

>> SAME-SEX RELATIONSHIP, THE WAY THAT THIS PARTICULAR CHILD WAS CREATED IS PROBABLY THE CRUX OF THE CASE HERE TODAY.

>> ARE THE FACTS, THEY SAY THE FACTS ARE NOT IN DISPUTE, THE FIFTH DISTRICT CASE, AND THEY TALK ABOUT THE FACT THAT THEY USED FUNDS FROM THEIR JOINT BANK ACCOUNT, PAID THEM, THEY HAD ESSENTIALLY DECIDED AS A COUPLE THEY WERE GOING TO RAISE THIS CHILD AND ALL OF THOSE FACTS. ARE THOSE IN DISPUTE, OR DO YOU AGREE THEY'RE UNDISPUTED?

>> YOUR HONOR, FOR THIS PARTICULAR CASE IN THIS PARTICULAR ACTION, THEY'RE NOT DISPUTED BECAUSE AT THE TRIAL LEVEL MY CLIENT FILED A MOTION FOR SUMMARY JUDGMENT, AND AS A MOTION FOR SUMMARY JUDGMENT SHE ACCEPTED ALL FACTS AS TRUE. BUT FOR THE PURPOSES OF THIS PARTICULAR CASE, THE FACTS ARE NOT DISPUTED, AND THE FACTS UNDER THE CASE LAW AND UNDER THE STATUTE AND UNDER ANY REASONABLE INTERPRETATION OF THIS SITUATION EVEN WITH ALL OF THESE FACTS, EVEN WITH THE ACT OF CONDUCT, COURSE OF CONDUCT, EVEN IF COMPLETELY TRUE, WOULD NOT BE SUFFICIENT TO GIVE APPELLEE PARENTAL RIGHTS.

>> IF TODAY BECAUSE THERE'S THE STATUTE THAT SAYS A SAME-SEX COUPLE CAN ADOPT AS DECLARED UNCONSTITUTIONAL, TODAY IS THERE A LEGAL WAY FOR A WOMAN WHO, YOU KNOW, I GUESS IN THIS CASE SHE'S THE GENETIC MOTHER, TO BE ABLE TO LEGALLY HAVE PARENTAL RIGHTS TO THIS CHILD UNDER THE LAW OF THE STATE OF FLORIDA? EITHER CONTRACTUALLY OR THROUGH ADOPTION OR THROUGH THE STATUTE THAT WAS DECLARED UNCONSTITUTIONAL BY THE FIFTH DISTRICT?

>> LET ME MAKE SURE I UNDERSTAND YOUR QUESTION.

ARE YOU ASKING ME IF THAT THE STATUTE THAT SAID SAME-SEX ADOPTION WAS ILLEGAL WAS DECLARED UNCONSTITUTIONAL?

>> IT WAS.

>> RIGHT.

>> SO WHAT I'M ASKING YOU IS, IF THIS OCCURRED TODAY WHERE THERE WERE TWO INDIVIDUALS WHO WANTED TO RAISE A CHILD TOGETHER, AGREED TO HOW THEY WERE GOING TO RAISE THE CHILD TO GIVE THEM -- WOULD THEY -- YOU'RE ASSERTING BACK THEN THERE WAS NO LEGAL WAY --

>> THAT'S CORRECT.

>> -- FOR THIS TO OCCUR. WHAT I'M ASKING YOU TODAY, IN 2012, IS THERE A LEGAL WAY FOR THIS TO OCCUR?

>> UNDER THE THIRD DISTRICT COURT CASE, YES.

IT WOULD REQUIRE THE CONSENT OF BOTH PERSONS TO DO AN ADOPTION, AND THEY WOULD BOTH JOINTLY ADOPT.

>> BUT THAT COULDN'T HAVE OCCURRED BACK IN 2006 BECAUSE THE STATUTE WAS, IN EFFECT, HAD NOT BEEN DECLARED UNCONSTITUTIONAL.

>> THAT'S ABSOLUTELY CORRECT, AND IT WOULD NOT BE A RETROACTIVE APPLICATION OF THE --

>> AND YOUR CLIENT, AS I UNDERSTAND IT, IS NOT WILLING TO EVEN GIVE THE GENETIC MOTHER ACCESS TO BE PART OF THIS CHILD'S LIFE?

I MEAN, THAT'S THE STATUS, THAT SHE WANTS NOTHING TO HAVE -- THE CHILD TO HAVE ANYTHING TO DO WITH THE CHILD?

>> THAT'S ABSOLUTELY CORRECT.

>> COULD WE ALSO JUST UNDERSTAND SAYING WE HAVE STIPULATED OR UNDERSTOOD FACTS, IS THERE OR IS THERE NOT A WRITTEN DOCUMENT THROUGH WHICH THE INDIVIDUAL WHO HAD SUBMITTED --

>> THE GENETIC MATERIAL.

>> -- THE GENETIC MATERIAL GAVE UP ALL OF -- I'M NOT SURE I'M SAYING IT CORRECTLY, BUT ESSENTIALLY, GAVE UP ALL RIGHTS, THAT KIND OF THING?

IS THERE, IS THERE NOT BECAUSE I THINK WE'RE HAVING TROUBLE FINDING THAT DOCUMENT, OR IS IT IN THE RECORD, OR WHAT'S THE STATUS OF THAT FACT?

>> THAT FACT IS ABSOLUTELY TRUE,
AND IT IS STIPULATED TO IN THE
PETITION AND THE AMENDED
PETITION THAT THE APPELLEE FILED
IN THE TRIAL COURT BELOW, SHE
ADMITTED SHE SIGNED A DOCUMENT
WHICH WAIVED HER PARENTAL RIGHTS
TO THIS PARTICULAR CHILD.
IT WAS NOT CONTINGENT ON SECTION
742.14 BEING DECLARED
CONSTITUTIONAL OR
UNCONSTITUTIONAL.
IT WAS AN ABSOLUTE WAIVER, AND
THAT'S PART OF THE STIPULATED
FACT.
>> OKAY.
THAT'S NOT CHALLENGED, THAT IS A
GIVEN TO WHAT WE'RE LOOKING AT?
>> THAT WAS THEIR OWN
ADMISSION --
>> WELL, THEY CHALLENGED THE
LEGAL IMPLICATIONS OF THAT.
>> WELL --
>> ISN'T THEIR POSITION THAT
THAT WAS JUST SOME PAPERWORK
THAT WAS SIGNED AND IT REALLY --
IT DID NOT FIT THE CIRCUMSTANCES
OF THEIR PARTICULAR CASE?
>> WELL, IT ABSOLUTELY FIT THE
CIRCUMSTANCES --
>> WHAT I'M ASKING -- I'M ASKING
THEIR POSITION OF THE
CIRCUMSTANCES --
>> WELL, I THINK THEY'RE TRYING
TO ARGUE AFTER THE FACT, OH, WE
REALLY DIDN'T MEAN THIS.
SO, YES, THEY ARE TAKING THE
POSITION --
>> SO THAT'S A DISPUTED FACT
THEN.
>> WELL --
>> THAT'S CRITICAL, IT SEEMS TO
ME, AND CORRECT ME IF I'M
WRONG --
>> UH-HUH.
>> IF ONE IS TO DETERMINE THAT
THIS IS A GIVEN, THAT THIS IS A
RELEASE, THAT IT'S VALID, THAT
THAT, I MEAN, RESOLVES AND
REMOVES ALL OTHER ISSUES,
WOULDN'T IT?
>> OH, IT ABSOLUTELY DOES.
>> SO THAT MAY BE A FACTUAL
QUESTION WE CAN'T EVEN REACH IF
IT'S DISPUTED.
>> WELL, I THINK YOU CAN REACH
IT BECAUSE I DON'T THINK THEY'VE

DENIED THE RELEASE SAID IT, AND
I DON'T THINK THEY'VE DENIED
THAT THEY SIGNED THE RELEASE.
BUT THEY'RE MAKING THE ARGUMENT
THAT'S OFTEN MADE JUST IN SIMPLE
CONTRACT LAW --
>> AS A MATTER OF LAW, THAT'S
NOT VALID.
>> YOU CAN'T GO BEHIND IT, YOU
CAN'T BRING IN PAROLE EVIDENCE,
YOU CAN'T LOOK TO INTENT.
>> SO WOULDN'T THE ACTIONS OF
THE PARTIES HERE -- IT SEEMS TO
ME THAT WHAT WE HAVE HERE IS ONE
PERSON DONATING THE EGG THAT WAS
FERTILIZED AND PLACED INTO THE
OTHER ONE, CORRECT?
>> CORRECT.
>> AND THAT THE INTENT WAS THAT
THESE TWO PEOPLE WERE GOING TO
RAISE THIS CHILD DESPITE THE
FACT THAT WE HAVE THIS
PREPRINTED FORM THAT BASICALLY
SAYS YOU'RE GIVING UP.
SO DO WE GET AN OPPORTUNITY HERE
OR SHOULD WE EVEN TAKE INTO
CONSIDERATION THE ACTIONS OF THE
PARTIES AND WHAT THEY INTENDED
AT THE TIME THAT THE CHILD WAS
BORN?
>> NO, YOUR HONOR, I
RESPECTFULLY SUBMIT THAT YOU
SHOULD NOT.
THE CASE LAW AND THE LONG
HISTORY OF THE CASE LAW AND BACK
INTO THE COMMON LAW GOES BACK
INTO THE FACT --
>> EXCEPT WE DIDN'T HAVE THIS
KIND OF SAME-SEX SITUATION.
>> WELL, I UNDERSTAND THAT, AND
THAT BRINGS TO ANOTHER POINT,
AND I'LL ADDRESS YOUR FIRST, BUT
UNDER THE COMMON LAW, OF COURSE,
THERE IS ARTIFICIAL
INSEMINATION, IN VITRO
FERTILIZATION.
BUT YOU HAVE A SITUATION NOW
THAT WHEN YOU DO THOSE THINGS
THAT ARE NOT IN THE COMMON LAW,
THEY ARE LEGISLATIVE ACTIONS AND
DETERMINED BY THE LEGISLATURE,
AND THE COURTS TRADITIONALLY
HAVE GIVEN DEFERENCE IN DOING
THAT POLICY.
BUT GOING BACK TO YOUR QUESTION
ABOUT THE COURSE OF CONDUCT, THE
LONG, LONG HISTORY AND HISTORY

OF THE CASE LAW OF THE STATE OF
FLORIDA HAS BEEN THAT PARTY THAT
MAY BE TOGETHER WITH A CHILD
UNDER MANY DIFFERENT
CIRCUMSTANCES -- A STEPPARENT, A
GRANDPARENT UNDER MANY DIFFERENT
KINDS OF CIRCUMSTANCES -- MAY
HAVE A RELATIONSHIP WITH THE
CHILD, BUT WHEN THE ACTUAL
PARENT DECIDES THAT THAT
RELATIONSHIP IS NO LONGER
APPROPRIATE FOR THE CHILD, THEN
THAT IS TERMINATED --
>> OH, GO AHEAD.
>> BUT I GUESS WHEN I LOOK AT
THE STATUTE AND I THINK PART OF
THE DISTRICT'S ANALYSIS HERE IS
THAT THIS PRINTED DOCUMENT --
NOT THE STATUTE, BUT THE PRINTED
DOCUMENT BASICALLY SAYS I'M
GIVING UP MY RIGHTS TO THIS
CHILD, BUT IT SAYS I UNDERSTAND
THAT THE RECIPIENT OF THE EGG,
HER PARTNER, THEIR SUCCESSES,
ETC., ETC.
AND SO YOU'RE SAYING THAT THE
BIOLOGICAL MOTHER DOESN'T FIT
UNDER THE PARTNER PORTION OF
THIS STATUTE?
>> FIRST OF ALL --
>> I MEAN --
>> VERY CAREFUL WITH THE TERM OF
"BIOLOGICAL MOTHER" BECAUSE
THERE IS BIOLOGY IN IMPLANTING
THE FETUS INTO THE WOMB --
>> THE DONOR OF THE EGG.
>> IF WE'RE TALKING ABOUT THE
GENETIC PERSON, YES, MA'AM.
THEY DO NOT HAVE A RIGHT.
JUST LIKE A GRANDPARENT DONATES
ONE-FOURTH OF THE GENETIC
MATERIAL, AND IF A PARENT WHO
HAS THE CONSTITUTIONAL RIGHTS
UNDER THE RICHARDSON CASE THAT
WAS DECIDED BY THIS COURT
DETERMINES THAT THERE SHOULD BE
NO CONTACT WITH THE GRANDPARENT,
THERE IS NO GRANDPARENT RIGHTS.
>> I'M GLAD YOU BROUGHT THAT
BACK UP --
>> YES, MA'AM.
>> -- BECAUSE I'M VERY FAMILIAR
WITH THE GRANDPARENT CASES.
>> YES, MA'AM.
>> MOTHER AND A FATHER, LEGAL
MOTHER, LEGAL FATHER, I'D LIKE
YOU TO ADDRESS THE IMPLICATIONS

OF THE LEHR CASE OUT OF THE
UNITED STATES SUPREME COURT.
WHAT I'M FINDING, AND I WANT TO
UNDERSTAND IT, IS THAT A SPERM
DONOR IF IT WAS A ONE NIGHT
STAND --
>> UH-HUH.
>> -- SAY THEY'RE A REAL PERSON,
BUT THEY'RE ESSENTIALLY A SPERM
DONOR --
>> RIGHT.
>> AND THE CHILD IS BORN OF THAT
FATHER AND THEN OF THAT MOTHER,
THAT THAT PERSON UNDER THE
UNITED STATES PRECEDENT IF THEY
PARTICIPATE ACTIVELY IN RAISING
THE CHILD HAS SOME
CONSTITUTIONAL RIGHT.
BUT YOU'RE SAYING THAT UNDER --
AND AS I UNDERSTAND THIS, THAT
THIS WOMAN WHO PARTICIPATED BY
DONATING HER EGG AND THEN
AGREEING WITH HER PARTNER THAT
THIS CHILD WOULD HAVE TWO
PARENTS TO RAISE THE CHILD, THAT
THERE ARE NO CONSTITUTIONAL
RIGHTS INVOLVED WHATSOEVER?
WHETHER IT'S UNDER STRICT
SCRUTINY OR A RATIONAL BASIS.
SO IS THAT, IS THAT CORRECT THAT
IF SOMEBODY WHO DONATED THE
SPERM WOULD HAVE MORE RIGHTS
THAN SOMEBODY WHO DONATED THE
EGG?
>> NO, MA'AM.
IF I MAY BREAK THAT DOWN, YOU
ASKED TWO QUESTIONS, I THINK.
THE CASE IN LEHR INVOLVED AN
IMPREGNATION IN THE WAY THAT WAS
CUSTOMARILY DONE, THROUGH SEXUAL
INTERCOURSE.
WHEN YOU HAVE A SITUATION WHERE
YOU DONATE GENETIC MATERIAL,
YOU'RE INTO THE LEMATADA CASE --
I'M SORRY, I APOLOGIZE -- IN
WHICH THE MALE DONATED THE SPERM
BUT NOT IN A TRADITIONAL MANNER
OF IMPREGNATION.
HAD A RELATIONSHIP WITH THE
MOTHER FOR A PERIOD OF TIME, AND
THE BIRTH MOTHER SAID, NO.
IN FACT, THEY HAD AN AGREEMENT,
AND I ADMIT WAKEMAN IS
FACTUALLY --
>> THE ISSUE IS WHETHER SOMEBODY
HAD SEX OR NOT?
>> WELL, THAT'S WHAT OUR CASE

LAW HAS BEEN SAYING.

>> WELL, BUT HERE IS THE PROBLEM, AND I THINK IT'S A CONSTITUTIONAL PROBLEM THAT AT LEAST THE FIFTH DISTRICT STRUGGLED WITH IS THAT CLEARLY, AND, YOU KNOW, THE BEST INTERESTS OF THE CHILD ANALYSIS DOESN'T COME IN UNLESS THERE IS CONSTITUTIONAL RIGHTS INVOLVED. THE STATUTE THAT WE'RE TALKING ABOUT, DID IT CONTEMPLATE -- CONTEMPLATED IN MOST SITUATIONS WHERE AN EGG WAS DONATED OR SPERM WAS DONATED COMPLETELY FOREIGN TO THE COUPLE.

IT'LL BE A HETEROSEXUAL COUPLE HAVING EITHER SPERM DONATED OR EGGS.

AND IT WOULD BE VERY, IT WOULD BE IN THE -- NOT IN THE BEST INTEREST OF THE CHILD, AT LEAST FROM MY POINT OF VIEW, I WOULD THINK FROM MOST PEOPLE'S POINT OF VIEW I WOULD THINK, THAT WAS JUST FOREIGN TO THAT RELATIONSHIP BE ABLE TO ASSERT RIGHTS.

AND IT SEEMS THAT THAT'S WHAT THAT STATUTE WAS INTENDED TO DO. WOULD YOU AGREE THAT THAT'S, YOU KNOW, THAT'S THE NORM?

THAT SOMEBODY DONATES SPERM OR EGGS AND, THEREFORE, KNOWS THEY'RE GIVING UP ALL -- ANY RIGHTS TO BE PART OF THAT CHILD'S LIFE?

THERE'S A COUPLE INVOLVED, AND IT IS IN VITRO FERTILIZATION.

>> I THINK THAT WOULD BE THE NORMAL SITUATION.

>> AND, IN FACT, IN MANY CASES IT'S ACTUALLY IMPLANTED, I DON'T KNOW IF THE SPERM IS FOREIGN EVEN TO THE PERSON UNTIL IT'S IMPLANTED.

SO DID THE LEGISLATURE CONTEMPLATE THAT THEY WANTED TO EXCLUDE A SITUATION LIKE THIS? OR WAS IT JUST NOT INTENDED?

>> I THINK THEY INTENDED TO INCLUDE IT.

AND I DON'T HAVE LEGISLATIVE HISTORY WHERE SOMEBODY STOOD UP AND SAID I SPECIFICALLY DO THAT, BUT I THINK WHEN YOU LOOK AT THE ENTIRE SWEEP OF THE LEGISLATION

THAT'S IN THE STATE OF FLORIDA
UNDER THESE PARTICULAR
SITUATIONS, THE CLEAR STATUTE
WHICH I UNDERSTAND THERE IS THE
THIRD DISTRICT COURT CASE THAT'S
RULED UNCONSTITUTIONAL, AND
THERE SHOULD BE NO SAME-SEX
ADOPTION.

THE CONSTITUTIONAL PROVISION OF
NO SAME-SEX MARRIAGE, THE VERY
SPECIFIC DEFINITION OF WHAT
COULD BE A COMMISSIONING COUPLE
USING A MALE TERM AND A FEMALE
TERM, I THINK THE CLEAR
IMPLICATION OF THE TOTALITY OF
THE FLORIDA LEGISLATURE WAS THAT
THEY ABSOLUTELY DID NOT INTEND
ANY OF THIS TO APPLY IN ANY WAY
TO A SAME-SEX COUPLE.

I THINK THE SURROGACY TYPE OF
SITUATION WAS THE SAME WAY THAT
THEY COULD -- WHERE TWO MEN
TOGETHER COULD DONATE SPERM AND
GET A THIRD PARTY EGG AND THEN
IMPLANT IT IN THE SURROGATE, I
THINK THAT WAS CLEARLY NOT
PERMITTED UNDER THE STATUTE, AND
I THINK WHEN YOU LOOK AT THE
CLEAR --

>> WHEN YOU SAY "PERMITTED" --

>> WAS NOT PERMITTED.

>> IT WOULD NOT GIVE THE PERSON
LEGAL RIGHTS.

>> THAT'S CORRECT.

THAT'S CORRECT, YES.

>> HOW LONG HAS THIS STATUTE
BEEN IN EFFECT, 742.14?

>> I DON'T KNOW.

>> I MEAN, WHEN YOU LOOK AT JUST
THE PLAIN LANGUAGE OF THE
STATUTE --

>> YES.

>> -- THE STATUTE SAYS "THE
COMMISSIONING COUPLE."

>> RIGHT.

>> A COUPLE IS TWO, AND THESE
PEOPLE WERE, THESE TWO WOMEN
WERE COMMISSIONING THIS.

SO IT JUST SEEMS TO ME THE
LITERAL LANGUAGE OF THE STATUTE
DOES NOT COVER THE SITUATION.

>> I TEND TO AGREE --

>> UNDER THE LITERAL LANGUAGE,
THESE TWO WOMEN WOULD BE A
COMMISSIONING COUPLE AND WOULD
BE EXCLUDED FROM THIS.

>> I MUST RESPECTFULLY DISAGREE

BECAUSE THE CLEAR LANGUAGE SAYS
THE COMMISSIONING COUPLE IS
DEFINED AS A MALE AND A FEMALE,
A MOTHER AND A FATHER.

I THINK THAT TWO WOMEN OR TWO
MEN WOULD BE BY THE CLEAR
LANGUAGE OF THE STATUTE
EXCLUDED.

>> YOU'RE IN YOUR REBUTTAL.

>> THANK YOU VERY MUCH.

>> YOUR HONORS, GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME
IS ROBERT SEGAL, CHRISTOPHER
CARLISLE AND I ARE HERE ON
BEHALF OF APPELLEE.

IT IS OUR POSITION THAT CHAPTER
721.14 DOES NOT APPLY --

>> WHY DOESN'T THAT RELEASE JUST
TRUMP EVERYTHING?

>> THERE ARE A LOT OF PROBLEMS
WITH THE RELEASE.

IF YOU LOOK AT THE CASE THAT WAS
CITED EARLIER, THERE THE PARTIES
HAD A VERY CLEAR CONTRACT
WHEREIN THEY EXPRESSED THEIR
INTENT THAT SHOULD THE WOMAN
BECOME PREGNANT AND BEAR A
CHILD, THAT THE FATHER WAS NOT
GOING TO HAVE ANY RIGHTS, THE
MOTHER WAS NOT GOING TO SEEK AN
ADJUDICATION OF PATERNITY.

IN THIS CASE WE HAVE A SIGNED
CONSENT FORM, ESSENTIALLY, TO
BENEFIT THE DOCTOR AND TO MAKE
SURE THAT APPELLEE KNEW WHAT SHE
WAS GETTING INTO WHEN SHE WENT
FORWARD WITH THE PROCEDURE.

>> IS THAT A QUESTION OF LAW OR
A QUESTION OF FACT?

AND, AGAIN, THIS GOES BACK TO
THE QUESTIONS THAT JUSTICE LEWIS
ASKED YOUR OPPONENT.

THAT CONCERNS ME BECAUSE WE'RE
HERE, AGAIN, IT WAS A SUMMARY
JUDGMENT, AND THE SUMMARY
JUDGMENT APPEARS TO SAY THAT
THIS WAS -- THEY HAD A VERBAL
CONTRACT TO EXACTLY DO WHAT
YOU'RE SAYING.

BUT THEN YOU'VE GOT SOMETHING IN
WRITING THAT APPEARS TO BE
CONTRARY, AND YET EVEN IF WE
AGREE WITH SOME PART OF THIS,
DOESN'T THIS MEAN TO GO BACK FOR
A FACTUAL HEARING?

>> I BELIEVE THAT THERE WAS
SUFFICIENT FACTS BEFORE THE

COURT AND SUFFICIENT FACTS
BEFORE THE FIFTH DISTRICT WHERE
THERE COULD BE VERY BASIC FACTS
DISTILLED FROM THAT THAT WOULD
SAY, LOOK, IF WE FIND THESE
FACTS TO BE TRUE, THEN WE CAN GO
FORWARD AND MAKE A DECISION AS A
MATTER OF LAW THAT APPELLEE IS
ENTITLED TO RIGHTS REGARDLESS OF
MAKING FURTHER FACTUAL FINDINGS
CONCERNING SOME OF THE DETAILS
IN THE --

>> WHAT THE FIFTH DCA, AS I
UNDERSTAND IT, THEIR REAL
QUESTION TO US IS WHETHER OR NOT
THERE IS A CONSTITUTIONAL RIGHT
UNDER FEDERAL OR STATE LAW FOR
THERE TO BE -- ISN'T THAT REALLY
WHAT THEY'RE ASKING US?

>> I THINK THE QUESTION REALLY
IS, IS DOES APPELLEE HAVE A
CONSTITUTIONAL RIGHT TO HELP
PARENT THIS CHILD THAT SHE
HELPED BRING INTO THE WORLD AT A
PARTY WHEN BOTH PARENTS --

>> AS A BIRTH MOM?

>> YES.

>> AND THEY'RE NOT ASKING US TO
TREAT ONE WHO GAVE BIRTH AS
SOMEONE DIFFERENT OTHER THAN A
BIRTH MOTHER, CORRECT?

>> CORRECT.

>> THEY WANT US TO TREAT UNDER
THE LAW OF FLORIDA THERE TO BE
TWO BIRTH MOMS.

>> THEY'RE NOT NECESSARILY --

>> CONSTITUTIONALLY.

>> TWO PARENTS, BOTH OF WHOM ARE
WOMEN.

WE'RE NOT SEEKING A
CLASSIFICATION OF ONE IS A BIRTH
MOTHER, ONE IS NOT A BIRTH
MOTHER.

THERE'S NO EFFORT TO EXCLUDE ONE
AS A BIRTH MOTOR, D.M.T., FROM
THE LIFE OF THIS CHILD.

WE'RE SIMPLY SEEKING
ADJUDICATION THAT SHE HAS RIGHTS
TO THE CHILD AS IT NOW EXISTS.

>> DON'T YOU THINK LANGUAGE OF
THE LAW CLEARLY APPLIES HERE?

>> NO.

IF YOU CONSIDER THE STATUTORY
SCHEME, AND IT SEEMS TO BE FROM
742.11 DOWN TO 17.

IN 742.14 IT TALKS ABOUT A DONOR
OTHER THAN THE COMMISSIONING

COUPLE.
RATHER THAN USING A
COMMISSIONING COUPLE, THEY'VE
USED THE COMMISSIONING COUPLE
SUGGESTING THAT THIS STATUTE WAS
GOING TO BE USED BY MEN AND
WOMEN WHO WERE NOT ABLE TO
CONCEIVE A CHILD AND WERE GOING
TO USE ASSISTED REPRODUCTIVE
TECHNOLOGY IN ORDER TO DO SO.
THERE DOESN'T SEEM TO BE
ANYTHING IN THIS STATUTE THAT IN
ANY WAY SUGGESTS THAT THEY
INTENDED TO INCLUDE PEOPLE OF A
SAME SEX.
THAT THEY INTENDED TO --
>> WHAT YEAR WAS THE STATUTE
PASSED INTO LAW?
>> 1993.
>> AT THAT TIME, THOUGH, IN
LOOKING AT THE POLICY OF THE
LEGISLATURE IN THE STATE OF
FLORIDA, THEY HAD A LAW THAT
SAID THE SAME-SEX COUPLES
COULDN'T ADOPT.
WHAT WOULD MAKE US THINK THAT
THEY WOULD -- LEGISLATURE AT
THAT TIME -- WASN'T CLEARLY
INTENDING THAT THE, THIS WOULD
APPLY TO, TO A SITUATION WHERE
YOU HAVE A SAME-SEX COUPLE?
WHETHER THAT'S CONSTITUTIONAL OR
NOT IS A DIFFERENT QUESTION.
YOU'RE SAYING NOW THE
LEGISLATURE NEVER INTENDED FOR
THIS TO APPLY IN THIS SITUATION.
I FIND THAT TO BE -- YOU THINK
BACK TO 1993 -- ABSOLUTELY
CONTRARY TO WHAT THE LEGISLATURE
INTENDED IN EVERY OTHER ASPECT
OF THIS TYPE OF SITUATION.
>> WELL, IN AN ADOPTION PARTIES
ARE SEEKING THE PERMISSION OF
THE COURT TO TAKE CUSTODY OF A
CHILD WHO IS A WARD OF THE
STATE, WHO IS ESSENTIALLY IN THE
CUSTODY OF THE STATE --
>> WELL, THAT'S NOT TRUE BECAUSE
IN 1990 WHEN SHE GAVE BIRTH,
WHEN THE BIRTH MOTHER GAVE BIRTH
IF YOUR CLIENT HAD THOUGHT
THAT'S ONE WAY TO DO IT, TO ALSO
ADOPT A CHILD WITH THE CONSENT
OF THE BIRTH MOTHER, THAT WOULD
NOT HAVE BEEN LAWFUL IN THE
STATE OF FLORIDA.
>> BUT ENGAGING IN --

>> CAN YOU ANSWER THAT YES OR NO?
WOULD THAT HAVE BEEN LAWFUL?
>> NO.
>> ALL RIGHT.
IT NOW WOULD BE LAWFUL.
>> YES.
>> THERE WOULD BE A PATH TO DO THIS IF TWO WOMEN WANTED TO RAISE A CHILD TOGETHER AND HAVE STABLE PARENTAL RELATIONSHIPS FOR THE PERSON WHO WAS NOT THE BIRTH MOTHER, WHO WAS NEITHER GENETICALLY SUPPLYING THE EGG, OR THEY BOTH WANTED TO HAVE TWO INDIVIDUALS, LOVING INDIVIDUALS BE PART OF THEIR LIFE, THEY COULD SEEK TO ADOPT.
BUT THAT WASN'T THE LAW AT THE TIME THAT THIS OCCURRED.
>> IN 1993 THESE PARTIES WERE MERELY ENTITLED TO USE ASSISTED REPRODUCTIVE TECHNOLOGY IN ORDER TO PRODUCE THIS CHILD.
WHAT THEY DID WAS LEGAL, WHAT THEY DID WAS ETHICAL.
THERE WAS NO EXPRESSION BY THE LEGISLATURE, NO SPECIFIC EXPRESSION BY THE LEGISLATURE AT THAT TIME THAT SAID THEY COULD NOT DO THIS.
SO IT'S NOT AS THOUGH THEY'RE SEEKING A STATE-SANCTIONED APPROVAL FOR AN ADOPTION WHICH IS WHAT A NUMBER OF THESE CASES, PARTICULARLY THE CASE CITED OUT OF NEW YORK SAYS, AND PARTICULARLY NEXT X.G.
THAT'S AN ADMINISTRATIVE PROCEDURE WHERE YOU'RE SEEKING THE APPROVAL OF THE COURT TO DETERMINE WHETHER OR NOT A PARENT CAN HAVE RIGHTS TO A CHILD.
AND CHAPTER 63 HAS CONSISTENTLY CHANGED, BUT THERE ARE PROVISIONS IN THERE FOR TAKING RIGHTS AWAY FROM A PARENT, FOR GIVING RIGHTS TO PEOPLE THAT AREN'T PARENTS.
BUT THIS IS NOT THAT.
THIS IS TWO PEOPLE THAT GOT TOGETHER AND ENGAGED IN AN ENTIRELY LEGAL AND, AGAIN, ETHICAL PROCEDURE TO BRING ABOUT A CHILD THAT THEY INTENDED TO RAISE TOGETHER.

AND THERE'S NOTHING EXPRESSED IN
THE LAW TO SUGGEST THAT THEY
SHOULD NOT BE ABLE TO DO THAT.
>> OKAY, SO NOW YOU'RE SAYING
THE LAW DOESN'T APPLY.
YOUR OPPONENT SAYS THE LAW
CLEARLY APPLIES.
THE FIFTH DISTRICT SEEMED TO
SAY, WELL, THE LAW APPLIES, BUT
IT'S UNCONSTITUTIONAL AS APPLIED
HERE.
SO WHICH WAY, WHAT'S THE PATH
THAT YOU WANTED TO GO DOWN?
THAT THE LAW DOESN'T EVEN APPLY,
THEREFORE, THERE WAS NO REASON
TO DECLARE THE LAW
UNCONSTITUTIONAL, OR THAT THE
LAW AS APPLIED TO YOUR CLIENT IS
UNCONSTITUTIONAL?
>> I'D SUGGEST THE COURT CAN
MAKE A RULING IN THIS CASE
WITHOUT HAVING TO FIND THE
STATUTE UNCONSTITUTIONAL, THAT
THAT WOULD BE A PREFERRED PATH.
BUT IF THE COURT IS UNABLE --
>> AND HOW WOULD WE GET THERE?
TO SAY THE PLAIN LANGUAGE OF THE
STATUTE DOESN'T APPLY EVEN
THOUGH THEY NAME A COMMISSIONING
COUPLE AS BEING A MAN AND A
WOMAN?
>> RIGHT.
>> SO WHERE IS IT THAT THAT
WOULDN'T -- WHERE WOULD YOUR
CLIENT FIT IN OR NOT FIT IN FOR
THE STATUTE?
>> SHE IS NOT A DONOR WHO WOULD
HAVE WAIVED HER RIGHTS TO PARENT
THE CHILD OR TO THE GENETIC
MATERIAL UNDER 742.14.
SHE SIMPLY IS NOT A DONOR IN
THAT SENSE.
>> BUT HOW DO YOU GET AROUND AN
UNDERSTANDING OF THE TERM
"DONOR," IN THIS CONTEXT?
DONOR IS SOMEONE WHO PROVIDES
BIOLOGICAL MATERIAL FOR A
MEDICAL PROCEDURE.
>> RESPECTFULLY, I DON'T BELIEVE
THAT IS A CORRECT UNDERSTANDING
OF THE TERM "DONOR."
I DON'T THINK THE STATUTE WAS
INTENDED TO EXCLUDE EVERYBODY
THAT PROVIDED GENETIC MATERIAL.
IT WAS INTENDED TO EXCLUDE --
>> BUT IT HAS THE PARTICULAR
PEOPLE THAT AREN'T COVERED, AND

IT EXPRESSES THAT.
BUT YOU'RE SAYING THAT SHE'S NOT
A DONOR, AND I DON'T UNDERSTAND
HOW YOU CAN FIT THAT IN THE
COMMON UNDERSTANDING OF THIS
TERM OF ART.
IT REALLY IS A TERM OF ART.
BUT I DON'T -- BUT THEY TALK
ABOUT THE DONOR IN THE CONTEXT
OF THESE SORTS OF PROCEDURES AND
THAT THE UNDERSTANDING OF THAT
IS PRETTY WELL ESTABLISHED.
>> I'D SAY IT'S NOT -- IF YOU
LOOK AT THE K.M. CASE THAT WAS
CITED IN THE BRIEF FROM
CALIFORNIA, THERE THEY
DETERMINED THAT IT WAS VERY
CLEAR THAT THE PARTIES DID NOT
INTEND TO RELINQUISH ANY
PARTICULAR RIGHT AND THAT THEY
INTENDED TO RAISE THE CHILD
TOGETHER.
THAT'S THE EXACT SAME SITUATION
THAT WE HAVE HERE.
THERE WAS NO INTENT EXPRESSED BY
EITHER OF THESE PARTIES UNTIL
THIS LITIGATION STARTED THAT
THEY DIDN'T INTEND TO RAISE
THESE CHILDREN TOGETHER.
>> LET ME ASK YOU ABOUT YOUR
UNDERSTANDING ABOUT THE DISTRICT
COURT'S OPINION, BECAUSE I READ
IT, AND I WAS A LITTLE --
[INAUDIBLE]
JUSTICE PARIENTE, I DON'T KNOW
EXACTLY WHICH ROUTE THEY WERE
GOING, AND MAYBE THEY'RE GOING
BOTH ROUTES.
WHAT IS YOUR UNDERSTANDING OF
WHAT THE ACTUAL HOLDING OF THE
FIFTH DISTRICT?
>> I THINK THE FIFTH DISTRICT,
IT WAS A TWO-PART HOLDING.
THEY FOUND THAT THE STATUTE
DOESN'T APPLY, AND IF IT WAS
APPLIED TO THIS SITUATION, IT
WOULD VIOLATE BOTH THE PRIVACY
PROVISIONS OF THE FLORIDA
CONSTITUTION AND THE EQUAL
PROTECTION PROVISIONS OF THE
CONSTITUTION OF THE STATE OF
FLORIDA.
>> YOU ADDRESSED THE PURPORTED
RELEASE.
I DON'T KNOW HOW YOU WANT TO
DESCRIBE IT OR THE CONCEPT OF A
RELEASE IN THIS CASE?

>> WE'RE TALKING ABOUT THE INFORMED CONSENT FORM THAT WAS SIGNED.

>> WELL, THAT'S -- I'M TRYING TO FIGURE OUT EXACTLY WHAT WE'RE TALKING ABOUT.

>> IT WAS AN INFORMED CONSENT FORM.

IT WAS A EIGHT OR NINE-PAGE DOCUMENT WHERE THE PROCEDURE WAS DESCRIBED; WHAT THEY WERE GOING TO DO, HOW THEY WERE GOING TO DO IT, THE RISKS THAT WERE INVOLVED IN THE PROCEDURE.

THERE IS A PARAGRAPH ON THE VERY FIRST PAGE OF THE FORM WHERE IT INDICATES THAT, UM, APPELLEE DOES, IN FACT, WAIVE HER RIGHTS TO THE GENETIC MATERIAL AND ANY OFFSPRING THEREFROM.

BUT I WOULD SUGGEST TO THE COURT SINCE IT'S AN INFORMED CONSENT FORM AND IT'S NOT A CONTRACT, IT'S AN INFORMED CONSENT FORM. FIRST OF ALL, YOU DON'T HAVE ANY MUTUAL EXPRESSION BY THE PARTIES THAT THEY INTENDED FOR THAT WAIVER TO EXIST.

IN FACT, APPELLANT'S NAME DOESN'T --

>> QUESTION IS, DOES THE SIGNATURE?

>> I'M SORRY?

>> DOES THE SIGNATURE APPEAR ON THE --

>> APPELLANT'S SIGNATURE?

>> YES.

>> NO.

NO, SHE'S NOT --

>> SO THIS IS A UNILATERAL FORM, IT'S NOT A FACTUAL THING?

>> CORRECT.

>> BUT, I MEAN, IN FLORIDA EVEN INFORMED CONSENT FORMS WITH CASES SUCH AS FLOWERS OUT OF THE THIRD DISTRICT WHICH WAS A STERILIZATION PROCEDURE THAT THEY HAVE BEEN INTERPRETED TO OPERATE AS FULL RELEASE, THE KINDS OF DOCUMENTS NOT JUST AS INFORMATION, FOR INFORMATIONAL PURPOSES.

>> I WOULD SUGGEST TO THE COURT THAT THERE'S NOTHING IN THAT DOCUMENT TO SUGGEST THAT IT RISES TO THE LEVEL OF A WAIVER OF SUCH A SIGNIFICANT RIGHT ON

THE PART OF APPELLANT.
>> OKAY, WHY?
I UNDERSTAND JUST WHAT YOU SAID,
BUT WHY?
>> AGAIN, BECAUSE THERE'S NO
MUTUAL EXPRESSION OF INTENT
BETWEEN THE PARTIES.
THE ACTIONS OF THE PARTY BOTH
BEFORE THE SIGNING OF THAT --
>> WELL, I MEAN, IF YOU SETTLE A
LAWSUIT, DO YOU HAVE THE PARTY
WHO IS EXECUTING THE RELEASE,
BOTH PARTIES SIGN THE RELEASE?
OR DO YOU JUST HAVE THE WHO IS
DOING THE RELEASING SIGN IT?
>> A LOT OF TIMES IT'S THE PARTY
WHO'S DOING THE RELEASE --
>> THAT'S TYPICALLY HOW WE DO IT
IN THE LAW.
>> IT'S NOT CONSISTENT WITH THE
ACTIONS OF THE PARTIES.
>> I UNDERSTAND THAT.
I UNDERSTAND THAT.
>> THE FORM ITSELF IS INTERNALLY
INCONSISTENT.
JUSTICE QUINCE MENTIONED ONE OF
THE INCONSISTENCIES.
THERE'S SEVERAL THROUGHOUT.
THERE'S INDICATIONS THAT THE
CHILD'S INTENDED TO BE RAISED BY
THE HUSBAND AND WIFE IN THIS
CASE.
THERE'S NO HUSBAND AND WIFE IN
THIS CASE.
IF THEY'RE GOING TO BE OBTAINING
THE SPERM FROM THE HUSBAND,
AGAIN, THERE IS NO HUSBAND.
THERE'S EVEN A PROVISION THAT
SAYS THAT THE APPELLANT AND HER
PART PARTNER ARE WAIVING VARIOUS
LIABILITY PROVISIONS AS TO MY
CLIENT.
APPELLEE IS THE PARTNER.
>> DO THOSE, UNDER FLORIDA LAW,
REVISIONS THAT MAY NOT APPLY OR
MAY BE INCONSISTENT, DOES
FLORIDA LAW HOLD THAT THAT WOULD
NEGATE A VALID PROVISION IN THE
RELEASE?
IN A RELEASE?
>> I THINK IT WOULD CREATE
ENOUGH INCONSISTENCY FOR THE
COURT TO THEN ENTERTAIN
TESTIMONY CONCERNING THE INTENT
OF THE PARTIES.
>> IF THAT'S THE CASE, IF THAT'S
WHAT NEEDS TO BE DONE, THEN WE

ARE NOT RIGHT FOR DECISION ON
SUMMARY JUDGMENT.

>> WELL, AGAIN, I THINK THERE
WERE SUFFICIENT FACTS IN THE
RECORD.

>> NO.

IF WE HOLD, I MEAN, WHAT YOU
JUST SAID IS YOU THINK THERE ARE
SUFFICIENT FACTS, AND THE OTHER
SIDE SAID WE'RE NOT RIPE FOR
DECISION BECAUSE WE HAVE TO HAVE
SOMEONE DETERMINE FACTUALLY
WHETHER THIS WAS THE INTENT AND
THE OPERATION OF FACTUALLY OF
THIS PRINTED DOCUMENT WITH THE
SIGNATURE.

>> MAYBE THIS IS WHERE THE
CONFUSION WITH THE HOLDING OF
THE FIFTH DISTRICT COMES IN.
AS PART OF THE CONSTITUTIONAL
ANALYSIS IN ESTABLISHING WHAT IS
THE PARENTAL RIGHT OF APPELLEE,
IT WAS SUGGESTED THAT IN THE
CASE OF A MAN, AN UNMARRIED
FATHER WHO'S SEEKING AN
ADJUDICATION OF PARENTAL RIGHTS
FOR A FATHER, HE WOULD NEED TO
SHOW IN ORDER FOR HIS RIGHT TO
PARENT TO CONVERT INTO ONE OF A
CONSTITUTIONAL SIGNIFICANCE,
HE'D HAVE TO SHOW A BIOLOGICAL
CONNECTION, AND HE'D HAVE TO
SHOW THAT HE MADE A SUBSTANTIAL
EFFORT AND COMMITMENT TO BECOME
A PARENT TO THIS CHILD.
ONCE HE HAD DONE SO HE THEN HAS
A PROTECTABLE INTEREST UNDER
BOTH THE STATE AND THE FLORIDA
CONSTITUTIONS.

SO IN THIS INSTANCE SINCE
APPELLEE DONATED BIOLOGICAL
MATERIAL AND SINCE YOU VERY
CLEARLY DEMONSTRATED A
COMMITMENT TO BECOME A PARENT TO
THIS CHILD, THERE SHOULDN'T BE
ANY QUESTION AT THAT POINT
WHETHER SHE DOES OR DOESN'T HAVE
A RIGHT TO PARENT THE CHILD.
SHE DOES.

AND THAT SHOULD --

>> OKAY.

I UNDERSTAND THAT.

COULD WE GO BACK TO WHAT I'D
ASKED BEFORE?

YOU ANSWERED A DIFFERENT
QUESTION, AND I UNDERSTAND THAT
YOU'D LIKE TO ANSWER IN THAT

WAY, BUT AGAIN, WE HAVE TO GET
ACROSS THAT THRESHOLD QUESTION.
IS THERE AN ISSUE OF FACT WITH
REGARD TO THE IMPACT OF THIS
FIGHTING, WHATEVER IT IS?
BECAUSE EACH PARTY IS ASSERTING
THAT A DIFFERENT FACTUAL
POSTURE.

>> I UNDERSTAND.

AND I GUESS I WAS HOPING TO
ANSWER THE QUESTION BY ANALOGY
THAT THE TRIAL COURT AND THE
FIFTH DISTRICT HAVING MADE THOSE
SIMPLE FINDINGS OF THE
BIOLOGICAL CONNECTION AND THE
COMMITMENT TO PARENTHOOD, THAT'S
ALL THAT WOULD BE NECESSARY FOR
A COURT TO FIND IN ORDER TO GET
PAST THE SUMMARY JUDGMENT ISSUES
AND MAKE A FINDING AS A MATTER
OF LAW --

>> WELL, YOU'D HAVE TO MAKE A
FINDING THAT THE RELEASE IS
INVALID.

YOU'D HAVE TO BE SOMEPLACE ALONG
THE -- THAT THIS IS NOT A
RELEASE.

WHATEVER THIS WRITING IS, IT'S
NOT A RELEASE.

SOMEBODY HAS TO MAKE THAT
DETERMINATION.

I MEAN, UP UNTIL THAT POINT IT
SEEMS TO ME IT'S A LEGAL
ARGUMENT, AND I UNDERSTAND YOU
MAY HAVE THE PREVAILING
ARGUMENT, BUT WE ARE NOT TO THAT
POINT UNTIL THAT ISSUE'S
RESOLVED, AND THAT INVOLVES, IT
SEEMS TO ME, TESTIMONY, FACTS
THAT WOULD HAVE TO BE ADDRESSED,
AND YOU MAY PREVAIL ON THAT, I
DON'T KNOW.

BUT WE CAN'T DETERMINE THE FACT.

>> WHAT WAS PRESENTED AT THE
SUMMARY JUDGMENT ARGUMENT NOT
ONLY WAS THE, THIS INFORMED
CONSENT FORM, BUT WAS ALSO THE
AFFIDAVIT OF THE DOCTOR THAT
PERFORMED THE PROCEDURE.

AND THE MATTERS THAT WERE
ALLEGED IN THAT AFFIDAVIT TAKING
ALL OF THOSE INTO CONSIDERATION
THE COURT COULD HAS FOUND THAT
THERE WASN'T ANY QUESTION AT
THAT POINT, AND THIS IS WHAT THE
PARTIES INTENDED AND,
THEREFORE --

>> WHAT PART OF THAT AFFIDAVIT?
>> I'M SORRY?
>> WHICH PARTS OF THAT
AFFIDAVIT?
>> PART OF THE AFFIDAVIT --
>> WHAT THE DOCTOR WOULD SAY,
HOW WOULD THAT AFFECT THE INTENT
OF PARTIES WITH THE DOCTOR NOT
BEING ONE OF THOSE PARTIES?
>> THE DOCTOR UNDERSTOOD THAT
BOTH PARTIES HAD COME TO HIM
WITH THE INTENT OF CREATING A
FAMILY THAT THEY WERE GOING TO
NURTURE TOGETHER, THAT THEY HAD
COME IN, THAT THEY HAD WAIVED
ANY SORT OF MEDICAL PRIVILEGE IN
CONVERSING BETWEEN EACH OTHER
ABOUT THESE MATTERS.
UM --
>> DOCTOR WAS JUST TRYING TO
AVOID A MALPRACTICE ACTION.
[LAUGHTER]
>> DOCTOR'S A GOOD MAN.
I DON'T BELIEVE THAT THAT'S THE
CASE, YOUR HONOR.
>> I HAVE NO DOUBT, AND I'M NOT
HERE TO CAST ASPERSIONS UPON THE
MEDICAL PROFESSION.
>> NEITHER AM I, BUT THAT'S A
CONSIDERATION THAT PERHAPS A
JUDGE SHOULD MAKE ON LIVE
TESTIMONY AS OPPOSED TO A CALLED
AFFIDAVIT.
>> HOW DID THE FIFTH DISTRICT
DEAL WITH THE, YOU KNOW, AND
I -- THE WAIVER?
I MEAN, IT'S NOT A CONTRACT.
IT'S THE PARTIES.
HOW DID THE FIFTH DISTRICT DEAL
WITH THE MEDICAL RELEASE IF YOU
WANT TO CALL IT THAT AS TO HER
RELINQUISHING HER RIGHTS?
DID THEY ADDRESS IT?
>> THEY FOUND THAT BASED UPON
THE FACTS THAT WERE PRESENTED IN
THE PLEADINGS AND THE OTHER
SUMMARY JUDGMENT EVIDENCE, THE
AFFIDAVIT OF THE DOCTOR, UM, THE
FORM ITSELF THAT SHE DID NOT
INTEND TO RELINQUISH ANY OF HER
RIGHTS.
>> OKAY.
SO, AND MY UNDERSTANDING -- AND
MAYBE WHEN YOUR OPPONENT GETS
BACK UP, HE CAN EXPLAIN.
THEY'RE REALLY NOT HANGING THEIR
HAT ON THE RELEASE, THEY'RE

HANGING THEIR HAT ON THAT THE
STATUTE, EVEN IF THEY DID INTEND
TO RAISE THIS CHILD TOGETHER AND
BOTH OF THEM HAVE PARENTAL
RIGHTS, THAT THE FLORIDA STATUTE
PROHIBITS THAT FROM HAPPENING
UNDER THE LAW OF THE STATE OF
FLORIDA?

ISN'T THAT THE ISSUE?

THAT THEY, THAT WE'RE HERE ON?

>> THAT'S JUST THE CERTIFIED
QUESTION --

>> BUT IF THE -- MAYBE I NEED TO
LOOK BACK AT THE BRIEF AS TO
WHETHER THE FIRST QUESTION WOULD
BE THAT IF THERE WAS AN ACTUAL
WAIVER BETWEEN THE TWO PARTIES,
THAT ALONE MIGHT BE ENOUGH TO
SAY THAT YOUR CLIENT COULD NOT
HAVE PARENTAL RIGHTS FOR THIS
CHILD.

>> RIGHT.

>> SO THAT'S -- IS THAT A
THRESHOLD QUESTION THAT HAS BEEN
CONCEDED FOR THE PURPOSE OF THIS
CASE IN FRONT OF US, OR IS THAT,
I MEAN, IS THAT BEING RAISED BY
ANYONE NOW, THAT THE RELEASE
ITSELF IS REALLY THE END OF THE
QUESTION, NOT THE STATUTE?

>> IT'S BEEN RAISED, I SUPPOSE,
AS AN ALTERNATIVE THEORY.

>> OKAY.

>> THAT, YOU KNOW, YOU CAN TAKE
AWAY HER PARENTAL RIGHTS BY
FINDING THAT SHE WAIVED HER
RIGHTS UNDER THE FORM.

>> WHAT YOU WOULD SAY TO THAT IS
IF WE WOULD GO DOWN THAT PATH,
YOU'VE GOT TO CONSIDER THAT,
THAT IT'S EQUIVOCAL.

IT'S NOT UNAMBIGUOUS, IT WAS
DONE FOR THE PROTECTION OF THE
DOCTOR AND USUALLY FOR THE
COUPLE.

BECAUSE, AGAIN, IN MOST CASES
YOU'VE GOT FAR -- AND I DON'T
MEAN FAR BY OUT OF STATE, YOU'VE
GOT THE -- WHAT'S THE WORD
THAT'S USED?

FOREIGN EGGS AND SPERM THAT ARE
BEING USED FOR A COUPLE THAT'D
BE ABLE TO CONCEIVE A CHILD.

>> RIGHT.

>> WHAT IS THAT CALLED?

ON THEIR -- THEY CALL IT
SOMETHING?

>> JUST ANONYMOUS DONATION?
>> ANONYMOUS.
IT COULD BE.
I MEAN, THAT WOULD BE THE NORM.
>> AND THAT'S SOMETHING THE
DOCTOR MADE CLEAR IN HIS
AFFIDAVIT WAS THAT THAT FORM WAS
SOMETHING HE TYPICALLY USES FOR
ANONYMOUS DONORS, AND THERE ARE
PARTS IN THAT FORM WHERE YOU CAN
CIRCLE IT TO SAY THAT THE DONOR
IS KNOWN OR UNKNOWN.
IT'S NOT CIRCLED IN THIS CASE.
THERE'S NO QUESTION THEY'RE
KNOWN TO EACH OTHER, BUT IT WAS
A VERY GENERAL FORM.
>> THE PROBLEM TO ME IS I HAVE A
CLIENT WHO HAD A FORM BY
OPERATION OF GIVING UP THE EGG
FOR FERTILIZATION BY OPERATION
OF THE FORM ITSELF, THE DOCTOR
GAVE UP RIGHTS, HAD AN OPERATION
OF A STATUTORY PROVISION THAT,
AGAIN, FLORIDA LAW MADE HER GIVE
UP WHATEVER PARENTAL RIGHTS THAT
SHE MAY HAVE HAD, BUT YET
THERE'S NO WRITTEN AGREEMENT OR
CONTRACT TO THE CONTRARY THAT
SAYS THESE THINGS DO NOT APPLY
IN THIS CIRCUMSTANCE.
THOUGH IT SEEMS LIKE THERE'S
MORE OF A -- YOU'RE ASKING THIS
COURT TO IMPLEMENT SOCIAL POLICY
THAT'S NOT REFLECTED IN THE
FLORIDA STATUTES, NOT IN THE
FLORIDA CONSTITUTION OR, TO ME,
IN THE U.S. CONSTITUTION.
BUT YOU'RE ASKING US TO MAKE A
CONSTITUTIONAL RULING ON SOCIAL
POLICY.
>> ASKING THE COURT TO MAKE A
DETERMINATION THAT APPELLEE HAS
PROTECTED PARENTAL RIGHTS BASED
ON THE ACTIONS OF THE PARTIES.
UM, THEY SIGNED A FORM, BUT THE
FORM IS PATENTLY INCONSISTENT
WITH THEIR CONDUCT, AND THE
TERMS OF THE STATUTE.
UM, AGAIN, WE'D RESPECTFULLY
SUGGEST THAT IT REALLY WAS
INTENDED FOR SITUATIONS WHERE
MARRIED COUPLES WANTED TO AVOID
THE POSSIBILITY OF INTERFERENCE
BY ANONYMOUS DONOR THAT THAT
STATUTE DOES NOT APPLY TO THE
FACTS OF THIS CASE.
>> OKAY.

>> THANK YOU, JUDGE.
>> TO ANSWER THE QUESTION, YES,
I THINK THE RELEASE IN AND OF
ITSELF WINS OUR CASE.
BUT I DON'T -- I THINK EVEN IF
WE DIDN'T HAVE THE RELEASE, EVEN
IF SHE HAD NEVER SIGNED A
RELEASE, I THINK THE FACTS OF
THE CASE ARE FAVORABLE TO US AND
WIN THE CASE FOR US.
>> LET ME ASK YOU BRIEFLY --
>> YES.
>> DID YOU HAVE ANY PROBLEM WITH
THE WAY THIS QUESTION IS
CERTIFIED?
>> I WOULD NOT PRESUME TO TELL
THE FIFTH HOW TO CERTIFY A
QUESTION.
>> WELL, BUT YOU CAN PRESUME TO
TELL US IF YOU DON'T LIKE IT.
[LAUGHTER]
>> I ASKED.
I GIVE YOU PERMISSION.
>> THANK YOU, SIR.
I THINK THAT THE FIFTH WANTED TO
ADDRESS THE CONSTITUTIONAL
ISSUE.
I THINK THE FIFTH TRIED TO DEAL
WITH THE FACT THERE WAS A
RELEASE.
I DON'T THINK THEY DID IT
EFFECTIVELY, AND I THINK THEY
WANTED, BASICALLY, TO IGNORE IT.
>> WELL, IF WE -- OKAY.
LEAVING ASIDE THE ISSUE OF THE
RELEASE, IF WE DECIDE THAT THE
STATUTE DOES APPLY, THEN WE HAVE
GOT TO CONFRONT THE
CONSTITUTIONAL ISSUE, RIGHT?
>> I MEAN --
>> IT'S BEEN RAISED, OR IS IT --
OR WHY IS THAT NOT RIGHT?
>> I DON'T THINK YOU DO BECAUSE
I DON'T THINK THERE'S EVER BEEN
A PROTECTED CLASS FOR GENETIC
MATERIAL.
>> OKAY, I UNDERSTAND YOU THINK
THEY DON'T WIN, BUT THAT'S A
DIFFERENT -- YOU'RE TALKING
ABOUT A PROTECTED CLASS.
THAT'S PART OF THE
CONSTITUTIONAL LAW ANALYSIS.
>> YES, SIR.
>> SO THAT'S CONFRONTING THAT
ISSUE.
>> YES, SIR.
OBVIOUSLY --

>> IF YOU LOOK AT THE LEHR CASE,
I MEAN, WE'VE MENTIONED IT IN
OTHER CONTEXT, AND PARTICULARLY
IN THOSE WHERE THERE'S AN
ATTEMPT TO CUT OFF THE RIGHTS OF
A FATHER AND THE QUESTION OF
NOTICE, WHO GETS NOTICE WITH
REGARD TO THAT.

AND THE U.S. SUPREME COURT IN
LEHR BASICALLY HAS SAID, YOU
KNOW, YOU HAVE TO GIVE AN
OPPORTUNITY.

THERE'S AN OPPORTUNITY TO
PARENT.

YOU CAN'T JUST SAY YOU'RE NOT
GOING TO.

SO, AND IT SEEMS TO SAY THAT IF
YOU EXERCISE THAT OPPORTUNITY
THAT YOU DO HAVE, YOU DO COME
UNDER THEN THE PROTECTIONS OF
THE UNITED STATES CONSTITUTION
ON THE RIGHT WITH REGARD TO
CHILDREN, DOESN'T IT?

>> IT DOES, AND, IN FACT, IT
EVEN GOES BACK TO THE STANLEY V.
ILLINOIS CASE.

BUT THOSE WERE ALL SITUATIONS
WHERE THERE IS A DISTINGUISHING
MADE BETWEEN THE BIOLOGICAL
CREATION OF A CHILD AND THE
NORMAL SEXUAL INTERCOURSE WAY,
AND IT DOES NOT CONTEMPLATE A
GENETIC DONATION.

>> BUT WHY IS THAT -- THE IDEA
THAT WE WOULD, AGAIN, IN 2012
AND IN 2006 SAY IT'S REALLY,
WE'RE OKAY WITH UNPROTECTED SEX,
A ONE NIGHT STAND THAT CAN
PRODUCE A CHILD, BUT WHERE TWO
PEOPLE GET TOGETHER AND AGREE
THEY WANT TO RAISE A CHILD
TOGETHER, AND THEY ACTUALLY
START OUT AND DO IT, THAT THOSE,
THAT CONSTITUTIONAL RIGHT IS
WORTHY OF LESS, UM, STATUS OR
DOESN'T EXIST, BUT THE ONE NIGHT
STAND HAS GREATER CONSTITUTIONAL
STATUS?

YOU'RE NOT -- I MEAN, AGAIN, I
UNDERSTAND THAT MAY HAVE BEEN
THE CASE 100 YEARS AGO BECAUSE
OUR SOCIETY WAS DIFFERENT AS FAR
AS THERE, BUT IS THAT NOT A
SITUATION THAT AT LEAST
IMPLICATES EQUAL PROTECTION
RIGHTS OF WOMEN OVER, YOU KNOW,
AT LEAST TO HAVE EQUAL STATUS AS

MEN?

>> NO, I DON'T THINK SO BECAUSE
I THINK YOU CAN DEAL WITH
GENETIC MATERIAL FROM BOTH THE
WOMAN AND A MAN AND SAY THAT
THAT IS NOT A PROTECTED CLASS,
NOT A COMPELLING STATE INTEREST.
WHATEVER LEVEL OF SCRUTINY YOU
WANT TO PUT ON IT AND PUT THE
ACTUAL WAY OF TRADITIONALLY
CREATING --

>> HAVE SEX THE GOOD
OLD-FASHIONED WAY WHERE IT'S
CONSTITUTIONAL, BUT ANYTHING
ELSE DOESN'T --

>> WELL --

>> AND, HONESTLY, I DON'T --
THIS IS A -- RAISES LOTS OF
QUESTIONS CONSTITUTIONAL AND
OTHERWISE.

SO I, I DON'T -- I'M ASKING THIS
REALLY TO TRY TO GET GUIDANCE
FROM YOU AS FAR AS WHY ONE IS
PREFERABLE.

>> I THINK YOU'RE REALLY TALKING
ABOUT SOCIAL POLICY ISSUES.

>> WELL, WE MAY BE.

BUT SOMETIMES SOCIAL POLICY AND
CONSTITUTIONAL POLICY COME
TOGETHER.

>> YES, MA'AM, THEY DO.
THERE'S ANY NUMBER OF CASES
WHERE THAT COMES TOGETHER --

>> WELL, IT CAME TOGETHER IN
LEHR, YOU KNOW, IN THE UNITED
STATES SUPREME COURT CASE.

>> BUT THAT HAS BEEN IN THE
TRADITION OF HOW PATERNITY IS
DETERMINED.

THE FIRST THING YOU ALLEGE IN
YOUR COMPLAINT FOR PATERNITY
AFTER YOU ALLEGE, YOU KNOW,
VENUE AND JURISDICTION IS THAT
THE PARTIES HAVE SEXUAL
INTERCOURSE IN A PARTICULAR
VENUE, AND THAT GIVES YOU THE
JURISDICTION, AND IT GIVES YOU
LONG-ARM JURISDICTION UNDER THE
LONG-ARM STATUTE.

SO THERE VERY DEFINITELY IS A
LEGISLATIVE DISTINCTION MADE.
AND SINCE WE ARE TALKING ABOUT
IT -- AND YOUR QUESTIONS ARE
VERY GOOD --

>> WELL, THANK YOU.

[LAUGHTER]

>> -- AND VERY ACADEMIC.

>> PANDERING WON'T GET YOU ANYWHERE.
[LAUGHTER]
>> "GOOD" AND "ACADEMIC," MEANING IT HAS NO RELEVANCE IN THIS CASE.
>> WELL, I THINK THEY GO TO SOCIAL POLICY, AND I THINK SOCIAL POLICY HAS ALWAYS BEEN A LEGISLATIVE PRIORITY.
>> SO YOU THINK THE FIFTH DISTRICT WAS INVOLVED WITH SOCIAL POLICY, NOT CONSTITUTIONAL?
>> I THINK SO, YOUR HONOR. AND I THINK THEY GO DOWN A SLOPE OF THE IMPLICATIONS, I THINK THEIR DECISION UNDERMINES THE PENNING'S OF RICHARDSON. I GO BACK TO THAT. I'M CERTAINLY NOT LECTURING THIS COURT ON THAT DECISION. YOU MADE IT. BUT THERE HAS BEEN THAT DETERMINATION THAT EVEN THOUGH THERE'S A GENETIC COMPONENT IN THE RICHARDSON GRANDPARENT, EVEN THOUGH THEY WERE AT ONE POINT ACTIVELY INVOLVED IN THE CHILDREN'S LIVES, THAT THEY DO NOT HAVE ANY KIND OF RIGHT THAT COMES FROM EITHER GENETICS OR COMES FROM PREVIOUS INVOLVEMENT WITH THE CHILD, AND THE SITUATION OPENS UP, AND THIS IS MUCH MORE IN THE AMICAE BRIEFS --
>> IF YOU WERE TO SUM UP. IF YOU WOULD SUM UP --
>> YES, I WILL. BASICALLY, YOU'RE OPENING UP THIS BEST INTEREST OF A CHILD TYPE ANALYSIS TO A STEPPARENT OF EITHER GENDER, TO A BOYFRIEND OR A GIRLFRIEND, TO SOMEBODY THAT'S RICHER. IT JUST OPENS UP A WHOLE BUNCH OF THINGS THAT HAVE BEEN AGAINST THE RULINGS OF THIS COURT IN THE APPELLATE-LEVEL COURTS OF THE STATE OF FLORIDA. THANK YOU VERY MUCH.
>> THANK YOU FOR YOUR ARGUMENTS. THE COURT WILL BE IN RECESS FOR TEN MINUTES.
>> PLEASE RISE. COURT WILL BE IN RECESS FOR TEN

MINUTES.