

2004

Kelly F. Pearson v. Kimberlee Y. Pearson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KELLY F. PEARSON,
Petitioner/Appellant,
vs.

KIMBERLEE Y. PEARSON,
Respondent/Appellee.

PETER D. THANOS,
Intervenor/Appellee.

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)
) Case No. 20040677-CA
)
)

BRIEF OF APPELLANT

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

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UTAH APPELLATE COURTS

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JURISDICTION OF THE APPELLATE COURT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(h).

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the trial court erred in granting intervenor standing to challenge the paternity of the child Zachary born during petitioner and respondent's marriage. Standing is a legal issue and is reviewed for correctness without deference to the trial court. Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, ¶ 13, 65 P.3d 1134. This issue was preserved by petitioner's memoranda opposing intervenor's intervention (R.83, R.222 & R.453).

Issue 2: Whether the trial court erred in denying petitioner's motion for summary judgment to bar respondent and intervenor from challenging Zachary's paternity on grounds of equitable estoppel. The trial court's grant or denial of a motion for summary judgment is reviewed for correctness, and no deference is accorded the trial court's conclusions of law. Malibu Inv. Co. v. Sparks, 2000 UT 30, ¶ 12, 996 P.2d 1043. This issue was preserved by petitioner's motion for summary judgment and supporting memorandum (R.1361, R.1302).

Issue 3: Whether the trial court erred in ruling that respondent benefits from the parental presumption on her claim for custody of Zachary against petitioner. The trial court's determination of what legal standard to apply in a custody case is reviewed for correctness, with no deference given to the trial court. See In re H.R.V., 906 P.2d 913, 915 (Utah Ct. App. 1995). This issue was preserved by petitioner's trial brief (R.2177).

Issue 4: Whether the trial court erred in awarding intervenor custody rights in Nicholas, respondent primary physical custody of Nicholas, and respondent and intervenor joint legal custody and primary physical custody of Zachary. The trial court's custody awards are reviewed for abuse of discretion. Hudema v. Carpenter, 1999 UT App 290, ¶ 21, 989 P.2d 491. However, the trial court's discretion in custody matters must be exercised within the confines of the legal standards set by appellate courts, and the facts and reasons for the court's decision must be supported by legally adequate findings of fact and conclusions of law. Jensen v. Jensen, 775 P.2d 436, 438 (Utah Ct. App. 1989). The issue of custody was preserved by petitioner's trial brief (R.2177).

DETERMINATIVE PROVISIONS

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of this appeal or of central importance to this appeal.

STATEMENT OF THE CASE

Nature of the Case

This appeal is from a final judgment of the Third District Court establishing paternity of a child of the marriage in a third party, and entering orders regarding custody, child support, alimony, and attorney fees.

Course of Proceedings and Disposition in Court Below

Petitioner commenced divorce proceedings in December 2000 (R.1). Intervenor moved to intervene in the proceedings on January 23, 2001, claiming to be the biological

father of Zachary, one of the children born of the marriage (R.37). Concurrently, respondent filed a motion requesting that petitioner be declared to be not the father of Zachary and without visitation rights, and that temporary custody of both children of the marriage be awarded to her (R.32). Petitioner opposed both motions and requested that temporary custody of the children be awarded to him (R.56). All three motions came on for hearing before Commissioner Michael S. Evans on February 8, 2001 (R.122).

At the hearing, respondent attempted to proffer her testimony that petitioner was not Zachary's father. Petitioner objected on the basis of Lord Mansfield's Rule, which objections were sustained. In the absence of any competent evidence of petitioner's nonpaternity, respondent stipulated that custody should continue as it had since the parties' separation, namely, upon a 50/50 access schedule (R.122). The stipulation was accepted by the court and reduced to order (R.133).

On August 1, 2001, intervenor renewed his motion to intervene (R.165), which petitioner again opposed (R.222). The motion was heard August 30, 2001 (R.248). Commissioner Evans found that intervenor had not acknowledged **his** paternity of Zachary for more than two years, though he was aware of and believed himself to be Zachary's biological father, and that intervenor kept his biological connection to Zachary hidden from others, including his wife of twenty-six years, allowing Zachary to be regarded as petitioner's son and to become closely bonded with petitioner during critical stages of Zachary's development. Commissioner Evans further found that intervenor had not had substantial

contact with Zachary prior to the initiation of the litigation, that he had not lived with Zachary in the same household or established a parent-child bond with Zachary, that he was completely absent from Zachary's life for the first year and a half and had only incidental contact with him thereafter, that during intervenor's absence Zachary had developed critical bonds with his primary caregivers, petitioner and respondent, and that to permit intervenor to be introduced as Zachary's father would be disruptive to the child's stability.

Commissioner Evans concluded that intervenor did not have standing to challenge the presumption of paternity in favor of petitioner and that he did not have a constitutionally protected liberty interest in establishing his paternity of Zachary. The Commissioner's findings and recommendation were subsequently reduced to order (R.671). Intervenor and respondent objected (R.257, R.400).

The trial court heard argument on intervenor's and respondent's objections on December 3, 2001 (R.684). After taking the matter under advisement, the court in a telephone conference indicated that it felt the issue was governed by the case of State In re J.W.F., 799 P.2d 710 (Utah 1990), and that the court needed additional information to adequately address the policy considerations set forth in that case. Therefore, the court appointed Dr. Jill Sanders "to provide the court with an independent 'Schoolcraft evaluation (R.728).'"

Dr. Sanders submitted her "Schoolcraft evaluation" on May 13, 2002 (Ex.I-2). She stated in the report that "Kelly Pearson functioned as Zachary's father prior to and following

his birth in September 1999. . . . Zachary identifies Kelly as his father and their attachment is secure, strong and healthy.” Id. at 3, ¶ 2. She further stated that intervenor’s contact with Zachary was minimal until January of 2001, and that Zachary identifies Peter as “Peter.” Id. She stated that she “found no information to suggest that Peter’s involvement in Zachary’s life is a disruption to Zachary’s normal **and positive** development,” id. at 4, and that “[t]here is no research that I am aware of that suggests having two positive father figures has a detrimental impact on a child.” Id. at 5. She found that “Peter Thanos is Zachary’s biological father,” id. at 4, and speculated that “psychologically speaking, some relationship between a biological parent and their child is necessary for the child’s normal development.” Id. In summary, she opined: “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.” Id. at 5.

Upon receiving Dr. Sanders’ report, petitioner requested that Dr. Sanders address the impact on Zachary of a disruption in the **established** parent-child relationship **between** petitioner and Zachary, which she had not done. Petitioner also requested that Dr. Sanders address Zachary’s present ability to understand the biological facts of his parentage, or the relevance of it to him. Dr. Sanders refused to do so. Petitioner therefore requested a telephone conference with the court, which was held May 28, 2002 (R.847). The court permitted petitioner to outline his concerns in a letter to the court, which he did (R.876). Dr.

Sanders responded with a letter stating that she intended to address the issues raised by petitioner in the custody evaluation and did not deem it necessary to address them in the "Schoolcraft evaluation" (Ex. I-3).

Meanwhile, respondent filed a motion to bifurcate the divorce and to terminate her marriage to petitioner, which was granted. The court entered a decree of divorce dissolving petitioner and respondent's marriage on June 21, 2002 (R.855).

The district court subsequently requested Dr. Sanders to address the issues raised by petitioner. Dr. Sanders did so by letter dated August 26, 2002 (Ex. I-4). In this letter, Dr. Sanders stated: "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." Id. at 2. She went on to state: "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 [since respondent left the marital home]. 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." Id. at 2-3. Finally, Dr. Sanders stated that "Zachary's

cognitive ability at the age of three to understand the complexities of his parents' relationships is extremely limited. . . . [T]he emotional meaning of these relationships is unlikely to have much impact on Zachary for 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." Id. at 3. She ended with a statement expressing her 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." Id.

Thereafter, petitioner filed a motion requesting that the court **set the matter** for evidentiary hearing (R.869). In a telephone scheduling conference September 19, 2002, the court summarily denied petitioner's request and set the matter for one-hour oral argument October 1, 2002 (R.875).

After argument on October 1, 2002, during which no evidence was taken, the court granted intervenor's motion to intervene (R.894). Findings, conclusions and an order were signed over petitioner's objection on November 7, 2002 (**R.933, R.975, R.971**).

The following week, intervenor filed a motion for partial summary judgment requesting that he be declared "the biological and natural father of Zachary Andrew Pearson (R.989)." Intervenor filed his affidavit in support of the motion, attaching genetic test results and alleging sexual relations with respondent (R.1000). Intervenor did not allege that it was in Zachary's best interests for petitioner to be disestablished as Zachary's legal father and

made no argument or reference to Zachary's best interests, except to state that "issues in regard to standing have already been addressed by this court and need not be readdressed in this context as they are the law of the case (R.992, at 5)."

Petitioner objected to the admissibility of the genetic test results attached to intervenor's affidavit and moved to strike the report (R.1298). Thereafter, petitioner filed a cross-motion for summary judgment, arguing, inter alia, that intervenor and respondent were equitably estopped from challenging Zachary's paternity (R.1361, R.1302). Petitioner also filed a memorandum responding to intervenor's memorandum arguing, inter alia, that paternity should not be established absent a best interests hearing (R.1302). Intervenor and respondent filed separate memoranda responsive to petitioner's motion for summary judgment, each claiming, inter alia, that Zachary's best interests mandated that intervenor be declared Zachary's father (R.1376, R.1427).

Petitioner filed a reply (R.1598) and the affidavit of Douglas Goldsmith, Ph.D. (R.1592), disputing the claim that Zachary's best interests mandated that intervenor be declared Zachary's father. Dr. Goldsmith noted that the parent-child relationship involves a unique empathy between parent and child that develops most crucially between 9 months and 15 months of age, and that by the age of 18 months, a child has a fully formed conception of who his parents are. Id. at 3. Dr. Goldsmith took particular issue with Dr. Sanders' opinion that it is necessary for a child's normal development to have a relationship with his biological parents, stating, rather, that it is crucial to the child's normal development

to have a healthy and undisrupted relationship with his parent, who is defined as the person with whom the child has developed the unique parent-child relationship. Id. at 2-3.

Intervenor's motion for summary judgment, petitioner's cross-motion for summary judgment, and petitioner's objection to the admissibility of the genetic test results were set for oral argument March 5, 2003 (R.1658). After **argument**, the court took the matter under advisement and on March 11, 2003 issued its ruling orally in a telephone conference (R.1676). The court granted intervenor's motion for summary judgment and denied petitioner's motion for summary judgment and objection to the admissibility of the genetic test results. In subsequently entered findings of fact and conclusions of law entered over petitioner's objection (R.1684, R.1723), the court concluded that intervenor had established his paternity by proof beyond a reasonable doubt and that the presumption that petitioner is Zachary's father had therefore been rebutted (R.1723, at 18). The court further concluded that it had previously granted intervenor's motion to intervene based upon having established that it was in Zachary's best interests to permit intervenor to intervene, and that the court's findings and order were the **law of the** case. Id. at 19. With respect to petitioner's motion for summary judgment, the court concluded that the doctrine of equitable estoppel is inapplicable to the facts of this case. Id.

Thereafter, the matter was set for six-day trial on the issues of custody, alimony and attorney fees. At the conclusion of the evidence, the court took the matter under advisement, subsequently issuing written findings of fact (R. 2434) and entering a

supplemental decree of divorce (R.2503). The court applied the parental presumption against petitioner, denied him legal custody rights in Zachary, awarded primary custody of Zachary to respondent and intervenor, awarded primary custody of Nicholas to respondent, and granted respondent's request to relocate with both children to the State of Oregon. At the same time, the court found that it was in the children's best interests that there be a "joint physical custody arrangement" between the petitioner on the one hand, and respondent and intervenor on the other, consisting of a 50-50 custody schedule for Nicholas, and a somewhat less than 50-50 physical custody schedule for Zachary. The schedule was made contingent upon petitioner relocating to Oreogn. The court awarded no child support, alimony or attorney fees.

Statement of Facts

Petitioner and respondent were married in Salt Lake City, Utah on August 17, 1992 (R.2434, at 2, ¶ 1; R.2532, at 388:24). They met while both students at the MBA school at Brigham Young University (R.2532, at 387:14) and married after completing their first year. Id. at 389:1-12. Upon graduating in April of 1993, they both obtained jobs with Hewlett-Packard in Corvallis, Oregon, and moved there in June of 1993. Id. 390:1-5.

Respondent quickly advanced in the company and was promoted to a management position approximately 18 months later. Id. 391:17 – 392:21. Over the next few years her responsibilities continued to increase. Id. 394:12 – 395:19.

The parties' first son, Nicholas, was born July 6, 1997 (R.2434, at 2, ¶ 1). By this time, respondent had risen to the position of joint fab manager (R.2532, at 395:20). She worked long hours, sometimes until 3:00 a.m. and on weekends. Id. 394:12 – 396:4. She did not change her work habits after Nicholas's birth, and frequently was at work by 8:00 a.m., not returning until 7:00 p.m. and sometimes later, 8:00 or 8:30 p.m. Id. 396:18 – 398:11. She also worked on her days off during the week and on weekends. Id.

Conversely, petitioner made substantial changes in his work schedule and habits to accommodate Nicholas's birth. Id. 396:5 – 399:7. He switched to a four-day work week, did not work weekends, and did not work on his days off. He maintained a regular 40-hour work week and took care of Nicholas when he was not working. Id. Petitioner was more involved in the care of Nicholas than respondent due to respondent's longer work hours, greater church responsibilities, and her personal involvements outside the home (R.2533, at 462:19 – 463:3).

Due to a company consolidation, petitioner and respondent moved to Fort Collins, Colorado on August 1, 1998 and continued their employment there (R.2532, at 405:12). Almost immediately upon moving to Fort Collins, a friend of respondent's began recruiting her to work for a startup company in Salt Lake City, and petitioner and respondent began discussing moving again. Id. at 407:12 – 408:6. Initially petitioner said no, but ultimately he agreed to the move, in part because respondent's had been the greater salary. Id. at 411:17 – 412:10.

Respondent moved back to Salt Lake City in January 1999 to begin in her new position, and petitioner followed over the next several months, transitioning from Fort Collins to Salt Lake City. Nicholas stayed partly in Salt Lake City with respondent and partly in Fort Collins with petitioner during this transition. Id. 412:11 - 419:11 & Ex. P-11.

Unbeknownst to petitioner, commencing in 1996 and continuing thereafter through Nicholas's birth and infancy, and Zachary's conception, respondent was involved romantically with intervenor (R.2533, at 449:15; R.74, ¶¶ 4-6). Intervenor was also married at the time, and respondent and intervenor concealed their relationship from their respective spouses (R.74, ¶¶ 4-6). Respondent became pregnant towards the end of 1998, and in January 1999 she told intervenor that she believed the child was his. Intervenor refused to leave his wife and was unwilling to be known or recognized as the child's father (R.2535, at 961:14 - 962:25; R.74, ¶¶ 4-6).

Thereafter, in late March 1999, respondent told petitioner of the pregnancy and of the affair. She was four months pregnant by this time (R.2532, at 433:1; R.45, ¶ 4). When respondent told petitioner that she was pregnant with Zachary, she stated that she believed intervenor was the child's biological father. Petitioner and respondent then discussed the viability of their marriage, and respondent stated that she must decide whether to stay with petitioner or leave. She asked petitioner whether, if she stayed, he would rear the child as his own, making no distinction between him and their older son. Petitioner affirmed that he would (R.2532, at 433:12 - 435:2; R.1570, ¶ 4).

The following day after this discussion took place, respondent told petitioner that she had decided she would stay and make their marriage work (R.2532, at 435:3 – 436:8; R.1570, ¶¶ 4-6). From that point forward, until this litigation began, respondent repeatedly confirmed to petitioner that she considered him to be the father of the child she was carrying and that she would treat him as such in all respects (R.2533, at 450:8 – 452:8; R.1570, ¶¶ 4-6). Respondent expressed her fear that petitioner would not do so, and she repeatedly asked petitioner for assurance that he would, which petitioner gave. Id. Respondent also confided to petitioner that intervenor was unwilling to do anything that would reveal the situation to his wife and that he wanted his belief that he was the child's biological father to remain secret (R.2533, at 456:5-11; R.1570, ¶ 4).

Relying on respondent's repeated representations and assurances, petitioner took on the commitment of fatherhood and was as involved in the pregnancy as a father can be, caring for and supporting respondent, attending all prenatal examinations with her, and shouldering increased household duties to relieve respondent during the pregnancy (R.2532, at 438:16 – 439:12; R.45, ¶¶ 5-8; R.1570, ¶ 9).

After Zachary's birth, respondent again resumed her full work schedule, leaving petitioner with the lion's share of the responsibility for the children (R.457:2-6). She had by this time been working for several months in the high management position for the startup company by which she'd been recruited (R.2533, at 459:14). She worked long hours during the week, typically leaving by 8:00 a.m. and not returning until 7:00 or 8:00 p.m. or later.

She also worked full days on Saturdays and 4 to 6 hours on Sundays. Id. at 457:1-15.

She was around even less for Zachary than she had been for Nicholas. Id. at 459:11-23.

Petitioner, on the other hand, consciously stepped back in his career in order to care for the children (R.2532, at 431:1-17). He maintained a schedule of working 8:00 a.m. to 5:00 p.m.

Monday through Friday, and he did not work over-time or weekends (R.2533, at 457:20 – 458:4). He was involved in all aspects of the children's care. Id. at 458:7 – 459:23. He was the one who took Nicholas to school in the morning, and he was the one who would arrive home in the evening to relieve the nanny (R.2535, at 1071:11-15).

Respondent never acted inconsistently with her commitment to petitioner as Zachary's father until this litigation began (R.2533, at 452:12). She listed petitioner as Zachary's father on his birth certificate. The papers were filled out by both respondent and petitioner together after Zachary was born (R.2533, at 453:14 & Ex. P-9; R. 1570, ¶ 9 & 1580). Petitioner chose Zachary's given name because respondent had chosen Nicholas's given name (R.2533, at 454:4-10). Respondent and petitioner both agreed without question that Zachary's surname would be "Pearson" (R. 1570, ¶ 10).

When Zachary was 6 weeks old both petitioner's family and respondent's family gathered to bless Zachary as a member of the LDS Church. It was announced that petitioner Kelly Pearson, Zachary's father, would give Zachary his name and a blessing, and petitioner did so with members of both families participating. After the blessing, respondent spoke from the pulpit and expressed the joy that she felt to welcome Zachary into their

family. Respondent completed the form for Zachary's Blessing Certificate, signed by the Pearson's bishop, stating that petitioner is Zachary's father and that he blessed him (R. 2533, at 454:11 – 455:23 & Ex. P-10; R.1570, ¶ 11 & R.1581, R.1582). The Pearson's church membership record confirms that Zachary was "born in the covenant" and is therefore sealed to petitioner as his father for all time and eternity (R.1570, ¶ 12 & R.1583).

Even after petitioner and respondent separated and respondent moved from the Pearson's marital home in May 2000, she continued to act consistently with her repeated representations to petitioner that she considered him to be Zachary's father. She left both Zachary and Nicholas with petitioner while she established herself in a new residence, and thereafter acquiesced in petitioner caring for both children in the home during the day while she worked. She established jointly with petitioner a 50/50 time-sharing schedule to care for Nicholas and Zachary, which continued through September of 2004, when the court's newly imposed time sharing schedule took effect (R.2434, at 16, ¶ 34.d; R. 1570, ¶ 13).

It was not until January 2001, when divorce proceedings commenced, that respondent changed her position. At that time she filed a motion with the court asking that the court declare that petitioner was not Zachary's father and that he had no rights of custody or visitation in Zachary (R.32).

Nevertheless, while taking this position in court papers, respondent continued to represent petitioner as Zachary's father in public forums and to acquiesce in his ongoing assumption of the role of Zachary's father. At Zachary's pre-school, which Zachary started

in the Fall of 2002, respondent listed Zachary's home phone as "Dad – 467-8923", petitioner's home phone, and his grandparents as "Velda and Wayne", petitioner's parents (R.1570, ¶ 15 & R.1587). Petitioner is listed as Zachary's father at work, at Zachary's school, on the church records, and in this state's vital records (R.1570, ¶ 14 & R.1580-91).

Intervenor also acquiesced in petitioner's assumption of the role of Zachary's father. Knowing of Zachary's existence before even petitioner did, and believing himself to be Zachary's father from the time he learned of respondent's pregnancy in January 1999, he allowed petitioner to assume that role for two full years, doing nothing to acknowledge his paternity (R.2535, at 963:1; R.671, ¶ 9). He felt that he would be "Uncle Pete" to Zachary rather than father, yet he acquiesced in that occurring (R.2535, at 964:8-16; R.2536, at 1302:21 – 1303:21; R.449, at 2, ¶ 4). He kept his biological connection to Zachary hidden from others, including his family members, until as late as August 2001 (R. 671, ¶ 9).

Despite his belief and knowledge that he was Zachary's biological father, intervenor allowed Zachary to be regarded in every way as petitioner's son and to become closely bonded with petitioner during critical stages of Zachary's development. Id. Intervenor's desire to keep Zachary's parentage secret also resulted in minimal contact between Zachary and intervenor during these critical stages (R.2434, at 19). During the first year of Zachary's life, intervenor saw him twice, each time about an hour (R.2535, at 964:17-21). During the second year of Zachary's life, until February 2001, he saw him two to three times (R.2535, at 964:22-25; R.2434, at 4, ¶ 9).

On December 25, 2000, intervenor's wife died (R.2533, at 635:20). Beginning in February 2001, intervenor began to have contact with Zachary and Nicholas during the periods of time that the children were in respondent's custody (R.2434, at 4, ¶ 9). Zachary was seventeen months old by this time. The contact consisted of approximately the equivalent of standard visitation for a noncustodial parent (R.2534, at 716:8). Intervenor continued to live in Oregon through the time of trial (R.2434, at 4, ¶ 8).

Nicholas and Zachary make no distinction between themselves in their relationship with intervenor, identifying him as their step-father and calling him "Pete" (Ex. I-2, at 3; R.2535, at 950). To both children, intervenor is a stepparent, not a parent (R.2534, at 711:17). Nor do Nicholas and Zachary make any distinction between themselves in their relationship with petitioner, identifying him as their father and calling him "Dad" (Ex. I-2, at 3; Ex. I-4, at 3; R.2434, at 19). Nicholas and Zachary's primary attachment figures are petitioner and respondent (R.2534, at 715:11, 716:18). They have a "secondary" attachment to intervenor (R.2534, at 716:14).

In May 2001, a few months after the first court appearance in this case, respondent voluntarily quit her executive position at the company where she had been working since February 1999 and took a position as a contractor working approximately 80 to 85 hours per month (R.2536, at 1155:3 – 1157:14). Prior to changing positions, she was expected to work 50 to 70 hours per week and keep minimum office hours of 9:00 a.m. to 6:00 p.m. each weekday (R.762, ¶ 16). She was also earning a salary of \$135,000 per year, plus a

bonus of \$5,000 (R.1224:8-16). After changing positions, she filed a motion with the court requesting that she be relieved of her child support obligation due to having experienced a significant decrease in income (R.782, R.762, ¶ 15). Commissioner Evans denied the motion, finding that because respondent's drop in income was voluntary, her support obligation should not be decreased (R.848, ¶ 8).

At the time of trial, respondent was employing a nanny to provide after-care for Nicholas and Zachary consisting of, on average, 35 hours per month (Ex. R-9; R.2536, at 1204:6 – 1207:10). This was for time that respondent had the boys with her at her home (every other week) and the boys were not in school (R.2536, at 1262:4). Zachary attended pre-school until 11:30 a.m., and Nicholas attended first grade until 3:00 p.m. at this time. Id. at 1160:16 – 1161:12. Conversely, petitioner did not employ a nanny, and was able to care for the boys personally in his home (R. 2535, at 494:21 – 495:18). He provided care on all levels, cooking for them, taking them to school, helping them with homework, educating them, playing with them, arranging play dates for them, seeing to their medical needs, and participating in their school and extra-curricular activities (R.2533, at 493:1 – 494:20).

Respondent maintained a home in Salt Lake City through the time of trial (R.2434, ¶ 9), but began living partially with intervenor in July 2001, when they purchased a home together in Oregon (R.2434, at 4, ¶ 8). Respondent was still married to petitioner at this time. On June 21, 2002, respondent obtained a bifurcated decree of divorce from petitioner (R.855). Shortly thereafter, respondent and intervenor married (R.2434, at 4, ¶ 7).

At the time of trial, Zachary had lived in Salt Lake City his whole life, having been born here, and Nicholas had lived here from the time he was approximately 19 months old (R.2532, at 412:21 – 415:7). Nicholas was in first grade at Uintah Elementary and Zachary was in pre-school at the Jewish Community Center. Id. 487:2-8. In a 4-week period of time the boys would spend one extended weekend in Oregon at intervenor and respondent's home there (R.2535, at 1074:5 – 1075:13). They spent the rest of their time in Salt Lake City, either at petitioner's home or respondent's home. Id.; R.2533, at 487:10-16. The children enjoyed very close and loving relationships with both sets of grandparents, as well as uncles, aunts, and cousins in Salt Lake City (R.485:8 – 487:1; R.2531 at 93:1 – 100:18; R.2531, at 182:5 – 187:18).

At trial, petitioner testified at length regarding why he did not wish to move to Portland, including, primarily, that he felt that Salt Lake City was the best place for Nicholas and Zachary due to the continuity of neighborhood, school and friends, the extensive family network, and the lack of a support network for him in Portland, which could result in the children losing him as a co-parent if he were unable to sustain himself there (R.2532, at 424:5 – 427:12). Additionally, he testified that he felt deeply concerned that respondent might choose to move again, even if he did move to Portland. Id. at 427:13 – 429:23. Nevertheless, he testified that he would be forced to follow if the court allowed respondent to relocate the children because they were the most important thing to him. Id. at 430:23 – 431:22).

Zachary and Nicholas have been raised together since birth and have a close, loving relationship with one another. Until September 2004, when the court's new custody schedule took effect, they had very seldom been separated from one another (R.27, ¶ 5). They are the very best of friends (R. 2434, at 15, ¶ 34.b). At trial, respondent testified that the time apart recommended by Dr. Sanders for the two boys was "more than she would like to see." R.2536, at 1211:15-22.

SUMMARY OF ARGUMENT

The trial court erred in granting intervenor standing to establish his paternity of Zachary in this divorce action. In doing so, the trial court did not adequately consider the policies informing the presumption of legitimacy, including, prominently, the importance of swiftly and permanently identifying those persons who will fulfill the parental role for children – including marital children. Additionally, the trial court did not identify or weigh the constitutional interests at stake in this controversy, which resulted in its erroneous conclusion that intervenor's rights in Zachary are constitutionally protected, in turn leading to the court's over solicitousness of the relationship between intervenor and Zachary.

The trial court also erred in concluding that equitable estoppel is not applicable to bar intervenor and respondent from litigating Zachary's paternity, based on the uncontroverted evidence set forth in support of petitioner's motion for summary judgment.

With respect to custody, the trial court erred in concluding that respondent benefits from the parental presumption vis-à-vis petitioner in her claim for custody of Zachary.

Petitioner's legal relationship with Zachary (prior to disestablishment by the trial court) combined with his *in loco parentis* status, qualify him as a parent to Zachary and entitle him to compete for custody based on a best interests standard.

The trial court also abused its discretion in awarding primary physical custody of Nicholas to respondent. The court's findings are internally inconsistent with respect to this award, and legally insufficient to support it. Further, the trial court abused its discretion in awarding custody rights in Nicholas to intervenor, who was not a contestant for custody of Nicholas and did not overcome the parental presumption in favor of petitioner and respondent. Additionally, the trial court erred in separating Nicholas and Zachary – an award that flows from its improper application of the parental presumption against petitioner, and not on best interests findings to support it. Finally, the trial court erred in failing to make findings that are legislatively mandated and/or pertinent to the determination of the children's best interests in this case.

ARGUMENT

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

A. Schoolcraft Analysis

A husband's rights in children born to his marriage have, from ancient times, been protected by the presumption of legitimacy. In Holder v. Holder, 340 P.2d 761 (Utah 1959), the Utah Supreme Court noted that the presumption "is rooted in the realization of the

importance of the integrity of the legally recognized family as the basic unit of society,” id. at 762, and held: “The presumption of legitimacy will prevail unless the contrary is proved beyond a reasonable doubt. . . . The considerations favoring legitimacy render it desirable as a matter of policy that the presumption should be accorded the same weight as the presumption of innocence.” Id. at 763.

The Utah Supreme Court reiterated the continuing importance of the policy considerations informing the presumption of legitimacy in State in re J.W.F., 799 P.2d 710 (Utah 1990) (“Schoolcraft”). Schoolcraft involved a child, J.W.F., born to Linda Schoolcraft after she had been separated from her husband, Winfield Schoolcraft, for seven months to one year. Id. at 712. Mr. Schoolcraft became aware of the child's existence when he received notice of termination proceedings that had been initiated in the juvenile court. He promptly filed a petition for custody of the child.

Reversing this court's holding that the guardian ad litem for the child had standing to challenge Schoolcraft's paternity of him, the supreme court stated that the analysis was “insufficiently sensitive to the legitimate policy considerations Schoolcraft raises.” Id. at 713. The court articulated the policies of “paramount consideration” to be: (1) “preserving the stability of the marriage,” and (2) “protecting children from disruptive and unnecessary attacks upon their paternity.” Id. The court concluded: “[W]hether individuals can challenge the presumption of legitimacy should depend not on their legal status alone, but

on a case-by-case determination of whether the above-stated policies would be undermined by permitting the challenge.” Id.

Applying the articulated standard to the facts before it, the court found that the marriage between Schoolcraft and J.W.F.’s mother, who separated long before J.W.F.’s birth, and probably even before his conception, was “one in name only.” As to the interest in protecting J.W.F., the court found that J.W.F.’s “expectations as to who his father is cannot be shaken by permitting a challenge to the presumption of legitimacy. The child has never had a relationship with Schoolcraft, [his biological father], or even his mother, so he has no expectations as to who his father is.” Id.

In the context of this case, the policy of protecting marriage takes on broader implications than were present in Schoolcraft. The Pearsons, unlike Mr. Schoolcraft and his wife, who lived together for eight months and separated before any children were born or likely even conceived of their union, lived together for ten years and jointly participated in the rearing of two children together in an intact family unit. Though they have now divorced, petitioner and respondent continue to participate in the rearing of two children together in separate households. The Pearsons was not a marriage “in name only.”

As noted by the Florida Court of Appeals in S.D. v. A.G. and J.G., 764 So. 2d 807, 810 (Fla. Ct. App. 2000, “Although divorce may separate and strain a family with children, divorce does not end the important child-rearing functions of the family.” Thus, the presumption of legitimacy protects not only the tranquility of an existing marriage and the

legitimacy of children born into a marriage, but also the sanctity of the parent-child relationship that develops in the context of marriage. From the standpoint of the child born into a marriage, the protection that is afforded by the presumption of legitimacy does not depend on the continued existence of the marriage, but to the contrary, acquires particular relevance when the marriage dissolves. Our sister state so recognized in In re Marriage of Freeman, 53 Cal. Rptr. 439 (Cal. Ct. App. 1996), where the court emphasized: "The state's interest in applying the [conclusive] presumption [that the husband is the father of children born into his marriage] is not limited to assuring adequate support for a child or protecting existing marriages from interference. Rather, as we have noted, the state has a well-recognized interest in preserving and protecting the dignity of parental relationships, especially when a marriage is being dissolved and instability is being introduced into a child's life." Id. at 448; see also Susan H. v. Jack S., 30 Cal. App. 4th 1435, 1442-1443 (1994)("The state has an 'interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability.' This interest is served notwithstanding termination of the mother's marital relationship with the presumed father.").

The importance of the marital family as the basic unit of society is grounded in large part on the role that marriage plays in nurturing young children. "A child's psychological tie to a parent is not a simple, uncomplicated relationship. A child requires from his parents not only bodily comfort and gratification, but also demands affection, companionship, and

stimulating intimacy. Where these needs are answered reliably and regularly by the parent, the child-parent relationship becomes firm, with immensely productive effects on the child's intellectual and social development. Where there are changes of the parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident." See In re Marriage of Ross, 783 P.2d 331, 338 (Kan. 1989) (citing Goldstein, Freud, & Solnit, Beyond the Best Interests of the Child, 17-20)

Thus, while genetic testing has become scientifically reliable to the extent that even the highest standard of proof required to rebut the presumption can be met, courts have nevertheless sustained the mandate of privileging the marital family and protecting children from disruption of the relationships developed within it. In California, the courts sustained the presumption from the attack that it no longer bore a reasonable relationship to the facts sought to be presumed by designating it a substantive rule of law. See In re Marriage of Freeman, 53 Cal. Rptr. 2d at 445 ("A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature.") (quoting Kusior v. Silver, 7 Cal. Rptr. 129 (1960)). This Court has also recognized that the presumption of legitimacy is grounded not in considerations of fact, but in public policy. See Theros v. Metropolitan Life Ins. Co., 407 P.2d 685, 692 n.5 (Utah 1965) ("[T]he so-called absolute presumption of legitimacy of a child born in wedlock is based on considerations of public policy rather than absolute certainty as to fact.").

Thus, while the Schoolcraft opinion considered a marriage “in name only,” the 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. The stability of the parent-child relationships that are formed within such marriages are of ongoing significance to the well-being of society and as such are entitled to the ongoing protection of the state, though the union between the husband and the wife dissolves.

Moreover, for the state to endorse a policy whereby protection of the parent-child relationship ends upon one partner to the marriage deciding to end the marriage – which can be done in this state without proof of fault – leaves any husband who lives with a wife who has had an affair – whether he knows of the affair or not – vulnerable to having the children he rears taken from him without recourse when the marriage ends. Such a policy would undermine marriage in general by discouraging reconciliation and/or the formation of parental bonds with children of the marriage.

In this case, the trial court's ruling, if upheld, would indict rather than support petitioner – and husbands in similar situations – for attempting to save his marriage. Petitioner agreed to attempt reconciliation with his wife, and as part of that reconciliation promised to raise the child she had conceived of an affair with another man as his own. After having done so, and investing emotionally, financially, and in every other way in the child, respondent changed her mind, decided she would rather be with intervenor, and asserted that petitioner had no parental rights in the child. The trial court endorsed

respondent's assertion, allowed intervenor standing to disestablish petitioner as the child's father, and ultimately deprived petitioner of any legal custody rights in the child, allowing him only physical access rights as a non-parent "third party".

If this court upholds the trial court's ruling, any husband who find himself in petitioner's position would be foolish to make the choice that petitioner did, knowing that the relationship he establishes with the child of the marriage will be at the whim of the wife. And, the marital child is left in the uniquely vulnerable position of being in a state of limbo – without the protection of permanency afforded the non-marital child by adoption statutes, and without the protection of permanency traditionally afforded the marital child by the presumption of legitimacy.

The other policy consideration informing the presumption of legitimacy that the supreme court identified in Schoolcraft, that of protecting children from disruptive and unnecessary attacks upon their paternity, is inter-related with the policy of protecting marriage, and as with that policy, takes on broader implications in the context of this case. Whereas in Schoolcraft, the child at issue had never had a relationship with Mr. Schoolcraft, the child whose paternity is at issue in this case, Zachary, lived together with petitioner, respondent and his older brother, Nicholas, for the first nine months of his life, and thereafter, lived together with petitioner and Nicholas. By the time intervenor moved to intervene, Zachary was 17 months of age. He had formed a strong and secure parent-child bond with petitioner and had a fully developed understanding of who his parents were.

This state has clearly articulated the paramount importance of ensuring the early and uninterrupted bonding of infants with their parents, see Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984), and has developed a "swift permanence" policy in both the adoption and child welfare context. See In re J.M. & N.P., 940 P.2d 527, 539 n.8 (Utah Ct. App. 1997). In the context of children born outside of marriage, the supreme court states:

It is and should be the policy of the law to so operate as to encourage the finding of suitable homes and parents for children in that need. It is obvious that persons who might be willing to accept a child for adoption will be more reluctant to do so if a consenting parent is permitted to arbitrarily change her mind and revoke the consent, and thus desolate the plan of the adoptive parents and bring to naught all of their time, effort, expense and emotional involvement.

See id.(quoting In re Adoption of F., 488 P.2d 130, 134 (Utah 1971). Moreover, our legislature has found:

(a) The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

...

(c) Adoptive children have a right to permanence and stability in adoptive placements;

(d) Adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(e) An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. . . .

Utah Code Ann. § 78-30-4.12(2) (2004).

In the marital context, it is no less essential to provide children and marital fathers with permanence and stability in their parent-child relationships. To adopt a policy that would allow the legal relationship between marital fathers and the children of their marriage to be disestablished at any time by a blood test is to afford marital fathers less protection than prospective adoptive parents, and to afford children born into marriage less permanence and stability than children born outside of marriage. Marital children are entitled to the same protection and the same permanence in the relationships they develop with their parents as are non-marital children.

In this case, the trial court did not adequately consider the relevant policy considerations attending the question of whether the presumption of legitimacy should have been allowed to be rebutted. The court refused to take evidence on the issue – while noting that “[t]here is no competent evidence before the court to suggest that allowing Mr. Thanos to intervene would be disruptive” – and instead summarily adopted Dr. Jill Sanders’ report, informed by her unsupported view of the general importance – not to Zachary in particular – of the biological relationship between parents and children and her speculation regarding the future importance to Zachary of his relationship with intervenor.

While Dr. Sanders may have expertise in custody evaluations, she has no expertise in biological versus non-biological relationships between parents and children. Dr. Douglas Goldsmith does have this expertise, both from his work as executive director of The Children’s Center, and his teaching and publishing on attachment theory. See R. 2531, at

113:23 – 118:15. Had the court permitted an evidentiary hearing before deciding the crucial issue of standing in this case, the court would have had the benefit of Dr. Goldsmith's expertise. As it was, the court had already disestablished petitioner as Zachary's legal father by the time of trial, when Dr. Goldsmith testified that there is no distinction in the process of attachment between a biological parent and child on the one hand and a non-biological parent and child on the other, id. at 120:17 – 121:13, that it is not essential, as Dr. Sanders' opined in her report, for children to have a relationship with their biological parent, id. at 160:3-12, that from the child's point of view, the presence or absence of a biological tie makes no difference as between caregivers, id. at 160:13 – 162:13, and that to a child of Zachary's age, the biological tie to a father has no meaning, id. at 163:17 – 164:20.

Further, as a custody evaluator, Dr. Sanders has no expertise in public policy and is unqualified to address the paramount concerns that the presumption of legitimacy protects. This failure is evident in the court's findings, which fail to address the paramount consideration whether disestablishing petitioner as Zachary's legal father (as opposed to allowing intervenor to intervene, which is the question that Dr. Sanders answered) would be disruptive to Zachary, or whether intervenor's untimely interest in developing a relationship with his putative son should take precedence over the protection of the established parent-child relationship between petitioner and his marital son.

The court erred in failing to conduct a proper standing analysis. A proper analysis would have required the court to address the policy concerns set forth above and to take

evidence on and make findings addressing those concerns, including, at a minimum, the risk to Zachary of losing legal protection in the relationship with the man he knows as his father, and the importance to him of having early, permanent and uninterrupted identification of those individuals who will function as his parents.

B. Constitutional Analysis

Petitioner was Zachary's legal father until he was disestablished as such by the trial court. He was not merely a "presumptive" father. "Under any other interpretation, a husband could never be more than a presumptive father absent an adjudication of paternity." G.F.C. v. S.G. and D.G., 686 So. 2d 1382, 1385 (Fla. Ct. App. 1997).

As Zachary's legal father, petitioner enjoyed all the rights, duties and obligations of a parent, and those rights are protected by the Constitution of this state. Article I, § 7 of the Utah Constitution guarantees that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art. I, § 7. Article I, § 25 ensures that the constitution's enumeration of rights "shall not be construed to impair or deny others retained by the people." A husband's legal relationship with a child that is born into his intact marriage and with whom he establishes an enduring parent-child relationship equal in all respects to the relationship he enjoys with other children of his marriage, is undoubtedly a liberty interest, as well as an inherent and retained right protected by the Utah Constitution.

In In re J.P., 648 P.2d 1364 (Utah 1982), this Court addressed the constitutionality of a statute that authorized the juvenile court to involuntarily terminate a mother's parental

rights upon finding that it would be in the best interests of her child to do so. Id. at 1374. In holding the statute unconstitutional, the Court began by referencing its previous decisions, in which the following had been declared: “[T]he ideals of individual liberty which protect the sanctity of one’s home and family” are “essential in a free society” Id. at 1372 (quoting In re Castillo, 632 P.2d 855, 856 (1981)). A parent has a “fundamental right, protected by the Constitution, to sustain his relationship with his child.” Id. (quoting State in re Walter B., 577 P.2d 119, 124 (Utah 1978)).

Acknowledging that the Court had not attempted to define with exactness the liberty interest guaranteed by the Constitution, nevertheless, it was felt to include, without doubt, “the right of an individual to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” Id.

Addressing those rights retained by the people, the Court stated that “[t]he rights inherent in family relationships – husband-wife, parent-child, and sibling – are the most obvious examples of rights retained by the people. They are ‘natural,’ ‘intrinsic,’ or ‘prior’ in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property.” Further, “[t]he integrity of the family and the parents’ inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture. . . . ‘To protect the [individual] in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government

is established.’ ‘The family is the basis of our society.’ ‘The family entity is the core element upon which modern civilization is founded.’ ‘This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.’” Id. at 1373 (citations omitted).

The Court went on to address the rights of parents in different circumstances as expressed in United States Supreme Court cases interpreting the federal constitution, stating: “Parental rights are at their apex for parents who are married. Some variation exists among unwed fathers.” Id. at 1374. Applying these principles to the case before it, the Court emphasized: “The parental liberty right at issue in this case is fundamental to the existence of the institution of family, which is ‘deeply rooted in this Nation’s history and tradition.’” Id. at 1375 (quoting Moore v. City of East Cleveland, 431 U.S. 494 (1977)). It was this “rooting in history and the common law” that the Court emphasized “validates and limits the due process protection afforded parental rights.” Id. The Court concluded: “For the reasons and upon the precedents discussed above, we conclude that the Utah Constitution recognizes and protects the inherent and retained right of a parent to maintain parental ties to his or her child under Article I, § 7 and § 25, and that the United States Constitution recognizes and protects the same right under the Ninth and Fourteenth Amendments.” Id. at 1377.

The parent-child relationship that is protected by the precedents and reasoning set forth in In re J.P. is no less protected because it is grounded in the institution of marriage

rather than in biological conception. Nowhere does the Court isolate parenthood from family in discussing its inherent and fundamental nature. Now, more than ever, marriage and marital relationships are in need of the law's protection.

Petitioner's relationship with Zachary is a natural relationship in that it does not exist by operation of a decree, but rather by virtue of petitioner's assumption of the legal and moral obligation to father the children that are born to his marriage, and "the emotional attachments that derive from the intimacy of daily association." Lehr v. Robertson, 463 U.S. 248, 261 (1983) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972)). It is by no means clear that petitioner is not the "natural" father of Zachary by his acceptance and fulfillment of his natural, moral, legal, and socially sanctioned role as husband and father. See Black's Law Dictionary, at 534 (Abridged 5th ed. 1983).

Nevertheless, the relationship can be analogized to an adoptive relationship in the sense that it is not a "blood" relationship. In Bonwich v. Bonwich, 699 P.2d 760 (Utah 1985), this Utah Supreme Court refused to accord any distinction between the parental relationship that exists between the legitimated child to his biological father and the adopted child to his adoptive mother. The court stated: "The status of an adopted child is in all respects identical with that of a natural child. The relationship of the adoptive parent and the child is the same legally as that of natural parent and child, with all the rights and duties of that relationship. That status remains inviolate irrespective of a subsequent divorce." Id. at 763. The Court further noted that "many parents who have had both natural and

adopted children attest that it was impossible to make a distinction between the affection they have for the natural and the adopted children.” Id. n.2 (quoting In re Adoption of D., 252 P.2d 223 (Utah 1953).

In In re S.A., 2001 UT App 307, 37 P.3d 1166, this court held that a father had a protected liberty interest both in maintaining the parent-child relationship he enjoyed with his child and in maintaining the familial relationship he had with his wife. Id. ¶ 14.

The legal relationship that existed between petitioner and Zachary, created by marriage, is worthy of no less deference than the legal relationship of husband and wife, or the legal relationship of adoptive parent and adopted child.

Our case law has also accorded the psychological relationship of parent-child great deference and recognized it to be a liberty interest protected by the due process clause of our Constitution. See Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978) (holding that one who stands *in loco parentis* to a child has a constitutionally protected right implicit in the due process clause of our state's constitution which “may confer the same rights upon a stepparent as those enjoyed by a natural parent.”); see also Searle v. Searle, 2001 UT App 367, n.11, 38 P.3d 307 (citing Gribble for proposition that “[w]here one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child”).

Our sister states have recognized that a legal father has a fundamental liberty interest in maintaining his filial relationship with his child. See Achumba v. Neustein, 793

So. 2d 1013, 1021 (Fla. Ct. App. 2001) (“[Husband’s] due process rights, as [child’s] legal father were not considered in the pending wrongful death action. The relationship between a parent and child is constitutionally protected. As such, that relationship cannot be altered or impugned without considering the ‘legal father’s’ due process rights to maintain his relationship with the child.”); Ferguson v. Winston, 996 P.2d 841, 846 (Kan. Ct. App. 2000) (“[T]he cases have been unanimous in concluding that a parent has a fundamental liberty interest in maintaining a familial relationship with a child.”).

Petitioner’s legal and psychological relationship with Zachary is entitled to constitutional protection. As such, it cannot be terminated by an order declaring intervenor Zachary’s “natural” father without a clear and compelling reason to do so that carefully weighs the competing interests at stake. See Dep’t of Health and Rehabilitative Services v. Privette, 617 So. 2d 305, 309 n.7 (Fla. 1993) (“We essentially are dealing with a species of termination proceeding when the petition will have the effect of vesting parental rights in the putative natural father and removing parental rights from the legal father. We do not see how a court constitutionally could apply a standard less than that recognized in Santosky v. Kramer, 455 U.S. 745 (1982), and other applicable cases where this is true.”).

The trial court abdicated its duty to weigh, or even identify, the interests at stake in this controversy and thereby failed in its duty to protect the rights of both Zachary and petitioner, which are of constitutional significance. And, contrary to the usual case involving a question of constitutionally protected rights, in this case the interests of petitioner,

Zachary, and the state are aligned. Petitioner's constitutionally protected liberty interest is in maintaining intact his parental rights in his son. Zachary's interest is in maintaining undisrupted the legal parent-child relationship that nurtures and sustains him. Cf. In re Bridget R., 41 Cal. App. 4th 1483 (Cal. Ct. App. 1996) (children hold fundamental rights and interests in family relationships which are of a constitutional dimension and which do not depend on the existence of a biological relationship). The state's interest is in protecting the legitimacy of children, protecting the sanctity of relationships that develop within the marital family, see In re Marriage of Freeman, 45 Cal. App. 4th 1437, 1450 (Cal. Ct. App. 1996), and in facilitating early and uninterrupted bonding of newborns to their parents, see Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984).

These interests outweigh intervenor's countervailing, untimely, interest in asserting parental rights in Zachary.

In determining whether an asserted interest is a fundamental liberty interest protected by due process, the interest sought to be protected must first be carefully defined. See Dawn D. v. Superior Court of Riverside County, 17 Cal. 4th 932, 940 (Cal. 1998). In this case, the trial court concluded, without analysis, that "[b]oth the U.S. and Utah Constitutions grant Peter Thanos constitutional rights afforded to a natural parent." R.975, ¶ 23. This description of intervenor's interest is inaccurate. Intervenor does not claim an interest simply as an alleged "natural parent." He claims an interest as the alleged biological father of a child born into the marriage of another man who is deemed the child's

father by operation of law upon birth. See Utah Code Ann. § 30-1-17.2. The constitutional significance of his claim is therefore distinct from that of other unwed fathers. The constitution requires some protection of the biological father's opportunity, which no other male possesses, to develop a relationship with his offspring. "Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage." Michael H. v. Gerald D., 491 U.S. 110, 129 (1989). Thus, to expand the "liberty" afforded intervenor is to contract the equivalent liberty of petitioner, or as Justice Scalia framed it: "[T]o *provide* protection to an adulterous natural father is to *deny* protection to a marital father." Id. at 130.

Carefully described, therefore, the interest intervenor claims is constitutionally protected is his interest in disestablishing petitioner as the legal father of a child born to petitioner's intact marriage, where the child has a fully developed and unquestioned father-child relationship with petitioner, to have himself declared the father of the child.

Once the asserted interest is identified, the court must next determine whether the interest denominated as a "liberty" is a fundamental right traditionally protected by our society and rooted in history, tradition and the conscience of our people. See Michael H. v. Gerald D., 491 U.S. 110, 123 (1989)("[T]he Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'") (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Only if the

liberty interest is fundamental is it necessary to conduct a complex balancing of competing interests. See Dawn D., 17 Cal. 4th at 940-41.

It is intervenor's burden to establish that the interest he has in disestablishing petitioner as Zachary's legal father to have his paternity declared is so deeply embedded within our traditions as to be a fundamental right. See Michael H., 491 U.S. at 126. At no time has he made any reasoned effort to do so. Nor did the district court articulate the basis for its conclusion that intervenor's interest rises to the level of a fundamental right. It cannot be denied that the plurality of United States Supreme Court did not hold the similar claim of a biological father to be of constitutional significance, but instead considered the question of whether a state may give categorical preference to the marital father over the biological father to be a matter of public policy for the state to decide. See id. at 129-30.¹

¹ Justice Scalia's opinion in Michael H. was joined by Justice Rehnquist, and in all but footnote 6, by Justices O'Connor and Kennedy. Justice Stevens concurred in the judgment, and wrote separately to distinguish the issues at hand as he saw them: first, is it unconstitutional to prevent Michael from obtaining a judicial determination that he is her biological father; and second, is it unconstitutional to deny Michael a fair opportunity to prove that the child's best interests would be served by granting him visitation? See Michael H. v. Gerald D., 491 U.S. 110, 132 (1989). As to the first question, Justice Stevens wrote: "I agree with Justice Scalia that the Federal Constitution imposes no obligation upon a State to 'declare facts unless some legal consequence hinges upon the requested declaration.' 'The actions of judges neither create nor sever genetic bonds.'" Id. at 133 (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)). As to the second question, Justice Stevens assumed for the purposes of his opinion that a constitutionally protected family relationship might exist between Michael H. and his daughter. As distinct from this case, Michael H.'s daughter identified Michael as her father, calling him "Daddy" id. at 144, and the child's guardian ad litem asserted that she had more than one psychological or *de facto* father and should be entitled to maintain her filial relationship with both. Id. at 114. If so, Justice Stevens concluded, the relationship was sufficiently protected by California law

Michael H. differs from this case in that, in Michael H., the mother remained married to the husband and the alleged biological father was denied access to the child. In this case, the mother is now married to intervenor, and intervenor's access to the child is therefore secure. It is intervenor's contention that this distinction renders the reasoning of Michael H. inapplicable and elevates his interest to a fundamental right.²

that gave Michael H. the opportunity to prove his entitlement to visitation as "any other person having an interest in the welfare of the child." Id. at 133. Utah law also affords the psychological parent of a child the right to seek visitation with the child. See Gribble v. Gribble, 583 P.2d 64 (Utah 1978). Here, intervenor does not claim to be Zachary's psychological parent (and it is undisputed that he is not and that petitioner is) and does not seek rights in Zachary on any ground other than as would ensue from a judicial declaration that he is Zachary's biological father. The majority of the U.S. Supreme Court held that the federal constitution does not entitle him to such relief.

² Whereas the integrity of the marriage is not at issue in this case due to the dissolution of the Pearson's marriage, the integrity and sanctity of the parent-child relationship developed in the context of the marital family is and calls into play the same considerations that defeated Michael H's claim. Moreover, the real effect of denying intervenor the right to be declared Zachary's legal father is of much less significance here, where intervenor's ability to develop a relationship with Zachary is not impaired by the denial: intervenor is assured a relationship with Zachary, essentially of his own making, by virtue of his marriage to Zachary's mother. By contrast, the alleged biological father in Michael H. was completely cut off from the child with whom he sought visitation by the dismissal of his paternity suit. Courts in our sister states have had no difficulty barring a biological father's claims where, as here, it is clear that the real purpose of the suit is to cut off the ex-husband's rights in the child, not to secure rights of visitation that have been denied. See Ghrist v. Fricks, 465 S.E.2d 501 (Ga. Ct. App. 1995) ("Public policy will not permit a mother and an alleged father to enlist the aid of the courts to disturb the emotional ties existing between a child and his legal father after sitting on their rights for the first three years of the child's life."); In re. D.B.S., 888 P.2d 875, 887 (Kan. Ct. App. 1995) (upholding dismissal of paternity action brought by alleged biological father of child who married mother after mother's divorce from husband, stating: "[T]he child's present relationships are healthy and stable, the child is unconcerned with his parentage, [] a blood test would threaten relationships which have supported the child from birth and promise to support him in the future[, and t]he movant's motives are suspect.").

The reasoning of Michael H. pertains and does not turn on the mother's current marital status. The question remains whether the relationship between a married woman, a man married to another woman with whom she commits adultery, and a child alleged to be born of that union into the extant marriage of the woman and her husband, has been treated as a protected family unit under the historic practices of our society. Id. at 124. It is impossible to find that it has. Historically, adultery has been treated as a crime, and it remains a crime in this state. See Utah Code Ann. § 76-7-103. At common law, alienation of affection and criminal conversation were widely recognized torts, the latter being directed specifically to adultery. The tort of alienation of affection, by which liability may attach to a third person who intentionally interferes with a marital relationship, retains continued validity in this state. See Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).

Traditionally, society was so scornful of bringing children into the world as a result of adulterous conduct that "bastardy" was also a crime. Utah's Bastardy Act was enacted in 1911 as part of the penal code and provided for the arrest and arraignment of the putative father. Whereas the father of a child born out of wedlock historically had no parental rights in his child, the husband's rights in children born to his marriage have, from ancient times, been protected by the presumption of legitimacy.

Consistent with the presumption of legitimacy and vindicating similar policies, Lord Mansfield's Rule dates back to the common law of the eighteenth century, gained wide acceptance in the jurisdiction of this country, and has continued application today in this

state. See In re J.W.F., 799 P.2d 710 (Utah 1990). The rule forbids a husband or wife to give testimony that would tend to illegitimate their child, or for a court to consider such evidence. See id. at 714 (holding court of appeals erred in relying on evidence that contravened Lord Mansfield's rule). In 1777, Lord Mansfield said: "It is a rule founded in decency, morality, and policy that they [husband and wife] should not be permitted to say after marriage that the offspring is spurious; or especially the mother, who is the offending party." See Lopes v. Lopes, 518 P.2d 687, 691 n.3 (Utah 1974).

It is clear that our history and traditions demonstrate a resounding repugnance for the conduct of fathering a child in the marriage of another man. It cannot be claimed to be a "right" traditionally protected by our society and rooted in the history, tradition and the conscience of our people. To the contrary, the conduct has been criminalized, the resulting biological link accorded no protection, and the child and husband of the marriage protected from such claims by longstanding, universally applicable laws with enduring application to the present day.

Moreover, even if it were appropriate in this case to look at the liberty interest that the trial court identified as "rights afforded to a natural parent" in isolation from both petitioner's and Zachary's liberty interests that are necessarily implicated by those rights, which it is not, intervenor's claim of constitutional protection must fail. The extent to which an unwed biological father's interest in parental rights in his child will acquire constitutional protection depends on the extent to which the unwed father "demonstrates a full

commitment to the responsibilities of parenthood by '[coming] forward to participate in the rearing of his child.'" Lehr v. Robertson, 463 U.S. 248 (1983). The interest the unwed father has is an opportunity interest, which is lost when he fails to seize the moment and permits another to assume the responsibility of meeting the child's needs. See Utah Code Ann. § 78-30-4.12(e) ("An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth.").

In In re D.B.S., 888 P.2d 875 (Kan. Ct. App. 1995), the court addressed the constitutional claims of a man in intervenor's position who had not promptly asserted parental rights in his child, but instead allowed the child's legal father to do so. After the mother and legal father divorced, the biological father then married the child's mother and argued that the relationship he subsequently developed with the child should be accorded constitutional protection.

The Kansas Court of Appeals rejected this argument. The court noted that the biological father had not been prevented from developing a relationship with the child by the mother, but rather had agreed to "stay out of the picture." Id. at 884. The court held: "[I]n agreeing to [the mother's request] to stay out of the picture, [the biological father] surrendered whatever constitutional opportunity he may have had to develop a protected relationship with D.B.S. There is no authority to support the proposition that having surrendered those rights he could later reclaim them by developing a stepfather relationship

after four years of providing no parental contact or support. We are justified, as the United States Supreme Court did in Lehr, to hold that [the biological father's] interest in [the child] came too late to preserve any constitutional liberty interest. [The legal father] voluntarily assumed the duties of paternity long before [the biological father] acted to secure any rights. Therefore, without following the plurality opinion in Michael H., but relying on the total opinion of the United States Supreme Court therein, we hold the rights of [the biological father] herein do not amount to a liberty interest sufficient to require that he be granted the requested blood tests." Id.

Even in Texas, where the Texas Supreme Court held its statutory scheme denying standing to an alleged biological father to assert paternity in a child born into the marriage of another unconstitutional under the Texas constitution, the court emphasized that the biological father must assert his interest near the time of the child's birth to preserve it. The court held: "In a situation such as that presented here where the biological father does assert his interest near the time of the child's birth, standing is constitutionally mandated if he both 1) acknowledges responsibility for child support or other care and maintenance, and 2) makes serious and continuous efforts to establish a relationship with the child." In re J.W.T., 872 S.W.2d 189, 195 (Tex. 1994).

In this state, the Utah Supreme Court has held that an unwed biological father's opportunity interest in parenting his child is inchoate only and requires a demonstrated and timely commitment to the responsibilities of parenting to warrant constitutional protection.

Cf. Swayne v. L.D.S. Social Services, 795 P.2d 637 (Utah 1990) (discussing cases involving unwed father's opportunity interest). Intervenor's interest, which involves a legitimate child born into the marriage of another man, does not gain greater protection by that circumstance than the unwed biological father who has refrained from violating another man's marriage, so that he alone among unwed biological fathers is afforded the luxury of choosing when he may decide it is convenient to come forward and assert his interests. Rather, the circumstance of the child being born into the marriage of another man is analogous to adoption from birth: the alleged biological father takes the risk that any interest he may have in the child will be cut off by the legal father's acceptance of the child into his family. See Dawn D. v. Superior Court of Riverside County, 17 Cal. 4th 932 (Cal. 1998) ("A man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage, and undertaking the responsibilities marriage imposes. One who instead fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child's life.").

In this case, intervenor, with full knowledge of respondent's pregnancy, and believing the child to be his from January 1999, took no steps whatsoever to come forward and shoulder the burdens of fatherhood during the pregnancy, nor to establish a relationship with Zachary or assert an interest in him after his birth. He did nothing, choosing to sit on whatever rights he may have had for two years, until January 2001, when he filed a motion

to intervene in the Pearson's divorce action. He so conducted himself to maintain intact the deception of his wife. It was intervenor's choice, and no one else's, to elevate his separate interests above his interest in Zachary.

Though intervenor has now developed a healthy step-parent relationship with Zachary (and Nicholas), he cannot reclaim the lost opportunity that he may have had to come forward and act as Zachary's father. Zachary now has an established father, who is not simply a fungible item capable of replacement at the convenience of another. See In re Marriage of Freeman, 53 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 1996) ("The relationship of father and child is too sacred to be thrown off like an old cloak, used and unwanted.").

The trial court erred in concluding, without analysis, that intervenor had constitutionally protected rights as Zachary's biological father, and in failing to recognize petitioner's constitutionally protected right to retain his legal relationship with Zachary intact. Because of the trial court's erroneous views, it conducted the Schoolcraft analysis in an analytically flawed way, being overly solicitous of intervenor's biological connection with Zachary. Cf. Campbell v. Campbell, 896 P.2d 635, 644 (Utah Ct. App. 1995) (vacating court's order based on analytically flawed findings where trial court believed Utah Code Ann. § 30-5-2 was unconstitutional).

This court should reverse the trial court and reinstate the recommendations of the commissioner based on the record that has now been established, holding that intervenor does not have standing to establish paternity of Zachary.

II. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF EQUITABLE ESTOPPEL

After the Court granted intervenor standing to assert his paternity of Zachary, petitioner filed a motion for summary judgment arguing, inter alia, that intervenor and respondent were equitably estopped from denying petitioner's paternity of Zachary (R.1361). In compliance with Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure, petitioner's memorandum in support of the motion set forth his statement of undisputed facts supported by citation to relevant materials (R.1304).

Neither intervenor nor respondent controverted petitioner's fact statement, nor did either party's response, by affidavits or otherwise as provided in Rule 56 of the Utah Rules of Civil Procedure, set forth specific facts showing that there was a genuine issue for trial (R.1377, 1427). Therefore, "each fact set forth by petitioner in his memorandum was deemed admitted for the purpose of summary judgment," Utah R. Civ. P. 7(c)(3)(A), and petitioner was entitled to summary judgment if the facts he set forth supported judgment in his favor as a matter of law. See Utah R. Civ. P. 56(e); Reagan Outdoor Adv., Inc. v. Lundgren, 692 P.2d 776 (Utah 1984); Olwell v. Clark, 658 P.2d 585 (Utah 1982).

The trial court denied petitioner's motion for summary judgment, concluding that "the doctrine of equitable estoppel is inapplicable to the facts of this case." (R.1741, ¶ 4.) This conclusion was erroneous. The elements of equitable estoppel are: (1) a statement, admission, act or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken or not take on the basis of the first

party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act. See Nunley v. Westates Casing Services, Inc., 1999 UT 100, ¶ 34; State v. Irizarry, 945 P.2d 676, 680 (Utah 1997).

The uncontroverted facts show that respondent and intervenor acted consistently with petitioner's paternity of Zachary for two years, from the time they learned of Zachary's conception until they commenced this litigation. Respondent's statements and actions, wherein she actively sought and encouraged petitioner's assumption of the role of Zachary's father, are inconsistent with her subsequent position that petitioner is not Zachary's father. Likewise, intervenor's failure to act as a father to Zachary for two years while petitioner openly assumed that role, and his active concealment of Zachary's paternity for his own purposes, are inconsistent with his later asserted claim of paternity. The uncontroverted facts establish that the first element of equitable estoppel is met.

The uncontroverted facts demonstrate that the second and third elements of equitable estoppel are also met. Respondent's representations to petitioner that she viewed petitioner as Zachary's father and wished petitioner to treat him in all respects as his son, making no distinction between him and Nicholas, and intervenor's acquiescence in that course of conduct, were an integral part of petitioner's bonding with Zachary as his father. Relying on respondent's repeated representations and assurances, petitioner took on the

commitment of fatherhood, caring for and supporting respondent throughout her pregnancy, and shouldering primary caretaking responsibilities for Zachary upon his birth.

Petitioner acted both reasonably and morally in taking on the responsibilities of father to Zachary, a child born into his marriage and younger brother to his first son, at his wife's request and in support of their continued marriage. Had he not done so, respondent would have been without support during her pregnancy and at least the first 17 months of Zachary's life, and Zachary would have been without a father during his infancy and young childhood. Moreover, after respondent left the marital home, Zachary and Nicholas would have been separated from one another half-time to accommodate petitioner's custody of Nicholas while Zachary remained with respondent.

It is both reasonable and socially desirable for petitioner to have acted as he did rather than to have repudiated the marriage, which had functioned well for the care and upbringing of Nicholas and was not without hope of overcoming the differences between the spouses. It is both reasonable and socially desirable for petitioner to have acted as he did rather than to have repudiated the child, leaving him fatherless and disrupting the sibling relationship with his older brother.

Additionally, it was entirely within respondent's and intervenor's control to prevent petitioner from taking on the role of Zachary's father had they desired that he not do so. Intervenor could have asserted his paternity of Zachary and stepped forward to take on the responsibilities attendant thereto from the date he first learned of respondent's pregnancy.

Respondent could have left the marital home and reared Zachary on her own or with intervenor had she not desired petitioner's participation. Had they done so, petitioner could not and would not have developed the relationship that he did with Zachary. It was respondent's and intervenor's actions that resulted in petitioner and Zachary developing the parent-child bond that they now enjoy, while intervenor's relationship is that of step-parent.

For respondent and intervenor to be permitted to now repudiate the course that they chose for two years is inequitable and unjust and injures petitioner. He is denied the fruits of the labor he has undertaken for Zachary's benefit, with the reasonable expectation that he would continue in his status as Zachary's father. Moreover, he suffers the inestimable loss of the father-child relationship that he has developed with Zachary, being relegated instead to the role of "non-parent" with no legal custody rights and visitation as a "third party". All the elements of equitable estoppel are met in this case, and the doctrine should have been applied to bar respondent and intervenor from pursuing their untimely challenge to Zachary's paternity.

The doctrine has been applied in our sister states to bar assertions of paternity under similar circumstances. See Kristen D. v. Stephen D., N.Y.S.2d 771, 773 (App. Div. 2001) (applying equitable estoppel to bar mother and biological father from challenging husband's paternity of 4-year-old child with whom husband had developed a parent-child relationship, concluding that "[i]t would be unjust and inequitable to permit [the biological father] to take a parental role at this late juncture."); Richard W. v. Roberta Y., 658 N.Y.S.2d 506, 506-07

(App. Div. 1997); In re Marriage of Sleeper, 929 P.2d 1028, 1029-30 (Or. Ct. App. 1996) (estopping wife from contesting husband's paternity of children born into their marriage, even though husband had had a vasectomy and both wife and husband knew husband was not the biological father of the children, yet they held him out to be, and husband had relied on wife's assertions that he was the children's father, though they were not his biological children, to develop a deep parental bond with the children); Randy A.J. v. Norma I.J., 677 N.W.2d 630 (Wis. 2004) (holding mother and biological father of child born during mother's marriage to husband were estopped from asserting genetic test results to rebut the marital child presumption where mother and biological father stood silent for 15 months while husband and child developed deep emotional ties, husband paid child's expenses, and husband had organized his life around providing for the child's needs); see also Dipaolo v. Cugini, 811 A.2d 1053, 1056-57 (Super. Ct. Pa. 2002)(affirming dismissal of mother's complaint for child support against biological father where husband and wife held out children as their own for 6 years, observing: "[T]he doctrine of estoppel in paternity actions is aimed at 'achieving fairness between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child.'")(citation omitted); In re Shockley, 123 S.W.3d 642(Tex. Ct. App. 2003) (applying equitable estoppel against mother who for 4 years after birth of child encouraged non-biological father to assume rights and duties of father, observing that "[e]stoppel is based on the public policy that children should be secure in knowing who their parents are.").

Additionally, the Uniform Parentage Act (2002), approved and recommended for enactment in all the states by the national conference of commissioners on uniform state laws, incorporates the doctrine of equitable estoppel to bar challenges to a child's paternity under appropriate circumstances where the child has a presumptive father. See Unif. Parentage Act § 608 (2002), 37 Fam. Law Q. 5 (Spring 2002). The Uniform Parentage Act has been introduced for adoption in this state this legislative session. See S.B. 14.

There can be little doubt that the doctrine of equitable estoppel is validly applied in paternity actions, and that it has application in this case. The court erred in concluding that "[t]he doctrine of equitable estoppel is inapplicable to the facts of this case." R.1741, ¶ 4.

This court should reverse the trial court's denial of petitioner's motion for summary judgment, holding that, as a matter of law, respondent and intervenor are equitably estopped from challenging Zachary's paternity.

III. THE TRIAL COURT ERRED IN APPLYING THE PARENTAL PRESUMPTION AGAINST PETITIONER IN HIS CLAIM FOR CUSTODY OF ZACHARY

The Utah Supreme Court restated and formalized the parental presumption in Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982). The court stated: "This presumption recognizes 'the natural right and authority of the parent to the child's custody' It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is

normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.” Id. at 40 (citations omitted).

The rationale for the presumption is that it will normally serve the best interests of the child, which is the governing consideration in custody cases. Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1250 (Utah 1987). Where it does not do so, rigid application of the presumption is not mandated. Cf. In re H.R.V., 906 P.2d 913, 917 (Utah Ct. App. 1995) (stating that Hutchison “does not require an inflexible, formulaic approach”). Thus, the Supreme Court emphasized in Kishpaugh v. Kishpaugh: “We have not hesitated to find the presumption inapplicable when we have concluded that it does not serve the best interests of the child in a particular class of cases.” 745 P.2d at 1255, n.1.

This court stated in In re H.R.V. that “children have a right to be loved, protected, and cared for, and society has an interest in seeing that they are. Allowing a natural parent to reassert the parental presumption after the parent’s own conduct has destroyed that presumption would do nothing to further the children’s rights or society’s goals. Neither would such a practice serve the children’s long-recognized need for stability in relationships.” 906 P.2d 917 (Utah Ct. App. 1995).

Likewise, allowing a wife, who is the biological parent of a child born into her marriage with her husband, to assert the presumption against her husband in a divorce proceeding, where her own conduct affirmed, nurtured and encouraged the parent-child

bond between the husband and child, defeats society's goal of protecting children from destabilization of their parental relationships at divorce.

Welcoming an infant into one's marriage and nurturing it through crucial periods in which parent-child bonds form creates exactly the relationship that the parental presumption seeks to protect, namely, one of mutual attachment, willingness to sacrifice for the child, and unique ability to win the child's confidence and love. Thus, the Utah Supreme Court made clear in Bonwich v. Bonwich, 699 P.2d 760 (Utah), cert denied, 474 U.S. 848 (1985), a biological parent may not assert the parental presumption against an adoptive parent.

In this case, like in Bonwich, the Hutchison presumption should not apply. While no Utah case is directly on point with the factual scenario presented by this case, other jurisdictions have addressed the parental presumption where it has been asserted against a presumptive father.

In Davis v. LaBrec, 549 S.E.2d 76 (Ga. 2001), LaBrec legitimated his one-year-old son pursuant to Georgia statute and then initiated a custody proceeding against the mother. In response, the mother asserted that LaBrec was not the child's biological father.

Subsequently Davis, the child's biological father, filed a complaint to set aside the previous legitimation order, to establish paternity and to obtain custody of the child. Id. at 76-77.

The trial court granted Davis's petition, concluding that if the biological father was found to be fit, the court was required to grant the petition. Id. at 77. On appeal the Georgia

Supreme Court held that the trial court had applied the wrong standard, reasoning: "First,

LaBrec is the child's legal father. . . . LaBrec stands in the same position as any other parent and possesses the same custodial rights with respect to the child. . . . [P]rior to any State involvement, LaBrec had a developed father and son relationship with the child which was later consummated through legitimation proceedings. . . . Under these circumstances, we find that Davis's interests as the biological father are adequately protected by the best interests of the child standard." Id. (citations omitted).

In Bodwell v. Brooks, 686 A.2d 1179 (N.H. 1996), the trial court determined that the husband's legal paternity was rebutted upon the establishment of the biological father's paternity and that he thereafter had no custodial rights in the child at issue. Id. at 1181. The husband appealed. The Supreme Court of New Hampshire upheld the paternity determination, but reversed the custody determination. The court stated: "One of the instances in which an individual may assert legal rights to a child not biologically his own is if that person stands in loco parentis toward the child. . . . By acting in loco parentis, an individual admits the child into his family and treats the child as a family member. . . . Although the assumption of in loco parentis status is voluntary, while the relationship exists an individual is 'charged, factitiously, with a parent's rights, duties, and responsibilities.'" Id. at 1182 (citations omitted). The court emphasized: "Which party or parties are ultimately entitled to custody of the child must be judicially ascertained among all relevant individuals using the best interests of the child as the primary guide. We therefore remand the case for a hearing to determine custody consistent with the best interests of the child." Id. at 1184.

The Arkansas Court of Appeals applied the same reasoning in Moss v. Moss, CA99-1312 (Ark. Ct. App. 2000). Here, the trial court awarded custody of two children, ages 6 and 3, to the husband based on the best interests of the children. The older child was the husband's biological child and the younger child was the child of another man, born during the marriage. Both children were the biological children of the wife. The wife appealed, arguing that the trial court erred in awarding custody of the younger child to the husband without first making a finding that she, the biological parent, was unfit. The court of appeals affirmed the trial court, holding that the trial court did not err in applying the best interests standard where the evidence established that the husband stood in loco parentis to the younger child. Id.

Our supreme court adopted the doctrine of in loco parentis in Gribble v. Gribble, 583 P.2d 64 (Utah 1978). There, the court granted a husband standing to seek visitation of his step-son, stating: "Where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child." Id. at 66 (citation omitted). The court noted that the husband claimed to have lived with his stepson since he was two months old and to have treated him as his own son. "If these claims are true," the court stated, "and if they indicate his desire to stand in the place of a parent, then appellant's relationship may entitle him to the same rights accorded to natural parents." Id. at 67.

The doctrine was subsequently reaffirmed in Searle v. Searle, 2001 UT App 367, where the court noted: “The term ‘in loco parentis’ means in the place of a parent, and a ‘person in loco parentis’ is one who has assumed the status and obligations of a parent without formal adoption. Whether or not one assumes this status depends on whether that person intends to assume that obligation. ‘Where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child.’” Id. ¶ 36, n.11.

In F.B. v. A.L.G., 795 A.2d 331 (N.J. Super. Ct. App. Div. 2002), the New Jersey court explained: “The *in loco parentis* principle is a venerable concept. As a private law rule, it developed in the common law for a variety of policy reasons expressly to govern family situations within a marriage in which a child was born and acknowledged by the male head of the family, and treated by him as other children were or would have been treated, with a later discovery that another person was the biological father of the child. . . . Even in contemporary contexts, the private law *in loco parentis* principle and concepts flowing therefrom have been applied primarily in situations in which a parent-child relationship has developed in a family setting. The principle has been useful in determining whether to apply waiver or estoppel either to a person functioning as a parent who believed initially he was the father of the child, or to such a person who always knew he was not the biological father but nevertheless assumed a parental role.” Id. at 335-36.

In this case, it is clear that petitioner is and has functioned as a parent to Zachary from before his birth. Nevertheless, the trial court concluded that respondent was entitled to the benefit of the parental presumption in her claim for custody of Zachary as against petitioner, finding: “[I]t is ironic at best to conclude that petitioner is a non-parent of Zachary when in real terms petitioner has established a strong mutual bond and relationship with Zachary, albeit *in loco parentis*.” (R.2434, at 20, ¶ 35). The court felt compelled to “follow[] the dictates of the Hutchison case” and ruled accordingly (R.2434, at 20, ¶ 35).

Hutchison does not dictate that respondent is entitled to the parental presumption against petitioner for two reasons. First, Hutchison did not involve a child born into the husband's marriage. Rather, as the supreme court states in the first sentence of the case, the controversy in Hutchison was between former spouses over the custody of a child “born to the wife before their marriage.” 649 P.2d 38, 39 (Utah 1982). The supreme court took special care to note that the husband was not seeking custody of the child as one who had created a legal relationship with her through adoption by acknowledgment, but rather “as a third party with whom the child should be placed in the best interest of the child.” Id. at 42, n.1. Thus, whereas petitioner enjoyed a legally recognized father-child relationship with Zachary, the husband in Hutchison did not.

Secondly, the husband in Hutchison did not assert that he stood *in loco parentis* to the child, and the supreme court did not address the issue. In this case, the trial court has found that petitioner stands *in loco parentis* to Zachary. It is therefore appropriate to apply

Gribble v. Gribble, 583 P.2d 64 (Utah 1978), which would confer upon petitioner “the same rights accorded to natural parents.” Id. at 67.

This case, like Bonwich, involves a parent who enjoyed the legal relationship of parent-child with the child as to whom he seeks custody. Additionally, he stands *in loco parentis* to the child. Therefore, this case falls into a class of cases in which the best interests of the child is not served by application of the presumption. The trial court’s conclusion that respondent benefits from the presumption should be reversed.

IV. THE TRIAL COURT ERRED IN AWARDING INTERVENOR CUSTODY RIGHTS IN NICHOLAS

The trial court’s findings of fact and conclusions of law appear to award intervenor custody rights in Nicholas, stating that “Kimberlee and Peter will make school placement decisions for both boys if the children reside in Oregon,” R.2434, at 26, ¶ 44, and “Kimberlee / Peter . . . would have the option of a ten-day period of uninterrupted access to both boys.” Id. at 27, ¶ 47. Intervenor is not a contestant for custody of Nicholas, and the parental presumption enjoyed by petitioner and respondent as to Nicholas was not been rebutted. Therefore the court erred in awarding intervenor any custody rights in Nicholas.

V. THE TRIAL COURT ERRED IN AWARDING RESPONDENT PRIMARY PHYSICAL CUSTODY OF NICHOLAS, AND RESPONDENT AND INTERVENOR JOINT LEGAL CUSTODY AND PRIMARY PHYSICAL CUSTODY OF ZACHARY

In its Conclusion of Law No. 2, the court stated: “Respondent is designated the primary physical custodian of Nicholas.” R.2434, at 35, ¶ 2. The court’s award is an abuse

of discretion because (1) it does not comport with the schedule actually established by the court, and (2) the court's findings are legally inadequate to support it.

A. The Court's Designation of Respondent as Primary Physical Custodian of Nicholas is Inconsistent With Its Award of 50/50 Physical Custody to Petitioner and Respondent and Should be Vacated

Petitioner and respondent shared 50/50 custody of both Nicholas and Zachary from the time that they separated in 1999 through the time of trial. The court-appointed custody evaluator recommended that the 50/50 physical custody schedule continue, and the court adopted the evaluator's recommendation. R.2434, at 26, ¶ 47. Nevertheless, the court additionally found that "[i]t is in the best interests of Nicholas that respondent be designated the primary physical custodian of Nicholas." Id. ¶ 46.

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.

"Physical custody" refers to the amount of time that the child lives in his or her parents' respective homes. See Utah Code Ann. § 30-3-10.1(2). 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. Cf. Utah Code Ann. § 30-3-10.1(d) (stating that joint legal custody is not based on awarding equal or nearly equal periods of physical custody, as best interests often requires a designation of primary residence); Thronson v. Thronson, 810 P.2d 428, 434 (Utah Ct. App. 1991) (award of 57% visitation to mother provides basis for trial court's identification of mother as having "primary physical custody.").

In this case, the court found that it was in Nicholas's best interests to spend equal time with petitioner and respondent and established an equal physical custody schedule accordingly. Hence neither petitioner nor respondent can be appropriately designated the primary physical custodian of Nicholas. The court's designation of respondent as primary physical custodian of Nicholas should be vacated.

B. The Court's Findings are Legally Insufficient to Support its Award of Primary Physical Custody of Nicholas to Respondent

Section 30-3-10 of the Utah Code mandates that, "[i]n 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." Utah Code Ann. § 30-3-10 (2004).

Our appellate courts have developed additional factors for the trial court's guidance in defining "the best interests of the child". See Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (identifying function-related factors, including "the stability of the environment provided by each parent"); Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982) (identifying factors relating to the child's feelings or special needs and factors relating to the prospective custodians' character or status or capacity or willingness to function as parents).

In this case, to support its award of 50/50 custody of Nicholas to petitioner and respondent, the court adopted as its findings the Rule 4-903 factors addressed by the

custody evaluator. R.2434, ¶ 34. Based on these findings, and the evaluator's testimony that Nicholas and Zachary shared unusually equivalent attachments to petitioner and respondent, R.2534, 719:7, and that Nicholas's time with petitioner should not be reduced below the 50 percent level, *id.* at 829:18 – 830:12, the court concluded: "It is in the best interests of Nicholas and Zachary that there be a joint physical custody arrangement" with the seven-day rotation as to Nicholas, and a somewhat reduced schedule as to Zachary beginning September 2004. R.2434, ¶47.

Petitioner does not dispute the sufficiency of the court's findings to support the 50/50 custody award. However, petitioner does dispute the sufficiency of these findings to support the award of primary custody to respondent. The findings cannot support a 50/50 physical custody award and also support an award of primary custody to respondent that permits respondent to remove Nicholas from the state, rendering the 50/50 shared physical custody arrangement impossible

With respect to the Rule 4-903 factors addressed by the evaluator and adopted by the court, it is important to note that only two factors appeared to have been weighed in favor of respondent over petitioner, namely, the benefit of keeping siblings together and the ability to provide personal rather than surrogate care. With respect to the first factor, the court found:

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. R.2434, ¶ 34.b.

The Utah Supreme Court first articulated a preference for keeping siblings together as a factor in custody awards in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979). The parties in Jorgensen had two children during their five-year marriage, a daughter and a son. The trial court awarded the father custody of the son and the mother custody of the daughter. The mother appealed, arguing that she should have been awarded custody of both children. On appeal, the supreme court affirmed the trial court's custody determination, holding: "While it is true that a child custody award which keeps all the children of the marriage united is generally preferred to one which divides them between the parents, that preference is not binding in the face of considerations dictating a contrary course of action." Id. at 512.

Subsequently, in Pennington v. Pennington, 711 P.2d 254 (Utah 1985), the Utah Supreme Court further qualified the preference, explaining that it does not pertain to situations in which a child is born after the marriage such that the siblings had not in fact lived together during the marriage. The court explained: "We have also expressed a preference to keep siblings together. However, many of the reasons underlying such a preference are not present in this case. The younger child, Mark, was born months after entry of the divorce decree. Michael was already in respondent's custody. Except for brief periods of visitation, the brothers have never lived together. No bonding between them occurred prior to their parents' divorce." Id. at 256; see also Deeben v. Deeben, 772 P.2d

972 (Utah Ct. App. 1989) (affirming trial court's award of custody of older child to father, infant child to mother); Merriam v. Merriam, 799 P.2d 1172, 1178 (Utah Ct. App. 1990) (affirming trial court's award of older child to father, infant child to mother and approving trial court's finding "[t]here is no particular special need created by and bond between siblings, there being no particular attachment of the sister to the newborn brother at this time").

Thus, the preference for keeping siblings together pertains to siblings of a marriage who have lived together and formed important sibling relationships. As the Utah Supreme Court explained, the purpose of the preference is to minimize the "emotional trauma [to a child] caused by stresses . . . to the bonds between [the child] and his siblings with whom he has resided for several years." Pennington v. Pennington, 711 P.2d 254, 256 (Utah 1985). Where no emotional trauma would result from separation, the preference should be given no weight. Further, where a child is born after the marriage is dissolved, to another marriage, and therefore never united with the children of the marriage, the preference is inapplicable.

In this case, respondent and intervenor gave birth to an infant daughter, Madelaine, eight months prior to the trial. The child is not a child of the marriage between petitioner and respondent, and has never been "united" with Nicholas and Zachary. Nicholas and Zachary have always been separated from Madelaine to a substantial degree, having only lived with her part-time while in respondent's care. Thus, the evaluator acknowledged that a long-distance schedule, similar to the one that she recommended for petitioner should the

court permit the children to be relocated to Oregon and petitioner chose to remain in Salt Lake City, would be adequate to maintain the boys' relationship with Madelaine (R.2534, at 858:13 – 859:22). It is legally and factually inappropriate to lump Nicholas and Zachary together with Madelaine as "three siblings" that should not be separated.

Additionally, with respect to Nicholas and Zachary, the two siblings at issue, the court's finding is inconsistent with its award, which separates the two boys for several days a month, though respondent has taken the position that the boys should not be separated. R.2536, at 1211:15-22; R.27, ¶ 5, and petitioner agrees. 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.

The second factor that the court appears to weigh in favor of respondent is the ability to provide personal rather than surrogate care. As to this factor, the court found:

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. R.2434, ¶ 34.g.

It is unclear whether the court actually weighed this factor in favor of one party or the other, since it finds that petitioner and respondent's abilities are "generally equal." However, that statement is followed by the observation that respondent is in a somewhat superior position to provide personal care, given her current part-time position. The trial court thus equates respondent's "part-time position" – which is not further defined by the court in terms of hours

of work required per week – with less need for surrogate care. In fact, that equivalence is contrary to the only direct evidence adduced at trial regarding the parties' recent use of surrogate care. Petitioner testified that he used no surrogate care for Nicholas and Zachary, but was able to care for the children personally in his home without a nanny, whereas respondent acknowledged the regular use of a nanny in her home for Nicholas and Zachary. See Ex. R-9; R.2536, at 1204:6 – 1207:10; R.2536, at 1262:4; R.2533, at 493:1 – 495:18. This evidence was uncontroverted. The court abused its discretion to the extent that it ignored the direct evidence regarding the parties' relative use of surrogate care in favor of an assumption regarding the need for surrogate care based on an undefined label of "part-time".

The remaining factors that the court identified and relied upon to support its physical custody awards, again adopting the custody evaluator's analysis almost verbatim, are set forth under the heading "Custody" in Findings of Fact 38, 39, 40, 41, 42 and 46. These findings are legally inadequate to support the court's awards. Each is dealt with in turn below.

1. Finding of Fact No. 38. The court states that maintaining extended family, social and academic networks "are of less concern than creating relationship, geographical and financial stability of the children." The court does not find that petitioner is less able to create relationship, geographical and financial stability for the children than is respondent or intervenor. Had the court employed a comparative analysis, geographical stability would

have weighed in favor of petitioner, who proposed to maintain the children's lifelong home in Salt Lake City, whereas respondent proposed to relocate the children to Portland. Similarly, the last sentence of Finding No. 38, that "the boys are in a transportable stage" and "have the capacity to positively adjust to a permanent move to Oregon" weighs in favor of neither party because it is not a comparative statement. Had the court employed a comparative analysis, clearly the boys had the capacity to remain in Salt Lake City, which was already their permanent home and required no adjustment. To the extent adjustment was required of the boys by moving, the factor should have weighed against respondent.

2. Finding of Fact No. 39. The court states that petitioner is capable of continuing his present employment in Oregon. The court again fails to make a comparative finding. Since respondent's work is portable, and her employer is headquartered in Salt Lake City, she is equally able to continue her present employment in Salt Lake City. There is no record evidence to support the finding that there are job openings for petitioner in Portland, and the court abused its discretion in so finding, but even so, the finding favors neither petitioner nor respondent since the court does not find that respondent would have less job opportunity in Salt Lake City than respondent would have in Portland.

3. Finding of Fact No. 40. In this finding, the court states that it is likely that intervenor would experience a significant reduction in income if he were to move to Utah. This finding, standing alone, does not favor respondent or petitioner. The court does not find that such a reduction in income would adversely impact the children. To the contrary,

the court's Finding No. 52 makes clear that intervenor could experience a 50% reduction in income, and nevertheless respondent and intervenor would enjoy household income exceeding \$100,000 per year. Intervenor could make no income, and respondent and intervenor would still enjoy household income the equivalent of petitioner's. Additionally, Finding No. 53 states that, without assistance from intervenor, respondent has adequate resources to support Nicholas without child support from petitioner. Given these findings, whether intervenor experiences a significant reduction in income or not is irrelevant to the Nicholas's best interests and should favor neither respondent nor petitioner. Instead, intervenor's choice to maximize his income by remaining in Oregon is simply an individual choice that does not bear on the custody question, except to the extent that it demonstrates a lack of willingness on intervenor's part to sacrifice his own interests in order to be present on a daily basis for the children.

The statement that it would be far more burdensome for respondent and intervenor to move to Salt Lake City than for petitioner to move to Portland is in the same vein, having no bearing on the children's best interests. It is instead simply a conclusory statement that preferences respondent and intervenor's desire to live in Oregon over petitioner's desire to live in Salt Lake City, revealing a value judgment that intervenor's desire to maximize his income is more important than petitioner's desire to remain in the city where he was born and raised, and where he enjoys close contact with extensive family, as well as social,

community, and religious networks. Assuming no improper motive, the court should not weigh the parties' preference at all, except as the preference will impact the children.

Additionally, respondent's testimony is that intervenor traveled to Salt Lake City once a month to stay with respondent and the children in respondent's home here, and that she herself lived half-time in her home here. It is difficult to understand how it would be burdensome for her to "move" to where she already lived, albeit half-time.

4. Finding of Fact No. 41. This finding is conclusory and contrary to the dictates of Utah Code Ann. § 30-3-10, which mandates 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). It does not weigh in favor of any of the parties.

5. Finding of Fact No. 42. In this finding, the court recites numerous subsidiary findings relating to respondent, none of which are comparative in nature or otherwise advance the analysis of whether petitioner or respondent is the better choice of custodial parent. The first two sentences restate the bias that biology is the pivotal factor in determining custody, equating respondent's biological relationship with "all three" children – though only two children are the subject of evaluation – with "the strongest inherent responsibility" for the children. There is no evidence to support the conclusion that biology creates the strongest "inherent responsibility" for a child, as this case demonstrates: Intervenor's biological tie to Zachary prompted no action on his part for two years. In any event, speculation regarding "inherent responsibility" has no place in a custody

determination, which should be focused instead on the relative advantages and disadvantages of the prospective custodians vis-à-vis the children's best interests, assessed by reference to actual conduct.

The remaining statements are not comparative and can be equally applied to petitioner as to respondent, i.e., petitioner has obeyed the court's orders, petitioner has facilitated respondent's relationship with the boys, petitioner has established a stable home life in Salt Lake City – of longer duration and greater breadth of associations than the home life established by respondent in Oregon – which fully incorporates Nicholas and Zachary, and petitioner has chosen to establish a life for himself in Salt Lake City with logic and reason.

The statement that respondent has borne the bulk of discomfort associated with obeying the court's temporary custody order is not tied to the children's best interests, and fails to recognize that the "discomfort" results from intervenor's choice to remain in Portland for the three years that this matter was pending prior to trial, though the children lived in Salt Lake City.

The finding that respondent would have to work outside the home to increase her earning potential does not bear on the custody determination in any discernible way.

Finally, the statement that the children consider Oregon to be one of their homes and are very comfortable in that environment is not comparative, and again, would favor petitioner if it were comparative since Salt Lake City was the children's primary home at the

time of trial, was the place where Zachary had lived all his life, and was the place Nicholas had lived nearly all his life.

6. Finding of Fact No. 46. This finding is conclusory as to the best interests of Nicholas and Zachary. As to the statement that “it is undisputed that the parties will relocate and will live within 100 miles of one another,” the finding favors neither petitioner nor respondent because it does not identify which party or parties will relocate. More importantly, it is improper for the court to “test parental attachments or to risk detriment to the ‘best interest’ of the minor children” on the basis of testimony that a proposed move will or will not occur. See In re Marriage of Burgess, 13 Cal. 4th 25, 45 n.7 (S. Ct.1996). “Nor should either parent be confronted with Solomonic choices over custody of minor children.” Id.; see also Larson v. Larson, 888 P.2d 719, 727 n.4 (Utah Ct. App. 1994) (noting that mother testified she would not move if it meant losing custody of her children, but nevertheless adhering to a best interests analysis based on her stated intention to move).

Petitioner testified that he believes it is in the children’s best interests to remain in Salt Lake City with him. At the same time, he testified that if the court were to permit the children to be relocated to Portland, then he would follow. Like most primary parents, he would make whatever sacrifices are necessary to maintain his involvement in his children’s lives. It was improper for the court to rely on this testimony to essentially force petitioner to move or lose 50/50 custody, after having found that the children’s best interests required joint physical custody. Such an approach short circuits the best interests analysis

altogether, risks detriment to the child, and awards custody on the basis of the convenience of adults – or, worse, awards custody on the basis of unwillingness to move to accommodate the children's needs – factors only negatively related to the children's best interests.

The findings as a whole, and the evaluation upon which they are based, rely on improper biases that have no legal foundation in the statutory or case law that governs custody disputes. For instance, Dr. Jill Sanders testified that she would not have distinguished between Nicholas and Zachary in her recommendations as to name change, or legal and physical custody, had it not been for the biological factor. R.2534, 872:5-17. Yet nowhere does she connect her view of the importance of biology to the best interests of Nicholas and Zachary, other than by general, conclusory and speculative statements. Without evidence that the biological relationship between a particular child and a particular adult in a particular case impacts on the child's best interests in an identifiable way, it should not be a factor in the best interests determination. The biological relationship between parent and child is legally protected by the parental presumption, and should not be further elevated in the best interests analysis.

It was also Dr. Jill Sanders' view, which informed in part her recommendation that petitioner should move to Oregon – a recommendation adopted in whole by the trial court – that the LDS culture was a negative factor for Zachary (R.2535, at 881:15- 882:11). This was because, in Dr. Sanders' view, the LDS culture is particularly conservative and would

stigmatize Zachary because of the circumstances of his conception and birth. Id. It is improper and inappropriate for such biases on the part of an evaluator to play any role in the determination of custody. It cannot be said that Dr. Sanders' biased view of the LDS culture did not play such a role in this case, given the inadequacy of the findings to support her conclusory recommendation that petitioner move to Oregon.

The trial court's award of primary custody of Nicholas to respondent, which adopts Dr. Sanders' recommendations, should be reversed.

C. The Findings of Fact are Legally Insufficient to Support the Court's Award of Joint Legal and Primary Physical Custody of Zachary to Intervenor and Respondent

The court concluded that respondent was entitled to the benefit of the parental presumption vis-à-vis petitioner in their competing claims for custody of Zachary. Petitioner disputes the correctness of this legal conclusion for the myriad reasons set forth earlier in this brief. The court made no findings of fact that support a determination that, absent the parental presumption, custody of Zachary should be awarded to intervenor and respondent based on Zachary's best interests. Instead, the court's custody award of Zachary flows from its application of the parental presumption against petitioner, and its conclusion that petitioner is a "non-parent" of Zachary, the evidence being clear that Nicholas and Zachary should not otherwise have been separated. If this court determines that the trial court erred in its application of the parental presumption against petitioner, the court should direct that

the 50/50 custody applicable for Nicholas be reinstated for Zachary forthwith during the pendency of any further proceedings.

D. The Court Abused Its Discretion in Not Making Findings Regarding Key Factors Relative to the Children's Best Interests in this Case

The court failed to make findings on several factors mandated by the legislature and/or of significance in this case, including: (1) the relative ability of the parties to provide continuity of environment and stability for the children; (2) the identity of the party who acted as the primary caretaker for the children during the marriage; (3) the relative strength of the children's bonds with each of the parties; (4) the past conduct and demonstrated moral standards of each of the parties; and (5) the identity of the party who has most consistently elevated the children's best interests above his or her own interests. The record is replete with evidence pertaining to these factors. The trial court abused its discretion in failing to make appropriate findings based on this evidence, and awarding custody instead on the basis of biology and other improper factors. The trial court's custody award should be reversed.

CONCLUSION

For the foregoing reasons, this court should (1) reverse the trial court's order granting intervenor standing to establish paternity of Zachary, (2) reverse the trial court's denial of petitioner's motion for summary judgment barring respondent and intervenor from challenging Zachary's paternity; (3) and reverse the trial court's custody awards based on

the improper presence of intervenor in this case, the improper application of the parental presumption against petitioner, and the trial court's inadequate findings of fact.

DATED this 7 day of February, 2005.

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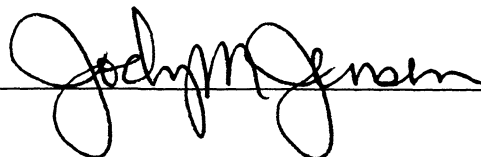
PAIGE BIGELOW
Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2005, I caused a true and correct copy of the foregoing BRIEF OF APPELLANT to be sent by United States mail, postage prepaid, to the following:

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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 FACTFact 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.

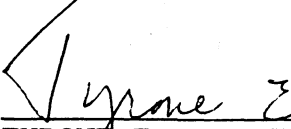
7. The property of petitioner and respondent should be divided according to the division described in their Stipulation for Property Division dated December 10, 2003.

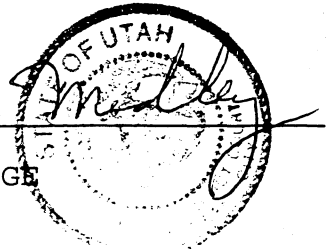
8. Respondent should not be held in contempt for failure to reimburse petitioner for childcare and medical expenses he incurred prior to November 13, 2003.

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:

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