

No. _____

FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

JULIA CATHERINE BOSEMAN,)
Plaintiff)

v.)

MELISSA ANN JARRELL,)
Defendant)

and)

MELISSA ANN JARRELL,)
Third-Party Plaintiff)

v.)

JULIA CATHERINE BOSEMAN)
and)
NORTH CAROLINA)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)
Third-Party Defendants)

From New Hanover County
07-CVD-625
COA08-957

PETITION FOR DISCRETIONARY REVIEW

UNDER N.C. GEN. STAT. § 7A-31

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From New Hanover County
07-CVD-625
COA08-957

PETITION FOR DISCRETIONARY REVIEW

UNDER N.C. GEN. STAT. § 7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioner Melissa Ann Jarrell ("Jarrell") seeks discretionary review of the unanimous opinion of the North Carolina Court of Appeals in Boseman v.

Jarrell, 2009 Westlaw 2601629 (N.C. Ct. App. August 18, 2009). Pursuant to Rule 15(c) of the North Carolina Rules of Appellate Procedure, a copy of this opinion is attached. There are three bases for this Petition:

(1) The subject matter of the appeal has significant public interest.

This case has enormous public interest because it presents an issue of first impression in this State as to whether same-sex adoptions are permitted under North Carolina law. The Court of Appeals finds that a same-sex adoption decree in which the biological mother waived the mandatory statutory requirement that her parental relationship be severed upon adoption is not void for lack of subject matter jurisdiction but might be voidable as contrary to law. If left to stand, this holding creates chaos within the adoption system as to:

- Whether same-sex and unmarried heterosexual couples now may adopt children in the State of North Carolina;
- Whether Superior Court clerks and District Court judges should grant these voidable adoptions not expressly permitted by North Carolina statute;
- Whether the state agencies which oversee adoptions and maintain adoption records now are required to recognize such adoptions; and,

- Whether any and all future direct-placement adoptions legally may include a waiver of the statutorily mandated requirement that parental rights be severed.

Of equal importance, the public has a vital and fundamental interest in the courts of this State not exceeding their constitutional limits by encroaching on legislative powers. Here, the Court of Appeals improperly engages in judicial legislation in allowing a type of adoption not permitted by the Legislature.

- (2) The Court of Appeals' decision conflicts with decisions of this Court at every step of its legal analysis.

The Court of Appeals does not simply misapply an otherwise correct statement of the law. Rather, by sanctioning a type of adoption not authorized by statute, the Court of Appeals promulgates new law, in conflict with established precedent of this Court and the constitutional and statutory law of this State. The Court of Appeals' opinion conflicts with this Court's decisions as follows:

- The Court of Appeals improperly restricts and effectively changes this Court's test for determining subject matter jurisdiction;
- The Court of Appeals ignores and circumvents this Court's rules of statutory construction by refusing to give effect to the plain language of

the unambiguous adoption statutes at issue in favor of its own judicial construction of those statutes;

- The Court of Appeals upholds the waiver of mandatory statutory provisions, in conflict with this Court's holdings that a mandatory statutory requirement may not be waived and that a statutory waiver may not operate to contravene public policy or to affect the rights of third parties which the statute was intended to protect; and,
 - The Court of Appeals violates the doctrine of separation of powers by creating an adoption not allowed under North Carolina statutes.
- (3) This cause involves legal principles of major significance to this State's jurisprudence.

This appeal implicates several legal principles of major significance to this State's jurisprudence, namely the doctrine of separation of powers, the proper test for subject matter jurisdiction, and the principles of statutory construction.

Accordingly, this decision requires swift judicial attention by this Court to address an issue of utmost public interest, to preserve the proper functioning of this State's adoption system, to protect the interests of adopted children and adoptive families, and to ensure that its legal precedents are clear and are adhered to by the lower courts.

I. STATEMENT OF FACTS

A. Procedural History

Plaintiff Julia Boseman (hereinafter "Boseman"), the former domestic partner of Jarrell, instituted this action for primary custody of the minor child ("Minor Child") as the alleged adoptive parent of the Minor Child and, alternatively, as the Minor Child's alleged *de facto* parent. [R. pp. 5, 10.] Jarrell, the Minor Child's biological mother, filed Motions pursuant to Rules 60(b)(4), 12(b)(1), 12(b)(6), and 56(a), and an Answer and Counterclaim for declaratory judgment, alleging that the Decree of Adoption allowing Boseman to adopt the Minor Child was void *ab initio* and that Boseman's status was that of a non-parent.¹ [R. pp. 14-47, 55-92, 160-84, 193-96, 197-201.]

The Trial Court denied Jarrell's Rule 56(a) and 60(b)(4) Motions on the ground that it did not have jurisdiction to declare void the Adoption Decree entered by another district court. [R. pp. 258-59, 263-65.] The case proceeded to trial on the issue of child custody between two parents. [Tr. 12/10, p. 71.] The Trial Court entered a Custody Order in which it ruled as a matter of law that

¹ Jarrell also filed a Third-Party Complaint for declaratory judgment against the North Carolina Department of Health and Human Services ("DHHS") as to DHHS's refusal to recognize these same-sex adoptions. [R. pp. 14, 55, 160.]

Boseman is the legal parent of the Minor Child and awarded joint legal custody of the Minor Child to Boseman and Jarrell. [R. pp. 251-57.] In apt time, Jarrell filed her Notice of Appeal. [R. p. 275.] The Court of Appeals issued its unanimous opinion on 18 August 2009, in which it took the following action:

(1) The Court vacated the Trial Court's denial of Jarrell's Rule 60(b)(4) motion for relief from the Adoption Decree, finding that the Trial Court did have jurisdiction to rule on it;

(2) The Court remanded to the Trial Court to enter an order denying Jarrell's Rule 60(b)(4) motion, finding that the Adoption Decree was not void;

(3) The Court vacated the Trial Court's order dismissing Jarrell's declaratory judgment for lack of jurisdiction but determined that this action was moot based on its finding that the Adoption Decree was not void; and,

(4) Based on its finding that the adoption was valid, the Court affirmed the Trial Court's ruling that Boseman is a legal parent of the Minor Child.²

² Because the Court of Appeals determined that the Adoption Decree was not void and that Boseman was, therefore, a parent of the Minor Child, it did not reach the other issues raised by Jarrell on appeal – namely, that the Trial Court erred in determining in its Custody Order that Boseman had standing to pursue custody of the Minor Child in that Jarrell had acted inconsistently with her "paramount parental rights and responsibilities." Boseman, supra, at *9.

B. Factual Background

Boseman and Jarrell were domestic partners from 1999 until they separated in May 2006. [R. p. 252.] Jarrell's Minor Child, conceived through artificial insemination, was born on 27 October 2002. [R. p. 252.] Jarrell and Boseman both were involved in caring for the Minor Child until the parties' separation. [R. p. 253.] The Minor Child is not biologically related to Boseman. [R. p. 118.]

In 2004, Boseman informed Jarrell that same-sex adoptions were being approved in Durham County, North Carolina. [R. p. 253.] On 14 June 2005, Boseman filed a purported proceeding³ to adopt the Minor Child in the Clerk's Office for Durham County Superior Court. [R. p. 156.] The proceeding was transferred to the Durham County District Court ("District Court"). [R. p. 156.]

During the adoption process, Boseman and Jarrell filed several documents in which they sought to waive two requirements of the adoption statutes: (1) the requirement in N.C. Gen. Stat. § 48-1-106(c) that a decree of adoption sever the relationship of parent and child between the adoptee and the adoptee's birth

³ The purported adoption proceeding initiated by Boseman is referred to herein as a "same-sex adoption." As used in this Petition, "same-sex adoption" refers to a purported decree of adoption in which a same-sex partner of the natural parent of a minor child purportedly adopts said minor child, and in which the legal ties between the minor child purportedly adopted and his or her biological parent are not severed and expressly remain intact.

parent; and (2) the requirement in N.C. Gen. Stat. § 48-3-606(9) that the birth parent's consent to the adoption must state that the parent understands that his parental rights and obligations to the child are terminated upon adoption. These documents requested that the court allow the adoption to proceed without the termination of Jarrell's parental rights required by these statutes.

On 10 August 2005, the District Court entered an Order Granting Waiver of Certain Statutory Requirements. [R. p. 150.] The District Court found that there "is no specific prohibition in Chapter 48 against gay or lesbian individuals adopting in North Carolina" and that it had "the authority to grant this adoption while at the same time allowing the minor adoptee's biological parent to retain her parental rights and obligations." [R. p. 151.] The District Court therefore ordered that the statutes "requiring termination of the biological parent's rights may be waived in this proceeding." [R. p. 152.] The District Court also entered a Decree of Adoption, finding that the Decree "does not sever the relationship of parent and child between the individual adopted and that individual's biological mother." [R. pp. 156-57.]

Despite the fact that the District Court allowed an adoption not authorized by the adoption statutes and granted the waiver of mandatory requirements of those statutes, the Court of Appeals held that it did not exceed its statutory

authority in issuing the Decree and that the Decree was not, therefore, void for lack of subject matter jurisdiction. The Court of Appeals left open the question of whether a waiver of severance of parental rights renders an adoption voidable: "we conclude that the adoption court acted within its authority in granting the direct placement adoption decree, and that the grant of waiver of certain provisions was, at most, erroneous and contrary to law." Boseman, supra, at *8 (emphasis added).

II. REASONS WHY CERTIFICATION SHOULD ISSUE

A. The Subject Matter Of The Appeal Has Significant Public Interest.

The Court of Appeals concludes that the Adoption Decree, "even if erroneous or contrary to law, was not void." Boseman, supra, at *4. Whether district court judges can order the waiver of the mandatory provisions of Chapter 48 and "create" valid same-sex adoptions is a matter of significant public interest. The legality of same-sex adoptions in North Carolina is a question of vital importance to adoptees, adoptive parents, biological parents, judges, clerks, lawyers, DHHS, and the citizens of this State. If contrary to law, such adoptions should not be allowed.

1. The Significant Public Interest in the Uniform Administration and Clear Judicial Process for North Carolina Adoption Proceedings is Substantially Impacted by the Court of Appeals Opinion.

The Court of Appeals acknowledges that "whether our State and its agencies sanction adoptions by same-sex couples...[is a] matte[r] of great public interest...." Boseman, supra, at *8. Although the Court of Appeals states that the "nature of the parties' relationship or marital status was not relevant to resolution of the appeal," the opinion, in effect, authorizes same-sex adoptions in the State of North Carolina and authorizes never-before-recognized "second-parent" adoptions.⁴ Id. ("[t]he same result would have been reached had the parties been an unmarried heterosexual couple").

Historically, same-sex adoptions have been available in only two counties in North Carolina – Durham County and Orange County. Mandy Locke, "Triangle judges aid gay adoption," News and Observer, August 22, 2009 (reporting that "hundreds of these adoptions [have been handled] in Durham and

⁴ The term "second-parent" adoption as used herein refers to situations in which an unmarried, heterosexual individual purports to adopt the biological or adopted child of his or her heterosexual partner and the biological or original adoptive parent "waives" the severance of his or her rights to the child.

Orange counties").⁵ Additionally, our State has never recognized second-parent adoptions. Reynolds, Lee's North Carolina Family Law, § 17.51, at 17-70 (5th ed., Vol. 3, 2002) (citing N.C. Gen. Stat. § 48-1-106(d) and noting that our State's adoption statutes "explicitly recognize second parent adoptions only in...two settings[:]" the adoption of the child by a stepparent and the readoption of the child by a former parent); see also N.C. Gen. Stat. § 48-1-101(18) ("stepparent" is defined as "an individual who is the spouse of a parent of a child, but who is not a legal parent of the child" (emphasis added)).

It is undisputed that a premium is rightfully placed on clear, prompt, conclusive, uniform adoption proceedings that result in adoptions with integrity and finality. N.C. Gen. Stat. §§ 48-1-100(a), (b)(1). These critical legislative purposes for adoption proceedings are lost when the judicial process is unclear, confusing, and inconsistently applied.

Because these new types of non-statutory adoptions are possibly "contrary to law," some judges will be rightfully hesitant to allow the waiver of mandatory provisions in Chapter 48. Cheryl Howell, a UNC School of Government

⁵ Following the Court of Appeals' opinion, the disjointed administration and unclear judicial process for these "adoptions" was underscored by the suggestion that "[f]or some unmarried couples, securing parental rights is worth a drive to Durham or Orange county." "Triangle judges aid gay adoption," supra.

Professor of Public Law and Government, works with the North Carolina Association of District Court Judges in planning and coordinating their judicial education programs and also has served as a member of the Family Court Advisory Committee, appointed by the Chief Justice of this Court, since its creation in 1998. Ms. Howell unequivocally stated after the Court of Appeals' opinion was issued that "[t]he statute doesn't allow for second-parent adoptions." "Triangle judges aid gay adoption," supra. This foreshadows and underscores the state of confusion that is unfolding in the arena of North Carolina adoptions.

There are at least three possible outcomes for prospective adoptive parents desiring a same-sex or second-parent adoption if the opinion of the Court of Appeals becomes precedent, and these outcomes may vary from county-to-county as judges and clerks are left to wonder whether these adoptions are legal and pursuant to law:

- Petitions for same-sex adoptions will be promoted and allowed, in violation of constitutional and statutory laws, as set forth below;
- Petitions for same-sex adoption will be denied by judges who are concerned by language in the opinion that these "adoptions" may be "contrary to law"; the denial of these petitions will open the floodgates for appeals based upon the opinion of the Court of

Appeals which suggests, if not holds, that these adoptions are possible under Chapter 48 as currently written; or,

- Prospective adoptive parents will search for judges willing to enter same-sex adoptions and make the trip to a few select counties.

This lack of certainty and state of confusion amongst the bench and the bar will lead directly to inconsistent application of the North Carolina adoption statutes. If same-sex and second-parent adoptions are legal under Chapter 48 as it currently exists, these adoptions should be allowed in all North Carolina counties; if these "adoptions" are illegal under this State's adoption laws, these adoptions should not be allowed in any county. The certainty, finality, and integrity of North Carolina adoptions are obliterated by the "creation" of these new types of non-statutory adoptions.

It is imperative for this Court to promptly and definitively resolve this issue in order to ensure the uniform application of adoption laws across North Carolina, to promote the integrity of the adoption process, to make certain the validity and finality of North Carolina adoptions, and to address and clarify the impact on other areas of the law relating to and involving children and their parents. Left undisturbed, the Court of Appeals' opinion will leave North

Carolina adoption proceedings in a state of confusion and have a sweeping effect on adoptions across the State of North Carolina.

2. DHHS has Previously Refused to Recognize Same-Sex Adoptions. Without a Clear Ruling about Whether These Adoptions Are "Contrary to Law," the Responsibilities of DHHS with Respect to Same-Sex Adoptions Will Be in a State of Confusion and Disarray.

DHHS is charged statutorily with indexing adoptions on the State's permanent adoption records, and is then responsible for initiating the issuance of amended birth certificates. N.C. Gen. Stat. § 48-9-102. Despite its statutory charge, DHHS has refused historically to recognize same-sex or second-parent adoptions for non-compliance with Chapter 48. [R. pp. 187-88; see also Deposition of Tammy Johnson, pp. 24-26, 55.] As a result of DHHS's rejection of these "adoptions," same-sex adoptions are not indexed on the State's permanent adoption records, and adoptees who are the subject of these same-sex adoptions do not have amended birth certificates following the entry of the adoption decree.

DHHS's position has been previously that same-sex adoptions are in violation of the North Carolina adoption statutes. [Deposition of Tammy Johnson, pp. 28-32.] Based upon language in the Court of Appeals' opinion that these "adoptions" may be "contrary to law," there is a substantial likelihood that DHHS will continue to reject these adoptions. The resulting confusion and

compromise of the adoption system should be of great concern – if these adoptions are valid, the State agency responsible for indexing them should approve and index them and the minor children should be issued amended birth certificates. DHHS needs to know whether or not these are valid, and the affected children and parents need to know whether or not the adoptions are recognized by the State agency responsible for indexing them and whether or not their birth certificates are accurate.

DHHS's refusal to recognize and process these "adoptions" results in "unperfected" adoptions. If DHHS continues to take this position in future same-sex and second-parent adoptions, the legislative purposes for uniform and clear procedures resulting in final adoption decrees with integrity will be thwarted. The Court of Appeals' opinion leaves wholly uncertain the relationship of the State's refusal to recognize these adoptions to the finality and integrity of these purported adoptions.

3. The Waiver of Mandatory Statutory Provisions Creates "Adoptions" that are Potentially Disruptive and Detrimental to the Affected Minor Children and Their Adoptive Families, and Discourages Prompt, Conclusive Disposition of Adoptions.

Chapter 48 contains mandatory provisions which require that the biological parent directly placing a child for adoption acknowledge that "when the adoption is final, all rights and obligations of the adoptee's former parents....with respect to the adoptee will be extinguished, and every aspect of the legal relationship between the adoptee and the former parent...will be terminated." N.C. Gen. Stat. § 48-3-606(9). The Court of Appeals posits that this mandatory provision is designed to protect the biological parent, not the minor child, and that any "waiver of this provision accrues to the detriment only of the would-be former parent...." Boseman, supra, at *7.

This conclusion fails to recognize that the severance of the relationship of parent and child between the individual adopted and that individual's biological parent is not just designed to protect the biological parent. Equally important, if not more so, is the protection of the adoptee and the adoptive family unit. Adoption of Kasim, 58 N.C. App. 36, 40, 293 S.E.2d 247, 250 (1982).

By allowing a waiver of the severance of parental rights provisions, the Court of Appeals leaves children in legal limbo and affects the likelihood, finality, and stability of all direct-placement adoptions, not just those involving

same-sex couples. For example, consider the married prospective adoptive parents who are so desperate to adopt a child that they agree to allow a young teenage mother to "waive" the severance of her parental rights, only to have her resurface years later claiming rights to a child who is now solidly part of the child's adoptive family unit.

The potentially disastrous and disruptive effect of this is exactly the situation that will be created if the Court of Appeals' opinion becomes precedent. This possibility is fraught with uncertainty and confusion. Because of the legal ties that remain intact by "waiving" the mandatory severance provisions, the resulting adoption decrees, lacking integrity and finality, will defeat the important legislative purpose and public interest in the "facilitation of adoptions of minors in need of adoptive placement by persons who can give them love, care, security and support." N.C. Gen. Stat. § 48-1-100(b)(1).

Of critical importance for the public and the State as a whole is that the effects of these same-sex adoptions are broad and far-reaching beyond the instant action and adoptions generally. Whether a person is recognized as having the legal relationship of "parent" implicates a myriad of legal situations beyond the issue of the adoptive process itself; the effects of conferring parental

status are pervasive and arise in multiple legal arenas.⁶ The judiciary, State agencies, and the public need to know whether same-sex adoptions are in fact "contrary to law" in order to assess the status of one as a parent in the context of these other important areas of the laws affecting and relating to children.

4. The Preservation of the Doctrine of Separation of Powers Is Vitally Important to the Public and Must Be Protected by Prohibiting Judicial Legislation.

North Carolina law clearly prohibits what the Court of Appeals did in this case – to substitute its own preferences for those of the elected legislative representatives. Article I, Section 6, of the North Carolina Constitution states that "the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The judiciary violates the separation of powers doctrine and acts in excess of its jurisdiction "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, ...[and the

⁶ There are numerous areas of the law which are impacted by a determination that one is a parent, such as child custody disputes (N.C. Gen. Stat. § 50-13.1); termination of parental rights (N.C. Gen. Stat. §§ 7B-1100, *et seq.*); financial support of minor children (N.C. Gen. Stat. § 50-13.4); inheritance rights of children (N.C. Gen. Stat. §§ 29-2(4), 29-17) (regarding succession by, through, and from adopted children); and guardianship over minors (N.C. Gen. Stat. § 35A-1221), just to name a few.

Court acts] beyond those limits...." Eudy v. Eudy, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), overruled on other grounds by Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Under the doctrine of separation of powers, the Court of Appeals had no power to encroach on the Legislature's authority by creating same-sex or second-parent adoptions not permitted by North Carolina statutes. Wilson v. Anderson, 232 N.C. 212, 215, 59 S.E.2d 836, 839 (1950) (because "[a]doption is a status unknown to common law, [it] can be accomplished only in accordance with provisions of statutes enacted by the legislative branch of the State government"). Any change in the laws of this State concerning same-sex adoptions must come from the North Carolina General Assembly, not the courts. State v. Cobb, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964). This is especially true in light of this State's clear public policy prohibiting same-sex marriages, a policy which is undermined and contradicted if same-sex adoptions are allowed. N.C. Gen. Stat. § 51-1.2 ("marriages...between individuals of the same gender are not valid in North Carolina").

Preserving the separation of powers is vitally important to the public in every case. It is especially important in this case; if the violation of the separation of powers doctrine goes uncorrected, the uniform application of and

clear judicial process for North Carolina adoptions will be severely compromised as some district court judges allow same-sex adoptions and others refuse to do so based on such proceedings being "contrary to law." This Court should not place its imprimatur upon a violation of separation of powers.

B. The Court Of Appeals' Opinion Conflicts Sharply With Decisions Of This Court, In Essence Promulgating New Law.

1. The Court of Appeals Improperly Limits and in Effect Changes the Supreme Court's Test for Determining Subject Matter Jurisdiction.

The Court of Appeals' opinion recognizes that this Court has clearly articulated a test for subject matter jurisdiction, mandating that "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." Boseman, *supra*, at *5 (quoting Eudy v. Eudy, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), overruled on other grounds by Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982)).

The Court of Appeals then states, however, that "despite this language, our courts have repeatedly rejected contentions that courts lack subject matter jurisdiction where statutory procedures and requirements are not met, particularly in juvenile proceedings." Id. (emphasis added). To support its

proposition of "repeated" rejections by "our courts," the Court of Appeals cites a single opinion, In re J.T., 363 N.C. 1, 672 S.E.2d 17 (2009), a case which dealt with personal jurisdiction and which did not modify the holding of Eudy or blunt its effect in juvenile proceedings.

The Court of Appeals' statement thus improperly attempts to change the Supreme Court's Eudy test for subject matter jurisdiction. To the contrary, this Court's opinion in In re T.R.P., 360 N.C. 588, 636 S.E.2d 787 (2006), demonstrates that, even in juvenile proceedings, this Court will not find subject matter jurisdiction where the lower court exceeds its authority by failing to follow statutory procedures. In that case, the Department of Social Services failed to verify a juvenile neglect petition, as required by N.C. Gen. Stat. § 7B-403(a). The Court of Appeals vacated the custody review order issued after a review hearing with respect to the petition, finding that the trial court lacked subject matter jurisdiction because the petition which initiated the case was not verified as required by statute. This Court affirmed on the basis of Eudy, finding that the "unambiguous statutory language" requiring verification of juvenile petitions "mandates our holding" of no subject matter jurisdiction. Id. at 594, 636 S.E.2d at 792.

Thus, the Court of Appeals' attempt to restrict and change this Court's test for subject matter jurisdiction conflicts sharply with this Court's Eudy and In re T.R.P. decisions. This improper revision is significant because it underlies the Court of Appeal's ultimate holding – that the District Court had subject matter jurisdiction to enter the Adoption Decree despite the fact that the adoption did not satisfy mandatory provisions of the adoption statutes.

2. The Court of Appeals Ignores and Circumvents Supreme Court Rules of Statutory Construction.

In determining whether the waiver of statutory provisions requiring termination of parental rights exceeded the adoption court's jurisdiction or was "merely contrary to law" (Boseman, supra, at *5), the Court of Appeals was required to examine the language of these two statutory provisions: (1) the requirement in N.C. Gen. Stat. § 48-1-106(c) that a "decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents"; and (2) the requirement in N.C. Gen. Stat. § 48-3-606(9) that a consent to adoption must state "that the individual executing the consent understands that when the adoption is final, all rights and obligations of the adoptee's former parents or guardian with respect to the adoptee will be extinguished..." The statutory analysis undertaken by the Court of Appeals not only ignores, but circumvents, this Court's rules of

statutory construction by refusing to give effect to the plain meaning of the unambiguous statutes in question.

This Court has established that "where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate or superimpose, provisions and limitations not contained therein." State v. Camp, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968) (emphasis added)). See also State ex rel. Util. Comm'n v. Edmisten, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) ("when the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction").

Here, the Court of Appeals was required to determine first whether the statutory provisions in question, N.C. Gen. Stat. §§ 48-1-106(c) and 48-3-606(9), are ambiguous. See State v. Hinton, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) ("in construing statutes, we first determine whether the statute is clear and unambiguous..."). If the Court of Appeals found them to be unambiguous, it was required to apply the plain meaning of the statutory

language and was not entitled to undertake judicial construction of the statute's legislative intent.

In conflict with and in circumvention of these rules, the Court of Appeals makes no determination that the statutes are ambiguous and identifies no language within those statutes that is unclear. Nonetheless, with no finding of ambiguity, the Court of Appeals simply ignores the plain language of the statutes and proceeds to analyze the "intent and purpose" of these sections and of the Chapter 48 adoption statutes as a whole. Boseman, supra, at *7-8.

Concluding that the waiver of these two statutory provisions is consistent with its judicial construction of legislative intent, while wholly ignoring the plain language of the statutes, the Court of Appeals determines that the District Court acted within its statutory authority in granting the waivers.

Proper application of this Court's rules of statutory construction yields the opposite conclusion. The Court of Appeals makes no finding that the statutes are ambiguous because they, in fact, are not in any way unclear. Accordingly, this Court requires a court to refrain from judicial construction and to accord words undefined in the statute their "plain and definite meaning." N.C. Gen. Stat. § 48-1-106(c) states clearly that the legal effect of an adoption decree is to "sever[] the relationship of parent and child" between the individual adopted and

the biological parent; there are no exceptions to this rule within the statute or any language that indicates that it is not mandatory or subject to waiver.⁷ The plain and definite meaning of "sever" is "to separate, as one from another; to cut off from something; to divide." Black's Law Dictionary 1373 (6th ed. 1990). Any interpretation of "sever" which allows a birth parent to retain parental rights after adoption is not within the plain meaning of the word.

N.C. Gen. Stat. § 48-3-606(9) is equally clear. The title of this provision is "content of consent; mandatory provisions" (emphasis added). The statute provides that the consent to an adoption "must be in writing and state..." (emphasis added). Subsection (9) sets forth one of the "mandatory provisions" which "must" be stated – that the adoption terminates "every aspect of the legal relationship between the adoptee and the former parent or guardian." Again, this statute contains no qualifying language, no exceptions, and no authority to waive any of its mandatory provisions. The plain meaning of "mandatory" in

⁷ In other provisions in Chapter 48, the Legislature specifically allows the waiver of certain adoption requirements. See N.C. Gen. Stat. §§ 48-2-301(a) and 48-2-301(b) (holding that certain adoption requirements must be met unless "waived by the court for cause"). The absence of any such waiver language in §§ 48-1-106(c) and 48-3-606(9) indicates that their requirements are mandatory, and that the General Assembly unequivocally intended for their requirements to be mandatory.

the statute's title is "of, relating to, or constituting a command; required; preemptory." Black's Law Dictionary 973 (7th ed. 1999).

Although the Court of Appeals acknowledges that the title of § 48-3-606 contains the word "mandatory" and makes no finding that the title or the text of the statute are ambiguous, it simply ignores this clear language in light of the "intent and purpose of subsection (9)," which it presumably believes must override the plain language of the statute. Boseman, supra, at *7. Even if the text of this statute were unclear, this Court has found that "when the meaning [of the statute] is not clear or there is ambiguity the heading which the Legislature has adopted in enacting the statute becomes important in determining the legislative intent." Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 290, 26 S.E.2d 573, 575 (1943). See also Naugatuck Sav. Bank v. Fiorenzi, 232 Conn. 294, 305-06, 654 A.2d 729, 735 (1995) (statute was mandatory where the term "requirements" appeared in its title). The Court of Appeals was required to give effect to the plain meaning of the title and text of § 48-3-606 – that the provisions set forth in the section, including the termination of parental rights, are mandatory elements of a consent to adoption.

Thus, based on the plain meaning of these statutes, an adoption decree must result in the termination of the birth parent's parental rights, and the

consent to adoption must set forth this termination. There is no room within the unambiguous and clear language of these two statutory provisions to argue that the Legislature intended that such provisions were not mandatory and could be waived. See Section 3.a, infra (mandatory statutory requirements may not be waived). By ignoring the plain meaning of these two adoption statutes in order to advance its contrary judicial construction, the Court of Appeals creates its own rules of statutory construction in obvious conflict with this Court's rules.

3. The Court of Appeals' Finding that the District Court Did Not Exceed Its Authority in Granting a Waiver of the Termination of Parental Rights Provisions Conflicts with Supreme Court Precedent Concerning Waivers.

a. Mandatory requirements of a statute may not be waived.

This Court has established that mandatory provisions of a statute may not be waived. See State v. Johnson, 298 N.C. 355, 360-61, 259 S.E.2d 752, 757 (1979) (judge had no authority to waive mandatory statutory requirement that a jury be impaneled to recommend punishment when a defendant enters a guilty plea); State v. Mitchell, 221 N.C. 460, 461, 20 S.E.2d 292, 293 (1942) (mandatory requirements of statute requiring an appeal in forma pauperis to be supported by affidavit are not "subject to indulgences or waiver").

The plain language of §§ 48-1-106(c) and 48-3-606(9) clearly establishes that the requirement that parental rights be terminated upon adoption is mandatory. The Court of Appeals' finding that these statutes are subject to waiver, despite being mandatory, directly conflicts with holdings of this Court.

b. A party may not waive the benefit of a statute if the waiver contravenes public policy or affects the rights of third parties which the statute was intended to protect.

This Court has determined that a waiver is not "allowed to operate so as to...transgress public policy or morals." Board of Managers of James Walker Mem'l Hosp. v. City of Wilmington, 237 N.C. 179, 190, 74 S.E.2d 749, 757 (1953). Similarly, although a person may lawfully waive by agreement the benefit of a statutory provision, there is an "imputed exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where rights of third parties which the statute was intended to protect are involved." Ingold v. City of Hickory, 178 N.C. 614, 617, 101 S.E. 525, 527 (1919) (quoting 9 Cyc. 480 (1903)). The waiver allowed in this case violates these rules of waiver on several grounds.

First, the effect of the waiver operates to transgress public policy. The North Carolina General Assembly, not the judiciary, determines the public policy of this State. Rhyne v. K-Mart Corp., 358 N.C. 160, 169, 594 S.E.2d 1, 8

(2004). Here, the waiver operated to allow Boseman to adopt the Minor Child while permitting Jarrell to retain her parental rights. This is permitted under North Carolina adoption statutes only if Boseman were a legal stepparent of the Minor Child. The North Carolina Legislature has determined, however, that same-sex marriages are not valid. N.C. Gen. Stat. § 51-1.2. Thus, because the waiver granted by the District Court permits an adoption not authorized by the North Carolina Legislature, it operates to contravene public policy, in direct violation of this Court's holdings.

Second, the waiver violates this State's public policy by contravening the legislative intent and purpose of § 48-1-106(c), which requires as a legal effect of an adoption that the relationship between the birth parent and adopted child be severed. The Court of Appeals determines that Jarrell was entitled to waive this requirement because it was only for her benefit and any waiver accrued only to her detriment. As the Court finds, "as with section 48-3-606(9), any waiver of this provision [§ 48-1-106(c)] accrues to the detriment only of the would-be former parent." Boseman, supra, at *7.⁸

⁸ In addition to conflicting with legislative intent, this reasoning is flawed. A parent's waiver of a provision requiring the termination of their parental rights allows them to retain their relationship with their child and therefore does not accrue to their detriment. Indeed, in her Motion for Waiver of Statutory Provisions, Jarrell argued exactly this point – that the requirement that her

This Court has determined that the adoption statutes requiring termination of parental rights were not enacted to protect the birth parents, but rather to protect the adopted child and the new adoptive family. In Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981), this Court held that the Legislature, in enacting N.C. Gen. Stat. § 48-23 (the predecessor statute to § 48-1-106), contemplated that adoption would effect a "complete substitution of families...with the adopted child becoming the child of his adoptive parents and a member of their family; likewise, the legal relationship with the child's natural parents and family would by virtue of the adoption order be completely severed." Id. at 663, 281 S.E.2d at 5.

This Court found that the statute's purpose was to create a "simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child" including, but not limited to, the child's right to inherit through intestate succession. Id. (quoting Headen v. Jackson, 255 N.C. 157, 159, 120 S.E.2d 598, 599-600 (1961)). Significantly, the Crumpton Court held that an interpretation of § 48-23 which does not require parental rights to be terminated violates this legislative intent:

parental rights be terminated did not "benefit" her and that the waiver of these provisions would be to her benefit, not her detriment. [R. p. 147.]

We are convinced the severance of legal ties with the child's natural family was not intended to be partial. It is most unlikely that in enacting G.S. 48-23 the legislature intended the child would for some purposes remain legally in its natural bloodline. Such a construction violates the spirit of the act and thwarts that which the act seeks to accomplish.

Id. at 664, 281 S.E.2d at 6 (emphasis added).

Thus, the Crumpton Court made clear that § 48-23's requirement that parental rights be terminated was not enacted for the benefit of the parent whose rights are being terminated. It was enacted to establish a bright-line rule as to the rights of the adopted child and of the adoptive parents. As the Court determined, this legislative intent can be satisfied only if there is a complete severance of the relationship with the birth parents; anything less than that frustrates the legislative purpose. Accordingly, the waiver allowed by the Court of Appeals contravenes the public policy of § 48-23 (now § 48-1-106(c)), by permitting the parental relationship to continue after adoption.

Finally, the waiver violates this Court's proscription that it may not affect third party rights which the statute was intended to protect. See Ingold, supra. As established in Crumpton, the termination of parental rights upon adoption is intended to protect the adopted child and his new family. Although the Court of Appeals finds that the waiver of termination of parental rights in this case might benefit the Minor Child (by giving him another adult legally obligated to care

for him), the waiver will, in other circumstances, adversely affect the adopted child and his new parents – for example, if a teenage unwed mother is allowed to waive the termination of her parental rights upon adoption and decides to reassert those rights years later.⁹ Because the waiver will adversely affect the intended beneficiaries of the statute, it violates this Court's law.

4. The Court's Decision Violates the Doctrine of Separation of Powers.

As set forth in Section II.A.4., supra, the doctrine of separation of powers is the cornerstone of our government. Unless and until the Legislature acts, the court's only duty and authority is to apply the statutes as written. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 525, 2 S.E.2d 560, 563 (1939). A court may not "extend a statute to cover cases not within its scope or purpose, however meritorious they may be." Burgess v. Your House of Raleigh, 326 N.C. 205, 218, 388 S.E.2d 134, 142 (1990). Nor may a court "overstep the bounds of legislative intent" by using the "rule of liberal construction" to read into the statute a meaning "alien to its plain and unmistakable words." Hatchett v. Hitchcock Corp., 240 N.C. 591, 593, 83 S.E.2d 539, 541 (1954).

⁹ This clearly would adversely affect the stability of the new family unit and the finality of the adoption, and would raise a host of legal issues with respect to the rights and duties of all involved.

The Court of Appeals eviscerates the doctrine of separation of powers by creating an adoption not permitted by North Carolina statutes. While Chapter 48 does not reference same-sex adoptions, the statutory language necessarily precludes such adoptions by requiring the severance of parental rights in all adoptions except re-adoptions by former parents and stepparent adoptions wherein the stepparents must be legally married. The Legislature has not enacted a procedure for same-sex adoptions. The Court of Appeals, under the guise of liberally construing Chapter 48 in the best interests of the Minor Child (see Boseman, supra, at *8), oversteps its bounds by upholding an adoption which the Legislature has not authorized. Any public policy decisions as to the types of adoptions allowed in North Carolina must be left to the Legislature.

C. This Appeal Involves Legal Principles Of Major Significance To The Jurisprudence Of This State.

The legal principles involved in this case are of major significance to this State's jurisprudence, as follows:

(a) The Court of Appeals violates the doctrine of separation of powers by upholding and in effect creating an adoption procedure not permitted under North Carolina statutes. This doctrine is one of the bedrock legal principles upon which our government is founded, and the preservation of the proper

balance between the judiciary and Legislature is an important jurisprudential and constitutional concern.

(b) The Court of Appeals finds that subject matter jurisdiction exists in this case even though the District Court granted an adoption not permitted under North Carolina statutes. Subject matter jurisdiction implicates the fundamental authority of every court, and a determination of when the court exceeds its statutory authority (and therefore lacks subject matter jurisdiction) is of great significance to the legal system as a whole; and,

(c) The Court of Appeals ignores the plain language of unambiguous statutes in upholding the waiver of a mandatory statutory requirement. The Court's action implicates the legal principles of statutory construction, which are vitally important to the courts' role in interpreting legislation.

III. CONCLUSION

The Court of Appeals oversteps its constitutional bounds by permitting a direct-placement adoption in which the birth parent retains her parental rights to the adopted child, an adoption procedure neither explicitly nor implicitly authorized by the North Carolina Legislature. The Court of Appeals reaches this result by violating and ignoring this Court's rules with respect to subject matter jurisdiction, statutory construction, and waiver. The effect of the Court of

Appeals' judicial legislation is an adoption system in chaos, with adoption courts, administrative agencies, attorneys, and petitioners unclear as to whether unmarried couples (same-sex and heterosexual) now may legally adopt in this State and whether any birth parent may waive termination of parental rights in a direct-placement adoption. It is critical for this Court to grant this Petition to provide much-needed guidance to the lower courts and the public with respect to the validity of these types of adoptions.

IV. ISSUES TO BE BRIEFED

In the event this Court allows Jarrell's Petition for Discretionary Review, Jarrell intends to present the following issues in her Brief for review:

1. WHETHER THE ADOPTION DECREE ENTERED IN THIS CASE IS VOID BECAUSE THE DISTRICT COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED THE DOCTRINE OF SEPARATION OF POWERS BY CREATING A NEW TYPE OF ADOPTION PROCEDURE NOT PERMITTED BY, AND CONTRARY TO, NORTH CAROLINA STATUTES AND LAW;
2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S RULING THAT BOSEMAN IS A LEGAL PARENT OF THE MINOR CHILD WHEN THE ADOPTION DECREE IS VOID;
3. WHETHER THE TRIAL COURT ERRED IN RULING THAT BOSEMAN HAD STANDING TO PURSUE CUSTODY OF THE MINOR CHILD BECAUSE JARRELL, BY CONTROLLING THE MINOR CHILD'S ASSOCIATIONS, ACTED

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing
PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT.
§ 7A-31 by facsimile transmittal and by depositing a copy thereof in an
envelope bearing sufficient postage in the United States mail addressed to the
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