FOURTH DISTRICT COURT OF APPEAL
WEST PALM BEACH, FLORIDA

CASE NUMBER: 4D07-237
L.T. NUMBER: 2006 DR 12687 FY

ANGELA MARIA LOHMAN, and JEREMY LOHMAN vs. THOMAS J. CARNAHAN,

Petitioners, Respondent

PETITIONERS' MOTION FOR REHEARING, MOTION FOR REHEARING EN BANC, AND CERTIFICATION OF CONFLICT

Petitioners, ANGELA LOHMAN and JEREMY LOHMAN, by and through their undersigned counsel, file this Motion for Rehearing for the following reasons:

1. This Court's opinion of July 5, 2007, recites the law as "a trial court's ruling on a motion to dismiss for lack of standing is confined to the four corners of the complaint or petition" and therefore, the trial court did not need to consider the facts stated in the Husband's affidavit. Given this precept, consistency then would require dismissal of the Petition for Paternity. Neither the Petition for Paternity nor the Amended Petition for Paternity contained the allegations as stated in the Court's opinion that "at the time of the child's birth, a Petition for Dissolution of Marriage filed by the Husband against the Wife remained pending" or the allegations that "the Husband had alleged that the baby his wife was then expecting, the child in question

was not his child." If collateral evidence presented by Petitioners Mr. and Mrs. Lohman had to be disregarded on the basis of the "four corners rule" then the same rule must be applied to Respondent Carnahan, and the Motion to Dismiss must be granted.

2. There is no dispute that at the time of the filing of the Motion to Dismiss the Petition for Paternity, the pending dissolution of marriage action had been dismissed. If it were proper for the trial court to take notice of the pendency of dissolution proceedings, then the trial court also should have taken notice of the lack of pendency of any dissolution proceedings at the time the Motion to Dismiss was filed. Whether a divorce action is voluntarily dismissed by stipulation, or terminated prematurely because one of the spouses dies prior to the final judgment, the effect is to leave the parties as though no action had been brought. *See, e.g., Marlowe v. Brown*, 944 So. 2d 1036 (Fla. 4th DCA 2006). The Lohmans' marriage was, and to this date remains, valid, continuous, and uninterrupted.

3. F.S. §61.031 (2006) states, "Dissolution of marriage to be *a vinculo*. No dissolution of marriage is from bed and board[1], but is from bonds of matrimony." There is no "legal separation" or "divorce from bed and board" in Florida, as in some other jurisdictions. In general,

Divorces are of two kinds: 1. *a vinculo matrimonii*, which dissolves and

[1]a mensa et thoro

> totally severs the marriage tie; and, 2. *a mensa et thoro*, which merely separates the parties... Divorces *a mensa et thoro*, are a mere separation of the parties for a time for causes arising since the marriage; they are pronounced by tribunals of competent jurisdiction. The effects of the sentence continue for the time it was pronounced, or until the parties are reconciled." *The 'Lectric Law Library's Lexicon on Divorce.* (www.lectlaw.com/def/d187.htm).

In Florida, not only do pending divorce proceedings have no effect in and of themselves to change the parties' legal marital status to something between "married" and "not married", but also there is no judicial decree that can do so, other than a final decree of divorce *a vinculo matrimonii.* While the pendency of divorce proceedings may be a factor evidencing the condition of, or "intactness" of the married parties' personal relationship with each other, it is but one of many possible factors in making that inquiry, because the pendency of divorce action itself is a legal nullity as far as altering the parties' status in relation to third parties. If it would be proper to consider this factor then, the pendency of dissolution proceedings (assuming, *arguendo*, it is appropriate at all for the law to make inquiry into the condition of couples' marital relationships for the purpose of ascertaining and granting third party strangers legal rights), then consistency dictates that other, just as relevant factors bearing on the same issue also must be considered. Thus, if it were proper for the trial court to take notice of the pendency of dissolution proceedings, then the trial court also should have taken notice of the *lack of pendency of any dissolution proceedings at the time the Motion to*

Dismiss was filed, and also considered that and the equally relevant or more relevant and readily ascertainable factors bearing on the state of the Lohmans' relationship, such as that the Lohmans were at all pertinent times residing together as husband and wife with their minor children, and are united in their position in opposition to the underlying legal proceeding.

4. The foregoing notwithstanding, whether by the arbitrary judicial presumption elevating one kind of factor into an absolute rule (such as that the pendency of divorce proceedings has rendered a marital relationship not "intact" prior to any determination of irretrievable breakdown), or by consideration of actual other relevant facts, Petitioners submit that allowing any inquiry into whether a given marital relationship (as opposed to legal status of being married, i.e. "marriage") is "intact" counterproductively encourages the very slippery slope of harms sought to be prevented by the laws and rules traditionally barring these kinds of third party intrusions into the sanctity of other persons' marital relationships and families. The Second District Court illustrated this proposition in *S.D. v. A.G.,* 764 So. 2d 807 (Fla. 2d DCA 2000), in which an inquiry made during the pendency of divorce proceedings is perceived to create less harm. The proceedings themselves, however, were not seen to be a special circumstance which itself rendered the marriage "not intact":

This court has already held that a putative father has no right to initiate a

> paternity action concerning the child of an intact marriage if both the married woman and her husband object. [**6] *See I.A. v. H.H.*, 710 So. 2d 162 (Fla. 2d DCA 1998). We extended this holding in *S.B. v. D.H.*, 736 So. 2d 766 (Fla. 2d DCA 1999), to prevent the trial court from evaluating the "intactness" of a marriage so long as no divorce proceeding was pending.

In the instant case, while the Motion for Paternity was filed at a time when the essentially dormant action for dissolution by the Lohmans remained pending, there is no question that the dissolution action had been dismissed and was no longer pending at the time the Lohmans moved to dismiss the Respondent's Petition for Paternity. In doing so, the Lohmans have made their own ruling that their marriage is intact -- and no one, including the State of Florida, would have standing to say otherwise at this point in time. The implication in the Second District Court's comment, above, is not that a pending dissolution means that a particular marriage no longer affords the protective status it once had because it deteriorated for a period of time into some kind of immutable "not intact" status (and that therefore a paternity action filed by a third party which caught it during the unlucky blip may thereafter proceed), but rather that so long as a dissolution action were pending, based on the equities, a trial court *may* be able to conduct such an evaluation of the marital relationship and under certain circumstances in which the obvious risk of harm were substantially lessened, particular and likely extraordinary equities *may* permit a third party paternity action to go forward.

5. The filing of a dissolution of marriage action is an inchoate event which has no effect upon the parties' status of being married. Marriage, like pregnancy, is an absolute status -- one either is or is not married. There are no "grey areas" -- except for the instant judicial decision which purports to alter the clear statutory intent of the status of being married. As a legal status, a marriage either exists or it does not. In contravention of this, it appears that the Court's decision arbitrarily has defined different degrees of marriage, with different marital statuses -- and differing protections -- directly affecting the legal rights of parties to these different kinds of marriage, depending upon whether they arbitrarily fall within one kind (an arbitrarily defined "intact marriage") or another. The Court's decision assumes a definition of an "intact marriage" as one "where no dissolution of marriage action is pending", based on *dicta* from prior decisions. In so doing, the Court's decision not only serves to lower the "presumption of legitimacy of a child born during a marriage" (i.e., that the husband is the legal father of children born of the marriage), but also is directly in contravention to the legislative pronouncement of F.S. §61.031.

In addition, in not recognizing that the Lohmans had in fact dismissed their pending dissolution of marriage action by the time they moved to dismiss Carnahan's Petition for Paternity, the Court has made a rule that notwithstanding the married couple's own opinion of their marriage, their marriage is not legally sufficiently "intact"

to be afforded the respect or legal protections to which it ordinarily would be entitled.

6. Under Florida law, there are no different kinds of marriages with different rights and protections attaining to each, or various degrees of legal marital status. A thorough search of the Florida Statutes will reveal that *nowhere* in the multitude of laws governing children, births, marriages, paternity or in other related sections did the legislature make distinctions of "intact marriages" and "non-intact" marriages. For example, an individual is not free to marry another while a dissolution is pending because his or her marriage to the divorcing spouse remains "intact" for all intents and purposes. In addition, nowhere in the Florida Statutes is any distinction made between "intact marriages" and "non-intact marriages" for purposes of other types of law, for example, medical and insurance law, tort law, real estate and other property law, including, without limitation, title issues, homestead law, debtor-creditor law, mortgage law, taxation, intestacy, and estate planning law. For all these other laws, persons either are married or they are not. They have the legal status, along with the rights and responsibilities that go with that, or they do not.

7. The phrase "intact marriage" appears to have originated in the family law in connection with assessing the equities as between the parties themselves to a dissolution action. For the most part, the phrase "intact marriage" does not describe the parties' legal status or alter their rights *vis-a-vis* third parties, but rather constitutes a

form of shorthand to describe the parties' actual relationship relative to each other, and with respect to what is equitable in a dissolution action between the married parties themselves. It is the status of marriage that defines the parties' relationship with the rest of the world, but the actual condition of their relationship as "intact" or not, is of no legitimate concern to anything or anyone outside of assessing the equities involved in a marital dissolution action. The term's common usage in the context of a dissolution action, as well as, perhaps, the pervasive lay usage in which many refer to "intact families" as presumably distinguished from inferior kinds of broken families, may have led to some casual or habitual usage of the term "intact" by family lawyers, spilling over into contexts in which the phrase is actually a redundancy, and has no real meaning or legal import outside of its narrow usage within the confines of the dissolution case itself.

For example, there may be a need in a dissolution case to differentiate periods of time when the marriage was breaking down from periods of time when it wasn't, or periods of time when the parties lived together as a couple from a period of time after one of the spouses abandoned the other, or a period of time when the parties were jointly accumulating assets to a time when they were not for purposes of equitable distribution. Be that as it may, the descriptive shorthand of "intact marriage" to describe the parties' personal relationship or working partnership does not have import

outside of narrow determinations of equitable issues being made within the context of the dissolution case itself, and even then, it is applicable only as to the parties involved in that case. It has no meaning in the law otherwise, and it does not change the legal status of the parties in connection with other cases, as to third persons, or *vis-a-vis* the rest of the world. As far as the rest of the world is concerned the parties are married -- unless or until they are not.

8. Lexis-Nexis reports forty (40) appellate decisions in Florida using the term "intact marriage." Of these decisions, 19, or nearly half, used the phrase within the confines of a dissolution action or a post-dissolution matter to ascertain the equities between the husband and wife. They are:

> *Crawford v. Crawford*, 415 So. 2d 870 (Fla. 1st DCA 1982); *Carroll v. Carroll*, 322 So. 2d 53 (Fla. 1st DCA 1975), ___ 341 So. 2d 771 (Fla. 1977); *Anderson v. Anderson*, 563 So. 2d 169 (Fla. 3d DCA 1990); *Auritt v. Auritt*, 334 So. 2d 68 (Fla. 3d DCA 1976); *Hoskins v. Hoskins*, 363 So. 2d 179 (Fla. 4th DCA 1978); *Brown v. Brown*, 592 So. 2d 325 (Fla. 4th DCA 1992); *Eisenberg v. Eisenberg*, 453 So. 2d 83 (Fla. 1st DCA 1984); *Butler v. Butler*, 866 So. 2d 1280 (Fla. 4th DCA 2004); *Goedmakers v. Goedmakers*, 520 So. 2d 575 (Fla. 1988); *Rosecan v. Springer*, 898 So. 2d 1021 (Fla 4th DCA 2005); *Busby v. Busby*, 671 So. 2d 162 (Fla. 4th DCA 1996); *Bode v. Bode*, 920 So. 2d 841 (Fla. 4th DCA 2006); *Marcus v. Marcus*, 902 So. 2d 259 (Fla. 4th DCA 2005); *Goodman v. Goodman*, 797 So. 2d 1282 (Fla. 4th DCA 2001); *Batson v. Batson*, 821 So. 2d 1141 (Fla. 5th DCA 2002); *Rosario v. Rosario*, 945 So. 2d 629 (Fla. 4th DCA 2007); *Feger v. Feger*, 850 So. 2d 611 (Fla. 2d DCA 2003); and *Department of Revenue ex rel. Hall v. Hall* (Fla. 5th DCA 1997).

In *Pohlmann v. Pohlmann*, 703 So. 2d 1121 (Fla. 5th DCA 1998), the term "intact

marriage" was used in a casual manner in a discussion of child support issues involving children of successive marriages, dissolved and ongoing, for contextual clarity. The term was used in a grandparent visitation case, to differentiate an existing marriage from one terminated by death or divorce, *Ward v. Dibble*, 683 So. 2d 666 (Fla. 5th DCA 1996). The term was used in a homestead case, *Law v. Law*, 738 So. 2d 522 (Fla. 4th DCA 1999) to indicate married persons living separately, versus being in an "intact marriage". The term also appears to have referred to the state of the married parties' relationship, rather than the legal status of their marriage, in *S.D. v. A.G.*, 764 So. 2d 807 (Fla. 2d DCA 2000).

In two paternity cases, *I.A. v. H.H.*, 710 So. 2d 162 (Fla. 2d DCA 1998) (3rd party paternity claim not permitted), and *T.B. v. M.M.*, 945 So. 2d 637 (Fla. 2d DCA 2006) (3rd party paternity claim allowed), "intact marriage" refers seemingly redundantly to a marriage that came into existence after the birth of the child, between the reputed father and the mother, perhaps to emphasize the legal married relationship state as opposed to a cohabiting arrangement or other non-marital relationship. In the following six cases, in which the marriages were "intact", use of the phrase again appears to refer redundantly to what simply could have been adequately described as "marriage", or else the meaning intended was just not defined:

G.F.C. v. S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997); *Kronfeld v.*

Kronfeld, 761 So. 2d 411 (Fla. 3d DCA 2000); *Taylor v. Maness*, 941 So. 2d 559 (Fla. 3d DCA 2006) (homestead real estate case); *Tijerino v. Estrella*, 843 So. 2d 984 (Fla. 3d DCA 2003); *Friedberg v. Sunbank/Miami, N.A.*, 648 So. 2d 204 (Fla. 3d DCA 1995); (probate/elective share issue); and *Achumba v. Neustein*, 793 So. 2d 1013 (Fla. 5th DCA 2001)

The term appears to have been used in two paternity cases to distinguish a marriage in which a child was conceived or born during the marriage and where the marriage was ongoing at the time of the paternity action from situations in which a child was conceived or born during a marriage but before or since the birth of the child, the marriage had been dissolved in fact, *Bellomo v. Gagliano*, 815 So. 2d 721 (Fla. 5th DCA 2002), and *Johnson v. Ruby*, 771 So. 2d 1275 (Fla. 4th DCA 2000).

In *Lander v. Smith*, 906 So. 2d 1130 (Fla. 4th DCA 2006), the marriage was deemed not "intact". The description seems to refer to a situation in which a child would have been conceived or born during a marriage, but at the time of the paternity action, the marriage was undergoing dissolution *and* one or both spouses took the position that the marriage was not "intact" or that the husband was not the biological father of the baby -- and the marriage, in fact, later dissolved.

9. The presumption at issue -- that a child born to a married woman is the child of the woman's husband -- is one of the strongest presumptions known to the law. *G.T. v. Adoption of A.E.T.*, 725 So.2d 404, 410 (Fla. 4th DCA 1999); *Eldridge v.*

Eldridge, 16 So. 2d 163, 163 (Fla. 1944); and *see, Michael H. v. Gerald D.*, 491 U.S. 110, 124, 109 S. Ct. 2333, 105 L. Ed.2d 91 (1989). Traditionally, courts have permitted this presumption to be countered by only the husband or wife -- and even then, only in very limited circumstances. At the time the subject Petition for Paternity was filed, the Lohmans were a married couple. While it should not be relevant since husband and wife were united in their position at that time, it bears pointing out that they not only were married but also living together with their two older children when the subject child was conceived as well as when their third child was born. It also bears pointing out that when the Lohmans moved to dismiss the Petition there was no dissolution action pending. The Lohmans' relationship was as intact as the legal status of their marriage. The only outrage here is the encroachment upon this family by a man -- an interloper who himself was married to another woman -- who claims to be the biological father of Mr. and Mrs. Lohmans' third child, and therefore demands the right -- without regard to the consequences that befall anyone else -- to seek to be declared the legal father of that child.

10. Many married couples have their ups and downs. Sometimes they get angry and say hurtful things, including things which they know are not true. Despite their marital difficulties, the Lohmans have managed to "beat the odds". They have retracted every assertion made in their now defunct divorce case that was aimed in anger at the

other. They remain together and they (along with their minor children) have fundamental interests in protecting their family from the unwanted intrusions of outsiders. The stated purposes of Chapter 61 as set forth in Fla. Stat. §61.001 are "To preserve the integrity of marriage and to safeguard meaningful family relationships" and "To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." F.S. §61.052 mandates to the trial court that "No judgment of dissolution of marriage shall be granted *unless* one of the following factors appears..." specifically, there must be a finding that the marriage is *irretrievably broken*.

The Lohmans' marriage was never irretrievably broken. Their marital status was never interrupted, and their marriage was never dissolved. To hold that the filing of a Petition for Dissolution of Marriage action renders a marriage no longer "intact" is in contravention not only to Chapter 61, but to other areas of law as well. The opinion of this court in creating an arbitrary legal distinction between an "intact" and a "non-intact" marriage has no place in the current law. The mere filing of a dissolution of marriage action does not affect the marital status of the parties nor alter their marital status as to anyone else in the world for any purposes. To allow an outsider standing based upon a vague assertion that someone else's marriage is not "intact" -- or worse, to create an the fiction that the filing of a dissolution action automatically has perpetrated

that status and subjected a family to irreversible and irreparable harm by permitting that outsider even to make inquiry into their lives not only subverts the legislative intent and purposes of Chapter 61, but also contravenes the common law and all other laws of this state.

11. Public policy of the State of Florida is to support and encourage strong and functional families. (*See, e.g.* the note to Fla. Fam R. 12.420:

> "1995 Adoption. Subdivision (a), which amends Florida Rule of Civil Procedure 1.420(a)(1), was added to eliminate the language of that subdivision which reads "except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim" and to specifically provide to the contrary. Subdivision (b), which amends rule 1.420(d), was added to prevent the discouragement of reconciliation.")

For another example, see *The Family Law Handbook* given to every couple applying for a marriage license in the State of Florida, which states:

> Just as the family is the foundation of society, the marital relationship is the foundation of the family.... The best marriages are not marriages where there is no conflict. The best marriages are marriages where couples know how to work through the rough spots.... [The marriage] exists until either one party dies or the parties' marriage is dissolved (divorce). Because the State of Florida has an interest in protecting and maintaining its citizens and in protecting and advancing families.... In order to end a marriage, a person must obtain a final judgment from a circuit court dissolving the marriage. (available at http://www.flclerks.com/)

The Handbook proclaims the public policy of the State of Florida as set forth by its

duly elected officials representing the people. It encourages couples to reconcile and not to divorce. It affirms the family as the foundation of society and the marital relationship as the foundation of the family. It affirms the statewide goal and overriding interest in protecting and advancing marriage and families. In addition, the Handbook reiterates the view that the marriage does not end "til death do we part" or through a Final Judgment of Dissolution of Marriage. Notably absent from the Handbook is any distinction between an "intact" versus some other kind of marriage. 12. The Court's opinion as rendered contravenes the public policy of the State of Florida, the privacy provisions of its constitution, its legislative mandates, and its compelling interest in preserving marriage and the family unit. It elevates the claim of biology over that of family and residential caregiving relationships. It even elevates what could be a claim based on adultery -- still a crime in Florida, F.S. §798.01 -- to a status of equivalency with marriage. For an example from another area of law, marital status is an absolute with regard to property rights in a probate action. In *Marlowe v. Brown*, 944 So. 2d 1036 (Fla. 4th DCA 2006), the death of the husband during the pendency of dissolution of marriage proceedings did not disable the wife from pursuing her spousal inheritance rights in probate court. It would not seem logical that marital property rights in a probate action would have more protection than constitutionally protected rights to family liberty and privacy, or the presumption that the husband is the father of minor

children born of the marriage, *i.e.*, the very identity of the family members themselves.

13. With regard to the right to bring a paternity action (*i.e.*, standing), F.S. §742.10 states, "This chapter provides the primary jurisdiction and procedures for the determination of paternity for **children born out of wedlock**...." Again, no mention is made in the statute of the right or standing of an outsider to bring an action against a married couple or of any distinction between an "intact marriage" and some other kind.

14. F.S. §409.256(1)(g) Administrative proceeding to establish paternity - defines a "Putative father" as "an individual who is or may be the biological father of a child whose paternity has not been established **and whose mother was unmarried when the child was conceived and born.**" In the matter at hand, Mrs. Lohman was married at the time or conception and at the time of the birth of the child at issue. No distinction is made in the statute of whether the marriage was "intact" at the time of conception or birth or the time an action for paternity commences.

15. Again, with regard to the issuance of a Birth Certificate or Birth Registration, F.S. §382.013 provides under (2) entitled "Paternity", "(a) If the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction." This is not a gestational surrogacy case, or a case with some other kind of highly unusual circumstances in which paternity of a child

would have been implicated otherwise. At the time Mrs. Lohman gave birth, Mr. Lohman was her husband, and his name is listed on the child's birth certificate. He already is the legal father of the child. There have been no proceedings or rulings by any court seeking to terminate or terminating his legal status as the father of the child. *See, Achumba v. Newstein*, 793 So.2d 1013, 1015 (Fla. 5th DCA 2001); *G.F.C. v. S.G.*, 686 So.2d 1382, 1386 (Fla. 5th DCA 1997) (rejecting concept of "dual fathership"); *see also, Department of Health & Rehabilitative Services v. Privette,* 617 So.2d 305, 309 n.7 (Fla. 1993) (describing action to establish paternity of biological father to child born during marriage to another man as a "species of termination proceeding" that has "the effect of vesting parental rights in putative natural father and removing parental rights from the legal father").

16. Fla. Stat. Section §742.011 provides that a paternity action may be brought so long as paternity has not already been established "by law or otherwise." "Paternity would be established 'by law' when there has been an adjudication of paternity or by the filing of affidavits or stipulation acknowledging paternity....." *G.F.C. v. S.G.*, 686 So.2d 1382 (Fla. 5th DCA 1997). "Or otherwise" refers to when a child is born during an intact marriage and the husband **accepts the child as his own**. *I.A. v. H.H.*, 710 So. 2d 162 (Fla. 2d DCA 1998). As asserted above, use of "intact" here refers to a marriage that simply has not been legally dissolved. It is not a term of art. To the extent that any

case misuses the phrase either carelessly or redundantly this must be clarified. It would appear to be a violation of equal protection that defies logic to extend one standard of presumptiveness of paternity to unmarried persons and to have another -- lower -- standard of presumptiveness to apply to children born of married individuals. The decision as it stands creates a curious distinction not found anywhere else in Florida law, a legal fiction that some marriages, such as the Lohmans', somehow are "not really a marriage" at the moment a dissolution action is filed. The law does not provide this. Filing for dissolution is not an irreversible act. Moreover, as that legal fiction would be applied in the instant case, it additionally constitutes technical "hair splitting" -- a determination of the condition of the marriage at the exact moment of the child's birth, or the filing of a paternity action. (Even worse, in the case at hand, the husband also had instructed his attorney to dismiss the divorce quite some time prior, but she neglected and/or simply refused to follow her client's directives.)

17. Florida statutes make reference only to "married" and "unmarried" parents in regard to actions for paternity. There are no references to degrees of marriage. There are no references to "intact" or "non-intact" marriages. There are no references found in the Florida Statutes to distinguish that a marriage loses its viability or existence at any stage of a dissolution of marriage proceeding. The marriage is intact until a Final Judgment of Dissolution of Marriage is entered. And no such distinctions should be

made based on occasional outlier cases. "Hard cases make bad law." An example of "bad law" that could have innumerable of unintended future consequences as precedent would be to declare that once a dissolution of marriage action is filed, the status of the marriage itself changes, and throws open the door to non-dissolution-related third-party claims of all kinds, whether paternity claims or other kinds of claims, such as creditor claims, probate issues, insurance denials, and other sorts of issues.

The unambiguous language of F.S. §61.031 is contrary to the distinction of an "intact" versus "non-intact" marriage made in this Court's opinion. If a statute is clear on its face, it requires no interpretation. *See generally*, *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000). This Court appears to be making new law regarding a divorce from bed from board which does not exist in this State (or even, to the Petitioners' knowledge, in any other state without a decree to that effect).

18. This Court's decision would throw the family status of every child born while a dissolution of marriage is pending into potential upheaval and question. Ironically, such children, who formerly enjoyed the presumptive status as children born of a marriage could have even less assured familial ties than a child born out of wedlock whose mother later marries a man who claims to be the father -- a situation in which no action for paternity was allowed to proceed in *I.A. v. H.H.*, 710 So. 2d 162 (Fla. 5th DCA 1997).

19. Furthermore, if a Judgment of Dissolution of Marriage had continued in Petitioner's case, and then confirmed Mr. Lohman as the father of the child subject to this action, that also could have served to bar an action for paternity by Respondent Carnahan. Thus, the stated rationale for this Court's decision would seem to encourage a dissolution of marriage action to proceed in such a circumstances -- and to discourage reconciliation, in violation of the state's interest in "preservation of marriage" as well as the very essence and sanctity of marriage as a family unit. The Court's rationale would create a legal fiction whereby unmarried couples would have an easier time excluding outsiders from challenging the familial identity of their minor children than a married couple who may have had the unfortunate occurrence of having a dissolution of marriage action pending at the moment of their child's birth. This is simply not what the legislature intended. It goes against the plethora of law and public policy in this area, not only in Florida, but throughout the Unites States.

20. It is interesting to view this opinion in light of another recent opinion by this Court, namely, *Williams-Raymond v. Jones*, 954 So. 2d 721 (Fla. 4th DCA 2007). In that case, the mother gave birth to a child while unmarried. She later married a man, Charles Raymond, who signed the birth certificate and fulfilled the role of the father. Later, the mother filed a petition for paternity against Jones claiming that he was the father of the minor child. Although her husband, Raymond, had been named as a

defendant, he agreed with the paternity action, stated that DNA testing showed Jones as the father, and agreed that Jones should contribute to the support of the minor child. Viewing Chapter 742, this Court affirmed the dismissal of the complaint below on the basis that "paternity was already established."

These two opinions appear to contravene each other when compared with the facts at issue where paternity is certainly established by law or otherwise where the husband and wife join in to confirm paternity and an affidavit is filed. Mr. Lohman already is the father of the child his wife gave birth to -- and both Mr. and Mrs. Lohman agree. *No paternity action can lie*.

Again, the clear intent of the Florida legislature and the plethora of case law would grant heightened protection to a child born within wedlock and to the status of the married family. And this is as it should be. One of the basic, historical purposes of the state's, or sovereign's, marriage laws was to eliminate uncertainties and define "who the families are." The legitimacy presumptions were less concerned (or concerned that much at all) with biology than with defining families in fact. The marriage laws have been less a state-bestowed status than a declaration by the individuals in question that "we are family". There have always been legal families undefined by biology, for example adoptions of children, both formally and informally. *See generally, e.g.*, Frances Gies and Joseph Gies, *Marriage and the Family in the Middle Ages* (New

York: HarperCollins, 1989), and other historical accounts of what "marriage" and "family" are and mean. It was arguably for reason of establishing certainty that Florida and other states have moved away from common law marriage formation to requiring licensing (registration of the declaration of marriage) and clear parameters defining it. The State of Florida also provides, via its no-fault dissolution and other marriage and family laws, accessible and appropriate vehicles for individuals who wish to exit from one family and who, in conjunction with another person, wish to declare themselves to have formed a new family. There is no compelling or even rational reason to undermine these established systems and the certainty they provide, in order to elevate claims of biological connection above what we historically have defined as family, and identified as family via the marriage laws, injecting confusion and uncertainty in lieu thereof, and encouraging and rewarding childbearing outside of established and defined family systems. Be this as it may, if we are to make such changes, they are for the legislature as constrained by the Florida and United States Constitutional privacy and family liberty interests.

21. The Court's opinion as rendered goes beyond the proper scope of judicial decision making and encroaches upon policy areas properly reserved for the legislature and/or implicitly proscribed by the Florida and United States Constitutions. The law and policy of the State of Florida as well as the United States has long promoted the

benefits and rights derived from the institution of marriage and family liberty and privacy interests. The sanctity of marriage and the presumption that a child born to a married woman is a child of the marriage and of the husband have long been backed by a compelling state interest in the preservation of marriage and the family unit. If a child is born into a marriage and both husband and wife say, in essence, to third parties "Go away", that ought to be sufficient for the government. The government has no interest whatsoever in stepping in further.

Marriage holds a special status in law and society and serves a unique and irreplaceable social function. This is recognized in many ways throughout Florida law, for example, F.S. §90.504, Husband-Wife Privilege, and for example, in our intestacy and homestead and property ownership laws. This Court's decision not only changes the law regarding a husband's presumptive paternity of children born to his wife, but also would purport to change public policy to undermine the sanctity of the family unit and the family's protected right to privacy. Any change made in these areas must be made by elected representatives of the people consistent with the protections of the Florida and United States Constitutions. "The role of judges is only to find the law, not to make it or state what it will be or might have been. If the law is to be changed that is the role of the legislature, not of courts." *Robbat v. Robbat*, 643 So. 2d 1153 (Fla. 4th DCA 1994).

22. A request for certification of conflict is further made with decisions such as *S.B. v. D.H.*, 736 So. 2d 766 (Fla. 3d DCA 1999), *Tijerino v. Estrella*, 843 So. 2d 985 (Fla. 3d DCA 2003), *G.F.C. v. S.G. & D.G.* 686 So. 2d 1382 (Fla. 5th DCA 1997) and *Bellomo v. Gagliano,* 815 So. 2d 721 (Fla. 5th DCA 2002) regarding whether a purported biological father ever should be permitted to bring an action for paternity when the mother and her husband, the legal father, are married and object to that proceeding. The Florida statutes do not contain a grey area state of marriage and expressly contravene any intent to utilize a dissolution from "bed and board." Moreover, the legal agreements and understandings of a married couple made between themselves, such their residential arrangements, whether separate or apart, as well as other aspects of their relationship, are not fodder for second-guessing by third parties.

23. The Second District has taken a conservative approach to this issue recognizing the refusal of the legislature to encroach into this issue in *G.F.C. v. S.G.*, 686 So. 2d 1382 (Fla. 5th DCA 1997) stating, "Eventually, the legislature may further clarify the state's policy with regard to the rights of children and fathers. Until then, we are reluctant to legally recognize lawsuits instituted by those simply professing to be biological fathers which impugn the legitimacy of children and disrupt families' lives."

24. This decision is irreparably injurious to the Lohman family -- Mr. and Mrs. Lohman, the child in question and the child's two siblings. This is a matter involving

basic and fundamental Constitutional principals of privacy, family liberty and sanctity of marriage which should not be taken lightly or depend on technicalities.

25. Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

WHEREFORE, Petitioners would respectfully request that this Honorable Court reconsider this issue and otherwise grant this Motion for a panel review and for a Certification of conflict to the Florida Supreme Court.

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. mail this 11th day of July, 2007 to: Neil Jagolinzer, Esq., Post Office Box 3346, West Palm Beach, Florida 33402.

Respectfully submitted,

LISA MARIE MACCI, P.A.
2255 Glades Road, Suite 324 Atrium
Boca Raton, Florida 33431
Telephone Number: (561) 361-8528
Facsimile: (561) 892-3955
Email: lisamacci@msn.com

By:_____
LISA MARIE MACCI, ESQUIRE
Fla. Bar No.: 994650