

2005

# Maria Del Carmen Suastegui Albores v. Agustin Bracomontes : Brief of Appellant

Utah Court of Appeals

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Agustin Bracamontes; pro se.

Waine Riches Bar; attorney for appellant.

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**UTAH COURT OF APPEALS**  
Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114

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**MARIA DEL CARMEN  
SUASTEGUI ALBORES,**

Petitioner and Appellant,

vs.

**AGUSTIN BRACOMONTES,**

Respondent and Appellee.

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Appellate Case No.

20050133-CA

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**BRIEF OF APPELLANT**

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Appeal from the sua sponte summary denial of Petition for Custody

Appeal from Third District Court, Salt Lake County,  
Matheson Courthouse  
District Court Judge Sandra Peuler

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Agustin Bracamontes  
Pro SE Respondent Appellee  
8510 South State Street #21  
Midvale, Utah 84047

Wasatch Club Apartments #2502  
6960 South State  
Midvale, Utah 84047

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UTAH APPELLATE COURTS  
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Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear appeals from district court involving domestic relations cases, including, child custody, support, and parent-time. Utah Code Ann. § 78-2a-3(2)(h)

## STATEMENT OF THE ISSUES

**Issue I:** May Maria Albores make an argument for the first time on appeal where the trial court sua sponte summarily denied her petition for custody without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type whatsoever prior to issuing the denial of the petition?

**Standard of review:** This issue presents a question of appellate procedure under Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure. There is no question presented with regards to the deference owed to the trial court. See e.g. State v. Irwin, 924 P.2d 5 (Utah App. 1996)(Irwin states that this issue is one of Rule and cites to Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure.)

**Issue not preserved below:** The trial court sua sponte denied Maria's petition without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument

of any type prior to issuing the denial of the petition. Maria did not have the opportunity to preserve this issue in the trial court. This is a rare anomaly and plain error which allows the issue to be raised on appeal.

**Issue II:** Is Custody actionable separate and apart from other actions such as Divorce and Paternity?

**Standard of review:** This issue presents a question of law which the Court of Appeals reviews for correctness, giving no deference to the trial court. Sullivan v. Sullivan, 2004 UT App 485.

**Issue not preserved below:** The trial court sua sponte denied Maria's petition without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type prior to issuing the denial of the petition. Maria did not have the opportunity to preserve this issue in the trial court. This is a rare anomaly and plain error which allows the issue to be raised on appeal.

**Issue III:** In light of Rule 11 of the Utah Rules of Civil Procedure, must the Petition filed in a Custody case request that the trial court determine the parties' standing to bring actions such as Divorce or Paternity when the parties cannot meet any of the requirements for standing to bring a Divorce or Paternity action?

**Standard of review:** This issue presents a question of law reviewed by the Court of Appeals for correctness without deference to the trial court. Alternative Options v. Chapman, 2004 UT App 488, ¶ 13.

**Issue not preserved below:** The trial court sua sponte denied Maria's petition without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type prior to issuing the denial of the petition. Maria did not have the opportunity to preserve this issue in the trial court. This is a rare anomaly and plain error which allows the issue to be raised on appeal.

**Issue IV:** Does allowing parents to petition for custody -- who happen to have standing to bring another type of action, such as paternity or divorce -- and denying parents the right to petition for custody -- who don't happen to have standing to bring another type of action, such as paternity or divorce -- violate the equal protection rights under the Constitutions of Utah and the United States of the parents who don't have standing to bring another type of action such as paternity or divorce?

**Standard of review:** **Standard of review:** Constitutional are questions of law that the appellate courts review for correctness. K.M., 965 P.2d 576, 578 (Utah App. 1998).

**Issue not preserved below:** The trial court sua sponte denied Maria's petition without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type prior to issuing the denial of the petition. Maria did not have the opportunity to preserve this issue in the trial court. This is a rare anomaly and plain error which allows the issue to be raised on appeal.

**Issue V:** Does placing the artificial barrier of requiring standing in other actions, such as divorce or paternity, in order to petition the court for a determination of the fundamental constitutionally protected right of parental care and custody, violate a parent's rights to petition the courts, and, rights to due process under the Utah and United States Constitutions?

**Standard of review:** Constitutional issues are questions of law that the appellate courts review for correctness. K.M., 965 P.2d 576, 578 (Utah App. 1998).

**Issue not preserved below:** The trial court sua sponte denied Maria's petition without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type prior to issuing the denial of the petition. Maria did not have the opportunity to preserve this issue in the trial court. This is a rare anomaly and plain error which allows the issue to be raised on appeal.

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES**

### **U.S. Constitution, Amendment I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### **U.S. Constitution, Amendment V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. Constitution, Amendment XIV, section 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Utah Constitution, Article I, Section 11:**

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause

to which he is a party.

**Utah Constitution, Article I, Section 24:**

All laws of a general nature shall have uniform operation.

**Utah Constitution, Article I, Section 27:**

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

**Utah Code § 30-3-10(1): Custody of children in case of separation or divorce -- Custody consideration.** (The full text of 30-3-10 is in the addendum at page 5.)

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

**Utah Code § 78-45a-1 et Seq., Utah Uniform Act on Paternity:** (the full text of 78-45a-1 et Seq. is in the addendum at page 7.)

**Utah Code § 78-45g-610: Joinder of judicial proceedings.**

(1) Except as otherwise provided in Subsection (2), a judicial proceeding to adjudicate parentage may be joined with a proceeding for adoption, termination of parental rights, child custody or visitation, child support, divorce, annulment, legal separation or separate maintenance, probate or administration of an estate, or other appropriate proceeding.

(2) A respondent may not join a proceeding described in Subsection (1) with a proceeding to adjudicate parentage brought under Title 78, Chapter 45f, Uniform Interstate Family Support Act.

**Utah Code § 78-45g-616: Temporary order.**

(1) In a proceeding under this part, the tribunal shall issue a temporary order for support of a child if the order is appropriate and the individual ordered to pay support is:

(a) a presumed father of the child;



- (b) petitioning to have his paternity adjudicated;
  - (c) identified as the father through genetic testing under Section 78-45g-505;
  - (d) an alleged father who has failed to submit to genetic testing;
  - (e) shown by clear and convincing evidence to be the father of the child; or
  - (f) the mother of the child.
- (2) A temporary tribunal order may include provisions for custody and visitation as provided by other laws of this state.

**Rule 11, Utah Rules of Civil Procedure:** (The full text of Rule 11 is in the addendum at page 3).

## **STATEMENT OF THE CASE NATURE OF THE CASE**

This is an appeal from the denial by Judge Sandra Peuler of a Petition for custody filed by Maria Albores in the Third District Court, Salt Lake County, Matheson Courthouse.

## **STATEMENT OF THE CASE COURSE OF PROCEEDINGS**

On 6-21-2004 Maria Albores filed a custody action in the Third District Court for Salt Lake County where both she and Agustin Bracamontes, the father of her child, reside. On 7-7-2004 she filed an Amended Verified Petition for Custody. On 7-13-2004 she filed a properly endorsed Summons showing that the Summons had been served on 7-9-2004 by leaving it with Antonia Rosa, the woman residing with Agustin. On 7-

15-2004 Maria filed a constable's proof of service showing service of a "Verified Petition" on Agustin Bracamontes, by delivering the Petition to Antonia Rosa. On 12-6-2004 Maria filed an Amended Constable Proof of Service showing that the "Amended Verified Petition" had been the petition actually served on 7-9-2004. On 12-16-2004 the default of Agustin Bracomontes was entered by the Clerk of the Court. On January 11, 2005, Judge Sandra Peuler signed a minute entry entitled "Court's Ruling" which sua sponte summarily denied the petition for failure of Marie to plead standing to bring an action such as divorce or paternity.

## **STATEMENT OF THE CASE DISPOSITION IN TRIAL COURT**

The trial Court sua sponte summarily denied the Custody Petition of Maria Albores because the Petition did not allege standing for other types of actions such as divorce or paternity.

## **STATEMENT OF FACTS**

On July 7, 2004, Maria Albores filed an amended petition for custody.<sup>1</sup> The amended petition states: "There has been one child born to

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<sup>1</sup> Maria Albores is an immigrant with poor English language skills. The petition was prepared by counsel in his clinic (now closed) which provided assistance to pro se parties. The top of the Petition contains the

the parties, Nathalia B. Suastegui, born 5/15/2003.” The petition did not ask the trial court to determine the standing of the parties to file divorce or paternity. The amended petition did not state grounds for divorce nor ask for a divorce or determination of paternity as relief.

Agustin Bracamontes was properly served with the amended petition but failed to answer and his default was entered on 12/16/2004 by the clerk of the court.

On 1/11/2005 the trial court sua sponte summarily denied the petition in a signed minute entry order entitled “Court’s Ruling” which reads as follows:

This matter has been brought as a petition for custody, without any request that the court determine the standing of the parties to bring such action, such as a divorce or an action to establish paternity. Therefore, the petition is denied.

(A complete copy of this order is in the trial court file at pages 49 and 50 and the addendum to this brief at page 1.)

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language “Online Court Assistance Program”. The Online Assistance Court Program (OCAP) is the Legislatively mandated interactive Internet system for the preparation of court documents by persons not legally trained. The petition was created by modifying an OCAP divorce petition. There was not then, nor is there now, a program on OCAP which allows a pro se litigant to prepare paperwork for a custody action separate and apart from divorce. However, the OCAP Board has approved a program which will probably be available to the public sometime in 2005 or 2006 and will allow users to include custody as part of a suit to determine parentage under the new Utah Uniform Parentage Act, Utah Code § 78-45g-101 et Seq.

The trial court did not notify Maria prior to the denial, did not ask her to brief the issue and did not invite argument of any type whatsoever prior to issuing the denial. Maria was therefore unable to preserve the legal arguments she presents for the first time here on appeal.

## **SUMMARY OF ARGUMENT**

**Issue I.** Maria Albores should be allowed to raise arguments for the first time on appeal where the trial court failed to notify her in any way prior to the denial of her petition and failed to seek input of any type or allow argument of any kind. The trial court's failure to accord Maria any type of due process whatsoever prior to the summary dismissal of her case is a rare anomaly, which at a minimum violates Maria's constitutional right to be heard concerning her fundamental constitutionally protected right to custody, and could not be anticipated by Maria.

The trial court's denial of Maria's petition is also plain error: (1) there was a denial of Maria's right to be heard, which is an error; (2) the error should have been obvious to the trial court based on the Constitutional requirement to -- at a minimum -- allow Maria to be heard; and (3) the error is harmful in that Maria continues without a custody order in place.

**Issue II.** Under Utah Code Ann. § 30-3-10(1) an action for custody in Utah may be brought as its own independent proceeding separate from other actions such as divorce or paternity. The Utah Supreme Court has made it clear that section 30-3-10 applies to custody cases where the parties are not married. To rule otherwise would be to allow the State Legislature to adopt a law which treats married parents different from non-married parents, which would violate both the federal and Utah Constitutions.

This Court should give the word “or” in section 30-3-10(1) its plain meaning. Thus when “or” is used in the phrase “If a husband and wife having minor children are separated, or their marriage is declared void or dissolved. . .” -- and where this statute has been interpreted to apply to both married and non-married couples -- the plain meaning of the phrase is that custody is actionable if a couple having minor children are separated.

Forcing a couple to obtain a divorce or paternity determination in order to have access to the courts for the resolution of a custody issue violates public policy. Public policy favors the stability which a custody determination brings to the life of a child. Public policy favors preserving marriages and not forcing couples to divorce solely as a method of gaining access to the court for other issues. There can be no public policy in favor of forcing couples to file a paternity action to access the court for custody

where paternity was not at issue and where Utah's paternity statute did not even mention custody, little alone require that paternity and custody must be filed together.

**Issue III.** Standing requires: (1) a justiciable controversy; (2) the parties' interests be adverse; (3) the party seeking relief have a legally protectible interest in the controversy; and (4) the issues between the parties be ripe for judicial determination. This means that there must be an actual or imminent clash of legal rights and obligations between the parties before they have standing.

There is no indication in the sparse record to this case that either Maria or Agustin had a need to have the trial court decide divorce or paternity, or that they had a justiciable controversy as to those issues. Alleging divorce or paternity in Maria's custody petition without standing would be a violation of Rule 11 of the Utah Rules of Civil Procedure.

**Issue IV.** All parents have a constitutionally protected interest in the care and custody of their children.

Under a federal Constitutional analysis, the denial of access to the courts to obtain custody orders of parents who don't happen to have standing to bring a divorce or paternity action is clearly an impermissible unequal treatment of parents who have equal fundamental constitutional rights.

Likewise, under Article I, Section 24 of the Utah Constitution, the trial court must apply the laws equally to all parents. If the trial court treats one group of parents different from another there must be a reasonable basis related to the law being applied.

There is no state interest in forcing parents to divorce. On the contrary, public policy favors preserving marriages. Further, there can be no public policy read into Utah's divorce statutes where Utah Code § 30-3-10(1) clearly allows custody actions upon separation of parents and without the need to file for divorce.

There is no state interest in forcing parents to seek paternity determinations where paternity is not at issue. Doing so raises an impermissible artificial barrier to access the courts for determination of constitutionally protected custody interests. Further, there can be no public policy read into the paternity statute in effect at the time this case arose where that statute did not even mention custody little alone authorize or require custody to be filed with paternity. Nor has the Utah Legislature spoken differently with the adoption of the new 2005 Parentage Act which clearly allows custody to be filed in conjunction with a petition for determination of parentage, but does no mandate such a filing.

On the other hand, there is a clear state interest in allowing access to the courts for parents to resolve issues arising out of their constitutionally protected right of the care and custody of their children. In its role as *Parens Patriæ* the state has an acute interest in insuring stability in the lives of children.

**Issue V.** The right of access to the courts is a fundamental right in and of itself found in the federal Constitution First Amendment right to Petition. To deny court access the trial court must at a minimum be protecting a countervailing state interest of overriding significance.

Access to the courts is protected in the Utah Constitution under its open courts provision, Article I, Section 11. This open courts provision guarantees access to the courts and guarantees a judicial procedure to protect basic individual rights. A parent's right to the custody and care of children is a basic individual right.

Under Article I, Section 11, there is a two part analysis. The first, the denial by the trial court of Maria's petition must leave her and her child with an effective and reasonable alternative remedy to an independent action for custody. Unless she were to violate Rule 11 of the Utah Rules of Civil Procedure and seek a determination of standing to bring another action, such as divorce or paternity for which she does not have such standing, the trial



court left her with no other alternatives. Nor are there any other alternatives at common law or under any statute.

Second, if no alternative remedy is provided, does the denial eliminate a clear social or economic evil. In light of the huge societal benefit of court ordered custody arrangements which bring stability to a child's life and work to resolve points of contention between two parents, there is no clear social or economic evil which the trial court's denial of Maria's petition seeks to overcome. Maria is merely asking the court to decide a custody issue, which given the volume of custody cases in Utah's courts is a routine function of those courts. On the other hand, forcing people into divorce merely to access the court is itself creating a social evil. Placing hollow artificial barriers to the access of the court is itself the creation of a social evil.

## **DETAIL OF ARGUMENT**

**I. May Maria Albores make an argument for the first time on appeal where the trial court sua sponte summarily denied her petition for custody without notifying her prior to the denial, without asking her to brief the issue and without inviting or granting opportunity for argument of any type prior to issuing the denial of the petition?**

### **1. The preservation rule**

As a general rule, arguments not raised before the trial court may not be raised on appeal. State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346. The

preservation rule applies to every claim, including constitutional questions.

Id. To be able to raise an argument for the first time on appeal an Appellant must demonstrate either that exceptional circumstances exist, or plain error was committed by the trial court. Id. (citing Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996); and State v. Lopez, 886 P.2d 1105, 1113 (Utah 1994)). "[T]he exceptional circumstances exception is ill-defined and applies primarily to rare procedural anomalies." State v. Dunn, 850 P.2d 1201, 1209 n.3 (Utah 1993). See also State v. Irwin, 924 P.2d 5, 8 (Utah App. 1996).

## **2. Judge Peuler's denial is a procedural anomaly and therefore an exceptional circumstance**

The trial court's denial of Maria Albores' custody petition is a rare procedural anomaly. The trial court sua sponte denied the petition without notifying Maria prior to the denial, without asking Maria to brief the issue and without inviting or granting opportunity for argument or input of any type prior to issuing the denial of the petition.

This total lack of procedural due process is an exception to the normal practice by District Court judges of holding a hearing prior to signing an order which terminates an action. "Although the exact requirements of due process may vary from situation to situation, the minimum requirements of

due process include adequate notice and an opportunity to be heard in a meaningful manner.” Jau-Fei Chen v. Jua-Hwa Stewart, 2004 UT 82, ¶ 68 (citing Dairy Prod. Serv., 2000 UT 81 at ¶ 49, 13 P.3d 581).

### **3. Maria had no reason to anticipate the need to present argument that custody is an independent action**

Maria had no reason to anticipate she would need to present an argument in the trial court concerning her ability to file an independent custody action separate from other actions such as divorce or paternity. See, State v. Lopez, 873 P.2d 1127 (Utah 1994). As stated more fully below, custody actions separate from divorce are statutorily provide for. Utah Code § 30-3-10(1). The Utah Supreme Court has applied 30-3-10 to couples who were never married.<sup>2</sup>

And as also stated in more detail below, there was no authority in Utah’s Uniform Act on Paternity<sup>3</sup> for a custody action to be included as part

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<sup>2</sup> See, e.g. Linam v. King, 804 P.2d 1235, 1237 n.1 (Utah App. 1991) (citing Sanderson v. Tryon, 739 P.2d 623, 625 n.1 (Utah 1987) and Lembach v. Cox, 639 P.2d 197, 199 (Utah 1981))

<sup>3</sup> Utah’s Uniform Act on Paternity was repealed by the 2005 Legislature after the trial court’s dismissal of Maria’s case. It has been replaced with the Utah Uniform Parentage Act found at Utah Code § 78-45g-101 et Seq., which does contain authority to bring a custody action in combination with a paternity action. The Parentage Act may not be applied retroactively. Utah Code § 78-45g-902.

of a paternity case. Without statutory notice, Maria therefore had no reason to anticipate the denial of her custody petition by Judge Peuler.

#### **4. Judge Peuler's denial was plain error**

The trial court's denial of Maria's petition is plain error. The plain error exception to the preservation rule was adopted by the appellate courts to 'balance the need for procedural regularity with the demands of fairness.' State v. Verde, 770 P.2d 116, 122 n12 (Utah 1989). To demonstrate plain error Maria needs to show (1) that an error exists, (2) the error should have been obvious to the trial court; and (3) that the error is harmful.

(1) The trial court denied Maria's petition for custody without any opportunity whatsoever for Maria to be heard on the issue of whether an independent action for custody exists in Utah. It is hard to think of a more blatant denial of due process than the complete omission by the trial court of any opportunity to be heard. This may be especially egregious where Maria is an unrepresented litigant and as such had much less of an ability to counter the trial court's actions than an attorney would have had.

(2) In light of well settled due process requirements that a party to a court action concerning custody must be given an opportunity to be heard by the court, this error was -- or should have been -- obvious to the trial court.

(3) Maria has been harmed. She has been prevented from obtaining a custody order merely because she has no standing to bring an action such as divorce or paternity.

**5. Utah's Bar and Bench are in desperate need of guidance from the Court of Appeals as to whether or not an independent action for custody exists in Utah.**

In 2004 somewhere between 8,000 and 13,000 people sought assistance from Counsel at his clinic in the Matheson Courthouse and through e-mail. Thousands of his clients had issues of custody which they were desperate for the court to resolve. Many did not need a divorce or paternity decision and in some abusive cases requesting divorce or paternity relief in their petitions would have been potentially dangerous.

Counsel was informed on two separate occasions by the Commissioners in the Third District that he was not to help pro se litigants file custody actions separate from divorce or paternity actions.<sup>4</sup> Among the clients attending counsel's clinic there were those who reacted with alarm when Counsel told them that if they asked for divorce or paternity it would make the court process easier for their custody case. Many stated plainly

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<sup>4</sup> The first communication was by phone. The second communication was through a meeting requested by Commissioner Arnett's clerk. The written document given to Counsel at that meeting is reproduced in the addendum at page 14.

that they were not ready to divorce and did not want to. Others stated clearly that they would simply not file for custody because raising paternity would cause serious problems in their relationship with the other parent.

The Third District Commissioners hear the largest share of custody cases in the state. In addition, Commissioner Evans authors the domestic law resource binder for District Court judges throughout the state which they use as a quick reference in making rulings on domestic law cases.

On a daily basis Counsel assisted clients at his clinic who were responding to independent actions for custody filed by other members of the bar. Counsel has filed independent custody actions since he entered practice in 1983 without any indication from the bench whatsoever that these cases were somehow inappropriate, that is until the communications with the Commissioners in mid 2004.

In his practice Counsel has routinely reviewed custody orders signed by District Court judges throughout the state that were independent of any determination of standing for such other actions as divorce or paternity. The District Courts have even created a separate category to file these actions under, "CS", which is separate from divorce, "DA", and paternity, "PA". As an example of the potential number of independent custody cases filed each year, there were 677 cases in the CS category for 2003.

Counsel authored and edited the Utah Domestic Relations Manual, published by Utah Legal Services, Inc. for use by pro bono attorneys. This manual has found its way to the three main law libraries and is in the private libraries of many attorneys and judges throughout Utah. Pro Se litigants use the manual from the Matheson Courthouse library heavily. Based on Counsel's research for this manual he has found nothing that would lead him to believe that custody cannot be filed as an independent action and he takes the position in the manual that independent actions are allowed.

Counsel does the legal work on the Utah Online Court Assistance Program. Programs on the OCAP system are used by thousands of people each year to produce court documents. Counsel is currently doing the legal work for a Parentage and Custody program. Counsel anticipates that this program will be used by thousands of people a year.

Utah Legal Services has developed a pro se packet for independent custody actions and has been providing it to clients for years. The Salt Lake County Legal Aid paralegal located in the Matheson Courthouse has routinely handed out the packets to Legal Aid clients.

Given that hundreds of independent custody cases are routinely filed throughout the state each year by the Bar and pro se litigants alike, given that hundreds of cases a year are impacted by the position of Counsel, the

Commissioners, and, Judge Peuler, given that both Counsel and Commissioner Evans author legal resources used by the Bench, Bar and pro se litigants, and that they hold opposite positions on this issue, this Court's guidance is desperately needed.

## **II. Is Custody actionable separate and apart from other actions such as Divorce and Paternity?**

### **1. Statutory authority for separate custody actions**

Utah Code Ann. § 30-3-10 authorizes custody actions separate from divorce and grants authority to the trial court to issue a custody order either if the parties are separated or as part of their divorce. Utah Code Ann. § 30-3-10(1) states: “If a husband and wife having minor children are separated, **or** their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.” (emphasis added).

Any interpretation of the meaning of Utah Code Ann. § 30-3-10 must take into consideration that the Utah Supreme Court has held that section 30-3-10 governs custody actions where the parents were never married (See, e.g. Linam v. King, 804 P.2d 1235, 1237 n.1 (Utah App. 1991) (citing Sanderson v. Tryon, 739 P.2d 623, 625 n.1 (Utah 1987) and Lembach v. Cox, 639 P.2d 197, 199 (Utah 1981)), and that under the Equal Protection Clause of the



United States Constitution and Article 1, Section 27 of the Utah Constitution the State of Utah may not adopt a statute that treats the custody rights of unmarried parents differently from those of married parents. See e.g. Stanley v. Illinois, 405 U.S. 645, 652, 92 S. Ct. 1208; 1213, 31 L. Ed. 2d 551, 559 (1972) and Blue Cross and Blue Shield of Utah v. State, 779 P.2d 634 (Utah 1989).

Under Article 1, Section 27 of the Utah Constitution a law must apply equally to all persons within a class. If it does not the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. Malan v. Lewis, 693 P.2d 661 (Utah 1984).

Utah Code § 30-3-30(1) is a statute authorizing court resolutions to custody disputes. The three people most often involved are a mother, father and child. There is no difference in the parent child relationship whether the parents happen to have purchased a marriage license and went through a marriage ceremony, are in a common law marriage, or have formed a family without any intent to marry at all. In fact, from the child's vantage point, a child may not know one way or another if the child's parents are married.<sup>5</sup>

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<sup>5</sup> See, e.g. Hudema v. Carpenter, 989 P.2d 948 (Utah App. 1994)(The Mother in Hudema moved in with her fiancé six weeks before their wedding and the father brought a petition to modify custody. The Hudema Court

Indeed, if a child is young enough, such as the age of Maria's child, that child will not even know what marriage is.

When interpreting a statute, the appellate court's paramount concern is to give effect to the legislative intent, manifested by the plain language of the statute. Unless a statute is ambiguous, the appellate court should not look beyond the plain language of the statute. State v. Huntington-Cleveland Irrigation Co., 2002 UT 75, ¶ 13, 52 P.3d 1257. The appellate court will look to the reason, spirit, and sense of the legislation as indicated by the entire context and subject matter of the statute dealing with the subject. Longley v. Leucadia Fin. Corp., 2000 UT 69, ¶ 19, 9 P.3d 762; In the Matter of the General Determination of rights to the Use of Water, 2004 UT 106, ¶ 18.

## **2. Plain language construction of Utah's custody statute**

"In construing the plain language of a statute, words "which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage." Mesa Dev. Co. v. Sandy City Corp., 948 P.2d 366, 369 (Utah App. 1997) (quoting Government Employees Ins. Co. v. Holder, 645

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stated that a five year old child would notice no difference between the living arrangement prior to the marriage and after the marriage of the mother.)

P.2d 672, 675 (Utah 1982)). As a result, courts often refer to the dictionary to define statutory terms.” Keene v. Bonser, 2005 UT App 37, ¶ 10.

The word “or” is used to express an alternative, to give a choice of one among two or more things. See, e.g. Black’s Law Dictionary, Fifth Edition, p. 987; accord Webster’s New Universal Unabridged Dictionary, Second Edition, Dorset & Baber, p. 1257 (“or” is used to introduce the second of two choices). Thus when “or” is used in the phrase “If a husband and wife having minor children are separated, or their marriage is declared void or dissolved. . .” -- and where the statute has been interpreted to apply to both married and non-married couples -- the plain meaning of the phrase is that custody is actionable if a couple having minor children are separated. In addition, and as a second and separate concept, custody is actionable if a married couple divorces or otherwise dissolves their marriage. Reading the plain language of section 30-3-10(1) the legislature clearly intended that the two options, (1) custody upon separation, (2) custody at the time of divorce or other dissolution, be separate and apart from one another.

### **3. Public Policy**

In addition to the plain meaning of the statute, there is simply no public policy, whether in a statute or otherwise, that would favor interpreting the statute as requiring standing to file other actions, such as divorce or

paternity, in order for a parent to petition the court for a determination of custody. Given the debates each legislative session over what can be done to reduce the rate of divorce and preserve marriages, and the constant pronouncements from Utah's other politicians, civic and religious leaders, as well as the courts, there can be little doubt that in Utah public policy does not favor divorce over marriage. See e.g. Neilson v. Neilson, 780 P.2d 1264, 1269 (Utah App. 1989) ("Notwithstanding the relative ease with which parties to a deteriorated marriage can obtain a dissolution on grounds enumerated in Utah Code Ann. § 30-3-1(3) (1989), we believe the statutes regulating marriage and divorce still reflect that it is the public policy of this state to preserve marriage and disfavor dissolution."). In fact, this sentiment is so prevalent among the citizens of Utah and every other state in the nation, that this Court can take judicial notice of it. Divorce is not favored over preserving a marriage.

It is also clear from any of a number of statutes and appellate decisions that public policy clearly favors having trial courts determine which custody arrangement is in the best interest of a couple's children when there is a controversy over custody. see e.g. Utah Code § 30-3-10(1)(a)("In determining any form of custody, the court shall consider the best interests of the child . . ."); see also, e.g., Hutchison v. Hutchison, 649

P.2d 38 (Utah 1982); Pusey v. Pusey, 728 P.2d 117 (Utah 1986), Hudema v. Carpenter, 989 P.2d 491 (Utah App. 1999).

It should therefore be against public policy for the trial court to deny a married couple the right to petition the court to determine which custody arrangement is in the best interest of their children merely because they do not have standing to bring a divorce action. This would be especially true, for example, if the parties needed some time apart for emotions to calm down, were in marriage counseling or taking other steps to save their marriage, and needed the divisive issue of custody settled by the court to remove it as a contention between them.

Since unmarried parents are to be treated the same as married parents in matters concerning custody, it would also violate public policy to deny an unmarried parent the right to petition for a determination as to which custody arrangement is best for their children where they do not have standing to bring a paternity action and where they need the court to make a decision as to custody to remove it as a point of contention between two unmarried parents.

#### **i. Public policy in Utah's paternity statute**

There is no statement of public policy which would require standing to bring a paternity action in order to file a custody action. In fact, Utah's

former Uniform Act on Paternity, Utah Code Ann. § 78-45a-1 et Seq. (in effect at the time this case arose. Repealed 2005), did not mention custody, authorize custody as a subpart of a Paternity action, or require that a party request a trial court to determine standing to file for paternity in order to request a determination of custody.

## **ii. Public policy in the new parentage statute**

The Legislature has not made a different public policy statement with the repeal of the Uniform Act on Paternity and the adoption in 2005 of Uniform Parentage Act, Utah Code § 78-45g-101 et Seq.

Reading the provision for temporary custody in the parentage act, it is readily apparent that the legislature continues to consider custody a separate action from parentage actions. Section 78-45g-616 states: “A temporary tribunal order may include provisions for custody and visitation **as provided by other laws of this state.**” (emphasis added) Note again that section 616 is permissive and does not require that a person must bring the action for parentage and custody together.

Reading section 610 it is also readily apparent that the legislature continues to consider custody a separate action from paternity: “. . . a judicial proceeding to adjudicate parentage may be **joined** with a proceeding for . . . child custody . . .” (emphasis added)

The words “child custody” are included in a list of actions in the Parentage Act which are authorized by the statute as separate proceedings: adoption, termination of parental rights, child custody or visitation, child support, divorce, annulment, legal separation or separate maintenance, probate or administration of an estate. Child custody in this context clearly refers to proceedings which are separate and apart from parentage or paternity proceedings.

Had the state legislature intended that custody must be brought as part of a parentage proceeding, (as opposed to permissibly allowing parentage proceedings and custody proceedings to be joined), they would have included such a provision in the new parentage statute, or in the least in the custody statute (Utah Code § 30-3-10). As with the former Uniform Act on Paternity, they have not done so. Counsel has not been able to find any statute, rule or appellate decision which would require that standing for such actions as divorce or paternity be alleged in order to bring an independent action for custody.

**III. In light of Rule 11 of the Utah Rules of Civil Procedure, must the Petition filed in a Custody case request that the trial court determine the parties’ standing to bring actions such as Divorce or Paternity when the parties cannot meet any of the requirements for standing to bring a Divorce or Paternity action?**

## **1. Standing requires a justiciable controversy**

Standing requires (1) a justiciable controversy, (2) the parties' interests be adverse, (3) the party seeking relief have a legally protectible interest in the controversy, and (4) the issues between the parties be ripe for judicial determination. see e.g. Alternative Options v. Chapman, 2004 UT App 488, ¶ 17; accord Black's Law Dictionary, Fifth Edition, West Publishing Co., p. 1260 ("Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court. The requirement of 'standing' is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation." Guidry v. Roberts, La.App., 331 So.2d 44, 50"); see also Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972) (cited in Black's)

"A justiciable controversy exists when 'a conflict over the application of a legal provision [has] sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto.' Redwood Gym v. Salt Lake Co. Comm'n, 624 P.2d 1138, 1148 (Utah 1981)." Alternative Options v. Chapman, 2004 UT App 488, ¶ 18. (change in the original); accord Blacks Law Dictionary, Fifth Edition, West Publishing Co. (Defining "justiciable controversy" as requiring that there be a real and substantial



controversy, an actual as distinguished from hypothetical difference or dispute, which is appropriate for judicial determination, and citing Duart Mfg. Co. v. Philad Co., D.C.Del., 30 F.Supp. 777, 779, 780; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239, 57 S.Ct. 461, 463, 81 L.Ed. 617 (1937) and Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co., 249 S.C. 561, 155 S.E.2d 618, 621))

## **2. Application of standing concept by the trial court**

The trial court's ruling is hard to understand in traditional terms of "standing." It may be that the Court is confusing the status of being married or a biological parent with concept of standing. If so, the Court's ruling takes us down a slippery slope. To require the status of being married or a biological parent in order to bring a custody action first of all ignores the body of law in Utah to the contrary. As the Utah Supreme Court stated in J.W.F., 799 P.2d 710 at 716 (Utah 1990): "There is no reason to narrowly restrict participation in custodial proceedings. Indeed, our case law and the legislature's pronouncements indicate that the interests of the child are best served when those interested in the child are permitted to assert that interest. The question of who should have custody of the child is too important to exclude participants on narrowly drawn technical grounds. . . . Those who

have legal or personal connections with the child should not be precluded from being heard on best interests.”

More importantly, however, requiring the status of “married” or “biological parent” focuses on form over the best interest of the child. This ignores that in many circumstances a person who has actually raised a child for a significant period of time might be the best choice to continue to raise the child even though that person is not married to either parent and is not a biological or adoptive parent of the child. A non-parent traditionally has standing to bring a custody action under the doctrines of In Loco Parentis, equitable estoppel or implied contract. *See, e.g. Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), *Brinkerhoff v. Brinkerhoff*, 945 P.2d 113 (Utah App. 1997)

A biological parent’s right to raise his or her own child is protected in these circumstances by the “Parental Presumption” doctrine. *J.P.*, 648 P.2d 1364 (Utah 1982). If rebutted, the non-parent stands on equal grounds with the parent in the court’s consideration of best interest of the child. *M.W.*, 12 P.3d 880 (Utah 2000); *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982).

### **3. Rule 11**

Rule 11 of the Utah Rules of Civil Procedures states that by presenting a pleading an attorney or unrepresented party is certifying that to the best of the person’s knowledge the claims and other legal contentions are

warranted by existing law. Maria would violate Rule 11 if she included in a Petition a request to determine standing to bring a cause of action which she is not asking the court to decide. For example, if Maria is not seeking to have the court dissolve a marriage (perhaps because she doesn't want to divorce, or she can't meet jurisdiction or grounds for divorce, or she has not been through a marriage ceremony and does not meet the criteria for a determination of common law marriage) then she does not meet the requirements for standing to bring an action for divorce. She does not have a real and substantial controversy regarding divorce. Divorce is not a justiciable controversy for her and certainly is not ripe for judicial determination.

Likewise, and for the same reasons, it would be a violation of Rule 11 for Maria to plead for the court to determine standing to bring a claim for paternity if Maria is not seeking to have the court determine paternity (perhaps because the issue of paternity has previously been decided, say in an agency proceeding such as allowed under Utah Code § 62A-11-101 et Seq., or the father of her child has acknowledged paternity under the process set out in Utah Code § 78-45e-1 et Seq. or a similar process in a foreign

jurisdiction, or the parties have a Decree of Adoption<sup>6</sup> where the father has adopted the child, or, as with Agustin in the case before the Court, the father does not deny the allegation that a child has been born to the parties).

The trial court's requirement that Maria put into a petition a request that the Court determine standing for actions like divorce or paternity places her in the position of putting useless language in a court pleading, in violation of Rule 11, or being denied access to the court entirely.

Furthermore, if a person has been in an abusive relationship with the other parent, that person may put themselves in actual physical danger by bringing an action for paternity, which raises issues of trust and truthfulness in their relationship, whereas a separate and independent custody action might have no consequences if, for example, a father does not want the responsibility of daily caretaking.

Where a party has no standing to bring actions such as divorce or paternity, where requesting the court to determine standing to file actions such as divorce or paternity would serve no logical purpose and would be an absolutely hollow process, there should not be a requirement by the trial court that the parent do so merely to be able to bring a custody action. Any

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<sup>6</sup> Such a Decree would of necessity either be from a foreign jurisdiction allowing non-married couples to adopt or predate the 2000 legislative changes to Utah Code § 78-30-1 which removed the ability of a non-married person who is cohabiting to adopt in Utah.

requirement to plead standing should apply to the standing to bring the custody action itself.

**IV. Does allowing parents to petition for custody who happen to have standing to bring another type of action, such as paternity or divorce, and denying parents the right to petition for custody who don't have standing to bring another type of action, such as paternity or divorce, violate the equal protection rights under the Constitutions of Utah and the United States of the parents who don't have standing to bring another type of action such as paternity or divorce?**

#### **1. Federal and state equal protection**

“As a general matter, the Equal Protection Clause requires all persons similarly situated to be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).” Bernat v. Allphin, 2005 UT 1, ¶ 41.

“The Utah Constitution provides a similar protection, stating that ‘[a]ll laws of a general nature shall have uniform operation.’ Utah Const. Art. I, § 24.” Bernat et al v. Allphin et al., 2005 Ut. 1, n14.

Whether or not a parent has standing to bring any other type of action, such as divorce or paternity, all parents seeking custody have a constitutionally protected interest in the care and custody of their children. In re J.P., 648 P.2d 1364, 1372 (Utah 1982) (citing Prince v. Massachusetts,

321 U.S. 158, 166, 88 L.Ed. 645, 64 S. Ct. 438 (1944) and Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 69 L.Ed. 1070, 45 S. Ct. 571 (1925))

Under a federal analysis, to allow one group of parents to petition for custody solely because they have standing to bring actions such as divorce or paternity and to deny all other parents the right to petition for custody on the sole basis that they don't have standing to bring such actions as divorce or paternity is clearly an impermissible unequal treatment of parents who have equal fundamental constitutional rights. Stanley v. Illinois, 405 U.S. 645, 652, 92 S. Ct. 1208; 1213, 31 L. Ed. 2d 551, 559 (1972). A state action that interferes with a fundamental right must withstand "strict judicial scrutiny". Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-58, 101 L. Ed. 2d 399, 108 S. Ct. 2481 (1988). A classification will only be upheld under a strict scrutiny analysis if it is narrowly drawn to serve a compelling government interest. Plyler v. Doe, 457 U.S. 202, 216-17, 72 L. Ed. 786, 102 S. Ct. 2382 (1982).

Likewise, under Article I, Section 24 of the Utah Constitution, the trial court must apply the laws equally to all parents. If the trial court treats one group of parents different from another there must be a reasonable basis related to the law being applied. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

## **2. There is no state interest in forcing a parent to plead for divorce or paternity in order to bring a custody action**

In analyzing Maria's equal protection rights under both the federal and Utah Constitutions there is no readily apparent state interest in having a parent petition the trial court for standing to bring an action such as divorce or paternity when the constitutionally protected right which that parent seeks to have the court address is custody.

For example, the trial court's ruling would prevent a parent, whose spouse obtained a divorce without custody in a foreign state pursuant to the federal Parental Kidnapping Prevention Act<sup>7</sup>, the state Uniform Child Custody Jurisdiction Act<sup>8</sup> or the more recent state Uniform Child Custody Jurisdiction and Enforcement Act<sup>9</sup>, from filing for custody in Utah. A divorced parent lacks standing to bring a divorce action. At the time Maria's case rose a divorced parent in most instances lacked standing to bring a paternity action.<sup>10</sup>

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<sup>7</sup> PKPA, 28 USC § 1738A

<sup>8</sup> Utah's former statute, the Uniform Child Custody Jurisdiction Act (UCCJA still in effect in a number of states)

<sup>9</sup> UCCJEA, codified in Utah at Utah Code § 78-45c-101 et Seq.

<sup>10</sup> But see, Masters v. Worsley, 777 P.2d 499 (Utah App. 1989)(The Masters Court points out that paternity and the legitimacy of a child born during a marriage can be two separate things.)

Note also that the ability of a married person to contest paternity has changed with the passage in 2005 of the Utah Uniform Parentage Act, Utah

The unequal treatment by the trial court is especially unsupportable where the statutory authority for paternity, one of the primary examples given by the trial court for the dismissal, did not mention custody, did not authorize custody as a subpart of a Paternity action, and did not require that a party request a trial court to determine standing to file for paternity in order to request a determination of custody. Utah Code Ann. § 78-45a-1 et Seq. (repealed 2005).

Likewise the current Utah Uniform Parentage Act, Utah Code Ann. § 78-45g-101 et Seq. (adopted 2005) does not require that a party request a trial court to determine standing to file for paternity in order to request a determination of custody. In fact, as stated above, a fair reading of section 610 under the Parentage Act is that it is permissive to combine the separate action of custody with a determination of parentage action: “. . . a judicial proceeding to adjudicate parentage may be joined with a proceeding for . . . child custody . . .” Utah Code Ann. § 78-45g-610(1) (emphasis added)

The trial court can have no interest whatsoever in requiring Maria to request the trial court to determine standing for paternity where the state legislature had not authorized custody as part of the paternity process at the

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Code § 78-45g-101 et Seq., which allows genetic testing by married persons for the purpose of determining parentage and which therefore overrides the long followed “Lord Mansfield’s Rule” which prohibited the introduction of evidence showing that a child born in a marriage was not legitimate.



time her case arose, and where the current statute does not mandate that custody be brought as part of a paternity action, but instead permissibly allows an action for parentage and an action for custody to be joined.

In addition, there can be no state interest in having a party request determination of standing for divorce where Utah Code § 30-3-10(1) allows a parent to petition the court for a custody order upon separation and without the need to seek a divorce. As noted above, the plain language of section 30-3-10(1) gives married couples with children the right to bring a separate custody action. As also noted above, this right has been expanded by the courts and section 30-3-10 now applies to couples who are not married.<sup>11</sup>

### **3. Impact on children of the court's unequal treatment**

No equal protection analysis should be made with respect to custody controversies without looking at the treatment the trial court's requirement has on children. No child has the ability to control the standing of a parent to seek actions such as divorce or paternity. In fact, Children cannot choose their parents or determine how their parents will go through life. Yet, the parent child bond is as important to a child whose parents do not have standing to bring such actions as divorce or paternity as it is to a child whose

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<sup>11</sup> Linam v. King, 804 P.2d 1235, 1237 n.1 (Utah App. 1991).

parents do have standing to bring actions such as divorce or paternity.<sup>12</sup> All children are similarly situated when it comes to the fundamental constitutionally protected right of care and custody by a parent.

All children are also similarly situated in that it is in their best interest to have stability in their lives. Both the Utah Supreme Court and the Court of Appeals have recognized stability as part of the best interest test for custody. Pusey v. Pusey, 728 P.2d 117 (Utah 1986); Hudema v. Carpenter, 989 P.2d 491 (Utah App. 1999). Court orders for custody are designed to create that stability to the extent possible.

And yet, the result of the trial court's requirement that a parent have standing to file for actions such as divorce or paternity in order to bring a custody action means that some parents will not be able to seek court created custody arrangements. Not only does this violate the clear intent of the legislature for the court to determine the best interest of children whose parents are involved in custody controversies, it arbitrarily denies children the right to have a court created custody arrangement designed to bring stability to their lives.

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<sup>12</sup> Accord Levy v. Louisiana, 391 U.S. 68, 71-72 (1968)(The Levy Court declared a Louisiana statute unconstitutional which denied illegitimate children the right to sue for wrongful death of a parent.)

Not only does the state have no interest in raising artificial barriers to parents seeking court custody determinations, there is a clear state interest in allowing access to the courts for parents to resolve issues arising out of their constitutionally protected right of care and custody of their children. In its role as *Parens Patriæ* the state and courts have an acute interest in insuring stability in the lives of children.

#### **4. Court's ruling leaves parents without any custody remedy**

The trial court's decision would leave parents with no remedy whatsoever in many circumstances. For example, where a non-parent, such as a grandparent, is given permission by a parent to take a child for a period of time and refuses to return the child. Of the other types of actions under which custody might be included, none are appropriate. Guardianship is not available to a parent. The court may only appoint a guardian if "all parental rights of custody have been terminated or suspended by circumstances or prior court order." Utah Code § 75-5-204. In fact, the parent having given permission for the child to be with the grandparent might give the grandparent standing to bring a guardianship action, but the parent has no ability to use the guardianship statute to retrieve her child. Divorce, annulment, and separate maintenance are not appropriate because the parties

are not married. Paternity is not appropriate because there is no issue as to parentage. Protective orders are not appropriate where the child is not being harmed and is being well taken care of. Adoption certainly would not get the child back for the parent. Neglect and dependency actions and termination of parental rights actions are not appropriate if the child is being well taken care of. Furthermore, since the parent allowed the grandparent to take the child, kidnapping is not appropriate.

The only appropriate remedy is a determination of custody and the custody case must of necessity be brought independent of any other type of action if the parent has no standing with regards to any other type of action.

**V. Does placing the artificial barrier of requiring standing in other actions, such as divorce or paternity, in order to petition the court with regards to issues arising in connection with the fundamental constitutionally protected right of parental care and custody, violate a parent's rights to petition the courts and rights to due process under the Utah and United States Constitutions?**

**1. Access to the court is itself a fundamental right**

The right of access to the courts is a fundamental right in and of itself.

Bounds v. Smith, 430 U.S. 817, 828, 52 L. Ed. 2d 72, 97 S. Ct. 149 (1977).

As stated above, the parent child custodial relationship is also a constitutionally protected right (J.P., 648 P.2d 1364, 1372 (Utah 1982)

(citing Prince v. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S. Ct. 438 (1944); Pierce v. society of Sisters, 268 U.S. 510, 534-35, 69 L.Ed. 1070, 45 S. Ct. 571 (1925))), and a person may not be denied court access where such access is essential to the exercise of a fundamental right. See e.g. Boddie v. Connecticut, 401 U.S. 371, 380-381; 91 S. Ct. 780, 787; 28 L.Ed. 2d 113, 120-21; (1971); accord Gale v. Providence Hospital, 118 Mich. App. 405 citing Wolff v. McDonnell, 418 U.S. 539; 945 S. Ct. 2963; 41 L. Ed. 2d 935 (1974)(“The right of access to the courts is founded in the Due Process Clause, and assures that no person will be denied the opportunity to present allegations to the judiciary concerning violations of fundamental rights.” Gale)

## **2. Federal analysis of right to access Utah’s courts**

The right of access to the courts is one aspect of the first amendment right to Petition and is a fundamental right. Harrison v. Springdale Water & Sewer Com., 780 F.2d 1422 (Eighth Cir. 1986).

“The power of a State to determine the limits of the jurisdiction of its courts and the character of controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution.” Howlett v. Rose, 496 U.S. 356, 387 n26; 110 S.Ct. 2430, 2446 n26; 110

L.Ed. 29 332, 357 n26 (1990)(citing McKnett v. St. Louis & San Francisco R. Co., 292 U.S. 230 (1934))

**i. There is no countervailing state interest that justifies the denial of Maria’s petition for custody**

To deny court access the trial court must at a minimum be protecting a countervailing state interest of overriding significance. Boddie v. Connecticut, 401 U.S. 371, 377; 91 S. Ct. 780, 785; 28 L.Ed. 2d 113, 118; (1971).

Without a prior court determination, both parents have equal rights to present their position to the court in hopes of proving that it is in the best interest of their child to be in their care and custody. Custody cases are routine. Thousands of custody cases a year are litigated in Utah courts. Custody orders bring desperately needed stability to a child’s life and work to remove contentions between the parents which harm the child. Allowing Maria access to the courts to obtain a custody order fulfills the states role as *parens patriæ*. There is no countervailing state interest in denying Maria access to the court to have custody over her child determined.

**3. State analysis of right to access Utah’s courts**

Access to the courts is protected in Utah’s Constitution under Article I, Section 11, which states in part: “no person shall be barred from prosecuting

or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.” This open courts provision guarantees access to the courts and a judicial procedure to protect basic individual rights. Currier v. Holden, 862 P.2d 1357, 1361 (Utah App. 1993). Under Article I, Section 11, there is a two part analysis. Id. at 1362. First, the denial by the trial court of Maria’s petition must leave Maria and her child with an effective and reasonable alternative remedy to an independent action for custody. Second, if no alternative remedy is provided, does the denial eliminate a clear social or economic evil?

**i. Maria has no alternative process for obtaining custody**

Unless Maria were to violate Rule 11 of the Utah Rules of Civil Procedure and seek a determination of standing, which she doesn’t have, to bring another action, such as divorce or paternity, the trial court left her with no other alternatives, nor are there any other alternatives at common law or under any Utah statutes or court rules. As stated above, guardianship is not available to a parent. The court may only appoint a guardian if “all parental rights of custody have been terminated or suspended by circumstances or prior court order.” Utah Code § 75-5-204. Divorce, annulment, and separate maintenance are not appropriate because Maria and Agustin are not married. Paternity is not appropriate because Maria lacks standing where

there is no issue as to parentage. A protective order is not appropriate.

Though not part of the record, Maria's child resides with Maria and is being well taken care of. Agustin is not harming the child physically. Adoption does not apply to a situation where both parties are the biological parents of the child. Neglect and dependency actions and termination of parental rights actions are not appropriate if the child is being well taken care of.

**ii. The court's ruling does not eliminate a clear evil**

Maria is merely asking the court to decide a custody issue, which given the volume of custody cases in Utah's courts is a routine function of the court and not an evil to be overcome.

In light of the huge societal benefit of court ordered custody arrangements which bring stability to a child's life and work to resolve points of contention between two parents, there is no clear social or economic evil which the trial court's denial of Maria's petition seeks to overcome. On the contrary, the court's ruling creates a social evil by forcing people into divorce who do not need or want to divorce. And the court's ruling creates an evil by forcing people to seek paternity where paternity is not disputed and where the act of serving an abusive opposing party with a paternity petition when the parties do not dispute paternity may result in actual physical harm to a petitioner.



Furthermore, requiring parties to seek a determination of paternity when paternity is not at issue denies persons who are not married or biological parents, such as a grandparent or a non-married significant other, who have raised a child over a period of years, from ever obtaining custody. This is contrary to the best interest of a child to have loving, concerned and caring non-parents raise them in appropriate circumstances.

In the final analysis, the greatest evil is not one that the trial court is attempting to overcome through the denial of Maria's petition. There is no evil apparent in Maria seeking custody without also seeking divorce or paternity. The greatest evil is the one being created by the court's act of denying Maria and her child the Constitutional right to access the court to obtain the benefits inherent in a court ordered custody award.

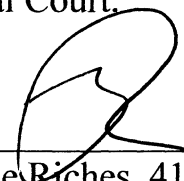
## **CONCLUSIONS (STATEMENT OF RELIEF SOUGHT)**

Maria Albores asks this Court to issue a written opinion clearly holding whether or not an independent action for custody exists in the State of Utah and whether or not she must bring her custody case as part of another action such as divorce or paternity.

If the holding allows an independent custody action to be brought without alleging standing to file other types of actions, Maria asks for a

remand to the trial court with instructions to enter the default of Agustin Bracamontes and sign the Findings of Fact and Conclusions of Law and the Decree of Custody previously submitted to the trial Court.

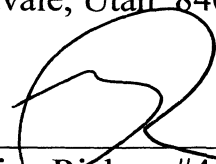
DATED 8-15-05

  
\_\_\_\_\_  
Wayne Riches, 4127  
Attorney for Appellant

### PROOF OF SERVICE

I certify that on 8-16-05 I mailed two copies of this brief to Agustin Bracomontes at his address on file with the Court, 8510 South State Street #21, Midvale, Utah 84047, and two more copies to the most recent address where Maria Albores believes he might be residing, Wasatch Club Apartments #2502, 6960 South State Street, Midvale, Utah 84047.

DATED 8-15-05

  
\_\_\_\_\_  
Wayne Riches, #4127

# **ADDENDUM**

<b>I. Trial Court's order of dismissal entitled "Court's Ruling"</b>	<b>1</b>
<b>II. Rule 11, Utah Rules of Civil Procedure</b>	<b>3</b>
<b>III. Utah Code § 30-3-10</b>	<b>5</b>
<b>IV. Utah Code § 78-45a-1 et Seq.</b>	<b>7</b>
<b>V. Memorandum from meeting with Commissioner Arnett's Clerk</b>	<b>14</b>

3RD DISTRICT COURT - SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

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MARIA DEL CARMEN SUASTEGUI  
ALBORES,

Plaintiff,

vs.

AGUSTIN BRACAMONTES,  
Defendant.

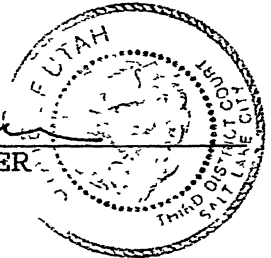
:  
: COURT'S RULING  
:  
:  
: Case No: 044903659  
:  
: Judge: SANDRA PEULER  
: Date: 01/11/2005

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Clerk: kathyg

This matter has been brought as a petition for custody, without any request that the court determine the standing of the parties to bring such action, such as a divorce or an action to establish paternity. Therefore, the petition is denied.

  
Judge SANDRA PEULER



Case No: 044903659  
Date: Jan 11, 2005

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CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 044903659 by the method and on the date specified.

METHOD NAME

Mail MARIA DEL CARMEN SUASTEGUI  
ALBORES  
PETITIONER  
8475 EASTBRIDGE RD  
MIDVALE, UT 84047

Dated this 11 day of Jan, 2005.

R. Grotapay  
Deputy Court Clerk

**Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.**

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

**30-3-10. Custody of children in case of separation or divorce -- Custody consideration.**

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

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

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

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

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

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

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

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

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

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

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

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



purpose of modifying an award of custody.

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

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

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

(c) Nothing in this section may be construed to apply to adoption proceedings under Title 78, Chapter 30, Adoption.

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

# Chapter 45a. Uniform Act on Paternity

## **78-45a-1 Obligations of the father.**

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

## **78-45a-2 Determination of paternity - Effect - Enforcement.**

(1) Paternity may be determined upon:

(a) the petition of the mother, child, putative father, or the Office of Recovery Services; or

(b) a voluntary declaration of paternity executed in accordance with Title 78, Chapter 45e, Voluntary Declaration of Paternity Act.

(2) If paternity has been determined or has been acknowledged according to the laws of this state or any other state, the liabilities of the father may be enforced in the same or other proceedings by:

(a) the mother, child, the Office of Recovery Services, or the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses; and

(b) other persons including private agencies to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses.

(3) An adjudication of paternity or a voluntary declaration executed in accordance with Title 78, Chapter 45e, Voluntary Declaration of Paternity Act, shall be filed with the state registrar in accordance with Section 26-2-5 .

(4) A party to an action under this chapter has a continuing obligation to keep the court informed of the party's current address.

**78-45a-3 Limitation on recovery from the father.**

The father's liabilities for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

**78-45a-4 Limitations on recovery from father's estate.**

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws.

**78-45a-5 Remedies.**

(1) (a) The district court and the juvenile court have jurisdiction of an action to establish paternity, in accordance with the provisions of Section 78-3a-105 .

(b) Except as provided in Section 78-3a-105 , the district court has jurisdiction over all remedies for enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for legitimate children. The appropriate court has continuing jurisdiction to modify or revoke a judgment for future education and necessary support. All remedies under Title 78, Chapter 45f, Uniform Interstate Family Support Act, are available for enforcement of duties of support under this chapter.

(2) (a) The obligee may enforce his right of support against the obligor and the state may proceed on behalf of the obligee or in its own behalf, pursuant to the provisions of Title 62A, Chapter 11, Recovery Services, to enforce that right of support against the obligor.

(b) The provisions of Title 62A, Chapter 11, Recovery Services, apply in all actions by the state.

(c) Whenever the state commences an action under this chapter, it shall be the duty of the attorney general or the county attorney of the county where the obligee resides to represent the state. Neither the attorney general nor the

county attorney represents or has an attorney-client relationship with the obligee or the obligor, in carrying out his responsibilities under this chapter.

(3) Upon motion by a party, the district court shall issue a temporary order in a paternity action to require the payment of child support pending a determination of paternity if there is clear and convincing evidence of paternity in the form of genetic test results under Section 78-45a-7 or 78-45a-10 , or other evidence.

(4) The court may enter an order awarding costs, attorney fees, and witness fees in the manner prescribed by Section 30-3-3 upon a judgment or acknowledgment of paternity.

(5) Rule 55, Default Judgment, Utah Rules of Civil Procedure, applies to paternity actions commenced under this chapter.

#### **78-45a-6 Time of trial.**

If the issue of paternity is raised in action commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage but during such delay testimony may be perpetuated according to the laws of this state.

#### **78-45a-6.5 Standard of proof.**

The standard of proof in a trial to determine paternity is "by a preponderance of the evidence."

#### **78-45a-7 Authority for genetic testing.**

(1) Upon motion of any party to the action, made at a time so as not to delay the proceedings unduly, the court shall order the mother, the child, and the alleged father to submit to genetic testing if the request is supported by a sworn statement by the requesting party:

(a) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(b) denying paternity and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.

(2) The court may, upon its own initiative, order the mother, the child, and the alleged father to submit to genetic testing.

(3) (a) The court shall order genetic testing:

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

(ii) to be performed by a laboratory approved by such an accreditation body; and

(iii) to be performed by a laboratory that follows strict guidelines regarding chain of custody of evidence which includes obtaining photographs of the parties at the time samples are taken.

(b) Except as provided in Subsection (7), the cost of genetic testing shall be paid by the party who requested it or shared between the parties if requested by the court, subject to recoupment against the party who challenges the existence or nonexistence of paternity if the result of the genetic test is contrary to the position of the challenger.

(4) Upon request by a party, a court may order a second genetic test that complies with Subsection (3) if paid for in advance by the requesting party and requested within 15 days of the result of the first genetic test being sent to the last-known address on file under Section 78-45a-2 .

(5) If the court orders a second genetic test in accordance with Subsection (4), the additional testing must be completed within no more than 45 days of the court's order or the requesting party's objection to the first test will be automatically denied. If failure to complete the test occurs because of noncooperation of the mother or unavailability of the child, the time will be tolled.

(6) If any party refuses to submit to genetic testing, the court may resolve the question of paternity against that party, or may enforce its order if the rights of others and the interests of justice so require.

(7) The office may request genetic testing under this section and shall pay for genetic testing it requests subject to recoupment as provided in Section 62A-11-304.1 .

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

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

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

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

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

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

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

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

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

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

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

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

(ii) results in an exclusion.

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

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

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

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

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

#### **78-45a-11 Judgment.**

Judgments under this act may be for periodic payments which may vary in amount. The court may order payments to be made to the mother or to some person, corporation, or agency designated to administer them under the supervision of the court.

#### **78-45a-11.5 Social security number in court records.**

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

#### **78-45a-12 Security.**

The court may require the alleged father to give bond or other security for the payment of the judgment.

**78-45a-13 Settlement agreements.**

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

**78-45a-14 Venue.**

An action under this act may be brought in the county where the alleged father is present or has property or in the county where the mother resides.

**78-45a-15 Uniformity of interpretation.**

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**78-45a-16 Short title.**

This act shall be known and may be cited as the "Uniform Act on Paternity."

**78-45a-17 Operation of act.**

This act applies to all cases of birth out of wedlock as defined in this act where birth occurs after this act takes effect.



## Pro Se Clinic & Waine's Clinic

\_ Go through checklists

\_ Default vs. Contested

~~ADR forms/language NOT to be included regarding stipulated divorces. - Rule 4-510 (6)(A) UCJA~~

\_ Petition for Sole Custody NOT proper action - Must have, or file, Divorce Action, or Paternity

\_ Approval as to Form of orders/decrees NOT necessary

\_ "Fill in the Blank" or handwritten forms are fine but **must** be legible and also have complete Certificate of Mailing

\_ Do NOT file "Custody and Support" action. Only "Paternity Action" and "Divorce Action".

\_ **Motion Hearings** - for temporary orders

### **Must have:**

Motion (to list requested relief), Affidavit (specific explanation of reasons why relief requested, notarized), and Notice of Hearing

**or** Motion for Order to Show Cause, Affidavit, Order to Show Cause (to be issued by court)

- Rule 6-401(2)(A) UCJA RE: Authority of Commissioners to require law and motion calendar

- Rule 7(b) URCP RE: Exception of proceedings before Commissioners

— **Get it done!** - *without* Appearance, Consent, & Waiver

File original Complaint (or Petition to Modify) and serve w/Summons, wait 20 days (or however long Summons is),

\*Answer?, file Certification of Readiness for Trial w/Financial Declaration and Income Verification, get Pre-Trial Settlement Conference w/Commissioner, either settle at pre-trial or case is certified for trial before Judge.

\*No Answer?, file Default papers.

Note: \*If Divorce Action with children, the party submitting Certification of Readiness for Trial **must** complete Divorce Education Class **before** filing Certification of Readiness.

Both parties must complete Divorce Education Class before final documents are submitted.

\*Commissioner may send parties to mediation if they do not settle at pre-trial. - Rule 4-510, UCJA

**The Utah Rules of Civil Procedure is your friend!**