IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, WEST PALM BEACH, FLORIDA

CASE NO.: 4D07-

ANGELA MARIA LOHMAN and JEREMY LOHMAN

Petitioners,

v.

THOMAS J. CARNAHAN,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

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Florida Bar No. 994650

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners, Angela Maria Lohman and Jeremy Lohman, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. John Christiansen, Esq.
   Respondent's trial counsel

2. Lisa Marie Macci, Esq.,
   Petitioner's trial counsel

3. Honorable Charles E. Burton,
   Trial judge

4. Angela Maria Lohman,
   Petitioner of these proceedings

5. Jeremy Lohman
   Petitioner of these proceedings

6. Thomas J. Carnahan,
   Respondent of these proceedings.

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STANDARD OF REVIEW

The applicable standard of review for this matter is a departure from the essential requirements of law and harm likely to result which cannot be remedied in a plenary appeal from a final judgment. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987).

BASIS OF INVOKING JURISDICTION

Article V section 4(b) of the Florida Constitution provides that the district courts of appeal have jurisdiction to issue writs of certiorari. See also Fla.R.App.P. 9.030(b)(2)(A). The order to be review in the present case was rendered January 9, 2007. The petition is timely under rule 9.100(c)(1).

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

The Petitioners (Mr. and Mrs. Lohman) are a young couple who have been married to each other since February 6, 1999. They have three tender aged children together: Hunter, age 3, Sage, age 2 and Landon, 4 months of age. The Lohmans and their three children live together in the single family home the Lohmans bought when they got married.

About a year ago, when the Lohmans were having some marital problems, Respondent ("Carnahan") who was going through a divorce, befriended Mrs. Lohman, entering the Lohmans' lives at or about the time Mrs. Lohman became

pregnant with their third child, causing further marital difficulties. Mr. Lohman became angry and filed a divorce action. Under stress, Mr. And Mrs. Lohman both made allegations in anger which were later retracted.[1] Meanwhile, Carnahan continued to attempt to court Mrs. Lohman, and be a disruptive influence until a criminal no contact order was laid against him.[2] [3]

After a brief separation of less than three months while she was pregnant, the Lohmans reconciled and repaired their marriage. Mr. Lohman participated in Mrs.

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[1]During the pendency of the dissolution action, the parties were very angry with each other. This anger and intent to hurt one another is reflected in the pleadings filed, which apparently were exacerbated by their lawyers who seemed to be more interested in divorce legal strategies and getting their clients to sign a settlement agreement (which they ultimately did, even though away from court they were in the process of reconciling) than assisting them through their temporary problems. Allegations that subsequently were withdrawn included the unfortunate and later deeply regretted claim that Mr. Lohman was not the father of their third child. (App-C, D)

[2]On or about July 5, 2006, Carnahan cut off Mrs. Lohman's vehicle while she was pregnant and driving with her two children. He rammed her vehicle after forcing her to stop. An independent witness alerted the Lantana Police Department and provided a sworn statement. The police arrived to aid an extremely frightened and shaken Mrs. Lohman and children. Carnahan was arrested, jailed and charged with a multiple count felony indictment. Carnahan plead Guilty to a misdemeanor "Domestic Assault" charge, and was ordered to complete an anger management program and to have no contact with Mrs. Lohman, with whom he appeared to obsessed to the point of violence. (App- J)

[3]At all times relevant hereto, Carnahan has been married to another woman, Rilyn Carnahan, against whom his heavily contested divorce is pending before the same judge as the matter below. (App- J)

Lohman's pregnancy and was there for the birth of Landon on September 29, 2006, as he had with his first two children. Mr. Lohman is named as the father on the birth certificate. (App- J)

Once the couple had adjusted from the pregnancy and events of the prior months, the Lohmans turned their attention back to their still-pending legal action, mutually dismissing their divorce case and discharging their lawyers. In their "Joint Voluntary Dismissal" they stipulated that all allegations and all other matters in the dissolution action were "voluntarily stricken, canceled, withdrawn and dismissed *ab initio*. (App- E)

Mr. Lohman filed an Affidavit indicating that he is Landon's father and accepting all responsibilities attendant to fatherhood. (App- J) Both Mr.and Mrs. Lohman have objected to the paternity proceedings filed below. (App- B, J)

On October 10, 2006, Carnahan filed a Petition for Paternity against Mrs. Lohman seeking *inter alia* custody of the baby, and claiming to be the father of the child. (App- A)

The Lohmans filed three Motions to Dismiss the Paternity action for lack of standing and for failure to join Mr. Lohman as an indispensable party. The second Motion to Dismiss was granted and Carnahan was permitted to amend his pleading and the other two Motions to Dismiss were denied. (App- B, F, G, H, J, K)

Carnahan's Amended Petition mirrored the now-withdrawn allegations contained in Mr. Lohman's divorce Petition. (App- D, I) The Lohmans filed an Answer to the Amended Petition containing general denials, and affirmative defenses, including Carnahan's lack of standing to bring the paternity action and to bring an action to terminate the parental right's of Landon's father, the Court's lack of jurisdiction to terminate the parental rights of the Landon's father, the fact that paternity has been established under Florida Law, and that the action is violative of the Florida and United States Constitutional rights and guarantees of family liberty and privacy interests. (App- L)

This matter involves not only the fundamental liberty and privacy interests of Landon and the Lohmans, but also the interests of the Lohmans' two other small children and their right to be let alone as an intact family unit.

NATURE OF RELIEF SOUGHT

The nature of the relief sought by this petition is a writ of certiorari quashing the order of the trial court which granted the Petitioners' Motion to Dismiss the Petition for Paternity for Lack of Standing and ordering a dismissal of the Petition filed below.

LEGAL ARGUMENT

The issue presented is whether the trial court departed from the essential requirements of law by denying the Lohmans' Motion to Dismiss and granting standing

to a man claiming to be a putative father of a minor child born within an intact marriage to pursue a claim of paternity over the objection of the Mother and her Husband, after the Husband has accepted full responsibility and paternity of this child. Although this Court does not typically consider the dismissal of a Motion to Dismiss by way of Petition for Writ of Certiorari, it has done so in the past in such a sensitive area such as the one at issue where irreparable harm may result if the matter is permitted to continue. *See, e.g.*, Mays v. Twigg, 543 So. 2d 241 (Fla. 2d DCA 1989). Similar to the Mays case, the Lohmans assert that to allow the matter to continue in the lower court would constitute an unwarranted intrusion into their privacy. The fundamental rights of privacy and freedom which are present in the matter below should protect this entire family from unjustified humiliation and psychological harm.

The case law is clear that a man alleging to be the putative father of a child born within an intact marriage DOES NOT have standing to bring an action for paternity over the objection of the mother and her husband, thereby violating their Constitutionally protected right to privacy along with violating the sanctity of marriage. The denial of a Motion to Dismiss for lack of standing is a clear departure by the trial court of the abundance of legal precedent in this area.

Fla.Stat. §61.001(2006) states that the first purpose of Chapter 61 is "To **preserve the integrity of marriage** and to safeguard meaningful family relationships."

(Emphasis added).

It has been held that proceedings under Fla.Stat. Ch. 61 are recognized as primarily equitable in nature. When specific statutory rules are lacking, Chapter 61 reposes direction in the trial court to achieve the **purposes** and aims of the statutes. Coltea v. Coltea, 856 So. 2d 1047 (Fla. 4th DCA 2003).

The established Florida precedent fully supports the position of the Lohmans and supports the granting of this Petition for Writ of Certiorari. *See, e.g.*, Dep't of Revenue v. Cummings, 871 So. 2d 1055 (Fla. 2d DCA 2004) which held:

> The legal father also has the right to seek to retain his relationship with the child and to fulfill the rights and responsibilities of parenthood. If the mother is in agreement with the husband's assertion of his legal rights to the child, there may be **no basis** for adjudicating paternity in a person other than the legal father. *See* S.D. v. A.G., 764 So.2d 807 (Fla. 2d DCA 2000) (**prohibiting putative biological father from intervening in divorce to establish paternity when legal mother and father objected**); S.B. v. D.H., 736 So.2d 766 (Fla. 2d DCA 1999) (**prohibiting putative biological father from pursuing action for paternity for child born to intact marriage once both mother and legal father object**); *see also* G.F.C., 686 So.2d 1382.

Emphasis added.

It was held in S.B. v. D.H. and H.H, 736 So. 2d 766 (Fla. 2d DCA 1999), where **SB's name was on the birth certificate**, DH and HH had separated for numerous periods of time during their marriage, filed divorce actions, etc., that based on privacy

decisions and precedent in both Florida courts and the United States Supreme Court that the paternity action of S.B., the putative father, must be dismissed. S.B. claimed he didn't even know that D.H. was married. The court stated, "**There is no Solomon within our judiciary who can accurately predict who would be the "better" father for this child.** D.H. and H.H. have decided to raise this child of their marriage and to accept all rights and responsibilities of parenthood. S.B. has **no statutory or constitutional right to intrude into that private decision**. *See* Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed. 2d 91 (1989)."

In the case at issue, the parties are contesting Carnahan's paternity and Mr. Lohman's name is listed on the child's birth certificate, not Carnahan's. The Lohmans are raising this child, to whom Carnahan is a stranger, and Mr. Lohman has accepted all rights and responsibilities of parenthood.

Additionally, there are clear public interests and policies, both nationally and within this State not to allow this action to proceed. For instance, in Tijerino v. Estella, 843 So. 2d 984 (Fla. 3d DCA 2003), the Court decided as follows:

> We affirm the order below finding the trial court properly dismissed the appellant's paternity suit. **A putative father does not have standing to seek to establish paternity of a child, where the child was born into an intact marriage, and where the married woman and her husband object to the paternity action**. See Johnson v. Ruby, 771 So.2d 1275 (Fla. 4th DCA 2000); I.A. v. H.H., 710 So.2d 162 (Fla.

> 2d DCA 1998); G.F.C. v. S.G., 686 So.2d 1382 (Fla. 5th DCA 1997).
>
> **The presumption of the legitimacy of a child born in wedlock is one of the strongest presumptions known to the law and is deeply rooted in this Nation's history and tradition; statutes preserving this presumption do not violate constitutional rights**. See Michael H. v. Gerald D., 491 U.S. 110, 124, 109 S.Ct. 2333, 105 L. Ed.2d 91 (1989) ("**[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.**").
>
> We decline the appellant's invitation to depart from the well established authority in this State and others, which recognizes the importance of preserving the legitimacy of a child born in wedlock. See G.F.C. v. S.G., 686 So.2d at 1382. **Opening the door to unfettered challenges to the sanctity of marriage, as well as to the potential for baseless and intrusive paternity challenges, is not in the best interests of our children**.

Emphasis added.

Fla.Stat. § 742.011 (2006) allows a paternity action to proceed only as follows:

> Any woman who is pregnant or has a child, any man who has reason to believe that he is the father of a child, or any child may bring proceedings in the circuit court, in chancery, to determine the paternity of the child **when paternity has not been established by law or otherwise.**

Emphasis added.

It is clear that there are three ways in which paternity can be established:

> (1) "By law," meaning that a court order establishing paternity is entered.
>
> (2)"Or otherwise," such as **when a child is born during an intact marriage and the husband accepts the child as his own**.
>
> (3)"Or otherwise," would also cover the situation where the child is born out of wedlock but the mother and "reputed father" marry each other and the husband accepts the child as his own as though the child had been born to them during marriage.

I.A. v. H.H., 710 So. 2d 162 (Fla. 2d DCA 1998). *See also*, Martha-Irene Weed, Esquire, Florida Bar Family Law Section Board Certification Review - Paternity, (2004).

According to Florida precedent, paternity has, in fact, been established as to Landon in favor of Jeremy Lohman as the child has been born during an intact marriage and Mr. Lohman has filed an affidavit accepting all parental responsibilities and duties of said child. The denial of the Motion to dismiss filed by the Lohmans was a departure from the essential requirements of law and should be reversed.

A similar factual scenario was presented to the Fifth District Court of Appeal and it was held that the trial court's order denying a married couple's motion to dismiss the putative father's petition to be declared the father of their child was a departure from the essential requirement of law and caused irreparable harm and the Petition for Writ

of Certiorari was granted. Bellomo v. Gagliano, 815 So. 2d 721 (Fla. 5th DCA 2002).

It is anticipated that Carnahan will respond with the argument that the marriage was not "intact" as a Petition for Dissolution of Marriage was pending, as he argued before the trial court. The filing of a Petition for Dissolution of Marriage is an inchoate act which, in and of itself, does not disturb the status of the parties as married nor does it disturb the "intactness" of their marriage. *See, e.g.* Faile v. Fleming, 763 So. 2d 459 (Fla. 4th DCA 2000)(Wife was entitled to recover an elective share of her deceased husband's estate under Fla.Stat. §732.201 as surviving spouse where a marriage dissolution proceeding was pending at the time of his death. *See also,* Cain v. Cain, 549 So. 2d 1161 (Fla. 4th DCA 1989)(Marriage deemed intact for purposes of homestead preservation where the husband left the former marital residence pursuant to an order of the trial court awarding possession of the residence to the wife). *But c.f.* S.B. v. D.H., 736 So. 2d 766, 767 (Fla. 2d DCA 1999)("So long as the husband and wife are married and have no pending divorce proceeding, we will not authorize the trial court to conduct any qualitative evaluation of whether the marriage is 'intact.' ")

Regardless of whether the divorce was pending at the time or not, for all practical purposes, the Lohmans and their three children were all living together as a family unit at the time of the birth of Landon in the same family home in which they have lived in since their marriage, as they continue to do so to this day. They hit a

rough patch in their marriage, and they were more fortunate than most to be able to repair their relationship.

Carnahan has based his argument below upon this Court's ruling in Lander v. Smith, 906 So. 2d 1130 (Fla. 4th DCA 2005) claiming that common sense and reason are outraged by the denial of the putative father's right to bring the paternity action. The trial judge agreed with this position and incorporated same into his Order denying the First Motion to Dismiss[4]. The case below is clearly distinguishable from the Lander case where it was *uncontested* that he (the putative father) was the biological father.

In Johnson v. Ruby, 771 So. 2d 1275 (Fla. 4th DCA 2000), a man claiming to be the putative father filed an action for paternity which was dismissed by the trial court for lack of standing. The Rubys were married **less than three (3) weeks** before the birth of the child who was the subject of the proceedings. This Court stated as follows:

> The prevailing law in this state, however, is that a putative father has no right to seek to establish paternity of a child who was born into an intact marriage when the married woman and her husband object. See I.A. v. H.H., 710 So. 2d 162 (Fla. 2d DCA 1998); G.F.C. v. S.G. and D.G., 686 So. 2d 1382 (Fla. 5th DCA 1997).

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[4]It is interesting to note that Carnahan's counsel represented the Mother in the Lander case and discretionary review was granted by the Florida Supreme Court. Smith v. Lander, 919 So. 2d 436 (Fla. 2006). The matter was voluntarily dismissed by the parties while pending in the Florida Supreme Court.

This Court further stated in Johnson,

> Pursuant to the current state of the law, **Johnson has no cause of action**. Thus, the trial court correctly dismissed his petition because **it had no authority to entertain it.**

Emphasis added.

In I.A. v. H.H., 710 So. 2d 162 (Fla. 2d DCA 1998), it was held that a third party claiming to be the child's biological father may **not** bring suit to establish his parental rights and responsibilities where the mother of a child born out of wedlock thereafter married the child's reputed father two months following the birth, thereby causing the child to be deemed as though born within wedlock pursuant to Fla.Stat. §742.091.

It simply does not make sense that a couple who married **two months after** the birth of the child and a couple who married **three weeks prior** to the birth of the child are treated differently and have enhanced rights and protections when compared to a couple with two other tender aged children married for **over seven years** who hit a "rough patch" in their marriage and did not have the opportunity to dismiss their pending legal proceedings until shortly after the birth of their child. This type of contradiction would certainly not further the goal of marriage preservation nor would it safeguard the sanctity of the family unit.

Lastly, the Constitutional violation of the right of privacy was not addressed by the Lander court. The Florida Constitution contains a specific right of privacy as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein....

Fla. Const. Art. I, § 23 (2006)

Cases supporting a right to privacy and upholding the sanctity of marriage, include the Florida Supreme Court affirmation of the appellate court's decision denying Department of Health and Rehabilitative Services the right to order a putative father of child, born to a woman married to another man, to undergo a blood test to determine paternity solely to reclaim public monies spent to support that child. In accordance with Fla. Const. Art. I §§ 9 and 23, where the child's best interests required maintaining the presumption of legitimacy, then the presumption prevailed because the state lacked a compelling interest justifying the blood test. Department of Health & Rehabilitative Servs. v. Privette, 617 So. 2d 305 (Fla. 1993).

Additionally, it has been held that under Fla. Const. Art. I, § 23, the state may not intrude upon parents' fundamental right to raise their children except in cases where a child is threatened with harm. A best interest test without an explicit requirement of harm cannot pass constitutional muster. Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996).

There is no "compelling state interest" involved in the within action justifying the right of a third party interloper to invade the sanctity of this marriage and this family. Quite to the contrary, the United States Constitution, the Florida Constitution and long standing precedent including the United States Supreme Court, across this country and within the State of Florida demand a dismissal of this action.

CONCLUSION

Based upon the foregoing it is respectfully requested that this Court grant this Petition for Writ of Certiorari and reverse the denial of the Lohmans' Motion to Dismiss as a departure from the essential requirements of law and due to the irreparable harm will result. The long established history of this country as well as the State of Florida demonstrate that society has historically protected, and continues to protect, the marital family. The integrity and privacy of the family unit should not be impugned by an action such as the one below to permit a third party to disrupt an otherwise peaceful union of husband and wife. In the wise words of my opposing counsel as quoted in Lander, to do otherwise would "constitute nothing more than an invitation to open a Pandora's Box best left to the legislature and travel down a slippery slope toward invasion of marital privacy."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. mail to John Christiansen, Esq., PO Box 3346, West Palm Beach, FL 33401 and Hon. Charles Burton, 200 West Atlantic Avenue, Delray Beach, FL 33444 on this 22nd day of January, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated document is typed in either Times New Roman 14 point font or Courier New 12 point font.

Respectfully submitted,

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