

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE	§	
DIMETMAN, VICTOR HOLMES, and	§	
MARK PHARISS,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	CIVIL ACTION NO.
	§	5:13-CV-982-OLG
GREG ABBOTT, in his official capacity as	§	
Governor of the State of Texas, KEN	§	
PAXTON, in his official capacity as Texas	§	
Attorney General, GERARD RICKHOFF,	§	
in his official capacity as Bexar County	§	
Clerk, and KIRK COLE, in his official	§	
capacity as interim Commissioner of the	§	
Texas Department of State Health Services	§	
<i>Defendants.</i>	§	

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ADVISORY TO THE COURT

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On August 11, 2015, the Court requested notification by August 24, 2015 that the Department of State Health Services (Department) has: (1) created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates, and (2) granted pending applications for birth and death certificates involving same-sex couples that are otherwise complete and qualify for approval. (Doc. #113 at 2.) As explained herein, the Department has exercised its authority to adapt its policies in light of *Obergefell v. Hodges*, No. 14-556 (U.S. 2015). As the Department's attorney, the Office of the Attorney General files this advisory to explain the Department's efforts to the Court. In short, the Department has created and implemented policy

guidelines that comply with *Obergefell* and this Court's injunction and has granted complete applications that qualify for approval. Additionally, the Department has contacted persons with pending applications that require additional information or payment to complete.

The State Defendants renew their objection to the intervention of a new party raising new issues in this matter after final judgment was entered. The State Defendants also continue to object to the unprecedented threat of contempt regarding the Department's processing of death and birth certificates by virtue of an attenuated link to this Court's injunction related to marriage, especially when that agency is diligently working to comply with a court ruling that unsettled what Justice Kennedy characterized at oral argument as a "millennia"-old definition of marriage. And the Office of the Attorney General continues to object to the threat of contempt for discharging a constitutional duty to represent a client agency. Because the Department is in full compliance with *Obergefell* and this Court's injunction and has granted the relief the intervenor sought, the State Defendant's believe there is no need for the Court's scheduled September 10, 2015 contempt hearing or any continued Court supervision of the Department.

**I. POLICY GUIDELINES RECOGNIZING SAME-SEX MARRIAGE IN DEATH AND BIRTH CERTIFICATES**

On August 12, 2015, the Department revised its policies regarding birth and certificates as well as surrogacy agreements.

**A. Birth Certificates and Amendments**

The Department adopted a birth certificate policy that provides:

Birth certificates will be processed, to same sex-couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married in Texas or another state at the time of the child's birth, and provide standard documentation required for birth certificate issuance.

Birth certificate amendments will be processed, upon request, for same-sex couples to whom a child was born in Texas when one spouse is the birth mother, if the parents were legally married prior to the birth of their child. Standard documentation, including verification of marriage, will be required. An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order establishing an informal marriage.

Department of State Health Services, Revised Policies: Vital Records Requests

from Married Same-Sex Couples, *at*

<http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID>

=8590000378 (Aug. 24, 2015). This policy is predicated on Texas statutes

regarding assisted reproduction that deem a child born to a marriage by means

of a sperm or egg donor to be a child of the marriage. *See* TEX. FAM. CODE

§§ 160.701-.707.

## **B. Death Certificates and Amendments**

The Department adopted a death certificate policy that provides:

Death certificates will be processed and issued/amended to include the name of a decedent's same-sex surviving spouse, when the death occurred in Texas on or after June 26, 2015 for same-sex couples that were legally married in Texas or another state, at the time of the decedent's death. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of a death certificate.

For decedents who died in Texas prior to June 26, 2015, an amendment to the death certificate, as requested, will be processed recognizing any legal, same-sex marriage at the time of death, for same-sex marriages that occurred in another state prior to June 26, 2015, to list the surviving spouse and the decedent's status as "married". Documentation must be provided to this effect, along with other standard documentation required for an amendment to a death certificate.

An informal marriage may be documented for purposes of amending a vital record by a properly filed informal marriage declaration or a court order adjudicating an informal marriage has been established.

Department of State Health Services, Revised Policies: Vital Records Requests from Married Same-Sex Couples, *at* <http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590000378> (Aug. 24, 2015).

### **C. Gestational Agreements (Surrogacy)**

The Department adopted a surrogacy policy that provides:

Birth certificates will be processed and issued/amended for any births occurring in Texas, for which persons that are a same-sex couple are legally authorized to be the intended parents of the child as authorized by Texas Family Code, ch. 160, subchapter I. Documentation must be provided to this effect, along with other standard documentation required for issuance/amendment of records for these vital events.

*Id.*; (Doc. # 114-1 at 6). The Texas surrogacy statutes deem a child born to a marriage under a gestational agreement to be a child of the marriage rather than a child of the gestational birth mother. TEX. FAM. CODE §§ 160.751-.763.

## **II. GRANTING OF PENDING APPLICATIONS FOR BIRTH AND DEATH CERTIFICATES FOR SAME-SEX COUPLES**

### **A. Birth Certificates and Amendments**

On August 19, 2015, the electronic platform that hospitals and birthing centers use to create entries for birth records was updated to allow spouses to select “Mother,” “Father,” or “Parent” in accordance with the above-addressed statutes and policies. Applications on file before that change occurred were given the option of: (1) obtaining at that time a birth certificate listing preexisting titles with the ability to obtain a subsequent amendment to reflect new titles after the software change occurs, or (2) waiting to obtain a revised birth certificate once the software change occurs. All such applicants the Department is aware of have now been contacted regarding their ability to obtain an amendment or a revised certificate. That Department has processed requests for birth certificates and amendments that met the Department’s revised policy. Its employees have also returned phone calls on a daily basis involving what documentation is needed to obtain a birth certificate or amendment.

#### **B. Death Certificates and Amendments**

The Department has been accepting death certificates that list a surviving same-sex spouse. Also, the Department has issued death certificate amendments to list a surviving same-sex spouse in conformance with its policy (including an amendment for the intervenor in this proceeding) to those who have requested it. The Department has notified several requestors that additional documentation is needed to process their request to amend a death certificate to add a same-sex surviving spouse.

### **C. Gestational Agreements (Surrogacy)**

As of the date of this filing, the Department has not received any requests for birth certificates to list same-sex spouses resulting from surrogacy agreements. If the Department receives such a request, it will issue any requested certificate in compliance with its policy.

### **III. OTHER MATTERS RELATED TO MARRIAGE**

The Department's August 12, 2015 policy states that matters such as burial permits, disinterment, divorce, and other vital events or records will be reviewed to ensure compliance with *Obergefell* and *DeLeon*. The Department has concluded that: 1) the disinterment application and consent forms need no change because they have no gender-specific fields, and 2) the form for county clerks reporting a divorce to the Department will be modified to accommodate same-sex spouses. It has revised its policy accordingly and will issue vital records and document vital events in conformance with its policy. See Department of State Health Services, Revised Policies: Vital Records Requests from Married Same-Sex Couples, at <http://www.dshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8590000378> (Aug. 24, 2015).

### **IV. MATTERS UNRELATED TO MARRIAGE**

The Department's August 12, 2015 policy also addressed supplemental birth certificates, which are issued to adoptive parents under Texas law. (Doc. # 114-1 at 5-6). The policy provides that supplemental birth certificates will

be issued or amended to reflect same-sex adoptive parents. *Id.* The supplemental birth certificate statute does not address marriage as a predicate to being listed on a supplemental birth certificate. *See* TEX. HEALTH & SAFETY CODE § 192.008(a). As such, Texas supplemental birth certificates are not addressed by *Obergefell* or *DeLeon*.

## V. CONCLUSION

The Department is complying with the Court's injunction as well as *Obergefell's* requirement that States provide for marriage on the same terms to same-sex couples as opposite sex couples. The State Defendant's believe there is no need for the Court's scheduled September 10, 2015 contempt hearing or any continued Court supervision of the Department.

Respectfully submitted,

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***ATTORNEYS FOR STATE  
DEFENDANTS***

**CERTIFICATE OF SERVICE**

I certify that on August 24, 2015, I served all parties a copy of the foregoing document via the Court's ECF service.

s/ Michael P. Murphy  
MICHAEL P. MURPHY