The trial court in this case determined that equitable estoppel is inapplicable to the facts of this case and that it is in the best interests of Zachary that his mother and father be his primary physical custodians. The court acted well within the bounds of its discretion and its decision should be upheld.

III. THE COURT CORRECTLY APPLIED THE PRINCIPLES OF PARENTAL PRESUMPTION AND *IN LOCO PARENTIS* IN AWARDING PRIMARY PHYSICAL CUSTODY OF ZACHARY TO RESPONDENT AND INTERVENOR.

Petitioner argues that "[t]he trial court erred in applying the parental presumption against Petitioner in his claim for custody of Zachary." (Brief of Pet. at 52.) The so-called "parental presumption" is a doctrine utilized in custody disputes where one potential custodian is a biological or natural parent and the other is not. The Utah Supreme Court has described the presumption thusly:

> In a controversy over custody, the paramount consideration is the best interest of the child, but where one party to the controversy is a non-parent, there is a presumption in favor of the natural parent.

Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982). The presumption is also applied to contests over parent time. *Gribble v. Gribble*, 583 P.2d 64, 67 (Utah 1978).

The presumption is not conclusive. It can be rebutted by evidence that the parent has no strong mutual bond with the child, has not demonstrated a willingness to sacrifice his interest in welfare for the child's welfare and lacks sympathy or an understanding of the child. *Hutchison*, 649 P.2d at 41.

In this case the trial court was confronted with the issue of whether the parental presumption should be applied as part of the process of determining who should have custody of Zachary. The court determined that Petitioner was not Zachary's biological father and that the presumption of paternity had been rebutted. (Finding no. 35, R. 2451.) The court also found that the parental presumption in favor of Intervenor had been rebutted. (Finding no. 35, R. 2452.) Thus the court further found that "petitioner and intervenor stand on equal footing and Zachary's custody between them is determined solely by the interests of the child." (*Id.*) As to Respondent, however, the court found that the parental presumption had not been rebutted.

> Respondent benefits from the Parental Presumption on her claim for custody of Zachary against Petitioner. Consequently, respondent and petitioner are not on equal footing.

(*Id.*)

Petitioner seems to argue that because he was a parent acting "*in loco parentis*", the parental presumption in favor of Respondent did not apply. (See Brief of Pet. at 58-59.)

The term "*in loco parentis*" means "in the place of a parent". BLACK'S LAW DICTIONARY 317 (Pocket ed. 1996). A person *in loco parentis* is one who has assumed the status and obligations of a parent without formal adoption. *Gribble*, 583 P.2d at 66. The significance of a finding that a non-parent occupies the position of a person *in loco parentis* is that that person has standing to participate in a proceeding dealing with custody rights. Thus in the *Schoolcraft* Case, *supra*, the Utah Supreme Court, discussing the rights of Schoolcraft, the stepfather, stated, "The stepparent relationship Schoolcraft shares with J.W.F. is sufficient to entitle him to a hearing on custody. 799 P.2d at 716. The court cautioned, however, that "granting Schoolcraft a hearing on best interests does not mean that he has any presumption of entitlement of custody." *Id.*

Petitioner's argument concerning the parental presumption is flawed because he mistakenly assumes that once his status as a person *in loco parentis* is recognized, the parental presumption in favor of Respondent is eliminated. That is not the case. The Supreme Court stated in *Hutchison, supra*:

> If the presumption in favor of the natural parent is rebutted, the contestants for custody compete <u>on equal footing</u>, and the custody award should be determined solely by reference to the best interests of the child.

649 P.2d at 41 (emphasis added). *Accord*, *Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1250 (Utah 1987). The converse to this rule must be that if the presumption is not rebutted, the contestants do not compete on an equal footing. *See Schoolcraft, supra*, 799 P.2d at 716 (granting the stepfather a hearing concerning the best interests of the child does not mean that he has any presumption of entitlement of custody).

This is precisely the analysis applied by the trial court in this case: "Respondent benefits from the parental presumption on her claim for custody of Zachary against Petitioner. Consequently, Respondent and Petitioner are not on equal footing." (Finding no. 35, R. 2452 (emphasis added)).

Finally, even if the parental presumption is completely disregarded, the fact remains that the court found that the best interests of Zachary would be served by awarding his primary physical custody to Respondent and Intervenor. Both the custody evaluator and the trial court addressed that issue in great detail. (Findings nos. 42, 46, R. 2455, 2458; Exh. P-5 at 11-13.) Thus, assuming *arguendo* that the lower court erred in considering the parental presumption as one of the factors comprising the "best interests" analysis, it was harmless error. *See Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991) (harmless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings).

The trial court considered the parental presumption as but one of many factors which lead it to the conclusion that the granting of primary physical custody of Zachary to Respondent and Intervenor was in the child's best interest. Even if the court's consideration of the parental presumption were error, it is an error which would not affect the court's "best interest" findings. That finding is neither "clearly erroneous" nor so "flagrantly unjust as to be an abuse of discretion." *Thomas, supra*, 1999 UT App. 239, ¶ 6. Petitioner's attack on the court's findings concerning the parental presumption and the *in locus parentis* doctrine must, therefore, be rejected.

IV. THE COURT DID NOT ERR IN AWARDING LIMITED SUPERVISORY AND PARENT TIME RIGHTS FOR NICHOLAS TO INTERVENOR BECAUSE THESE RIGHTS ARE TO BE EXERCISED JOINTLY WITH RESPONDENT.

A. Appellant's Brief Should Be Dismissed or Alternatively Point IV of Appellant's Brief Should Be Rejected Because It Fails to Comply with Rule 24(a) of the Utah Rules of Appellate Procedure.

Utah R. App. P. 24(a) requires that an appellant's brief contain "a statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority." Furthermore, an appellant's brief must include "the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9).

While Petitioner cited to authorities with respect to the proper level of review in the "Issues Presented for Review" section of his Brief, in Point IV Petitioner fails to cite to any authority or statute supporting his argument. This court dealt with a similar situation in *Burns v. Summerhays*, 927 P.2d 197,198 (Utah Ct. App. 1996), wherein the appellant failed to comply with the requirements of Rule 24 of the Utah Rules of Appellate Procedure. In *Burns*, the court found that the appellant, in addressing the issues before the court, failed "to provide adequate legal analysis and authority to support his assertions." *Id.* at 199. The Court, quoting an Illinois Court of Appeals, wrote, "'[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.'" *Id.* (quoting *Williamson v. Opsahl*, 92 Ill. App. 3d 1087 (Ill. Ct.

App. 1981)). Ultimately, this court declined to rule on the merits in *Burns*, and upheld the trial court's ruling due to the failure of appellant's brief to meet the requirements of Rule 24.

Similarly, in the present case, Petitioner failed to support his argument in Point IV with "adequate legal analysis and authority to support his assertions." *Id.* Based upon the foregoing, the Petitioner's brief should be dismissed or, alternatively, Point IV of Appellant's Brief should be rejected.

B. Petitioner has Failed to Marshal the Evidence Pursuant to Rule 24 of the Utah Rules of Appellate Procedure in Support of His Contention that the Trial Court Erred in Awarding Intervenor Custody Rights in Nicholas.

The Petitioner has a duty on appeal to do more than merely reargue the same evidence that was brought before the trial court. *See, generally, Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah Ct. App. 1994); *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah Ct. App. 1994) stating, "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court..." *See, also, Wright v. Westside Nursery,* 787 P.2d 508, 512 n.2 (Utah Ct. App. 1990):

> Wright beseeches us to make a thorough review of the whole record, which fills a box the size of an orange crate. We do not apologize for declining Wright's invitation. The very purpose of such devices as the 'marshaling' doctrine and R. Utah Ct. App. 24(a)(7), requiring that all references in briefs to factual matters 'be supported by citations to the record,' is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.

In the event the Court does not reject Point IV of Petitioner's Brief, based upon his failure to marshal the evidence, the Petitioner's argument still must fail. The trial court did not grant Intervenor "[c]ustody rights in Nicholas..." (See Brief of Pet. at 59.) The court was merely providing a practical solution for vacation planning and school placement of both children that is in their best interests. Section 4-903(7) of the Utah Rules of Judicial Administration provides that a factor to be considered by a custody evaluator is "kinship including, in extraordinary circumstances, step-parent status." The trial court has some discretion in making allowances for step-parent rights and access and, in particular, addressing discretionary vacation or parent time which impacts the natural child of Intervenor.

The Intervenor and the Respondent will be making joint travel and vacation plans and school placement decisions in regards to Zachary, the child with which they have primary physical custody. Respondent also has primary physical custody of Nicholas. (Finding no. 46, R. 2458.) The children will be residing in Oregon with Respondent and Intervenor. It naturally flows from this circumstance that Intervenor and Respondent would jointly make vacation and school placement decisions with both minor children. Intervenor is Nicholas' stepfather. This Court in *Gribble v. Gribble*, *supra*, held that a step parent, in certain circumstances may be granted "[t]he same rights accorded to natural parents." 583 P.2d at 66. The trial court has discretion to make practical orders which do not grant substantial rights, but allow for an equitable result. The Court, in awarding both Intervenor and the Respondent the ability to make vacation decisions, as

well as school placement decisions, (Finding no. 44, R. 2434, and Finding no. 47, R.2459), is merely acknowledging and clarifying a practical and natural process.

Again, the Court did not grant Intervenor a full spectrum of custodial rights in Nicholas similar to those of Respondent or Petitioner, but simply made a practical procedure that clarifies a particular course of events to prevent future discord or disruption to the children.

V. THE TRIAL COURT'S AWARD OF PRIMARY PHYSICAL CUSTODY OF NICHOLAS TO RESPONDENT IS SUPPORTED BY THE RECORD AND BY ITS FINDINGS OF FACT.

Petitioner argues in Point V of his Brief that the Court's award of primary physical custody of Nicholas to Respondent was not supported by the court's findings. Although Petitioner characterizes his attack as being based upon legal sufficiency (*see* Brief of Pet. at 60), in reality, it is, for the most part an attack based upon the alleged absence of support in the record for the findings. Petitioner is mistaken. The Court's award of custody is supported by its findings. Moreover, as more fully described below, because Petitioner has failed to marshal evidence in support of the findings, this court must assume that the record supports them. *Saunders v. Sharp,* 806 P.2d 198, 199 (Utah 1991). Neither has Petitioner demonstrated that the factors considered by the trial court in determining the best interests of Nicholas were legally impermissible.

A. The Court Did Not Abuse Its Discretion In Awarding Primary Physical Custody Of Nicholas To Respondent.

Paragraph 1 of the Supplemental Decree of Divorce (R. 2504) awards joint legal custody of Nicholas to Petitioner and Respondent. Paragraph 3 awards joint legal

custody of Zachary to Intervenor and Respondent. (*Id.*) Paragraph 5 states, "Respondent is designated the primary physical custodian of Nicholas. Respondent and Intervenor are designated the primary physical custodians of Zachary." (*Id.*) Petitioner argues that the trial court's designation of Respondent as Nicholas' primary physical custodian constitutes reversible error. (Brief of Pet. at 60-61.)

Utah Code Ann. § 30-3-10 (1998 and 2004 Supp.) requires that a court called upon to determine custody "shall consider the best interests of the child...." An appellate court will overturn findings of fact "only if they are clearly erroneous, and '[o]nly where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion...'" *Thomas v. Thomas,* at 606.

In this case the trial court specifically found that "[i]t is in the best interests of Nicholas that Respondent be designated the primary physical custodian of Nicholas...." (Finding no. 46, R. 2458.) That Finding was supported by the custody evaluator's Child Custody Evaluation. (Petitioner's Exhibit P-5.) The court incorporated that evaluation into its Findings. (Finding no. 45.e., R. 2458.)

Inasmuch as Petitioner failed to marshal all record evidence that supports the trial court's finding of best interest, this court must assume that the record supports that finding. Utah R. App. P. 24(a)(9); *Saunders v. Sharp*, 806 P.2d at 199. *See also Wright v. Westside Nursery, 787 P.2d at* 514 (court refused to disturb jury's verdict where appellant failed to identify and explain any of evidence supporting verdict).

Consistent with the report of the evaluator, the court found that if Petitioner and the Thanoses lived in close proximity to one another the awarding of generous parent

time to Petitioner would be in the best interests of the boys. (Findings nos. 45.d. and 47, R. 2458.) As to Nicholas, that parent time schedule creates a weekly rotation with Petitioner having Nicholas one week and the Thanoses having him the next. (Decree, R. 2505, ¶ 6.a.) If, however, Petitioner chooses to remain in Utah, he is awarded more limited parent time owing to the difficulty in maintaining the rotating weekly schedule from a distance of several hundred miles. (R. 2507-2508, ¶ 7.)

Petitioner argues that the court's designation of Respondent as the primary physical custodian of Nicholas is, as a matter of law, improper. He states:

> The court's designation of Respondent as "primary physical custodian of Nicholas" is inconsistent with its award of equal time with Nicholas to Petitioner and Respondent . . . an award of equal physical custody means that the child spends equal time in each home, and forecloses designation of a primary physical residence for the child.

(Brief of Pet. at 60.)

In support of the above proposition Petitioner cites Utah Code Ann. § 30-3-10.1(d) (1998 and 2004 Supp.). But that statute does not support Petitioner's theory. For starters, Petitioner's reference to subdivision (1) ("joint <u>legal</u> custody") is wrong because the issue he raises concerns <u>physical</u> custody. More importantly, subparagraph (2) ("joint physical") states just the opposite of Petitioner's assertion that the award of joint physical custody is inconsistent with the designation of a primary residence for the child. Utah Code Ann. § 30-3-10.1(2) (1998 & 2004 Supp.) states:

> (2) "Joint Physical Custody":
> (a) means the child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child support;

> (b) can mean equal or nearly equal periods of physical custody of and access to the child by each of the parents, as required to meet the best interest of the child;
> (c) may require that a primary physical residence for the child be designated; and
> (d) does not prohibit the court from specifying one parent as the primary care taker and one home as the primary residence of the child.

(Emphasis added.)

Thus, far from stating that "an award of equal physical custody forecloses designation of a primary physical residence for that child" (Brief of Pet. at 60), Utah Code Ann. § 30-3-10.1(2)(c) and (d) (1998 & 2004.)) specifically allows the court to designate a primary physical residence where joint physical custody has been awarded.

Petitioner's reliance on *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991) is equally puzzling. There the trial court had awarded 57% of the parent time to the mother. It described her as having "primary physical custody", but did not explain what the significance of that designation was. *Id.* at 434. On appeal this Court noted that "[t]he '57%' visitation award to the mother provides the basis for the 'primary physical custody' statement." This Court did not state that the only basis for awarding primary physical custody is the award of a preponderance of the child's time to one parent or the other, as implied by Petitioner. Such a rule would stand in direct contravention of Utah Code Ann. § 30-3-10.1(2)(d) which states that the award of joint physical custody "does not prohibit the court from specifying one parent as the primary care giver and one home the primary residence of the child."

Furthermore Petitioner's argument misstates the facts. He argues that the trial court granted him "50/50 physical custody." (Brief of Pet. at 60.) In fact the court did no such thing. It granted him parent time equal to that of Respondent only if he lives in close proximity to the Thanoses. If he does not, his parent time will be less than that of Respondent. (R. 2507, ¶ 7.) Under the terms of the Decree the custodial position of the parties is "50/50" only if they live close to one another.

B. Findings 38, 39, 40, 41, 42 And 46 Are Not Clearly Erroneous And Are Legally Sufficient To Support The Award Of Primary Physical Custody To Respondent.

At the time of the entry of the Decree, Petitioner was living in Utah and the Thanoses were living in Oregon. (R. 2533 at 519; R. 2533 at 628-629.) Recognizing that equal parent time would not be possible if the parties continued to live in two different states, the court designated Respondent as the "primary physical custodian of Nicholas." (R. 2504, ¶ 5.) The court further ordered that if Petitioner chose to remain in Utah, his parent-time rights would need to be adjusted to give him generous visitation time on weekends, holidays and in the summer. (R. 2507-2508, ¶ 7.) It is the requirement that he must move to Oregon in order to maximize his parent-time with Nicholas to which Petitioner objects on a number of grounds.[3]

[3] In an apparent effort to avoid the task of marshaling all record evidence that supports the findings in favor of Respondent' award of primary physical custody, Petitioner characterizes his criticism of the award as an attack on the legal sufficiency of those findings. In reality, many of his arguments are based upon the alleged insufficiency of the evidence which supports the findings.

1. The Court Properly Considered The Relationship Of Nicholas And Zachary To Their Sister Madelaine In Awarding Primary Physical Custody Of Nicholas To Respondent.

One of the factors which the trial court considered in awarding primary physical custody of Nicholas to Respondent and primary physical custody of Zachary to Intervenor and Respondent is the boys' strong attachment to their sister Madelaine, who, at the time of trial, was approximately nine months old. Petitioner argues that as a matter of law, the court should not have considered the desirability of keeping Nicholas and Zachary together with their sister in the awarding of physical custody. Thus, Petitioner states, "To the extent that the court relied on this factor to conclude that primary custody of Nicholas should be awarded to Respondent, and primary custody of Zachary should be awarded to Respondent and Intervenor, the court erred." (Brief of Pet. at 65.) In effect Petitioner argues that because Madelaine is Nicholas' half sister, the desirability of keeping them together, no matter how close their relationship, should not have been considered by the trial court. Petitioner's argument is fallacious and should be rejected.

Rule 4-903 of the Rules of Judicial Administration provides that in preparing a custody evaluation an evaluator must consider several factors, including "the benefit of keeping siblings together." C.J.A. Rule 4-903(5)(B). Despite this clear mandate, Petitioner maintains that the relationship Nicholas and Zachary share with their sister Madelaine should be "given no weight," arguing that the preference for keeping siblings together is inapplicable "where a child is born after the marriage is dissolved, to another marriage." (Brief of Pet. at 64.) Petitioner asserts that the preference only "pertains to siblings of a marriage who have lived together and formed important sibling

relationships," and thus should not be applied to the boys' relationship with Madelaine, who was born subsequent to the divorce. *Id.*

Petitioner's arguments not only contravene the plain language of C.J.A. Rule 4-903, but also do not comport with Utah case law or the facts of this case. Rule 4-903 states that an evaluator must consider the "benefit of keeping siblings together." By its plain language the rule makes no distinction between half- or step-siblings, on the one hand, and full-blooded siblings, on the other; nor does it specify that it applies only to children born during the marriage.

Utah case law supports the view that all sibling relationships deserve preservation. The Utah Supreme Court has stated that "the factors the court may consider in determining the child's best interests" include "keeping siblings together." *Hutchison*, 649 P.2d at 41; *see also Merriam v. Merriam*, 799 P.2d 1172, 1178 (Utah Ct. App. 1990) ("The desirability of keeping siblings together is a legitimate factor to consider in deciding custody."); *Deeben v. Deeben*, 772 P.2d 971, 973 (Utah Ct. App. 1989) (quoting *Hutchison*).[4] These cases do not distinguish between children born in the marriage and those born prior to the marriage or subsequent to divorce. For example, in *Merriam*, the court determined that even though the case involved half-siblings, custody should be "resolved by referring to the law regarding split custody of full siblings," since the

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[4] In an earlier case, *Jorgensen v. Jorgensen*, 599 P.2d 510, 512 (Utah 1979), the Utah Supreme Court made reference to keeping "all the children of the marriage united." However, as herein discussed, subsequent cases and the plain language of Rule 4-903 make it clear that the preference for keeping siblings together applies to all siblings, not just children of the marriage.

"children had lived together since they were both very young." *Merriam*, 799 P.2d at 1178; *see also Bonwich v. Bonwich*, 699 P.2d 760, 761 (Utah 1985) (considering relationship between child and his infant "brother," born out of wedlock to child's adoptive father, in custody determination); *Nilson v. Nilson*, 652 P.2d 1323, 1325 (Utah 1982) (considering relationship of older half-sister).

In fact, in *Pennington v. Pennington*, 711 P.2d 254 (Utah 1985), a case heavily relied upon by the Petitioner, the court declined to invoke the preference for keeping siblings together, not due to the fact that the younger child was born after entry of the divorce decree, but because "[e]xcept for brief periods of visitation, the brothers ha[d] never lived together" or bonded with each other. *Id.* at 256. This is not such a case. Nicholas and Zachary have spent half of their time with their mother, and thus with Madelaine, since Madelaine's birth approximately two years ago. The boys are very much attached to their little sister, thus demonstrating that the same reasons underlying the preference for keeping siblings together are present in this case.[5]

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[5] The Supreme Court of Wyoming has recently addressed this subject indicating that "the presumption of keeping children together has been applied by many courts in cases where children have only one parent in common, i.e., brothers and sisters who were born of a parent's prior or subsequent marriage," and holding that "the strong public policy toward preservation of sibling relationships [is] equally applicable whether the children are full sibling, half sibling, or stepsibling." *Aragon v. Aragon*, 104 P.3d 756, 764 (Wyo. 2005).

2. Findings 38, 39, 40, 41, 42 And 46 Are Not Clearly Erroneous; In Any Case, Petitioner Has Failed To Marshal The Record Evidence Which Supports Those Findings.

Most of Petitioner's Point V.B. is devoted to a discussion of the alleged failings of the court's Findings nos. 38, 39, 40, 41, 42 and 46. (Brief of Pet. at 65-72.) None of those findings are clearly erroneous or legally insufficient.

a. Finding No. 38.

The court found that "maintaining extended family social and academic networks was of less concern than creating relationship, geographical and financial stability of the children." (Finding no. 38, R. 2453.) Petitioner argues that the court should have employed a "comparative analysis," whatever that means. (Brief of Pet. at 66, 67.) Since Petitioner failed to marshal any evidence, comparative or otherwise, which supports Finding no. 38, this court must assume that the record supports that Finding. *Saunders v. Sharp*, 806 P.2d at 199. In any case, this court has stated that the maintenance of ties with an extended family are on the "less significant end of the spectrum" of factors which a court should consider in awarding custody. *Hudema v. Carpenter*, 1999 UT App 290, 989 P.2d 491, 501.

b. Finding No. 39.

In Finding no. 39 the court found that Petitioner would be able to continue his present employment if he were to move to Oregon. As with Finding no. 38 Petitioner argues that the finding is flawed because "the court fails to make a comparative Finding." (Brief of Pet. at 67.) Again, Petitioner fails to marshal the evidence in the record which supports Finding no. 39. That evidence includes the testimony of Petitioner and

Respondent that Petitioner, since he works in his home, largely by computer, could as easily be employed in Oregon at the same job as in Utah. (R. 2533 at 559:19-23.) In addition, adopting Petitioner's "comparative" approach the evidence was that Intervenor, the principal wage earner for the Thanoses, would have a difficult time in Utah finding comparable work and, if he did, would likely take a significant pay cut. (R. 2533 at 643-644; 2535 at 968-969.) Intervenor's present employment is secure. (R. 2533 at 646.) By contrast, Petitioner can just as easily perform his assigned tasks for his present employer in Oregon as in Utah.

In short there is evidence in the record supporting Finding no. 39.

c. <u>Finding No. 40.</u>

The trial court found in Finding no. 40 that if the Thanoses were forced to move to Utah, Intervenor "would experience a significant reduction in income." Petitioner does not disagree with the accuracy of this finding, but argues that it is "irrelevant to the [sic] Nicholas's best interests...." (Brief of Pet. at 68.)

Assuming that Intervenor would take a significant pay cut if he moved to Utah[6], the question is whether the trial court was justified in considering a potentially significant loss of family income as part of the "best interest" analysis.

The Utah Supreme Court has stated that the financial condition of the prospective custodians may be considered by a court in determining the best interests of a child. *Hutchinson*, 649 P.2d at 41. Thus, the trial court's consideration of the parties' incomes

[6] Intervenor testified that his pay reduction might be as great as 50% or $5,900 per month. (Finding no. 52, R. 2460; R. 2533 at 643.)

and of the impact of moving on those incomes were relevant to its "best interests" finding.

d. Finding No. 41.

In this Finding the Court found that it was "not helpful to rely on historical issues [presumably infidelity] or to assign fault for the breakup of the Pearson marriage." (Finding no. 41, R. 2455.) Petitioner lists this finding as one of those to which he takes exception because Utah Code Ann. § 30-3-10(1)(a)(i) (1998 and 2004 Supp.) directs that custody decisions take into account the "past conduct and demonstrated moral standards of each of the parties."

While it is quite true that Utah law requires that the court consider "past conduct and demonstrated moral standards of each of the parties," it does not follow that the extramarital affair of Intervenor and Respondent would disqualify Respondent from being the primary physical custodian of Nicholas. Rather, Petitioner would have to show that Respondent's behavior had a negative impact on Nicholas. *Hudema,* 1999 UT App at ¶ 35, 989 P.2d at 501. There was no finding of such adverse impact and Petitioner has failed to draw the court's attention to any such evidence. In any event, Petitioner admits that Finding no. 41 "does not weigh in favor of any of the parties." (Brief of Pet. at 69.) The alleged error of the trial court, even if one were made, is therefore harmless.

e. Finding No. 42.

The centerpiece of the trial court's "best interest" determination concerning physical custody is Finding no. 42 in which the court states:

> The Respondent is pivotal in this case in that she is the biological mother of both boys and their sister, Madelaine. The Respondent has the strongest inherent responsibility for all three of these children.

Based, in part, on Finding no. 42 the trial court awarded primary physical custody of Nicholas to Respondent and of Zachary to Respondent and Intervenor. A logical and necessary concomitant of that custody award was the determination that if Petitioner and the Thanoses chose not to live close to one another, the primary custodians, the Thanoses, would have more parent time with the boys than Petitioner.

Petitioner does not, and cannot, disagree with the finding that Respondent is the biological mother of Nicholas, Zachary and Madelaine – that, in a sense, she is the common denominator for the three children, unlike their fathers. Instead, he argues that their biological relationship is irrelevant to the determination of who should have primary physical custody of the two boys. (Brief of Pet. at 69.) Petitioner's argument is contradicted by the decision of the Utah Supreme Court in *Hutchison* in which the court listed kinship as a factor to be considered in the determination of the best interests of a child. 649 P.2d at 41.

Rule 4-903 of the Utah Code of Judicial Administration also provides that custody evaluators should consider "kinship, including in extraordinary circumstances step-parent status…". C.J.A. Rule 4-903(5)(e)(vii). In accordance with the statutory mandate the custody evaluator determined that a factor to be considered in the award of physical custody of the boys is the fact that Respondent is their mother and the mother of their sister, Madelaine:

> What remains is a logistical problem. What arrangement will allow Nicholas and Zachary to have a significant relationship with all three of their parents and allow them to develop a relationship with their sister, Madelaine? What arrangement provides that most stability over the long term?
>
> I am pivoting my conclusions around Kimberlee's role as the biological mother of both boys and their sister. She is the parent with the strongest inherent responsibility to all of these children, and it is a responsibility that she fully recognizes and embraces.
>
> . . . .
>
> I am convinced that these parents will be able to create a good life for themselves and their children in Oregon and urge that Kelly relocate to Oregon in time for Nicholas to begin the second half of this school year there. . .

(Child Custody Evaluation of Dr. Jill D. Sanders, Petitioner's Exhibit P-5 at pp. 11-12.)

Taken together with the findings that the three children should not be separated (Finding no. 34.b., R. 2449), Intervenor is the biological father of Zachary and Madelaine (Finding no. 31, R. 2447), Petitioner had expressed a willingness to move to Oregon (Finding no. 45.d, R. 2457), Petitioner would suffer less a financial loss if he were to move to Oregon than if the Thanoses were to move to Utah (Findings nos. 39 and 40, R. 2454) and the boys are very comfortable living in Oregon (Finding no. 42, R. 2456) and based also upon the evaluator's "strong recommendation" that Petitioner move to Oregon (Petitioner's Exhibit P-5 at 12), the trial court's ultimate finding that it would be in the best interest of Nicholas that Respondent be designated as the principal physical custodian is well-supported. The Court's findings are neither clearly erroneous nor lacking in relevance.

f. Finding No. 46.

The Court in Finding no. 46 states that "[i]t is in the best interests of Nicholas that respondent be designated the primary physical custodian of Nicholas" and that "it is in the best interest of Zachary that respondent and intervenor be designated the primary physical custodians of Zachary." (Finding no. 46, R. 2458). The Court also found that "the evidence is undisputed that the parties will relocate and will live within 100 miles of one another…" (*Id.*) Petitioner disputes that finding, but fails to marshal the evidence which supports the court's statement. This court must therefore assume that the record supports the findings. There is, in any case, evidence which supports the Court's finding. As of the time of the trial Intervenor resided in Oregon with Respondent. (R. 2533 at 628, 629.) Petitioner admitted to the evaluator that he was willing to move to Oregon. (R. 2534 at 720.)

Petitioner also argues that "[i]t was improper for the court to rely on this testimony [that he was willing to move to Oregon] to essentially force petitioner to move or lose 50/50 custody, after having found that the childrens' best interests required joint physical custody." (Brief of Pet. at 71.) In point of fact, the court did no such thing. The Decree does not represent an effort by the court to force Petitioner to move to Oregon. Rather, its provisions show a recognition by the court that an equal division of parent time with Nicholas would not be possible or desirable for a school-age child whose parents live in two different states. The choice which Petitioner is required to make flows from the court's designation of Respondent as the primary physical custodian of Nicholas. Indeed, Utah Code Ann. § 30-3-10.2(2)(e) (1998 and 2004 Supp.) dictates that the "geographical

proximity of the homes of the parents" be considered by the Court in deciding the best interest of a child. If Petitioner and the Thanoses chose to live in separate states, the trial court had no choice but to consider their "geographical proximity" in determining physical custody.[7]

C. The Findings Of Fact Are Legally Sufficient To Support The Court's Award Of Joint Legal And Primary Physical Custody Of Zachary To Intervenor And Respondent.

Petitioner has failed to marshal the evidence pursuant to Rule 24 of the Utah Rules of Appellate Procedure in support of his contention that the Findings of Fact are legally insufficient to support the court's award of joint legal and primary physical custody of

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[7] Petitioner also attacks the custody evaluation based upon alleged bias on the part of the evaluator, Dr. Jill Sanders, as revealed in her testimony at trial. According to Petitioner, Dr. Sanders' testimony shows bias against members of the Church of Jesus Christ of Latter-day Saints. Petitioner claims that Dr. Sanders concluded that "LDS culture was a negative factor for Zachary" and that "her biased view of the LDS culture" colored her recommendations to the Court. (Brief of Pet. at 72, 73.)

Because religion and religious compatibility are not mentioned by Dr. Sanders as a factor upon which she based her recommendations, it is tempting to say nothing about Petitioner's criticism of her. However, Petitioner's allegations are so serious and have such a potential for damage to Dr. Sanders' practice that they should be answered. It is important that the Court understand the following: (1) the evaluation report makes no mention of the so-called "LDS culture." (2) Dr. Sanders' statement was made in response to a question about her deposition testimony that she had given concerning the possibility that Zachary, because he will grow up "having a relatively odd parent configuration", may find it necessary to explain "this strange arrangement." (R. 2535 at 881.) She expressed a concern that if he is living in "a culture that is particularly conservative in that regard", there was a danger that he could be stigmatized. She hastened to add that her expression of concern was not directed at the LDS Church and was not "religious-specific." (*Id.* at 882.) (3) There is nothing in Dr. Sanders' testimony or in her report that remotely suggests that her recommendation that Respondent be designated as the primary custodial parent was based upon a bias against members of the LDS Church. It is an unfair and inaccurate attack on a skillful and well-respected professional.

Zachary to Intervenor and Respondent. The Petitioner has a duty on appeal to do more than merely reargue the same evidence that was brought before the trial court.

Petitioner has failed to support his argument in Point V.C. with "adequate legal analysis and authority to support his assertions." *Burns v. Summerhays*, 927 P.2d at 199. Although Petitioner cites to the record in Point V.C. of his brief, he fails to direct the court's attention to any statutory or authoritative case law, leaving this court and Respondent and Intervenor guessing as to the basis for Petitioner's argument. Based upon the foregoing, Point V.C. of Appellant's Brief should be rejected.

In any event, Utah Code Ann. § 30-3-10 (1998 and 2004 Supp.) establishes the factors that a court must consider in making any award in custody. It indicates specifically that, "in determining any form of custody the court shall consider the best interest of the child and, among other factors, the court finds relevant, the following: (i) the past conduct and demonstrated moral standard that each of the parties, (ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent, and (iii) those factors as outlined in 30-3-10.2. *Id.* Furthermore, Utah Code Ann. § 30-3-10.2 sets forth additional factors that are to be considered:

> (a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody; (b) the ability of the parent to give first priority to the welfare of the child and reach shared decisions in the child's best interest, (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection and contact between the child and the other parent, (d) whether both parents participated in raising the child before the divorce, (e) the geographical proximity of the homes of the parent, (f) the preference of the

> child as the child is of sufficient and capacity to reason so as to form an intelligent preference as to joint legal or physical custody, (g) the maturity of the parents and their willingness and ability to protect the child from conflict which may arise between the parents, (h) the past and present ability of the parents to cooperate and make decisions jointly, (i) any history of, or potential for, child abuse, spouse abuse or kidnapping, and (j) any other factors the court finds relevant.

The trial court specifically addressed each of those factors in paragraphs 33 through 44 of the Findings of Fact and Conclusions of Law (R. 2448-2457.). Further, the court fully addressed the factors set forth in U.C.A. §30-3-10.3 at length, to wit: the benefit of keeping the siblings together; the wealth and strength of bonds between the parents; the impact that the parent time arrangement has had upon the children finding that it was had been a positive one; (implying that the physical, psychological, emotional needs of the children were benefited from the joint legal and physical custody arrangement); the moral character of all parties; the depth and desire of all parties; the flexibility of both parents to provide personal rather than surrogate care; the moral character of the parties and any issues relating to drug abuse or other impairment, the religious compatibility of the parties; the financial stability of the parties to support the children; and, the fact that there is no evidence of abuse or domestic violence involving the children and other factors that the court found appropriate such as, the biological parentage of all parties in relation to this case. (Finding no. 34, R. 2448-2450.)

The trial court made specific findings regarding a custodial arrangement. (Findings of Fact, §§ 44 through 50, R. 2456 to 2460.) Furthermore, the court in Finding no. 47 set forth a parent time schedule for the children. (R. 2458-59, quoting Petitioner's Exhibit P-5, pp. 12-13, ¶ 2.)

The court did conclude, based upon its Findings of Fact, that it was in the best interest of Zachary that Respondent and Intervenor be designated as the primary physical custodians of the child and that they not be required to obtain Petitioner's permission to move to Oregon. The court also found, however, that it was in the best interest of Nicholas and Zachary that there be a joint physical custody arrangement involving all three parties. (Finding no. 46, R. 2458.)

The Petitioner has argued that the court made no findings to support its determination that the Respondent and Intervenor should be awarded primary physical custody of Zachary absent the parental presumption. This argument is erroneous in two respects: first, the court did not conclude that Petitioner was a "non-parent" of Zachary. Second, the court made specific findings in regard to Zachary's custody and the best interest of Zachary. 34-35 and 48-27. (Findings nos. 33-35, 38-47, R. 2448-2459.)

In considering the best interests of Zachary the court read the report and heard testimony of Dr. Sanders. Dr. Sanders' report, on page 10, carefully analyzed each factor of the Rule 4-903 of the Code of Judicial Administration. Further, testimony was given at trial and portions of the custody evaluation were cited by the trial court in its Findings of Fact and Conclusions of Law, attached as Exhibit A to the Brief of Petitioner. For example, Finding no. 19 (R. 2442-2443) states, "Dr. Sanders concluded that by age 18 months, Zachary was firmly established in a loving, secure, and relatively predictable relationship with Petitioner, Respondent and Intervenor."

In Finding no. 20 the court observed, "Again, Dr. Sanders noted that Zachary has a loving relationship with Petitioner and Intervenor." *Id.*

The trial court made specific findings on the pertinent facts and issues addressed in the custody evaluation, the factors considered in Rule 4-903, the expert qualifications of Dr. Sanders, factors relating to the parental presumption, as analyzed in *Hutchison* the factors related to custody and factors relating and even the testimony of the Petitioner's experts, who were not court appointed. (R. at 2448-2456, Findings of Fact, ¶¶ 33-44). Petitioner alleges a complete lack of findings of fact to support an award of legal and primary physical custody of Zachary to Intervenor and Respondent. It is incredible that Petitioner wholly ignores twelve full paragraphs of findings directly on point. The Petitioner's analysis is neither sound nor supported by the record. The Trial Court's findings should be upheld as legally sufficient to support the court's award of joint legal and primary physical custody of Zachary to Intervenor and Respondent.

D. The Trial Court's Findings Concerning Physical Custody Of Nicholas And Zachary Are Sufficient To Support Its Award Of Primary Physical Custody To The Thanoses.

Petitioner's final argument concerning the trial court's Findings is that "the court failed to make findings on several factors mandated by the Legislature and/or of significance in this case." (Brief of Pet. at 74.) Of the five allegedly "mandated" findings, Respondent and Intervenor have been able to find only one described in any Utah statute: the requirement that the court consider "the past conduct and demonstrated moral standards of each of the parties…." Utah Code Ann. § 30-3-10(1)(a)(i). As to that requirement, the court found as follows:

> Petitioner, respondent and intervenor all are of high moral character and exhibit strong emotional stability.

(Finding no. 34.e., R. 2449.)

In addition, the court found:

> In making a custody determination in this matter, it is appropriate to rely on present realities and focus on what is in the best interest of the children today. It is not helpful to rely on historical issues or to assign fault for the breakup of the Pearson marriage.

(Finding no. 41, R. 2455.)

The custody evaluation, which was approved and adopted by the court, states, in the context of the Rule 4-903 criteria, "All three parents are of high moral character and exhibit emotional stability." (Plaintiff's Exhibit P-5 at 10.)

None of the other findings, which, according to Petitioner are "mandated" are, in fact, required by statutes or rules adopted by Utah courts. They are therefore optional according to the needs of the particular case.

In a sense what a custody decision comes down to is what the trial court feels is in the best interests of the children. As to that determination, this Court has stated:

> We accord broad discretion to the trial court so that it may use its first-hand proximity to the parties to resolve the delicate and highly personal problems presented in custody disputes.

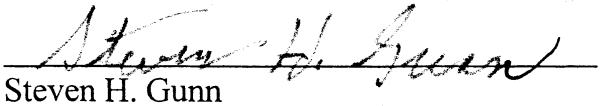
Erwin v. Erwin, 773 P.2d 847, 849 (Utah Ct. App. 1989). In this case, the trial court permissibly exercised its discretion in what it clearly thought was a close case. The court did not adopt any criteria which this court has determined to be unacceptable. The trial court's award of primary physical custody to the Thanoses should therefore be upheld.

CONCLUSION

In the last analysis what really matters in this case is that the best interests of Nicholas and Zachary be served. After hearing six days of evidence, including the recommendations of a qualified custody evaluator, the trial court found that it was in the best interests of the boys that Respondent be appointed primary physical custodian of Nicholas and that Respondent and Intervenor be appointed as primary physical custodians of Zachary. The relief which Respondent and Intervenor seek is that that decision be affirmed.

DATED this 12th day of May, 2005.

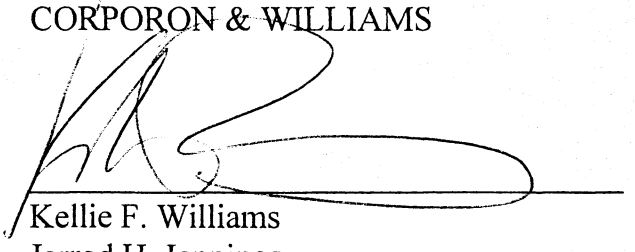
RAY QUINNEY & NEBEKER



Steven H. Gunn
Attorneys for Appellees

DATED this 12th day of May, 2005.

CORPORON & WILLIAMS



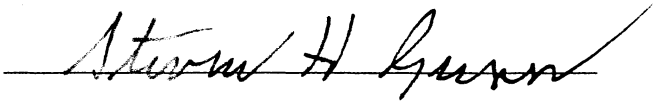
Kellie F. Williams
Jarrod H. Jennings
Attorneys for Intervenor/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of May, 2005, two true and correct copies of the foregoing BRIEF OF APPELLEES were sent via U.S. Mail, first-class postage prepaid, to:

Paige Bigelow
KRUSE, LANDA, MAYCOCK & RICKS
50 West Broadway, Eighth Floor
P.O. Box 45561
Salt Lake City UT 84145-0561

Attorney for Appellant



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Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KELLY F. PEARSON,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Petitioner,	:	
vs.	:	CASE NO. 004907881
KIMBERLEE Y. PEARSON,	:	
Respondent.	:	
	:	
PETER D. THANOS,	:	
Intervenor.		

The above-entitled matter was tried to the Court on April 1, 2, 5, 6, 7 and 8, 2004. Petitioner was present and represented by Paige Bigelow, respondent was present and represented by Steven H. Gunn, and intervenor was present and represented by Kellie Williams. The Court having heard the testimony of the witnesses, having considered the evidence presented and the argument of counsel, and being otherwise fully informed enters the following Findings of Fact and Conclusions of Law.

To the extent any of the following Findings of Fact should be considered as Conclusions of Law, they shall be considered a Conclusion of Law.

FINDINGS OF FACT

Fact and Procedural History

1. Petitioner and respondent, Kimberlee Thanos, were married on August 17, 1992 and were divorced on June 5, 2002 by a Decree which terminated their marriage, but reserved custody and visitation issues for later disposition. Petitioner and respondent, Kimberlee Thanos, conceived a child that was born on July 6, 1997, named Nicholas Browning Pearson.

2. Also during their marriage, respondent, Kimberlee Thanos, conceived a child, Zachary Andrew Pearson ("Zachary"), who was born on September 14, 1999. However, approximately four months after respondent, Kimberlee Thanos, became pregnant with Zachary, respondent, Kimberlee Thanos, informed petitioner that intervenor, Pete Thanos, was Zachary's natural father. Approximately two weeks after Zachary's birth, respondent, Kimberlee Thanos, and intervenor, Pete Thanos, again informed petitioner that intervenor, Pete Thanos, was Zachary's father.

3. Intervenor, Pete Thanos, obtained DNA paternity test results which he later filed with the District Court. The paternity index for intervenor is 98011 and the probability of paternity is 99.999%.

4. Respondent, Kimberlee Thanos, filed various affidavits with the Court, commencing January 2001, stating under oath that intervenor, Pete Thanos, was the natural father of the minor child.

5. Petitioner and respondent, Kimberlee Thanos, separated when Zachary was nine months of age. In his first filed Affidavit, petitioner acknowledged that respondent, Kimberlee Thanos, had become pregnant with Zachary and disclosed to petitioner that Zachary was intervenor, Pete Thanos' son and not petitioner's biological child. Other like statements are contained in various pleadings. In his Affidavit dated September 28, 2001, petitioner admitted that he was aware that intervenor, Pete Thanos, was the child's biological father, although he alleged that he was the child's "psychological" parent. In paragraph 15 of that affidavit, petitioner acknowledged that he does not advocate secrecy regarding the biological facts of Zachary's conception (implicitly acknowledging that Pete is the biological father). In paragraph 16, page 11 of that document, petitioner states that, "I have at all times known that he [Zachary] was conceived of Mr. Thanos."

6. At the time of Zachary's conception and birth, intervenor, Pete Thanos, was married to another woman. Intervenor, Pete Thanos' prior wife died from cancer in December, 2000. Intervenor, Pete Thanos, has set forth in his affidavits and in argument that he did not inform his prior wife of Zachary's birth

because he did not want to further damage her already fragile health or cause her further emotional trauma, and that he wished to remain with her to assist her through her final months of life. Based on intervenor's affidavits, it appears that out of compassion for his then-wife, intervenor did not file a paternity action regarding Zachary until after her death.

7. Petitioner and respondent, Kimberlee Thanos, separated and later divorced. As part of their divorce action, they stipulated to a temporary order which granted them joint legal physical custody of Zachary and his brother Nicholas. Intervenor, Pete Thanos, and respondent, Kimberlee Thanos, continued their relationship, and married on July 1, 2002, after the Pearson divorce was finalized.

8. The respondent and intervenor have since had a child as issue of their marriage, namely Madelaine, whose date of birth is July 13, 2003. Respondent and intervenor purchased a home in Oregon in July of 2001. Intervenor has at all times since the filing of his Motion for Intervention and Petition for Paternity been a resident of the State of Oregon.

9. Beginning in February, 2001, intervenor, Pete Thanos, had ongoing contact with Zachary, which included day long visits and periods of vacation, although he was precluded from having overnight visits until he married respondent, Kimberlee Thanos.

The contact has been frequent and consistent since February 2001. As the petitioner and respondent share joint custody, the respondent has been traveling to Utah from Oregon for her parent time with Nicholas and Zachary, and has maintained a home in Utah for that purpose and also the children, Nicholas and Zachary, are transported to Oregon during the respondent's parent time. Madelaine typically accompanies respondent on her trips to Utah. petitioner has not remarried and resides in Salt Lake City.

10. The current access schedule is one week/one week rotation with transitions occurring on Friday mornings. The respondent flies from Portland, Oregon with Madelaine and then returns to her home with intervenor in Oregon and, again, with Zachary and Nicholas as frequently as possible.

11. As to the procedural history of this case, at the time of hearing before Commissioner Evans on the Motion to Intervene on August 30, 2001, the Commissioner analyzed the case of State of Utah in the Interest of J.W.F, 799 P.2d 710 (Utah 1990), known as the Schoolcraft case, and recommended that intervenor, Pete Thanos' Motion to Intervene be denied. The Commissioner reasoned that intervenor, Pete Thanos, lacked standing to challenge the presumption of paternity that existed in favor of petitioner, given the consideration that should be given to preserving the stability

of marriage and to ensure that the children are protected from disruptive and unnecessary attacks on their paternity.

12. After briefing and argument of the case on December 3, 2001, an Order on Objection to Recommendation was entered by this Court. At the time of the initial hearing, this Court found that the criteria outlined in the case of In re: J.W.F., 799 P.2d 710 (Utah 1990) ("the Schoolcraft case") apply to this case and set forth the framework to determine whether intervenor, Pete Thanos' Motion to Intervene should be granted.

13. The Court found that in order to determine whether intervenor, Pete Thanos, had standing to intervene to establish Zachary's paternity and to rebut the presumption that Zachary was the legitimate son of petitioner and respondent, Kimberlee Thanos, the Court must first consider the policies set forth in Schoolcraft. The two-prong analysis of Schoolcraft included (1) preserving the stability of the marriage and (2) protecting children from disruptive and unnecessary attacks on their paternity. The Court found that the second of the policy considerations—protecting children from disruptive and unnecessary attacks—was most applicable in this particular case, but that the record was insufficient to adequately address that policy consideration as it applied to the circumstances in this case.

14. The Court found that the affidavit of Dr. Goldsmith was not case-specific and was of little help to the Court in this regard. Therefore, in order for the Court to adequately address the second Schoolcraft policy consideration, the Court appointed Dr. Jill Sanders to provide an independent "Schoolcraft" evaluation. Petitioner and respondent, Kimberlee Thanos, had previously stipulated to Dr. Sanders conducting the custody evaluation in this matter. The Court then reserved judgment on intervenor, Pete Thanos' standing in order to allow Dr. Sanders to conduct a separate preliminary evaluation.

15. As proffered at the time of hearing before the Commissioner and stated in pleadings and as set forth in the affidavits of respondent and intervenor Zachary's physical resemblance to intervenor was such that Zachary would soon recognize that intervenor was his father. Further, the biological relationship between Zachary and intervenor, Pete Thanos, cannot and should not be hidden from the child, as intervenor, Pete Thanos, will continue to be an integral part of Zachary's life. Respondent, Kimberlee Thanos, and intervenor, Pete Thanos, have an intact family unit to provide care and security to Zachary. Further, petitioner and respondent, Kimberlee Thanos, have, in one form or another, informed dozens of individuals in their circle of family, friends and acquaintances that intervenor, Pete Thanos, is

Zachary's biological father. It is impossible to keep the "secret" of Zachary's parentage hidden from him.

16. Dr. Sanders submitted an evaluation report to the Court and counsel dated May 13, 2002. Dr. Sanders' summary opinion was that from a developmental and psychological prospective, Zachary's functioning was not inherently disrupted by intervenor, Pete Thanos' involvement. Further, Dr. Sanders found that intervenor, Pete Thanos' relationship with Zachary was not only not disruptive, but was necessary to Zachary's normal and positive development.

17. In addition, Dr. Sanders noted that respondent, Kimberlee Thanos, and intervenor, Pete Thanos, planned to marry and that if they did marry, intervenor, Pete Thanos, would, at the least, have a role as stepfather, and that his status as Zachary's biological father inherently escalates the importance of the relationship between Zachary and intervenor. As Dr. Sanders reported, the relationship between parents and their biological children is psychologically extremely important. Dr. Sanders reported that the most satisfying type of relationship between a child and his biological parent is generally a personal one, that the relationship between intervenor and Zachary is essential to Zachary and that no one can play this role in Zachary's life except intervenor, Pete Thanos. Dr. Sanders also stated that, based upon the quality of the relationship between Zachary and intervenor and

the likelihood that intervenor, Pete Thanos, and Zachary would have continuing extensive contact, their attachment would be likely to deepen and become more significant over time. Dr. Sanders opined that if petitioner was not interested in continuing to parent Zachary, he would likely develop a full father/son attachment to intervenor, Pete Thanos, because Zachary was still young and because intervenor and Zachary have had contact since Zachary's infancy.

18. Upon receipt of the report, petitioner did not object to the report, nor did he object to the Court receiving the report. Instead, petitioner requested further clarification with regard to the Schoolcraft evaluation by Dr. Sanders. Pursuant to a telephone conference requested by petitioner on May 28, 2002, the Court permitted petitioner to supplement his concerns and address the Court with a letter outlining his concerns and his further requests regarding Dr. Sanders' further analysis. Based upon petitioner's motion and letter, the Court directed Dr. Sanders to make further analysis, to-wit: the impact on the child of a disruption in Zachary's relationship with petitioner, and Zachary's ability to understand his biological relationship.

19. In response, Dr. Sanders submitted a supplemental report dated August 26, 2002. Dr. Sanders found that the primary disruption in Zachary's relationship with petitioner occurred at

the parties' separation when Zachary was approximately nine months of age. Dr. Sanders concluded that by age 18 months Zachary was firmly established in a loving, secure, and relatively predictable relationship with petitioner, respondent and intervenor. Dr. Sanders indicated that there was no inherent reason why intervenor's presence as another loving caregiver should have any further disruptive impact.

20. In addition, Dr. Sanders stated that she did not believe that Zachary had lost his relationship with petitioner or that there was a basis to believe that further disruption to the relationship between Zachary and petitioner was intrinsically linked to intervenor, Pete Thanos' presence in Zachary's life. Dr. Sanders found that given Zachary's cognitive ability at the age of 3, Zachary can understand simple descriptions of biological facts of his parentage in the same way that a three-year-old adopted child can understand the biological facts of his or her parentage. She indicated that the emotional meaning of these relationships is unlikely to have much impact on Zachary for quite some time. Again, Dr. Sanders noted that Zachary has a loving relationship with petitioner and with intervenor.

21. After considering both of Dr. Sanders' reports, the criteria applicable to the facts in this case, and the Schoolcraft criteria, the Court previously found that it was appropriate to

sustain intervenor's objection to the recommendation of Commissioner Evans and grant the Motion to Intervene. The Court found that Dr. Sanders had very carefully articulated, to the Court's satisfaction, the policy considerations that the Court must make and find under Schoolcraft. As previously found, the first prong of the Schoolcraft analysis—relating to preserving the stability of the marriage—was not a consideration in this case, due to the fact that there was no marriage between petitioner and respondent, Kimberlee Thanos, to be preserved, and that the stability was shattered when the parties separated when Zachary was approximately nine months of age. The Court also noted that intervenor, Pete Thanos, and respondent, Kimberlee Thanos, are now married. Further, pursuant to the report of Dr. Sanders intervenor has established a relationship with Zachary, and there was nothing that would be adverse to the best interests of the child or disruptive to him and the Court previously found it was in the best interest of Zachary to allow Pete Thanos to intervene. The Findings of Fact and Conclusions of Law in Re: Motion for Intervention and Order Granting Intervention of Intervenor, Pete Thanos, were signed by the Court November 7, 2002.

22. On October 10, 2002, the petitioner filed a Motion to Bifurcate, to Stay Proceedings, and to Set Date for Response to Motion for Summary Judgment. That matter came on for hearing

before the Honorable Tyrone E. Medley on November 1, 2002, and an Order on Motion to Bifurcate and to Stay Proceedings was signed December 16, 2002.

23. On November 12, 2002, the petitioner filed an Answer to the Intervenor's Verified Petition for Paternity.

24. The petitioner filed another Motion for Stay and For Expedited Disposition on or about November 20, 2002. That was heard by the Court on November 27, 2002, and denied by the Court and the Order Denying Petitioner's Motion for Stay Order was signed December 20, 2002.

25. On November 15, 2002, Pete Thanos, as intervenor in the divorce action, filed a Motion for Partial Summary Judgment with a supporting memorandum and Affidavit, seeking a declaration by the Court that intervenor, Pete Thanos, is Zachary's biological father.

26. The petitioner filed a Motion for Stay with the Utah Court of Appeals on or about November 27, 2002, requesting that the Court of Appeals stay the paternity and custody proceedings in the District Court pending resolution of the petitioner's Petition for Extraordinary Relief. Petitioner filed his Petition for Extraordinary Relief with the Utah Supreme Court on or about November 14, 2002, and the matter was transferred to the Utah Court of Appeals by the Supreme Court of the State of Utah, given the

misfiling. The petitioner's Motion for Stay was summarily denied by the Utah Court of Appeals by an Order dated December 4, 2002.

27. The petitioner also filed an Objection to Admissibility of Genetic Test Results and Motion to Strike, dated November 27, 2002. Intervenor filed his Response to Objection to Admissibility of Genetic Tests on December 9, 2002, and amended the same due to an error in the title of said pleading on December 23, 2002.

28. On or about December 9, 2002, the petitioner filed a Motion for Summary Judgment and Memorandum in Opposition to Intervenor's Motion for Partial Summary Judgment and In Support of Petitioner's Motion for Summary Judgment. Petitioner requested in his Motion for Summary Judgment that he be declared the legal father of Zachary on the basis of his controlling presumption of paternity or, alternatively, on the basis of the equitable parent doctrine or, alternatively, barring intervenor and respondent from challenging Zachary's parentage on the basis of equitable estoppel.

29. Subsequent to receiving the respondent and intervenor's response to the Petitioner's Motion for Summary Judgment, Petitioner filed a reply memorandum and affidavits of Douglas Goldsmith and Kelly Pearson. Intervenor filed motions to strike the affidavits and petitioner filed a responsive memorandum thereto to which intervenor replied. The petitioner's Objection to Admissibility of Genetic Test Results and Motion to Strike and the

intervenor's motions to strike were heard simultaneous with intervenor's Motion for Partial Summary Judgment and petitioner's Motion for Summary Judgment.

30. After hearing on intervenor's Motion for Partial Summary Judgment and petitioner's Motion for Summary Judgment, this Court found that Utah Code Annotated, Section 78-3a-105(b), establishes concurrent jurisdiction between the District Court and the Juvenile Court in an action to establish paternity. This case is, in part, a paternity action. The Court found, however, that this is not a termination of parental rights action which precludes the District Court from exercising jurisdiction.

31. Subsequent to the Court's consideration of all arguments made by petitioner, respondent and intervenor, an Order on Motion for Partial Summary Judgment and Order Denying Petitioner's Motion for Summary Judgment was entered by the Court on May 8, 2003. Intervenor was declared to be the biological and natural father of Zachary Andrew Pearson on May 8, 2003, and the petitioner's Motion for Summary Judgment, dated December 9, 2002, was denied.

32. The petitioner filed a Petition for Permission to Appeal Interlocutory Orders on or about May 28, 2003, with the Utah Court of Appeals. On July 3, 2003, the Petition for Permission to Appeal was denied by the Utah Court of Appeals.

Custody Evaluation

33. Dr. Jill Sanders completed her child custody evaluation and a settlement conference was held before Commissioner Michael S. Evans, the parties and Dr. Sanders on August 13, 2003. That did not result in a settlement of this matter and a final report was issued by Dr. Sanders dated November 3, 2003.

34. Dr. Jill Sanders is a licensed psychologist who this Court finds is a qualified expert in the performance of custody evaluations and is well respected and recognized in the community for that expertise. Dr. Sanders, prior to issuing her final report of November 3, 2003, conducted multiple interviews, a battery of psychological testing and reviewed documents presented to her by the parties and their counsel, and contacted collaterals as she deemed appropriate. The Court finds that Dr. Sanders' child custody evaluation was thoroughly performed and that the report issued complied with and addressed the requirements of Rule 4-903 of the Code of Judicial Administration. Pursuant to that Rule and the requirements that the evaluator consider and, therefore, which the Court should consider, the Court finds the following:

a. Nicholas and Zachary are too young to consider the child's preference.

b. Zachary and Nicholas are very best friends and it is likely that their sister, Madelaine, will join their unusually

strong relationship. Madelaine is Nicholas' half-sister and Zachary's full-sister. Those three children should not be separated absent some compelling circumstances not present here. There is a substantial benefit of keeping these siblings together.

c. Nicholas and Zachary have excellent relationships with petitioner, respondent and intervenor.

d. The petitioner and respondent have established a 50/50 parent time arrangement with Nicholas and Zachary, which has worked relatively well.

e. Petitioner, respondent and intervenor all are of high moral character and exhibit strong emotional stability.

f. Petitioner, respondent and intervenor each have exhibited a deep desire for custody of the children. Contrary to the allegations and representations of the petitioner, intervenor has stepped in to assume the role of parent to Zachary and did so although delayed, given the circumstances present in this case.

g. The intervenor is employed full-time out of the home. Respondent is employed in a part-time position and petitioner is employed full-time. Both petitioner and respondent can work from home, to a large degree. Their ability to provide personal rather than surrogate care is generally equal though the respondent is in a somewhat superior position to provide that personal care, given her current part-time position.

h. None of the parties exhibit significant impairment of ability to function as a parent due to drug abuse, excessive drinking or other related causes.

i. The petitioner is a practicing member of the LDS Church. Respondent is no longer a practicing member of the LDS Church. The respondent and intervenor support Nicholas and Zachary's participation in religious training and activities. Religious compatibility is not of substantial importance in this case.

j. The petitioner and respondent are Nicholas' biological parents. The respondent and intervenor are Zachary's biological parents; however, Nicholas and Zachary have a strong attachment to both intervenor and petitioner.

k. All three parties have the capacity financially to support these children.

l. There is no evidence of abuse of either of the children or of any domestic violence involving the children.

Parental Presumption

35. The Parental Presumption recognizes the natural right and authority of a parent to the child's custody where one party to the controversy is a non-parent. The Parental Presumption is a rebuttable presumption and can be rebutted by evidence establishing that a particular parent at a particular time generally lacked all

three of the characteristics that give rise to the presumption: (1) that no strong mutual bond exists; (2) that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child; and (3) that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

There is no Parental Presumption as to Nicholas because petitioner and respondent are both the natural parents of Nicholas. Therefore, a best interests analysis as to Nicholas is controlling.

The Parental Presumption has application to petitioner's respondent's and intervenor's claims for custody of Zachary. As to Zachary, between petitioner and respondent and intervenor, it has been established beyond a reasonable doubt that petitioner is not the biological parent of Zachary. Consequently, the presumption of legitimacy regarding Zachary, who was born during the marriage of petitioner and respondent, has been rebutted. Based upon the evidence as set forth in these Findings of Fact and Conclusions of Law, petitioner cannot and has not established that respondent at any time had no strong mutual bond with Zachary, that respondent at any time has not demonstrated a willingness to sacrifice her own interests and welfare for Zachary, or that at any time respondent lacked the sympathy for and understanding of Zachary that is

characteristic of parents generally. In fact, the Court finds the opposite to be true, that respondent and Zachary have a strong mutual bond, that she has sacrificed her interests and welfare for Zachary, and has an abundance of sympathy and understanding of Zachary that is characteristic of parents generally. Respondent benefits from the Parental Presumption on her claim for custody of Zachary against petitioner. Consequently, respondent and petitioner are not on equal footing. The Parental Presumption has been rebutted regarding intervenor's claim for custody of Zachary. During approximately the first 15 months of Zachary's life, intervenor, with the assistance of petitioner and respondent, kept intervenor's parentage of Zachary a secret resulting in minimal contact between Zachary and intervenor during this period. During this critical 15 month period of time, intervenor and Zachary generally did not have a strong mutual bond, during this time intervenor generally did not demonstrate a willingness to sacrifice his own interests and welfare for Zachary, and generally lacked the sympathy for and understanding of Zachary that is characteristic of parents generally. Therefore, petitioner and intervenor stand on equal footing and Zachary's custody between them is determined solely by the best interests of the child. In the context of the Parental Presumption Analysis, it is ironic at best to conclude that petitioner is a non-parent of Zachary when in real terms

petitioner has established a strong mutual parental bond and relationship with Zachary, albeit *in loco parentis*. The Utah Supreme Court deemed Mr. Hutchison to be a "non-parent" in its analysis and Mr. Hutchison's parental relationship was of longer duration than petitioner's in the present case. 649 P.2d at 39. Consequently, following the dictates of the Hutchison case and in furtherance of the policies which support the Parental Presumption, this Court ruled accordingly.

Petitioner's Experts

36. Dr. Douglas Goldsmith's testimony is of little assistance or weight in the Court's determination of custody. Dr. Goldsmith has not met with the respondent, intervenor or children nor has he conducted a custody evaluation. His testimony is generic and not case specific and the Court finds that Dr. Goldsmith misapprehends Dr. Sanders' opinions regarding the importance of biological relationships to children. In particular, Dr. Goldsmith has no factual basis with which to offer an opinion regarding whether Dr. Sanders' recommendations regarding custody of Zachary Pearson are potentially damaging to Zachary.

37. The testimony of Dr. Heather Walker is of no benefit to the Court. The petitioner offers her as an expert in an effort to discredit or call into question the quality and methodology of the evaluation of Dr. Sanders. The Court is not persuaded by Dr.

Walker's testimony that Dr. Sanders' recommendations, opinions or conclusions are not consistent with the data or not within the scope of her expertise. This Court is not persuaded that Dr. Sanders' statements and opinions are not supported by current psychological literature, though the Court believes that is of little weight in this Court's determination of custody. The Court is not persuaded by Dr. Walker that Dr. Sanders' methods are not consistent with the guidelines for conducting custody evaluations. Dr. Sanders has performed her evaluation consistent with the guidelines and Rule 4-903 of the Code of Judicial Administration. The Court finds that Dr. Sanders has assigned appropriate weight to the best interests of the children in her evaluation and recommendations and has conducted a child-centered evaluation according to the guidelines and consistent with the data and literature. Nothing in the testimony of Dr. Walker leads this Court to believe that a different result, conclusion or recommendation would be made in the event that another evaluator evaluated this matter. Indeed, Dr. Sanders has a long history with this case, having been involved with the parties and children for a period of time between April, 2002 and November 3, 2003.

Custody

38. The Court finds that there are some benefits to the children remaining in Salt Lake City, due to the social, family and

academic networks. However, given the ages of the children and the other considerations, as set forth in these findings, maintaining extended family, social and academic networks are of less concern than creating relationship, geographical and financial stability of the children at this point in their development. Both boys are in a transportable stage and the Court finds that they have the capacity positively to adjust to a permanent move to Oregon.

39. The Court cannot order any party to this action to relocate. Although the respondent's current employer is headquartered in Salt Lake City, she works from home and so her employment is portable. She works from her home in Oregon. Petitioner also works from his home. He is capable of continuing his present employment, if he were to move to Oregon. In addition, there are job openings in Portland for individuals who have skills like those possessed by petitioner.

40. The intervenor is the primary financial provider for the Thanos family. Unlike petitioner and respondent he could not continue to work for his present employer if he were to move to Salt Lake City. It is likely that if he were to move to Utah he would experience a significant reduction in income. It would be far more burdensome for respondent and intervenor to move to Salt Lake City, than for petitioner to move to Portland.

41. In making a custody determination in this matter it is appropriate to rely on present realities and focus on what is in the best interest of the children today. It is not helpful to rely on historical issues or to assign fault for the breakup of the Pearson marriage.

42. The respondent is pivotal in this case in that she is the biological mother of both boys and their sister, Madelaine. The respondent has the strongest inherent responsibility for all three of these children. At considerable inconvenience to herself and her husband respondent has obeyed the Court orders currently in place and borne the bulk of the physical, emotional and financial discomfort associated with it. She has performed in an exemplary manner in facilitating the petitioner's relationship with both boys. At the same time, she has established a stable home life in Oregon with intervenor and with their child Madelaine, which fully incorporates both Nicholas and Zachary. Further, intervenor has fully accepted and supported both boys and their relationship with petitioner. The respondent has chosen to establish a life for herself and her family in Oregon and she has done so with logic and reason. In order for her to increase her earning potential she would have to work outside the home and to hire daycare providers to take care of her three small children. It is not in the best interest of any of the children to require her to do so, the more

so since her present income is comparable to that of petitioner. The children consider Oregon to be one of their homes and are very comfortable in that environment.

43. There is a sufficient level of trust between petitioner and the Thanoses in that all three are excellent parents which is a view generally shared by each party. Communications between them at times are tense. However, in the past and currently they have consistently reached a consensus concerning decisions relating to the upbringing of the boys. A joint legal custody relationship therefore does appear to be feasible and in the best interest of Nicholas and Zachary as further defined below.

44. It is in the best interests of Nicholas that joint legal custody of Nicolas be awarded to petitioner and respondent, and that joint legal custody of Zachary be awarded to respondent and intervenor. Joint legal custody shall be further defined as set forth at page 12, paragraph numbered 1, of the Child Custody Evaluation, as follows:

> 1. Legal Custody. Kimberlee and Peter should be named joint legal custodians of Zachary. Kimberlee and Kelly should be named joint legal custodians of Nicholas. Kelly's special relationship with Zachary should be legally protected in the form of third party access with the responsibility to make daily decisions on Zachary's behalf when Zachary is in his care. Kimberlee and Peter will make school placement decisions for both boys if the children reside in Oregon. Both biological parents of each child must agree upon any elective medical or dental treatment. It would be best if decisions regarding any

extracurricular activities would be jointly made by all three parents so that the boys' schedules are manageable. If this is not possible, Kelly and Kimberlee will jointly decide on Nicholas' activities and Kimberlee and Peter will jointly decide on Zachary's activities.

45. The following factors support the conclusion that joint legal custody of the boys divided between petitioner and respondent for Nicholas and between respondent and intervenor for Zachary is in the boys' best interest:

a. The emotional needs of the children will be met by joint legal custody. A generally positive decision making process has always existed between the parties and they have managed quite well at keeping the children out of the fray.

b. The parenting skills and abilities of all three parents are excellent and complimentary.

c. All three parties have similar major values and they recognize the importance of each other in the children's lives.

d. The primary physical custody of Nicholas is awarded to respondent. The primary physical custody of Zachary is awarded to respondent and intervenor. All of the evidence, including petitioner's testimony indicates that petitioner will move to Oregon. Therefore, all three parties will live in close proximity to one another, which makes joint legal custody workable.

e. This legal custody determination is consistent with the custody evaluation, said custody evaluation is incorporated herein in full by this reference.

46. It is in the best interests of Nicholas that respondent be designated the primary physical custodian of Nicholas and that she not be required to obtain petitioner's permission to move to Oregon. It is in the best interest of Zachary that respondent and intervenor be designated the primary physical custodians of Zachary and that they not be required to obtain petitioner's permission to move to Oregon. It should be noted that while the Court cannot order any party to move to another state, the evidence is undisputed that the parties will relocate and will live within 100 miles of one another because it is in the best interests and needs of Nicholas and Zachary to live in close proximity to petitioner, respondent and intervenor.

47. It is in the best interests of Nicholas and Zachary that there be a joint physical custody arrangement. The joint physical custody arrangement or access schedule for Nicholas and Zachary shall be as described and set forth in the Access Schedule recommendation of Dr. Jill D. Sanders at pages 12-13, paragraphs numbered 2, 2a, 2b, 2c and 2d, of the Child Custody Evaluation, as follows:

2. Access schedule. Regardless of whether this "extended family" lives in Salt Lake City or in Oregon the following schedule is recommended. However, my strong recommendation is that Kelly relocate to Oregon so that Nicholas can begin the second school term in Oregon:

a. Continuation of the present seven day/seven day rotation. The children have been on this schedule since September and appear to be able to tolerate the amount of time away from the other parent.

b. During the summer months Kimberlee/Peter and Kelly would have the option of a ten-day period of uninterrupted access to both boys. Kelly will have the first choice of that period in even years and Kimberlee/Peter will have the first choice in odd years. These periods may not be combined with regular access to form a block longer than ten days.

c. Beginning in the school year of 2004/2005 Nicholas will continue on the weekly rotation. Transitions would occur Sunday evening. Zachary will spend five nights with Kelly and either return to Kimberlee/Peter for the last two nights of the seven-day period or remain with them for the first two nights of Kelly's period (rotating each time). Nicholas would join Zachary at Kimberlee/Peter's on Sunday for his continuous seven-day period in that home. This arrangement keeps the boys on a highly predictable schedule, allows them to spend the vast majority of their time together, allows each of them some time alone with their biological fathers, and coincides with Peter's greater availability on the weekends.

d. Holidays may be rotated according to Utah guidelines, or according to mutual agreement, with only major holidays being included (i.e. UEA, Thanksgiving, Christmas, Spring Break, July 4th).

48. For purposes of transportation, each party should be responsible for picking up the children at the beginning of that parent's access

49. It is reasonable and in the best interest of Zachary that his surname be changed to "Thanos." It is reasonable that an

explanation regarding the circumstances of each child's conception, birth and circumstances be crafted with the help of Dr. Jay Thomas and that it be provided to the boys in a unified manner. It is in their best interest that the boys hear a consistent presentation regarding these issues.

50. It is reasonable that the petitioner, respondent and intervenor be able to attend events for both boys and any of the three parties should be permitted to perform volunteer work in either of the boys' school classrooms.

51. In the event that the parties are unable to facilitate a parenting plan or in the event that petitioner and Thanoses reach an impasse regarding major issues concerning the boys, it is reasonable that a parenting coordinator be utilized to facilitate resolution of parenting disagreements. Each party should pay one-half of the cost of that coordinator.

Child Support

52. The intervenor's income is approximately $11,747 gross per month. Petitioner's gross monthly income is $7,750 per month. Respondent's monthly gross income is $7,440. The combined adjusted gross incomes of petitioner and respondent exceeds the guidelines, therefore, the amount of child support is determined on a case by case basis and the Court must determine what is reasonable.

53. The current gross monthly incomes of petitioner and respondent are substantially the same. The standard of living currently enjoyed by petitioner and respondent is consistent with that which was enjoyed during the course of petitioner's and respondent's marriage, except currently respondent benefits from the income and earning capacity of intervenor. Petitioner and respondent's earning capacity is similar based upon their education, training and work experience. There is a seven year age difference between petitioner and respondent which does not impact their respective incomes or earning capacity. Based upon the joint physical custody arrangement or access schedule as to Nicholas, petitioner will have 182 overnights and respondent will have 183 overnights, or vice versa. Based upon the foregoing, both petitioner and respondent each have adequate resources to adequately support Nicholas without child support from the other. Therefore, zero child support is awarded for either petitioner or respondent regarding Nicholas, which is reasonable under the facts set forth hereinbefore. Respondent and intervenor have agreed or the Court finds that petitioner should not be required to pay child support for Zachary. Petitioner's claim for retroactive child support is denied.

Medical, Dental Insurance/Daycare

54. Through their employment the Thanoses are capable of obtaining medical and dental insurance for Nicholas and Zachary. They should be required to obtain such insurance. The Thanoses have agreed to pay all insurance expenses for Zachary. Petitioner should be ordered to reimburse them for one-half of the cost of obtaining such medical and dental insurance for Nicholas. The Thanoses should be ordered to provide petitioner with documentary proof that they have obtained medical and dental insurance coverage for Nicholas. Petitioner should be ordered to pay his one-half share of the premium for Nicholas' medical and dental insurance on the 5th day of each month beginning with the first month following his receipt from Thanoses of confirmation of the said medical and dental insurance coverage.

55. Neither petitioner nor the Thanoses should be required to pay any daycare expenses incurred by the other party in the providing of care for the boys.

56. Petitioner should be required to pay one-half of all medical or dental insurance co-pays or deductibles and one-half of all dental and medical expenses incurred by either petitioner or the Thanoses on behalf of or for the benefit of Nicholas. The Thanoses have agreed to pay all such expenses and all school

expenses incurred on behalf or for the benefit of Zachary. It is reasonable that they be required to pay all of such expenses.

Alimony

57. For the following reasons neither petitioner or respondent should be awarded alimony:

a. The financial conditions of petitioner and respondent are similar. The standards of living of petitioner and respondent as of the date of their separation has not changed significantly. Neither will be required to accept a lower standard of living if he or she does not receive alimony from the other.

b. The incomes of petitioner and respondent are nearly identical. Each has the ability to produce significant income in the future.

c. Neither petitioner nor respondent directly contributed to any increase in the skill or earning capacity of the other during their marriage.

d. Although respondent's affair with intervenor was a contributing cause of the disintegration of the marriage of petitioner and respondent, the ultimate cause of the termination of their marriage was their irreconcilable differences. The parties made a good faith effort to reconcile after respondent's affair with intervenor became known to petitioner. The Court is therefore of the view that fault should not be considered in the awarding of

alimony. As is often the case in marital relationships, the Court finds petitioner and respondent both responsible for the irreconcilable differences that ended their marriage.

58. Petitioner and respondent have executed and filed with this Court a Stipulation which resolves all remaining differences between them concerning the division of their marital property. The Stipulation is reasonable and should be incorporated into this Court's Decree of Divorce.

Contempt/Work-Related Child Care Expenses

59. By a motion for an Order to Show Cause dated November 13, 2003, petitioner asked this Court to hold respondent in contempt for her failure to reimburse him for certain expenses which he had incurred on behalf of Nicholas and Zachary. The motion was based upon an interim order entered by this Court on March 28, 2001, which required the parties equally to divide expenses related to the rearing of the boys. Following a hearing before Commissioner Michael S. Evans on January 22, 2004, the Commissioner recommended that respondent be held in contempt for her failure to reimburse petitioner and that this Court enter a judgment against respondent in the approximate sum of $12,000. Respondent objected to that recommendation. This Court determined that respondent's objection to the Commissioner's recommendation be heard at the trial of this matter.

60. At the time of trial petitioner and respondent informed the Court that they had reached an agreement with regard to the sums which each had paid before the trial for medical insurance and uninsured medical expenses. The parties stipulated that in the Decree the Court should award petitioner the sum of $1,911.41 representing net expenditures by petitioner for medical insurance premiums and uninsured medical expenses after offsetting payments made by respondent for those categories of expenses.

61. Petitioner and respondent were unable to reach an agreement concerning work-related childcare expenses incurred by each of them. The Court received evidence concerning those expenses and determined that prior to trial petitioner had incurred work-related childcare expenses of $8,811.20 and respondent had incurred work-related childcare expenses of $2,315.00. The net amount owing to petitioner is therefore $6,496.20. The Decree of Divorce should award petitioner that amount for pretrial work-related childcare expenses.

62. There is no evidence that respondent deliberately violated the interim order. At the time the Order to Show Cause was issued petitioner and respondent were communicating about the sums which each had expended for the boys. Respondent had requested additional financial information which petitioner had not provided. Respondent had potential offsets which she had not yet

computed or documented. Under the circumstances, holding respondent in contempt would be inappropriate.

Attorney's Fees

63. The attorney fees incurred by petitioner, respondent and intervenor are substantial and comparable in amount. Each party has the ability to pay their respective attorney fees based upon their annual incomes. Additionally, in a case of this nature and complexity, determining who is the prevailing party is next to impossible. Therefore, each party is required to assume responsibility for their respective attorney fees without contribution.

Transition

64. The fifty/fifty shared temporary custody arrangement shall continue until petitioner's anticipated relocation to Oregon. It is in the best interests of the minor children that petitioner, respondent and intervenor relocate to Oregon simultaneously in order to reduce any period of separation necessitated by the transition. In any event, respondent and intervenor's relocation to Oregon must occur prior to Nicholas starting the school term in Oregon.

Based upon the preceding Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. Petitioner and respondent are awarded joint legal custody of Nicholas. Respondent and intervenor are awarded joint legal custody of Zachary as further described in the Court's Findings.

2. Respondent is designated the primary physical custodian of Nicholas. Respondent and intervenor are designated the primary physical custodians of Zachary.

3. Petitioner should be awarded joint physical custody time with Nicholas and Zachary in the manner described in the Court's Findings.

4. Petitioner and respondent should be ordered each to pay one-half of Nicholas' uninsured medical and dental insurance premiums, co-pays and deductibles and one-half of the cost of health and dental insurance for him. Respondent and intervenor should be ordered to pay all such expenses of Zachary.

5. None of the parties should be ordered to pay alimony or for the cost of work-related childcare.

6. Respondent should be ordered to pay petitioner the sum of $6,496.20 as reimbursement for expenses incurred by him on behalf of Nicholas and Zachary for work-related childcare prior to the date of trial.

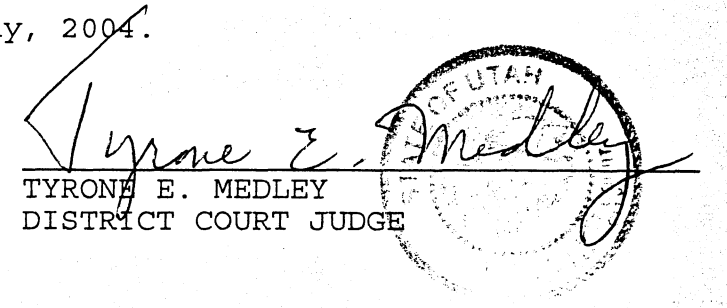
7. The property of petitioner and respondent should be divided according to the division described in their Stipulation for Property Division dated December 10, 2003.

8. Respondent should not be held in contempt for failure to reimburse petitioner for childcare and medical expenses he incurred prior to November 13, 2003.

9. The parties are ordered to share in thirds equally the costs of Dr. Sanders' custody evaluation.

10. Counsel for respondent and intervenor are instructed to submit a Decree consistent with the Court's Findings of Fact, Conclusions of Law, and Rule 7, Utah Rules of Civil Procedure.

Dated this 11 day of May, 2004.



TYRONE E. MEDLEY
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to the following, this 11 day of May, 2004:

Paige Bigelow — Hand delivered / picked up by Mr. Pearson
Attorney for Petitioner
50 West Broadway, 8th Floor
P.O. Box 45561
Salt Lake City, UT 84145-0561

Steven H. Gunn
Attorney for Respondent
36 S. State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Kellie F. Williams
Attorney for Intervenor
808 E. South Temple
Salt Lake City, Utah 84102

J Ashley

Tab B

Steven H. Gunn (A1272)
RAY, QUINNEY & NEBEKER
36 South State Street, Suite 1400
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
Attorneys for Respondent

IMAGED

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, DIVISION I, STATE OF UTAH

KELLY F. PEARSON, Petitioner, vs. KIMBERLEE Y. PEARSON, Respondent.	SUPPLEMENTAL DECREE OF DIVORCE Civil No. 004907881
PETER D. THANOS, Intervenor.	Judge Tyrone E. Medley Commissioner Michael S. Evans

The above-captioned case was tried to the Court on April 1, 2, 5, 6, 7 and 8, 2004. Petitioner was present and was represented by Paige Bigelow; Respondent was present and represented by Steven H. Gunn; and Intervenor was present and represented by Kellie F. Williams. The Court having heard the testimony of the witnesses, having considered the evidence presented and the arguments of counsel, having considered the Stipulation of the parties relating to certain property division issues, having previously entered its Decree of Divorce Terminating Marriage and having entered its Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

Supplemental Decree of Divorce @J
JD16138859

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1. Petitioner Kelly F. Pearson and Respondent, Kimberlee Y. Thanos (f/k/a Kimberlee Y. Pearson) are awarded joint legal custody of the minor child Nicholas Browning Pearson ("Nicholas").

2. Respondent and Intervenor (sometimes referred to herein collectively as "Thanoses") shall make school placement decisions for Nicholas if he resides in Oregon. Petitioner and Respondent must agree upon any elective medical or dental treatment for Nicholas. Petitioner, Respondent and Intervenor shall make decisions concerning Nicholas' extracurricular activities and shall be guided by the principle of manageability of that schedule. If Petitioner, Respondent and Intervenor cannot agree upon Nicholas' extracurricular activities, Petitioner and Respondent shall make such decisions.

3. Joint legal custody of the minor child Zachary Andrew Pearson is awarded to Respondent and Intervenor.

4. Petitioner's special relationship with Zachary should be protected by means of third party access. Petitioner is awarded the responsibility and right to make daily decisions on Zachary's behalf when Zachary is in Petitioner's care. Respondent and Intervenor shall have the responsibility and right to make daily decisions for Zachary when he is in their care. Respondent and Intervenor shall make school placement decisions for Zachary if he resides in Oregon. The Thanoses shall have the right to make decisions concerning the elective medical or dental treatment of Zachary. Decisions concerning Zachary's extracurricular activities shall be made jointly by Petitioner, Respondent and Intervenor and shall be guided by the principle of manageability of that schedule. If Petitioner, Respondent and Intervenor cannot agree upon Zachary's extracurricular activities, the Thanoses shall make such decisions.

5. Respondent is designated the primary physical custodian of Nicholas. Respondent and Intervenor are designated the primary physical custodians of Zachary.

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6. If the parties live in close proximity to one another, the parties shall observe the following joint physical custody arrangement: until the beginning of the 2004/2005 school year the seven-day rotation described in this Court's Order on Motion for Order to Show Cause, Motion for Leave to Amend Complaint for Divorce, and Motion for Temporary Relief dated March 28, 2001 ("Interim Order") shall apply:

a. Beginning with the 2004-2005 school year Nicholas will continue on the weekly rotation. Transitions shall occur Sunday evening. Zachary will spend five nights with Petitioner and either return to Respondent and Intervenor for the last two nights of the seven-day period or remain with them for the first two nights of Petitioner's period (rotating each time). Nicholas will join Zachary at the home of Respondent and Intervenor on Sunday for his continuous seven-day period in their home.

b. During the summer months the Thanoses and Petitioner shall have the option of a ten-day period of uninterrupted access to both boys. Petitioner will have the first choice of that period in even years and the Thanoses will have the first choice in odd years. These periods of uninterrupted access may not be combined with regular access to form a block of time longer than ten days.

c. Respondent and Intervenor shall be entitled to the following holidays in years ending in an even number, and Petitioner shall be entitled to the following holidays in years ending in an odd number:

(1) The children's birthdays on the day before or after the actual birthday beginning at 3:00 p.m. until 9.00 p.m.;

(2) Martin Luther King, Jr. Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m.;

(3) Spring Break or Easter holiday beginning at 6:00 p.m. on the day school lets out for the holiday until 7:00 p.m. on the day before school resumes;

(4) Memorial Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m.;

(5) July 24th beginning at 6:00 p.m. on the day before the holiday until 11:00 p.m. on the holiday;

(6) Veterans Day holiday beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and

(7) The first portion of the Christmas school vacation (defined as the time period beginning on the evening school lets out for the Christmas school break until the evening before school resumes, except for Christmas Eve and Christmas Day), plus Christmas Eve and Christmas Day until 1:00 p.m.

d. Respondent and Intervenor shall be entitled to the following holidays in years ending in an odd number, and petitioner shall be entitled to the following holidays in years ending in an even number:

(1) The children's birthdays on the actual birthday beginning at 3:00 p.m. until 9:00 p.m.;

(2) Washington and Lincoln Day beginning at 6:00 p.m. on Friday until 7:00 p.m. on Monday;

(3) July 4th beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(4) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m. on Monday;

(5) Fall Break, if applicable, beginning at 6:00 p.m. on the day school lets out for the holiday until 7:00 p.m. on the day before school resumes;

(6) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(7) Thanksgiving holiday beginning Wednesday at 7:00 p.m. until Sunday at 7:00 p.m.;

(8) The second portion of the Christmas school vacation, including New Year's Day, (defined as the time period beginning on the evening school lets out for the Christmas school break until the evening before school resumes, except for Christmas Eve and Christmas Day) plus Christmas Day beginning at 1:00 p.m. until 9:00 p.m.

e. Unless otherwise agreed to in writing by the parties, Nicholas shall spend Father's Day with Petitioner and Zachary shall spend Father's Day with Intervenor. The parenting time on Father's Day shall be 9:00 a.m. until 7:00 p.m.

f. Each parent shall be responsible for picking up the children at the beginning of that parent's access time.

7. If Petitioner does not move to Oregon, he is awarded the following monthly access to both boys:

a. The Petitioner should have monthly parent time for a period of five days of which no more than one day should be a day when the child is, or would otherwise be, in school.

b. Petitioner is awarded the Thanksgiving holiday and school spring break in even-numbered years and the entire Christmas school break in odd-numbered years. He is awarded the fall school break, if such a break is taken in Oregon. Further,

Petitioner is awarded parent time each year on Columbus Day, Memorial Day, Martin Luther King Day and Presidents Day each year to maximize long weekends.

c. The Petitioner is awarded summer parenting time with Zachary for a period of six weeks each summer coincident with the exercise of parenting time with Nicholas. Such parenting time will be divided into three 2-week blocks of time which are separated by at least seven days. Only one of three 2-week blocks of parenting time will be uninterrupted.

8. Petitioner and the Thanoses shall be entitled to call the children once a day when the children are residing in the other party's or parties' household. Phone calls initiated by the children to the other household shall be unlimited and neither Petitioner nor the Thanoses shall take steps to restrict such child-initiated calls.

9. At the discretion of Respondent and Intervenor Zachary's surname may be changed to "Thanos". Any of the parties may disclose to the children the circumstances of either child's conception and birth; however, such explanation shall be made consistent with the recommendations of Dr. Jay Thomas and in a manner that is consistent between the parties.

10. Petitioner and the Thanoses may, if they desire, attend events for both boys and each shall be permitted to perform volunteer work in either of the boys' school classrooms.

11. In the event that the parties are unable to facilitate a parenting plan or in the event that Petitioner and Mr. and Mrs. Thanos reach an impasse regarding major issues concerning the boys, a parenting coordinator shall be utilized to facilitate resolution of such disagreements. In the event that the use of a parenting coordinator becomes necessary, Petitioner shall pay one-half of the costs of retaining that coordinator and Mr. and Mrs. Thanos shall pay the other half.

12. Neither Petitioner nor Respondent is awarded child support for Nicholas. Petitioner shall not be required to pay child support for Zachary.

13. Respondent and Intervenor shall purchase and maintain appropriate health, hospital and dental care insurance for Nicholas and Zachary. Petitioner shall reimburse them for one-half the cost of obtaining and maintaining such insurance for Nicholas. Nicholas' share of the insurance will be a per capita share of the premium actually paid. Respondent and Intervenor shall provide Petitioner with documentary proof that they have obtained health, hospital and dental care insurance for Nicholas. Petitioner shall pay his one-half share of the insurance costs on the fifth day of each month beginning with the first month following his receipt from Respondent and Intervenor of confirmation of said insurance.

14. Neither Petitioner nor Mr. and Mrs. Thanos are required to pay any daycare expenses incurred by the other party in the providing of care for Nicholas and Zachary.

15. Petitioner shall pay one-half and Respondent shall pay one-half of all reasonable and necessary uninsured medical expenses, including deductibles and co-payments, incurred on behalf, or for the benefit, of Nicholas. Petitioner is not required to pay such expenses for Zachary. The parent who incurs medical expenses shall provide written verification of the cost and payment of those expenses to the other parent within thirty days of payment. A parent failing to provide written verification may be denied the right to recover the other parent's share of the expenses.

16. The ultimate cause of the termination of the marriage of Petitioner and Respondent was their irreconcilable differences. Petitioner and Respondent are both responsible for those irreconcilable differences. Neither Petitioner nor Respondent is awarded alimony.

17. Petitioner and Respondent are awarded marital property in accordance with their Stipulation for Property Division dated November 24, 2003. In particular the following division of property is ordered:

a. Each of the parties is awarded the personal property in his or her possession as of November 24, 2003.

b. Petitioner is awarded the marital residence located at 1988 South 1800 East in Salt Lake City. Petitioner is ordered to pay or satisfy all obligations, payment of which is secured by any lien, mortgage or trust deed on the said property.

c. Petitioner is awarded ownership of the 1997 Ford Taurus and the 1993 Mazda MX6 automobiles. Respondent is awarded ownership of the 1997 Ford Explorer and the 1999 SeaRay ski boat. The party to whom a motor vehicle or boat is awarded shall be responsible for paying any obligation secured by a security interest in that vehicle or boat and shall hold the other party harmless from any loss or damages with which he or she may incur as a result of the failure of the responsible party to pay one of the debts described in this paragraph.

d. Each party is awarded all funds currently held in his or her Agilent Technologies Defined Benefit Plan account.

e. Each party is awarded all cash in his or her possession as of November 24, 2003, including all cash which is part of the marital estate.

f. Respondent is awarded all assets contained in her 401(k) account, as well as $10,000 in value of assets held in Petitioner's 401(k) account. The Court shall enter a Qualified Domestic Relations Order (QDRO) ordering that Petitioner's 401(k) account be divided as stated above.

g. The securities owned by the parties are divided as follows:

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(1) Petitioner is awarded 10,277 shares and Respondent 10,278 shares of the Campus Pipeline stock which on November 24, 2003 was controlled or owned by Respondent.

(2) Petitioner is awarded 25 shares and Respondent is awarded 25 shares of the Agilent Technologies, Inc. stock which, as of November 24, 2003, was owned or controlled by Petitioner.

(3) Petitioner is awarded 32 shares and Respondent is awarded 32 shares of Hewlett-Packard Company stock which, as of November 24, 2003, was in the control or ownership of Petitioner in a Charles Schwab account.

(4) Petitioner is awarded 207 and Respondent 206 stock options in Agilent Technologies, Inc., which, as of November 24, 2003, were in the control of or owned by Petitioner.

h. The following guidelines shall apply to the division of the stock and of the options:

(1) Upon entry of this Decree of Divorce, the Hewlett-Packard and Agilent Technologies stock shall be withdrawn from the Charles Schwab joint account and distributed to the parties. If any fees or costs are owed to Charles Schwab the Petitioner and Respondent shall equally divide and pay those fees and costs.

(2) The division of stock ordered by this Decree shall take into account differences in the tax basis of particular blocks of stock. The division shall be carried out in such a manner as to equalize the potential capital gains tax treatment of the stock awarded to each party.

(3) All taxable losses and cash proceeds from the sale of Campus Pipeline stock shall be distributed evenly between Petitioner and Respondent.

(4) The division of stock options shall be made in a manner which will equalize the potential capital gains tax obligations of Petitioner and Respondent.

i. Any securities or options obtained by either party after May 1, 2000 are awarded to that party.

j. Within a reasonable time Petitioner and Respondent shall each pay $6,500 to Glen and Joan Young as repayment of the $13,000 loan which Mr. and Mrs. Young made to the parties during their marriage.

k. Petitioner and Respondent shall execute and deliver to one another such documents, including deeds and certificates of title, as shall be necessary to effectuate the terms of the property division described in this Decree.

18. Within a reasonable length of time after the entry of this Decree Respondent shall pay Petitioner the sum of $1,911.41 which represents the net amount Respondent owes Petitioner, after offsets, for her one-half share of the medical insurance premiums and uninsured medical expenses paid or incurred by Petitioner for Nicholas and Zachary through March 30, 2004. Within a reasonable length of time after entry of this Decree Respondent shall pay Petitioner the sum of $7,653.70 which represents the net amount Respondent owes Petitioner, after offsets, for her one-half share of the work-related childcare expenses paid or incurred by Petitioner for Nicholas and Zachary through March 30, 2004.

19. Petitioner's motion seeking to have Respondent held in contempt for violation of the Interim Order is denied.

20. Petitioner is awarded the right to claim Nicholas as a dependent on his state and federal income tax returns in odd-numbered tax years. The Thanoses are awarded the right to

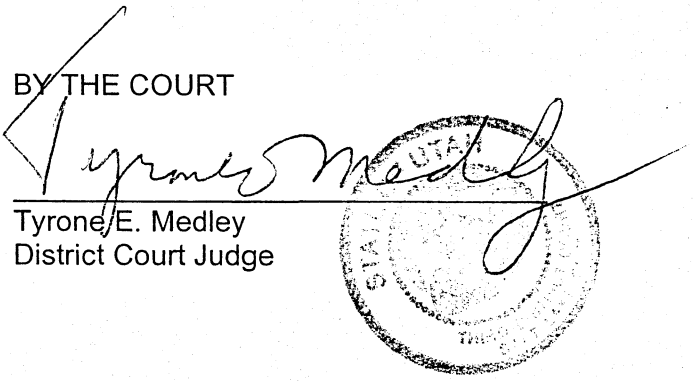
claim Nicholas as a dependent in even-numbered years. The Thanoses are awarded the right to claim Zachary as a dependent.

21. Each party is required to assume responsibility for the fees of that party's attorney. Neither party is awarded court costs incurred by that party.

22. Petitioner, Respondent and Intervenor shall each pay one-third of all fees and costs of the custody evaluator, Dr. Jill Sanders, including Dr. Sanders' fees arising from her testimony at trial.

DATED this 12 day of July, 2004.

BY THE COURT



Tyrone E. Medley
District Court Judge

2513

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of July, 2004 a true and correct copy of the foregoing SUPPLEMENTAL DECREE OF DIVORCE was mailed, postage prepaid, to:

Paige Bigelow
Kruse, Landa & Maycock, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
PO Box 45561
Salt Lake City, UT 84145-0561
Attorneys for Petitioner

Kellie Williams
CORPORON & WILLIAMS
808 East South Temple
Salt Lake City, Utah 84102
Attorneys for Intervenor

Steven H. Gunn

766436.v5

2514

Tab C

EVALUATION REPORT – Pearson v. Pearson/Thanos
Schoolcraft (State of Utah, Supreme Court Case No. 890001) Policy Considerations

IDENTIFYING INFORMATION:

Kelly F. Pearson (Petitioner) vs. Kimberlee Y. Pearson (Respondent)/
Peter D. Thanos (Intervenor)
Case No 004907881
Judge Tyrone Medley
Third Judicial District Court, Salt Lake County, State of Utah

Child in Question: Zachary Pearson (DOB: 9-14-99)

Attorneys: Paige Bigelow (Petitioner), Steven H. Gunn (Respondent), Kellie F. Williams (Intervenor)

Evaluator: Jill D. Sanders, Ph.D., Clinical Psychologist

Dates of Evaluation: 4-9-02, 4-12-02, 5-6-02, 5-10-02

Date of Report: May 13, 2002

REASON FOR REFERRAL:

Judge Medley has requested me to provide information and opinions to assist the Court in ruling on Mr. Thanos' intervention to establish paternity. Specifically, the Court has determined that the criteria outlined in State of Utah in the Interest of J.W.F., a person under eighteen years of age, Winfield D. Schoolcraft are applicable to this case. The Court has requested an evaluation (independent of the previously ordered custody evaluation involving these parties) related to the Schoolcraft policy of "protecting children from disruptive and unnecessary attacks on their paternity".

METHODS OF EVALUATION:

Kelly Pearson and Peter Thanos were interviewed in person on one occasion. They were each observed in the presence of Zachary on one occasion. Two telephone interviews were conducted with Kimberlee Pearson. All three parties were fully informed as to the limits of confidentiality associated with court-ordered evaluations, as well as payment obligations, and indicated their informed consent by signing a Forensic Warning and a Payment Agreement. Stormie Tisdale (Zachary's nanny) was interviewed by telephone. Documents submitted by all three parties were reviewed. The following Court documents were reviewed: Order on Objection to Recommendation (March 7, 2001), Supreme Court of Utah Opinion No. 890001, Affidavit of Denise F. Goldsmith, Ph.D. (August 28, 2001) and Transcript of Hearing (January 10, 2002).

Jill D. Sanders, Ph.D.
Clinical Psychologist

7138 South 2000 East, Suite 105 • Salt Lake City, Utah 84121 • Phone (801) 944-1312 • Fax (801) 947-0017

CASE SUMMARY:

Kelly and Kimberlee Pearson married in August 1992. Their first child, Nicholas, was born in July 1997. Peter Thanos and Kimberlee met in December 1996 and began a romantic relationship in February 1998. In April 1999 Kimberlee told Kelly that she was pregnant with Peter's child and requested a divorce. The Pearsons separated in May 2000. Since that time Nicholas and Zachary have spent equal amounts of time with Kelly and Kimberlee. Since Kimberlee's separation from Kelly, Peter has visited Kimberlee, Nicholas and Zachary in Utah and they have traveled to visit Peter in Oregon numerous times.

CHILD IN QUESTION:

Zachary is a normal, high functioning three-year-old boy. No developmental delays or physical or emotional handicaps were observed. He has no known need for special care of any type. There is no indication that Zachary has a less than normal capacity for adjustment to novel places or persons. Zachary is an active, articulate three-year-old who is initially shy with strangers. He is very competent at gaining comfort from his caregivers. His attachments to Kelly Pearson and Kimberlee Pearson, who have functioned as his primary caregivers since birth, appear secure, strong and healthy. His attachment to Peter Thanos is also secure and healthy. Zachary has a strong bond with his brother, Nicholas. Zachary's nanny reported that she believes the current access schedule and the continuing conflict between Kelly and Kimberlee are negatively affecting Zachary and his brother in terms of emotional stability though both boys are currently functioning well within the normal range in all areas.

INFORMATION RELATED TO THE SCHOOLCRAFT ISSUES:

1. Protecting children from disruption:

For the past two years of Zachary's life he has enjoyed consistent primary caregiving by Kimberlee and Kelly Pearson, as well as consistent daycare provided by Stormie Tisdale. The basic routines in both households are relatively similar. Both parents work outside the home, though currently Kimberlee does not work outside the home while the children are in her care. During his first year of life Zachary had limited contact (approximately four visits) with Peter. Since January 2001 Zachary and Peter have seen each other once or twice each month for periods ranging from one to four days per visit. Kimberlee typically travels to Peter's home in Oregon once a month with the children. To some degree this disrupts their normal schedules, however, this travel pattern has been in place for almost one year and is part of their typical routine. In August 2001 Peter and Kimberlee selected a home together in Oregon and the children reside in this home during their visits there.

Zachary and his brother are accustomed to a frequently changing schedule. Since May 2000 they typically transfer between their parents' homes twice a week. They spend equal amounts of time with both parents. Some holidays are always spent with one parent and some holidays are rotated. Peter's contact with Zachary does not significantly add to or subtract from the disruption associated with the current arrangement.

2. Unnecessary attacks on paternity:

Kelly Pearson functioned as Zachary's father prior to and following his birth in September 1999. Since the Pearsons separated in May 2000, Zachary and his brother have spent equal amounts of time with both parents. Kelly employs a nanny but is completely involved in Zachary's daily care during his periods of access. Zachary identifies Kelly as his father and their attachment is secure, strong and healthy.

Peter Thanos is Zachary's biological father. His contact with Zachary during Zachary's first year of life was minimal due to various circumstances including the fact that the Pearsons continued to reside together until May 2000, Peter works and resides in Oregon, and Peter cared for his wife until her death in December 2000. Since January of 2001 Peter has seen Zachary at least once a month, more typically twice a month for periods lasting between one and four days. Zachary identifies Peter as "Peter". Observation of their interaction suggests that Zachary has a healthy, positive attachment to Peter. Zachary perceives Peter to be a familiar, competent, and comforting caregiver. The biological relationship between Peter and Zachary is obvious in terms of appearance, temperament and mannerisms.

CONCLUSIONS:

The Court must determine "whether Mr. Thanos has standing to intervene to establish paternity of Zachary Pearson and to rebut the presumption that Zachary Pearson is the legitimate son of Mr. and Mrs. Pearson". The Court has ordered this evaluator to gather and report information related to the policies set forth in Schoolcraft, primarily the policy related to protecting children from disruptive and unnecessary attacks on their paternity, and to offer opinions based on the information gained.

Disruption:

Peter Thanos has gradually developed a relationship with Zachary over the past three years. Since January 2001 he has had contact with Zachary an average of twice a month. Since January 2002 they have had contact an average of three times per month. Observation suggests that Peter and Zachary have a positive, loving relationship. Zachary is relaxed in Peter's presence, allows Peter to comfort him, and easily engages in activities with Peter, including play and routine care. I found no information to suggest that Peter's involvement in Zachary's life is a disruption to Zachary's normal and positive development. Peter has no history of substance abuse, criminal behavior or abusive behavior that would suggest that he poses a current or future risk to Zachary's emotional or physical health. Kimberlee and Peter plan to marry as soon her divorce from Kelly is final. Based on the relatively long and evolving relationship between Peter and Zachary, the level of disruption related to Peter's intervention in this case is minimal.

Unnecessary attacks on Paternity:

Peter Thanos is Zachary's biological father. Kimberlee and Peter plan to marry as soon as possible. If they do marry Peter will have no less than the role of a stepfather. However, his status as Zachary's biological father inherently escalates the importance of their relationship. Peter is committed to a positive and significant relationship with Zachary regardless of his marital relationship to Kimberlee. Peter claims that he recognizes Kelly's importance to Zachary and intends to support their relationship.

Kelly Pearson has functioned as Zachary's father since his birth. Despite Zachary's paternity, Kelly is committed to raising Zachary as his son. Zachary recognizes Kelly as his father and their attachment is secure and healthy. Kelly does not believe Peter's relationship with Zachary is beneficial or significant. If Peter were not interested in a relationship with Zachary, Zachary would function well in the parent-child relationship he has with Kelly. In regard to basic care and general well being, establishing Peter as a father to Zachary is unnecessary.

However, the relationship between parents and their biological children is psychologically extremely important. Most adopted children spend considerable time and energy thinking about their biological parents, if not actively seeking to locate them. Psychologically speaking, some relationship between a biological parent and their child is necessary for the child's normal development. Sometimes this relationship can only occur through fantasy, sometimes only through information. But the most satisfying type of relationship between a child and their biological parent is generally a personal one. In this sense, the relationship between Peter and Zachary is essential. No one can play this role in Zachary's life but Peter.

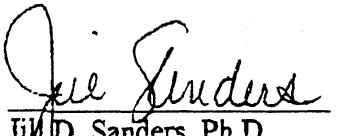
Based on the quality of their current relationship and the likelihood that Zachary and Peter will have extensive contact in the future, their attachment is likely to deepen and become more significant over time. If Kelly were not interested in continuing to parent Zachary, Zachary would likely develop a full father-son attachment to Peter because Zachary is so young and because they have had contact since infancy.

Zachary has the opportunity to experience two positive, important relationships with the two fathers in his life. Zachary has already established a meaningful relationship with both men. It is yet to be seen whether his fathers can establish a tolerant relationship with each other and allow Zachary to benefit from both relationships. There is no research that I am aware of that suggests having two positive father figures has a detrimental impact on a child.

But the outcome is in the hands of Kelly and Peter. If they can support Zachary's need to participate in both relationships, there will be little if any disruption for Zachary. If Kelly and Peter are in constant conflict the potential for damage to Zachary is considerable.

SUMMARY OPINION:

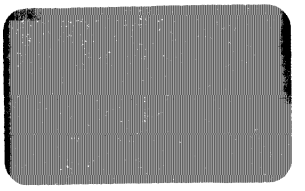
From a developmental and psychological perspective, Zachary's functioning is not inherently disrupted by Peter's involvement and Peter's relationship with Zachary is necessary to Zachary's normal and positive development.



Jill D. Sanders, Ph.D
Clinical Psychologist
May 13, 2002

Tab D

August 26, 2002



The Honorable Tyrone E. Medley
Third Judicial District Court
450 South State Street
Salt Lake City, UT 84111

Re: Pearson v. Pearson, Thanos
Case No. 004907881

Dear Judge Medley,

Your clerk has informed me that you wish me to address the issues raised by Ms. Bigelow in her letter dated June 13, 2002. To the best of my knowledge there are two specific issues that she felt should have been covered in my original evaluation report dated May 13, 2002. The first issue is the impact of a disruption in Zachary's relationship with Mr. Pearson. The second issue is Zachary's ability to understand his biological relationship to these parties.

As I stated in my letter to the Court dated July 22, 2002, these issues will be explored in more depth in my remaining interviews with the parties and will bear significantly on the parenting plan I develop. However, I can offer preliminary opinions on these two issues based on the interviews and observations I have conducted to date.

1. Impact of Disruption in Zachary's Relationship with Mr. Pearson.

The primary disruption in Zachary's relationship with Mr. Pearson occurred when Mr. and Mrs. Pearson separated. The separation reduced Zachary's exposure to Mr. Pearson by half. At that point in time, Zachary surely experienced some sense of loss and upheaval though it is highly unlikely that he has any verbal memory of those sensations. Zachary was nine months old at the time. He is now almost three years old. It is unlikely that Zachary has cognitively registered any further sense of disruption in his relationship with Mr. Pearson though he surely experiences the normal emotional difficulties and inconveniences that any child of divorce experiences. For more than two years Zachary has lived within the current parenting arrangement. His time with Mr. Pearson is not interrupted by the presence of Mr. Thanos. It is probable that Zachary experiences this schedule and the division of caretaking between parents as "normal"; it is really the only life he has ever known.

Referring to Dr. Denise Goldsmith's Affidavit dated August 28th 2001, I agree with her general comments about the importance of the first three years of life related to establishing psychological security through secure parent-child relationships. I particularly agree with her opinion that the period between eighteen and thirty-six months is critical to mastering the balance between emotional independence and dependence.

Jill D. Sanders, Ph.D.
Clinical Psychologist

7138 South 2000 East, Suite 105 • Salt Lake City, Utah 84121 • Phone (801) 944-1312 • Fax (801) 947-0017

Zachary and Mr. Pearson's primary disruption occurred at nine months. By eighteen months Zachary was firmly established in a loving, secure and relatively predictable relationship with Mr. Pearson, Mrs. Pearson and Mr. Thanos. Dr. Goldsmith states, "In order to successfully move through this developmental phase, it is imperative that the child be with trusted caregivers with whom they have already developed a close attachment." My observation of Zachary with Mr. Pearson and with Mr. Thanos leads me to conclude that Zachary enjoys close, though not necessarily equal, attachments with both men which were in place throughout the crucial eighteen to thirty-six month developmental phase.

There 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. Further disruption could occur under two conditions: 1) if any of these parents choose not to support Zachary's relationship with the other parties. A detrimental effect is created when and if caregivers compete with each other for the child's attention, affection and allegiance. Under those conditions Zachary's relationship with all three parties will be seriously disrupted; and 2) if Zachary's time with Mr. Pearson is drastically reduced. Zachary's emotional security would likely be significantly disrupted in the case of severely limited or complete loss of contact with Mr. Pearson.

Children's reactions to severely restricted or complete loss of contact with a loved and trusted caregiver vary dramatically from child to child. It is impossible to predict any child's specific response to such a disruption. Reactions may range from mild and transient symptoms of grief or depression to severe mood and behavior disruption including self-destructive behaviors. Obviously the way to protect Zachary from additional disruption is to maintain his relationship with Mr. Pearson. How much time is required to maintain the relationship is unknown. I am aware of no research that demonstrates some finite amount of time as necessary to maintain a significant relationship with a father figure. The requirements are idiosyncratic to each specific child and parent. Zachary's needs in this regard will be carefully considered as a part of the formal custody evaluation.

Based on the interviews I have conducted all three parties are dedicated to maintaining Zachary's relationship with the other parties. Whether or not they are able to behave according to their intentions is yet to be seen.

In summary, I do not believe Zachary has "lost" his relationship with Mr. Pearson. To the contrary, their relationship is a strong and positive parent-child attachment. Mr. Pearson's actual time with Zachary was disrupted by the separation but has been stable and significant for more than two years. There is no basis to believe that further disruption to the relationship between Zachary and Mr. Pearson is intrinsically linked to

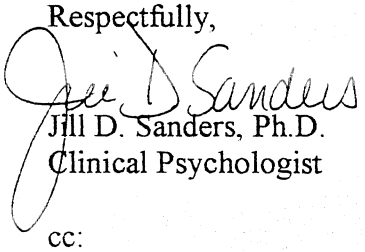
Mr. Thanos' presence in Zachary's life. Further disruption could occur if Mr. Pearson, Mr. Thanos and Mrs. Pearson choose to compete with each other for Zachary's affection and fail to provide Zachary with genuine permission to have a full and loving relationship with all parties, or if Zachary's time with Mr. Pearson is drastically reduced.

2. Zachary's Ability to Understand His Relationship With the Parties.

Zachary's cognitive ability at the age of three to understand the complexities of his parents' relationships is extremely limited. He can understand simple descriptions of the biological facts of his parentage in the same way that a three year old adopted child can understand the biological facts of his/her parentage. However, the emotional meaning of these relationships is unlikely to have much impact on Zachary for a quite some time. What Zachary currently understands is that he has a loving relationship with Mr. Pearson, whom he considers his father and a loving relationship with Mr. Thanos, whom he considers an additional caregiver. Whether or not Mr. Thanos' presence becomes a "replacement" or an "addition" depends entirely upon the parties' attitudes and behaviors towards each other and the natural evolution of Zachary's attachment to both men.

It is my hope that these parties handle Zachary's intellectual understanding of these relationships in the same way that parents who adopt handle the explanation of an adopted child's circumstances. It is never too soon to be open about the facts of the relationship, the child's questions must be openly and objectively addressed as they arise, and the child must be given permission to explore all parental relationships to their fullest conclusion without competition between the parents.

Respectfully,



Jill D. Sanders, Ph.D.
Clinical Psychologist

cc:
Paige Bigelow
Kruse, Landa & Maycock
8th Floor, Bank One Tower
50 West Broadway
P.O. Box 45561
Salt Lake City, UT 84145-0461

cc Continued:
Steven H. Gunn
Ray, Quinney & Nebeker
400 Deseret Building
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Kellie F. Williams
Corporon & Williams
808 East South Temple
Salt Lake City, Utah 84102

Tab E

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

Kelly Pearson
Petitioner
vs.
Kimberlee Y. Pearson
Respondent
and
Peter D. Thanos
Intervenor

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CHILD CUSTODY EVALUATION

Case No. 004907881

Judge Tyrone E. Medley

Commissioner Michael S. Evans

APPOINTED CUSTODY EVALUATOR: Jill D. Sanders, Ph.D., Clinical Psychologist

DATE OF SETTLEMENT CONFERENCE: August 13, 2003

DATE REPORT PERFORMED: November 3, 2003

MINOR CHILDREN & DATES OF BIRTH: Nicholas (7/6/97) and Zachary (9/14/99)

MOTHER: Kimberlee Thanos (f.k.a. Kimberlee Pearson)

FATHER: Kelly Pearson

OTHER PARTIES EVALUATED AND RELATIONSHIP TO CHILDREN:
Peter Thanos, now married to Kimberlee Thanos; biological father of Zachary Pearson and step-father to Nicholas Pearson

MOTHER'S COUNSEL: Steven H. Gunn

FATHER'S COUNSEL: Paige Bigelow

INTERVENOR'S COUNSEL: Kellie Williams

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CHILD CUSTODY EVALUATION

IDENTIFYING INFORMATION:

Pearson v. Pearson and Thanos
Case No. 004907881
Judge Tyrone E. Medley
Commissioner Michael S. Evans
Evaluator: Jill D. Sanders, Ph.D.
Date of Settlement Conference: August 13, 2003
Date of Final Report: November 3, 2003

REASON FOR EVALUATION:

Kelly Pearson, Kimberlee Thanos (formerly Pearson) and Peter Thanos have been unable to come to agreement regarding a parenting plan for Nicholas and Zachary Pearson. Nicholas is Kimberlee and Kelly's biological child. Zachary is Peter and Kimberlee's biological child, born during her marriage to Kelly Pearson. Kimberlee and Peter Thanos are now married, reside in Oregon, and have an infant daughter together. Kelly is unmarried and resides in Utah. Nicholas and Zachary have shared equal time with Kelly and Kimberlee since the Pearsons separated in May 2000.

METHODS OF EVALUATION:

Multiple individual interviews were conducted with Nicholas and Zachary's biological mother, Kimberlee; Nicholas' biological father, Kelly; and Zachary's biological father, Peter. The children were observed in the presence of each parent and in the presence of Peter and Kimberlee jointly. The boys were interviewed individually on two separate dates, once accompanied by Kelly and once by Kimberlee. Each parent completed psychological testing including the Minnesota Multiphasic Personality Inventory II, the Beck Depression Inventory, the Sentence Completion and a parenting questionnaire. The following collateral sources were contacted: Stormie Tisdale (former nanny), Sonja Traub, Ph.D. (Peter's therapist), Christopher Thanos (Peter's adult son), Vanessa Tomazini (nanny), Wendy Boyle (friend of Kimberlee and Kelly), Kristina Farrar (friend of Kimberlee and Kelly), and Jay Thomas, Ph.D. (consulting psychologist). Multiple court and personal documents were reviewed, including email between the parties. All documents were provided to counsel in October 2003 per a Subpoena Duces Tecum from Kelly's attorney, Paige Bigelow.

Jill D. Sanders, Ph.D.
Clinical Psychologist

5353 South 960 East, Suite 230 • Murray, Utah 84117 • Phone (801) 263-3335 • Fax (801) 263-2845

CASE BACKGROUND:

Kelly and Kimberlee began dating in May 1992 and married three months later. From Kelly's perspective the first two or three years of the marriage were very good as both partners focused on career development. He believes tension began to build as his desire to begin a family clashed with her career plans. According to Kelly, Kimberlee never truly focused on their relationship. From Kimberlee's perspective the marriage was difficult to begin with due to Kelly's controlling and angry demeanor in combination with her passive style. In 1995 Kimberlee developed a strong friendship with her co-worker, Peter Thanos. Because they were both married they attempted to limit their relationship in various ways and were committed to remaining married to their spouses. Peter's wife was diagnosed with cancer in 1996, which further complicated his decision making regarding Kimberlee. Kimberlee and Kelly had Nicholas in 1997. The relationship between Peter and Kimberlee grew and they started a sexual relationship in early 1998. In April 1999 Kimberlee told Kelly that she was pregnant with Peter's child and requested a divorce. Peter's wife was in the final stages of cancer and despite his desire to be with Kimberlee and Zachary he did not leave Sharlene during her final months. Zachary was born in September 1999 the Pearsons separated in May 2000 and Sharlene Thanos died in December 2000. Nicholas and Zachary have spent equal amounts of time with Kimberlee and Kelly since the separation. In July 2002 Kimberlee and Peter Thanos married and purchased a home in Oregon. Their daughter, Madelaine, was born July 13, 2003. Kimberlee has been returning to Utah from Oregon for her parent time with Nicholas and Zachary, maintaining a home in Utah for that purpose. Whenever possible she travels home to Oregon with the boys. Madelaine currently accompanies Kimberlee on her trips to Utah. Kelly has not remarried and resides in Salt Lake City.

The current access schedule is a one week/one week rotation with transitions occurring on Friday afternoons. Kimberlee flies from Portland, Oregon with her infant daughter, Madelaine, and lives in Salt Lake City during her access periods. She returns to her home with Peter in Oregon with the boys as much as possible. The boys are very comfortable in all three homes but this arrangement has no future. Nicholas and Zachary are fast approaching the time when geographical stability will be necessary for their normal development. Madelaine will soon reach the age when so much travel is disruptive to her need for routine and security of environment.

Kelly continues to live in the marital home in Salt Lake City. He has not remarried but retains a nanny when the boys are with him. He lives alone when Nicholas and Zachary are not in Utah. Kimberlee and Peter live in Portland, Oregon with Madelaine and the boys visit that home as often as possible.

CLINICAL SUMMARIES:

Kelly Pearson is forty-two years old. He comes from a close, supportive family. He gained an MBA from Brigham Young University in 1993 and has been steadily employed since that time. Presently he is a computer systems consultant for Agilent and works from home. Kelly has no history of psychiatric, legal or substance abuse problems. He had a limited relationship history before meeting and marrying Kimberlee. Despite the knowledge of Kimberlee's relationship with Peter Thanos, Kelly persisted in believing that the marriage would survive. He was willing to remain married and raise both Nicholas and Zachary. Kimberlee pursued the divorce. Kelly has not remarried. Kelly was an involved parent with Nicholas and earnestly assumed the role of father to Zachary. Psychological testing was within normal limits, suggesting that Kelly does not experience psychological or psychiatric problems that interfere with his overall ability to function.

Kimberlee Thanos is thirty-six years old. She maintains good relationships with her diverse family members. Since gaining an MBA from Brigham Young University in 1993, Kimberlee has been steadily employed as a computer systems consultant. Presently she works part time from home for a Utah based company. Kimberlee has no history of legal or substance abuse problems. She was treated for Generalized Anxiety Disorder by Lynda Steele, LCSW beginning in 1999 but has never been medicated for this or any other psychiatric disorder. According to Ms. Steele, Kimberlee's symptoms were primarily related to marital distress, the stress of having two very young children and occupational stress. Kimberlee's relationship with Kelly was her first significant relationship. She reported being unhappy very early in the marriage. Her relationship with a co-worker, Peter Thanos, evolved over a period of six years and they are now happily married. Kimberlee has consistently been a primary parent to Nicholas, Zachary and now Madelaine, age four months. Psychological testing was within normal limits, suggesting that Kimberlee does not experience psychological or psychiatric problems that interfere with her overall ability to function.

Peter Thanos is fifty-three years old. He maintains close relationships with his mother and sister, his father is deceased. Peter attended college but did not complete a degree. He was employed by HP/Agilent for twenty-four years and is now the Director of Operations for Cascade Microtech/Pyramid Probe Division. Peter had two serious relationships, including one brief marriage, before marrying Sharlene Gordon when he was twenty-three years old. Their twenty-five year marriage ended when Sharlene died of cancer in December 2000. Their one child, Christopher, is twenty-eight years old, married, and recently completed a Ph.D. from Brown University. Christopher described Peter as a very loving, involved and supportive father. Peter is eager and willing to parent Nicholas as well as his two biological children with Kimberlee, Zachary and

Madelaine. Psychological testing was within normal limits, suggesting that Peter does not experience psychological or psychiatric problems that interfere with his overall ability to function.

CHILDREN AT ISSUE:

Nicholas Pearson, age six, DOB: 7/6/97:

Nicholas is a bright, articulate and socially outgoing six-year-old boy. He is sensitive, vigilant and somewhat anxious, but he typically externalizes these characteristics rather than becoming withdrawn. He is a very good, curious and compliant student and is well liked by his peers. Organization and information help him feel in control so he actively seeks to gain and/or provoke information from others. He can become irritable and whiny or sad when his attempts to manage his environment and other people are thwarted. Nicholas will do well academically and socially. He responds very well to structure and reasoning and is highly unlikely to become a behavior problem. Nicholas' most significant needs fall in the emotional category. He is worried and confused about the future. I suspect that he often feels on the verge of chaos. He wonders if he will be able to manage all these relationships in his life and feels responsible for making his loved ones happy.

Nicholas requires some emotional supports which are easy to identify and not so easy to deliver:

- He needs consistent and predictable access to the important people in his life. He is a "counter" – he emotionally tracks the amount of time he spends with people and comes to internal conclusions as to whether he and they "got enough".
- Nicholas does not perceive flexibility of schedule or plan as a good thing. He needs consistency and predictability. He needs information and he needs to know when the information he has becomes obsolete.
- Nicholas worries about the people he loves. He needs to be told where people stand with each other and he needs to observe people acting in accordance with their words. He is very busy trying to figure out how to keep people happy and make these complex relationships work. He may actually be working harder at this than anyone else. He needs help from his parents through their role modeling of positive relationships and productive problem solving.
- Nicholas needs stable and consistent daily routines as a foundation for a less anxious view of the world.
- Nicholas' attachment to Kimberlee is very strong and his time with her should not be reduced below present levels.

Zachary Pearson, age four, DOB: 9/14/99:

Zachary is an active, curious, loving four-year-old boy. He is inquisitive, but somewhat reserved. He likes to take stock of situations before he dives in. He interacts with the world in a very physical manner, a characteristic that he will need to learn to manage. Based on his current developmental path it is unlikely that Zachary will have academic, social or behavioral problems. He is less guarded emotionally than Nicholas and seems less worried. The current situation does not appear to confuse Zachary; he treats all three parents as loved and trusted caregivers. He is a physical child and requires physical attention, play and nurturing to feel secure. Zachary also requires consistent attention to his skin condition. He will thrive under a high level of intellectual and physical stimulation. His attachment to Kelly is very strong and he would be traumatized if that relationship were to suddenly change. Kelly is clearly Zachary's psychological father at present and Peter is clearly his biological father and growing in importance. Zachary's relationship with Kelly must continue and his relationship with Peter must grow.

These boys have an exceptional sibling relationship. They are best friends. They need to reside together. They also now have an infant sister to whom they will no doubt become much attached. Separating these three siblings is not an option.

They are also developing a need for a well-coordinated explanation of their circumstance that is not contaminated by judgment and resentment. Failure to provide this will leave both boys on shaky ground in terms of their sense of origin, belonging and most importantly, their sense of being wanted, loved and accepted.

PARENTING INFORMATION:

Parenting Strengths - Kimberlee's parenting skills are excellent. She is very loving, well organized, and invested in education – even at home. When communicating with her children she uses clear, age appropriate language and is able to guide their behavior very effectively without becoming negative. Her parenting style is responsible and responsive. She recognizes the uniqueness of each child and understands her children's strengths and weaknesses.

Kelly's parenting skills are also excellent. He is highly involved with the children in all areas. He emphasizes play and companionship, along with education. He also communicates very clearly with the children and has no need or desire to be authoritarian in his attempts to manage their behavior. His love and devotion to both children is tangible and authentic. He is attuned to the boys' emotional needs and they sense his unconditional love.

Peter is the third excellent parent in this case. His gentle, calm demeanor makes him instantly available to the boys, both emotionally and physically. He is funny, creative and enjoys physical play. Under these unusual circumstances he has shown much patience and an understanding of the complex emotional environment the boys live in. His discipline style is slightly more authoritarian than Kimberlee or Kelly's style but this is a benefit to the boys under the circumstances. Peter has the advantage of having successfully raised another child to adulthood.

Parenting Weaknesses –

It is nearly impossible to talk about parenting weaknesses related to these three parents. The deficits are very minor in all three cases.

Kimberlee's primary weakness is probably her natural desire to do everything too well, sometimes failing to set reasonable limits for herself and thereby reducing her accessibility to others, including her children. As she overextends herself her preoccupation, irritability and stress increases.

Kelly's primary weakness is a tendency to overindulge the boys at times. He may give in too often to the demands of these children. He needs to be more diligent at controlling Zachary's eczema through daily treatment.

Peter's primary weakness may be his tendency to underestimate his own impact. Any firmness of tone of voice or angry body posture is so in contrast with Peter's general demeanor that the boys will take even the slightest negativity and exaggerate it in their own minds. Peter must be aware of his impact on the children and factor it into his behavior, especially when disciplining the children.

The greatest difficulty in this case lies not in the individual parenting deficits of these people, but in the complicated and tension filled interaction between the three of them. Kim experiences Kelly as controlling and emotionally abusive; Kelly experiences Kim as manipulative and insincere; Peter experiences Kelly as possessive and inattentive; and Kelly experiences Peter as angry and aloof.

Despite the negative tone of this triangular interaction, a generally positive decision making process has always existed between them, and they have managed quite well at keeping the children out of the fray. Nevertheless, the suspiciousness and sense of disapproval between Kelly and Kimberlee and Peter is high and the children sense it and react to it. The damage to the children will become more pronounced if these conflicts are not resolved.

Impairment – None of these parents has a history of impairment that impacts parenting.

Availability – Kelly currently works full time from home with limited business travel. Kimberlee currently works part time from home with very limited travel. Peter works full time outside the home with limited travel.

Facilitating a Relationship With the Other Parent - Kimberlee, Kelly and Peter have done an excellent job of maintaining the children's relationships with the other parents. There has been relatively little negative talk in front of the children. Kelly has a tendency to ask too many questions of the boys regarding Kimberlee and Peter. Peter and Kimberlee have the tendency to proceed with their parenting agenda, sometimes without fully considering Kelly's position. However, compared to other cases all three parents have done an exceptional job of promoting the worth of all relationships for the boys.

Unique Fit Between Child's Needs and Parents' Capacities –Individually, or in pairs, these three parents have the capacity to effectively parent Nicholas and Zachary. Each has minor weaknesses that scarcely dent the strong resources they have to offer these children. Their parenting styles are complimentary. They have similar major values and they recognize the importance of each other in the children's lives. Kimberlee and Peter offer the benefit of a parenting team, but it is likely that Kelly will remarry in the near future and offer a similar benefit to the boys.

Parents' Perception of Issues –

Kelly:
In an email dated July 31, 2003 Kelly wrote, "My concern since litigation began has always been that Peter and Kimberlee want to define my relationship with Zachary as one that is not a father son relationship when it clearly currently is a father son relationship." Kelly maintains that he is Nicholas and Zachary's real father despite the fact that Peter Thanos is Zachary's biological father. Kelly points to his hands on, fifty percent parenting of Zachary since Zachary's birth. He maintains that Peter's relationship with Zachary was slow in developing and that he has been the most consistent father. While he recognizes Peter's importance to both boys, he believes their best interests will be served by his being allowed to be their legal and joint custodial father. He worries that his relationship with Zachary will be diminished if Peter is allowed legal custody of Zachary. Kelly stresses Peter's unwillingness to forge a relationship with him, and sees that as a huge impediment to co-parenting. He worries that if his time with either child is reduced below fifty percent that he will lose his emotional and psychological place in their lives. Kelly worries that Peter and Kimberlee are sabotaging his relationship with Zachary by emphasizing the importance of the

biological relationship between Zachary and Peter. Though Kelly has offered at various times to move to Oregon to facilitate a joint access schedule, he is worried that he will not find suitable employment or potential marital partners there and worries about the lack of support from his extended family in Utah.

Peter:
In an email dated July 24, 2003 Peter wrote, "...the current roles that Kim and Kelly occupy exclude me from parenting Zacky, except for what time I get during Kim's time with the boys" and wrote on May 2, 2003, "I just can't understand how Zacky's natural parents, who are married, shouldn't have primary care of their son." Peter is worried that his limited time with Zachary will prevent the development of a healthy, normal father-son relationship. He is concerned that though Zachary is his biological child, his influence over Zachary and his right to make decisions will be severely limited. Peter wonders about the negative effect of Kelly's rigid ideas and positions on the boys' ability to establish relationships with each parent as they see fit. Peter is stumped by Kelly's unwillingness to recognize the importance of the biological bond between him and Zachary. He does not perceive Kelly as having attempted to establish any real relationship with him, and does not believe that Kelly is sincere in his protestations to the contrary. Peter sees Kelly as working harder to maintain his relationship with Zachary than with Nicholas; an effort that strikes Peter as misguided, unrealistic and unfair to Nicholas. He is also concerned about what he perceives as parenting deficits on Kelly's part - primarily related to health care and supervision issues. Peter is very concerned about his ability to gain equivalent employment in Utah if he is forced to relocate. He is very worried about his precarious financial position that is a result of supporting two homes in two different states as well as the ongoing costs of travel and litigation.

Kimberlee:
Kimberlee maintains that she has gone to great lengths to recognize, support and accommodate Kelly's position with the children. She feels she has been more willing to compromise from the very beginning than has Kelly. Kimberlee struggles with what she perceives to be Kelly's negative and intimidating attitude toward her and worries about the effect of this attitude on the children. Kimberlee points to her complete compliance with the court order regarding joint custody as evidence of her willingness to co-parent but stresses the extreme emotional and financial hardships that this places on her. Kimberlee worries about Kelly's ability to supervise the boys, his ability to manage Zachary's skin condition, his inability to isolate his anger and his "rigid" decision making process and its effect on Nicolas and Zachary. On January 21, 2003 Kimberlee stated "I think he (Kelly) legitimately hates me and Peter" and worries about the impact of his negative talk on the boys and their relationships with her and Peter. Kimberlee is concerned about the impact of time spent away from Oregon on both their marriage and Peter's relationship with Madelaine. She is concerned

that the lack of a stable, productive routine in one place will rob the boys of the stability they need and deserve. But more than anything, Kimberlee is concerned about Nicholas. She stated "I'm not worried about Zacky. The person who's losing in all this in Nicky" because Nicholas "has to pretend he doesn't like Peter". She perceives Nicholas as emotionally vulnerable because "Kelly's a better Dad to Zach than he ever was to Nick" and sees Nicholas as getting a lesser share of Kelly's attention and effort. She is also worried about the financial impact of continued travel and litigation.

Looking Ahead – The current access plan which requires Kimberlee to travel between Utah and Oregon is not sustainable on any level for anyone. The financial, emotional and physical costs are too high. Nicholas and Zachary have only a few more years where they are socially and academically "portable" and need to be established in one primary community soon. By fourth grade Nicholas will be making friends that could transition with him into junior high school. Both boys will be expanding their extracurricular activities and making long term activity commitments. Their exceptional relationship with each other will become even more important and their relationship with their sister will have an significant influence on their development as boys. Their relationships with each of their three parents will grow and evolve to suit their individual needs.

<u>RULE 4-903:</u>

1. Child's preference: Nicholas and Zachary are too young to assess their custodial options.

2. Benefit of keeping siblings together: These children are very best friends and it is likely that their sister will join their unusually strong relationship. They should not be separated.

3. Relative strength of the child's bond with one or both of the prospective custodians: Nicholas and Zachary have excellent relationships with all three parents.

4. General interest in continuing previously determined custody arrangements where the child is happy and well adjusted: Kelly and Kimberlee established a 50-50 parenting time arrangement that has worked relatively well but is not feasible over the long term if all parties do not reside in the same area.

5. Factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

i. Moral character and emotional stability: All three parents are of high moral character and exhibit emotional stability.

ii. Duration and depth of desire for custody: Equal

iii. Ability to provide personal rather than surrogate care: Generally equal

iv. Significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes: None

v. Reasons for having relinquished custody in the past: Not applicable

vi. Religious compatibility with the child: Kelly is a practicing Mormon; Kimberlee no longer practices the Mormon religion; Kimberlee and Peter support the boys' participation in religious training and activities.

vii. Kinship, including, in extraordinary circumstances, stepparent status: Peter and Kimberlee are Zachary's biological parents. Kelly and Kimberlee are Nicholas' biological parents. Kelly is Zachary's psychological father at present. Nicholas and Zachary have a very strong attachment to Peter.

viii. Financial condition: All parties have the capacity to support these children.

ix. Evidence of abuse of the subject child, another child, or spouse: None

F. Special Considerations/Recommendations:

Proximity to Parents: Zachary and Nicholas need to live in close proximity to Kimberlee, Kelly and Peter. This requires that either Kelly relocates to Oregon or Peter, Kimberlee and their infant daughter relocate to Salt Lake City. The benefits to the children remaining in Salt Lake City include stability of social, family and academic networks. Kimberlee's current job is headquartered in Salt Lake City though she works from home. The disadvantage is that Peter does not have adequate employment opportunities in Salt Lake City and he is the primary financial provider for their family. Additionally, Kelly's Salt Lake employment status could change in the very near future, requiring him to relocate. Being single, Kelly is more transportable and during negotiations, he offered to move to Oregon. Maintaining extended family, social and academic networks are of less concern than creating geographical and financial stability for the children at this

point in their development. Developmentally speaking, both boys are in a transportable stage. They have the capacity to positively adjust to a permanent move to Oregon.

If these parents can not make a realistic assessment of the options and come to a mutual decision an independent vocational advisor could assess the employment options in both locations for Peter and Kelly and choose which location offers the best options for both. Kelly has consistently made offers to move to Portland to maintain his relationship with the Nicholas and Zachary.

CONCLUSIONS:

This complicated case has no simple solution. As in all complicated cases it is tempting to focus on the provocative, and often times, negative aspects of a case and link recommendations to those high profile issues. In this case the provocative issues include a long term affair, a father eager to raise a son fathered by another man, a man unable to leave a dying wife to the detriment of his true love and new baby, and a mother reduced to making the very best of bad choices. These issues are part of the history of these children, but they have very little to do with their future and consequently, should have little bearing on a plan that takes Nicholas and Zachary forward from here.

Instead of relying on historical issues, these recommendations focus on present realities. Like all parents, these three have strengths and they have weaknesses. Like all parents, they could each improve. But any attempt to magnify their small personal foibles or minor parenting missteps into major differences is stretching far beyond the data. Worse, it would leave a legacy of misinformation for Nicholas and Zachary. Kelly Pearson, Kimberlee Thanos and Peter Thanos are fine people and excellent parents. Period.

What remains is a logistical problem. What arrangement will allow Nicholas and Zachary to have a significant relationship with all three of their parents and allow them to develop a relationship with their sister, Madelaine? What arrangement provides the most stability over the long term?

I am pivoting my conclusions around Kimberlee's role as the biological mother of both boys and their sister. She is the parent with the strongest inherent responsibility to all of these children, and it is a responsibility that she fully recognizes and embraces. She has honored the Court Order currently in place and bears the bulk of the physical, emotional and financial discomfort associated with it. She has done an exemplary job of facilitating Kelly's relationship with both boys. Meanwhile she has established a life in Oregon with Peter and Madelaine that fully incorporates Nicholas and Zachary.

Given her unequalled role in the lives of these children I recommend that the solution be centered on allowing Kimberlee to parent in an optimum manner She has chosen to establish a life for herself and her family in Oregon. This choice did not diminish her earning potential and maintains Peter's employment. It is a location familiar to Kelly and an area with probable strong employment options for him. The children consider Oregon to be one of their homes and are very comfortable in that environment. Currently single and working from his home, Kelly is the most portable of the three parents.

I am convinced that these parents will be able to create a good life for themselves and their children in Oregon and urge that Kelly relocate to Oregon in time for Nicholas to begin the second half of this school year there. Specific recommendations regarding legal responsibilities and access schedules are detailed in the following section.

RECOMMENDATIONS:

1. Legal custody. Kimberlee and Peter should be named joint legal custodians of Zachary. Kimberlee and Kelly should be named joint legal custodians of Nicholas. (During the Settlement Conference, Kimberlee and Peter proposed a three-way joint legal custody of Zachary. I am not opposed to this option as it ultimately gives Kimberlee and Peter a majority position). Kelly's special relationship with Zachary should be legally protected in the form of third party access with the responsibility to make daily decisions on Zachary's behalf when Zachary is in his care. Kimberlee and Peter will make school placement decisions for both boys if the children reside in Oregon. The choice of Utah school should be based on a comparison of test scores for each parent's neighborhood school. Both biological parents of each child must agree upon any elective medical or dental treatment. It would be best if decisions regarding any extracurricular activities would be jointly made by all three parents so that the boys' schedules are manageable. If this is not possible, Kelly and Kimberlee will jointly decide on Nicholas' activities and Kimberlee and Peter will jointly decide on Zachary's activities.

2. Access schedule. Regardless of whether this "extended family" lives in Salt Lake City or in Oregon the following schedule is recommended. However, my strong recommendation is that Kelly relocate to Oregon so that Nicholas can begin the second school term in Oregon:

    a. Continuation of the present seven day/seven day rotation. The children have been on this schedule since September and appear to be able to tolerate the amount of time away from the other parent.
    b. During the summer months Kimberlee/Peter and Kelly would have the option of a ten-day period of uninterrupted access to both

boys. Kelly will have first choice of that period in even years and Kimberlee/Peter will have the first choice in odd years. These periods may not be combined with regular access to form a block longer than ten days.

c. Beginning in the school year of 2004/2005 Nicholas will continue on the weekly rotation. Transitions would occur Sunday evening. Zachary will spend five nights with Kelly and either return to Kimberlee/Peter for the last two nights of the seven-day period or remain with them for the first two nights of Kelly's period (rotating each time). Nicholas would join Zachary at Kimberlee/Peter's on Sunday for his continuous seven-day period in that home. This arrangement keeps the boys on a highly predictable schedule, allows them to spend the vast majority of their time together, allows each of them some time alone with their biological fathers, and coincides with Peter's greater availability on the weekends.

d. Holidays may be rotated according to Utah guidelines, or according to mutual agreement, with only major holidays being included (i.e. UEA, Thanksgiving, Christmas, Spring Break, July 4th).

3. Transportation. Each parent will be responsible for picking up the children at the beginning of that parent's access period.

4. Review. This schedule will be reviewed in August 2005 and a revised schedule may be recommended at that time based on current circumstances.

5. Relocation. Once the decision is made to have the children reside in Oregon or Utah, which ever parent chooses to relocate there after agrees to not attempt to relocate the children but will propose a reasonable long-distance access plan.

6. Renaming. Zachary's first name should not be altered; his last name may be changed to reflect his biological parentage.

7. Religion. Both children may participate in religious activities as any of the three parties chooses during their access time. However, Zachary should not be confirmed or baptized or prepared for such events without the complete agreement of Peter and Kimberlee.

8. Attendance at school and extracurricular events. To whatever extent possible all three parents should be welcomed to attend all events for both children. If this becomes problematic, rather than expose the boys to toxic conflict, Kimberlee will develop an attendance rotation reflecting 50% attendance at all events for Kelly. Any or all three parents may volunteer in either boy's classroom.

9. Parenting Coordinator. Sandra Foster, LCSW, is recommended as a parenting coordinator to facilitate the relationship between Peter and Kelly and serve as an advisor for any parenting disagreements. If the parties reside in Oregon a similar professional should be identified to assist these parties.

10. Explanation. It is important that an explanation regarding the circumstances of each child's conception, birth and circumstances be crafted with the help of a child psychologist and provided to the boys in a united manner. Nicholas and Zachary need to hear a consistent presentation regarding these issues.

11. Phone access. Each parent may call the children once a day while they are in the other parents' care but phone calls initiated by the children should be unlimited.

Jill D. Sanders, Ph.D.
Clinical Psychologist
November 3, 2003

Tab F

UTAH CODE SECTION 30-3-10
30-3-10. Custody of children in case of separation or divorce -- Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent; and

(iii) those factors outlined in Section **30-3-10.2**.

(b) The court shall, in every case, consider joint custody but may award any form of custody which is determined to be in the best interest of the child.

(c) The children may not be required by either party to testify unless the trier of fact determines that extenuating circumstances exist that would necessitate the testimony of the children be heard and there is no other reasonable method to present their testimony.

(d) The court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the children's custody or parent-time otherwise. The desires of a child 16 years of age or older shall be given added weight, but is not the single controlling factor.

(e) If interviews with the children are conducted by the court pursuant to Subsection (1)(d), they shall be conducted by the judge in camera. The prior consent of the parties may be obtained but is not necessary if the court finds that an interview with the children is the only method to ascertain the child's desires regarding custody.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) Except as provided in Subsection (4)(b), a court may not discriminate against a parent due to a disability, as defined in Section **57-21-2**, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising from the disability by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.

(c) Nothing in this section may be construed to apply to adoption proceedings under Title

78, Chapter 30, Adoption.

(5) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

Amended by Chapter 356, 2004 General Session

Tab G

UTAH CODE SECTION 30-3-10.1

30-3-10.1. Definitions -- Joint legal custody -- Joint physical custody.

As used in this chapter:

(1) "Joint legal custody":

(a) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(b) may include an award of exclusive authority by the court to one parent to make specific decisions;

(c) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(d) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(e) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

(2) "Joint physical custody":

(a) means the child stays with each parent overnight for more than 30% of the year, and both parents contribute to the expenses of the child in addition to paying child support;

(b) can mean equal or nearly equal periods of physical custody of and access to the child by each of the parents, as required to meet the best interest of the child;

(c) may require that a primary physical residence for the child be designated; and

(d) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

Amended by Chapter 269, 2003 General Session

Tab H

UTAH CODE SECTION 30-3-10.2

30-3-10.2. Joint custody order -- Factors for court determination -- Public assistance.

(1) The court may order joint legal custody or joint physical custody or both if the parents have filed a parenting plan in accordance with Section **30-3-10.8** and it determines that joint legal custody or joint physical custody or both is in the best interest of the child.

(2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal or physical custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents;

(h) the past and present ability of the parents to cooperate with each other and make decisions jointly;

(i) any history of, or potential for, child abuse, spouse abuse, or kidnaping; and

(j) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a preponderance of the evidence.

(4) The court shall inform both parties that an order for joint physical custody may preclude eligibility for cash assistance provided under Title 35A, Chapter 3, Employment Support Act.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody or joint physical custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

Amended by Chapter 176, 2003 General Session
Amended by Chapter 269, 2003 General Session

Tab I

UTAH CODE SECTION 30-3-10.3

30-3-10.3. Terms of joint legal custody order.

(1) Unless the court orders otherwise, before a final order of joint legal custody is entered both parties shall attend the mandatory course for divorcing parents, as provided in Section **30-3-11.3**, and present a certificate of completion from the course to the court.

(2) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and

(e) as necessary, the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly.

(3) The court shall, where possible, include in the order the terms of the parenting plan provided in accordance with Section **30-3-10.8**.

(4) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(5) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other.

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order.

(c) The agreement shall contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

Amended by Chapter 126, 2001 General Session

Tab J

UTAH CODE SECTION 78-45a-10

78-45a-10. Effect of genetic test results.

(1) Genetic test results shall be admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy if:

(a) of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of Health and Human Services;

(b) performed by a laboratory approved by such an accreditation body; and

(c) not objected to with particularity and in writing within 15 days after the written test results being sent to the parties.

(2) (a) Upon a motion of a party, a court may receive testimony from genetic testing experts and others involved in conducting the genetic tests if the testimony:

(i) is based on a genetic test performed in accordance with Subsection **78-45a-7**(3)(a) or **78-45a-7**(4); and

(ii) is useful to the court in determining paternity.

(b) Unless a party objects with particularity and in writing within 15 days after the written test results are sent to the last-known address of that party on file under Section **78-45a-2**, testimony received under Subsection (2)(a) shall be in affidavit form.

(3) (a) A man is presumed to be the natural father of a child if genetic testing results in a paternity index of at least 150.

(b) A presumption under Subsection (3)(a) may only be rebutted by a second genetic test:

(i) that complies with Subsection **78-45a-7**(4); and

(ii) results in an exclusion.

(4) If a presumption of paternity established under Subsection (1) is not rebutted by a second genetic test under Subsection (2), the court shall issue an order establishing paternity.

(5) Bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

Repealed and Re-enacted by Chapter 232, 1997 General Session

Tab K

UTAH CODE SECTION 78-45a-10.5

78-45a-10.5. Parent-time rights of father.

(1) If the court determines that the alleged father is the father, it may upon its own motion or upon motion of the father, order parent-time rights in accordance with Sections **30-3-32** through **30-3-37** as it considers appropriate under the circumstances.

(2) Parent-time rights may not be granted to a father if the child has been subsequently adopted.

Amended by Chapter 255, 2001 General Session