IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC2017-1963

TRENEKA SIMMONDS, ET AL.,
Petitioner(s),

vs.

CONNOR PERKINS
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
CASE NO. 4D16-3502

INITIAL BRIEF ON MERIT OF PETITIONERS, TRENEKA SIMMONDS AND SHAQUAN FERGUSON

Law Office of Victor H. Waite, P.A.
VICTOR H. WAITE, ESQ.
FBN: 98165
3440 Hollywood Blvd.
Suite 415
Hollywood, FL 33021
P: (954) 834-3764
F: (954) 688-2975
victor@vhwlaw.com

QUESTION PRESENTED

Whether a third-party DNA contributor has the right to challenge paternity of a child born to an intact marriage when both the husband and wife desire to have child raised as the child of the husband?

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Introduction	1
Statement of Case and Facts	1
Standard of Review	3
Summary of the Argument	3
Argument	4
A. PATERNITY OF A CHILD IS ESTABLISHED ONCE THE CHILD IS BORN TO AN INTACT MARRIAGE. THE PRESUMPTION OF LIGITMECY IS SO STRONG IT CAN EVEN OVERCOME THE CHALANGE BY A THRID-PARTY PROVEN TO BE THE CHILD'S BIOLOGICAL FATHER.	4
B. PETITIONERS DECEISION TO RAISE CHILD AS THE CHILD OF HUSBAND IS A PROTECTED RIGHT GIVEN TO THEM UNDER ARTICLE I, SECTIONS 9 AND 23 OF THE FLORIDA CONSTITUION.	8
Conclusion	10
Certificate of Service	11
Certificate of Compliance	11

TABLE OF AUTHORITIES

Cases	**Page(s)**
Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996)	9
C.G. v. J.R., 130 So. 3d 776 (Fla. 2nd DCA 2014)	3, 7
Dep't of Health & Rehabilitative Servs. v. Privette, 617 So. 2d 305 (Fla. 1993)	1, 5
Fla. Dept. of Corr. v. Abril, 969 So. 2d 201 (Fla. 2007)	3
G.F.C. v. S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997)	3, 5, 7
Johnson v. Ruby, 771 So. 2d 1275	3, 7
Lohman v. Carnahan, 963 So. 2d (4th DCA 2007)	9
Michael H. v. Gerald D., 491 U.S. 110 (1989)	1, 8, 9
Slowinski v. Sweeny, 64 So. 3d 128 (Fla. 1st DCA 2011)	3, 5, 7
Tijerino v. Estralla, 843 So. 2d 984 (Fla. 3d DCA 2003)	3, 7

Other Authorities

Art I, § 9, Fla. Const.	1, 4, 8, 9
Art I, § 23, Fla. Const.	1, 4, 8, 9
§ 382.013(2)	3, 4, 5, 9
§ 742.011, Fla. Stat.	1, 3, 5
§ 742.10, Fla. Stat.	1, 3

INTRODUCTION

Petitioner, Treneka Simmonds (hence "Wife" or "Mother"), is the biological mother of minor child C.A.P. (hence "Child"). Petitioner, Shaquan Ferguson (hence "Husband" or "Father"), is the legal and recognized father of Child. Treneka Simmonds and Shaquan Ferguson are together referred to as "Petitioners". Husband and Wife were legally married at the time of Child's birth. The Respondent, Connor Perkins (hence "Mr. Perkins"), is a third-party DNA contributor of Child.

The symbol "R" followed by an appropriate page number(s) will constitute a reference to the record on appeal. The symbol "C.R." followed by an appropriate page number(s) will constitute reference to the confidential record on appeal.

STATEMENT OF THE CASE AND FACTS

At issue in this appeal is whether sections 382.13(2), 742.011 and 742.10 of the Florida Statute, along with Article I sections 9 and 23 of the Florida Constitution, allows a child's biological father to bring forth an action to establish paternity of a child born to an intact marriage when both the husband and wife hold the child out as their own. This Court like this nation has long held they do not. Dep't of Health & Rehabilitative Servs. v. Privette, 617 So. 2d 305, 308 (Fla. 1993). See also Michael H. v. Gerald D., 491 U.S. 110 (1989).

January 6, 2013, Petitioner, Treneka Simmonds (hence "Wife"), gave birth to minor child C.A.P (hence "Child"). (R. at 16.) At the time of Child's birth Wife was married to Petitioner, Shaquan Ferguson (hence "Husband"). (C.R. at 8.) Two-and-half years after Child's birth, Respondent, Connor Perkins, filed a Petition to Establish Paternity, Child Support and Other Relief. (R. at 23.) Subsequently, Wife and Husband filed a joint Motion to Dismiss Respondent's Petition for Paternity for lack of standing. (R. at 58 and 90.) Petitioners alleged Respondent lacked standing to establish paternity as Child was born to an intact marriage and both Husband and Wife desired to raise Child as Husband's child.

On June 17, 2016, the trial court held an evidentiary hearing. At the hearing both Husband and Wife testified their marriage was intact, and both have always held Husband out as Child's father. (R. at 148, 149 and 163.) Based on the evidence presented the trial court dismissed Respondent's Petition for Paternity with prejudice. (R. at 319.)

February 28, 2017, Respondent filed his Appellate brief appealing the trial court's ruling. (R. at 321.) On October 4, 2017, the Fourth District Court of Appeal erroneously entered an order reversing the trial court's order of dismissal while remanding the case to the trial court for further proceedings. (R. at 389.)

STANDARD OF REVIEW

Orders granting motions to dismiss are reviewed by this Court de novo. Fla. Dept. of Corr. v. Abril, 969 So. 2d 201 (Fla. 2007).

SUMMARY OF THE ARGUMENT

Although this case may be one of first impression for this Court the facts of this case are not unique. As such, there exists applicable laws as to how paternity of a child born to an intact marriage should be determined. Florida courts have long held a child born to an intact marriage is the legal child of the husband and a third party is precluded from bringing forth an action of paternity over the objections of the parents. C.G. v. J.R., 130 So. 3d 776 (Fla. 2nd DCA 2014); Slowinski v. Sweeny, 64 So. 3d 128 (Fla. 1st DCA 2011); Tijerino v. Estralla, 843 So. 2d 984 (Fla. 3d DCA 2003); Johnson v. Ruby, 771 So. 2d 1275, (Fla. 4th DCA 2000); G.F.C. v. S.G., 686 So. 2d 1382 (Fla. 5th DCA 1997).

Similarly, Florida statutes precludes a third party from bringing forth an action for paternity of a child born to an intact marriage. Section 742.10 of the Florida Statute only allow paternity actions for a child born out of wedlock. Section 742.011 of the Florida Statute only allow a paternity action to be brought when paternity of a child has not already been established by law. By law paternity is established when a child is born to an intact marriage. § 382.013(2)(a),

Fla. Stat. Section 382.013(2)(a) of the Florida Statutes provides the name of the husband shall be placed on the birth certificate for a child born to a woman who is married. There is no statute which allows an action for paternity to be brought for a child born in wedlock.

Because Child was born during the intact marriage of Petitioners she is legally the daughter of Husband. Petitioners, as a family, have the constitutional right to raise Child without the fear of government intrusion. Art I, § 23, Fla. Const. The Fourth District Court of Appeal, in deciding to allow Respondent to bring forth his action for paternity, wrongfully deprived Husband and Wife of their due process and there right to privately decide how to raise Child. Art I, § 9, Fla. Const.

ARUGMENT

Respondent has no standing to bring forth an action for paternity of Child as Child was born to the intact marriage of the Petitioners and the Petitioners have decided to hold Child out as Husband's child.

A. PATERNITY OF A CHILD IS ESTABLISHED ONCE THE CHILD IS BORN TO AN INTACT MARRIAGE. THE PRESUMPTION OF LIGITMECY IS SO STRONG IT CAN EVEN OVERCOME THE CHALANGE BY A THRID-PARTY PROVEN TO BE THE CHILD'S BIOLOGICAL FATHER.

Chapter 742 of the Florida Statute details who may bring froth an action for paternity. Section 742.011 limits paternity actions to those involving children for which paternity has not already been established. Paternity is established once a child is born to an intact marriage. § 382.013(2), Fla. Stat.; see also G.F.C., 686 So. 2d at 1382 and 87. Once paternity of a child is established a third-party cannot bring forth an action for paternity over the objection of the legal parents. Slowinski, 64 So. 3d 128. The choice of the parents even extends beyond survivorship of the marriage. Id. In Slowinski, the court ruled a biological father could not challenge paternity of a child even after the death of the mother, as allowing so would interfere with the husband's right to hold the child out as his own. Id, at 129.

As early as 1993 this Court held a child born to an intact marriage is the legitimate child of the husband even if he is not the biological father. Privette, 617 So. 2d 305. As the recognized legal father, the husband has an unmistakable right to maintain his relationship with the child unimpugned. Id, at 307. The Fourth District Court of Appeal is the only court in the State to allow the presumption of paternity to be successfully challenged. Even then, it did so only when the challenge did not impugn on the husband's choice to be involved in the child's life, and it was a clear that disestablishing paternity was in the child's best interest. Lander v. Smith, 906 So. 2d 1130 (4th DCA 2005). To show disestablishing

paternity between child and the husband was in in the child's best interest the Fourth District Court of Appeal had to find (1) the legal father abandoned the child and did not recognize child as his own, while (2) the biological father bonded with the child and provided child with financial and emotional support. Id, at 1132 – 33.

The facts in this case far differ from the facts of Lander. In Lander the biological father's name was placed on child's birth certificate. Id, at 1131. In the present matter Respondent's name is not on the birth certificate.[1] (R. at 16.) Secondly, in Lander the husband completely abandoned the child by not holding the child out as his own and not providing child with any financial support. Id, at 1133. On the contrary, in Lander, the biological father supported the mother through her pregnancy, bonded with child after the birth and continued to provide child and mother with child support. Id, at 1131. In the present matter Respondent concedes Husband has not abandoned Child. In his appellate brief he states Child will continue to have a loving and supportive relationship with Husband even if he, Respondent, is recognized as Child's legal father. (R. at 349.) Furthermore, it is unrebutted that Husband provided Wife with both emotional and financial support throughout the duration of her pregnancy and continues to provide Child and

[1] Child has Respondent's last name as Wife thought that was required as Respondent is the biological father. (R. at 164.) However, Wife nor Husband ever held Respondent out as Child's legal father, exemplified by his name not being placed on the birth certificate. (R. at 16.)

Mother with emotional and financial support. (R. at 13 and 164 – 65.) Husband even introduced a photo of him lovingly holding Child, holding Child out as his own, when Child was a new born. (C.R. at 10.)

While it is unrebutted Husband has always held Child out as his own and has always provided child with emotional and financial support, it is a fact that Respondent wanted nothing to do with Child until Child was two years old.[2] Further, Respondent had no evidence he ever provided Mother with child support (R. at 210 and 213), nor did any of his witnesses ever hear Mother hold him out to be Child's father or know him, Mother and Child to reside together. (R. at 184 – 85 and 197.)

This case, on its four corners, is more in line with cases such C.G., 130 So. 3d 776; Slowinski, 64 So. 3d 128; G.F.C., 686 So. 2d 1382; Tijerino, 843 So. 2d 984; and Johnson, 771 So. 2d 1275. In every one of those cases, in various courts throughout this State, the ruling was the same. A third-party cannot bring forth a paternity action for a child, born to an intact marriage, over the objection of the

[2] During Mother's pregnancy Respondent filed a petition to disestablish paternity in which he alleged paternity should be disestablished because he was not the biological father of Child, and even if he was in fact the biological father it should still be disestablished as Mother was legally married to Husband. Respondent also asserts that he and Wife never resided together and implies their relationship was one-time thing. See Broward County, Florida Family Circuit Civil Case FMCE 12-012068.

mother's husband. This is the very same decision reached by the United States Supreme Court in Michael H., 491 U.S. 110. Because Husband has always held himself out as Child's father and has taken on all the responsibilities that come along with being the father, while Respondent was absent from Child's life for her first two-and-a-half years, the appellate court was wrong to conclude this case more resembled Lander than all the other cases. Minus taken such an ill-fated view of the facts the trial courts decision to dismiss Respondent's petition for paternity would have been upheld.

As it is uncontroverted Child was born during Petitioners intact marriage (C.R. at 8 and R. at 16), Petitioners have always held Child out as the child of Husband and Husband has never abandoned child, Respondent is precluded from bringing forth his action for paternity.

C. PETITIONERS DECEISION TO RAISE CHILD AS THE CHILD OF HUSBAND IS A PROTECTED RIGHT GIVEN TO THEM UNDER ARTICLE I, SECTIONS 9 AND 23 OF THE FLORIDA CONSTITUION.

Minus allegations of abuse, neglect or abandonment parents should have the right to raise their child without the fair a third party may one day show up to take the child away. Art I, § 23, Fla. Const. Allowing a third party to claim parental rights of a child over the objection of the legal parents deprive the parents of their

due process allotted them via section 9 of Article I of the Florida Constitution, and their right to privacy under section 23 of Article I of the Florida Constitution.

This state has long held a child born to an intact marriage is the child of the husband and wife. § 382.013(2), Fla. Stat. Legal parents have the right to decide how to raise their child. A state allowing a third party, even a third party related by blood, to intrude on that decision violates the due process of the family. Michael H. 491 U.S. at 124; see also Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996) (holding grandparents could not seek visitation rights over the objection of one legal parent as doing so would violate the parent's right to be free of government intrusion); see also Lohman v. Carnahan, 963 So. 2d (4th DCA 2007) (holding a man who contributed to the DNA of a child has no statutory or constitutional right to intrude into the private decision of a marital couple and thus cannot seek to establish paternity of the child over the decision of husband and wife). It is undeniable the Respondent is in fact a DNA contributor to Child. (R. at 70.) It is also undeniable that Child's father is Husband. (R. at C.R. at 8.) Respondent's paternity action is kin to the grandparent's action for visitation in Beagle. Like in Beagle such an action violates the privacy and due process right of Husband and Wife and should be deemed unconstitutional.

Petitioners have the right to raise Child free of government intrusion. This means they have the right to live everyday without the fare this State will allow a third party to contest Child's legitimacy. As Respondent's petition for paternity intrudes on Petitioners constitutional rights it should be dismissed with prejudice.

CONCLUSION

As Child was born during the intact marriage of Petitioners she is legally the daughter of Husband. Even though Husband may not be Child's biological father he has the right to raise child as his own, even over the objection of the proven biological father. Because Husband holds Child out as his own Respondent can not bring forth an action contesting paternity of Child and therefore the trial court decision to dismiss his case with prejudice was correct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Nancy A. Hass, Esq., attorney for Respondent, Connor Perkins, 3800 South Ocean Drive, Suite 214, Hollywood, FL 33019, at nahpa@nahpalaw.com, on this the 5th day of March, 2015.

Respectfully submitted,

By: */s/ Victor H. Waite*
Victor H. Waite, Esq.
FBN: 98165
Law Office of Victor H. Waite, P.A.
3440 Hollywood Blvd.
Suite 415
Hollywood, FL 33021
P: (954) 834-3764
F: (954) 688-2975
victor@vhwlaw.com

CERTIFICATE OF COMPLAINCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that Petitioners Jurisdictional Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: */s/ Victor H. Waite, Esq.*
FBN: 98165
Law Office of Victor H. Waite, P.A.