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Utah Adoption Services for Women, a Utah non-profit corporation v. Bradley Thomas Belanger : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

UTAH ADOPTION SERVICES FOR WOMEN, a Utah non-profit corporation,	:	
Plaintiff/Respondent	:	
v.	:	APPELLANT'S BRIEF
BRADLEY THOMAS BELANGER	:	Civil No. C88-03292
Defendant/Appellant	:	Case No. 890018 - CA

AN APPEAL FROM THE DECISION OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON PRESIDING.

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ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 7

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BRADLEY THOMAS BELANGER	:	Case No. 890018 - CA
Defendant/Appellant	:	Priority #7

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. Section 78-2a-3(g) (1987) and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

On or about May 18, 1988 the Plaintiff filed a Complaint for declaratory judgment that temporary custody of the male minor child conceived and born to Defendant Bradley Thomas Belanger, a resident of the State of Nevada, and one "D.R.F." in the state of Nevada was properly in the Plaintiff, Utah Adoption Services for Women, and for an order granting that Plaintiff could place said child for adoption pursuant to said temporary custody. Defendant responded with a Counterclaim claiming that he had stated his opposition to the placement of said child for adoption, that he

sought custody of said child and that he had been damaged by the Plaintiff's placement of said child for adoption. A trial of this matter was held in September and October, 1988 at which time the Court found that Defendant was the natural father of said minor child; that Defendant did not exercise his rights in the State of Nevada for establishment of paternity; that the signing of the consent by Defendant releasing said child to "D.R.F" for adoption was not without duress and coercion and that there was no evidence to support Defendant's claims that the Plaintiff acted in bad faith. The Court found in favor of the Plaintiff and granted the relief sought by the Plaintiff, and concluded that the Defendant should have complied with Utah law in registering paternity; that Defendant had failed to establish paternity in Nevada pursuant to Nevada law; that the purported consent signed by Defendant was invalid; and that the Interstate Compact on Adoptions was not applicable to this proceeding. This is an appeal of the Memorandum Decision rendered by the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Leonard H. Russon presiding, entered on or about November 9, 1988. After trial the Court issued Findings of Fact. The Appellant considers the following findings central to the instant appeal:

24. That night, the evening of April 27, 1988, Belanger (Appellant) in a telephone conversation with "D.R.F." learned that she had executed the Release and Consent and placed the child for adoption. Belanger said he was going to resist the

adoption. "D.R.F.: did not relay that information to Bagley (Respondent) until the next Saturday, April 30, 1988.

26. Belanger was informed on Tuesday, May 3, 1988 by his lawyer that Nevada law required him to file an affidavit at the hospital to be on the birth certificate, and if not, to file an affidavit with the Nevada Department of Vital Statistics acknowledging paternity of the child. He filed an affidavit with the State more than a week after the birth and two months later he received a birth certificate with his name on it. Belanger and D.R.F. had labored under the belief that Belanger's name was going to be on the birth certificate since his name was on the "worksheet." There is no evidence as to why the name was not placed on the birth certificate, except that the proper papers were not filed.

29. Under the facts of this case, with the clear knowledge of Belanger that the child was to be born in Utah, to be placed for adoption with the Plaintiff in Utah, the defendant literally had months in which to so register with the Utah Bureau of Vital Statistics since such registration may occur prior to the birth of a child in Utah. And, during this time, plaintiff had legal counsel in other matters and could have and should have protected his rights because of the notice and knowledge that he had in this matter. Belanger did not exercise his rights in the state of Nevada for establishment of paternity as required by Nevada statutes. He and the natural mother were never married, they did not co-habit for at least six months prior to the period of

conception, nor continued to co-habit through the period of conception, before the child's birth he and the natural mother did not attempt to marry one another, he did not receive the child into his home and hold it out openly as his own natural child, and he did not timely acknowledged or admitted (sic) his paternity in a writing filed with the Nevada State Registrar of Vital Statistics as required.

30. The Defendant eventually filed an affidavit in Nevada claiming paternity. By then, however, the child had been placed by the natural mother, with the appropriate consent and release with the plaintiff adoption agency in Utah.

32. (a) The mother, herself, brought the baby into Utah and placed it with the adoptive family and agency and signed her consent and release before a notary in Utah.

(b) The mother had initially contacted the adoption agency in Utah while living in Utah with her sister concerning the adoption of the baby.

(c) The mother's intention was to travel from California to Utah for the purpose of delivering her baby and placing it with an adoption agency, and the premature delivery was not anticipated. Only by accident was the baby born in Nevada.

(d) Both the father and the mother knew of the mother's intention to give birth to the baby in Utah.

(e) After the premature delivery in Nevada, both mother and father knew of her plans to personally deliver the

baby in Utah to adoptive parents and the adoption agency.

33. The Court further finds that there were no actions upon the part of the plaintiff Utah Adoption Services for Women or its agents supporting the claims of the defendant in his counterclaim. The plaintiff acted in good faith in its attempt to assist the natural mother in placement of her child for adoption. D.R.F. approached the Plaintiff in Utah, and requested their services. The agency made the effort to travel to California to talk to D.R.F. and the father of the child, and left a consent form with him. While the adoption agency knew the father did not want the child to be placed for adoption, he never refused, nor did he indicate to the adoption agency that he would not consent (until after the child had been placed). While the consent has been determined not to be valid, because of all the facts known to the adoption agency, it was not unreasonable to dictate a consent, although inadequate, and to believe that Belanger would sign this consent with his understanding full knowledge that it had come from the adoption agency and was for the purpose of the child being released for adoption. There are no facts to support any claim of unethical or unprofessional conduct, or that the plaintiff agency acted wrongfully or maliciously.

34. Belanger did not register with the Utah Department of Vital Statistics as provided under Utah Code Annotated 78-30-4, 1953 as amended.

Pursuant to these Findings of Fact the Court concluded, as a

matter of law, that:

5. Utah law required the natural father making a claim of paternity to register with the Utah Registrar of the Department of Vital Statistics, and to indicate his willingness to support the child to the best of his ability, and failure to do so prior to the child being relinquished or placed with an agency for adoption terminated his rights. Belanger did not register with the Utah Department of Vital Statistics. Since he had full knowledge that the baby was going to be relinquished to the adoption agency in question in the State of Utah, and he knew when D.R.F. was flying to the State of Utah for this purpose, to protect his rights he was obligated to so register. His failure to do so terminated his rights within Utah.

6. The Court finds that if it is a requirement in a Utah adoption to check for similar acknowledgment statutes in other states that the defendant failed to establish his paternity as required by Nevada law prior to the relinquishment of the child for adoption.

8. The Interstate Compact on Adoptions is not applicable to this proceeding or the underlying adoption.

14. The Nevada statute, NRS 126.041-041 state that a man "may establish his paternity where (1) he and the mother have been married during a certain period, or (2) the father and the natural mother were co-habiting for at least six months before the period of conception and continued to co-habit through the period of conception, or, (3) he receives the child into his own

home and openly holds it out as his natural child, or (4) he and the mother attempt to marry before the birth, or (5) at any time he acknowledges or admits paternity of the child in writing filed with the State Registrar of Vital Statistics."

ISSUES PRESENTED BY APPELLANT

1. Did the trial court err in finding that the Defendant/Appellant had not satisfied legal requirements to proclaim himself the natural father of the child, the Appellant having fully satisfied the requirements under his state of residence and the state of birth of the child, the State of Nevada?

2. Did the trial court err in requiring the Defendant/Appellant to register with the Utah Department of Vital Statistics when Appellant was a resident of Nevada and the said child was conceived and born in Nevada?

3. Did the trial court deprive the Appellant of due process rights by terminating his parental rights for failure to provide proper notice of paternity as required by Utah law.

4. Did the trial court err in finding that the Interstate Compact on placement of children was not applicable to this matter and that Plaintiff/Respondent had not violated the said Compact?

STATEMENT OF THE CASE

Appellant Brad Belanger has been a resident of the State of Nevada his entire life. (Tr. 2 of 3, p. 114) He and "D.R.F." lived together in Las Vegas, Nevada for a period of several months (Tr. 1 of 3, p. 145) and a result of this relationship, a child was conceived. "D.R.F." during her pregnancy visited with her sister in Salt Lake City, Utah for a few weeks, and, without the knowledge of the Appellant, contacted the Plaintiff/Respondent, Utah Adoption Services for Women, Ms. Bagley, director, to discuss a possible adoption of the baby she was carrying. (Tr. 1 of 3, pp. 145 - 148). "D.R.F." then returned to Las Vegas, Nevada to live with her mother and subsequently left to reside with a friend in Ontario, California after the Appellant refused to agree that placing the parties' expected child for adoption was an acceptable option. (Tr. 1 of 3, p. 149).

During this separation Appellant and "D.R.F." had numerous telephone contacts (Tr. 1 of 3, p. 151), and "D.R.F." requested Appellant to meet with her and Respondent in Ontario, California to provide family background information for an adoption, and at the time of the meeting Respondent left release documents for Appellant releasing the expected child for adoption, but Appellant informed Respondent that he would not sign a consent or release. (Tr. 1 of 3, pp. 155 and 158).

On April 25, 1988 "D.R.F." gave birth to a male child in

Henderson, Nevada with the Appellant present in a supporting role. (Tr. 1 of 3, p. 162). Appellant checked the worksheet provided by the hospital for the filing of the child's birth certificate to ensure that his name was entered as natural father, since "D.R.F." was in constant contact with Respondent and appeared to be still considering an adoption. (Tr. 1 of 3, p. 165). Respondent advised "D.R.F." not to enter the Appellant's name on the birth certificate as that would "make the adoption easier" but Appellant and "D.R.F." entered his name. (Tr. 1 of 3, p. 167). From the filing of this worksheet which contained the name of Appellant as natural father, all parties assumed that Appellant's name would appear on the birth certificate, and all parties acknowledged his paternity. (Tr. 1 of 3, p 165 and p. 169).

On April 26, 1988, the Appellant, "D.R.F.', and the newborn child removed from the hospital to a nearby motel where the Appellant believed that he could convince "D.R.F." to abandon the idea of the adoption and go with him and the child to his parents' residence. (Tr. 2 of 3, pp. 126-172), (Tr. 1 of 3, p. 168, pp. 173-174). During that evening and night the Appellant held the child and talked about keeping the child and raising him themselves. Also during that evening "D.R.F." telephoned Respondent and talked to her and Respondent dictated a consent form for Appellant to sign releasing the child to "D.R.F." for adoption, Respondent stating that now the natural father had been entered on the birth certificate, his consent would have to be

obtained. (Tr. 1 of 3, pp. 169-171).

Respondent had purchased an airline ticket for "D.R.F." to fly to Utah for the birth of the child, but when said child was born in Nevada, "D.R.F." was to use the ticket to avoid the Interstate Compact for adoption regulations by having the mother bring the child to Utah thereby avoiding having the Respondent or adoption agency bring the child or cause him to be brought from another state for adoption placement. (Tr. 2 of 3, pp. 249-252). "D.R.F." was to fly to Utah on April 27, 1988. Appellant assumed that he would be the one to drive them to the airport and would have until that time to convince "D.R.F." to abandon the idea of adoption. However early the following morning, the mother of "D.R.F" and a family friend, a police officer, arrived at the motel, and Appellant began to realize that D.R.F. had decided to take the flight to Utah. "D.R.F." then produced the consent which had been dictated by Respondent and after being urged by "D.R.F." and her mother that he had promised to sign a release in exchange for being included on the child's birth certificate, the Appellant, in tears and protesting that he didn't want to do this, signed the consent. (Tr. 2 of 3, pp. 127-127).

Respondent realized that the consent form signed by Appellant was inadequate, as it was later ruled by the court invalid, and forwarded adoption documents to the Nevada Welfare Department for Appellant to sign. (Tr. 2 of 3, pp. 130, 262). Appellant was called to the office of one Marguerite Williams of

that department on Monday, May 2, 1988, and she advised him, after he stated that he objected to the placement of his child for adoption, to seek legal advice. (Tr. 2 of 3, p. 133). Appellant met the next day, May 3rd, with Robert E. Gaston, attorney, who immediately telephoned Respondent and notified her that Appellant was not going to sign the release forms, was seeking the return of the child to Nevada, and seeking custody of said child. (Tr. 2 of 3, p. 134). Respondent told Mr. Gaston that she had already placed the child for adoption and did not need a release form from the Appellant. Respondent then caused a Certificate of Search for Acknowledgment of Paternity to be issued in the State of Utah on May 11, 1988, in spite of her knowledge that Appellant was the father of said child, and that his name had been submitted for recording on the birth certificate in the State of Nevada. Interestingly Respondent made no such search for acknowledgment of paternity in the State of Nevada.

On May 4, 1988, the day following the meeting with his attorney, Appellant, acting on the advice of his attorney that he must file an Affidavit of Paternity in the State of Nevada when the parents of a child are unwed, arrived in Fontana, California to ask "D.R.F." to sign the natural mother's portion of said Affidavit. "D.R.F." refused to sign, on the advice of the Respondent who again advised "D.R.F." that the adoption would be easier" if "D.R.F." did not sign, so the Appellant filed the Affidavit of Paternity with the State of Nevada without her

signature. Concurrently the Appellant filed an action in the State of Nevada, believing that, as the state of birth of the child, Nevada was the appropriate forum.

Five days after she was served with the Appellant's Clark County action, the Respondent filed an action in the Salt Lake County District Court for declaratory judgment, creating a jurisdictional conflict. The Clark County, Nevada Court referee ruled that the Appellant was the natural father of said child, that he had a cause of action, and referred the matter to the State of Utah as the present state of domicile of the said child, leading to the action and decision appealed herein.

SUMMARY OF ARGUMENTS

Point I

The trial court erred in finding, in paragraph 29 of the Court's Findings of Fact that Appellant had not satisfied legal requirements to establish himself as the natural father of the child in the State of Nevada. In paragraph 14 of the Court's Conclusions of Law, the Court concluded:

> "The Nevada statute, NRS 126.041-041 state that a man "may establish his paternity where (1) he and the mother have been married during a certain period, or (2) the father and the natural mother were co-habiting for at least six (6) months before the period of conception and continued to co-habit through the period of conception, or, (3) he receives the child into his own home and openly holds it out as his natural child, or (4) he and the mother attempted to marry before the birth, or (5) at any time he acknowledges or admits his paternity of the child in a writing filed with the State Registrar of Vital Statistics."

The Appellant in fact did acknowledged his paternity in writing with the State of Nevada. The Appellant took every affirmative step and undertook each and every procedure as each became necessary and as he became aware of each requirement. He did insist on being entered on the worksheet at the hospital which he believed at the time would result in his name being on the birth certificate. He did file an Affidavit of Paternity with the State of Nevada. He did bring a legal action in Nevada which resulted in him being declared the father of said child. The length of the period between the birth of the child and the ultimate issuance of a birth certificate listing Appellant as father was the result of the actions of the mother and the adoption agency to avoid dealing with the Appellant in the adoption, and not the result of any indifference or unnecessary delay on the part of Appellant.

The Court's Conclusion of Law, paragraph 5, that Appellant should have filed an acknowledgment of paternity in Utah demands an unreasonable standard of adherence to the law of another state from a party who was doing everything he knew how to do to acknowledge paternity in the state of birth of his child. Further it was unreasonable to expect Appellant to have taken action in Utah prior to the birth of the child when both he and "D.R.F" testified that the Utah adoption was always discussed between the parties as an "option" until such time as it actually took place.

Utah case law which has established the unwed father's

responsibility to file acknowledgment of paternity and object to the adoption in a timely manner have the following common threads:

1. Both parents were Utah residents.

2. The father would not assume any financial responsibility for the mother or baby.

3. The father did not sign a birth certificate or acknowledgments of paternity.

4. Neither the child's mother nor the adoption agency were involved in an effort to prevent the father from asserting his parental rights.

5. Neither the child's mother nor the adoption agency knew at the time of relinquishment that the father was seeking to assert his parental rights.

The facts of the present case differ substantially from the above determining factors.

Point II

The trial court erred in finding that the Appellant had to register his claim to paternity in the State of Utah. The Appellant was a resident of the State of Nevada, the natural mother had been a resident of Nevada, the said child was conceived and born in Nevada, the Respondent knew the identity of the natural father and did not at any time advise him of the necessity of filing any acknowledgment of paternity, let alone of filing one in the State of Utah, and the Appellant believed that

he was doing everything necessary to establish his parental rights by filing his claim of paternity in the State of Nevada. It is reasonable and fair, given in the facts of this case, that the natural father, the Appellant, should be determined to have satisfied the requirements of the State of Utah by having satisfied the requirements of the State of Nevada.

Point III

The Appellant followed the procedures for the State of Nevada in claiming paternity of the child, obtained counsel to seek the return of the child, brought action in the State of Nevada to declare his paternity and to seek the return of the child to Nevada, sought and took alternative measures when the Respondent adoption agency, and the mother failed to cooperate with his attempts to file his claim to paternity, and at all times to all persons claimed his paternity and expressed his desire to raise and provide for the child. The adoption agency withheld specific information that it knew when Dr. Bagley used the jurisdiction of the State of Nevada, sought counsel on the Interstate Compact, and search for acknowledgment of paternity in the State of Utah, all of which adversely affected the Appellant's opportunity to fairly claim his child. The trial court deprived the Appellant of his right to due process when it terminated his parental rights for failing to file proper notice.

Point IV

The Appellant claims that the purchase of the transportation ticket by Respondent adoption agency constitutes having "brought, or caused to bring" as provided under Article III, Conditions of Placement of the Interstate Compact on Placement of Children, Utah Code Annotated, 55-8b, 1953 as amended. The Respondent testified that she sought the advice of the authorities of the Interstate Compact before placing the child for adoption in Utah and claimed that she was not, according to the opinion of those authorities bound by the provisions of that Compact in the instant case. The finding that Respondent should or should not have complied with the Interstate Compact was important to Appellant because in the event Respondent was subject to said Compact, the State of Nevada would have been put on notice, and Appellant would have had more opportunity to assert his claim of paternity.

However Respondent testified that she withheld information from those authorities which may or would have affected their opinion, specifically that she, Respondent, had paid for the ticket to transport the mother and child from California and subsequently, Nevada, and the crucial information that the child was born in Nevada. The trial Court erred in finding that the Interstate Compact on Placement of Children for adoption was not applicable in this case.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT HAD NOT SATISFIED LEGAL REQUIREMENTS TO PROCLAIM HIMSELF THE NATURAL FATHER OF THE CHILD, THE APPELLANT HAVING FULLY SATISFIED THE REQUIREMENTS UNDER HIS STATE OF RESIDENCE AND THE STATE OF BIRTH OF THE CHILD, THE STATE OF NEVADA.

In support of its ruling that Appellant had not satisfied legal requirements to proclaim himself that natural father of the child the Court stated in page 12 of its Memorandum Decision entered in this matter that Appellant knew that "D.R.F." intended to give birth to her expected child in Utah and to place said child for adoption in Utah, and that further Appellant knew that "D.R.F." flew to Utah with the child with that intent. From that "knowledge" the Court concludes that Appellant should have reasonably been expected to protect his rights pertaining to said child by filing an acknowledgment of paternity in the State of Utah. (Conclusion of Law, #5) This does not seem to be a reasonable requirement for someone who is not conversant with the law. It would perhaps have been reasonable to assume that a layman, upon the birth of his child in the State of Utah, would conclude that he should file an acknowledgment of paternity in Utah, but when his child is born in Nevada and he is a resident of that state, he would reasonably be expected to pursue that acknowledgment in Nevada.

It is an inaccurate finding that Appellant had known for months that "D.R.F." intended to place the baby for adoption in Utah since "D.R.F." herself in testimony supported the

Appellant's claim that he believed adoption was always only an option by stating that she was not, prior to the birth of the child, confirmed that she was placing the child for adoption and said "No, I was never totally going to do it until I did it. This is something I can't decide until I had the baby." (Tr. 1 of 3, p. 163). The only testimony adduced at the time of trial with regard to "D.R.F's" intent to place the child for adoption came from Appellant and "D.R.F." who both testified that it was only discussed between the two as an option and that they experienced disagreement when Appellant refused to discuss adoption as an alternative. Testimony from Respondent indicates only that she knew that Appellant was unwilling and unresponsive, and noted in her progress notes that at the hospital he was suggesting arrangements for the remodelling of his parents' home to make a home for the child to be with its' parents. (Ex. P-8).

No witness testified that it was a known and sure fact during the months preceding the birth of the child that "D.R.F" was certainly placing the child for adoption in Utah as concluded by the Court. The Court, in Findings of Fact 32(c), stated that "Only by accident was the child born in Nevada." Testimony and the notes of Respondent indicate that it had always been planned for "D.R.F." to stop in Las Vegas at that time for her birthday celebration. As always, "D.R.F.'s" discussions with Appellant on that occasion supported Appellant's belief that "D.R.F." was still considering his arguments against an adoption.

The Court ruled on Page 14 of the Memorandum Decision, with

regard to the State of Nevada, that the Appellant "never acknowledged or admitted his paternity in writing filed with the State Registrar of Vital Statistics as required." This is simply not the case. The Appellant's Affidavit of Paternity was filed May 4, 1988 in the State of Nevada (Tr. 2 of 3, p. 117). The Nevada statute, NRS 126.041-041, requires:

> ". . . a man "may establish his paternity where (1) he and the mother have been married during a certain period, or (2) the father and the natural mother were co-habiting for at least six months before the period of conception and continued to co-habit through the period of conception, or, (3) he receives the child into his own home and openly holds it out as his natural child, or (4) he and the mother attempt to marry before the birth, or (5) at any time he acknowledges or admits paternity of the child in writing filed with the State Registrar of Vital Statistics."

In trying to understand the Court's rational behind the ruling, one can infer one of two reasons: (1) that the Court is making a requirement of the Appellant that he should have taken such action before the birth of the child, since Appellant supposedly knew the mother intended to place the child for adoption immediately at its birth; or (2) that Court has determined that the Appellant should have filed his admission of paternity before Respondent's placement of the child with the adoption parents.

In response to (1), the Appellant clung to his determination and belief that he could change the mother's mind, and (2) that his rights as a parent would be protected if he ensured, somehow, that he was included on the child's birth certificate. He

consequently took every action reasonably expected of a layman from the moment of the child's birth to ensure that he was on the birth certificate, including, but not limited to, telephoning the hospital the day of "D.R.F.'s" departure to Utah with the child to request the birth certificate; talking to Marguerite Williams of the Nevada Welfare Department and immediately following up on her suggestion, which had obviously not occurred to him previously, to consult with an attorney; talking by telephone with an attorney that same day and consulting with him the next day; leaving the same day and arriving the next in California to secure the mother's signature on an Affidavit of Paternity as advised by his counsel; taking the only avenue available upon "D.R.F.'s" refusal to sign said Affidavit by filing it that same day back in Nevada without her signature; and concurrently initiating a legal action in the county of birth of the minor child to halt the adoption proceedings and obtaining a ruling thereby of his paternity. In effect Appellant took every action which could reasonably be expected of him to satisfy Nevada's requirements to proclaim himself the father of the child.

It is unfair and unjust to expect the Appellant to have achieved the desired end result of the proclaiming of his paternity in the short period of time, two days, between the child's birth in Nevada and his placement for adoption when such process was made unnecessarily lengthy by the intentional and deliberate actions of both the Respondent and "D.R.F." to

frustrate Appellant's claim to paternity as follows:

a) The Appellant was present at the birth of the child, and entered his name on the worksheet provided by the hospital for the filing of a birth certificate, in spite of Respondent's advice to "D.R.F." that "the adoption would proceed easier" if his name was not included. Both Appellant and "D.R.F." believed that the worksheet would lead to the Appellant's name being included on the birth certificate and all parties had expected it to be so.

b) Both Appellant and "D.R.F." testified that "D.R.F." represented to Appellant that she could and would prevent the entering of Appellant's name on the birth certificate if he refused to sign his consent to release the child to "D.R.F." for adoption. Appellant did so.

c) When Appellant rushed to California to obtain the signature of "D.R.F." on the Affidavit of Paternity, "D.R.F." telephoned the Respondent for advice and Respondent advised "D.R.F." not to sign such affidavit as "the adoption would proceed more easily if she didn't." The Appellant immediately returned to Nevada and filed his own affidavit acknowledging paternity of the child.

d) Because of the refusal of "D.R.F." to sign the affidavit, the Appellant was required to wait a sixty (60) day waiting period for the mother to dispute said affidavit (Nevada statute 128.150) or rely on a court ruling of his paternity to bring about the issuance of the birth certificate bearing his

name as natural father.

e) Respondent stated in testimony (Tr. 1 of 3, p. 131) in response to a question as to why she did not check in the State of Nevada prior to placement for adoption that "it wouldn't have done any good because it takes a week to ten days for the birth certificates to get there anyway."

In light of the delays caused by the actions of the Respondent and "D.R.F." and the circumstances in this matter, the Defendant/Appellant had satisfied all requirements of his state of residence and the state of the birth of the child, the State of Nevada, to establish paternity and to have his name entered on the birth certificate as father of said child as expeditiously as possible. Any use of the adjective "untimely" is unreasonable in this case in light of the Appellant's actions, and not supported by the Nevada statute which states paternity may be acknowledged "at any time."

Further, with regard to the Appellant's opportunity to take affirmative action prior to the birth of the child, such an expectation fails to take into account many normal factors, including the Appellant's genuine wish to convince "D.R.F.", not intimidate and threaten, and his polite and unassertive behavior with Respondent at their only meeting being the result of instructions from "D.R.F." to "be nice" and not from any lack of desire to strongly express his opposition to the adoption. It also fails to take into account the fact that it is very normal for a father to fail to realize his child as more than an idea

until the actual birth; until holding the child himself. The mother carries the child and is physically aware of the reality of another being, but this is not the case for a father. This father was galvanized into action after seeing and holding his son, and realizing the morning of the signing of the consent and the flight to Utah, that "D.R.F." was going to go ahead with an adoption and that he must take every action he could think of, like calling the hospital for a copy of the birth certificate and going to the library to check the statutes to ensure that his consent would be necessary before the adoption could proceed.

In the present case, there are no facts to support a claim that Appellant had any knowledge about registering a claim to paternity. In Swayne v. L.D.S. Social Services, 670 F. Supp. 1537 (D. Utah 1987) the father was advised of this necessity at the time of the birth of the child, and even had actual prior personal experience with the requirement. Respondent, who as an adoption agency had the superior knowledge in such matters, had not advised Appellant or the natural mother of this necessity and had even gone so far as to give advice and take steps that would made Appellant's performance of the acknowledgment more difficult and time-consuming.

What the Appellant did know and believe was that he must be indicated on the birth certificate of the child as the natural father in order to establish his parental rights. All the parties believed from the date of the birth of the child that the Appellant was on the birth certificate. The inclusion of his

name on the birth certificate had been Appellant's compelling intent, even to the point of "bargaining" with "D.R.F." to have his name included. The trial court erred in finding, in paragraph 29 of the Court's Findings of Fact that Appellant had not satisfied legal requirements to establish himself as the natural father of the child in the State of Nevada.

Point II

THE TRIAL COURT ERRED IN REQUIRING THE APPELLANT TO REGISTER WITH THE UTAH DEPARTMENT OF VITAL STATISTICS WHEN APPELLANT WAS A RESIDENT OF NEVADA AND THE CHILD WAS BORN IN NEVADA.

In its Findings of Fact, paragraph number 34, the Court found:

> "Belanger did not register with the Utah Department of Vital Statistics as provided under Ut. Code Ann. 78-30-4 (1953, as amended)."

And concluded, in paragraph 5 of the Conclusions of Law, that

> "Utah law required the natural father making a claim of paternity to register with the Utah Registrar of the Department of Vital Statistics, and to indicate his willingness to support the child to the best of his ability, and failure to do so prior to the child being relinquished or placed with an agency for adoption terminated his rights. Belanger did not register with the Utah Department of Vital Statistics. Since he had full knowledge that the baby was going to be relinquished to the adoption agency in question in the State of Utah, and he knew when D.R.F. was flying to the State of Utah for this purpose, to protect his rights he was obligated to so register. His failure to do so terminated his rights within Utah."

In this matter the Court has concluded that, although the child was born in Nevada and the Appellant was a resident of Nevada and the birth certificate was filed in Nevada, the child was placed for adoption in the State of Utah, and therefore the Appellant was required to register his acknowledgment of paternity with the Utah Department of Vital Statistics. If this conclusion is reasonable it means that:

(1) all the actions of the mother and the adoption agency in this matter in bringing the child to Utah and relinquishing it for adoption in one day and in attempting to avoid dealing with the Appellant as regards the adoption were justified;

(2) the birthplace and state of issuance of birth certificate of a child placed for adoption has no meaning or importance under the law in Utah, as only Utah's records will be checked or judged valid in determining an unwed father's claim to paternity;

(3) an adoption agency can deliberately or unintentionally fail to advise an unwed father of the requirement to claim paternity <u>in the State of Utah</u> in discussions held with said unwed father, knowing that said adoption agency can then avoid dealing with the wishes and rights of that father on the technicality of simply initiating a paternity search in the State of Utah;

(4) an adoption agency in Utah may, as in this case, <u>act</u> as if the father of a child is unknown, simply because he is

actively involved in protecting his paternal rights in another state, and has not claimed them in the State of Utah, when it in fact does know the identity of said father and his attitude towards the adoption.

The primary purpose of the filing of acknowledgment of paternity is the issuance of a birth certificate naming a natural mother and father as in the case of a legitimate child. If the State of Utah has no interest in issuing a birth certificate for said child, why require the Appellant to file a duplicate acknowledgment in the State of Utah?

The facts of this case represent a conflict of law between the states of Utah and Nevada. "Is an adoption agency in Utah required to recognize the rights and claims of a natural father made in the State of Nevada regarding his child born in Nevada?"

In Buhler v. Maddison, 109 Utah 267, 176 P.2d 118 (1947), the Supreme Court of Utah ruled regarding potential loss of rights in applying procedural and substantive law when a cause of action or right arises in a sister state. The Court stated:

> "When the situation is one where a different result might be reached according to the rule applied, the court must determine under the law of conflicts of laws whether it will apply the rule of a foreign state for rules of substance and the forum state for procedural process. In determining whether an element or a cause of action is a matter of substance or of procedure, the court will examine the statute or rule of law creating the claimed right or duty, and the interpretation thereof by the courts of state creating the right, or where the cause of action arose."

Id at 122, emphasis added.

In this present case the Appellant's paternal right "arose" in the State of Nevada where the birth of the child took place and the Appellant complied with Nevada law in filing an affidavit of acknowledgment of paternity and having himself named as the father on the issued birth certificate. There would be a "different result" to the ruling in this case that Appellant be required to file under Utah law and that Appellant's paternal rights be terminated if the rule of the State of Nevada were applied. According to Nevada statute a "presumed father's" parental rights cannot be terminated without hearing, (NRS 128.150) and the acknowledgment of paternity may be submitted "at any time" (NRS 126.051(2)(e)).

Appellant contends that it is not reasonable nor should this state compel a citizen of a sister state to file an acknowledgment of paternity in two states particularly in light of the fact that this child was conceived in Nevada, born in Nevada, the putative father resided in Nevada, the birth certificate (a form of acknowledgment of paternity) was issued in Nevada, the Respondent and mother knew of the existence of the natural father and his residence in Nevada, and the Respondent attempted to utilize a Nevada State agency to procure the consent of the Appellant in this matter. Further, the Respondent was in serious violation under the Nevada statutes, Sections NRS 127.053 and NRS 127-057, regarding notice of adoption, which impose a misdemeanor penalty, so that if the laws of the State of Nevada

are invoked, a completely different result would occur.

Appellant filed suit in Nevada to regain custody of his child and Respondent filed suit in Utah five (5) days after she was served in Nevada with the summons, thus creating the conflict of jurisdictions. In referring the matter to the Utah court, the Nevada referee deferred to the present domicile of the child in question, not to the superior claim of Utah statute over the actions of the parties. Appellant contends that the trial court should have looked to the laws of the State of Nevada in determining whether Appellant had satisfied requirements to establish his paternity and whether Appellant's parental rights should be terminated, and erred in finding that the Appellant had failed to satisfy the requirements for acknowledgment of paternity in Nevada, and the erred in requiring the Appellant to register with the State of Utah Department of Vital Statistics.

Point III

THE TRIAL COURT DEPRIVED THE APPELLANT OF DUE PROCESS RIGHTS BY TERMINATING APPELLANT'S PARENTAL RIGHTS FOR FAILURE TO PROVIDE NOTICE OF CLAIM OF PATERNITY.

The most prevalent and necessarily the most important issue in recent Utah cases involving the paternal rights of an unwed father is that of due process. The rights of a putative father have been well-established in these and other cases. The facts of this case contain many of the same factual elements of the recent cases, but also some which are significantly different.

Deprivation of parental rights must be supported by clear

and convincing evidence. In Stanley v. Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S. Ct. 1208 (1972), the United States Supreme Court firmly held that an unwed father does have a constitutionally protected interest in his children. At issue in that case was a state law which, in effect, provided that children of unwed fathers become wards of the state upon the death of the natural mother. The court first ruled that the interest of a father in his children is sufficiently important to be constitutionally protected, holding:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."
>
> The rights to conceive and raise one's children have been deemed "essential" . . . and "(r)ights far more precious . . . than property rights". 405 U.S. at 651, 31 L.Ed.2d at 558. (citations omitted, emphasis added)

The United States Supreme Court also made clear that a man's interest in his children was no less constitutionally protected merely because he had not been formally married to their mother:

> (T)he law (has not) refused to recognize those family relationship unlegitimized by a marriage ceremony. The Court has declared unconstitutional the state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as

> warm, enduring and important as those arising within a more formally organized family unit . . . "To say that the test of equal protection should be that of 'legal' rather than biological relationship is to avoid the issue . . . " 405 U.S. at 651-52, 31 L.Ed. 2d at 559 (citations omitted)

The court then unequivocally stated its holding that:

> Stanley's interest in retaining custody of his children is cognizable and substantial.

Because of the drastic nature of depriving a father of the constitutionally protected right to his child and his parental rights, the burden of proof must be met with evidence that is clear and convincing. The court has made that position clear in the case of Robertson v. Hutchison, 560 P.2d 1110 (Utah 1977) where it stated:

> Arising out of the natural bonds of affection and concern which natural parents usually have for their children, it is and should be the policy of the law to support and give strength to the family by encouraging the preservation of the parent-child relationship and by being reluctant to interfere with or destroy it. Accordingly, the Court does not easily find such abandonment, but will do so only when the evidence is clear and convincing that the parent has either expressed an intention or so conducted himself as to clearly indicate an intention, to relinquish parental rights and reject parental responsibilities.

This need for "clear and convincing evidence" of the abandonment of a child before a parent's rights are relinquished requires a careful examination of all the factual elements in this case to determine if Appellant "expressed an intention or so conducted himself as to clearly indicate an intention" to

relinquish or abandon his parental rights to his son. The Court found, in its Findings of Fact, paragraph number 34:

> "Belanger did not register with the Utah Department of Vital Statistics as provided under Ut. Code Ann. 78-30-4 (1953, as amended)."

And, the Court concluded, in paragraph 5 of the Conclusions of Law, that

> "Utah law required the natural father making a claim of paternity to register with the Utah Registrar of the Department of Vital Statistics, and to indicate his willingness to support the child to the best of his ability, and failure to do so prior to the child being relinquished or placed with an agency for adoption terminated his rights. Belanger did not register with the Utah Department of Vital Statistics. Since he had full knowledge that the baby was going to be relinquished to the adoption agency in question in the State of Utah, and he knew when D.R.F. was flying to the State of Utah for this purpose, to protect his rights he was obligated to so register. His failure to do so terminated his rights within Utah."

In re. Adoption of Baby Boy Doe, 717 P.2d 686, 689 (Utah 86) and Ellis vs. Social Services Dept., Etc., 650 P.2d 1250 (Ut. 1980) this Court was previously asked to determine the constitutionality of Utah Code Annotated 78-30-4(3). In these cases the Court avoided overturning the statute itself by stating that the application of the statute could be looked at, and that:

> If the putative father "is successful in showing that the termination of his parental rights was contrary to basic notions of due process, and that he came forward within a reasonable time after the baby's birth, he should be deemed to have complied with the

statute."

In Wells v. Children's Aid Society of Utah, 681 P.2d 208 (Utah 1984) the Court defined "within a reasonable time" or the reasonable opportunity standard as one that applies only where it is first shown that it was "impossible" for the father to file "through no fault of his own."

The "impossibility" exception is applicable in Swayne v. L.D.S. Social Services, 670 F. Supp. 1537 (D. Utah 1987), Wells, and Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984) because of the following:

1. Both parents were Utah residents.

2. The father would not assume financial responsibility for the mother and baby.

3. The father did not sign a birth certificate or acknowledgment of paternity.

4. Neither the child's mother nor the adoption agency were involved in an effort to prevent the father from asserting his parental rights.

5. Neither the child's mother nor the adoption agency knew at the time of relinquishment that the father was seeking to assert his parental rights.

A brief review of the facts of this case highlight significant variations with these factors:

1. The father was a resident of Nevada; the mother was a resident of Nevada at the time of conception of the child and a resident of the California immediately prior to the birth; the

child was born in Nevada and transported to Utah after its birth.

2. The father had plead and bargained with the mother to stay with the father and raise the child as a family unit.

3. The father made every effort to be entered on the birth certificate, and filed an affidavit of paternity.

4. Both the child's mother and the adoption agency were involved in actions and omissions which interfered with the father speedily asserting his parental rights, including, but not limited to, paying for the transportation of the mother and child to Utah in an effort to avoid provisions of the Interstate Compact on Adoptions which would have put the State of Nevada and the father on notice prior to the effecting of the adoption; advising the mother not to enter the father's name on the birth certificate; checking for acknowledgment of paternity in the State of Utah and not Nevada; the mother's failure to inform the agency prior to the relinquishment of the child that the father intended to dispute the adoption; the mother's misleading of the father until less than one hour prior to the mother and child's flight to Utah that she and the child would stay with him in Nevada; the agency's failure to inform the Nevada Welfare Department that the child was born in Nevada; agency's failure to report to Utah authorities that she knew the identity of the natural father; agency's advice and mother's refusal to sign the acknowledgment of paternity.

The "impossibility" exception is inapplicable, however, in situations where both parents lived out of Utah and the child is

born out of Utah. In In re Adoption of Baby Boy Doe, and Ellis, the Court found that even though the child was relinquished prior to filing the notice of paternity, the bar imposed by the statute should not apply because:

> In the usual case, the putative father would either know or reasonably should know approximately when or where his child was born. Ellis, p. 1256.

Appellant sought to protect his parental rights "when and where" the child was born, in the State of Nevada. Utah Code Annotated Section 78-30-4(3) in summary says that an unwed father loses parental rights to his child if he fails to provide timely notice; in this case, the Appellant's notice of claim of paternity was timely filed. The Respondent filed her search for acknowledgment of paternity on May 11, 1988 in the State of Utah. If she had filed the same search in the State of Nevada she would have found the Appellant's Affidavit of Acknowledgment of Paternity on file.

Appellant has been deprived of due process in the terminating of his parental rights for failure to comply with Utah Code Annotated 78-30-4, as was stated by the Court in In Re. Adoption of Baby Boy Doe,

> In all but the most exceptional cases, the operation of section 78-30-4 achieves that balance as it affords putative fathers the opportunity to assert and protect their rights while provided a finite point at which the state's interest supercedes that of the father. However, where a father does not know of the need to protect his rights, there is no "reasonable opportunity" to assert or protect parental rights. In such a case, the operation of the statute fails to achieve

> the desired balance and raises serious due process concerns. Id, page 691.

In Ellis, the Court stated that "a statute fair upon its face may be shown to be void and unenforceable as applied", and in Wells stated "The general test for the validity of such rules, the test of procedural due process, is fairness." The termination of Appellant's parental rights in the circumstances of this case by either the ruling that he should have complied with Utah Code Annotated 78-30-4 or that he did not file an affidavit of paternity in the State of Nevada is not fair or justifiable. In the State of Nevada, Appellant would have been accorded the right of a hearing before termination of his parental rights.

Point IV

THE TRIAL COURT ERRED FINDING THAT THE INTERSTATE COMPACT ON PLACEMENT OF CHILDREN IS NOT APPLICABLE IN THIS CASE.

The Appellant claims that the purchase of the transportation ticket by Respondent adoption agency for the use of the mother and baby constitutes having "brought, or caused to bring a child into the receiving state for the purpose of placement for adoption" as provided under Article III, Conditions of Placement of the Interstate Compact on Placement of Children, Utah Code Annotated, 55-8b, 1953 as amended.

The Respondent testified that she sought the advice of the authorities of the Interstate Compact before placing the child for adoption in Utah and claimed that she was not, according to

the opinion of those authorities, bound by the provisions of that Compact in the instant case. (Tr. 2 of 3, pp. 251-252) The finding that Respondent should or should not have complied with the Interstate Compact was important to Appellant because in the event Respondent was subject to said Compact, the State of Nevada would have been put on notice, the Respondent and the mother would not have been able to avoid dealing with the Appellant in the adoption, and Appellant would have had more opportunity to assert his claim of paternity prior to the placement of the child for adoption.

However Respondent testified that she withheld information from those authorities when seeking their opinion. It is the belief of the Appellant that said information may or would have affected their opinion, specifically that she, Respondent, had paid for the ticket to transport the mother and child from California and subsequently, Nevada, and the crucial information that the child was born in Nevada.

This is yet another example of the Respondent adoption agency exercising a selective process in the facts which were revealed to others in this adoption. She asked Dr. Bill Ward, Deputy Interstate Compact Administrator for the State of Utah if she was bound by the Interstate Compact if the birth mother brought the child to Utah, yet she omitted to tell Dr. Ward that she, Respondent, had paid for the ticket. She filed a search for acknowledgment of paternity in Utah, knowing that said acknowledgment was being pursued by Appellant in Nevada. She

failed to file a search for paternity in Nevada although she knew the child had been born there. She "used" the authority and jurisdiction of the State of Nevada by sending authorization and release documents to the Nevada Welfare Department for the signature of Appellant, and yet failed to tell said authorities that the child was born in Nevada and used the expression "putative father" for Appellant when she knew that both mother and Appellant acknowledged Appellant's paternity.

Adoption agencies must be required to conduct their business with the most scrupulous honesty, care, and attention to detail because of the delicate and far-reaching effects of their actions. It is unfair that should one adoption agency be advising a putative father of his rights to claim paternity while another takes every "legal" avenue to discourage a father from doing so, and, further, from dealing with the father at all. A court must abide by strict procedures for ascertaining the attitude and intent of a natural father before terminating his rights in the State of Utah. An adoption agency should be just as sure of protecting those rights. There are certainly enough instances of unwed fathers having no concern whatsoever for the future or welfare of their illegitimate offspring. It is unthinkable that an unwed father who is honestly taking action and seeking to be involved in the decisions that affect his child should be outflanked by a superior knowledge of laws in another state. The trial Court erred in finding that the Interstate Compact on Placement of Children for adoption was not applicable

in this case.

CONCLUSION

Based upon the foregoing Points and Authorities, Defendant/Appellant herein requests that this Court:

1. Reverse the trial court and find that the Defendant/Appellant had satisfied the legal requirements of the State of Nevada to establish paternity and thereby satisfied any and all legal requirements to proclaim himself the natural father of his child;

2. Reverse the trial court and find that the Defendant/Appellant is not required to register a claim of paternity with the Utah Department of Vital Statistics when he had done so in the State of Nevada;

3. Reverse the trial court and find that the Defendant/Appellant was deprived of due process by the Court's ruling to terminate his parental rights for failure to provide notice of claim of paternity;

4. Reverse the trial court and find that the Interstate Compact for Placement on Children was applicable in this matter and that Respondent was required to act in compliance thereof; and

5. Order that, therefore, the case be remanded, with judgment to be rendered for the Defendant/Appellant.

RESPECTFULLY SUBMITTED this 6 day of July, 1989.

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of and for
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MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing Appellant's Brief this 6 day of July, 1989 to:

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