IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2193
Lower Ct. Case No: 4D07-237

THOMAS J. CARNAHAN

Petitioner,

v.

ANGELA MARIA LOHMAN and JEREMY LOHMAN,

Respondents.

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RESPONSE TO PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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In this case, the Fourth District Court of Appeal had to grapple with the issue of when, if ever, it may be appropriate for a court to intrude into an existing marriage in order to question the paternity of a child born into that marriage.

Petitioner Carnahan, a man married to another woman, claims to be the father of the baby born to Respondent Mrs. Lohman while she was married to Respondent Mr. Lohman. Carnahan asserts that because a subsequently-dismissed action for dissolution of marriage was pending between the Lohmans when he filed his Petition for Paternity, the Lohmans' marriage is not "intact". Therefore, Carnahan argues that his paternity action should be permitted to proceed, contrary to otherwise established law protecting the sanctity of marriage from these kinds of claims.

Carnahan's argument relies on *dicta* in Lander v. Smith, 966 So. 2d 1130 (Fla. 4th DCA 2005) to the seeming effect that an "intact marriage" is a marriage in which no divorce proceedings are pending. This *dicta* itself originated in reference to the holding in S.B. v. D.H. AND H.H., 736 So. 2d 766 (Fla. 2d DCA 1999), which was that a court may not inquire into the "intactness" of a marriage precedent to permitting a putative father claim to proceed against the mutual wishes of the husband and wife of that marriage, so long as no divorce proceedings are pending.

The Fourth District Court initially accepted Carnahan's argument, but on rehearing, following a more thorough analysis and briefing of the usage throughout Florida law of the phrase "intact marriage", reversed itself. The Court accepted Respondent Lohman's arguments that a marriage in Florida is either intact or it isn't -- there is no gray area status. The Court held that the pendency of divorce proceedings do not in and of themselves define a marriage as "not intact" or create an alternate marital status that permits the historically exceptional violation of the marriage by permitting an interloper putative fatherhood claim to proceed over the objections of a married couple. It recognized that the Second District had merely said that so long as no divorce proceedings are pending, there cannot even be a preliminary inquiry made into the "intactness" of the marriage in order to permit this. The Fourth District then rendered a decision that was expressly compatible with the Second District case.

Respondents Mr. and Mrs. Lohman are a young couple married since 1999, with three young children, currently ages 4, 3, and 15 months. (AP-1) In or about early 2006, Petitioner Carnahan (himself married to another woman) befriended Mrs. Lohman. The Lohmans began having marital difficulties. Mrs. Lohman then became pregnant. Angry and suspicious of Carnahan's disruptive presence, Mr. Lohman filed for divorce. Under stress, the Lohmans made various ill-considered

allegations against each other, all of which later were retracted, including that Mr. Lohman was not the father of Mrs. Lohman's child in vitro. (AP-1)

After a mid-pregnancy separation of less than three months, Mrs, Lohman returned home. The Lohmans reconciled. It was a hectic time, and the dissolution action was neglected. On September 26, 2006, the baby was born. Mr. Lohman participated in the pregnancy and birth, just as he had with his first two children, and was named as the father on the birth certificate. (AP-1)

On October 10, 2006, Carnahan filed a Petition for Paternity against Mrs. Lohman seeking, *inter alia*, custody of the baby, and claiming to be the father of the child. (AP-1) On October 30, 2006, the Lohmans mutually dismissed their divorce case and discharged their lawyers. In their "Joint Voluntary Dismissal" they stipulated that all allegations and all other matters in the case were "voluntarily stricken, canceled, withdrawn and dismissed *ab initio*." (AP-1) Both Mr. and Mrs. Lohman objected to Carnahan's paternity proceedings. Mr. Lohman filed an Affidavit that he was the baby's father, accepting all responsibilities of fatherhood. The Lohmans filed a Motion to Dismiss the Paternity action for lack of standing. It was denied by the trial court. (AP-1) The Lohmans filed a Petition for Certiorari with the Fourth District Court of Appeal, and on Motion for Rehearing, the Petition was granted.

SUMMARY OF ARGUMENT

There is no express and direct conflict of a question of law that will invoke the discretionary jurisdiction of this Court. Discretionary review under Article V of the Florida Constitution requires that a decision be in conflict with either a Supreme Court decision or that of another District Court of Appeal. Petitioner cites to Lander and S.B. as in conflict with the below decision. Lander is from the same district which rendered the opinion at issue, and was reconciled factually and legally by the Court. S.B. is from the Second District, but was considered and discussed at length by the Fourth District, which rendered a decision compatible with it. There is no conflict.

LEGAL ARGUMENT

Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv) (2007) enable the Supreme Court of this state to review a decision that expressly and directly conflicts with a decision of this Court or with another district court of appeal on the same question of law.

Applying this standard, Lander v. Smith, 906 So. 2d 1130 (Fla. 4th DCA 2005) does not apply since it is a decision from the same district as the instant case. Moreover, the Fourth District explained that it used the phrase "intact marriage" in Lander as *dicta*, and that its holding was narrowly circumscribed to the facts of that case. 906 So. 2d at 1135. In Lander, the mother acknowledged the putative father as the child's father by placing his name on the birth certificate, and the putative father supported the child and bonded with the child after his birth. Id. at 1131-33. (AP-1)

Also applying this standard, S.B. v. D.H. and H.H., 736 So. 2d 766 (Fla. 2d DCA 1999) is not conflictual, but compatible. In S.B., a putative father's claim was denied, even though he alleged that he had not known that the baby's mother was a married woman, and even though his name was placed on the child's birth certificate. What Petitioner Carnahan sees as conflict is an aspect of that case that moved the Fourth District Court's decision on rehearing, because ***Petitioner has***

failed to grasp the difference between a necessary condition and a sufficient condition.

In S.B., the Second District affirmed the dismissal with prejudice of a paternity action filed against D.H. and H.H., a married couple, recognizing that the "time-honored" presumption of legitimacy of F.S. §382.013(6)(a) was so strong that it "can defeat even the claim of a man proven beyond all doubt to be the biological father." The Second District stated:

> So long as the husband and wife are married and have no pending divorce proceeding, we will not authorize the trial court to conduct any qualitative evaluation of whether the marriage is "intact"...

In other words, prior to a court's even being able to make inquiry into possibly finding *de facto* that there is no marriage and defeating the presumption of marital paternity, there must be at least the *necessary* condition present that a divorce action be pending. Compared with the instant case, the facts of S.B. would seem to have been compelling in favor of the putative father, albeit there was no divorce pending.

By contrast, in the case at hand, a divorce action was pending at the time the paternity action was filed, but it was no longer being pursued and was dismissed shortly thereafter. Notably, the instant case otherwise lacks any of the compelling facts of S.B. that would seem to favor a putative father. The married Lohmans

were living together with their children during all relevant periods, and Carnahan was aware of this.

Carnahan reads S.B. as making a rule that if a divorce action is pending, *ipso facto*, a marriage is not "intact" and a marital interloper's paternity action can proceed. That is incorrect. The Fourth District in the instant case considered whether this was the holding of S.B., decided that it was not, and held, in essence, that while the pendency of a divorce action may be a *necessary* condition prior to permitting an inquiry into whether a marriage is intact, it is not in and of itself a *sufficient* condition to establish that a marriage is not intact. There has to be more: additional facts sufficiently compelling to warrant the extraordinary intrusion precedent to overcoming the marital presumption of paternity. In addition, because the Lohmans dismissed their divorce case, the necessary condition failed, and the trial court was divested of jurisdiction to make further inquiry into the “intactness” of the marriage. This is compatible with S.B., not in conflict with it .

CONCLUSION

The decision below reaffirms long standing precedent and constitutional guarantees aimed at the very heart of our society with regard to the importance of marriage, the sanctity of the marital family unit, the familial right to privacy, and the best interests not only of a child born within a marriage, but also those of other adult and child family members. There is no conflict with either Lander v. Smith, 906 So. 2d 1130 (Fla. 4th DCA 2005) or S.B. v. D.H. and H.H., 736 So. 2d 766 (Fla. 2d DCA 1999). Jurisdiction is not proper in this matter and this Court's discretionary jurisdiction should not be exercised.

CERTIFICATE OF SERVICE

_____**I HEREBY CERTIFY** that a true and correct copy of the foregoing instrument has been furnished by U.S. mail to Neil Jagolinzer, Esq., 1555 Palm Beach Lakes Blvd., Suite 101, West Palm Beach, FL 33401 on this 7th day of January, 2008.

CERTIFICATE OF COMPLIANCE

_____**I HEREBY CERTIFY** that this computer-generated document is typed in either Times New Roman 14 point font or Courier New 12 point font.

Respectfully submitted,

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