IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHELSEA TORRES, et al.,

Plaintiffs,

v. Case No. 3:15-cv-288-bbc

KITTY RHOADES,

Defendant.

DEFENDANT'S BRIEF CONCURRING IN PART AND OPPOSING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Chelsea and Jessamy Torres are a same-sex married couple. Chelsea gave birth to A.T. on March 13, 2015. At the present time, Chelsea is the only parent listed on A.T.'s birth certificate. In this case, the Torreses are asking this Court to order defendant Kitty Rhoades, Secretary of the State of Wisconsin Department of Health Services (DHS), to include the names of both Chelsea and Jessamy on A.T.'s birth certificate as his parents.

Plaintiffs also seek class certification. Rhoades files simultaneous with this brief her Response Opposing Plaintiffs' Motion for Class Certification as Proposed and Proposing in the Alternative Certification of a Class Action with Three Subclasses. As described in that Response, Rhoades believes that the most effective way to resolve this case is to divide the proposed class into three subclasses: (1) couples who conceived their child through artificial

insemination and complied with Wis. Stat. § 891.40(1); (2) couples who conceived their child through artificial insemination but did not comply with § 891.40(1); and (3) couples who conceived their child through natural insemination.

Plaintiffs have moved for summary judgment. The Court should grant plaintiffs' motion for summary judgment with respect to the subclass of married same-sex plaintiffs who conceived their children through artificial insemination and complied with § 891.40(1). As to all other plaintiffs, the Court should deny the summary judgment motion and grant summary judgment instead to defendant Kitty Rhoades. *See* Fed. R. Civ. P. 56(f).

Rhoades agrees that same-sex couples in the first subclass are entitled to have the names of both spouses automatically listed on their child's birth certificate as parents. Under Wis. Stat. § 69.4(1)(g), different-sex couples who conceive a child through artificial insemination are entitled to have the husband's name automatically listed as a parent on the child's birth certificate as long as the couple complied with the requirements of § 891.40(1). Rhoades concludes that same-sex and different-sex couples should be treated the same way under these statutes.[1]

[1]Rhoades will use the terms "automatic" or "automatically" to refer to the identification of a non-gestational parent on a child's birth certificate pursuant to Wis. Stat. § 69.14(1)(e)1. or (1)(g). In contrast, the identification of a non-gestational parent on a child's birth certificate after a step-parent adoption is not automatic. *See* Wis. Stat. §§ 48.94; 69.15(2).

Rhoades does not agree that same-sex couples in the second and third subclasses can be treated the same way as different-sex couples under the birth certificate statutes. Such couples must go through step-parent adoption or other legal process to have the name of the non-gestational spouse placed on the child's birth certificate. As Rhoades will show, requiring these couples to go through the step-parent adoption process is not barred by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Rhoades' brief will not track the plaintiffs' brief section-by-section. The organization of the parties' briefs must diverge because the parties view this case in fundamentally different ways. As noted, Rhoades sees three different groups of same-sex married parents whose circumstances require three different legal analyses according to different applications of the birth certificate statutes to their different circumstances. In contrast, plaintiffs see no distinctions. Further, they treat Wis. Stat. § 891.40(1) (the artificial insemination statute) and Wis. Stat. § 891.41 (the presumption of paternity statute) as if they were a single statutory force, rather than two distinct statutes treating distinct factual situations and legal concerns.

Rhoades' analysis also differs from the plaintiffs' with respect to the role of biological fathers in reproduction. The birth certificate statutes and related provisions explicitly address the interests of biological fathers, with differing results. For example, where a couple complies with the

requirements of § 891.40(1), the artificial insemination statute, the biological father has no parental rights or responsibilities. Wis. Stat. § 891.40(2). And, where a man not named on a child's birth certificate is proved to be the child's natural father in a paternity action, his name will be placed on the child's birth certificate. *See* Wis. Stat. §§ 69.14(1)(e)1.; 69.15(1)(a), (3)(a)2.-3. These statutes reflect a concern for biological fathers and a recognition that they have potential interests that cannot be ignored. Yet, plaintiffs barely acknowledge that they even exist.

Rhoades' brief will examine how the Wisconsin birth certificate statutes apply to each of the three subclasses she proposes. Then, as to each subclass, Rhoades will respond to the constitutional arguments contained in plaintiffs' brief.

Before moving on to her Argument, Rhoades will clarify the question presented in this case. The question is *not* whether the non-gestational spouse is entitled to have her name on the child's birth certificate *at all*. A same-sex spouse can adopt her wife's biological child and the child's birth certificate can then be amended to include her name as his parent. *See* Wis. Stat. §§ 48.94; 69.15(2). The question is instead whether the non-gestational spouse in a same-sex marriage is entitled to have her name placed on the birth certificate of a child delivered by her wife without going through a step-parent adoption. In other words, can the name of the

non-gestational female spouse be placed on the child's birth certificate automatically, as is the case when the non-birthing spouse is a male?

At only one point in their brief do the plaintiffs accurately state what this case is about: "The spousal presumption, *which attaches immediately upon the birth of a child*, is consistent with this common sense understanding of parenthood." Plaintiff's Brief at 19 (emphasis added). That is the issue—whether the non-gestational mother's name will be entered on the child's birth certificate automatically or "immediately," or whether it will be entered only after a court proceeding, such as a step-parent adoption. The question is not whether these families are entitled to a two-parent birth certificate; it is what they must do to obtain one.[2] In some cases, the non-gestational spouse will have to go through the step-parent adoption process to obtain a two-parent birth certificate. *See* Wis. Stat. §§ 48.81(4); 48.88(2)(c); 48.94; 69.15(2). Rhoades understands that the plaintiffs consider the adoption process unfair and inappropriate for their families. But for some of them, that is the only process that is legally available.

The plaintiffs' brief also implies that the name-on-the-birth-certificate problem is tantamount to denying equal recognition to the plaintiffs' families. Plaintiffs exaggerate or misunderstand the legal significance of the birth

[2]In this brief, Rhoades will use the phrase "two-parent birth certificate" to describe a birth certificate including the names of both the gestational mother and her spouse.

certificate. A birth certificate is "presumptive evidence of the . . . birth" it records, and "may be admitted as prima facie evidence" of any fact it records, "including the names" of the child's parents. Wis. Stat. § 891.09(1), (2). In other words, identifying a person as a child's parent on his birth certificate does not prove that she is his legal parent. Rather, it creates only a rebuttable presumption that she is his parent. *See DiBenedetto v. Jaskolski*, 2003 WI App 70, ¶¶ 2, 14, 21, 261 Wis. 2d 723, 661 N.W.2d 869.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiffs state in their brief that Rhoades "has *refused* to provide A.T. with an accurate birth certificate that identifies both Chelsea and Jessamy as his parents." Plaintiffs' Brief at 1 (emphasis added). This assertion is false.

On April 24, 2015, counsel for the Torreses sent a letter to Rhoades requesting that she issue a two-parent birth certificate for A.T. PFOF ¶ 12.[3] DHS counsel wrote back in an email dated Friday May 1, 2015 that "[t]he Vital Records Office, in consultation with Heather Curnutt (the assigned [Office of Legal Counsel] attorney) is evaluating the request and will respond when the evaluation is complete. Please contact me if you have any questions." DFOF ¶ 13. Instead of working with DHS on the matter,

[3]Rhoades will refer to Plaintiffs' Proposed Findings of Fact as "PFOF"; and Defendant's Proposed Findings of Fact as "DFOF."

the Torreses filed a lawsuit twelve days later. The Torreses' original complaint was not a class action. (Dkt. 2.)

Rhoades' Answer in this case was due for filing on June 5, 2015. DFOF ¶ 15. As the Answer deadline approached, Rhoades' counsel contacted the Torres counsel asking if they would object to a brief extension of the Answer deadline because Rhoades was hoping to pursue a negotiated settlement. DFOF ¶ 16. Rhoades' counsel did not suggest what the settlement offer would be, but DHS would eventually agree to offer A.T. a two-parent birth certificate. *Id.*

On June 4, 2015, Rhoades' counsel filed a motion to extend the time for filing Rhoades' Answer by seven days to allow more time for counsel "to pursue a negotiated settlement between the parties in this case," indicating that the Torres counsel had been informed of this. (Dkt. 14.) That same day, plaintiffs filed a First Amended Class Action Complaint for Declaratory and Injunctive Relief and a Motion for Class Certification. (Dkt. 11; 12.) The class action motion made Rhoades' hope to settle the Torres case by supplying A.T. with a two-parent birth certificate effectively moot. DFOF ¶ 19. Nevertheless, on June 9, 2015, undersigned counsel told the Torres counsel that DHS was prepared to give A.T. a two-parent birth certificate. *Id.* That offer was not accepted. *Id.*

In a telephone conference that took place on July 28, 2015, undersigned counsel offered a partial settlement of the class action to the Torres counsel. Consistent with her current litigation position, Rhoades offered to settle the birth certificate question for same-sex couples who had complied with the requirements of § 891.40(1), by giving two-parent birth certificates to their children. DFOF ¶ 20. The case did not settle. *Id*. If the Torreses had agreed to that offer, there would be no "subclass 1" remaining in this lawsuit, and the litigation would only be about whether couples who had not complied with § 891.40(1) are entitled to automatic two-parent birth certificates.

ARGUMENT

I. Legal standards.

A. Summary judgment methodology.

Summary judgment is appropriate when "there is no genuine issue as to any material fact at issue and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Questions of "statutory construction based upon an undisputed set of facts present legal questions which may be resolved as a matter of law." *Tech. Mktg. Corp. v. Hamlin, Inc.*, 974 F. Supp. 1224, 1227 (W.D. Wis. 1997).

The issues presented in this case are purely legal. There are no "genuine issue[s]" of "material fact." Therefore, summary judgment is appropriate in this case.

Plaintiffs have moved for summary judgment in this purported class action. Rhoades has proposed that this Court subdivide their proposed class into three subclasses. Rhoades concedes that the first of these three subclasses is entitled to summary judgment. As to the second and third subclasses, Rhoades opposes summary judgment for the plaintiffs and moves this Court to grant summary judgment instead to her.

B. *Obergefell v. Hodges* and related case law.

In *Obergefell v. Hodges*, the U.S. Supreme Court ruled that same-sex couples "may exercise the right to marry." 135 S. Ct. at 2599. Plaintiffs assert that the *Obergefell* court "mentioned two-parent birth certificates for marital children as one of the benefits of marriage unfairly denied same-sex couples as a result of the unconstitutional marriage ban." Plaintiffs' Brief at 14. The Court *did not* "mention[] two-parent birth certificates." Rather, it noted in passing that "birth . . . certificates" are among the "aspects of marital status." *Id.* at 2601. Beyond that brief reference, it did not consider how the birth certificate statutes of the various states should or must be reinterpreted to accommodate the new recognition of same-sex marriage. The Court clearly did not address the question presented here: under what circumstances can a same-sex married couple automatically obtain a two-parent birth certificate for a child born to one of the spouses?

Prior to *Obergefell*, the Seventh Circuit decided *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), in which it affirmed the decisions of this Court and the U.S. District Court for the Western District of Indiana invalidating and enjoining the state law prohibitions against same-sex marriage. The court did not address the birth certificate issue despite the plaintiffs' implication that it did. Plaintiffs' Brief at 19-20.

In *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014) (affirmed by *Baskin v. Bogan*), this Court "concluded that the Wisconsin laws banning marriage between same-sex couples are unconstitutional." The Court did not address the birth certificate issue in that decision. In an order issued one year later, the Court denied a motion from two of the *Wolf* plaintiffs seeking an automatic two-parent birth certificate. The Court analyzed their request in detail, pointing out the many unanswered questions their motion raised. For example, the Court asked:

> Does equal treatment mean that all married lesbian couples are entitled to have both of their names on the birth certificate so long as one of them is the biological parent? Or in cases such as this one in which the married couple used artificial insemination, does equal treatment mean listing both parents only if they have followed the procedures outlined in §§ 891.40 and 69.14(1)(g)?

Wolf v. Walker, No. 14-cv-64-bbc, slip op. at 6 (W.D. Wis. July 7, 2015).

Plaintiffs cite three post-*Obergefell* cases as supporting their position. *See* Plaintiffs' Brief at 16. They do not. The first, *Robicheaux v. Caldwell,* Nos. 13-5090 C/W, 14-97, 14-327, 2015 WL 4090353 (E.D. La. 2105), is a

"judgment" only. Among other things, it orders the Louisiana State Registrar to "issue forthwith a birth certificate for the child of Plaintiff M. Lauren Brettner identifying Jacqueline M. Brettner as one of the child's parents." But the judgment reveals nothing about the circumstances of this family. What was the language of the applicable statutes? Did the couple comply with their requirements? Had Jacqueline already adopted the child? We don't know. The second case is not readily available. The last case, *Roe v. Patton*, No. 2:15-cv-00253-DB, 2015 WL 4476734 (D. Utah 2015), involved a same-sex couple who complied with Utah's artificial insemination statute. The Roes are thus like those couples in the first subclass proposed by Rhoades: because they complied with their state's artificial insemination statute, they are entitled to an automatic two-parent birth certificate.

C. The Wisconsin Statutes governing birth certificates.

The Wisconsin Statutes provide that the names of a child's legal parents will be included on his birth certificate. How parentage is determined for birth certificate purposes is set out in the "Vital Statistics" Subchapter of Chapter 69. *See* Wis. Stat. §§ 69.14-.15. These statutes predate the *Wolf*, *Baskin*, and *Obergefell* decisions. Therefore, it is indisputable that the statutes were written with different-sex couples in mind.

Two subsections of § 69.14 provide that, when a woman gives birth, her husband's name will be automatically entered on the child's birth certificate as his legal father.

First, if a woman is married to a man "at any time from the conception to the birth of the registrant,[4] the name of the husband of the mother shall be entered on the birth certificate as the legal father of the registrant." Wis. Stat. § 69.14(1)(e)1.

Second, § 69.14(1)(g) provides that if a woman gives birth as a result of artificial insemination, her husband "shall be considered the father of the registrant on the birth certificate," but only if the insemination satisfied the requirements of § 891.40(1). Under § 891.40(1), a husband of a woman artificially inseminated with donor semen "shall be the natural father of a child conceived" provided that the artificial insemination occurs under the supervision of a licensed physician and the husband gives his written consent. The statute further states that a donor who provides his semen to a licensed physician to inseminate a woman other than his wife "has no parental rights with regard to the child." Wis. Stat. § 891.40(2). The husband's status as natural father under the statute is not a rebuttable

[4]"Registrant" refers to the child who is the subject of the birth certificate. *See* Wis. Stat. § 69.01(19).

presumption. It is irrebuttable and definitive, and cannot be later challenged by the father/husband, the mother/wife, the donor, or any third party.[5]

Section 69.14(1)(g) is specifically limited to couples who comply with § 891.40(1): "If the registrant is born as a result of artificial insemination which does not satisfy the requirements of s. 891.40, the information about the father of the registrant shall be omitted from the registrant's birth certificate."

The birth certificate itself provides only "prima facie evidence" of the facts recorded on it, such as the names of the parents. Wis. Stat. § 891.09(2). In other words, those facts may be rebutted.

A man who is not married to a child's mother can rebut the statutory presumption of her husband's paternity in a successful paternity action. Wis. Stat. § 767.80. An order establishing his paternity will result in a change to the child's birth certificate. Wis. Stat. § 69.14(1)(e)1. The statutes direct that a corrected birth certificate be prepared upon a finding that "the man whose name appears on the registrant's birth certificate is not the father." Wis. Stat. § 69.15(3)(a). One of three types of new birth certificate will be prepared. If the father originally listed has been shown not to be the

[5]Plaintiffs note that "the worksheets prescribed by DHS do not even seek information about whether a couple and their doctor complied with Wis. Stat. § 69.14(1)(g)." Plaintiffs' Brief at 6 n.2. Rhoades concedes that this is true. *See* D-PFOF at ¶41; Biely Aff. at ¶¶ 6, 7. Those forms are currently under review by DHS. DFOF ¶ 4.

father, his name will be removed. *Id.* at (3)(a)1. If a different man has been adjudicated the child's father, the name of the father will be changed accordingly. *Id.* at (3)(a)2. If no father was listed on the original certificate, the name of the adjudicated father will be inserted. *Id.* at (3)(a)3.

II. Rhoades does not oppose plaintiffs' motion for summary judgment with respect to same-sex couples who have complied with Wis. Stat. § 891.40(1).

The first subclass of plaintiffs identified by Rhoades are those same-sex couples who complied with § 891.40(1) when they conceived their child. The artificial insemination statute has three requirements: (1) a couple must be married at the time of the insemination; (2) the insemination must be performed "under the supervision of a licensed physician"; and (3) the "husband" must give his written consent, which must be "signed by him and his wife."[6] When a couple complies with this statute, they are entitled to an automatic two-parent birth certificate. Wis. Stat. § 69.14(1)(g).

Rhoades concludes that after *Obergefell*, these two statutes must be applied equally to same-sex and different-sex married couples.[7] Regardless of

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[6]In its July 7, 2015, Order in *Wolf*, this Court suggested that a gender-neutral application of Wis. Stat. §§ 69.14(1)(g) and 891.40 might be "appropriate" for same-sex couples seeking two-parent birth certificates. *Wolf*, No. 14-cv-64-bbc, slip op. at 6.

[7]The Wisconsin Court of Appeals held in 2011 that Wis. Stat. § 891.40(1) is inapplicable to same-sex couples both because of the gendered language of the statute and because "same-sex couples can never satisfy the marital relationship described by the statute." *Dustardy H. v. Bethany H.*, 2011 WI App 2, ¶ 10, 331 Wis. 2d 158, 794 N.W.2d 230. Rhoades agrees with plaintiffs that the reasoning of *Dustardy H.* does not survive *Obergefell*. Plaintiffs' Brief at 6-7 n.3.

whether the non-gestational spouse is male or female, the statute deems him or her the "natural" parent of the child as a matter of law, not biology. Regardless of gender, if the non-gestational parent gives written consent to the artificial insemination, he or she has agreed to take on the legal responsibility of parenting the child. And, regardless of whether the parents are a same-sex couple or a different-sex couple, the semen donor has surrendered his parental rights. Thus, same-sex couples and different-sex couples should be treated the same way under both § 891.40(1) and § 69.14(1)(g). The statutes are easily interpreted to embrace same-sex couples. The reader need only replace the word "husband" with "wife" or "spouse" and the word "father" with "mother" or "parent."

Significantly, two of the authorities relied on by plaintiffs require the government to do exactly what Rhoades is ready and willing to do here. *See Della Corte v. Ramirez*, 961 N.E.2d 601, 602-03 (Mass. App. Ct. 2012) (determining that, with respect to artificial insemination statute, "same-sex married partners are similarly situated to heterosexual couples in these circumstances"); *Roe v. Patton*, 2015 WL 4476734, *4 (enjoining state defendants from applying statutes "in a way that differentiates between male spouses of women who give birth through assisted reproduction with donor sperm and similarly situated female spouses of women who give birth through assisted reproduction with donor sperm"); *see also In re Robinson*,

890 A.2d 1036 (N.J. Super. Ct. 2005). These cases support Rhoades' position that same-sex couples are entitled to equal treatment with different-sex couples, but must also satisfy the same requirements imposed on those couples.

In applying the statute to same-sex couples, certain clarifications are necessary. To qualify as a "married" couple under § 891.40(1), the couple must have been legally married under the law of some jurisdiction at the time of insemination. They were legally married under Wisconsin law if they were married between June 6 and 13, 2014,[8] or after October 6, 2014.[9] If they were legally married under the law of another jurisdiction at the time of insemination, they were legally married for purposes of the artificial insemination statute even if their marriage was not recognized by Wisconsin at the time of insemination. *See Obergefell*, 135 S. Ct. at 2607.

"Under the supervision of a licensed physician" means that a licensed physician must either perform or oversee the insemination.

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[8]This Court held that Wisconsin's prohibition against same-sex marriage was unconstitutional on June 6, 2014. *Wolf v. Walker*, No. 14-cv-64-bbc (W.D. Wis. June 6, 2014). Many same-sex couples married in the immediate wake of that decision. Subsequently, the Court issued an injunction ordering the equal processing of marriage licenses for same-sex and different-sex couples, and simultaneously stayed that injunction. *Wolf v. Walker*, No. 14-cv-64-bbc (W.D. Wis. June 13, 2014). Pursuant to the stay, same-sex couples ceased getting married.

[9]On October 6, 2014, the U.S. Supreme Court denied Wisconsin's petition for certiorari in *Wolf*. *Wolf v. Walker*, 135 S. Ct. 316 (2014).

The written consent requirement can be satisfied after the fact. Although § 891.40(1) provides that *consent* must exist at the time of insemination ("[i]f . . . *with* the *consent* of her husband, *a wife is inseminated* artificially with semen donated by a man not her husband"), the statute is silent about when the consent must be reduced to writing. It states only that "[t]he husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination . . . ." Wis. Stat. § 891.40(1). No specific time is mandated. Thus, if a couple married at the time of artificial insemination, supervised by a licensed physician, did not create a written consent document at the time of the insemination, they can do so later. This interpretation promotes the purpose of the statute, which is "to ensure the husband's paternal responsibility" for the child conceived. Unif. Parentage Act § 702 cmt. (Unif. Law Comm'n 2002) (describing Unif. Parentage Act § 5 (Unif. Law Comm'n 1973), on which § 891.40(1) is based).

Plaintiffs contend that Rhoades' interpretation and application of the birth certificate statutes violate their equal protection rights on sex and/or sexual orientation grounds. On the contrary, as shown here, Rhoades intends to apply § 69.14(1)(g) equally to same-sex and different-sex couples.

III. Summary judgment should be denied to the class of same-sex couples who conceived a child through artificial insemination without complying with Wis. Stat. § 891.40.

The second subclass identified by Rhoades is the class of same-sex couples who used artificial insemination but failed to comply with the requirements of § 891.40(1). Rhoades opposes summary judgment for these plaintiffs, and instead requests this Court to grant summary judgment in her favor with respect to this subclass.

Members of the second subclass are not entitled to automatic two-parent birth certificates without going through step-parent adoption under the birth certificate statutes. First, these couples cannot satisfy § 69.14(1)(g) because they did not comply with the requirements of § 891.40(1). Second, they cannot meet the terms of § 69.14(1)(e)1. because that general statute is controlled by the more specific § 69.14(1)(g). Plaintiffs' arguments concerning § 69.14(1)(e)1. and the related presumption of paternity statute, Wis. Stat. § 891.41, must be rejected because those statutes are based on biological facts of reproduction that are inapplicable to same-sex couples.

Plaintiffs argue that they have a constitutional right to be treated the same way as different-sex couples with respect to birth certificates. Plaintiffs' Brief at 1. Rhoades agrees. In her view, all married couples where one partner gives birth to a child conceived with sperm from a third party should be treated the same way. It doesn't matter whether the

non-gestational spouse is a man or a woman. Thus, same-sex couples seeking an automatic two-parent birth certificate under § 69.14(1)(g) must meet the same requirements imposed on different-sex couples. Neither group can look to § 69.14(1)(e)1. to make an end-run around § 69.14(1)(g), because § 69.14(1)(g) controls in artificial insemination cases.

A. Couples who conceived a child through artificial insemination without complying with Wis. Stat. § 891.40 are not entitled to automatic two-parent birth certificates under Wis. Stat. § 69.14(1)(g).

The birth certificate statutes clearly provide that "[i]f the registrant [of a birth certificate] is born as a result of artificial insemination which does not satisfy the requirements of s. 891.40, the information about the father of the registrant shall be omitted from the registrant's birth certificate." Wis. Stat. § 69.14(1)(g). Thus, the statutes unambiguously preclude non-compliant couples from obtaining automatic two-parent birth certificates, regardless of whether the parents are same-sex or different-sex couples.

As discussed above, the § 891.40(1) prerequisites are (1) marriage at the time of insemination; (2) supervision of the artificial insemination by a licensed physician; and (3) written consent by the non-gestational spouse. A couple who fails to satisfy any of these conditions does not qualify for an automatic two-parent birth certificate under § 69.14(1)(g).

The first requirement is marriage. Based on the plaintiffs' description of their proposed class, all class members were married at the time the children were born. As explained above, marriage in this context includes legal Wisconsin marriages and legal marriages performed in other jurisdictions. *See supra* at 16. There may be class members who, although married at the time of the child's birth, were not married at the time of the child's conception. These class members are not entitled to automatic two-parent birth certificates under § 69.14(1)(g). *See* Wis. Stat. § 891.40(1) ("the husband of the mother *at the time of the conception of the child* shall be the natural father of a child conceived").

The second requirement is that the artificial insemination was supervised by a licensed physician. Courts in other jurisdictions have held that the medical requirements of artificial insemination statutes similar or identical to § 891.40 must be satisfied in order to trigger the statute's application to a particular conception. If the medical requirements are not complied with, the legal protections provided by the statute, *i.e.*, transforming the non-gestational spouse into a "natural father" (or "natural *parent*") and nullifying the parental rights and liabilities of the semen donor, are not available to the parties involved. *See Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 398 (Cal. Ct. App. 1986); *E.E. v. O.M.G.R.*,

20 A.3d 1171, 1174-75 (N.J. Super. Ct. Ch. Div. 2011); *Mintz v. Zoernig*, 198 P.3d 861, 863 (N.M. Ct. App, 2008).

Section 891.40 is adopted almost verbatim from the Uniform Parentage Act ("UPA") of 1973. *Compare* Wis. Stat. § 891.40 *with* Unif. Parentage Act § 5 (1973), *superseded by* Unif. Parentage Act art. 7 (2002). The UPA deliberately adopted the physician requirement. As noted in *Jhordan C.*, there are at least two reasons to apply the requirement strictly:

> First, the history of the UPA . . . indicates conscious adoption of the physician requirement. The initial "discussion draft" submitted to the drafters of the UPA in 1971 did not mention the involvement of a physician in artificial insemination; the draft stated no requirement as to how semen was to be obtained or how the insemination procedure was to be performed. The eventual inclusion of the physician requirement in the final version of the UPA suggests a conscious decision to require physician involvement.
>
> Second, there are at least two sound justifications upon which the statutory requirement of physician involvement might have been based. One relates to health: a physician can obtain a complete medical history of the donor (which may be of crucial importance to the child during his or her lifetime) and screen the donor for any hereditary or communicable diseases. Indeed, the commissioners' comment to the section of the UPA on artificial insemination cites as a "useful reference" a law review article which argues that health considerations should require the involvement of a physician in statutorily authorized artificial insemination. This suggests that health considerations underlie the decision by the drafters of the UPA to include the physician requirement in the artificial insemination statute.
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> Another justification for physician involvement is that the presence of a professional third party such as a physician can serve to create a formal, documented structure for the donor-recipient relationship, without which, as this case [in which the known sperm donor established paternity and visitation rights] illustrates, misunderstandings between the parties regarding the nature of the their relationship and the donor's relationship would be more likely to occur.

Jhordan C., 179 Cal. App. 3d at 393 (citations and footnote omitted); *accord Alexandria S. v. Pac. Fertility Med. Ctr., Inc.*, 55 Cal. App. 4th 110, 119 (Cal. Ct. App. 1997).

Many couples choose to perform artificial insemination at home, without any medical supervision. *See Jhordan C.*, 179 Cal. App. 3d at 390; *A.A.B. v. B.O.C.*, 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013); *E.E.*, 20 A.3d at 1172; *Mintz*, 198 P.3d at 363; *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989). Such couples might protest that they should not be treated differently under the artificial insemination statute. But the statute does treat them differently. The legislature decided that married couples—regardless of their sexual orientation—may enjoy the benefits of § 891.40(1) only if the artificial insemination occurs "under the supervision of a licensed physician." This statutory requirement is constitutional in all respects. It applies equally to different-sex and same-sex couples, so it raises no equal protection concerns. And, because there is no fundamental right to conceive a child by artificial insemination at home without medical supervision, it raises no substantive due process concerns, either.

The third requirement of § 891.40(1) is written consent of the spouse. As discussed above, satisfying this requirement is fairly straightforward.

In sum, couples who conceive a child through artificial insemination without complying with the requirements of § 891.40(1) are not entitled to an automatic two-parent birth certificate. This is true for both same-sex and different-sex couples. Rhoades' interpretation of the statute does not violate plaintiffs' equal protection rights on sex and/or sexual orientation grounds. On the contrary, Rhoades intends to apply § 69.14(1)(g) equally to same-sex and different-sex couples.

B. Couples who conceived a child through artificial insemination without complying with Wis. Stat. § 891.40 are not entitled to automatic two-parent birth certificates under Wis. Stat. § 69.14(1)(e)1.

Plaintiffs argue that they are entitled to automatic two-parent birth certificates according to the general presumption of paternity statute, Wis. Stat. § 891.41, and the related provision in the birth certificate statutes, Wis. Stat. § 69.14(1)(e)1. Neither provision applies in this case.

1. Under the specific/general canon of statutory construction, Wis. Stat. § 69.14(1)(e)1. cannot apply because Wis. Stat. § 69.14(1)(g) specifically controls the birth certificate question in artificial insemination cases.

As the U.S. Supreme Court recognizes, "it is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (internal modification omitted). Similarly, the Wisconsin Supreme Court

holds that "a specific statute generally prevails over a general statute." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 20, 316 Wis. 2d 47, 762 N.W.2d 652.

Plaintiffs argue that they are entitled to use the general provision of § 69.14(1)(e)1. to obtain an automatic two-parent birth certificate. This provision provides that if the mother "was married at any time from the conception to the birth of the registrant, the name of the husband of the mother shall be entered on the birth certificate." Wis. Stat. § 69.14(1)(e)1. However, this is a general provision. Artificial insemination births are governed by the more specific provision relating to parentage of children conceived by artificial insemination. The more specific § 69.14(1)(g) governs the general § 69.14(1)(e)1.

The subsection relating to artificial insemination provides that if the parents do "not satisfy the requirements of s. 891.40, the information of the father of the registrant shall be omitted from the registrant's birth certificate." Wis. Stat. § 69.14(1)(g). With this language, the legislature explicitly stated that the specific artificial insemination provision in the birth certificate statutes must control. This language becomes meaningless if the non-gestational spouse is nonetheless entitled to have his or her name listed on the birth certificate without complying with § 891.40(1). If the specific artificial insemination provision is held not to apply to all couples who

conceive by artificial insemination, it becomes superfluous. Here, obeying the specific/general canon of construction avoids "the superfluity of a specific provision that is swallowed by the general one, 'violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *RadLAX*, 132 S. Ct. at 2071 (citation omitted).

Furthermore, the provisions in the birth certificate statutes cannot be overridden by the evidentiary presumption of paternity, Wis. Stat. § 891.41. This evidentiary presumption does not apply to the government's issuance of birth certificates. Moreover, the only section of Chapter 891 applicable to the determination of parentage in the birth certificate statutes is § 891.40, not § 891.41. After all, § 891.40 is explicitly referred to in § 69.14(1)(g). Also, for a child conceived by artificial insemination, § 891.40(1) is more specific than § 891.41 and thus governs the more general presumption of paternity statute.

2. The birth certificate and evidentiary presumptions of paternity are based on biological facts and do not warrant presuming the parenthood of a non-gestational same-sex spouse.

Plaintiffs fail to recognize that both § 69.14(1)(e)1. and the evidentiary presumption of paternity in § 891.41 are based on biology. The presumption reflects the biological truth in most cases—the husband is likely to be the biological father of the child. Under both the birth certificate statutes and

§ 891.41, the presumption is rebuttable because, in some cases, it will not be true. Unlike § 891.40, which definitively establishes the non-gestational spouse as a legal parent and cuts off the sperm donor's parental rights, these statutes do not conclusively establish parentage. On the contrary, they allow for the possibility that there might be a biological father with rights and obligations to the child.

While § 69.14(1)(e)1. provides that "the name of the husband of the mother shall be entered on the birth certificate as the legal father," it also provides that the name may be changed if another man prevails in a paternity action. With this language, the statute both presumes that a husband is the biological father of his wife's child, and allows that presumption to be overcome if another man proves that he is the child's father. Upon entry of a court order finding that a husband is not the father of a child, "the clerk shall report the facts to the state registrar, who shall issue a new birth certificate showing the correct facts as found by the court." Wis. Stat. § 891.39(3). If the state registrar receives a court order "which establishes paternity or determines that the man whose name appears on a registrant's birth certificate is not the father of the registrant, the state registrar shall" issue a new certificate that corrects the record as appropriate, either by removing the father's name, changing the father's name, or inserting the father's name. Wis. Stat. § 69.15(3)(a)1.-3.

These statutes show that the birth certificate is meant to record the biological parentage of the child.

The evidentiary presumption of paternity is likewise grounded in biology. The presumption itself is a biological one. It presumes that a man is "the natural father of a child"—not that the man has the rights accorded the legal father of the child. Wis. Stat. § 891.41(1). The "natural father" is the "biological father," defined as "[t]he man whose sperm impregnated the child's biological mother." *Black's Law Dictionary* 724 (10th ed. 2014). Thus, what the presumption provides is a rebuttable guess as to the identity of the biological father. This presumption has no place in a same-sex marriage where there is no question that the non-gestational spouse is not the child's "natural father." She may obtain the irrebuttable status of "natural [parent]" as a matter of law, either by complying with § 891.40(1) or adopting the child. *See* Wis. Stat. § 48.92. But she cannot become the "natural father" of the child based on the presumption that spouses engage in sexual intercourse through which the female spouse may be impregnated by the male spouse.

This is clear from the way the presumption can be rebutted. The presumption that the husband is the biological father is rebutted by "results of a genetic test . . . that show that a man other than the man presumed to be the father under sub. (1) is not excluded as the father of the

child and that the statistical probability of the man's parentage is 99.0% or higher." Wis. Stat. § 891.41(2). The Wisconsin courts have held that the presumption can be rebutted when a husband, even one who raised the children as his own for several years, proves that he is not the biological father. *Strawser v. Strawser*, 126 Wis. 2d 485, 487-88, 491, 377 N.W.2d 196 (Ct. App. 1985). If the biology-based rebuttable presumption can be rebutted only with biological evidence, it is irrefutable that the presumption is tied to biological fatherhood.

The plaintiffs observe that one purpose of the presumption is to "protect[] a child from the stigma of what historically was termed 'illegitimacy' or 'bastardy,' which is a status that continues . . . to subject children to private bias and expressions of disapproval." Plaintiffs' Brief at 8. Putting aside the stigma associated with children of unmarried mothers, the stigma plaintiffs refer to arises from a child's biological father being someone other than the man who is married to his mother, other than the man who raises him, and other than the man he calls father. *See Michael H. v. Gerald D.*, 491 U.S. 110, 161-62 (1989) (plurality opinion) (White, J., dissenting). This type of stigma can never attach to a child being raised by a same-sex couple. Everyone familiar with the "facts of life" knows that neither spouse is the child's biological father. The stigma argument is thus completely irrelevant to these circumstances.

The plaintiffs also observe that the presumption "preserve[s] a child's bond with the presumed father against attack by someone outside the marital family who claims a genetic connection to the child." Plaintiffs' Brief at 8. They rely on cases in which the courts declined to upset the presumption of paternity because existing family relationships outweighed the biological father's interests. For example, the Wisconsin Supreme Court held that a biological father was "equitably estopped from rebutting the marital presumption of Wis. Stat. § 891.41" because he did not assert his rights immediately. *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶ 31, 270 Wis. 2d 384, 677 N.W.2d 630. Meanwhile, the husband and presumed father had raised the child as his own and "developed deep emotional ties with [the child]." *Id.* ¶ 30. The facts of *Michael H.*, 491 U.S. at 113-16, and *W.W.W. v. M.C.S.*, 161 Wis. 2d 1015, 468 N.W.2d 719 (1991), are similar. In all of these cases, the courts refused to allow a showing of biological paternity to disrupt existing family relationships. In *W.W.W.*, the court relied on a statutory provision authorizing it to "'determine[] that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child.'" *Id.* at 1033 (citation omitted).

Equitable estoppel against disturbing the presumption of paternity is based on the individual facts of each case; sometimes those facts will support overriding the interests of the biological fathers, but other times they will

not. Thus, in *Strawser*, a husband who was not the biological father of six-year old twins had no child support obligations to the children. 126 Wis. 2d at 491. In *Randy A.J.* and *W.W.W.*, the putative biological fathers were not allowed to insert themselves into an established family relationship between legal fathers and children. In *J.F. v. R.B.*, 154 Wis. 2d 637, 638, 454 N.W.2d 561 (Ct. App. 1990), the court held that a putative biological father had "the right to present relevant evidence" of paternity, and that the circuit court was wrong to assume without evidence that the paternity action was not in the best interests of the child. In none of these cases did the courts suggest that the presumption of paternity is not biologically based.

The most important thing about these cases is what they are not. They are not birth certificate cases. Instead, the cases examining § 891.41 do so within a variety of family law and other legal proceedings (divorce, custody, paternity actions, inheritance, etc.). Unlike the cases relied on by plaintiffs, this case does not involve preserving a family that has lived together for years from a biological father's claim for access to his biological child after sitting on his rights.[10]

[10]Apart from the birth certificate question, families who use artificial insemination should follow § 891.40(1) in order to conclusively establish parental rights. Such a family may eventually be protected from later disruption by disputes like the one in *Randy A.J.* There, the biological father did not prevail, but that result was reached after costly litigation. Section 891.40 provides the appropriate avenue for married couples, both same-sex and different-sex, to establish parental rights when using artificial insemination.

This case is about the automatic issuance of two-parent birth certificates. With respect to those, Wisconsin treats same-sex married couples the same as different-sex married couples by requiring couples who conceive through artificial insemination to comply with § 891.40(1) in order to have the non-gestational spouse's name included on the birth certificate. Wis. Stat. § 69.14(1)(g). As a result, there is no constitutional violation.

IV. Summary judgment should be denied to the class of same-sex couples who conceived a child through natural insemination.

The third subclass identified by Rhoades consists of same-sex couples who conceived a child through natural insemination—in other words, one of the spouses became pregnant as the result of sexual intercourse with a man.

There is no legal basis for issuing an automatic two-parent birth certificate for a child conceived in these circumstances. To reiterate, there are only two statutory provisions under which an automatic two-parent birth certificate can issue: § 69.14(1)(g) and § 69.14(1)(e)1. Section 69.14(1)(g), based on a couple's compliance with the artificial insemination statute, is obviously inapplicable. Section 69.14(1)(e)1., which enters the name of the mother's husband on the birth certificate as the child's "legal father," does not apply to natural insemination couples for the same reason it doesn't apply for artificial insemination couples who failed to comply with § 891.40(1): biology. On the one hand, consistent with the presumption of paternity, the husband

of the mother is identified as the child's legal father because it is presumed that he impregnated her. On the other hand, the one circumstance in which the name of the father can be changed on the child's birth certificate is "by a proceeding under ch. 767," *i.e.*, a paternity proceeding. Wis. Stat. § 69.14(1)(e)1.

The major difference between subclass 3 and the artificial insemination subclasses is that an artificial insemination donor may or may not be anonymous, but a natural insemination donor is never anonymous. Section 891.40(2) resolves the legal status of a semen donor and his relationship with the married couple regardless of whether he is known or unknown. "The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child." Wis. Stat. § 891.40(1). This is why it is so important for all concerned to adhere to the § 891.40(1) requirements. Where the semen donor is known, his rights as a biological parent are resolved only if the statute is complied with.

Natural insemination has no statutory analogue to § 891.40(2), annulling a man's rights by operation of law. A known biological father has a right to a paternity determination and is given the statutory means to obtain it. Wis. Stat. § 48.423; § 767.80(1)(d). The law does not permit the woman

who bears his child to cut off his rights to the child unilaterally. If her spouse wants to adopt the child as a step-parent, she can do so only if the biological father is either deceased or his parental rights have been legally terminated. Wis. Stat. § 48.81(4). A biological father may voluntarily consent to terminate his parental rights. Wis. Stat. § 48.41. His rights may be involuntarily terminated, but only under specific circumstances such as abandonment, child abuse, and failure to assume parental responsibility. Wis. Stat. § 48.415. If the biological father's rights are terminated, the non-gestational spouse can adopt the child and the child's birth certificate will be changed accordingly. Wis. Stat. §§ 48.81(4); 69.15(2).[11]

Same-sex couples who achieve pregnancy by one partner's sexual intercourse with a man are not similarly situated to different-sex couples who achieve pregnancy without the participation of a third party. They are similarly situated to different-sex couples who need the biological assistance of a third party to conceive a child. Different-sex couples who need the assistance of a semen donor are entitled to an automatic two-parent birth certificate only if they comply with § 891.40(1). Different-sex couples who need the assistance of a female surrogate are not entitled to an automatic two-parent birth certificate, but must go through statutorily required court

[11]These same principles would apply in artificial insemination cases where § 891.40(1) was not complied with and the semen donor is not anonymous.

proceedings before they can get one. Wis. Stat. § 69.14(1)(h). Couples who need the biological assistance of a third party to become parents must comply with specific statutory directives in the birth certificate context. This is true regardless of their sexual orientation. There is no equal protection violation because same-sex couples are treated the same way as similarly situated different-sex couples.

CONCLUSION

For the reasons stated herein, this Court should grant plaintiffs' motion for summary judgment with respect to married same-sex couples who conceived their children through artificial insemination and complied with Wis. Stat. § 891.40(1). As to all other couples, plaintiffs' summary judgment motion should be denied and summary judgment should be granted instead to defendant Kitty Rhoades.

Dated this 2nd day of October, 2015.

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