

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE**

**CHARITEY MACKENZIE and HEATHER MACKENZIE, individually and as next friends of their unborn child,** )  
**CRYSTAL DAWN MEARS and TERRA MEARS, individually and as next friends of their unborn child,** )  
**ELIZABETH BROADAWAY and HEATHER BROADAWAY, individually and as next friends of their unborn child,** )  
**KATHRINE GUTHRIE and EMILIE GUTHRIE, individually and as next friends of their unborn child,** )  
**Petitioners,** )  
 v. )  
**BILL HASLAM, GOVERNOR OF TENNESSEE, STATE OF TENNESSEE,** )  
**JOHN DREYZEHNER, MD, COMMISSIONER OF THE TENNESSEE DEPARTMENT OF HEALTH, and TENNESSEE DEPARTMENT OF HEALTH** )  
**Respondent** )

No.: 17-443-TL

FILED  
 2017 MAY -8 AM 8:53  
 CLERK OF COURT  
 DAVIDSON COUNTY  
 TENNESSEE

PETITION

Pursuant to the Tennessee Declaratory Judgment Act (Tennessee Code Annotated §§ 29-14-101 through 29-14-113), the Tennessee Vital Records Act of 1977 (Tennessee Code Annotated §§ 68-3-101 through 68-3-612), as well as Tennessee Code Annotated § 36-2-301 through 36-2-366 addressing parentage and legitimation, Tennessee Code Annotated §§ 36-2-301 through 36-2-322 addressing adoption, Tennessee Code Annotated § 1-3-104 addressing construing terms in statutes, and the newly enacted statute, Tennessee Code Annotated § 1-3-105(b), the Petitioners, hereby request that this Court enter an Order protecting their rights and the rights of the children whom they will soon bring into the world, by

recognizing that each spouse in the marriage which gave rise to the impending birth of a child is entitled to be recognized as the legal parent of that child. In support of this Petition, the Petitioners would show the Court as follows:

1. The Petitioners respectfully request that the Court bear in mind the crucial role of the parent-child relationship in our world, the relationship which the Petitioners seek to protect. The United States Supreme Court has recognized the significance of this relationship, stating that “[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.” Lehr v. Robertson, 463 U.S. 248, 256 (1983).

2. The Petitioners are all legally married couples who are residents and citizens of Tennessee and they are all expecting to bring a child into the world in the very near future, which births will occur in Tennessee.

a. Charitey Mackenzie and Heather Mackenzie were married on June 27, 2015 and the child with whom Charitey is pregnant is due on September 1, 2017.

b. Crystal Dawn Mears and Terra Mears were married on May 7, 2014 and the child with whom Crystal is pregnant is due on September 20, 2017.

c. Elizabeth Broadway and Heather Broadway were married on March 24, 2015 and the child with whom Elizabeth is pregnant is due on September 21, 2017.

d. Katherine Guthrie and Emilie Guthrie were married on September 16, 2011 and the child with whom Katherine is pregnant is due on November 3, 2017.

3. All the Petitioners conceived the children whom they will soon welcome into the world through conception with sperm which had been donated to them.

4. In Tennessee when an opposite-sex couple conceives a child through conception with sperm which had been donated to them, the husband in that relationship is automatically "deemed" to be the legitimate parent of the child, under Tennessee Code Annotated § 68-3-306, which provides that "[a] child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife." He does not have to take any further legal steps at all in order to fully protect his legal relationship with the child, even though he has no genetic relationship with the child. He is deemed, as a matter of law, to be the child's parent.

5. The Petitioners seek the same protection under the law that husbands conceiving with donated sperm are afforded by Tennessee statutes.

6. The State of Tennessee Department of Health is charged with following the laws of the State of Tennessee, including the Vital Records Act. In that role, the Department, Office of Vital Records, has to interpret Tennessee statutes in a manner so as to most fully accomplish their mission which is to collect, record, and store information "such as will aid the public health of the state." Tennessee Code Annotated § 68-3-201. The Department applies common law principles as well as rules encoded in statutes regarding statutory interpretation. One of these principles is that, Courts have a duty to construe a statute in a way that will sustain it and avoid constitutional conflict, if such a reasonable construction

exists. Davis-Kidd Booksellers, Inc., v. McWherter, 866 S.W.3d 520, 530 (Tenn. 1993). Another common law principle of statutory construction is actually codified into law in Tennessee Code Annotated § 1-3-104(b) which says that "[w]ords importing the masculine gender include the feminine and neuter, except when the contrary intention is manifest."

7. Since the United States Supreme Court issued the Court's opinion on marriage equality in the Obergefell v. Hodges, 576 U.S. \_\_\_\_ (2015) decision, the Department has interpreted Tennessee Code Annotated § 68-3-306 to apply to same-sex, married women who are bringing a baby into the world, just as it applies to people in opposite-sex marriages. When a married woman gives birth to a baby conceived with donated sperm, since Obergefell, her wife has been recognized as the baby's other parent by the Department, applying § 68-3-306 gender-neutrally. When these babies have been born, the Tennessee hospital staff has prepared birth certificates for them with both mothers' names on them and the Department has accepted these birth certificates as properly prepared. The Department has even gone so far as to interlineate the word "Father" on these babies birth certificates and type in "Mother."

8. In the 2017 legislative session our General Assembly enacted a change to Tennessee Code Annotated § 1-3-105 to add a subsection designated as (b) which provides that: "As used in this code, undefined words shall be given their natural and ordinary meaning, without forced or subtle construction that would limit or extend the meaning of the language, except when a contrary intention is clearly manifest." A review of the legislative history as revealed in the recorded comments made on the floor of the Senate indicates that the legislative intent of this bill was to limit access to Tennessee's statutory protection for children and families to opposite-sex couples and the children they conceive, excluding the children of same-sex couples from that protection, by passing a law which purports to control how statutes are to be construed. This quest of certain legislators to separate the right to marry from all the

benefits of marriage has resulted in the enactment of the law which stands to cause substantial harm to Petitioners.

9. Regardless of the actions of the Tennessee General Assembly, the right to be recognized as the parent of a child of one's marriage is a right which deserves Constitutional protection. The United States Supreme Court spoke on the issue of allowing the democratic process to work out issues, when those issues affect the rights of individuals who are at risk of suffering present day harm. In Obergefell v. Hodges 576 U.S. \_\_\_, 24 (2015), the Court said:

The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid*.

10. Given the comments made by members of the Tennessee House of Representatives and by Tennessee Senators, the Petitioners have a sincere, reasonable, and well-founded fear that the Governor, the Commissioner, and the Department of Health will apply § 1-3-105(b) to interpret statutes with gender-specific terms in such a way as to deny the Petitioners the protection of these statutes. The Petitioners seek the Court's protection from such interpretations. In particular, without limiting the relief sought, the Petitioners seek an Order from this Court which interprets § 68-3-306 to mean that the spouse (not just husband) of any married woman who gives birth in Tennessee is the legal parent of the child to whom she gives birth.

11. The Petitioners seek this Order prior to the births of their children so that, in the event that this Court finds that § 68-3-306 is not applicable to them, they can attempt to make arrangements to

deliver their children in States in which their fundamental rights will be respected and in which they will both be recognized as the parents of the children to whom they give life.

12. The Petitioners also seek this Court's Order because of their fear of the possible consequences of their children being born in Tennessee without full recognition of the legal parent-child relationships the children have with both their parents. To protect their children from these possible consequences, the Petitioners need this Court's ruling prior to the birth of their babies. These consequences include, but are not limited to, the following:

a. The children may be denied health insurance coverage if the parent whose employment provides the coverage for the family is not recognized as a legal parent.

b. If the child is born and requires the extra assistance of the Neonatal Intensive Care Unit, only the legally recognized parent may be allowed to be with the child and provide care to him or her.

c. The child will not be entitled to Social Security if one of their parents dies and the deceased parent had not been recognized as the child's legal parent.

d. If the mother who is carrying the baby dies, the surviving spouse is, legally, a stranger to the child and can not take custody without Court proceedings.

e. If the mother who is carrying the baby is unable to make decisions for the baby (because of death or because of incapacity) her spouse will not be recognized as having any right to make decisions for the child.

f. If the mother who is carrying the baby dies, the deceased mother's family members may be deemed to have a greater right to custody of the child than the wife of the deceased mother does, so the child could, ultimately, lose both his or her mothers.

g. If the parents' marriage dissolves, the children can be deprived of their emotional connection with and financial support from one of their parents unless both of them are recognized as legal parents, each of whom is entitled to advocate for the parent-child relationship in the divorce proceedings and each of whom has obligations to the child.

h. If the family travels to another country or even another State, such as Arkansas, they can not be assured that the laws there will protect their family unless they are both legally recognized as parents in Tennessee.

13. It is a denial of the principles of equal protection in the United States Constitution and the Tennessee constitution to treat children conceived with donated sperm by opposite-sex married couples differently than children conceived with donated sperm by same-sex married couples.

a. Interpreting a statute to deny a married woman the right to be deemed the parent of a child to whom her wife gives birth while interpreting the same statute to deem a husband in the same

circumstances to be the parent of a child to whom his wife gives birth is an impermissible gender-based denial of the equal protection of the law.

b. Denying a same-sex couple (who conceived with donated sperm) the right to both be deemed the parents of a child to whom one of the spouses gives birth while granting the right to an opposite-sex couple (who conceived with donated sperm) is an impermissible denial of equal protection of the law based on sexual orientation. The Obergefell Court recognized that such differential treatment based on sexual orientation is an impermissible denial of equal protection when it declared unconstitutional statutes under which "same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." Obergefell v. Hodges, 576 U.S. \_\_\_, 22 (2015)

14. It is a violation of the principles of substantive due process in the United States Constitution and the Tennessee Constitution for the Governor, the State of Tennessee, and the Department of Health to infringe upon the Petitioners' fundamental rights and liberty interests in familial, marital, procreational, and parental freedom without showing an adequate State interest justifying this infringement.

15. The United States Supreme Court addressed the right to marry by citing cases which already recognize the fundamental liberty interests which are inherent in procreation, child-rearing, and familial life. If marrying your beloved and raising your child is a fundamental right worthy of Constitutional protection, surely being recognized as your child's parent is an equally significant right. In Obergefell v. Hodges, 576 U.S. \_\_\_, 13 (2015) the Court said:



A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also *Zablocki, supra*, at 384 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence, supra*, at 574. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki, supra*, at 386.

16. The *Obergefell* Court also cited long-standing precedent on liberty interests which are protected by principles of due process as follows:

"[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty interest protected by the Due Process Clause." *Zablocki*, 434 U.S. at 384 (quoting *Meyer, supra*, at 339)  
*Obergefell v. Hodges*, 576 U.S. \_\_\_, 13 (2015)

17. It is a violation of the principles of procedural due process in the United States Constitution and the Tennessee Constitution for the State of Tennessee Department of Health to deprive the Petitioners of their fundamental rights and liberty interests in familial, marital, procreational, and parental relations without providing them with a meaningful and adequate procedure by which to seek to protect those rights.

a. The only way the Petitioners who are not giving birth have to seek to protect their relationships with their children is through adoption.

b. The adoption process is not an adequate process to meet the requirements of procedural due process because:

i. Adoptions are granted only when found to be in the child's "best interest." No other class of parents has to prove that it is in their children's best interest for their parent-child relationship to be recognized. (See Nale v. Robertson, 871 S.W.2d 674 (1994) (a "best interests" finding was insufficient grounds for termination of a birth parent's rights in favor of adoption by unrelated adoptive parents). Same-sex parents who bring children into the world with their spouse should not have to prove to a Judge that it is in the best interests of the child to be legally recognized as the child of both those parents.

ii. The standard of review of a best interests decision is whether the Judge abused his or her discretion. The standard of review is a very high standard. Thus, if a Tennessee Judge decided to deny adoptions for same-sex couples (as a Kentucky Judge recently did), the Petitioners would have an arduous path seeking a reversal of that decision. They should not have to pursue this path in order to protect their fundamental rights to procreational and familial freedom.

iii. Adoptions by spouses of legal parents are subject to the same safeguards as other adoptions, the only difference being that the Judge can, in his or her discretion, waive some of the requirements, such as the costly and time-consuming home study and the six month waiting period. Judges do not have to waive these requirements and, in fact, some Judges make it a standard practice in their courts to never waive these requirements. With adoption as the only way to protect their relationships with their children, the Petitioners who are not giving birth will face costly and time-consuming Court proceedings.

iv. Pursuing the only procedure afforded the Petitioners to protect themselves and their children, adoption, takes so long and poses such financial burdens on couples as to bar many from having meaningful access to this procedure. When the State only affords its citizens a procedure to address a potential deprivation of liberty which is so burdensome to access as to be inaccessible, the State has not complied with the Constitutional requirements regarding procedural due process.

18. Finally, this Court should apply the common law principle of statutory construction which our Courts have espoused many times that, when there is a conflict between a general statute and a specific statute, the specific statute will control. "As a matter of statutory construction, a specific statutory provision will control over a more general statutory provision." Opinion of Tennessee Attorney General and Report, regarding Statutory Construction Language, Opinion Number 17-29, April 13, 2017 (citing In re Harris, 849 S.W.2d 334, 337 (Tenn. 1993), Washington v. Robertson County, 29 S.W.3d 466, 475 (Tenn. 2000) (holding that, as a matter of statutory construction, a specific statutory provision, such as the definition of "person" under Tenn. Code Ann. § 4-21- 102(14), will control over a more general statutory provision). Rent-N-Roll v. Highway 64 Car & Truck Sales, 359 S.W.3d 183, 188, (Tenn. Ct. App. 2010) (since it is "a well settled rule of statutory interpretation that the specific controls the general," court "cannot disregard the specific language of Tenn. Code Ann. § 47-2A-310, which deals directly with the issues at hand, on the basis of the exceedingly general language in Tenn. Code Ann. § 47-2A-104(1)(a)"). As the Attorney General opined, the newly enacted statute, §1-3-105(b), is exceedingly general while the long-standing statute § 1-3-104 is quite specific. Therefore, the specific statute which requires that "[w]ords importing the masculine gender include the feminine and neuter," § 1-3-104, controls over the statute which requires that "undefined words to be given their natural and ordinary meaning," §1-3-105(b). This Court should interpret § 68-3-306 to mean that the spouse (not

necessarily a husband) of a woman who gives birth after conception with donated sperm is the other legal parent of that child.

WHEREFORE, based upon the foregoing, the Petitioners, request that this Court enter an Order, finding that:

1. Consistent with the United State's Supreme Court rulings including Obergefell v. Hodges, 576 U.S. \_\_\_, 13 (2015), Lehr v. Robertson, 463 U.S. 248, 256 (1983), and Zablocki v. Redhail, 434 U.S. 374 (1978), the Petitioners all have a fundamental interest in their parental relationship with the babies whom they will soon welcome into the world soon, and that the State of Tennessee can show no legitimate State interest sufficient to justify the deprivation of that liberty interest.

2. A statutory scheme which deems a man to be the legal parent of the child to whom his wife gives birth after conception with donated sperm but does not allow a woman the same right when her wife gives birth after conception with donated sperm is an impermissible, gender-based denial of equal protection.

3. A statutory scheme which allows a child from an opposite-sex marriage to automatically have two legal parents but denies that right to a child from a same-sex marriage is an impermissible denial of equal protection based upon the State drawing a distinction between classes of parents based on sexual orientation.

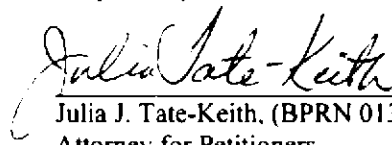
4. Giving the Petitioners the option to adopt the children they are bringing into the world with their wives is an inadequate remedy to the deprivation of liberty interests posed by the State's statutory scheme and, therefore, is a violation of principles of procedural due process.

5. Common law and statutory rules of statutory construction require that Tennessee Code Annotated § 68-3-306 be read in a gender-neutral manner so that spouses (not only husbands) of women giving birth after conception with donated sperm, are the legal, legitimate parents of the children.

FURTHER, Petitioners, pray that due to the impending birth of the children in this case, the Court enter a scheduling Order which will allow for a hearing of this case prior to the date on which the first of these babies is due to be born. The Petitioners request this relief so that, if the Court rules against the Petitioners, they can make arrangements to give birth in a State where their full participation in this democracy as citizens of the United States and their entitlement to due process and equal protection of the laws is respected.

FURTHER, the Petitioners request such other, further, and general relief to which the Court may find them entitled.

Respectfully Submitted,

  
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