

Who can sue? A
discussion on standing
in the law.

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What is Standing?

- The legally protectible stake or interest that an individual has in a dispute that entitles him to bring the controversy before the court to obtain judicial relief.
- Standing, sometimes referred to as standing to sue, is the name of the legal doctrine that focuses on whether a prospective plaintiff can show that some personal legal interest has been invaded by the defendant. It is not enough that a person is merely interested as a member of the general public in the resolution of the dispute. The person must have a personal stake in the outcome of the controversy.

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Why do we need standing?

- The standing doctrine is derived from the U.S. Constitution's Article III provision that federal courts have the power to hear "cases" arising under federal law and "controversies" involving certain types of parties. In the most fundamental application of the philosophy of judicial restraint, the U.S. Supreme Court has interpreted this language to forbid the rendering of advisory opinions.
- Standing is a concept "rooted in the historical and constitutional role of the judiciary" as one of three separate and equal branches of government. *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983). Through our case law, we have developed the requirement that a party have standing in order "to confine the courts to a role consistent with the separation of powers, and to limit the jurisdiction of the courts to those disputes which are most efficiently and effectively resolved through the judicial process." *Id.*, *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 925-926 (2006).

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4 Privity of Contract and Standing

- Privity of contract is a doctrine of contract law that states that contracts should not give rights or obligations to entities other than those who are parties to the contract.

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5 Horizontal v. Vertical Privity

- Horizontal privity refers to the relationship between the original parties who created the contract, whereas vertical privity refers to the relationship between an original party and a successor.
- Common example of horizontal privity happens when people sell or trade their debts to debt collection agencies.
 - Affirmative defense that plaintiff must show privity of contract.

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6 Mortgage Electronic Registration System (MERS)

- When a borrower takes out a home loan, the borrower executes two documents in favor of the lender: (1) a promissory note to repay the loan, and (2) a deed of trust, or mortgage, that transfers legal title in the property as collateral to secure the loan in the event of default. State law requires the lender to record the deed in the county in which the property is located. Any subsequent sale or assignment of the deed must be recorded in the county records, as well.
- Cumbersome for lenders who may transfer a loan multiple times.
- At the origination of the loan, MERS is designated in the deed of trust as a nominee for the lender and the lender's "successors and assigns," and as the deed's "beneficiary" which holds legal title to the security interest conveyed. If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf.

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Mortgage Electronic Registration System (MERS) cont.

- This practice has come under fire in recent years and has been the subject of a number of lawsuits challenging MERS's authority as a nominee for its members.
- Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc., 2011 UT App 232, 263 P.3d 397, we considered whether transferring a note secured by a trust deed rendered the note an unsecured obligation, extinguished MERS's beneficial interest as nominee for the lender, or precluded MERS from foreclosing on property on behalf of the new holder of the promissory note. Id. ¶¶ 2-5. We held that MERS's beneficial interest in the trust deed was not extinguished with the transfer of the note and that the trust deed's language making MERS a nominee for both the lender and [372 P.3d 743] its successors and assigns was enforceable. Id. ¶¶ 11-14.
- In other words, parties to a security instrument may "validly contract at the outset to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument]."

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Mortgage Electronic Registration System (MERS) cont.

- Courts did make disclosure requirements to provide increased notice to borrowers in foreclosure cases.
- Some states have enacted legislation to mitigate the difficulties created by the widespread use of the MERS system. Many of these statutes seek to increase transparency in the foreclosure process by requiring that foreclosure notices provide more information to the homeowner about the parties involved in the foreclosure proceedings.
- There has been a wave of litigation in state and federal courts challenging various aspects of the MERS system. Almost all of the relevant law is state rather than federal. The results under state law have been inconsistent. Other state supreme courts have reached essentially opposite conclusions. Federal courts, applying state law, have reached similarly disparate results.
- MERS may potentially be attacked on the principal of standing if they cannot show a clear chain of conveyance, but this is an affirmative defense difficult to prove.

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Standing for Businesses in Utah – Assumed Name Statute

- Utah Code Annotated § 42-2-5 provides that "a person who carries on, conducts, or transacts business in this state under an assumed name, whether...as an individual, association, partnership, corporation, or otherwise, shall": (1) file the name of the business, (2) provide the names of the owners and person carrying on the business, (3) list the location of the principal place of business, and (4) designate a registered agent in the state. Furthermore, U.C.A. § 42-2-10 lists penalties for failing to comply with this 'registration' requirement such that any parties failing to comply with this chapter, "shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state."

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Assumed Name Statute (cont.)

- Utah Code Annotated § 16-10a-1502 states that, "[a] foreign corporation transacting business in this state without authority, or anyone in its behalf, may not maintain a proceeding in any court in this state until an application for authority to transact business is filed with the division."

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Assumed Name Statute (cont.)

- That "address[ing] the capacity to sue, and lack of capacity is an affirmative defense". Elite Legacy Corp. v. Schvaneveldt, 391 P.3d 222, 235 (Ut.Ct.App. 2016).
- The Court further identifies that a defense must be asserted in "timely fashion" such as "...an early motion to dismiss". Eaucheaux v. Provo City, 436 P.3d 104, 109 (Ut.Ct.App. 2018).
- This is distinguished from cases where this defense was raised in a Rule 60(b) motion to dismiss a judgment after the case had concluded. *Id.*

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Assumed Name Statute (cont.)

- Even though a motion to dismiss may be filed, the statute provides a district court to stay the proceeding or dismiss it without prejudice rather than outright dismissing the matter completely.
- U.C.A. 16-10a-1502 - (3) A court **may stay** a proceeding commenced by a foreign corporation, its successor, or assignee **until** it determines whether the foreign corporation, its successor, or assignee is required to file an application for authority to transact business. If it so determines, the court **may further stay** the proceeding **until** the required application for authority to transact business has been filed by the division.
- Does come with risk of penalty. (4) A foreign corporation that transacts business in this state without authority is subject to a civil penalty, payable to this state, of \$100 for each day in which it transacts business in this state without authority. However, the penalty may not exceed a total of \$3,000 for each year. Each officer of a foreign corporation ... is subject to a civil penalty, payable to this state, not exceeding \$1,000.

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Marine Life Scis., Inc. v. Unique Sea Farms, Ltd., No. 2:09-CV-914 TS, 2010 WL 1506912 (D. Utah Apr. 8, 2010)

- According to Defendants, because Plaintiff could not do business in Utah at the time it filed this action, its claims were not redressable by the Court at the time they were filed and, therefore, Plaintiff lacked standing. Because standing is determined as of the time a case is filed, Defendant argues that this case must be dismissed for lack of standing.
- In enacting §§ 16-10a-1501 and -1502, Utah adopted the Model Business Corporation ... a Nevada [court] ... followed the majority of states with similar statutes which had adopted a "more forgiving approach rather than dismiss an action filed by an unqualified foreign corporation outright, most states with statutes similar to Nevada's simply stay the action until the corporation qualifies."
- Under the plain language of the Utah statutes, this case need not be dismissed, and instead could be stayed if Plaintiff had not complied. Because there was subsequent compliance even before briefing on the present motion was completed, a stay is not necessary.

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Standing against Government

- One year statute of limitations.
- Living Rivers v. Exec. Dir. of the Utah Dep't of Env't Quality, 417 P.3d 63 (2017). - Under our traditional standing test, a party has standing if (1) **it has a legally cognizable interest that "has been or will be adversely affected by the [challenged] actions."** Utah Chapter of Sierra Club, 2006 UT 74, ¶ 19, 148 P.3d 960 (citing Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983)). (2) **there is "a causal relationship 'between the injury to the party, the [challenged] actions and the relief requested,"** "id. (alteration in original). and (3) **"the relief requested [is] substantially likely to redress the injury claimed,"** "id. (citation omitted).

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Public Nuisance – U.C.A. 76-10-803

- (1) A public nuisance is a crime against the order and economy of the state and consists in unlawfully doing any act or omitting to perform any duty, which act or omission:
 - (a) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
 - (b) offends public decency;
 - (c) unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway;
 - (d) is a nuisance as described in Section 788-6-1107; or
 - (e) in any way renders three or more persons insecure in life or the use of property.
- (2) An act which affects three or more persons in any of the ways specified in this section is still a nuisance regardless of the extent to which the annoyance or damage inflicted on individuals is unequal.

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Where to file a Public Nuisance – U.C.A. 76-10-806

- The action shall be brought in the district court of the district where the public nuisance exists and shall be in the form prescribed by the Rules of Civil Procedure of the State of Utah for injunctions....

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Damages for Public Nuisance

- While the civil redress of the societal wrong caused by a public nuisance is usually through an action for abatement by a public official, private actions for damages may also be pursued, *Erickson v. Sorensen*, 877 P.2d 144, 148 (Utah Ct.App.1994)
- However, the plaintiff in a private suit must establish additional elements beyond those required to be proven by a public entity, *Erickson*, 877 P.2d at 148-49.
- *Whaley v. Park City Mun. Corp.*, 190 P.3d 1, 2008 UT App 234 (App. 2008) Must establish that: **(1)**the alleged nuisance consisted of "unlawfully doing any act or omitting to perform any duty," Utah Code Ann. § 76-10-803(1) (emphasis added); **(2)** the "act or omission ... in any way render[ed] three or more persons insecure in life or the use of property," id. § 76-10-803(1)(e); **(3)** Plaintiffs suffered damages different from those of society at large, **(4)** Defendants caused or are responsible for the nuisance complained of; and **(5)** "[D]efendant[s] conduct was unreasonable," *Erickson*, 877 P.2d at 148-49.

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Damages for Public Nuisance (cont.)

- **The "special injury" requirement is fully satisfied, however, where the private plaintiff has suffered physical injuries...** *Hostetter*, 704 P.2d at 1202; *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 90, at 648 (5th ed. 1984).
- To the Utah Supreme Court, "[i]t is of no consequence that a business which causes a nuisance is a lawful business." *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (citing *Mowrer v. Ashland Oil & Refining Co.*, 518 F.2d 659 (7th Cir.1975)).
- U.C.A. 76-10-804 - Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a **class B misdemeanor**.

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Who can Adopt - Adoption of an Adult

- 78B-6-115(2) - ...any adult may be adopted by another adult.
- There are baseline requirements (see Utah Adoption Act)
- 78B-6-115(4) Before a court enters a final decree of adoption of a mature adoptee, the mature adoptee and the prospective adoptive parent or parents shall appear before the court presiding over the adoption proceeding and execute consent to the adoption.

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Who can adopt – Minor stepchild U.C.A. 78B-6-117

- the adopting parent must be married to the adoptee's custodial parent;
- the adopting parent or the adopting parent's spouse must be at least 10 years older than the adoptee; and
- the adoptee must have lived with the custodial parent and the stepparent for one year (can be waived by the judge).
- the adopting parent cannot have a felony that would disqualify them from adopting (like a felony for child abuse) unless they meet specific criteria.

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Who can Adopt – minor child (no relation) U.C.A. 78B-6-117

- Married couple
- Single adult (must meet other criteria defined by U.C.A. 78B-6-117(4) and not fall under the following:
 - A child may not be adopted by an individual who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state unless the individual is a relative of the child or a recognized placement under the Indian Child Welfare Act, 25 U.S.C. Sec. 1901 et seq.

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Adoption – Major hurdles

- Birth parents alive and have parental rights.
 - Need for relinquishment of rights or termination of rights
- No prior relationship with the minor child.
 - Need for adoption agency to perform necessary checks required by statute to ensure placement of child is okay. Very expensive.

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Child Welfare Cases – Who has standing to children?

- Technically only parents have standing. However, interested parties can intervene and have their voice/opinion heard and even receive temporary guardianship and eventual permanent rights to the child.
- Petition to intervene - reasons why they are an interested party, why it is in the best interest of the child, notice to all parties.

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Child Welfare Cases – Shelter Hearings

- U.C.A. 80-3-302 - Initial hearing to determine placement of minor children.
- (6) Subject to Subsection (7), if, at the time of the shelter hearing, a child is removed from the custody of the child's parent and is not placed in the custody of the child's other parent, the juvenile court:
 - (a) shall, at that time, determine whether there is a relative or a friend who is able and willing to care for the child...;
 - (b) may order the division to conduct a reasonable search to determine whether there are relatives or friends who are willing and appropriate...for placement of the child;
 - (c) shall order the parents to cooperate... [by providing] information regarding relatives or friends who may be able and willing to care for the child; and
 - (d) may order that the child be placed in the temporary custody of the division pending the determination under Subsection (6)(a).

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Child Welfare Cases – Shelter Hearings (cont.)

- (7)(a)(i) ...the division and the juvenile court shall give preferential consideration to a relative's or a friend's request for placement of the child, if the placement is in the best interest of the child.
- (ii) ...there is a rebuttable presumption that placement of the child with a relative is in the best interest of the child.
- (b)(i) The preferential consideration ... expires 120 days after the day on which the shelter hearing occurs.
- (d) [Before that 120 days expires the order of preference shall be:]
 - (i) a noncustodial parent of the child;
 - (ii) a relative of the child;
 - (iii) ...a friend if the friend is a licensed foster parent; and
 - (iv) other placements that are consistent with the requirements of law.

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Question

- If a party was never contacted by DCFS as required by the statute, can that presumption carry past the 120 days?
 - How is that affected if parents provide notice of said family member and/or interested party?

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Grandparents Rights - Visitation

- U.C.A. 30-5-2(1) -
- (a) a grandparent has standing to bring an action requesting visitation in district court by petition; and
- (b) a grandparent may file a petition for visitation rights in the juvenile court or district court where a divorce proceeding or other proceeding involving custody and visitation issues is pending.
- **Presumption that parent knows best.**
- Presumption can be overcome by **clear and convincing evidence** that:
 - (a) the grandparent has filled the role of custodian or caregiver to the grandchild that:
 - (i) is in a manner akin to a parent; and
 - (ii) the loss of the relationship between the grandparent and the grandchild would cause substantial harm to the grandchild; or
 - (b) both parents are unfit or incompetent in a manner that causes potential harm to the grandchild.

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Protective Orders – Who can be protected?

- Aggrieved party
- Minor children to aggrieved party (not always granted)

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Protective Orders – Who are not protected?

- People often list adults living in same home and/or family members they fear are in danger. The Court will not grant these and require parties to submit their own protective orders
- Easiest checkbox to identify standing is requirement of cohabitation

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