PROTECTING LIFE AND FOLLOWING PRECEDENT: THE UTAH SUPREME COURT AND HUMAN LIFE ISSUES

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The first decision of the Supreme Court of the United States (herein "SCOTUS") upholding significant substantive restrictions on access to abortions was *H.L. v. Matheson*.[2] *Matheson* affirmed a judgment of the Utah Supreme Court (herein "Court") upholding a law requiring notification of the parents, if physically possible, before performing an abortion on a minor. The statute had been upheld by a Utah trial court and unanimously affirmed by the Court.[3]

The Utah Supreme Court is composed of very capable justices. As a general rule, the Court is conservative and careful, tending to follow precedent faithfully. Most of the opinions on life issues, both pro and con, have been narrow and technically well-written. Only the liberal Chief Justice, Christine Durham, regularly pushes liberal positions in discussing broader policy issues in her opinions; she has been in the minority on most life issues, to date.

While the clear majority of citizens in the state oppose abortion in all but extraordinary hard cases, and while the Utah Supreme Court to date has rendered several significant decisions upholding pro-life legislation, the current Chief Justice of the Court and several justices over the years have been hostile to and critical of such laws and policies in their dissenting opinions. The gap between the pro-life majority and the unsympathetic dissenters appears to have narrowed.

I. LIFE ISSUES

The Utah Supreme Court operates in a state that is demographically and culturally unique. Most of the residents of Utah belong to the Church of Jesus Christ of Latter-day Saints

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2 H.L. v. Matheson, 450 U.S. 398 (1981), *aff'g* H– L– v. Matheson, 604 P.2d 907 (Utah 1979).
3.*Id.*

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(herein "Mormons" or "LDS Church"). Currently, 62.4% of Utahns are members of the LDS Church.[4]

The LDS Church is staunchly pro-life and outspoken in its opposition to abortion. As a moral matter, at every semi-annual general conference from 1970 (before *Roe v. Wade*)[5] to 1995 (after *Planned Parenthood v. Casey*) [6], at least one general authority spoke out explicitly against abortion. Every Prophet-President of the LDS Church for the past forty years has explicitly condemned abortion as a serious moral and social evil,[7] and, historically, condemnation of abortion by church leaders goes back to the days of Joseph Smith and Brigham Young.[8] Participating in or paying for elective abortion is grounds for church discipline (including excommunication), and persons who have had, financed, or performed abortions are prohibited from serving as missionaries. Abortions performed after ecclesiastical counseling and individual prayer, for the sake of preserving the mother's life, because the child would be born with such severe defects it would soon die, or because of rape do not invoke church censure or discipline.

As a matter of public policy, the Church has long officially opposed legalized elective abortion. After *Roe*, the LDS Church sent an official representative to testify before Congress against legalized elective abortion.[9]

The Utah Department of Health's most recent report on abortions in Utah shows that, in 2005, there were 3,279 abortions performed in the state, with an abortion rate of 5.7 per 1,000 females aged 15-44, and an abortion ratio of 63.6 per 1,000 live births.[10] The number of

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4.Matt Canham, *Mormon portion of Utah population steadily shrinking*, SALT LAKE TRIB., June 22, 2006, http://www.sltrib.com/ci_2886596 (citing statistics for 2004).

5 410 U.S. 113 (1973).

6 505 U.S. 833 (1992).

7.Lynn D. Wardle, *LDS Church Church Leaders' Opposition to Legalized Permissive Abortion* (Prepared for Children & the Law Winter 2003) (copy in author's possession); Lynn D. Wardle, *Summary of LDS Church General Authorities' Statements About Abortion in General Conferences from October 1970 through April 1995* (rough draft manuscript in author's possession).

8.*Id.*

9.*Hearing on S.J. Resolution 119 and S.J. Resolution 130 Before the Subcomm. On Constitutional Amendments of the S. Comm. On the Judiciary*, 93rd Cong. 286-318 (1974) (statement of David L. McKay).

10.UTAH DEPARTMENT OF HEALTH, CENTER FOR HEALTH DATA, OFFICE OF VITAL RECORDS AND STATISTICS UTAH'S VITAL STATISTICS, ABORTIONS 2005, S-3 tbl. 1 (2007).

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abortions has steadily dropped since the high point of 1989 when 4,950 abortions were performed (for an abortion rate of 11.0 and ratio of 121.1).[11] Nearly 8 percent of abortions in Utah are performed on out-of-state residents (with women from nearby Wyoming and Idaho accounting for 6.4 percent of the abortions done in Utah. Utah is one of the few states that reports the reasons given for abortion. In 2005, only 22 were performed because the life of the mother was endangered, 13 were performed because of fetal malformation, 2 because of rape, 0 because of incest, one because the mother was HIV positive, and one unknown; all the rest were labeled simply "therapeutic" or "elective."[12]

Prior to *Roe*, Utah's abortion law prohibited abortion unless "necessary to preserve [the pregnant woman's] life."[13] Not only were abortionists punished, but the law also applied to the woman who obtained an elective abortion.[14]

The Utah abortion law was challenged and upheld in 1971 by a three-judge federal court. The challenger(s) appealed, and the case was pending in the SCOTUS when *Roe* was decided, whereupon the Court vacated and remanded the case for consideration, in light of *Roe*.[15] On remand following *Roe*, the three-judge panel struck down the Utah abortion law.[16]

Since *Roe*, Utah has been one of the most active pro-life, anti-abortion states in the nation when it comes to enacting and defending legislation designed to protect unborn human life. Utah has been among the leaders in requiring informed consent to abortion. One of the first substantive restrictions on abortion (non-funding restriction) upheld by the SCOTUS was a mandatory parental consent law enacted by the Utah legislature in 1974.[17]

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11. *Id.*
12. *Id.* at R-8 tbl. R-12.
13. UTAH CODE ANN. § 76-2-1 (2007).
14. *Id.* at § 76-2-2.
15. Doe v. Rampton, No. C-234-70 (D. Utah. Sep. 29, 1971), *vacated* 410 U.S. 950 (1973). *See generally* Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 110 n.136 (1993).
16. Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973) (holding that Utah traditional abortions laws are unconstitutional with lead opinion by Judge Willis Ritter).
17. *Matheson*, 450 U.S. 398. However, a federal district court previously had held the law unconstitutional as applied to a specific mature minor in L.R. v. Hansen, No. C-80-0078J (D. Utah Feb. 8, 1980) (discussed at http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-

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In 1991, the Utah legislature enacted a comprehensive new abortion statute in the interlude between *Webster v. Reproductive Health Services*[18] and *Planned Parenthood v. Casey*,[19] when it appeared that the Court might be moving in the direction of upholding more substantial restrictions of abortion.[20] The 1991 Utah abortion law[21] permitted abortion at any time "if necessary to save the [mother's] life," "to prevent grave damage to the pregnant woman's medical health, or "to prevent the birth of a child that would be born with grave defects."[22] Additionally, during the first 20 weeks of gestation, an abortion could be performed on grounds of rape or incest.[23] These provisions were initially upheld but later invalidated after *Casey*. Additional informed consent, including disclosure of the facts of fetal development, was also enacted in 1991, and most have been upheld.[24] The 1991 Utah legislation makes Utah one of only four states (Louisiana, Rhode Island, South Dakota, and Utah) that have enacted legislation directly challenging the *Roe* doctrine of abortion-on-demand. The lawyers for Utah won in the U.S. District Court, but lost at the Tenth Circuit after *Casey* was decided. The battle to defend the law was fierce and expensive. Some of the 1991 law is still intact.

Additional restrictions and regulations were added in 2004,[25] and major revisions to the informed consent requirements were added in 2006.[26] Both saline amniocentesis abortions and partial-birth abortions are generally prohibited by statutes that are still in effect.[27] Utah state courts and even some federal courts in Utah have upheld abortions restrictions.[28]

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profiles/utah.html?templateName=lawdetails&issueID=6&ssumID=2856).
18.492 U.S. 490 (1989).
19.505 U.S. 833 (1992).
20.Lynn D. Wardle, *"Time Enough":* Webster v. Reproductive Health Services *and the Prudent Pace of Justice,* 17 FLA. L. REV. 881 (1989).
21.*See* 1991 Utah Laws ch 2.
22.UTAH CODE ANN. § 76-7-302 (2007).
23.*Id.*
24.*Id.* at. § 76-7-305.
25.*Id.* at § 76-7-302, -310.5, -324, -328.
26.*See id.* § 76-7-4 to -5.5.
27.*Id.* at § 76-7-310.5 and -326.
28.*See generally* Doe v. Rampton, *infra* note 27; H.B. v. Wilkinson, 639 F.Supp. 952 (D. Utah 1986) (rejecting for lack of standing challenge to parental consent); Jane L. v. Bangerter district court decisions cited and described, *infra* note 27(1991 abortion law); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994), *rev'd in part*,

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Abortion

The Utah state courts, including the Utah Supreme Court, have been consistently (though not absolutely) pro-life. That history probably explains why most of the recent, and the all of the successful, challenges to abortion legislation and policies in Utah have been, and are usually brought, in the federal courts, rather than the state courts.[29]

As noted above, the Utah Supreme Court upheld a state statute mandating parental consent for abortion.[30] It required the doctor intending to perform an abortion on a minor to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed is she is a minor . . . ."[31] Construed to require notification of the parents if physically possible, the law was defended by the Democratic Governor, Scott Matheson, and the statute was upheld by the trial court and unanimously affirmed by the Court in *H.L. v. Matheson*.[32] Two

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appeal dismissed in part, 75 F.3d 564 (10th Cir. 1995), *cert. denied* 518 U.S. 1019 (1996), *on appeal after remand* 136 F.3d 707 (10th Cir. 1998) (upholding 24-hour waiting period and informed consent requirements, and awarding attorneys' fees to state - that award reversed on appeal).

29.*See generally* Doe v. Rampton, 366 F.Supp. 189 (D. Utah 1973) (post-*Roe* three judge ruling that Utah traditional abortions laws are unconstitutional); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) (invalidating law prohibiting abortion before 20 weeks gestation unless necessary to save mother's life, prevent grave damage to her health, pregnancy a result of rape or incest, or fetus has grave defects), *aff'd in part, rev'd in part* 61 F.3d 1493, *cert. granted, judgment rev'd in* Leavitt v. Jane L., 518 U.S. 137 (1996) *on remand to* Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996); *cert. denied* Leavitt v. Jane L., 520 U.S. 1274 (1997); Jane L. v. Bangerter, 828 F.Supp. 1544 (D. Utah. 1993), *rev'd* Jane L. V. Bangerter, 61 F.2d 1505 (10th Cir. 1995), *on remand* 914 F.Supp. 484 (D. Utah 1996), *amended* 920 F.Supp. 1202 (D. Utah 1996); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482 (D. Utah 1994), *rev'd in part*, *appeal dismissed in part*, 75 F.3d 564 (10th Cir. 1995), *cert. denied*, 518 U.S. 1019 (1996) (invalidating law prohibiting abortion after 20 weeks gestation unless necessary to save mother's life, prevent grave damage to her health, or fetus has grave defects); Planned Parenthood Ass'n v. Dandow, 635 F.Supp. 184 (D. Utah 1986), *aff'd* 810 F.2d 984 (10th Cir. 1987) (state parental consent requirement applicable to federal medicaid services violates Title XIX of Social Security Act); Does 1 through 4 v. Utah Dep't of Health, 776 F.2d 253 (10th Cir. 1985) (federal law supersedes Utah consent law as applied to recipients of federal program); *see also* Utah Women's Clinic v. Walker, No. 2:04CV00408 PGC (D. Utah June 10, 2004) (reportedly enjoining enforcement of law banning some abortions as early as 12 weeks) (discussed at http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/utah.html?templateName=lawdetails&issueID=5&ssumID=2862). *But see* Jane L. V. Bangerter, 794 F.Supp. 1537 (D. Utah 1992) (upholding 1991 Utah abortion law against vagueness, establishment, free exercise, free speech, Thirteenth Amendment, and other claims); but related to Jane L, *supra.*

30. *Matheson*, 604 P.2d 907.

31.UTAH CODE ANN. § 76-7-304 (2007)(enacted in 1974).

32. *Matheson*, 604 P.2d 907.

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years later, the Court was affirmed by the SCOTUS in the landmark case of *H.L. v. Matheson*.[33] None of the Utah justices who upheld the parental consent law in *Matheson* are still on the court.

However, the Utah courts generally will follow precedents, even when anti-family and anti-life. In *Reynolds v. Reynolds*,[34] a husband involved in divorce sought to enjoin his wife's abortion. The district court declined to issue an injunction under *Planned Parenthood v. Danforth*,[35] as the wife was in first trimester; the wife had an abortion. The Utah Court of Appeals dismissed the husband's appeal as moot.

Regarding the subject of wrongful death, in 1983, the Utah Legislature passed the Utah Wrongful Life Act ("UWLA"), which, *inter alia*, provides that "[a] cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted."[36]

In *Wood v. University of Utah Medical Center*,[37] in 2002, the Court affirmed the constitutionality of the Wrongful Life Act against claims that it violated the "Open Courts Clause" of the Utah Constitution and the Equal Protection and Due Process Clauses of the Utah and U.S. Constitutions. In 1988, Marie Wood and her husband, Terry Borman, sought genetic counseling at the University of Utah Medical Center, because of Marie's age. After two tests, they were informed that the test was positive for Down syndrome, but the doctors reassured her that false positives were common and that the chance of a Down syndrome baby were very small. The couple decided not to abort, and in August 1998, Marie gave birth to a baby girl with Down syndrome. The parents sued for negligence, negligent infliction of emotional distress, and failure to obtain informed consent. The Medical Center raised the UWLA in defense, and the trial court granted summary judgment, upholding the constitutionality of the Act. On appeal, the Utah Supreme Court affirmed, holding that the Act did not violate the "Open Courts Clause" of

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33. *Matheson*, 450 U.S. 398.
34.788 P.2d 1044 (Utah App. 1990)
35.428 U.S. 52 (1976).
36. UTAH CODE ANN. § 78-11-24 (2007).
37.67 P.3d 436 (Utah 2002).

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the Utah Constitution, did not unduly burden the right to abortion, and did not violate equal protection,.[38] The majority opinion was written mostly by Justice Wilkins. Correcting previous decisions that had applied heightened scrutiny to "Open Courts Clause" cases, he emphasized that deference to the legislature is appropriate. Elimination of an existing right to recover violates the Open Courts Clause, unless the law provides another remedy for vindication of the constitutional interest or there is a clear social or economic evil to be eliminated, and eliminating the existing legal remedy is a non- arbitrary and reasonable way to achieve that end.[39] Since Utah did not recognize wrongful birth (the opinion mixes and confuses "wrongful life" and "wrongful birth") in 1983, when the Act was passed, the Act did not eliminate an existing legal remedy.[40] The plaintiffs also argued that, because the Act expressed as the public policy of Utah "to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons,"[41] it unduly burdened the fundamental right of abortion.[42] The majority, however, distinguished *Casey*, finding that the Act did not, on its face, place a substantial burden in the path of a woman seeking an abortion, found no improper attempt to prevent or hinder lawful abortion, nor have that practical impact even though it might partially immunize some anti-abortion doctors from liability; there was no evidence that the Act would reduce the rate of abortion, and other statutes with greater impact like informed consent and waiting period statutes had been upheld.[43] The equal protection claims were rejected as no suspect class was implicated.[44] Because the emotional distress and lack of consent claims were also based on the alleged loss of right to abort, they, too, were barred by the Act.

Chief Justice Durham dissented, arguing (for a majority, with two justices agreeing) that

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38. The Court held that the Act barred negligent infliction of emotional distress and failure to obtain informed consent as well; *Compare* King v. Searle Pharmaceuticals, Inc., 832 P.2d 858 (Utah 1992) (patient who suffered spontaneous abortion after IUD perforated her uterus can proceed with tort claim against IUD manufacturer).
39.67 P.3d. at 441.
40.*Id.* at 442-443.
41.UTAH CODE ANN. § 78-11-23 (2007).
42. Wood v. Univ. of Utah Med. Ctr., 67 P.3d at 436, 444 (Utah 2002).
43.*Id.* at 445-47.

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challenges under the Open Courts Clause of the Utah Constitution invoke heightened scrutiny. That was as far as Justice Hall would go with her; he agreed (with the Wilkins majority) that the Act did not violate the Open Courts Clause (albeit under heightened scrutiny). However, Chief Justice Durham's dissent argued that, under a heightened standard, the Act violated the Open Courts Clause. [45] The *Payne* decision implied that a wrongful birth cause of action existed,[46] and "since *the right to choose whether or not to abort* is statutorily protected in Utah . . . as well as part of a fundamental right to privacy under the United States Constitution . . . it *cannot be considered a 'social evil'* for the purpose of article I, section 11 [the Open Courts Clause of the Utah Constitution]."[47] Moreover, Chief Justice Durham concluded that the Act violated federal due process because "the purpose of Utah's Wrongful Life Act is to discourage and burden a woman's choice to obtain an abortion; the Act serves to interfere with the provision of accurate and correct information regarding the health of a fetus."[48] Testimony about the purpose of discouraging doctors from failing to protect live-born victims of abortion proves that the law was founded on an unconstitutional purpose to prevent abortion.[49] Justice Russon, dissenting, lodged an opinion explicitly agreeing with Durham that the Act violated the Utah Open Courts Clause, but he did not express approval (or disapproval) of her *Roe* analysis.[50]

The *Wood* opinions show how broadly Chief Justice Durham reads the abortion precedents. In her opinion, *Roe* was read as prohibiting a legislative preamble that expresses state support for protecting the life of unborn children, legislative history that shows the bill was intended to prevent killing live-born victims of abortion was cited as evidence that it was intended to burden access to abortion, and a law that prohibits suits for the "damage" of the birth of a child was held to violate *Roe* and *Casey*. Her enthusiasm for expansively reading the

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44.*Id.* at 448.
45.*Id.* at 436.
46.*See infra* note 49.
47. *Wood*, 67 P.3d at 456 (emphasis added).
48.*Id.* at 457.
49.*Id.* at 459 (misconstruing testimony of Professor Lynn D. Wardle [myself]).
50.*Id.* at 461-62 (Russon, J., dissenting). However, Russon began: "I concur in Chief Justice Durham's dissenting opinion." *Id.* at 461.

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abortion precedents is unmistakable.

Earlier, in *Payne by and through Payne v. Myers*,[51] the parents of a child with a rare, genetic disease called "Pelizaeus-Merzbacher Syndrome, a "progressively degenerative neurological disorder that is characterized by widespread demyelination of the brain sheath, causing severe motor disorders and eventually death,"[52] were allegedly told by physicians that a second child would not be at risk of being born with the disease, so the wife removed her IUD and became pregnant with a son who soon was diagnosed with the same disease. The parents filed claims for "wrongful life" and for "wrongful birth." The Utah Supreme Court assumed, without deciding, that Utah would recognize a wrongful birth claim[53] but held that the claim was barred by a governmental immunity statute as against the state actors and by the statute of limitation.[54]

Likewise, in *C.S. v. Nielson,*[55] the Court avoided holding that wrongful life or wrongful birth claims existed, finding that the claim was for wrongful pregnancy only. In that case, a woman who gave birth to a healthy, normal child sued her doctor, claiming that he had been negligent in failing to inform her that the sterilization she received was not absolutely effective to prevent pregnancy, and failing to advise her of alternatives. The Utah Supreme Court, to whom the issue was certified by the federal district court, ruled that the claim for the woman's personal financial and emotional damages was for "wrongful pregnancy" and not a "wrongful birth" claim that the plaintiff would have avoided conception or terminated the pregnancy but for the negligence of others, nor a "wrongful life" claim by the child for the negligence that caused the child to be born suffering some affliction.[56] Writing for two, Chief Justice Hall outlined the elements of the wrongful pregnancy claim and rejected the defendants' assertion that the Wrongful Life Act barred the wrongful pregnancy claim, noting that the Act precludes claims for

51.743 P.2d 186 (Utah 1987).
52.*Id.* at 187.
53.*Id.* at 188. This non-decision was noted later in *Wood*, 67 P.3d at 442-43.
54.*Myers*, P.2d. at 188-90.
55.767 P.2d. 504 (Utah 1988).
56.*Id.* at 506 & n.4-6.

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frustration of a wish to abort a child, not frustration of an attempt not to conceive a child.[57] Granting total immunity to the negligent physician would be improper; wrongful pregnancy claims do not contravene Utah's "policy of placing high value on human life . . . ."[58] Medical expenses and compensation for suffering, pain and damage, as well as lost wages, during the pregnancy could be recovered, but not after birth, for (agreeing with most other courts) "a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child . . . ."[59] "We believe that the benefits of the birth of a healthy, normal child outweigh the expense of rearing a child."[60] Justice Durham agreed that wrongful pregnancy was a valid cause of action but would allow recovery of greater damages based on "the extent of any substantial negative impact suffered by plaintiff and her family resulting from a subsequent childbirth."[61] Then-Justice Zimmerman also agreed that wrongful pregnancy could be the basis for a claim in Utah and that it is not barred by the Utah Wrongful Life Act (noting ominously that "we can postpone reaching the constitutionality of that act to another day,") but would allow recovery of all normal negligence damages.[62] Dissenting, Associate Chief Justice Howe would allow no claim or recovery for the birth of a healthy child.[63]

Protection of the Unborn from Criminal Violence

In 1978, in *State v. Larsen*,[64] the Court considered whether a defendant could be convicted of automobile homicide for causing the death of an unborn child injured in an automobile accident. The trial court ruled that causing the death of a fetus came under the automobile homicide law, but the Court reversed the criminal conviction finding (on the basis of common law and absence of statutory intent otherwise, and noting *Roe*) that an unborn child is not "another" within meaning of automobile homicide statute. The Court, however, invited the

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57.*Id.* at 508.
58.*Id.*
59.*Id.* at 512, citing Univ. of Arizona v. Superior Court, 667 P.2d 1294, 1297 (Ariz. 1983).
60.*Id.* at 514.
61.*Id.* at 516 (Durham, J., concurring in part and dissenting in part).
62.*Id.* at 521-22 (Zimmerman, J., concurring in part and dissenting in part).
63.*Id.* at 522 (Howe, A.C.J., dissenting).
64.578 P.2d 1280 (Utah 1978).

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Legislature to pass such a statute, if it wished to change the established law.

In response, the Legislature amended the criminal homicide statute to add "*causes the death of another human being, including an unborn child*."[65] (In 2002, the words "at any stage of its development." were added.)[66] In 2006, the effectiveness of the amended statute was illustrated in *State v. Perez-Avila*, [67] when the Utah Court of Appeals affirmed the conviction of a man for two counts automobile homicide when, as a result of his drunk driving, his pregnant wife and unborn child were killed in an automobile accident. Because of the next-discussed case, there was no issue regarding his criminal liability for the homicide of the unborn child.

In 2004, in *State v. Macguire*,[68] the Utah Supreme Court upheld the conviction of a man for homicide of an unborn child. The man shot and killed his former wife, whom he knew was pregnant, and one of the bullets (shot into her abdomen) also killed her unborn child. He convicted of two counts of aggravated murder, for the mother and unborn child (the two deaths being aggravating). The Court upheld the convictions and the statutes against claims that the "unborn child" homicide statute and aggravation factor was vague and that it, therefore, violated due process. Justice Durrant (joined by three justices) rejected the claim that "it is impossible to ascertain from the statute, or otherwise, when unborn childhood begins."[69] The majority found no uncertainty referring to the "plain, commonsense" understanding,, dictionary definitions, [70] other provisions of the Utah Code (regarding informed consent to abortion, using the same term), and cases from other jurisdictions.[71] The subsequent addition of "at any stage of its development" did not make the prior version of the law vague.[72] "In sum, we conclude that the

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65.UTAH CODE ANN. § 76-5-201(1)(a) (2007).
66.*Id.*, 2002 Utah Laws ch. 327, §1.
67.131 P.3d 864 (Utah App. 2006). *See also* State *ex rel.* W.P.O., 104 P.3d 662 (Utah App. 2004) (affirming termination of parental rights of the defendant in *Perez-Avila* to his two surviving children, who were also in the car when he rolled it causing the death of his wife and pregnant child).
68.84 P.3d 1171 (Utah 2004). *See also* Myers v. State, 94 P.3d 211 (Utah 2004) (denying post-conviction relief to man who pled guilty to aggravated murder of his pregnant former wife in return for dismissal additional charge of murder for killing the unborn child).
69.*Id.* at 1175.
70.*Id.* at 1177 (citing Blacks Law Dictionary, Merriam-Webster's Collegiate Dictionary).
71.*Id.* at 1175-76.
72.*Id.* at 1176-77.

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term ‘unborn child’ is not unconstitutionally vague for either the homicide or aggravated murder statutes because, absent modifying language to the contrary, it clearly encompasses a human being at any stage of development in *utero*.”[73]

Justice Jill Parrish, who joined the Durrant opinion, specifically rejected the dissent’s claim that defining “person” as an unborn child violates the *Roe* line of cases,[74] distinguishing the homicide and aggravated murder statutes from abortion laws “restricting a woman’s right to terminate her pregnancy.”[75] Since the homicide statute “does not declare a fetus to be a person entitled to equal protection, nor does it restrict a woman’s right to obtain an abortion” it was constitutional.[76]

Chief Justice Christine Durham dissented as to the aggravated murder conviction (not the simple homicide), because the use of the term “child” to apply to the unborn was disrespectful to the views of those in society who think only a post-birth human is a “child.” “A statute that used the word ‘fetus’ rather than ‘unborn child’ would be clearer and more respectful of the diversity of opinion in our society. Nonetheless, the legislature is entitled to use polemical and political language . . . .”[77] But since it is clear that the legislature clearly meant to amend the homicide statute to include “unborn children” she agrees that the simple homicide statute is not vague.[78] However, the aggravated murder statute was not specifically amended and used the term “persons.” It extends to unborn children only if the term “persons” (unclarified by the “unborn child” language) includes unborn children. “[D]eclaring a fetus to be a ‘person’ entitled to equal protection would require not only overturing *Roe* . . . But also making abortion, as a matter of constitutional law illegal . . . .”[79] “To declare a fetus a ‘person’ is beyond the power of the state

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73.*Id.* at 1177. The court declined to consider the improperly-raised equal protection claim that allowing doctors to perform abortion made the unborn child homicide law unconstitutional. *Id.* at 1178.
74.*Id.* at 1179 (Parrish, J., concurring).
75.*Id.*
76.*Id.* at 1180. Justice Parrish noted that the unborn child homicide statute specifically does not apply to “the death of an unborn child caused by an abortion.” UTAH CODE ANN., § 76-5-201(1)(b) (2007).
77.*Macguire*, 84 P.3d at 1181.
78.*Id.*
79.*Id.* at 1182.

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of Utah,"[80] and, anyway, "the legislature does not seem to have done so."[81]

This is an important case, because all of the current justices of the Court participated in the decision. The majority of the Court gave broad interpretation of the unborn child homicide law and liberally interpreted the "person" reference in the aggravated murder statute to include reference to unborn children.

On the other hand, it is clear that the two women on the Court intend to stand up for what they perceived to be "women's right" to abortion, as defined, created, and elaborated in the *Roe*-line of cases. Justice Parrish's concurrence in *MacGuire* had no other purpose than to indicate that she is protective of the right-to-abortion doctrine, but that she (quite reasonably) distinguishes abortion from murderous shootings by angry ex-husbands/fathers. She wanted to make the point that it is not either-or, all-or-nothing, that one can protect elective abortion and prohibit rampage killings. She is willing to distinguish *Roe* and give it limiting construction, so long as the right to abortion is not narrowed. Chief Justice Durham, on the other hand, showed by her opinion that she will give *Roe* a very broad reading, such that the state Legislature would be without the power to even "declare a fetus a 'person.'"[82] She went out of her way to deride and disparage the Legislature for using the term "unborn child," and she gave a grudging, restrictive reading to the aggravated murder statute, which the legislature had not specifically amended. Her defense of women's unfettered access to abortion leads her to attack any legislation that casts even a shadow upon that access.

In 2004, in *Alternative Options & Services for Children v. Chapman,*[83] the Utah Court of Appeals held that the Interstate Compact on the Placement of Children (ICPC), which regulates (with a time-consuming bureaucratic process) the taking of children from one state into another for purpose of adoption, custody placement, etc., does not apply to pregnant women who cross state borders for the purpose of placing their newborns with persons in another state. The case

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80.*Id.*
81.*Id.* at 1183.
82.*Id.* at 1182.
83.106 P.3d 744 (Utah App. 2004).

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overturned Opinion # 49 of the Association of Administrators of the Interstate Compact on Placement of Children, which opined that such travel was covered by the ICPC. The court relied on the fact that the definition of child in the ICPC easily could have specifically included the unborn child but did not and because that interpretation was inconsistent with the other provisions of the ICPC indicating "children" with known places and dates of birth, etc..[84]

In *State Farm Mutual Automobile Insurance Co.v. Clyde,*[85] the Utah Supreme Court concluded that the maternal grandparents of an unborn child were not "legally entitled" to assert a claim for relief under the Utah wrongful death statute and, thus, were also unable to assert a claim under the underinsured motorist clause in an insurance policy. The court observed: "'The fact that the result in some circumstances may be to unreasonably restrict the class of persons who can bring a wrongful death action is an argument for amendment of the statute, not for our ignoring its words.'"[86] The clear implication is that parents, but not grandparents, can bring a wrongful death action, as they are named in the statute as having a claim for wrongful death of a child,.

At common law in Utah, a woman could recover for miscarriage caused by wrongful acts of others and for the physical and mental suffering resulting from it, but "damages [we]re not awarded for 'loss of the unborn child' itself.[87] Wrongfully causing the death of a viable fetus was explicitly determined to be grounds for civil recovery.[88]

Utah statutes protect unborn children in other ways, as well. Unborn children are presumed to be a child of the marriage and of the husband of the mother if born within 300 days after the marriage or attempted invalid marriage is terminated.[89] If born within 300 days of assisted reproduction, the intended parents will be confirmed by order as the legal parents of the

84.*Id.* at 751-52 & n.8.
85.920 P.2d 1183 (Utah 1996).
86.*Id.* 1183, 1187.
87.Webb v. Snow, 132 P.2d 114, 119 (Utah 1942) (jury instruction erroneous in suit by woman struck in fight who miscarried); *see also* Nelson v. Peterson, 542 P.2d 1075, 1977 (Utah 1975)
88.*Nelson*, 542 P.2d at 1077-78 (claim against doctor and hospital for death of full-term unborn child due to alleged negligence is proper).
89.UTAH CODE ANN. §§ 30-1-17.2, 78-45g-204 (2007).

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child.[90] After-born children are protected by the Uniform Probate Act.[91]

Assisted Suicide

Utah has a Personal Choice and Living Will Act that authorizes and regulates living wills and directives for medical services.[92] The Act contains a provision explicitly reaffirming that suicide, euthanasia, and mercy killing are not permitted in Utah. It provides: "Nothing is this part may be construed to condone, authorize, or approve mercy killing, euthanasia, or suicide."[93]

Healthcare Rights of Conscience

Utah explicitly protects, by statute, the consciences rights of doctors, other hospital staff and employees. If he or she "states an objection to an abortion or the practice of abortion in general on moral or religious grounds," he or she "shall not be required to participate in the medical procedure which will result in the abortion."[94] Such refusal may not be used for any "disciplinary or recriminatory action against such person, or for any claim for damages against them.[95] Discrimination against such moral or religious principles in hiring is also expressly forbidden.[96] Private and denominational hospitals are not required to admit patients for the purpose of abortion.[97] Interestingly, however, doctors performing abortion are required to use all their skill to "maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb."[98]

Another section provides protection against licensure violations to persons acting on religious faith of conscience.[99] However, Utah has no explicit statutory protection of the rights

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90.UTAH CODE ANN. § 78-45g-807(2007).
91. UTAH CODE ANN. § 75-2-302 (2007).
92. *Id.* § 75-2-1101 to -1118 *repealed by* §75-2a-101 to -124 (effective January 1, 2008).
93. *Id.* § 75-2-1118. *See also* UTAH CODE ANN. § 26-4-2 (2007) (suicide defined); UTAH CODE ANN. § 62A-15-602 (2007) (risk of committing suicide basis for mental commitment). *See generally* Thomas J. Marzen, et al, *Suicide: A Constitutional Right?* 24 DUQ. L. REV. 1, 232-33 (1985) (for history of law of suicide and history of the law of suicide in Utah).
94. UTAH CODE ANN. § 76-7-306(1) (2007).
95.*Id.*
96.*Id.*
97. § 76-7-306(2). However, the protection is limited to construction of provisions in "this part" of the Utah Code.
98. § 76-7-308.
99. UTAH CODE ANN. § 58-71-305. *See generally* State v. Hoffman, 558 P.2d 602 (Utah 1976) (affirming conviction for nonlicensure; privacy defense rejected).

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of conscience of pharmacists, students, or in the insurance context.

Cloning & Destructive Embryo Research

Utah does not have any direct statutory prohibition of human cloning, *per se*, nor has the Court addressed an issue regarding cloning.

Thus, overall, the Utah Supreme Court has been reliable and consistent in upholding laws and applying legal doctrines that favor pro-life values and policies, generally. However, the dissent also has been consistent and exerts constant pressure to embrace positions and doctrines hostile to pro-life values. The tension continues to exist, and the Court is likely to give a sympathetic ear to, but is not a "slam dunk" on, any pro-life issue.

II. JUDICIAL RESTRAINT

The justices of the Court are very capable, in terms of their professional abilities, and generally are moderate in terms of their judicial approach. It is unlikely that the current Court would defy the settled precedent of the SCOTUS in *Roe* and its numerous progeny. The Utah justices seem committed to upholding the rule of law, including established decisional law, even when that law is wrong and wrongfully created. However, the Court probably would not give expansive ruling to those abortion precedents and would likely support credible arguments reasonably limiting the scope of those rulings.

Chief Justice Christine M. Durham is the most willing to "expand" precedents to create new legal rights or achieve new (liberal) social policies. For example, last year, in *State v. Holm*,[100] the Court affirmed the conviction of Rodney Holm for bigamy and unlawful sexual conduct with a minor arising out of his polygamous marriage (at age 32) with a sixteen-year-old girl (the sister of another of his wives).[101] Chief Justice Durham was the only justice to dissent. While she would have upheld the unlawful sex with a minor conviction, she would have

100.137 P.3d 726 (Utah 2006).
101.*Id.* at 730.

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overturned the bigamy conviction because, *inter alia*, it violated his free exercise of religion,[102] and she suggested that *Lawrence v. Texas*,[103] should be interpreted as extending constitutional protection against criminal prosecution for engaging in polygamy.[104]

Another of Chief Justice Durham's well-known failed attempts to push the envelope involved punitive damages. In *Campbell v. State Farm*,[105] Justice Durham wrote an majority opinion ordering the reinstatement a punitive damage award of $145 million (in lieu of a remitted punitive damage award of $25 million) when the compensatory damage award was only $1 million (remitted from a $2.6 million jury verdict). The SCOTUS famously and emphatically reversed in *State Farm Mutual Auto Insurance Co. v. Campbell.*[106]

The Utah Supreme Court generally is known for conservatism and strict constructionism, not activism. The last two appointees to the Court (Justices Parrish and Nehring) both told the state Senate committee that "they believed in judicial restraint."[107] As they are the least conservative members of the Court culturally, that is a significant declaration. On the other hand, Chief Justice Christine Durham is known among judges and legal intellectuals throughout the United States as a prominent activist liberal jurist, and her record and opinions reflect that ideological grounding and judicial style.

III. THE COURT

The Utah Supreme Court is "the highest court" in Utah.[108] It consists of five justices; the Utah Legislature has the power to increase the number but has not done so.[109] All justices are appointed "until the first general election held more than three years after the effective date of the appointment" and thereafter for a term of ten years, beginning from the first Monday in

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102.*Id.* at 766-76 (Durham, C.J., dissenting in part).
103.539 U.S. 558 (2003).
104.*Holm*, 137 P.3d at 776-778 (Durham, C.J., dissenting in part).
105 65 P.3d 1134 (Utah 2001).
106.538 U.S. 408 (2003).
107.Lisa Riley Roche, *Senate panel gives nod to 2 justice choices*, DES. NEWS., Feb. 25, 2003, at B6.
108.UTAH CONST. art. VIII, § 2.
109.*Id.*; UTAH CODE ANN. § 78-2-1(1) (2007).

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January following the date of election.[110] Thus, the justices are subject to unopposed "retention elections," three years after appointment and thereafter every ten years.[111] If the justice receives a majority of "yes" votes, he or she is retained for another term.[112]

The Chief Justice is elected by and from among the justices, serves a term of four years, and may serve multiple terms. An Associate Chief Justice is elected to serve a term of two years, up to a maximum of two successive terms.[113] Justices must be at least 30 years old, U.S. and Utah citizens (the latter for at least five years), and admitted to practice law in Utah.[114]

Vacancies on the Court are filled by a three-step process. First, a judicial nominating commission (set up by the Legislature but without any legislator-members) presents the Governor with a list of three nominees. Second, the Governor fills the vacancy by appointment of one of the three nominees (within 30 days, of the Chief Justice may do so). Third, the Senate approves the appointment by majority vote within 60 days of appointment.[115]

The appellate court nominating commission that creates the list of nominees to serve on the Court consists of seven members appointed by the governor to four-year, non-renewable terms.[116] No more than four commission members may come from the same political party; no more than four can be lawyers; two are selected from a list of six persons nominated by the Utah State Bar.[117] The Chief Justice (or another justice appointed by the Chief) serves as an *ex officio*, non-voting member of the nominating commission; and the state court administrator serves as the secretary.[118]

The Court "has original jurisdiction to issue all extraordinary writs."[119] It "has appellate jurisdiction, including of interlocutory appeals" from Court of Appeals judgments and pre-

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110.§ 78-2-1(2).
111.UTAH CODE ANN. § 20A-12-201 (2007).
112.*Id.*
113.§ 78-2-1.
114.*Id.*
115.UTAH CONST. art. VIII, § 8.
116.§ 20A-12-102.
117.*Id.*
118.*Id.*
119.§ 78-2-2.

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judgment certifications, etc.[120] One interesting restriction imposed by the Utah Constitution on the Court is that: "[t]he court shall not declare any law unconstitutional under this [state] constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court."[121]

The Court schedules oral arguments in the first week of every month. "After attorneys argue their cases before the Court, the justices hold a conference, and one justice is assigned to write an opinion. Writing assignments are rotated to distribute the caseload as equally as possible. The justices may also elect to write separate concurring or dissenting opinions."[122]

Four of the five members of the Court were appointed by a Republican governor. (The current governor is, and his immediate predecessors have been, Republican.) Both houses of the state Legislature are controlled by the Republican Party.[123] NARAL labels the Governor, Lieutenant Governor, Attorney General, and both houses of the Utah Legislature as "anti-choice."[124]

Thus, the Utah Supreme Court functions in a governmental context that is currently dominated by one party - the Republican Party. That creates a dynamic that may be expected to have some influence on the exercise of the judicial role in a tri-partite form of republican government.

For example, in 2004, a trial court in Utah ruled that the lesbian ex-partner (and Vermont-registered civil union partner) of a biological mother had standing *in loco parentis* to seek visitation after the lesbian couple broke up and the mother took her child and left the relationship and the homosexual lifestyle. The trial court ordered visitation. The decision was appealed to the Utah Supreme Court. While the case was pending, the legislature, in 2006,

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120.*Id.*
121. UTAH CONST. art. VIII, §2.
122.Utah State Courts, Overview of the Utah Supreme Court, available at http://www.utcourts.gov/courts/sup/overview.htm (last visited March 8, 2007).
123.*See generally* Utahdotgov, Official Website for the State of Utah, available at http://www.utah.gov/ (last visited March 8, 2007).
124.NARAL Pro-Choice America, Who Decides State Profiles, *Utah Political Info and Laws in Brief,* available at http://www.naral.org/choice-action-center/in_your_state/who-decides/state-profiles/ (last visited March 8, 2007).

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passed a bill that would have substantially revised the *in loco parentis* doctrine to prevent its use to give standing to seek visitation to ex-same-sex partners (and most heterosexual nonmarital cohabitants, as well). The Governor vetoed the bill in part because of the pending case. In 2007, another bill was introduced and on the track to passage, also designed to significantly curtail use of *in loco parentis* by nonmarital cohabitants including lesbian partners. While that bill was pending in the Legislature, the Court reversed the trial court and held (5-0) that the *in loco parentis* doctrine did not give standing to the lesbian ex-partner to seek visitation with the child, who was biologically and legally unrelated to her.[125] The majority also rejected claims based on concepts of *parenthood by estoppel* and *de facto parenthood* that the American Law Institute's *Principles of the Law of Family Dissolution* (2002) had proposed. Dissenting, Chief Justice Durham agreed that the common law *in loco parentis* doctrine did not apply, but she argued that the *de facto* or *estoppel* parenthood principles endorsed by the ALI gave the ex-partner standing. Whether the legislative passage and near-enactment in 2006, and the pendency in 2007, of legislation reacting strongly against the trial court decision expanding the *in loco parentis* doctrine to confer standing to seek visitation or custody upon lesbian and other non-marital cohabitants had any influence on the Court is unknown. It certainly clarified the legislative policy on an issue as to which judicial deference to legislative policy is important. It is not unlikely that the members of the Court were aware that the Legislature felt strongly about the issue and were ready and willing to overturn a judicial decision if necessary to effectuate their preferred policy.

At least three of the current Justices (Durham, Durrant, and Wilkins) belong to the LDS Church. However, Durham has a strong record of very liberal voting on most social issues. Both Parrish and Nehring were questioned by state Senators about their views on abortion and apparently invoked judicial ethics to decline to answer the questions; nonetheless, the conservative Utah Senate confirmed the conservative Governor's nominations.[126]

125.Jones v. Barlow, 154 P.3d 808 (Utah 2007).

126.Elizabeth Neff, *Senators Caution Judicial Nominees*, SALT LAKE TRIB., March 9, 2003, at C1; Lisa Riley Roche, *Senate panel gives nod to 2 justice choices*, DES. NEWS., Feb. 25, 2003, at B6. *See also* Elizabeth Neff,

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Additional information about the members of the Utah Supreme Court is available at various online sites, including the office web home of the Utah Supreme Court website.[127]

Member	Appointed by/ Year	Term Expires	Miscellaneous
Christine M. Durham, Chief Justice	Mattheson/ 1982.	2014	- Biographical information: J.D. Duke Law School 1971; B.A. Wellesley College; trial judge 1978-1982, one year as presiding judge of the Third Judicial District Court; professor at Duke Law School; Brigham Young University Law School; University of Utah College of Law. - Professional affiliations: Member of the Council of the American Law Institute; ABA Council on Legal Education and Admission to the Bar; first chair of the Utah Judicial Council's Education Committee and a founder of the Leadership Institute in Judicial Education; Served on the Governor's Task Force that recommended legislation to implement the 1985 amendments to the Judicial Article of the Utah Constitution; the Utah Judicial Council; the Commission on Justice in the 21st Century; and the Committee on Improving Jury Service, which she co-chaired; First chair of the courts' Public Outreach Committee, and leads the Coalition for Civic, Character, and Service Learning. - Other: Considered one of the leading liberal state court judges in the country; clearly the most liberal member of the Utah court.
Michael J. Wilkins	Leavitt/ 2000.	2014	- Biographical information: J.D. University of Utah College of Law 1977; L.L.M. University of Virginia 2001; Appointed to

Senators Try to Get Justice Nominees' Take on Legislative-Judicial Tiffs, SALT LAKE TRIB., Feb. 19, 2003, at A6 (Parrish said the Governor did not force her to state her position on abortion but played a "word-association game" about abortion with her).

[127] *See* Utah State Courts, http://www.utcourts.gov/courts/sup/ (last viewed May 3, 2007).

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			the Utah Court of Appeals 1994; private law practice in Salt Lake City 1977-1994. - Biographical information: member of the Judicial Council and has served as chair of the Judicial Council's Policy and Planning Committee, Legislative Liaison Committee, and Standing Committee on Technology; currently chairs the Supreme Court's Committee on Professionalism, and teaches as an adjunct professor at BYU's J. Reuben Clark Law School. - Other: Considered a moderately conservative justice.
Matthew B. Durrant	Leavitt/ 2000.	2014	- Biographical information: J.D. Harvard Law School 1984; clerked for Judge Monroe McKay on the U.S. Court of Appeals for the 10th Circuit; practiced law for 15 years; served as a trial judge in the Third Judicial District; also served as the Supreme Court representative on the Utah Judicial Council and has previously served as Associate Chief Justice. - Professional affiliations: Chair of the Supreme Court's Professionalism Committee; also has chaired the Judicial Council's Technology Committee; taught as an adjunct professor at Brigham Young University's J. Reuben Clark Law School. - Other: Considered the intellectual equal and counter-weight to Chief Justice Durham; Writes very thoughtful, conservative, non-flamboyant opinions.
Jill Parrish	Leavitt/ 2003.	2016	- Biographical information: J.D. Yale Law School 1985; clerked for U.S. District Judge David K. Winter (Utah); practiced commercial litigation in Salt Lake City; Served as assistant U.S. Attorney in the Civil Division of the United States Attorney's Office for the District of Utah. - Professional affiliations: Chair of both the Supreme Court Committee on Civility and

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			Professionalism and the State Law Library Oversight Committee; member of the Court Technology Committee and of the Judicial Performance Evaluation Committee; past president of the Utah Chapter of the Federal Bar Association and currently serves as the State Court Liaison to that organization. - Other: Her opinions are very professional, but in the life-abortion area suggest a controlled underlying standard feminist ideological tilt.
Ronald E. Nehring	Leavitt/ 2003.	2016	- Biographical information: J.D. University of Utah College of Law[128]; B.A. Cornell University; worked for the Utah Legal Services and in private practice in Salt Lake City. - Professional affiliations: Served as chair of the Board of District Court Judges; member of the Supreme Court Advisory Committee on the Rules of Professional Conduct; member of the Utah Judicial Council; Fellow of the American Bar Foundation. - Quotes: A conservative organization that the author does not know and cannot vouch for states online: "Since taking his seat on Utah's highest court, Justice Nehring has already publicly affirmed his disregard for the life of the unborn."[129] - Other: So far his opinions have been thoughtful, professional and non-ideological.

CONCLUSION

The Utah Supreme Court has a strong pro-life history and tradition. But that does not guarantee a favorable outcome in any particular case involving life issues. The dissents from

128.*Id.*
129.Accountability Utah, Pink Slips Report, available at http://www.accountabilityutah.org/Reports/PinkSlipReports/ExtendedBillSummaries.htm (last viewed March 8, 2007).

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pro-life decisions in the past decade have been sharp and strong. The Court has a legacy of judicial restraint, but several influential justices, most notably the current liberal Chief Justice, press for more judicial activism.

Thus, the Court is "in play" on life issues. It cannot be taken for granted. While the Court can be expected to give a fair hearing to life issues, the outcome will depend on factors relating to the merits and professional presentation, as well as to broader policy and political concerns. The pressure on and within the Court to embrace "progressive" positions is constant. Pro-life lawyers must fully earn the victories they achieve in the Court by careful, competent, well-prepared, professional representation.

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