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# UNWED PUTATIVE FATHERS: BEWARE UTAH ADOPTION LAW

Samuel C. Johnston\*

## I. INTRODUCTION

In March of 2011, John Wyatt, a lifelong resident of Virginia, filed an action with a United States District Court in his home state to regain custody of his daughter, Baby Emma, whose mother gave her up for adoption to a Utah couple shortly after her birth in February of 2009.<sup>1</sup> The filed action is a contingency plan in case his direct appeals fail—one then pending before the Utah Supreme Court, but now decided, and the other to be filed with the United States Supreme Court.<sup>2</sup> The action alleges that “a vast conspiracy exists in Utah to take children away from unmarried biological fathers and place them with married couples via restrictive adoption laws.”<sup>3</sup> It names as defendants: the adoption agency who handled Emma’s adoption, its owner, the agency’s attorney, a Virginia-based adoption attorney, and the parents of the baby’s mother.<sup>4</sup>

Wyatt’s story and the allegations in his federal claim raise a number of questions regarding adoptions and adoption law in Utah, especially when the adoptions involve unwed fathers and occur across state lines.<sup>5</sup> Wyatt is just one of many out-of-state unwed fathers, in recent years, to be entangled by Utah’s adoption laws.<sup>6</sup> Each story is slightly different, but in each, a mother with little or

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<sup>1</sup> See Brooke Adams, *Virginia Father Asks Federal Court to Decide Adoption Case*, SALT LAKE TRIB. (March 3, 2011, 10:55 PM), <http://www.sltrib.com/sltrib/home/51349203-76/adoption-wyatt-utah-baby.html.csp>.

<sup>2</sup> Brooke Adams, *Virginia Man Asks U.S. High Court to Hear Adoption Case*, SALT LAKE TRIB. (Jan. 11, 2012, 11:39 PM), <http://www.sltrib.com/sltrib/news/53200751-78/wyatt-utah-adoption-court.html.csp>.

<sup>3</sup> Adams, *supra* note 1.

<sup>4</sup> Complaint, Wyatt v. McDermott, No. 1:11-CV-00058, (E.D. Va. Jan. 19, 2011), available at <http://www.babyemmawyatt.com/wyatt.Complaint1-19-11.pdf>.

<sup>5</sup> See generally UTAH CODE ANN. §§ 78B-6-110, -120 to -122.5 (LexisNexis Supp. 2011) (codifying the provisions of the Utah Adoption Act relevant to the rights of unwed putative fathers).

<sup>6</sup> See, e.g., O’Dea v. Olea, 217 P.3d 704, 713–15 (Utah 2009) (holding that a putative father knew or should have known that a “qualifying circumstance” existed when his child’s mother called him on the phone, and, amidst cryptic conversation, told him “I am in Utah”); *In re I.K.*, 220 P.3d 464, 472–73 (Utah 2009) (holding that a New Mexico man failed to preserve his parental rights when he initiated a paternity and custody action in New Mexico but failed to do so in Utah or register with either state’s putative father registry); Jesse Fruhwirth, *Some Call it Kidnapping*, SALT LAKE CITY WKLY., Jul 29, 2010, at 16, available at <http://www.cityweekly.net/utah/article-11795-some-call-it-kidnapping.html> (relating the story of Ramsey Shaud, an unwed putative father from Florida, who received a mysterious note from his child’s mother stating she will be in Utah,

no lifetime ties to Utah gave her baby up for adoption in Utah with the help of a Utah agency and attorney. In each case, the father tried to comply with Utah law or the laws of his home state but fell short in some legally significant way.<sup>7</sup> Only in the most recent case<sup>8</sup> did an unwed putative father prevail, making the current state of the law even more uncertain for the rights of unwed out-of-state fathers.

This phenomenon sparks concern over the practical effects of Utah's adoption statute—and its corresponding interpretation by the Utah Supreme Court—on unwed, out-of-state fathers who are unlikely to be familiar with Utah law. The phenomenon also suggests Utah's adoption law may be vulnerable to manipulation; potential bad faith or deception on the part of the adoption agency, adoption attorney; or the mother herself could skew the laws' protections away from equity and toward prejudice.

Utah's procedures and requirements present a maze that unwed putative fathers must successfully navigate in order to preserve their parental rights. The requirements are both complex and idiosyncratic; they defy cultural notions of inherent rights, such that a father who is unfamiliar with the law is unlikely to guess the steps he needs to take to preserve his rights. This is because, first, under Utah law, the courts of other states—competent in nearly every other capacity to offer a person within their jurisdictions protection—are impotent to protect a father's rights. And second, the law denies a father protection whose actions, while reasonable and made in good faith, do not precisely align with the law's intricate requirements and procedures. John Wyatt's case—along with other unwed putative fathers, Cody O'Dea and Robert Manzanares—illuminate the ways in which the law, in its unforgiving stringency, can fail to accord proper weight to the interests of a father who, despite failing to comply in some trivial way, has acted in good faith to preserve his rights and to become a responsible parent to his child.

Using Wyatt's, O'Dea's, and Manzanares's stories—recounted in Section II—as frames of reference, this Note will explore the recent developments in Utah adoption law, explain it in its current state, and discuss its likely implications for unwed fathers in Section III. Section IV recommends modifications to Utah's statutory adoption scheme.

## II. THREE EXAMPLES OF PUTATIVE FATHERHOOD

### A. *John Wyatt*

John Wyatt's story began when he and Coleen Fahland first met in the second grade.<sup>9</sup> The two were friends throughout elementary school, middle school, and

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thus triggering the 20-day deadling to comply with the qualifying circumstances rule).

<sup>7</sup> *O'Dea*, 217 P.3d at 712; *In re I.K.*, 220 P.3d at 468–69.

<sup>8</sup> *In re Adoption of Baby B*, 270 P.3d 486 (Utah 2012).

<sup>9</sup> Jerry Markon, *The Baby He's Never Met; Va. Father Fights for Child His Girlfriend Sent to Utah for Adoption*, WASH. POST, Apr. 14, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/13/AR2010041302445.html>.

high school, and dated on and off during those years and again after high school.<sup>10</sup> In 2008, Fahland discovered she was pregnant with Wyatt's child.<sup>11</sup> Though Fahland was upset when learning about her pregnancy, Wyatt was excited from the very beginning.<sup>12</sup> He claims that he went to doctors' appointments, helped pick out the baby's name, and, having grown up without a father since age ten, that he wanted to make sure he was there for his child.<sup>13</sup>

Wyatt first learned about Utah's potential involvement in his daughter's future on February 5, 2009, when Fahland allegedly sent him a text message that, according to Wyatt, said she was "receiving information" from a Utah adoption agency.<sup>14</sup> Wyatt alleges that he called Fahland immediately and she assured him that "they would make a decision jointly."<sup>15</sup> Wyatt also claims that he spoke to Fahland mere hours before Emma's birth on February 10, 2009, and the couple agreed to raise their child together.<sup>16</sup> After their final conversation, however, Wyatt did not hear from Fahland until after Emma's birth.<sup>17</sup> On the morning of February 11, he and his mother visited the local hospital where Fahland had given birth mere hours earlier.<sup>18</sup> Fahland, however, had instructed the hospital not to list her as a patient, and the hospital turned Wyatt and his mother away.<sup>19</sup> Finally, on February 18, Wyatt's lawyer learned from Fahland's lawyer that Emma had been born.<sup>20</sup> Wyatt acted quickly, initiating custody and visitation proceedings in a Virginia court that day.<sup>21</sup> But Fahland had already, on February 12, relinquished her parental rights and consented to Emma's adoption. And as of February 17, Emma was already in Utah with Thomas and Chandra Zarembinski, her adoptive parents.

### B. Cody O'Dea

Cody O'Dea's story began in 2005 in Sheridan, Wyoming, where he had an intimate relationship with Ashley Olea.<sup>22</sup> Sometime before Olea and O'Dea separated, Olea found out she was pregnant.<sup>23</sup> She never told O'Dea about the pregnancy, and moved to Buffalo, Wyoming.<sup>24</sup> In October, O'Dea found out Olea

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> John Wyatt, *Our Story*, BABY EMMA WYATT'S OFFICIAL WEBSITE, <http://www.babyemmawyatt.com/ourstory.html> (last visited Mar. 13, 2012).

<sup>14</sup> Markon, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *In re Adoption of Baby E.Z.*, 266 P.3d 702, 705 (Utah 2011).

<sup>22</sup> *O'Dea v. Olea*, 217 P.3d 704, 706 (Utah 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

was pregnant and visited her in Buffalo, where he encouraged her not to abort the child and offered to pay medical expenses.<sup>25</sup> Three weeks later, Olea told O’Dea she had miscarried the child.<sup>26</sup> O’Dea did not find out until mid-May of the next year from a friend that Olea was “possibly still pregnant.”<sup>27</sup> O’Dea contacted Olea again, and discovered Olea planned to place the child for adoption.<sup>28</sup> O’Dea told Olea that he wanted to maintain a relationship with the child, contacted the adoption agency being used by Olea, and notified them of his intentions.<sup>29</sup> The agency terminated their placement services.<sup>30</sup> O’Dea also attempted to preserve his rights by filing with putative father registries in Wyoming and Montana.<sup>31</sup>

In June of 2006, O’Dea received a cryptic phone call from Olea, during which she told him “I am in Utah,” but also said, “you will not father this child,” and “you will pay child support until the child is in college.”<sup>32</sup> O’Dea took the child support reference to mean that Olea was not placing the child for adoption, and did not take any action to assert his parental rights. Olea gave birth to a baby girl in Utah later that same day.<sup>33</sup> In O’Dea’s action to contest his daughter’s adoption, the Utah Supreme Court found that he failed to comply with the requirements of its statute, by not registering with the Utah putative father registry.<sup>34</sup> The court also found that O’Dea learning Olea was “in Utah” was enough to create a “qualifying circumstance,” meaning O’Dea could not establish an exception from the statutory requirements.<sup>35</sup>

### C. Robert Manzanares

Robert Manzanares and Carie Terry conceived a child in Colorado in the summer of 2007.<sup>36</sup> They ended their relationship in August of that year, but Manzanares “repeatedly told Terry that he wanted to raise the child and would do so alone if necessary.”<sup>37</sup> But Terry “consistently expressed her desire to place the child for adoption.”<sup>38</sup> In November, a Colorado adoption agency contacted Manzanares for his consent to an adoption, but he refused.<sup>39</sup> Manzanares acted to preserve his rights by filing a paternity action in Colorado in January of 2008. In

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 706–07.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 711.

<sup>35</sup> *Id.*

<sup>36</sup> *In re Adoption of Baby B*, 270 P.3d 486, 489 (Utah 2012).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

his action, Manzanares detailed his “serious and founded concerns” that Terry would “flee to Utah, where she has family, to proceed with an adoption.”<sup>40</sup> In February, Terry filed a response to Manzanares’s action, also asking the Colorado court to deny Manzanares parental rights.<sup>41</sup> That month, she traveled to Utah with the “stated purpose of visiting her sick father,” but while she was there her brother and sister-in-law signed a petition for the adoption of Terry’s baby in Utah.<sup>42</sup> Also in February, Manzanares filed a response in the Colorado action, asserting that Terry “is planning to give birth in Utah and place the parties’ unborn child up for adoption,” but he never acted to preserve his rights in Utah.<sup>43</sup>

On February 17, Terry gave birth to her child in Utah.<sup>44</sup> On February 20, the day scheduled for a hearing in the Colorado action, Terry did not appear in court and instead appeared before a Utah court, where she executed the consent to adoption of her child.<sup>45</sup> On February 25, Manzanares became aware Terry had given birth, and he called Colorado hospitals, attempting to locate his child.<sup>46</sup> Finally, he contacted Terry’s brother and sister-in-law, the baby’s adoptive parents, who told Manzanares only that he would be hearing from their lawyer.<sup>47</sup>

### III. UTAH’S ADOPTION LAW IN THREE PARTS

In a move that foreshadows the treacherous road that an unmarried biological father in Utah must tread, Utah’s adoption statute offers a warning to those fathers. “An unmarried biological father,” it disclaims, “by virtue of the fact that he has engaged in a sexual relationship with a woman: (i) is considered to be on notice that a pregnancy and an adoption proceeding regarding the child may occur; and (ii) has a duty to protect his own rights and interests.”<sup>48</sup>

The adoption statutes governing unwed fathers in Utah are laid out principally in five sections. The first section, 78B-6-110, sets forth which persons a court must notify of adoption proceedings.<sup>49</sup> The second, 78B-6-120, details whose consent a court must obtain to execute adoption.<sup>50</sup> The third, 78B-6-121 sets forth specific requirements for unwed biological fathers.<sup>51</sup> The fourth, 78B-6-122, defines “qualifying circumstances.”<sup>52</sup> The fifth, 78B-6-122.5, explains the effect of other

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<sup>40</sup> *Id.* at 490.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 490–91.

<sup>46</sup> *Id.* at 491.

<sup>47</sup> *Id.*

<sup>48</sup> UTAH CODE ANN. § 78B-6-110(1)(A)(i)–(ii) (LexisNexis Supp. 2011).

<sup>49</sup> *Id.* § 78B-6-110.

<sup>50</sup> *Id.* § 78B-6-120.

<sup>51</sup> *Id.* § 78B-6-121.

<sup>52</sup> *Id.* § 78B-6-122.

jurisdictions' adjudication of paternity under Utah law.<sup>53</sup> Utah's statute sets unwed fathers apart as a special case and sets forth a number of complex requirements and procedures they must comply with in order to preserve their rights to notice and consent of adoption proceedings. The scheme can be analyzed in three parts: notice, consent, and the qualifying circumstance exception.

#### A. Notice of Adoption Proceedings

Utah's adoption statute requires an unwed father to take significant action to preserve his right to be notified of any adoption proceedings. A father who does not manage to comply with the statutory guidelines risks his rights being waived and his child being given up for adoption before he even discovers his child has been born.

For an unmarried biological father to preserve his right to notice of adoption proceedings, he must

- (1) "initiate proceedings in a district court of the state of Utah to establish paternity" and
- (2) file notice of those proceedings with Utah's putative father registry.<sup>54</sup> The section further provides that notice shall be provided
  - (a) "at any time after the petition for adoption is filed" and "at least 30 days prior to the final dispositional hearing."<sup>55</sup>

Notably, these notice requirements require the father to initiate proceedings "in a district court of the state of Utah," and not in any other state.<sup>56</sup> In fact, another section of Utah's adoption code states "an out-of-state order that adjudicates paternity, or an out-of-state declaration or acknowledgement of paternity . . . does not entitle [an unmarried biological father to] notice of any judicial proceeding related to the adoption of the child."<sup>57</sup> The second provision similarly limits a father's compliance to registration with Utah's putative father registry.

As for the statute's notice timeline, if a father manages to preserve his right to notice, he will be guaranteed thirty days to contest the adoption. But, by allowing the notice to be sent "at any time after the petition for adoption is filed," the state effectively sets the filing of the petition as a deadline for the father to comply with the notice requirements and preserve his opportunity to grind the wheels of the adoption to a halt.<sup>58</sup>

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<sup>53</sup> *Id.* § 78B-6-122.5.

<sup>54</sup> *See id.* § 78B-6-110 (3)(a)(i)–(ii).

<sup>55</sup> *Id.* § 78B-6-110 (5)(a)–(b).

<sup>56</sup> *Id.* § 78B-6-110 (3)(a)(i).

<sup>57</sup> *Id.* § 78B-6-122.5(1).

<sup>58</sup> *See infra* notes 74–76 and accompanying text.

Utah's two notice requirements work in concert to deny a right to notice to many willing but perhaps tragically bungling, misled, or unaware fathers. Although putative father registries, like Utah's, help guarantee a registrant the right to intervene in any adoption action initiated regarding his child, they can "make it too easy for a state to discard a father's interest in the adoption of his infant child,"<sup>59</sup> even if that father attempted in good faith to preserve his rights but failed to register because of deception, miscommunication, misunderstanding, improper assistance of counsel, or simple lack of awareness that such a database existed. States consider a failure to register as "prima facie evidence of unfitness,"<sup>60</sup> and in so doing exclude otherwise competent and willing fathers that likely would have been located through a more comprehensive search. In Utah, the requirement that fathers register with the database in combination with its deadline for preserving notice completely wipe out fathers' rights to notice—which often leads to a complete termination of rights—before some fathers realize the mistake they made.

Both John Wyatt's case and Cody O'Dea's case provide examples of precisely this result. Wyatt offered to pay Fahland's expenses, attended doctors' appointments, and was present from the beginning, but his failure to register with Utah's database allowed the court to proceed without contacting him.<sup>61</sup> O'Dea filed with other states' putative father registries, and may have assumed he had done enough to preserve his rights.<sup>62</sup> But a technical failure on his part—failure to register with Utah's database—prevented a Utah court from locating him.

Putative father registries are especially problematic when adoptees cross state lines.<sup>63</sup> A legislature may reasonably assume that, where a father is aware a pregnancy exists, and where he and the mother disagree regarding adoption, that he should seek help from an attorney familiar with that state's law, or seek other available information regarding how the laws of his home state protect his parental rights. Proceeding in such a way, a father is likely to discover his state's putative father registry. It is much less reasonable, however, for a legislature to assume that an out-of-state father will be able to locate the database of the ultimate state where the adoption occurs. This is especially true when the father has no reason to believe an adoption could occur in that state.

Finally, the effectiveness of Utah's putative father registry requirement is frustrated when, as in Wyatt's, O'Dea's, and Manzanares's cases, a mother purposely deceives and misleads the father. In both cases, the actions of the birth

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<sup>59</sup> Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39, 40 (2006).

<sup>60</sup> *Id.* at 49.

<sup>61</sup> See Wyatt, *supra* note 13.

<sup>62</sup> O'Dea v. Olea, 217 P.3d 704, 706 (Utah 2009).

<sup>63</sup> See generally Mary Beck, *Toward A National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1033 (2002) (advocating a federal putative father registry and discussing the failure of state registries when adoptions occur across state lines).



mother may have resulted in the father's failure to file with Utah's putative father registry. In Wyatt's case, birth mother Colleen Fahland assured him they would "make a decision jointly" mere hours before their child's birth, causing Wyatt to decide not to pursue legal action.<sup>64</sup> In O'Dea's case, Olea's cryptic message led him to believe that she intended to keep the child and seek child support rather than pursue an adoption, causing him to decide not to register with Utah's putative father registry in addition to Wyoming's and Montana's registries.<sup>65</sup> Deception is made even more problematic for unwed fathers by the statute's provision that allows notice to be sent any time after the adoption petition is filed. Due to deception, fathers like Wyatt, O'Dea, and Manzanares think they have taken appropriate measures to secure their rights, but cannot discover their mistakes until the baby is born and the petition is signed, legally as early as 24 hours after birth.

Interstate confusion, deception, or mistake could all keep a father from filing a timely paternity action and registering with Utah's putative father registry. Due to the statute's technical requirements and unforgiving deadline, fathers who have otherwise sought in good faith to raise their children can be denied the opportunity to demonstrate to a court that they are fit to do so.

#### *B. Preserving Right to Consent*

Utah's adoption statute further sets forth complex and stringent procedures that an unwed putative father must follow if he wishes to preserve his right to consent to the adoption of his child. It requires the putative father to

- (a) "initiate proceedings in a district court of Utah to establish paternity;"
- (b) file a separate affidavit with the court
  - (i) swearing that "he is fully able and willing to have full custody of the child;
  - (ii) "setting forth his plans for care of the child; and
  - (iii) "agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth;"
- (c) file notice of the proceedings with the state's putative father registry; and
- (d) offer to pay and *actually pay* a "fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability," unless
  - (i) "he did not have actual knowledge of the pregnancy,"
  - (ii) "he was prevented from paying the expenses," or
  - (iii) the mother refused to accept the offer to pay expenses.<sup>66</sup> In order to preserve his right to consent, the unwed putative father must

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<sup>64</sup> Markon, *supra* note 9.

<sup>65</sup> *O'Dea*, 217 P.3d at 706-07.

<sup>66</sup> UTAH CODE ANN. § 78B-6-121(3)(a)-(d) (LexisNexis Supp. 2011).

complete all of the above requirements *before* the mother executes consent to adoption or relinquishment to an adoption agency.<sup>67</sup>

These requirements are both overly technical and more complex than most jurisdictions. Compare Virginia's consent statute, which simply requires consent from any man who is (a) an acknowledged father, (b) an adjudicated father (a father who obtains a paternity declaration), (c) a presumed father or (d) a man who has registered with the Virginia Putative Father Registry.<sup>68</sup>

Complex adoption laws requiring particular actions to preserve rights conflict with the culturally promulgated belief that biological parents' rights to their children are fundamental.<sup>69</sup> Consequently, putative fathers may proceed based on the belief that they have inherent rights or that they are acting appropriately to preserve their rights when they are not. This problem of a false sense of security for a father seeking to preserve his rights is potentially further aggravated when he attempts to comply with another jurisdiction's requirements for which he had little or no chance of hearing about either through word-of-mouth or the media. Adoption counsel, too, could be misled or confused by a complex adoption scheme that, like Utah's, is unlike the statute in the jurisdiction that they are accustomed to practicing in.

For instance, for a father to preserve consent under Utah's scheme, he is required not only to file an action in a district court in Utah, but also to file a *separate* affidavit detailing, among other things, how he plans to raise the child.<sup>70</sup> If a lawyer, not accustomed to such a requirement, forgot to file an affidavit or misunderstood that it needed to be separate from the assertions of the contesting action itself, a father's rights could be lost forever. Indeed, consent is required from an unmarried biological father only if he "*strictly* complies with the requirements of Sections 78-6-121 and 78-6-122."<sup>71</sup> A father, as mentioned above, who managed to comply with every requirement of 78-6-121 but whose counsel asserted the affidavit requirements in the complaint rather than in a separate filing, has not strictly complied and therefore has no right to consent under Utah law.

Utah's complex requirements make it difficult for an unwed putative father to comply, especially when he must do so before the mother executes a consent to adoption which, as discussed in the notice context above, can occur as early as twenty-four hours after the baby is born. Utah makes no exception for a father who, though acting reasonably and in good faith, made a technical mistake as to

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<sup>67</sup> *Id.* § 78B-6-121(3).

<sup>68</sup> VA. CODE ANN. § 63.2-1202(C)(1) (Supp. 2011).

<sup>69</sup> *See, e.g.,* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Tyler M. Hawkins, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal That Better Balances the Interests Involved*, 2009 UTAH L. REV. 1335, 1337-43 (discussing the constitutional framework for the rights of unwed fathers).

<sup>70</sup> UTAH CODE ANN. § 78B-6-121(3)(b) (LexisNexis Supp. 2011).

<sup>71</sup> *Id.* § 78B-6-120(1)(f).

Utah's requirements and thus failed to *strictly* comply as required. Even though a tremendous loss is at stake—fathers who fail to preserve their right to consent stand to lose their children forever—Utah offers no sympathy or fail-safe to fathers who unwittingly or trivially failed to follow its precise procedures.

### C. Utah's "Qualifying Circumstance" Exception

Utah's adoption law, in its "qualifying circumstance" provision, contains an exception for an unwed putative father who failed to preserve his right to consent but was completely unaware that Utah law could be involved in a potential adoption proceeding.<sup>72</sup> It also offers what amounts to a small extension to a father who did not know Utah law could be involved, but found out or should have found out that it was likely to be involved.<sup>73</sup> But the Utah Supreme Court has broadly interpreted the portion of the statute describing when a qualifying circumstance is created—or when the exception is defeated—such that it offers little protection, especially for out-of-state putative fathers and where deception was involved.<sup>74</sup>

Under Utah's statute, once a father knows, or through the exercise of reasonable diligence, should know, that a "qualifying circumstance" exists, he must act within twenty days to preserve his rights.<sup>75</sup> A "qualifying circumstance" is defined as any point in time during the period between conception and the moment the mother executes a consent to adoption when

- (i) the child or the child's mother resided, on a permanent or temporary basis, in the state;
- (ii) the mother intended to give birth to the child in the state;
- (iii) the child was born in the state; or
- (iv) the mother intended to execute a consent to adoption or relinquishment of the child for adoption
  - (A) in the state; or
  - (B) under the laws of the state.<sup>76</sup>

The "twenty day" provision acts as an extension to a father who did not have the benefit of all nine months of the mother's pregnancy to attempt to establish his rights in Utah. That is, the statute provides a father who, at some point before the mother executes a consent to adoption, discovers a qualifying circumstance—or discovers that Utah law could possibly govern the adoption of his child—twenty additional days to comply with Utah's laundry list of requirements to preserve his parental rights.

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<sup>72</sup> See *id.* § 78B-6-122(1)(c).

<sup>73</sup> See *id.*

<sup>74</sup> See *supra* notes 64–65 and accompanying text.

<sup>75</sup> See UTAH CODE ANN. § 78B-6-122 (1)(c)(ii)(B).

<sup>76</sup> *Id.* § 78B-6-122(1)(a).

If the father never becomes aware of a qualifying circumstance until after a mother executes her consent to adoption, the section acts as a kind of opt-out provision that excuses the father from the stringent § 78-6-121 guidelines and requires his consent despite his non-compliance. In addition to requiring that a father did not know or could not have known about a qualifying circumstance, the opt-out portion of the section requires that a father complied with the laws of his home state—requiring what could be called constructive compliance with § 78B-6-121 through his demonstrated parental fitness.<sup>77</sup> Fathers unaware of a qualifying circumstance must have “before the mother executed a consent to adoption . . . fully complied with the requirements to establish paternal rights in the child, and to preserve the right to notice . . . imposed by” (I) the last state where the putative father knew that the mother resided, or (II) the state where the child was conceived.<sup>78</sup> In addition to complying with another state’s requirements, the father must demonstrate, “based on the totality of circumstances, a full commitment to his parental responsibilities.”<sup>79</sup> Among the criteria set forth by the statute for determining if a “full commitment” was made: the father’s efforts to discover the location of the mother or child, demonstrated interest in taking responsibility of the child, the extent to which he offered or actually did provide financial support.<sup>80</sup>

But for its broad interpretation by the Utah Supreme Court, this exception could have made Utah’s entire set of adoption statutes strikingly more reasonable by recognizing fathers who, due to misleading or confusing circumstances, had no reason to believe they needed to pursue legal protection in Utah and *in fact* did not believe they needed to pursue such action.

Cody O’Dea’s case, for instance, turned on whether a cryptic and bizarre phone call from Ashley Olea was sufficient to establish O’Dea’s knowledge or constructive knowledge of a qualifying circumstance. The court in *O’Dea* describes the entire phone conversation. Its account must be read in its entirety to understand the message it likely conveyed to O’Dea:

During the conversation, Ms. Olea told Mr. O’Dea: “You will listen and you will not speak. First of all I want you to stop harassing me and that includes your mother. I am in Utah. You will not father this child. You will pay child support until the child is in college. You will never see this baby. Do you understand?” Mr. O’Dea stated that he did not understand, and Ms. Olea asked again if he understood. Mr. O’Dea again stated that he did not and asked if Ms. Olea meant that she was not placing the child for adoption. Ms. Olea responded, “If you understand what I have told you, that is all I have to say.” She then terminated the call. Since the number was blocked, Mr. O’Dea could not call back.<sup>81</sup>

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<sup>77</sup> See *id.* § 78B-6-122.

<sup>78</sup> *Id.* § 78B-6-122(1)(c)(i)(A)–(B).

<sup>79</sup> *Id.* § 78B-6-122(1)(c)(i)(C).

<sup>80</sup> *Id.*

<sup>81</sup> *O’Dea v. Olea*, 217 P.3d 704, 707 (Utah 2009).

Few reasonable observers would know how to interpret this conversation. Having no prior knowledge, an observer might assume, as O’Dea did, that Olea’s statements regarding child support, coupled with her cryptic answer to O’Dea’s question about adoption, meant that she had decided to keep the child and seek financial support. Add to that observation O’Dea’s bias—he had been deceived and misled numerous other times by Olea since her pregnancy—and it is reasonable to expect that observer to come to the same conclusion as O’Dea, that he need not pursue any further legal protections. Read into the context of the conversation, Olea’s assertion that she was “in Utah” may have even seemed incidental or unrelated to the rest of the information she conveyed. Rather than being the reasonable and natural reaction to the call, it would seem to take a person of *extraordinary* diligence to latch onto the singular clue “I am in Utah” to seek out and comply with Utah’s putative father requirements.

The Utah Supreme Court, however, first held that Olea’s statement that she was “in Utah” was enough to establish a qualifying circumstance of temporary residence in the state and second, that the phone call gave O’Dea the requisite knowledge. The result stretches the bounds of logic in that it does not establish a connection between the fact of the existence of the qualifying circumstance—Olea’s presence in Utah—and the understanding of that fact conveyed to O’Dea. The court should have read the factual existence and constructive knowledge requirements together; that is, the court should have required the fact be somehow communicated to the father. “I am in Utah” alone does not convey the fact of permanent or temporary residence; Olea could have been on vacation or passing through on her way to another state. If Olea had told O’Dea, for instance, “I’m *staying* in Utah,” he might have had some reason to believe she would give birth to the baby there. Instead, under the court’s interpretation, after a qualifying circumstance is factually established, perhaps the mere mention of the word “Utah” to a putative father, out of context, would be sufficient to construct knowledge.

The court’s holding sets such a low standard for the establishment of knowledge of a qualifying circumstance such that the exception may be impossible for any father to invoke. It also encourages crafty adoption attorneys, adoption agencies, and mothers seeking to deprive a father of his rights to purposely establish a qualifying circumstance while simultaneously throwing that father off of the trail toward establishing his rights in Utah. This may have been precisely what happened in O’Dea’s case: O’Dea had not heard from Olea for months, until she made the phone call in question on the day she gave birth to their child. The circumstances suggest that an attorney with knowledge of the statute instructed her to give the father some indication that she was in Utah lest he later win back his rights in a Utah court.

Wyatt’s case poses a similar fact pattern. Assuming that Wyatt had complied with Virginia law and the “full commitment to parental responsibilities” requirement, he still could not have availed himself of the qualifying circumstance exception because of the low bar set by the Utah Supreme Court. Colleen Fahland

sent him a text message six days before Baby Emma's birth stating that she was "receiving information' from a Utah adoption agency."<sup>82</sup> This statement certainly establishes knowledge under the *O'Dea* formulation of the qualifying circumstance test. Like in *O'Dea*, this was Fahland's only mention of Utah in all of her dealings with Wyatt—suggesting that a lawyer instructed her to defeat the exception through a short, precise text message.

The Utah Supreme Court failed to correct the issues created by its *O'Dea* and *E.Z.* rulings in a third case, *In re Adoption of Baby B.*<sup>83</sup> The most unfortunate part of the court's decision in *O'Dea* was the standard it set when it determined that the statement "I am in Utah" was enough to establish knowledge or constructive knowledge of the existence of a qualifying circumstance.<sup>84</sup> Rather than correcting that mistake in *Baby B* by requiring more developed knowledge of a qualifying circumstance than it did in *O'Dea*, the court abandoned the "inquiry notice" standard and instead distinguished between knowledge and what it termed "belief," requiring "proof of knowledge and not mere subjective belief."<sup>85</sup> That is, it required an opponent of a contested adoption to show the particular father *actually* knew or, seemingly quite literally, could have *actually* discovered that a qualifying circumstance existed to establish knowledge or constructive knowledge.<sup>86</sup>

What the court missed is that the problem for unwed putative fathers in past cases under the Utah statute is not that the fathers had "belief" and not "knowledge," but that the fathers did not have *enough* knowledge. In fact, the opposite was true of Cody O'Dea and John Wyatt—both had knowledge but not belief.<sup>87</sup> O'Dea *knew* that Olea was "in Utah," but, without more, had no reason to *believe* she would initiate an adoption proceeding there and thus no functional inducement to act.<sup>88</sup> John Wyatt *knew* that Coleen Fahland had received information from a Utah Adoption agency, but given his longstanding relationship with Fahland and their residence in Virginia had no *belief* that she would actually execute a consent to adoption in Utah and did not, without more knowledge, have a functional inducement to act.<sup>89</sup>

Manzanares, by contrast, may have been the least "deserving" father. Manzanares had *both* knowledge *and* belief.<sup>90</sup> He knew Terry was planning a trip to Utah, and believed that she would execute a consent to adoption there.<sup>91</sup> He

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<sup>82</sup> Markon, *supra* note 9.

<sup>83</sup> *In re Adoption of Baby B*, 270 P.3d 486 (Utah 2012).

<sup>84</sup> *See O'Dea*, 217 P.3d at 711.

<sup>85</sup> *Baby B*, 270 P.3d at 501–02.

<sup>86</sup> *See id.* at 502.

<sup>87</sup> *See O'Dea*, 217 P.3d at 707; *In re Adoption of Baby E.Z.*, 266 P.3d 702, 705 (Utah 2011).

<sup>88</sup> *See O'Dea*, 217 P.3d at 707.

<sup>89</sup> *See* Markon, *supra* note 9.

<sup>90</sup> *See generally Baby B*, 270 P.3d 486 (finding that Manzanares knew Terry was planning a trip to Utah, and, based on court filings, believed she would give her child up for adoption there).

<sup>91</sup> *Id.* at 490–91.

even knew of a potential motive—her desire to have her child raised in the Mormon faith.<sup>92</sup> The court’s distinction between belief and knowledge and failure to address the *amount* of knowledge only resulted in completely backward outcomes: O’Dea and Wyatt failed, while Manzanares prevailed.<sup>93</sup> The court instead seems to have created a result-oriented regime where the court arbitrarily picks which fathers will and will not prevail, hanging their decision on the formalistic and unrealistic “belief” vs. “knowledge” distinction created in *Baby B*. Rather than offering more protection to fathers, this factual “toss up” will, as Justice Parrish predicts in the dissent, result in a “predictable lack of predictability” for future determinations.<sup>94</sup>

The qualifying circumstance exception should be employed by Utah law for circumstances where, although a putative father had reason to suspect that something may be awry and that the State of Utah could potentially be involved, he was not meaningfully alerted that a Utah adoption could occur such that he would move quickly to seek legal advice and take legal action.

The Utah Supreme Court’s recent modification of its rule purports to distinguish between a father’s “belief” and his “knowledge,” but still might not save fathers who have no belief but nevertheless have some knowledge, albeit not enough to realistically induce them to act. Cody O’Dea, after all, “knew” that Ashley Olea was “in Utah,” but lacking either more knowledge or belief, had no functional inducement to act. A higher standard for the establishment of a qualifying circumstance and a clearer interpretation of the state of mind required of a father could serve to help fathers seeking in good faith to comply, while deterring mothers, who, in bad faith, say just enough to meet the “qualifying circumstance” standard but withhold just enough to keep from compelling the father to act.

#### IV. REMEDIES AND RECOMMENDATIONS TO UTAH POLICYMAKERS

The Utah Supreme Court, in John Wyatt’s case, may have already significantly helped unwed putative fathers from outside of Utah by ruling that the federal Parental Kidnapping Prevention Act (PKPA) applies to Utah adoptions.<sup>95</sup> This statute, which forces states to honor the custody decrees of other states, will likely preserve the rights of unwed putative fathers who complied with the laws of their home states but failed to comply with those of a foreign jurisdiction after their children were taken across state lines.

State policymakers, too, have recently taken steps to improve matters for unwed putative fathers. As of January 3, 2012, the Utah Department of Health made paternity proceeding forms and information on how to file with Utah’s

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<sup>92</sup> *Id.* at 491.

<sup>93</sup> See generally *O’Dea*, 217 P.3d 704 (refusing to overturn an adoption decree); *In re Adoption of Baby E.Z.*, 266 P.3d 702 (Utah 2011) (refusing to overturn an adoption decree); *Baby B*, 270 P.3d 486 (overturning an adoption decree in favor of the unwed putative father).

<sup>94</sup> *Baby B*, 270 P.3d at 509 (Parrish, J., dissenting).

<sup>95</sup> *Baby E.Z.*, 266 P.3d at 704; see 28 U.S.C. § 1738A (2006).

putative father registry available online.<sup>96</sup> The Utah State Legislature, however, can take additional steps to improve the fairness of its adoption statute and remedy some of the biases detailed above. It should first add a provision to its adoption statute to combat bad faith on the part of mothers or adoption agencies, and second, add a “substantial compliance” provision to the statute that rewards fathers that comply with the vast majority of the statute’s requirements or constructively comply, and who demonstrate a good faith attempt to preserve their rights.

Utah can help putative fathers while also improving the perceived fairness and legitimacy of its statutory scheme by giving putative fathers the opportunity to present evidence of bad faith on the part of the child’s mother. Perhaps the most troubling cases involving unwed biological fathers are those, like O’Dea’s and Wyatt’s cases, where a mother gave a father cryptic and possibly deceptive notice that she was in Utah or was considering a Utah adoption. Lawmakers could mitigate the effects of deception by granting a father, who could demonstrate that his child’s mother purposely deceived him in order to extinguish his rights, an additional ten days after discovery—that his child is the subject of a Utah adoption petition—to comply with 78B-6-121. Such a provision would not only help fathers that have been deceived but encourage mothers and adoption agencies to be open and transparent with potential fathers throughout the adoption process.

The provision of Utah’s adoption code that gives it much of its bite is the provision requiring a father to *strictly* comply with the requirements for preserving his right to consent. Instead of its qualifying circumstance provision, Utah could give courts the discretion to find constructive compliance for a father who attempted in good faith to comply with Utah’s requirements or the requirements of his home state, but ultimately failed to technically comply with all of its guidelines and procedures. Such a provision would aid a father who complied with every other requirement and pursued the preservation of his parental rights but failed to, for instance, file the required separate affidavit laying out his plan to care for the child. Such a provision would notify the father of his deficiency and give him one week to perfect his compliance. This “catch-all” provision would keep a court from depriving an otherwise deserving father of his rights through what could be perceived as a correctable technicality.

## V. CONCLUSION

Wyatt’s case and the plights of other unwed putative fathers demonstrate that Utah’s adoption statute makes compliance unfairly difficult for unwed putative fathers. The difficulty is compounded by the possibility that predatory adoption

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<sup>96</sup> See Brooke Adams, *Unwed Fathers Get Help Figuring Out What to Do in Adoption Fight*, SALT LAKE TRIB. (Jan. 5, 2012, 11:53 AM), <http://www.sltrib.com/sltrib/news/53232799-78/fathers-state-adoption-paternity.html.csp>; *Court Orders*, UTAH DEP’T HEALTH, OFF. VITAL RECS. & STAT. (Jan. 4, 2012), <http://health.utah.gov/vitalrecords/courtorders/courtorders.htm> (containing instructions to file a “Notice of Commencement of Paternity Proceeding”).



agencies may be working with mothers to use Utah's strict adoption laws to purposely deceive putative fathers who oppose adoption.

Utah lawmakers commendably want their state to be on the cutting edge of adoption law such that the interests of adoptees are served with speedy and efficient adoptions. But those lawmakers should also recognize that they can increase the legitimacy and perceived fairness of Utah laws by inserting new provisions into Utah's adoption statute or tweaking existing requirements to provide unwed putative fathers a more realistic opportunity to preserve their rights and to help prevent those laws from being manipulated.

Absent changes to Utah law, lawmakers should work hard to publicize and distribute their requirements to adoption agencies, courthouses, lawyers, and community groups all across the country. When it comes to adoptions, no amount of money or opportunity for notice can mitigate the extreme anguish and unspeakable loss suffered by a father who wants to raise and have a relationship with his child, but is not allowed to do so. Rather than assume that a father who fails to comply is inept or incompetent, Utah should provide the opportunity to help willing fathers comply, because the best thing for a child is a relationship with a loving and caring biological parent.

As asserted by then-Chief Justice Durham, "Not every unmarried biological father is indifferent to or unworthy of [connections with his children]. Many would marry the mothers of their children if they could, and many would make suitable and loving parents."<sup>97</sup> Utah should allow fathers that opportunity.

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<sup>97</sup> *O'Dea*, 217 P.3d at 716 (Durham, C.J., dissenting).