**IN THE SUPREME COURT OF MISSISSIPPI**

NO. 2016-CA-01504

CHRISTINA STRICKLAND — APPELLANT

v.

KIMBERLY JAYROE STRICKLAND DAY — APPELLEE

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ON APPEAL FROM THE

CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

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# BRIEF OF APPELLEE

# KIMBERLY JAYROE STRICKLAND DAY

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## CERTIFICATE OF INTERESTED PERSONS

*Christina Strickland v. Kimberly Jayroe Strickland Day*

NO. 2016-CA-01504

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This the 20th day of June, 2017.

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Attorney of record for Kimberly Joyroe Strickland Day

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## STATEMENT OF ISSUES

1. Whether the trial court was correct in ruling a biological parent of a child cannot have its rights terminated without following the established laws of the State of Mississippi. If so, then:

   a. Whether termination of parental rights can be recognized under Mississippi Law without a judicial decree;

   b. Whether the trial court was correct when it recognized the legal rights of a biological parent to a child;

   c. Whether Miss. Code Ann. §93-15-101 et. seq. overrules the marital presumption when a child born during a marriage is not biologically related to both parents; and

   d. Whether married parties who conceive a child via Assisted Reproductive Technology from any donor, anonymous or otherwise, not related to either or both of the prospective parents can be recognized as parents without termination of the donor's parental rights.

2. Whether the Supreme Court and/or the Court of Appeals can render an opinion on the purported waiver of an alleged anonymous sperm donor's parental rights without said waiver being part of the record in the lower court.

## STATEMENT OF ASSIGNMENT

This case concerns whether the lower court was correct in its decision that a biological parent to a child cannot have their rights terminated without following the established laws of the State of Mississippi as set forth in Miss. Code Ann. §93-15- 101 et. seq., and more importantly, whether this Court can deem a sperm donor's parental rights waived based upon reference to a document which has not been placed in the record. This is not a case of first impression as existing law is directly applicable to the issues before the Court. The case does not contain substantial constitutional questions as the existing laws apply equally to married persons of the same-sex as well as married persons of the opposite-sex.

## STATEMENT OF THE CASE

Appellant, Christina, and Appelle, Kimberly, were engaged in a romantic relationship. During their relationship, but prior to their marriage, Kimberly adopted a child, E.J. E.J. was adopted in 2007. Transcript page 9 lines 26-27. The child was adopted pursuant to Miss. Code Ann. §93-17-3, which states in paragraph (4) "Any person may be adopted in accordance with the provisions of this chapter in term-time or in vacation ***by an unmarried adult*** or by a married person whose spouse joins in the petition. [Emphasis added]. Kimberly was that unmarried person. The parties married in Massachusetts in November 2009. Transcript page 7 lines 10 – 11. Same-sex marriage has been legally recognized in Massachusetts since May 17, 2004, as a result of the Massachusetts Supreme Judicial Court (SJC) ruling in **Goodridge v. Department of Public Health** that it was unconstitutional under the Massachusetts constitution to allow only opposite-sex couples to marry. Massachusetts became the sixth jurisdiction in the world (after the Netherland, Belgium, Ontario, British Columbia and Quebec) to legalize same-sex marriage. It was the first U.S. State to issue marriage licenses to same-sex couples.[1] Christina and Kimberly could have been married prior to the adoption of E.J. but instead chose to marry after the adoption.

Following their marriage, Kimberly became pregnant via Assisted Reproduction Technology whereby donor sperm was combined with Kimberly's harvested egg and the embryo surgically implanted in Kimberly. Kimberly carried the child. The child, Z.S., was born in 2010. In 2013, Christina and Kimberly separated and E.J. and Z.S. lived with Kimberly who allowed Christina to visit with the children until several events occurred which Kimberly deemed detrimental to the best interest of the children.

[1] *Burge, Kathleen (November 18, 2003). "SJC: Gay marriage legal in Mass.". The Boston Globe. Archived from the original on January 28, 2016.*

In the Final Judgment of Divorce, the court granted Christina visitation with the minor children pursuant to the doctrine of "in loco parentis". The court correctly ruled Christina was not a parent to the minor children as there exists a biological parent whose rights have not been terminated. Well established in the statutes of Mississippi is a procedure to terminate the parental rights of biological parents. The statute governing termination of parental rights is Section 93-15-101, et. seq. Miss. Code Ann (1972), as amended. Christina argues the anonymous sperm donor executed a waiver which terminated his parental rights. The execution of a waiver alone does not terminate parental rights. Miss. Code Ann. §93-15-111, sets forth the proper procedure for the Court to enter an Order accepting a parent's written voluntary release of his parental rights. Only through judicial decree is a parent's rights terminated in Mississippi. This, however, did not occur. In fact, Christina did not seek to introduce the alleged waiver by the donor of his parental rights into evidence. So even if Mississippi recognized a procedure for termination of parental rights without a judicial decree, without the waiver entered into evidence this Court cannot consider same. This Court has stated on numerous occasions: "The Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record." **Shelton v. Kindred**, 279 So.2d 642, 644, (Miss. 1973). Therefore, any argument Christina raises which relies upon the alleged written waiver of the donor of his parental rights is not supported by the record before this Court and should be dismissed and denied.

Christina then promotes the position that Mississippi's ban on same-sex couples adopting at the time of E.J.'s adoption is what precluded her from adopting E.J. and legally being recognized as his parent. Christina and Kimberly could have married in Massachusetts prior to the adoption as same-sex marriages were allowed in 2004. Their decision not to marry prior to the adoption of E.J. was theirs and the Court should not allow Christina to circumvent the law by

granting her parentage of a child legally adopted by Kimberly alone. The fact Christina and Kimberly were in a relationship whether same was a heterosexual relationship or a homosexual relationship is irrelevant.

Christina also attempts to argue that she and Kimberly planned to travel to Massachusetts for Z.S. to be born in order for both Christina and Kimberly to be listed on the birth certificate. Christina argues in her brief that she and Kimberly did not travel to Massachusetts due to health problems of Kimberly. Transcript page 31, lines 2 – 8, However, this testimony was directly refuted by Kimberly who testified that she did not travel to Massachusetts to give birth because she did not want Christina to be listed on the birth certificate. Transcript page 52, lines 24 – 28. Nevertheless, the end result was Z.S. was born in Mississippi and Christina was not listed on the birth certificate. This position by Christina is also irrelevant to the issues before the Court. It does not matter why Kimberly gave birth in Mississippi vs. Massachusetts, as Christina is not listed on the birth certificate. This argument is only an attempt by Christina to garner sympathy from the Court.

Also irrelevant is Christina's argument that she had planned to adopt E.J. as his step-parent but Mississippi Law would not allow same-sex couples to adopt. The correct factual description of events by Christina is that the parties separated and began living apart. Kimberly married Thomas Day and did allow Christina visitation with E.J. and Z.S. until such time as several events occurred involving Christina that Kimberly deemed not in the best interest of the minor children, causing Kimberly to stop allowing any visitation by Christina. Transcript page 54, Lines 1 -29, and page 55, Lines 1 – 6. It was the relationship between Christina and the minor children that the lower court relied upon in granting Christina visitation under the "in loco parentis" doctrine.

## SUMMARY OF THE ARGUMENT

This case involves a person who became pregnant through Assisted Reproductive Technology while married to another person by the use of donor sperm. The lower court was correct in its ruling that another parent exists who's parental rights were not terminated in accordance with existing Mississippi Law. The lower court made a correct distinction between a child born "of the marriage", wherein the parental presumption applies, and a child born "during the marriage" where the married couple is aware another biological parent or parents exists. This distinction is directly in compliance with Miss. Code Ann §93-9-7, wherein it states: "A child born out of lawful matrimony also includes a child born to a married woman by a man other than her lawful husband". In this case Christina clearly knew Z.S. was born to Kimberly, a married woman, by a man other than her lawful husband/spouse, Christina. Whether the sperm donor is unknown is not material to the issues because summons by publication could be utilized to properly bring him before the court for termination purposes. Many known fathers of children whose whereabouts are unknown and many unknown fathers of children have their rights terminated via summons by publication. This judicial procedure was not utilized herein and in fact was never attempted by Christina.

Christina argues the fact Kimberly agreed in writing never to seek the identity of the sperm donor proves that Kimberly recognizes the donor has no rights. The language in the document does not remove the fact he is the child's parent, it just documents Kimberly's agreement not to seek his identity. The writing executed by Kimberly actually supports the fact the sperm donor is recognized as the parent. Two paragraphs below the portion cited by Christina the agreement executed by Kimberly reads:

> I further agree that I am assuming entire responsibility for any child or children conceived or born. I agree that I will not seek support for the child or children, or any other payment from the **donor**, Physicians, or nurses associated with FINO. I further agree that if the child or children should seek support or any other payment from the **donor**, physicians, or nurses, I will indemnify and hold harmless the donor, physicians, nurses, and FINO. [Emphasis added]

Why would Kimberly have to: 1) agree not to seek support from the donor if the donor was not the legal parent of the child, 2) agree to indemnify the donor if the child sought support if the donor was not the legal parent of the child, and 3) agree not to seek support from the donor or indemnify the donor if the child sought support if the donor's rights were terminated by the signed contract alone? She would not! Therefore, the document itself, executed by Kimberly, provided by the medical agency performing the invitro fertilization, and relied upon by Christina, clearly evidences the donor is the legal parent of the child. Without lawful termination of the donor's parental rights via judicial decree, Christina cannot be recognized as the child's parent. This would hold true whether the married couple was same-sex or opposite-sex. The Court's reliance on adherence to existing law would not place an undue burden on couples who use Assisted Reproductive Technology no more than it places an undue burden on couples who adopt children. In each case the couple would have to follow the law to terminate the parental rights of the known/unknown parent by judicial decree and then be recognized by law as the child's legal parent. This does not violate of the equal protection clause.

The marital presumption relied upon by Christina is a reputable presumption. This presumption is clearly rebutted herein by the fact that a sperm donor was utilized to achieve reproduction. The sperm donor's rights were not terminated in accordance with the laws of the State of Mississippi. This is evidenced by Kimberly's written agreement not to seek support from the sperm donor and indemnify the sperm donor if the child sought support. A sperm donor whose rights were allegedly waived by a written document which was not placed into evidence

and which is not a portion of the record before this Court. **Obergefell v. Hodges**, 135 S. Ct. 2584 (2015) does not govern this appeal.

The controlling law on this appeal is the termination of parental rights statute, Miss. Code Ann. §93-15-101 et seq. A court cannot recognize a third party as a parent without first terminating the parental rights of the biological parent. Therefore, the court was correct in its finding that the sperm donor's parental rights were never terminated. Thus, Christina cannot be recognized as Z.S.'s parent.

Also, **Shelton v. Kindred**, 279 So.2d 642, 644, (Miss. 1973) governs this appeal. Christina never attempted to introduce the sperm donor's alleged waiver of parental rights and it is not a part of the record in this matter. This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record. **Id**.

## AGRUMENT

**1. Whether the trial court was correct in ruling a biological parent of a child cannot have its rights terminated without following the established laws of the State of Mississippi.**

This case is not an equal protection case or a presumption of marriage case. It is an assisted reproduction case. The main question here is simple: whether a couple, same-sex or opposite-sex, who conceives and has a child through assisted reproduction technology using donor sperm, donor egg, or a surrogate mother should be required to follow existing law and terminate the parental rights of the donor or surrogate. The answer is a resounding yes.

The marttal presumption that a child was conceived during wedlock and that the father of the child was the mother's husband, where the birth of the child was within nine months of the date of the decree of divorce, is one of the strongest presumptions known to the law. **Madden v. Madden**, 338 So.2d 1000 (Miss. 1976). However, it is not a conclusive presumption. The Court said in Madden, "Although the presumption is rebuttable, it has been held that a husband denying paternity of a child born in wedlock must prove beyond reasonable doubt that he is not the father. **Stone v. Stone**, 210 So.2d 672 (Miss. 1968). What more proof can this Court have to rebut the marital presumption than the inability of Christina and Kimberly to biologically procreate? Madden states "that a child was conceived during wedlock" which is a biological presumption that the husband fathered the child. A presumption rebuttable by evidence the assumed father is not the biological father of the child. Here Christina knew from the beginning of the reproduction process she did not father Z.S. The parties used a sperm donor. Christina attempts to utilize a presumption that clearly does not apply to her situation.

Courts in different states have varying rulings depending upon whether the sperm donor is anonymous or known. A California court held that a donor who contributed sperm for

artificial insemination could assert a claim of paternity. The court rejected the mother's argument that she did not intend to allow the donor to have rights with regard to the child, stating that she could have avoided the result by having the donor provide the sperm through a physician. Bell on Mississippi Family Law, Second Edition page 510, (citing **Jhordan c. v. Mary K.**, 224 Cal. Rptr. 530, 537-38 (Cal. Ct. App. 1986). However, the Illinois Supreme Court held that an unmarried woman's partner was the father of a child born through ART under an estoppel theory: "If an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law. Bell on Mississippi Family Law, Second Edition, page 509, (citing **In re Parentage of M.J.** 787 N.E.2d 144, 152 (Ill. 2003). Anonymous donors in several states have their rights terminated by contract. Bell on Mississippi Family Law, Second Edition, page 509. To have different rights to known donors than to anonymous donors is a violation of the equal protection clause.

The agreement executed by Kimberly to prevent the child from seeking child support from the donor is void, as parties cannot contract away rights of others. Parents may not curtail the duty of support prior to majority by agreement. **Lawrence v. Lawrence**, 574 So.2d 1376, 1378 (Miss. 1991). This Court stated, in **Calton v. Calton**, 485 So.2d 309, 310 (Miss. 1986), that [t]he duty to support children is a continuing duty on both parents and is a vested right of the child. Applying [this principle], it follows that parents cannot contract away rights vested in minor children. Such a contract would be against public policy." Therefore, the agreement executed by Kimberly insofar as it attempts to contract away child support from the donor is void as against public policy. The agreement, however, IS a recognition of the obligation of the donor to pay support and his parentage of the child, Z.S. Christina cannot take the place of the

recognized parent of Z.S. without 1) filing the appropriate action, 2) issuing a summons by publication for the anonymous donor, and 3) terminating the donor's parental rights by judicial decree. This was not done, nor even attempted by Christina. Additionally, the Legislature has not seen fit to carve out a special exception in the termination statute, Miss. Code Ann. §93-15-101 et. seq., to exempt sperm donors or egg donors or surrogates from termination without judicial decree.

Christina also argues opposite-sex couples have been utilizing assisted reproductive techniques without having to terminate the donor's rights, and to require her to do so in this case, is an equal protection violation. The difficulty with this argument is opposite-sex couples have been able to utilize the assisted reproductive techniques vs. marital presumption to disestablish parentage. In **Wells v. Wells**, 35 So.3d 1250 (2010), a Doctor and his wife had twins via in vitro fertilization. The wife, a nurse, wanted another child and her husband refused unless it was natural. Without the husband's knowledge, the wife obtained donor sperm and impregnated herself. Once the husband discovered the truth he filed divorce proceedings and the husband was granted custody of the twins and was adjudicated not to be the father of the third child. This Court affirmed the lower court's decision to grant the husband custody (parentage) of the twins and at the same time adjudicate the husband not the father of the third child. **Id.** This difference in treatment of siblings clearly shows the marital presumption does not apply to assisted reproduction technique cases. If the parties were required to use the termination statute as to the rights of the donors this result would have been more applicable to the lower court's ruling. Dr. Wells would have terminated the donor's rights to the twins and be acknowledged as their father and not terminated the donor's rights to the third child. The Court's decision in **Wells**, leaves unanswered questions: 1) Do the twins have three parents (Dr. Wells, Ms. Wells and the donor) or does the third child have only one parent (Ms. Wells)? 2) Can Ms. Wells seek support from

the donor now that Dr. Wells has been adjudicated not the father of the third child? This situation and the one currently before the Court can be easily resolved by requiring all couples or single persons who get pregnant through assisted reproductions techniques to have the donor's rights terminated and the non-biological person(s) declared parents of the child(ren).

**2. Whether the Supreme Court and/or the Court of Appeals can render an opinion on the purported waiver of an alleged anonymous sperm donor's parental rights without said waiver being part of the record in the lower court.**

Christina is attempting to achieve status of a parent herein, by referring to an alleged waiver, allegedly executed by an anonymous donor, which is not a part of the record, and claim the donor's parental rights are terminated. This waiver was never offered into evidence nor made a part of the record. This argument cannot be considered by this Court. **Shelton v. Kindred**, 279 So.2d 642, 644, (Miss. 1973). The Court has no way to determine what the alleged waiver says or whether it was properly executed in accordance with Mississippi law. Even if the alleged waiver were a part of the record it would not terminate the donor's parental rights if not in compliance with Mississippi law. Miss Code Ann. §93-15-111, provides a procedure for termination by written voluntary release. Miss. Code Ann. §93-15-111(2), specifically provides: "**The court's accepting** the parent's written voluntary release terminates all of the parent's parental rights to the child, including, but not limited to, the parental right to control or withhold consent to an adoption." [Emphasis added]. Plainly stated: an alleged waiver of parental rights, without a court order accepting same, is useless as the paper it is allegedly written on.

## CONCLUSION

The lower court was correct in its decision that the donor's parental rights have not been terminated and Christina cannot be recognized as a parent pursuant to Mississippi law. Christina cannot argue the effect of a waiver allegedly executed by the donor which has not been made a part of the record. Therefore, the judgment of the lower court should be affirmed.

Respectfully submitted, this the 20th day of June, 2017.

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## CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 20th day of June, 2017, have served a copy of this BRIEF OF APPELLEE KIMBERLY JAYROE STRICKLAND DAY, by properly filing herein and by hand delivery to the following persons:

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SO CERTIFIED this the 20th day of June, 2017.

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