IN THE SUPREME COURT OF FLORIDA

D.M.T.,

Appellant,

v. Case No. SC12-261

T.M.H.,

Appellee.
_____/

On Review from the District Court of Appeal, Fifth District
State of Florida

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

The Appellant, D.M.T., shall be referred to as the "birth mother." The Appellee, T.M.H., shall be referred to as the "biological mother." References to the decision of the district court below, *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. 5th DCA 2011), shall be indicated as "*T.M.H.*, at __" with the appropriate page number inserted. Citations to the record on appeal will be indicated as (R ___), with the appropriate page number inserted. References to the Amended Initial Brief of Appellant shall be designated as "Initial Brief, at __" with the appropriate page number inserted.

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

As the district court noted, this is a case of first impression in this state, and the facts are not in dispute. *T.M.H.*, at 788. Although the birth mother offered a Statement of the Case and Facts that was not inaccurate, the recitation of the facts offered by the district court is offered here to provide a more complete factual understanding and context.[1]

> [The biological mother] and [the birth mother] were involved in a committed relationship from 1995 until 2006. They lived together and owned real property as joint tenants, evidenced by a deed in the record. Additionally, both women deposited their income into a joint bank account and used those funds to pay their bills.
>
> The couple decided to have a baby that they would raise together as equal parental partners. They sought reproductive medical assistance, where they learned [the birth mother] was infertile. [The biological mother and the birth mother], using funds from their joint bank account, paid a reproductive doctor to withdraw ova from [the biological mother], have them fertilized, and implant the fertilized ova into [the birth mother]. The two women told the reproductive doctor that they intended to raise the child as a couple, and they went for counseling with a

[1]The terms "birth mother" and "biological mother" are used in this Brief in an attempt to avoid confusion concerning the parties. As noted in the Initial Brief, D.M.T. was the Petitioner in the trial court, the Appellee at the Fifth District Court of Appeal, and is now the Appellant. Initial Brief, at vi. Citing to the district court's opinion, where Appellant was Appellee (and vice versa), provides an example of how confusing the matter can become. While the biological mother is aware of, and sensitive to, the potential issues concerning the use of these terms as noted in the dissent, she uses the terms to assist this Court to distinguish the parties.

mental health professional to prepare themselves for parenthood. The in vitro fertilization procedure that was utilized proved successful, and a child was conceived.

The child was born in Brevard County on January 4, 2004. The couple gave the child a hyphenation of their last names. Although the birth certificate lists only [the birth mother] as the mother and does not indicate a father, a maternity test revealed that there is a 99.99% certainty that [the biological mother] is the biological mother of the child. [The biological mother and the birth mother] sent out birth announcements with both of their names declaring, "We Proudly Announce the Birth of Our Beautiful Daughter." Both women participated at their child's baptism, and they both took an active role in the child's early education.

The women separated in May 2006, and the child lived with [the birth mother]. Initially, [the biological mother] made regular child support payments, which [the birth mother] accepted. [The biological mother] ended the support payments when she and [the birth mother] agreed to divide the child's time evenly between them. They continued to divide the costs of education. The child treated both women as parents and did not distinguish between one being the biological or the birth parent.

The parties' relationship further deteriorated, and the affection each once had for the other eventually turned to animus. [The birth mother] severed [the biological mother's] contact with the child on December 22, 2007, when [the birth mother] quit her job and moved with the child to an undisclosed location. Eventually, [the biological mother] located them in Queensland, Australia, and there served [the birth mother] with the underlying lawsuit.

[The birth mother] filed a Verified Motion for Summary Judgment, which alleged that the facts were not in

> dispute and that she was entitled to summary judgment as a matter of law. [The birth mother] accepted [the biological mother's] facts for the purpose of summary judgment. The trial judge held a hearing on the motion and issued the final summary judgment in favor of [the birth mother].[2] In ruling as he did, the trial judge stated that he felt constrained by the state of the law and expressed his hope that this court would reverse the ruling:
>
> THE COURT: First, let me say, I find that [the birth mother's] actions to be—this is my phraseology—morally reprehensible. I do not agree with her actions relevant to the best interest of the child. However, that is not the standard. There is no distinction in law or recognition of rights of the biological mother verses a birth mother. If a contract is not binding in this situation, then intent is not relevant under these circumstances.
>
> * * *
>
> Same-sex partners do not meet the definition of commissioning couple. There really is no protection for [the biological mother] under Florida law because she could not have adopted this child to prevent this current set of circumstances. I do not agree with the current state of the law, but I must uphold it. I believe the law is not caught up with science nor the state of same-sex marriages. I do think that is on the horizon.
>
> The trial court then stated to [the biological mother], "If you appeal this, I hope I'm wrong."

[2]The Final Order Granting Summary Judgment found, among other things, that "the law does not recognize the rights of a biological mother versus a birth mother;" "an agreement or contract between the parties, and/or previous course of conduct, does not create any rights in [the biological mother] to the minor child;" and that "Florida law does not provide any protection" for a party in the biological mother's position (R 303-04).

T.M.H., at 788-90.

The biological mother did appeal. In *T.M.H.*, a majority of the court found that, "[b]ased on the facts and circumstances of this case, we can discern no legally valid reason to deprive either woman of parental rights to this child." *Id.* at 790. The majority found that nothing in section 742.14 addressed a situation where a child "has both a biological mother and a birth mother who were engaged in a committed relationship for many years and who decided to have a child to love and raise together as equal parental partners." *Id.* The majority further held that the biological mother had "constitutionally protected parental rights to the child," and thus if section 742.14 applied to the situation presented, the statute was unconstitutional. *Id.* at 798. The majority opinion certified the following question to this Court as being of great public importance:

> Does the application of section 742.14 to deprive parental rights to a lesbian woman who provided her ova to her lesbian partner so both women could have a child to raise together as equal partners and who did parent the child for several years after its birth render the statute unconstitutional under the Equal Protection and Privacy clauses of the Federal and State Constitutions?

Id. at 803.

Judge Monaco concurred and specially concurred, and Judge Sawaya (who authored the majority opinion) concurred with the special concurrence. *Id.* at 803-05 (Monaco, J. concurring and specially concurring). Judge Lawson dissented,

arguing that section 742.14 barred the biological mother's claim of parentage, and that section 742.14 is not unconstitutional. *Id.* at 805-28. This Court accepted jurisdiction over the case.

SUMMARY OF THE ARGUMENT

The biological mother provided ova which was fertilized with sperm from a donor and then placed in the birth mother's womb. The biological mother and the birth mother intended to raise the child together as parental partners, and indeed did so for several years. Under these facts, the biological mother had protected parental rights to the child.

Florida Statutes section 742.14 does not apply to this matter. The undefined terms "donor" and "donate" do not apply to the biological mother because the undisputed facts demonstrated the biological mother had no donative intent concerning the ova that was used to create the child. The biological mother did not intend to give her ova away, but instead intended to be, and was, a mother to the child born from her ova for several years.

If section 742.14 does apply, then the certified question should be answered in the affirmative because the statute violates the biological mother's equal protection and privacy rights. The statute defines "commissioning couple" as a mother and father, and thus treats heterosexual couples in a manner unequal to the way it treats similarly situated same-sex couples. Further, the biological mother enjoyed a liberty interest in the fundamental right to parent her child. The statute forces her to relinquish this right, and therefore it is unconstitutional.

The standard informed consent form, which authorized the process, did not constitute a waiver of the biological mother's parental rights. By the form's terms, the biological mother was not a donor who relinquished her claims to the child. An affidavit filed by a doctor from the reproductive clinic stated that the standard form did not apply to this matter, and the form was signed in an effort to let couples know about the procedure itself. Finally, similar forms have been rejected by courts in other jurisdictions who have considered the fact pattern presented by this case.

ARGUMENT[3]

This case of first impression in Florida presents a unique situation where a woman who provided her ova (along with years of love, care, financial support, bonding and indeed, her name) to her child could be forever denied any parental rights to that child. The majority found the undeniable truth of this matter was that "both women were parents to the child and equally cared for the child for several years." *T.M.H.*, at 790. Yet, the trial court found and the dissent agreed that "Florida law does not provide any protection" to the biological mother. Thus, once the relationship between the women ended, the biological mother was left without any rights to the child she helped create and raise. As the majority held, this is not the law.

The key issue in this case concerns the biological mother's constitutionally protected rights to parent the child. If, as the majority held, the biological mother does have such rights, then such rights obviously must be protected. If, as the majority held, section 742.14 did not apply, then those rights gave the biological mother a role in her child's life. If the statute does apply, then it is unconstitutional because it operates to infringe on those rights, and indeed would completely

[3]The issues before this Court involve statutory interpretation and construction, and are therefore reviewed *de novo*. *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008).

deprive the biological mother of those rights. In either case, the inquiry hinges on the existence of the biological mother's constitutional rights.

ISSUE: THE BIOLOGICAL MOTHER HAD CONSTITUTIONALLY PROTECTED RIGHTS AS A GENETIC PARENT WHO ESTABLISHED A PARENTAL RELATIONSHIP WITH HER CHILD.

The factual scenario through which the issue of constitutionally protected parenting rights must be examined was succinctly stated by the majority as follows:

> The women were in a committed relationship for many years and both decided and agreed to have a child born out of that relationship to love and raise as their own and to share parental rights and responsibilities in rearing that child. Specifically, when it was discovered that [the birth mother] was infertile, both women agreed to have ova removed from [the biological mother], to have them artificially inseminated with the sperm of a donor, and to have the ova inserted into [the birth mother's] womb, in order to conceive a child they would raise together as parental partners. After the child was born, both women were parents to the child and equally cared for the child for several years.

Id. at 790.

A. The Biological Mother's Constitutionally Protected Parental Rights.

"The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength,

beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection." *Lehr v. Robinson*, 452 U.S. 248, 256 (1983). Here, the biological mother was connected to her child in ways both tangible (her ova helped create the child) and intangible (the bonds between her and the child she loved and raised for years).

Assume an unwed father impregnated his girlfriend and then cared for their child in exactly the same manner demonstrated by the biological mother in this case. Assume further the couple had a falling out, and the girlfriend took the child and refused to allow the boyfriend to play any role in the child's life. In that scenario, such father would have constitutionally protected rights as a parent of the child.

In *Lehr v. Robinson*, 452 U.S. 248 (1983), the Court considered the rights of such fathers, and focused on whether the father demonstrated "a full commitment to the responsibilities of parenthood" by coming forward and participating in the child's rearing. *Id.* at 261. It is clear that merely establishing a biological link to the child is not enough to automatically entitle one to such rights; rather, the "full commitment" of accepting "some measure of responsibility for the child's future" would entitle the father to constitutional protection. *Id.* at 261-62. In such cases, a father's "interest in personal contact with his child acquires substantial protection

under the due process clause." *Id.* at 261. There can be no doubt that if such hypothetical unwed father had established the connections and accepted the responsibility for the child as the biological mother did in this case, he would have constitutionally protected parental rights.[4]

This Court, following *Lehr* as it must, has recognized the protected rights that arise by virtue of the relationship. In *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995), this Court stated that substantial constitutional protections apply "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in raising his child," and further recognized "the sanctity of the biological connection, and we

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[4]The dissent attempts to distinguish *Lehr* by noting that "it is not an assisted reproductive technology case," and then relies on *Michael H. v. Gerald D.*, 491 U.S. 110 (1991), which is likewise not an assisted reproductive technology case. *T.M.H.*, 79 So. 3d 787, 825 (Lawson, J., dissenting). It is respectfully submitted that the issue of assisted reproductive technology is not enough to distinguish *Lehr*, and the reasoning of that case would logically extend to an unmarried couple that used the father's sperm and a donor's ova to impregnate an infertile girlfriend. To suggest that the use of modern technology to achieve pregnancy voids the rights a biological mother has to her child is simply incorrect. As the majority stated, "[t]o suggest that procreative rights do not encompass the use of medical technology ignores the fact that the right not to procreate through the use of contraception and the right to terminate a pregnancy necessarily require access to medical technology and assistance." *Id.* at 799. As to the issue of tradition raised in *Michael H.*, that case recognized that a father did not have rights to a child born of an adulterous affair. This case involves the rights of a biological mother to a child that she bonded with and parented for years. This case involves the traditional, essential right to conceive and raise one's children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

look carefully at anything that would sever the biological parent-child link." *Id.* at 967. Similarly, in *In re Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989), this Court stated that it is "clear from *Lehr* that the biological relationship offers the parent the opportunity to assume parental responsibilities. Parental rights based on the biological relationship are inchoate, it is the assumption of the parental responsibilities which is of constitutional significance." *Id.* at 748. *See also Kendrick v. Everheart*, 390 So. 2d 53, 60-61 (Fla. 1980)(recognizing the importance of a father establishing a familial relationship with his illegitimate children before having standing to adjudicate his paternity).

In the present case, the biological relationship between the biological mother and the child was conclusively established, and it is difficult to conceive of a case where a parent more fully accepted parental responsibilities than the biological mother did here. Again, the only distinctions between the unwed father scenario set forth above and the present case are the facts that this matter involved two women, and pregnancy was medically assisted. However, neither of these facts may deprive the biological mother of the rights she has obtained in her child by virtue of her genetic tie and her loving role in the child's life. As noted by the majority, making such a distinction raises substantial equal protection issues. *T.M.H.*, at 797 n.8.

It is respectfully submitted that the reasoning of *Lehr* and its progeny apply to this matter, and no valid legal basis exists for distinguishing those cases. The right to conceive and raise one's child has been deemed "essential,"[5] and such right has been deemed "far more precious than property rights."[6] A "parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). The biological mother has the constitutional right to be a parent to her child.

In response to this position, the birth mother raises several arguments. First, the birth mother argues that the biological mother "merely donated genetic material." Initial Brief, at 9. This statement ignores the facts. The parties intended that the biological mother live with the child, care for the child, raise the child, and that the child would bear her name. In short, the biological mother acted as the child's parent until the relationship ended. To characterize her contribution as merely providing genetic material ignores the very facts that make this case unique.

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[5] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[6] *May v. Anderson*, 345 U.S. 528, 533 (1953).

The birth mother argues that *Lamaritata v. Lucas*, 823 So. 2d 316 (Fla. 2d DCA 2002), is "analogous" to this case. Initial Brief, at 9. However, *Lamaritata* is plainly distinguishable. In *Lamaritata*, the sperm from a donor was used to impregnate a woman through artificial insemination. *Id.* at 318. The parties entered into a contract that provided that the donor would have "no parental rights and obligations associated with the delivery, and both parties would be foreclosed from establishing those rights and obligations by the institution of an action to determine the paternity of any such child or children." *Id.*

Here, there was no contract, and the only agreement between the parties was "that they would be equal parental partners to the child, and they both complied with that agreement for several years after the child was born." *T.M.H.*, at 794 n.6. Thus, the *Lamaritata* court reached the inevitable conclusion that the sperm donor's attempts to gain parental rights was foreclosed by both section 724.14 and the contract, subsequent attempts to gain parental rights through modifications of the contract notwithstanding. Section 724.14 clearly works to provide certainty to "donors" and recipients concerning their respective rights in the event a child is conceived. This case presents a unique factual situation where the biological mother provided the ova that formed the child, and the parties intended and actually raised the child together. *Lamaritata* addressed a vastly different

situation. *See Janssen v. Alicea*, 30 So. 3d 680 (Fla. 3d DCA 2010) (distinguishing *Lamaritata* and reversing summary judgment where factual issues existed concerning the parties' parental intent concerning the child).

The birth mother argues that "mere genetic participation is not sufficient to create a right to contact and parenting." Initial Brief, at 10. The biological mother has never claimed parental rights merely by virtue of her "genetic participation." Rather, she seeks parental rights based on the use of her ova to create the child in addition to her full commitment to the responsibilities of parenthood consistent with the intent of the parties.

The birth mother next argues that *Wakeman v. Dickson*, 921 So. 2d 669 (Fla. 1st DCA 2006) is somehow relevant to this case, though it is clearly distinguishable. In *Wakeman*, a lesbian partner was inseminated through a sperm donation, and the partners entered into a contract which purported to give both the birth mother and her partner parenting rights to the child. The *Wakeman* court did not uphold the agreement, though the lesbian partner who did not bear the child had no role in the child's genetic creation. As such, *Wakeman* is "clearly distinguishable from the instant case." *T.M.H.*, at 794 n.6. *Music v. Rachford*, 654 So. 2d 1234 (Fla. 1st DCA 1995) is distinguishable for the same reason. Initial Brief, at 11-12.

The birth mother then misconstrues the nature of the biological mother's position by arguing that "Florida law has long disfavored providing certain rights based on same sex relationships." Initial Brief, at 12. As an example of this "disfavor," the birth mother states "[t]here is a statutory prohibition against same sex couples adopting a child," and cites Florida Statutes subsection 63.042(3). Initial Brief, at 12. However, as noted in the majority opinion, in late 2010 the Third District found that Florida Statutes subsection 63.042(3) was unconstitutional because it violated the Equal Protection Clause of the Florida Constitution. *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 92 (Fla. 3d DCA 2010); *T.M.H.*, 79 So. 3d at 801. The birth mother states that subsection 63.042(3) is "currently under appellate review," but to the extent the birth mother refers to an appeal of that case, no such appeal is pending.[7] Presently, gays and lesbians may adopt in Florida in light of *X.X.G.*[8]

[7]In *X.X.G.*, the court noted that it "need not certify a question of great public importance because the Department has a right to appeal to the Supreme Court of Florida." *Id.* at 92 n.14. The Department chose not to exercise that right.

[8]*See, e.g.*, Georgia East, *End of Gay Adoption Ban Spurs Start of 100 New Families in South Florida*, SunSentinel.com, October 2, 2011, http://articles.sun-sentinel.com/2011-10-02/news/fl-gay-adoption-year-later-20111002_1_national-adoption-day-robert-lamarche-adoption-cases. It should be noted that the trial court misstated the present situation when it found that "[u]nder the current status of Florida law, [the biological mother] could not have adopted the minor child" (R 304).

In any event, the biological mother does not seek rights based solely on her former relationship. Rather, she seeks rights as a parent because of her genetic contribution to the child combined with her assumption of parental duties over a number of years. The fact that homosexuals may not marry in Florida is of no consequence to the issue presently before the Court. To paraphrase the majority, the legislature's undeniably important role in shaping policy concerning marriage and adoption "does not relieve the courts from the solemn duty to ensure the protection of constitutional rights." *T.M.H.*, at 799.

Finally, the birth mother argues that "the district court has created a unique and unsupportable legal fiction that a child may have two mothers (and by implication) two fathers." Initial Brief, at 13. It is difficult to see how the recognition that two women (one whose ova helped to create the child and one that bore the child) who raised the child as their own could create "a unique and unsupportable legal fiction" when other states have recognized the rights of both women in such a circumstance. The issue is not whether a child can have two *mothers*; rather, it is whether a child can have two *parents* who both happen to be women. *See Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) ("We perceive no reason why both parents of a child cannot be women"). *See also K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005) (holding that both the biological mother and

the birth mother were mothers of the twins borne to the birth mother under California law); *In re Adoption of Sebastian,* 879 N.Y.S. 2d 677, 687 (N.Y. Sur. Ct. 2009) (recognizing that "in New York there is no legal impediment to recognizing the parentage of *two* mothers") (emphasis in original).

In this case, the child presently has no father because the sperm donor's rights were relinquished under section 742.14. The child has a birth mother and a biological mother, and the biological mother's full commitment to the responsibilities of parenthood established the "intangible fibers that connect parent and child" and thus warrant constitutional protection. *Lehr*, 452 U.S. at 256. The biological mother seeks rights as a parent of the child.

B. Section 742.14, by its Terms, Does Not Apply To This Case.

Though the district court certified a question concerning the constitutionality of section 742.14, it also found that the statute did not apply to the unique facts of this case.[9] *T.M.H.*, at 792.[10] Thus, if this Court agrees that the statute does not

[9]Although the district court did not certify a question addressing the inapplicability of Section 742.14 to this matter, it is clear that this Court may consider the issue. *See, e.g., In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 964 (Fla. 1995) (noting that the Court had jurisdiction to review issues beyond the certified question); *see also Price v. State*, 995 So. 2d 401, 406 (Fla. 2008) (noting that this Court may consider issues properly raised and argued that went beyond the issues giving rise to jurisdiction).

[10]Judge Monaco's special concurrence, with which Judge Sawaya concurred, states that "it is clear to me that section 742.14, Florida Statutes (2009), simply

apply to this matter, then there is no need to address the constitutional issues raised in the certified question.[11] Moreover, as the dissent notes, this Court should not reach constitutional questions unless it is absolutely necessary to do so. *Id.* at 827 (Lawson, J., dissenting).

Section 742.14 provides that:

> The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.

§ 742.14, Fla. Stat. (2009).

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does not apply to fact situation presented to us by this case." *T.M.H.*, at 803 (Monaco, J., concurring and concurring specially). Judge Monaco also wrote that he agreed "with the majority that this legislation, which was adopted in 1993, was not designed to resolve the problem of how to treat children born by in vitro fertilization to a same-sex couple." *Id.* (Monaco, J., concurring and concurring specially).

[11]The dissent argues that, if the statute does not apply, then the issue would be decided by the common law principle that "the birth mother is the legal mother of the child." *T.M.H.*, at 815 (Lawson, J., dissenting). There is no doubt that the birth mother has parental rights to the child, but that fact does not conclusively determine the issue of the biological mother's parental rights. It is respectfully submitted that, if the statute does not apply, the dissent's suggestion of relying on such a common law principle and ignoring the issue of the biological mother's constitutional rights is an inappropriate manner of resolving the case.

The majority correctly found that the biological mother did not fall under the undefined statutory term "donor," and that the providing of her ova in this case did not constitute a "donation" under the statute. *T.M.H.*, at 791. This is so because when the legislature does not define terms, they are generally given their plain and ordinary meaning. *Id.* (citing *Greenfield v. Daniels*, 51 So. 3d 421 (Fla. 2010)). "Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000).

The most analogous case to the present matter is *K.M. v. E.G.*, 117 P.3d 673 (2005), where the California Supreme Court held that a lesbian who provided her ova to impregnate her partner was not a donor of her ova. The court reasoned that a "true egg donation" did not occur because the biological mother "did not intend to simply donate her ova to [the birth mother], but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home." *Id.* at 679. The majority opinion contains a lengthy citation to the case which "accurately states the issue, the holding of the court, and how the court utilized the pertinent terminology." *T.M.H.*, at 791. The biological mother will not reproduce the entire citation in this Brief, but adopts the reasoning of that case. After the citation to *K.M.*, the majority concluded that

> based on the uncontradicted facts, [the biological mother] would not be a donor under this [statutory] definition because she did not intend to give her ova away. Rather, she always intended to be a mother to the child born from her ova and was a mother to the child for several years after its birth.

T.M.H., at 792.

Likewise, Judge Monaco focused on the issue of donative intent, stating that:

> simply, the [biological mother] certainly did not intend to be a "donor," as referenced in the statute, the [birth mother] certainly did not act as if the [biological mother] was a "donor," and in my view I do not think that she was, in fact, a donor as that term was used by the legislature. In this respect I believe that the use of the term by the dissent is far too restrictive and does not comport with either contemporary understanding and usage, or the unique facts of this case and the specific relationship between the parties.

T.M.H., at 803-04 (Monaco, J., concurring and concurring specially).

Breit v. Mason, 718 S.E. 2d 482 (Va. Ct. App. 2011), addressed a similar situation where the court refused to deny parental rights under an assisted conception statute that clearly did not apply to the unique facts of that case. In *Breit*, an unmarried couple in a long-term relationship desired to have a child, though their attempts at conception were unsuccessful. *Id.* at 485. They sought reproductive assistance, and a physician used the father's sperm to fertilize the mother's eggs and then transferred the fertilized embryos to the mother's uterus. *Id.* at 484-85. A child was born to the couple, the father executed a

"acknowledgement of paternity," and the couple raised the child together until it was just over a year old. At that point, the mother terminated the relationship and denied the father any contact with the child.

The father brought an action for custody and visitation, though the mother obtained summary judgment because of a Virginia statute that which stated that a "donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother." *Id.* at 488. The court recognized that the effect of the statute in that circumstance was to forever deny parental rights to the biological father of the child, despite that the father was obviously known to the mother, she intended him to be the father, and he acknowledged paternity. *Id.* at 489. The court recognized the statutes at issue were "primarily concerned with ensuring that infertile married couples will not be threatened by parentage claims from anonymous sperm and egg donors," and therefore should not bar the father's claim of parental rights under the facts of that case. *Id.* The court noted that statutes should not be construed in a manner which results in a "manifest absurdity." *Id.* at 488. The same reasoning applies to this case.

It is respectfully submitted that the majority is correct in holding that the statute was not drafted to deal with the present situation, and the undefined terms

"donor" and "donation," if given their plain and ordinary meaning, do not encompass the facts of this case. Further, none of the other statutes cited by the birth mother change this result.

As mentioned above, the birth mother cites section 63.042(3) (concerning adoption) in an attempt to argue that the legislature "disfavors" affording rights to same-sex couples. Initial Brief, at 12. Notwithstanding the Third District's decision in *Florida Department of Children & Families v. X.X.G.*, 45 So. 3d 79, 92 (Fla. 3d DCA 2010) that found the statute unconstitutional, and the fact that same-sex adoptions are presently occurring in the state, the majority addressed the issue of alleged legislative disfavor. It stated that "we do not discern any legislative intent that the prohibitions of that statute apply to deprive either woman of parental rights to a child conceived through the reproductive process employed here, and we can find no prohibition to lesbian women utilizing that process to conceive a child." *T.M.H.*, at 800-01. The majority is correct.

The birth mother points to Florida Statutes section 382.013 as evidence that there "is simply no statutory scheme under Florida law to permit the designation of two same sex persons as birth parents." Initial Brief, at 14. However, as the majority noted, "it is clear that these provisions were written to facilitate the issuance of birth certificates and the keeping of vital statistics for public health."

T.M.H., at 794. Further, nothing in Chapter 382 establishes parental rights. *Id.* As the district court noted, Chapter 742 is entitled "Determination of Parentage," and that chapter "is the statutory vehicle by which paternity is established for children born out of wedlock, *see* section 742.10(1)." *Id.* Yet, as the majority held and as demonstrated above, nothing in that chapter, including section 742.14, specifically addresses the unique facts of this matter. Section 742.14 does not control, and nothing else in the Florida Statutes specifically denies the biological mother parental rights to her child.

C. Assuming Section 742.14 Applies, It Is Unconstitutional.

The majority opinion certified a question to this Court concerning the constitutionality of section 742.14. Specifically, the district court certified the following question as being of great public importance:

> Does the application of section 742.14 to deprive parental rights to a lesbian woman who provided her ova to her lesbian partner so both women could have a child to raise together as equal partners and who did parent the child for several years after its birth render the statute unconstitutional under the Equal Protection and Privacy clauses of the Federal and State Constitutions?

Id. at 803.

Should this Court choose to address the certified question, it should be answered in the affirmative. In addressing the constitutionality of the statute, the strict scrutiny test should be applied because the issue involves fundamental

rights.[12] *N. Fla. Women's Health & Counseling Servs., Inc. v. State,* 866 So. 2d 612, 625 n.16 (Fla. 2003). Specifically, "the rights to procreate and to parent one's child are fundamental rights under both the Florida Constitution and the United States Constitution." *T.M.H.*, at 792.[13] *See also J.R. v. Utah*, 261 F.Supp.2d 1268, 1294 (D. Utah 2002) (finding unconstitutional a statute creating an irrebuttable presumption that a gestational mother is the legal mother of a child because such

[12]The dissent suggests that the rational basis test should be used because "this case does not implicate a fundamental constitutional right because the use of assisted reproductive technology is neither deeply rooted in our country's tradition nor so implicit in the concept of ordered liberty that neither liberty nor justice would exist if access to this technology were denied." *T.M.H.*, at 824 (Lawson, J., dissenting). It is respectfully suggested that, as the majority held, the fundamental rights implicated in this case involve a mother's right to procreate and parent her child, not the use of assisted reproductive technology. Moreover, even if the rational basis test is used, the statute is still unconstitutional. *See In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 689 (N.Y. Sur. Ct. 2009) (finding there was no "rational, much less compelling" reason to discriminate against females who sought to use state law to establish paternity rights).

[13]*See Lawrence v. Texas*, 539 U.S. 558 (2003) (constitutional protections are provided to individuals, including homosexuals, making personal decisions relating to procreation and child-rearing); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (noting that the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests," which include the right "to have children"); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as . . . whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("[T]here is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

statute infringed on the biological mother's "fundamental rights to raise and bear children").

1. Equal Protection.

The Equal Protection Clause of the United States Constitution provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Similarly, the Equal Protection Clause of the Florida Constitution provides that "[a]ll natural persons are equal before the law...." Art. I, § 2, Fla. Const. "The reason for the equal protection clause was to assure that there would be no second class citizens." *Osterndorf v. Turner*, 426 So. 2d 539, 545-46 (Fla. 1982).

Here, the effect of the statute is to deny the biological mother the equal protection of the law. The statute states that the "donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children." § 742.14, Fla. Stat. (2009). A "commissioning couple" is defined as "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents." § 742.13(2), Fla. Stat. (2009).

Simply put, excluding same-sex couples from the statute results in an equal protection violation. A "mother and father" may be a commissioning couple, but a same-sex couple may not, thus making same-sex gays and lesbians "second class citizens." As Judge Monaco noted in his special concurrence, "[b]ut for the fact that the [biological mother] and [the birth mother] are of the same sex, we would probably consider them to be a 'commissioning couple' under the statute, and the outcome of this case would be easy." *T.M.H.*, at 804 (Monaco, J., concurring specially). Thus, the statute treats gays and lesbians in an unequal manner, and is therefore unconstitutional. *See Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 92 (Fla. 3d DCA 2010) (finding that statute forbidding same-sex individuals from adopting children violated the equal protection clause of the Florida Constitution).[14] *See also Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that allowing an unwed biological mother to prevent the adoption of her child by withholding her consent while at the same time requiring an unwed biological father to prove that an adoption would not be in the best interest of his child in order to prevent the adoption violated equal protection); *Stanley v. Illinois,*

[14]It should be noted that *Adoption of X.X.G.* found the statute to be unconstitutional using the rational basis test, which the dissent argued was the appropriate standard to be applied to this case. *T.M.H.*, 79 So. 3d at 824 (Lawson, J., dissenting); *Adoption of X.X.G.*, 45 So. 3d at 83. Although the majority applied strict scrutiny because fundamental rights were involved, it is respectfully submitted that the statute would still be unconstitutional under the rational basis test under the rationale of *Adoption of X.X.G.*

405 U.S. 645, 658 (1972) (requiring that unwed mothers be shown to be unfit before their children could be taken by the state, but not requiring any showing of unfitness before an unwed father's parental rights could be terminated violated equal protection); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 688-89 (N.Y. Sur. Ct. 2009) (finding New York paternity statute violated equal protection because it permitted a biological father of a child born out of wedlock to establish parental status while denying the same statutory mechanism to women who are biological, but not gestational, mothers); *Soos v. Superior Court*, 897 P.2d 1356, 1361 (1994) (finding equal protection violation concerning a surrogacy statute that allowed a genetic father to rebut the presumption that the gestational mother's husband was the legal father, but did not allow a genetic mother to rebut the presumption that the gestational mother was the legal mother).

2. Liberty Interests.

Parental rights constitute a fundamental liberty interest.[15] *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991). The parent-child relationship has been described as "sacrosanct." *Id.* Here, a mother provided her ova to create the child, intended to raise the child and indeed raised the child until

[15]The dissent argues that there are no fundamental rights associated with "the use of assisted reproductive technology," and thus no liberty interest is at stake. *T.M.H.*, 79 So. 3d at 819 (Lawson, dissenting). It is respectfully submitted that the appropriate standard involves fundamental rights associated with being a parent.

the child was taken away. The biological mother's "constitutionally protected rights to the child" were statutorily relinquished by the section 742.14, and therefore her liberty interests have been violated. *See Troxel v. Granville,* 530 U.S. 57, 65 (2000) (stating that a parent's liberty interest "in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests," which include the right "to have children"); *In re Adoption of Baby E.A.W.,* 658 So. 2d 961, 966 (Fla. 1995) ("The United States Supreme Court has held that natural parents have a fundamental liberty interest in the care, custody, and management of their children").

D. The Informed Consent Form Did Not Waive The Biological Mother's Parental Rights.

The birth mother briefly mentions the informed consent document signed by the biological mother at the reproductive clinic, and claims that it operated as a waiver of her rights to the child. Initial Brief, at 7-8. The preprinted form provided in pertinent part:

> I, the undersigned, forever hereinafter relinquish any claim to, or jurisdiction over the offspring that might result from this donation and waive any and all rights to future consent, notice, or consultation regarding such

> donation. I agree that the recipient may regard the donated eggs as her own and any offspring resulting there from as her own children. I understand that the recipient of the eggs, her partner, their successors, offsprings and assigns have agreed to release me from liability for any mental or physical disabilities of the children born as a result of the Donor Oocyte Program and from any legal or financial responsibilities from an established pregnancy or medical costs related to that pregnancy or delivery.

The facts clearly indicated that neither the birth mother nor the biological mother intended to waive any rights to the child they were attempting to conceive. In examining the issue, the majority gave three reasons as to why the form did not waive the biological mother's parental rights.

1. The Biological Mother Was Not A "Donor."

As argued above in the context of section 742.14, the biological mother is not a "donor" under the statute because she had no donative intent. The same reasoning prevents her from being a "donor" as defined in the standard form. In the form, a "donor" is one who has "relinquished any claim to, or jurisdiction over the offspring that might result from this donation" and who "understands that the recipient may regard the donated eggs as her own and any offspring resulting therefrom as her own children" *T.M.H.*, at 801. The undisputed facts indicate that the biological mother could not be a "donor" because she did not relinquish her claim to the child, nor did she understand or recognize that the child was solely to

be the birth mother's child. As the majority noted, "both women agreed to raise any child born with the ova supplied by [the biological mother] as equal parental partners and both women complied with that agreement for several years after the child was born." *T.M.H.*, at 801. The majority also noted the absurd consequence arising from the sentence that states "the recipient's partner has 'agreed to release me from liability' and it is clear that [the biological mother] was the partner and that she did not agree to release herself from anything."[16] *Id.*

2. The Standard Form Was Not Intended to Apply To These Circumstances.

The majority addressed an affidavit filed by the biological mother from the doctor who operated the reproductive center where the birth mother was inseminated. The affidavit noted that: 1) the waiver provisions were part of the standard form signed by all patients; 2) the birth mother and the biological mother came to the clinic seeking reproductive therapy in order to raise a child together; 3) the form's purpose was to inform patients of the procedure itself and the risks and goals of the procedure; 4) the form was not tailored to address the unique relationship between the parties; and 5) the form was "used in situations where the donor is anonymous." *Id.* at 801-02.

[16]The majority also found it "very revealing that [the birth mother] never attempted to assert this waiver claim until she decided to take the child to Australia and deprive [the biological mother] of any further contact with the child." *Id.*

3. Other Jurisdictions Have Recognized That Such Standard Forms Do Not Waive The Biological Mother's Rights.

Two cases addressed similar factual situations, and both rejected similar waiver arguments based on standard forms. In *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005), the California Supreme Court considered the rights of a woman who had ova removed and fertilized in her partner. The woman signed a virtually identical form containing waiver language, though the court held the form did not waive the biological mother's parental rights to the child. "A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights;" *see also In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009) (holding that the biological mother in similar situation did not waive parental rights by signing a standard donor waiver form at a reproductive clinic).

Just as the majority rejected the waiver argument under the facts of this case, so should this Court. The majority recognized the "importance of such waiver forms in the use of assisted reproductive technology," and made it clear that the decision was limited to the unique facts of this case. *T.M.H.*, at 802.

CONCLUSION

Appellee, T.M.H., respectfully requests that this Court find that she has parental rights to the child. Further, she requests that this Court find that Florida Statutes section 742.14 does not apply to the facts of this matter. In the alternative, she requests that this Court find that section 742.14 is unconstitutional because it violates the Equal Protection and Privacy clauses of the Federal and State Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via □ U.S. regular Mail; □ facsimile; □ email; □ Federal Express overnight delivery to: **Michael B. Jones, Esquire,** The Wheelock Law Firm, LLC, 7601 Della Drive, Suite 19, Orlando, Florida 32819 (Counsel for Appellant); this 11th day of May, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

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