IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-CA-01504-SCT

CHRISTINA STRICKLAND

v.

KIMBERLY JAYROE STRICKLAND DAY

DATE OF JUDGMENT:	10/17/2016
TRIAL JUDGE:	HON. JOHN S. GRANT, III
TRIAL COURT ATTORNEYS:	PRENTISS M. GRANT DIANNE HERMAN ELLIS
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	DIANNE HERMAN ELLIS ELIZABETH LYNN LITTRELL
ATTORNEY FOR APPELLEE:	PRENTISS M. GRANT
NATURE OF THE CASE:	CIVIL - CUSTODY
DISPOSITION:	REVERSED, RENDERED IN PART, AND REMANDED IN PART - 04/05/2018
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ISHEE, JUSTICE, FOR THE COURT:

¶1. Christina Strickland and Kimberly Day were a same-sex couple legally married in Massachusetts in 2009—a marriage that later was recognized legally in Mississippi. At the time of their marriage, the couple resided in Mississippi. A year later, the newlywed couple sought to bring a child into their family through the use of artificial insemination (AI) of sperm from an anonymous donor. Kimberly served as the gestational mother and eventually

gave birth to Z.S.[1] in 2011. Z.S. was born in Mississippi.

¶2. The couple separated in 2013. And eventually, in October 2016, the Rankin County Chancery Court entered a final judgment of divorce. In the judgment, the chancery court found, among other things, that Christina acted *in loco parentis* to Z.S., but that Christina was not Z.S.'s legal parent. Central to the chancery court's decision was the finding that the anonymous sperm donor had parental rights that must be terminated and thus precluded Christina from being Z.S.'s legal parent. Christina appeals to this Court.

¶3. This case presents an issue of first impression. We never before have addressed what rights, if any, an anonymous sperm donor has in a child conceived of his sperm. Accordingly, we must determine whether the chancery court erred in finding that the rights of the anonymous sperm donor precluded a finding that Christina was Z.S.'s legal parent. After review of the record and the relevant law, we find that the chancery court erred in this finding. First, an anonymous sperm donor is not a legal parent whose rights must be terminated. And second, the doctrine of equitable estoppel precludes Kimberly from challenging Christina's legal parentage of Z.S. And so we reverse the findings of the chancery court and remand the case for a custody determination in a manner that is consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶4. Christina and Kimberly first began a romantic relationship in 1999. Later, while still unmarried, the couple decided to adopt a child. After going through the adoption process,

[1] Because Z.S. was a minor at the time, initials will be used to protect his anonymity.

the couple adopted a child named E.J.,[2] finalized in 2007. Kimberly alone served as the adoptive parent because Mississippi law precluded same-sex couples from adopting jointly. In 2009, Kimberly and Christina were married in Massachusetts. Kimberly took Christina's last name.

¶5. In 2010, the newlywed couple decided to add to their family through the use of assisted reproductive technology[3] (ART)—specifically, AI of sperm from an anonymous donor. Both Kimberly and Christina considered, and were evaluated to determine, which one of them should carry the child. And after testing and consultation with a fertility clinic, the couple decided that Kimberly would serve as the gestational mother, and that they first would attempt in vitro fertilization[4] (IVF) with Kimberly's ova.

¶6. They searched for sperm, eventually choosing sperm from a Maryland sperm bank. The name of the anonymous donor is unknown and he was identified only as a number—"Donor No. 2687." Kimberly signed an acknowledgment agreeing that she would "never seek to identify the donor." The acknowledgment further stipulated that the donor never would be advised of Kimberly's identity. In the clinic paperwork, Kimberly was recognized as a married woman, and Christina was identified as her spouse. Both women

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[2] Because E.J. was a minor at the time, initials will be used to protect his anonymity.

[3] ART refers to various practices and procedures beyond AI, including in vitro fertilization, intracytoplasmic sperm injection, egg donation, and surrogacy, which provide individuals the opportunity to conceive children other than through sexual intercourse.

[4] IVF refers to a method of fertilizing a human ovum outside of the body. K. Anderson, L. Anderson, and W. Glanze, *IVF*, Mosby's Medical, Nursing, & Allied Health Dictionary 842 (4th ed. 1994).

signed an acknowledgment stating that they were:

> voluntarily undergoing, individually and as a couple, treatment . . . in order to conceive a child through this treatment and that [they] acknowledged [their] natural parentage of any child born to [them] through this technique.

Christina testified that she was involved in and supportive through every step of the conception and pregnancy.

¶7. As for the birth of Z.S., Christina testified that the couple planned on traveling to Massachusetts to have the child, so that both she and Kimberly could be listed as parents on the birth certificate. But on April 12, 2011, six weeks before her due date, Kimberly gave birth to Z.S. via a cesarean section in a Mississippi hospital. The reason Z.S. was born in Mississippi, and not in Massachusetts, is disputed. Kimberly claimed it was because she did not want Christina on the birth certificate,[5] while on the other hand, Christina claimed it was due to the unforseen, emergency cesarean section. Nevertheless, because Z.S. was born in Mississippi, Kimberly's name was the only name placed on his birth certificate.

¶8. As it relates to child rearing, Christina testified that, as a family unit, Kimberly and she raised their two children as coparents. And during the first year of Z.S.'s life, Christina stayed home with him while Kimberly worked full time. Christina further testified that the children—both Z.S. and E.J.—share a close child-parent bond with her, and they call her "Mom."

¶9. In January 2013, Christina and Kimberly separated. Following the separation, Christina continued to visit both children. She also paid child support, medical, and daycare

[5] Mississippi law at the time precluded both members of a same-sex couple from being listed on a birth certificate. *See* Miss. Code Ann. § 41-57-14 (Rev. 2013).

expenses for Z.S.

¶10. On August 13, 2015, while still married to Christina, Kimberly married a second spouse. Christina then filed for divorce in the Harrison County Chancery Court on August 31, 2015. On November 16, 2015, Kimberly filed a motion for declaratory judgment and complaint for divorce in the Rankin County Circuit Court. In that motion, Kimberly sought a declaration that her second marriage was valid and that her first marriage was dissolved. Christina then filed her answer and counterclaim for divorce in which she sought legal and physical custody of the children, and to be named a parent of Z.S. The Harrison County and Rankin County cases were consolidated in Rankin County. And on May 17, 2016, an order was entered declaring Christina's and Kimberly's marriage valid, and Kimberly's remarriage void.

¶11. On September 27, 2016, Kimberly and Christina filed a consent and stipulation agreeing that Z.S. was born during their marriage, that they jointly would pay all school expenses for Z.S., and that Kimberly would retain physical and legal custody of E.J. Kimberly and Christina agreed to allow the chancery court to decide custody, visitation, and child support as to Z.S., child support and visitation of E.J., and Christina's parentage of Z.S.

¶12. A hearing was held on September 27, 2016, and a final judgment of divorce was entered on October 18, 2016. In the final judgment, the chancery court made various findings. Relevant to this appeal, the chancery court ordered Christina to pay child support for both children, and held that Z.S. was born during a valid marriage. But the chancery court held that Z.S. was "a child born during the marriage, not of the marriage," and so both

parties were not considered parents. The chancery court found that the anonymous sperm donor constituted "an absent father," and even though the donor might never be identified, the donor's legal parentage precluded a determination that Christina was Z.S.'s legal parent. The chancery court concluded that Christina had acted *in loco parentis*[6] to Z.S. and awarded her visitation rights.

¶13. On October 21, 2016, three days after entry of the final judgment, Christina filed her timely notice of appeal.

STANDARD OF REVIEW

¶14. A chancellor's findings will not be disturbed on review unless he abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. ***Bank of Mississippi v. Hollingsworth***, 609 So. 2d 422, 424 (Miss. 1992). A chancellor's conclusions of law are reviewed de novo. ***Consolidated Pipe & Supply Co. v. Colter***, 753 So. 2d 958, 961 (Miss. 1999). Because the issues here raise questions of whether a chancellor correctly applied the law, we review this case de novo.

DISCUSSION

I. Parental Rights and Anonymous Sperm Donors

¶15. The chancery court's decision, finding Christina not the legal parent of Z.S., turned largely on its determination that the sperm donor was the "natural father," whose parental

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[6] "[A] person acting *in loco parentis* [is] one who has assumed the status and obligations of a parent without a formal adoption." ***Logan v. Logan***, 730 So. 2d 1124, 1126 (Miss. 1998). A person acting *in loco parentis* has a right to custody of a child, but only against third persons. ***Farve v. Medders***, 128 So. 2d 877, 879 (Miss. 1961). The custody rights of a person holding this status are inferior to the custody rights of the natural parent. ***Davis v. Vaughn***, 126 So. 3d 33, 37 (Miss. 2013).

rights were subject to termination. On appeal, Christina argues that this finding is not supported by the evidence and is an erroneous conclusion of law. We agree.

¶16. At the outset, we are cognizant of the fact that we never before have determined what parental rights, if any, anonymous sperm donors possess in the children conceived through the use of their sperm. As such, this is an issue of first impression.

¶17. In searching our state's existing law, the only law that even addresses AI is the disestablishment-of-paternity statute—Mississippi Code Section 93-9-10(2)(d) (Rev. 2013). And while Section 93-9-10(2)(d) does not address anonymous sperm donors' parental rights directly, we find it useful as it illustrates the Legislature's intent on such rights. Indeed, under Section 93-9-10(2)(d), a father cannot seek to disestablish paternity when the child was conceived by AI during the marriage to the child's mother. Reading this provision, in light of the context before us, the logical conclusion—while not explicit—is that the Legislature never intended for an anonymous sperm donor to have parental rights in a child conceived from his sperm—irrespective of the sex of the married couple that utilized his sperm to have that child.

¶18. How, on one hand, can the law contemplate that a donor is a legal parent who must have his rights terminated, while at the same time prohibiting the nonbiological father of a child conceived through AI from disestablishing paternity? These two policies cannot co-exist. And for one to make such a logical leap effectively would say that the child has three legal parents: the mother who birthed the child, the natural father who donated his sperm, and the person who was married to the child's mother (and is statutorily prohibited from

disestablishing paternity). Three parents—that cannot be what the Legislature intended. Indeed, even the chancery court here said that cannot be possible.

¶19. In making its determination, the chancery court seemed to place great weight on the biological connection between the anonymous sperm donor and Z.S. Yet the Supreme Court of the United States has held that "[p]arental rights do not spring full-blown from the biological connection between the parent and child. *They require relationships more enduring*." ***Lehr v. Robertson***, 463 U.S. 248, 260, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) (quoting ***Cuban v. Mohammed***, 441 U.S. 360, 397, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) (Stewart, J., dissenting)) (emphasis added). In a similar vein, we too have held that a biological connection alone is not enough to establish parentage. *See* ***Griffith v. Pell***, 881 So. 2d 184, 186 (Miss. 2004) (finding that a biological father does not have any paternity rights where "he fails to establish that he has had a substantial relationship with the child").

¶20. As a broader policy consideration, we find that requiring parents of a child conceived through the use of AI to terminate parental rights of the donor would not be in the best interest of the child—to say nothing of the expense and time it would require. When children are involved, we consistently have held that "the polestar consideration . . . is the best interest and welfare of the child." ***Albright v. Albright***, 437 So. 2d 1003, 1005 (Miss. 1983).

¶21. The consequences of assigning rights to donors, who do not engage in an act of procreation but provide biological material with no intention to act as a parent, would disrupt the familial relationships and expectations of Mississippians who have conceived children through the use of AI. For one, it would elevate the rights of a donor—who is a complete

stranger to the child, and likely never will be identified—over the rights of a person who has known and cared for the child. Make no mistake—affirmance here arguably would impose parentage, and all its responsibilities, on anonymous sperm donors who contribute sperm to assist families in achieving pregnancy—perhaps creating a chilling effect on sperm donation. Furthermore, it effectively would leave many children conceived through this method with *one* legal parent. And in the tragic situation in which a mother dies during childbirth or before a proper termination proceeding—it would leave the child an orphan. Such a notion is untenable and certainly contrary to the public policy of this state.

¶22. On appeal, Kimberly's position is that all of the nonbiological parents of children conceived through AI should be required to terminate the sperm donor's parental rights and then establish parentage through the adoption process. We disagree. As a practical matter, the process of requiring one under these circumstances to adopt her own child (one which she intentionally agreed to bring into the family) would be intrusive, time-consuming, and expensive. In fact, it would require: parents who use AI with anonymous sperm donation to file a petition and wait thirty days to seek a hearing; a guardian ad litem to be appointed by the court at the parents' expense; and a hearing to be held to determine whether an unknowable sperm donor has abandoned the child. *See* Miss. Code Ann. § 93-15-107 (Rev. 2013).

¶23. One of the rationales behind termination statutes no doubt is to safeguard the rights of any potential parent-child relationship. Indeed, this Court has held that "[p]arents have a liberty interest, more precious than any property interest, in the care, custody, and

management of their children and families." ***G.Q.A. v. Harrison Cty. Dep't Of Human Res.***, 771 So. 2d 331, 335 (Miss. 2000) (citing ***Santosky v. Kramer***, 455 U.S. at 753–54, 758–59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). The seriousness of the action is reflected in the fact that termination of such rights requires clear and convincing evidence of the statutory grounds for termination. ***Chism v. Bright***, 152 So. 3d 318, 322 (Miss. 2014) (citing ***Kramer***, 455 U.S. at 754).

¶24. But with anonymous sperm donors there is no reason to protect the donor, as the donor has no intention or desire to act as a father. In reaching its conclusion in this case, the chancery court found that the donor was merely an "absent father," but in reality, the donor is a nonexistent father. For the child could never find the donor, much less have a meaningful relationship with him. It is one thing for a child to cling to the hope of a possibility of discovering and eventually building a relationship with an absent father; it is quite another thing for a child to know that he has a natural father that he has no possibility of ever discovering, let alone having a relationship with. That is, short of perhaps a court order mandating the disclosure of the donor's identity, it is arguably factually and legally impossible for the child ever to obtain the identity of the donor.

¶25. The impracticality and futility of applying the termination statute in this context is clear. Under Section 93-15-107, the natural father is a necessary party to such termination action, but here, or with any anonymous donor, whose identification cannot be known, compliance with the statute arguably is impossible. One cannot serve a party with no information to act upon and which likely never can be acquired.

¶26. To that end, Kimberly argues that Christina, and nonbiological parents alike, can effectuate this service though publication. To be sure, the text of the statute does allow for publication of service of a "necessary party whose *address* is unknown after diligent search[.]" Miss. Code Ann. § 93-15-107(1)(b) (Rev. 2013) (emphasis added.) Publication in this instance is for a party whose address is unknown, not a party whose *identity* is unknown. (Emphasis added). What is more, how can it be evaluated whether there was a diligent search for the party, if the party is unknown? The chancery court itself conceded that it is unlikely that the donor ever could be hailed before the court. The chancery court also conceded that this donor's identification likely would never be known. And with an absence of identification, publication practically cannot be effectuated in every case in which a couple utilizes AI to bring a child into the family. Indeed, publication under the statute presupposes that, while one may not know the exact location of the party, one at least knows, at a minimum, the identity of the party. This is not to say that, under these circumstances, service by publication could not be accomplished; it is, however, to say that, as a matter of public policy, we find it unwise to demand that it must be accomplished.

¶27. And so, we ask, would it not be futile for the chancery court to require parties to comply with a statute the chancery court itself admits cannot be satisfied due to reasons beyond the control of the parties? Though this exact question is not before us here, we find it demonstrative of the impracticability and futility of requiring compliance with Section 93-15-107(1)(b) in this context.

¶28. Aside from our determination that anonymous sperm donors, in general, do not

possess parental rights in the children conceived through the use of their sperm, we also find that there is no other vehicle which allows us to conclude that the anonymous sperm donor here is Z.S.'s parent. The donor was not married to the mother at the time of Z.S.'s conception or birth, he has not executed a voluntary acknowledgment of paternity, and he has not been adjudicated to be the child's "natural" father under state law. Miss. Code Ann. § 93-9-28 (Rev. 2013).

¶29. In sum, we find that the chancery court erred in finding that an anonymous sperm donor was Z.S.'s parent whose parental rights had to be terminated. Indeed, we find that there is no legal or policy basis to find that an anonymous sperm donor is a parent in this specific context.

II. Equitable Estoppel

¶30. Christina argues that the chancery court erred in failing to apply equitable estoppel as a bar to Kimberly's argument that Christina was not Z.S.'s legal parent. At the very core of the doctrine of equitable estoppel are "fundamental notions of justice and fair dealings." ***PMZ Oil Co. v. Lucroy***, 449 So. 2d 201, 206 (Miss. 1984). The doctrine applies when "there is a (1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." ***B.C. Rogers Poultry Inc. v. Wedgeworth***, 911 So. 2d 483, 492 (Miss. 2005). Indeed, we previously have defined equitable estoppel "as the principle *by which a party is precluded from denying any material fact*, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or

contrary assertion was allowed." ***Koval v. Koval***, 576 So. 2d 134, 137 (Miss. 1991) (emphasis added).

¶31. Reviewing the record before us, we find that the elements of estoppel are met here. First, the evidence in the record shows that Kimberly made numerous representations that Christina was an equal coparent to Z.S. Indeed, Kimberly, along with Christina, signed an agreement at the clinic acknowledging the couple's joint intention to undergo the AI procedure. Additionally, after the birth of Z.S., the couple sent out birth announcements that read: "Hatched by Two Chicks. Chris[tina] and Kimberly proudly announce the birth of their son." And the record is replete with evidence of Christina's belief and reliance on this representation.

¶32. Second, as a result of her belief of and reliance on Kimberly's representation, Christina clearly changed her position. For example, Christina signed an acknowledgment to undergo the AI treatment with Kimberly as "a couple," served as Z.S.'s primary caretaker for at least the first year of the child's life, and gave Z.S. her last name—Strickland. And lastly, the record shows that Christina suffered detriment which was caused by the change of position. That is, by changing her position in reliance on her belief that she would be an equal coparent, Christina took on all the responsibilities and rewards that accompany parenthood. To now deprive Christina of these responsibilities and rewards, and diminish her parent-child relationship with Z.S., is certainly a detriment to Christina, to say nothing of the detriment to Z.S. himself.

¶33. At the hearing, Kimberly argued that the fact that she was married to Christina at the

time was not material to her decision to have Z.S.; she was planning on having a child of her own regardless of her marital circumstances. But the evidence in the record belies this assertion. For one, Kimberly allowed Christina to take part in the process of conceiving Z.S.—even signing an acknowledgment at the clinic together. In fact, in the clinic paperwork, Kimberly was recognized as a married woman, and Christina was specifically identified as her spouse. What is more, Kimberly admitted in her testimony that the couple had discussed the possibility of Christina, and not Kimberly, carrying and having the baby. This further evidences the couple's plan to undertake the role of parenthood together, as it undercuts Kimberly's assertion that her primary reason for having Z.S. was to fulfill a lifelong desire to have a child biologically her own. It also is particularly telling that Kimberly and Christina sent out birth announcements which held out Z.S. as their own. Simply put, it is strong evidence of Kimberly's position regarding Christina's coparent status. This announcement, by its own terms, represented to those receiving it that both Kimberly and Christina were Z.S.'s parents.

¶34. All this in the record shows that Kimberly's original representation was that Christina was Z.S.'s equal coparent, and that Christina relied on this representation in changing her position. To now allow Kimberly to challenge Christina's parentage of Z.S. undoubtedly will cause injury to Christina and the child. The gravity of the injury is particularly clear in this case, as Christina has had to confront the possibility that Kimberly will allow another adult to adopt Z.S. And Christina, with an inferior *in loco parentis* status, could do nothing to prevent it. At bottom, to deny Christina the relationship she has built with Z.S. would be a

miscarriage of justice. And so, we find that Kimberly is estopped from challenging Christina's parental rights as to Z.S., as this position is wholly inconsistent with her earlier position, which held Christina out to be the parent of Z.S.

CONCLUSION

¶35. In this case of first impression, we hold that under Mississippi law, an anonymous sperm donor does not possess any parental rights in a child conceived through the use of his sperm. And to that end, the chancery court erred in finding that the anonymous sperm donor here was Z.S.'s parent, whose rights were subject to termination.

¶36. As for Christina's parental rights, we hold that the doctrine of equitable estoppel precluded Kimberly from challenging Christina's parentage of Z.S.—where there was ample evidence the then-married couple jointly and intentionally agreed to have Z.S. through the use of AI. In reaching this holding, we reverse the chancery court's finding that Christina acted *in loco parentis*, but was not an equal parent with parental rights as to Z.S. And so we remand the case to the Rankin County Chancery Court with instructions to determine custody as to Z.S. in accord with the multifactor test articulated in ***Albright***, 437 So. 2d at 1005. The ***Albright*** analysis shall be on the record, and with a guardian ad litem representing Z.S. through the course of the proceedings. *See generally* ***Albright***, 437 So. 2d at 1005.

¶37. **REVERSED, RENDERED IN PART, AND REMANDED IN PART.**

KITCHENS, P.J., KING AND BEAM, JJ., CONCUR. WALLER, C.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED IN PART BY RANDOLPH, P.J., COLEMAN, MAXWELL AND CHAMBERLIN, JJ. COLEMAN, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CHAMBERLIN, J.; RANDOLPH, P.J., AND MAXWELL, J., JOIN IN PART. MAXWELL, J., CONCURS

IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH , P.J., AND COLEMAN, J.; CHAMBERLIN, J., JOINS IN PART. RANDOLPH, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED IN PART BY COLEMAN, MAXWELL AND CHAMBERLIN, JJ.

WALLER, CHIEF JUSTICE, CONCURRING IN PART AND IN RESULT:

¶38. The narrow issue before the Court is whether two people legally married who jointly engage in a process of assisted reproduction technology resulting in the natural birth by the gestational mother are both considered parents for purposes of divorce and determination of parental rights of the minor child. I conclude that they are and that the decision of the chancellor should be reversed and remanded.

¶39. This decision is based on the legal status of the parties at the time of birth and on the basis of equitable estoppel. The conception and birth was a process both parties agreed to and relied upon. ***Simmons Hous., Inc. v. Shelton ex rel. Shelton***, 36 So. 3d 1283, 1287 (¶15) (Miss. 2010) (Equitable estoppel "is defined generally as 'the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.'"). *See also* ***Koval v. Koval***, 576 So. 2d 134, 137 (Miss. 1991) ("The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon.").

¶40. While this Court can use common-law principles to render a decision here,[7] the Legislature should speak directly to the recognition of the legal status of children born during a marriage as the result of assisted reproductive technology. ***Miss. Baptist Hosp. v. Holmes***, 214 Miss. 906, 931, 55 So. 2d 142, 152 (1951) ("[T]he function of creating a public policy is primarily one to be exercised by the Legislature and not by the courts."). The Legislature has spoken that a spouse cannot "disestablish" paternity of a child born by this process. Miss. Code Ann. § 93-9-10(2)(d) (Rev. 2013). Today's decision is the only logical extension of that code section, but the Legislature should nonetheless further address these developments in the law.

¶41. For the preceding reasons, I respectfully concur only in part and in the result.

RANDOLPH, P.J., COLEMAN, MAXWELL AND CHAMBERLIN, JJ., JOIN THIS OPINION IN PART.

COLEMAN, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶42. All justices agree that, at least in the instant case, the trial judge erred in finding that the parental rights of the anonymous sperm donor must be terminated before the legal status of Christina Day could be adjudicated. However, I agree with Presiding Justice Randolph that we should not be rendering a decision based on an issue never presented to the trial

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[7]*See* ***Funk v. United States***, 290 U.S. 371, 383, 54 S. Ct. 212, 216, 78 L. Ed. 369 (1933) (noting the power of the "courts, in the complete absence of . . . legislation on the subject, to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions[.]"); ***State v. Edward Hines Lumber Co.***, 150 Miss. 1, 115 So. 598, 605 (1928) ([T]he public policy of the state must be found in its constitution and statutes, 'and when they have not directly spoken, then in the decisions of the courts . . . .'").

court, *e.g.*, the application of equitable estoppel. Accordingly, I would reverse the chancellor's order, hold that he erred in finding that the anonymous sperm donor enjoyed parental rights, and remand the case to the trial court to allow the parties to present whatever evidence and arguments they wish that accord with the Court's holding.

CHAMBERLIN, J., JOINS THIS OPINION. RANDOLPH, P.J., AND MAXWELL, J., JOIN THIS OPINION IN PART.

MAXWELL, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶43. I agree with the plurality that the chancellor wrongly declared the sperm donor the natural father. He was neither a party to the proceeding nor asserted any claim to the child. So it was error to grant him parental rights. I also agree with Presiding Justice Randolph and Justice Coleman that it is improper to decide this case based on equitable estoppel—an argument not presented to the chancellor. Restraint is particularly called for here, because the facts the plurality and Chief Justice Waller rely on to find equitable estoppel are hotly contested on appeal. The proper course is to remand to the chancellor for factual findings, keeping in mind the polestar consideration of all custody matters—the best interest of the child.

¶44. I do, however, agree with Chief Justice Waller on one point—what parental rights a sperm donor may or may not have is a policy issue for the Legislature, not the Court. And since the Legislature admittedly has never spoken on this issue, we should be extremely hesitant to draw conclusions about the disestablishment-of-paternity statute, when that statute is wholly inapplicable here. Indeed, it is dangerous for the plurality to weigh in so heavily

with what it views to be the best policy, since we all agree the chancellor erroneously inserted this issue into the case.

RANDOLPH, P.J., AND COLEMAN, J., JOIN THIS OPINION. CHAMBERLIN, J., JOINS THIS OPINION IN PART.

RANDOLPH, PRESIDING JUSTICE, DISSENTING:

¶45. Time-tested maxims of trial practice and appellate review constrain me to depart from opinions of my fellow justices. First, due process requires that courts may not adjudicate rights or liabilities of persons not made parties to a proceeding. *See* ***Baker by Williams v. Williams***, 503 So. 2d 249, 254 (Miss. 1987) ("[A] decree in equity cannot adjudicate the rights or liabilities of persons not parties to the proceeding."). The next fundamental tenet is that appellate review is constrained to the trial court record presented on appeal.[8] *See* ***Copeland v. Copeland,*** 235 So. 3d 91 (Miss. 2017) ("This Court may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record."). Finally, our precedent mandates that a trial court cannot be held in error for an issue not presented to it for determination. *See* ***Burnham v. Burnham***, 185 So. 3d 358, 361 (Miss. 2015) ("The well-recognized rule is that a trial court will not be put in error on appeal for a matter not presented to it for decision.").

¶46. The trial-court record reveals that Christina and Kimberly entered a Consent and Stipulation, jointly agreeing on the issues to be presented to and decided by the chancellor.

[8] Otherwise, parties could "sandbag" trial judges in hopes of prevailing before appellate courts. Such a practice contravenes the fair and efficient administration of justice on appeal. *See* Order Adopting the Mississippi Rules of Appellate Procedure (Dec. 15, 1994).

(*See* Appendix I). *Inter alia*,[9] Christina and Kimberly agreed to submit to the trial court the issues of visitation and child support of and for E.J. and Z.S. The issue of custody was raised as to Z.S. only. Christina claimed, and Kimberly testified, that they "shared . . . parenting" of both children. The chancellor held, based on the pleadings, exhibits, and testimony, that Christina stood *in loco parentis* to both children., E.J. and Z.S. *See* ***Logan v. Logan***, 730 So. 2d 1124, 1126 (Miss. 1998) ("[A] person acting *in loco parentis* [is] one who has assumed the status and obligations of a parent without a formal adoption.")

¶47. In this appeal, Christina challenges the chancellor's findings as to Z.S. only, vastly expanding and reframing issues that were never presented to, nor considered by, the trial court. (*See* Appendix II, comparing the agreed-upon issues before the trial court *vis à vis* the issues raised in this appeal, *verbatim et literatim*). Equitable estoppel was raised for the first time on appeal, and therefore should not be considered by this Court. *See* ***Burnham***, 185 So. 3d at 361.[10]

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[9] Additionally, they asked who would claim E.J. and Z.S. for state and federal income tax purposes, and whether Christina would be placed on the birth certificate of Z.S. and named as a parent thereon. Christina failed to name the State Board of Health as a party in to these proceedings. *See* Miss. Code Ann. § 41-57-23(1) (Rev. 2013).

[10] Assuming *arguendo* that this Court is not procedurally barred from considering equitable estoppel, the "facts" relied upon by the plurality were disputed at trial. The chancellor, who heard the testimony and observed the witnesses' demeanor, commented in his bench ruling that "[t]here are two different versions of how the child was cared for and how it came to be that Christina Strickland became a part of his life. Kimberly actually maintains that she was primarily involved in seeking out this procedure [artificial insemination]. Christina claims that she was very much involved with the whole thing. There is a little bit of diametrically opposed testimony as to who was making these decisions." Notwithstanding, the plurality relies on Christina's testimony and opines that "Kimberly is estopped from challenging Christina's parental rights as to Z.S. . . ." (Plurality Op. ¶ 34.)

¶48. As to the sperm donor, the chancellor erred in declaring him a natural father whose parental rights had to be terminated. However, I disagree with the plurality's blanket assertion that in any case, no anonymous sperm donors will be accorded the burdens and benefits of natural fathers. Because the record is devoid of an attempt to notice the sperm donor in order to make him a party to these proceedings, the trial court erred in granting the sperm donor such rights. No citation is required for the proposition that in all child-custody, support, and visitation cases, a bonafide effort to give notice of the proceedings is required. Our state and federal constitutions require no less. Further, the parties failed to offer the chancellor documented evidence of a waiver or consent to the proceedings. A diligent review of the record reveals that neither party presented pleadings or affidavits supporting a purported waiver. Our precedent mandates that cases be decided on the facts contained in the record. *See* ***In re Adoption of Minor Child***, 931 So. 2d 566, 579 (Miss. 2006).

¶49. The plurality's holding regarding sperm donors begins with suggesting that the "legislative intent"[11] of the disestablishment-of-paternity statute—a statute not at issue in this case—puts the plurality at odds with paragraphs ten through fourteen of the chancellor's final decree. I agree that paragraphs ten through fourteen should be struck from the final decree after remand, but only because they are *obiter dictum*. The statute referenced in the plurality's opinion never was quoted or argued by either party at the trial level.

¶50. Christina sought custody of Z.S. only. The trial court awarded custody of E.J. and

[11] An inquiry into legislative intent is a hazardous undertaking under even the best of circumstances.

Z.S. to Kimberly based on the best interests of the children.[12] Still, the trial court found that Christina, standing *in loco parentis* to Z.S. and E.J., was entitled to the burdens and benefits of a parent, granting her rights to visitation and ordering child support. This finding is consistent with established legal principles, with or without the sperm donor or a determination of who is Z.S.'s natural father. *See* ***Griffith v. Pell***, 881 So. 2d 184, 186 (Miss. 2004) ("Merely because another man was determined to be the minor child's biological father does not automatically negate the [parent-child] relationship held by [Christina] and the minor [children].") Further, substantial evidence in the record supports the chancellor's finding. Christina argues that the trial court erred in this finding as to Z.S. only, for Christina pleaded that she stood *in loco parentis* to E.J.

¶51. As to Z.S., she argues that married men had their "parental status . . . recognized notwithstanding a lack of genetic relationship to their marital children." Christina cites ***J.P.M. v. T.D.M.***, 932 So. 2d 760, 762 (Miss. 2006), and ***Griffith***, 881 So. 2d at 185. According to this Court:

> In both ***Pell*** and ***J.P.M.***, a husband learned during the pendency of divorce proceedings that he was not the biological father of a child born of, or just prior to, the marriage. In those cases, we reasoned that the natural-parent presumption had been overcome based on several facts: (1) ***the husbands stood in loco parentis*** . . . .

In re Waites, 152 So. 3d 306, 312 (Miss. 2014) (quoting ***Smith v. Smith***, 97 So. 3d 43, 47 (Miss. 2012)). In ***Pell*** and ***J.P.M***., nonbiological fathers were granted *in loco parentis* status, entitling them to burdens and benefits associated with parenthood, successfully rebutting the

[12] "Court[s] shall in all cases attempt insofar as possible, to keep the children together in a family unit." ***Bredemeier v. Jackson***, 689 So. 2d 770, 775 (Miss. 1997).

natural-parent presumption in a child-custody battle. In ***Pell***, the Court remanded for a best-interest ***Albright***[13] analysis. Significantly, in ***J.P.M.***, the Court affirmed the chancellor's decision to award physical custody to the husband standing *in loco parentis*, for his decision was based on the best interest of the child—the polestar consideration in all child-custody cases.

¶52. In the case *sub judice*, the chancellor found that it was not in the best interest of either child for Christina to have custody. While the chancellor's custody determination was not manifestly wrong or clearly erroneous, the chancellor erred by failing to address each ***Albright*** factor on the record.

¶53. Christina's equal-protection argument as it relates to her standing *in loco parentis* is without merit. *In loco parentis* is a gender-neutral legal principle. There is no different treatment, analysis, or outcome for men and women who establish *in loco parentis* status. *See*, e.g., ***In re Waites***, 152 So. 3d at 307 (finding that husband of child's mother acted *in loco parentis*, even though husband and mother were married during child's birth and raised child together, because he was not biological father of child). Christina's *in loco parentis* status was a gender-neutral determination.

¶54. For the reasons herein stated, I would reverse and remand for the trial court to examine the record and the chancellor's notes and issue a final decree consistent with this dissent.

COLEMAN, MAXWELL AND CHAMBERLIN, JJ., JOIN THIS OPINION IN PART.

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[13] ***Albright v. Albright,*** 437 So. 2d 1003 (Miss. 1983).

APPENDIX I

Issues presented to the trial court *verbatim et literatim*[14]

ISSUES THAT THE PARTIES WISH FOR THE COURT TO DECIDE

The following issues are therefore, presented to his Court for determination:

A. Custody of the minor child. [Z.S.];

B. Child support for the benefit of [Z.S.];

C. Visitation of the minor child [Z.S.];

D. Whether Christina Strickland shall be placed on the birth certificate of [Z.S.] and named as a parent thereon;

E. Child support for the benefit of [E.J.];

F. Visitation of the minor child [E.J.];

G. Who will claim the children for Federal and State Income tax purposes;

[14]Substituted initials for full name.

APPENDIX II

"ISSUES THAT THE PARTIES WISH FOR THE COURT TO DECIDE"	APPELLANT'S "STATEMENT OF ISSUES" Presented on appeal *verbatim et literatim* (*See* Appellant's Brief 1)
A. Custody of the minor child, [Z.S.];	1. Whether the trial court erred in holding that a child born to a married couple who achieved pregnancy via medically assisted reproductive technology ("A.R.T.") with sperm from an anonymous donor may be denied the benefit and protection of a parental relationship with both spouses.
B. Child support for the benefit of [Z.S.];	*a. Whether children born to married parents who give birth to a child via A.R.T. with sperm from an anonymous donor are entitled to the marital presumption that both spouses are their legal parents.*
C. Visitation of the minor child, [Z.S.];	*b. Whether the Supreme Court's decision in Obergefell v. Hodges requires Mississippi to apply laws relating to the marital presumption of parentage in a gender-neutral manner so as to apply equally to married same-sex couples.*
D. Whether Christina Strickland shall be placed on the birth certificate of [Z.S.] and named as a parent thereon;	*c. Whether the doctrine of equitable estoppel precludes a parent from seeking to disestablish her spouse's parentage of the couple's marital child based solely on the absence of a genetic relationship, when the child was born as a result of anonymous donor insemination, to which both spouses consented.*
E. Child support for the benefit of [E.J.];	*d. Whether the trial court erred in ruling that a man who contributes sperm anonymously for use in A.R.T., whose identity is not and cannot be known, constitutes the legal parent of a child born to a married woman and therefore prevents recognition of the spouse as a parent.*
F. Visitation of the minor child, [E.J.];	*e. Whether the trial court committed reversible error by failing to apply precedent that recognizes the parental rights of a spouse to a child born during the marriage, reared as her own from birth, with an attached parent-child relationship and where no putative father exists or seeks to displace her parental rights.*
G. Who will claim the children for Federal and State Income tax purposes;	2. Whether the trial court erred in failing to recognize the constitutionally protected liberty interests of Christina and Z.S. in their parent-child relationship that may not be disturbed absent a compelling governmental interest.
	3. Whether, consistent with the U.S. Constitution, the marital presumption may denied only to same-sex couples.