IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-CA-01504

CHRISTINA STRICKLAND APPELLANT

v.

KIMBERLY JAYROE STRICKLAND DAY APPELLEE

ON APPEAL FROM THE

CHANCERY COURT OF RANKIN COUNTY, MISSISSIPPI

RESPONSE BRIEF OF APPELLANT CHRISTINA STRICKLAND

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INTRODUCTION

As set out in Appellant's initial brief, the trial court committed reversible error in its Order dissolving Appellant's marriage but denying her request to be recognized as a parent of the child born during her marriage. In urging this Court to affirm the lower court's error, Appellee's response brief ignores this State's established law and public policy, which entitle children born to a married couple via assisted reproductive technology (A.R.T.) to the benefit and protection of a child-parent relationship with both spouses.

Kimberly concedes that affirmance would impact all married couples in the State – whether different-sex or same-sex – who achieved pregnancy via A.R.T. with anonymous sperm donation. A ruling that all children born to married couples via A.R.T. are inherently nonmarital children would be devastating. *See, e.g.*, Brf. of *Amici Curiae* American Society of Reproductive Medicine, *et. al.*; Brf. of *Amici Curiae* National Association of Social Workers, *et. al.* It would disrupt hundreds, if not thousands, of families who justifiably relied upon the recognition that a spouse is a parent of a child born to a wife until and unless paternity is disestablished in a proper proceeding. *Id*. Adding grave insult to grievous injury, Kimberly urges this Court to elevate the "parental rights" of those who donate sperm anonymously in order to *avoid* the obligations of parenthood over the rights of those who intentionally bring children into their marital unions and nurture, support and love those children. Such a result is contrary to statutory law, the needs of children, and to the interests of justice. For the reasons set forth in Appellant's brief, the briefs of *Amici Curiae* in support of Appellant, and the additional argument and authority below– including a recent Supreme Court decision – , the lower court erred in its conclusion that Christina is not the legal parent of the child born into her marriage and should be reversed.

ARGUMENT

I. The Marital Presumption Applies to Establish Christina as Z.S.'s Parent.

Kimberly does not refute that marriage confers the presumption of parentage on the same-sex spouses of women who give birth. Nor could she. The presumption of parentage is well established as among the constellation of benefits attendant to marriage. *See Madden v. Madden*, 338 So. 2d. 1000 (Miss. 1976); *Pittman v. Pittman*, 909 So.2d 148, 153 (Miss. App. 2005) (noting that marriage provides children with "legally recognized status" to spouse). The Supreme Court recognized that these protections of marriage flow to same-sex couples and their children in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2590, 2601-02 (2015).

The Supreme Court's recent decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), finding that where state laws "give married parents a form of legal recognition that is not available to unmarried parents" they "may not, consistent with *Obergefell*, deny married same-sex couples that recognition," *id.* at 2078-79, erases any question that Mississippi's statutory and common law presumptions and protections for children born to married couples apply with equal force to children born to same-sex couples.

In *Pavan*, the petitioners were two married same-sex couples whose children were born as a result of assisted reproduction with anonymous donor sperm. When it came time to secure birth certificates for the newborns, each couple filled out paperwork listing both spouses as parents. *Id*. at 2077. Both times, however, the Arkansas Department of Health issued certificates bearing only the birth mother's name, construing the statute that instructed that "[i]f the mother was married at the time of either conception or birth…the name of [her] husband shall be entered on the certificate as the father of the child" to apply only to male spouses. *Id*. In the subsequent challenge to the denial of equal treatment, the trial court agreed that the statute as applied to same-sex couples violated the Constitution. *Id.* The Arkansas Supreme Court reversed, holding

the statute constitutional on the theory that it rested on the presumed biological relationship of the parents to the child, not to the marital relationship of husband and wife, and thus, did not "run afoul of *Obergefell*." *Id*. The Supreme Court disagreed and summarily reversed.

In a *per curium* decision, the Supreme Court held that application of Arkansas's statute to deny female spouses the right to be listed as parents of the children born during their marriage violated the mandate of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), to provide same-sex couples "the constellation of benefits that the States have linked to marriage." *Pavan*, 137 S. Ct. at 2078. Noting that state law required male spouses' names to be listed on birth certificates despite a known lack of biological connection, such as in the case of A.R.T. and adoption, the Court held that the same application of the law must be applied to female spouses. *Id*. Following *Pavan*, no ambiguity exists regarding the constitutional mandate to treat same-sex couples and their families equally, specifically in the context of parent-child relationships determined by marriage and the use of reproductive technology.

The lower court's conclusion that Christina cannot be a legal parent because it is impossible for two married women to achieve pregnancy is directly at odds with the reasoning and outcome of *Pavan*. As was the case under the Arkansas law at issue in *Pavan*, Mississippi law makes clear that that the spouse of a woman who gives birth is recognized as a parent and listed as such on the child's birth certificate. Miss. Code Ann. § 41-57-14. This is so without any limitation, exceptions, or reference to the biological relationship of the spouse to the child. And as in *Pavan*, Mississippi's listing of the birth parent's spouse as a parent on the birth certificate statute is a reflection of the legal status that attaches to a child born into a marriage. 137 S. Ct. at 2078-79 ("birth certificates [are] more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents"); *see also, e.g.*, *Pittman*, 909 So.2d at 153 (validity of spouse's marriage

established children's "legally recognized status as [spouse's] children."). *Pavan* thus makes clear that, with regard to the legal recognition of children born to married couples, Mississippi is constitutionally required to extend the same statutory protections to children of married same-sex couples as to children of married different-sex couples, regardless of biological connections.

As well, *Pavan* and *Obergefell* apply to common law principles that recognize the parent-child relationship of a spouse regardless of genetic ties as a "right[], benefit[], and responsibility[] of marriage." *Id*. (citing *Obergefell*, 135 S. Ct. at 2601). The lower court erred in failing to apply equally to wives the common law tenets upholding the parent-child relationships and support obligations of husbands, notwithstanding evidence of non-genetic ties. *Logan v. Logan*, 730 So. 2d 1124 (Miss. 1998), *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004), *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006). Here, Christina sought judicial recognition of her parental status by virtue of her marriage in a divorce proceeding, as did the fathers in *Logan*, *Griffith*, and *J.P.M*.

Whether Z.S. is denominated as a child born "of the marriage" or "during the marriage," the court erred in denying Christina's request to "be named as the legal parent of [Z.S.] pursuant to Miss. Code Ann. § 93-17-1(1)," CR:128; T:82, relegating her to the inferior legal status of a person standing "in loco parentis."

II. Neither Kimberly nor the Trial Court *Sua Sponte* Can Disestablish Christina's Presumed Parentage Based Solely on the Fact of Christina's Lack of Biological Connection to Z.S.

Kimberly asserts, correctly, that the presumption of Christina's parentage is rebuttable. However, the circumstances under which that presumption may be rebutted are limited. Kimberly does not refute that point, but simply assumes that the mere fact of the use of donor sperm inherently rebuts the presumption. As discussed in Appellant's opening brief at 24-32, where a child is born to a married couple via A.R.T. with donor sperm, no statutory mechanism

allows a birth mother to disestablish her spouse's parentage and equitable principles prevent courts from allowing children born to married couples via A.R.T. to have their legal relationship to one of their parents severed solely because of the circumstances of their births.

Kimberly tries to suggest that the marital presumption simply does not apply to A.R.T. cases, relying on *Wells v. Wells*, 35 So. 3d 1250 (Miss. App. 2010). To the contrary, however, *Wells* plainly establishes that when a spouse consents to achieving pregnancy via A.R.T. with donor sperm, the marital presumption applies to that spouse. In *Wells*, all three of the children born during the marriage were the result of A.R.T. with donor sperm but only two of the children resulted from inseminations that were consented to by the husband; the third child was the result of A.R.T conducted by the wife without the knowledge or consent of the husband. *Wells*, 35 So. 3d at 1253-54. The appellate court did not question – let alone disturb – the finding that that marital presumption applied as to the two children born via the A.R.T. to which the father consented, but allowed him to disestablish parentage of the child resulting from an insemination without his knowledge or consent. *Id*.

Another case Kimberly cited, *In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003), is particularly unhelpful to her as it makes clear that equitable principles prevent the disestablishment of the parentage of an intended parent who consented to the child's birth via A.R.T. In *Parentage of M.J.*, the Illinois court held that an unmarried partner who had consented to his partner's pregnancy via A.R.T. and agreed to raise the child was thereafter estopped from disestablishing his parentage and obligated to the support the child.

Tellingly, Kimberly also fails to distinguish the factually similar line of cases upon which Christina relies in her initial brief, which show that a lack of biology does not inherently undermine the parent-child relationship created between the birth mother's spouse and the marital child. Indeed, this Court set out in *Griffith v. Pell*, "[m]erely because another man was

determined to be the minor child's biological father does not automatically negate the father-daughter relationship held by [spouse] and the minor child." 881 So. 2d at 186. Directly contrary to Kimberly's argument, this Court found that "because [spouse] supported and cared for the minor child as if she were his own natural child, under state law, he may be required to pay child support for the minor child. It therefore follows that he may be awarded custody and/or visitation rights with the minor child." *Id*. (citing *Logan*, 730 So. 2d at 1126 (holding "a stepparent can be required to pay child support for a stepchild based on his support of the stepchild over a period of time, [and] where it is in the best interests of the child, he should be allowed to have custody of the stepchild based on the affection for and support of that child over a period of time. With the burden should go the benefit.")).

In *J.P.M.*, where genetic testing on the eve of the custody hearing showed that the spouse was not genetically related to the marital child and the putative father was unknown, this Court affirmed the custody award to spouse, finding and ruling that:

> [Spouse] was established as [Child's] legal father at the time of her birth … and has supported her under that assumption without challenge for several years. Because [Spouse] is [Child's] legal father, he has legal rights and obligations which cannot be compromised without sufficient cause. Also, [Child] and [Mother] have continually relied on the support that [Spouse] provided for [Child], and the record reflects that [Spouse] and [Child] have established a strong father-daughter relationship. … Furthermore, we note that there is no putative father in this case seeking to be recognized as [Child's] father, as there was in *Rafferty*. Because [Child's] biological father has not been conclusively established and no man is seeking to fill [Spouse's] role as Catherine's father, disestablishing [Spouse] as [Child's] father would require [Mother], DHS, and the court system to expend additional time and resources in an effort to establish another man as [Child's] father, without any guarantee that such an individual would pay child support or attempt to establish a father-daughter relationship with [Child]. Such a result is not likely to be in [Child's] best interests.

932 So. 2d at 25-26.

Whereas the only distinction here is the gender of the spouse, who raised Z.S. as her natural child and has agreed and been ordered to pay child support, the decision below is

reversible error where these common law tenets were not applied equally, as *Pavan* and *Obergefell* make clear that they must.

III. Anonymous Sperm Donors Do Not Have Parental Rights That Need to Be Terminated as a Predicate to Confirming the Parentage of a Birth Mother's Spouse.

Kimberly argues, and the lower court's ruling suggests, that married couples who use A.R.T. to achieve pregnancy are required to terminate the anonymous sperm donor's rights. In so arguing, Kimberly asks this Court to disestablish the parentage of thousands of children born to married couples – different-sex and same-sex alike – by elevating the rights of men who seek to *avoid* parental obligations over spouses who intentionally brought those children into their families. Kimberly's arguments and the lower court's ruling would find that use of A.R.T with donor sperm transforms marital children into so-called "illegitimate" children who are considered to have been "born outside of lawful matrimony." Resp. Brf. at 6. The suggestion that an *actual stranger* of a seven year-old child is a parent whose rights supersede the rights of the person the child knows and needs as a parent and who has functioned as a parent since his birth is unsupported and contrary to law and public policy. *See Wansley v. Schmidt*, 186 So. 2d 462, 465 (Miss. 1966) (Court's obligation is to "protect and promote the best interests of minor children."). Such a ruling would leave these children with only one known parent obligated to support and provide for them; leave the children orphans if their mother dies during childbirth or prior to a termination proceeding followed by an adoption; disrupt the marital relationship; expose confidential medical information about infertility and medical procedures; and require all married couples who use A.R.T to go through the expensive and time-consuming process of adopting their child. A statutory or regulatory construction "that causes absurd results is to be avoided if at all possible." *Timex V.I. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998) (citing *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. X–Citement Video, Inc.*,

513 U.S. 64, 68–69 (1994); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–29 (1989) (Scalia, J., concurring)).

A. Biology alone does not establish parentage.

Kimberly's argument that Christina seeks to "take the place of [Donor No. 2687], a recognized parent of Z.S." Resp. Brf. at 10-11, is inaccurate and incompatible with Mississippi law. Unlike Christina, who was married to the mother at the time of Z.S.'s birth, Donor No. 2687 is simply *not* the recognized parent of Z.S. because he was not married to the mother at the time of Z.S.'s conception or birth, has not executed a voluntary acknowledgement of paternity, and has not been adjudicated to be the child's "natural" father pursuant to state law. Miss. Code Ann. § 93-9-28. As addressed in depth in Christina's opening brief, a sperm donor does not automatically become a parent based solely on his genetic link to the child. Brf. at 19-23. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("the mere existence of a biological link" does not establish constitutionally protected parental rights); *see also In re Zacharia D.*, 6 Cal. 4th 435, 451 (1993) (reasoning that "interpreting 'parent' to include a strictly biological father" in the dependency context to "fathers who had never demonstrated any commitment to the child's welfare…would arguably grant 'reunification services to a rapist or an anonymous sperm donor.'") (citations omitted). Though distinguishable from an unknown sperm donor, as this Court noted in *Griffith*, "even when a third party to a marriage is the biological father of a child of the marriage, the biological father does not have any paternity rights if he fails to establish that he had a substantial relationship with the child." 881 So. 2d at 186 (citing *A.J. v. I.J.*, 677 N.W.2d 630, 642 (Wis. 2004)).

Kimberly's sole support for the proposition that a donor has parental rights, *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537-538 (Cal. Ct. App. 1986), is wholly inapplicable to married couples who achieved pregnancy through A.R.T. with anonymous donor sperm at a clinic.

Jhordan involved an unmarried woman who performed an in-home insemination with a friend's donated sperm, and application of an assisted reproduction statute that specified that sperm donation occur under the supervision of a licensed physician.

Nor does *Wells* support Kimberly's position that a donor has parental rights that must be terminated before recognizing a spouse's parentage. As discussed *supra*, that case presumed the parentage of the husband for children born during the marriage via A.R.T. with donor sperm. The court did not in any way address the rights of the sperm donor or require that the sperm donor's rights first be terminated before it would recognize the father as a legal parent to the children born during his marriage and affirmed the award of custody to him.

B. Termination of "parental rights" of anonymous sperm donors is neither possible nor required.

Kimberly argues that "[t]he controlling law on this appeal is the termination of parental rights statute." Resp. Brf. at 8. As set out above, this assertion is in error because Donor No. 2687 is not a legal parent whose rights need to be terminated. Miss. Code Ann. § 93-9-28. The absurdity and waste of judicial and litigant resources in requiring such a proceeding is apparent. Whereas the birth mother would be the only "necessary party" under the this construction, it would require: a) parents who use A.R.T. with anonymous donor sperm to file a petition and wait 30 days to seek a hearing; b) a court-appointed Guardian Ad Litem at the parents' expense; and c) a hearing to determine whether an unknowable sperm donor has abandoned the child. *See* Miss. Code Ann. § 93-15-107 *et. seq*. Even if the law contemplated such a process for unidentifiable anonymous sperm donors, and it does not, a futile and pointless act is not required, especially as a predicate to recognizing an established parent-child relationship. *See generally Reynolds v. Golden Corral Corp.*, 213 F.3d 1344, 1346 (11th Cir. 2000) (declining to follow federal statutes requiring a litigant to obtain the formality of a separate judgment where doing so

"was a futile gesture. In so holding, we join the majority of the circuits in concluding that it would be futile and a waste of judicial resources"); *Cook v. United States,* 104 F.3d 886, 890 (6th Cir. 1997) (refusing to "compel a futile and pointless duplication of effort by the government" and "the attendant waste of public resources").

Finally, contrary to Kimberly's claims, Christina does not argue that Kimberly's written agreement is a waiver of the anonymous sperm donor's parental rights or that she executed an agreement "to prevent the child from seeking child support from the donor." The agreement, which is in the record, evinces that the donor's identity is unknown and unknowable. R: 100, 210 No waiver of parental rights is argued because Donor No. 2687 is not a parent and no waiver of parental rights is required. The argument that the agreement is offered to show that Kimberly agreed "to prevent child from seeking child support from donor," Resp. Brf. at 10, is particularly absurd given the fact that Christina agreed, and the lower court ordered her, to pay child support to both children. Kimberly did not appeal this award of child support and continues to accept the benefit of Christina's payments of child support as well as other financial support of the children they jointly brought into their family and raised together. *See Logan*, 730 So. 2d at 1126 (holding that the spouse was the father in fact, despite lack of genetic ties to the marital child, was obligated to support the child and entitled to custody; "with the burden should go the benefit.").

CONCLUSION

Nothing in Kimberly's Resp. Brief refutes the arguments and authority presented by Christina showing that the lower court committed reversible error. This Court should reverse the decision below and remand with instructions to recognize Christina as a legal parent of the child born during her marriage.

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of August, 2017, I electronically filed the foregoing Response Brief of Appellant Christina Strickland with the Clerk of the Court using the appellate e-filing system, which sent notifications of such filing, with copies sent by U.S. Mail, to the following:

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