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.

RESPONSE OPPOSING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AS PROPOSED AND PROPOSING IN THE ALTERNATIVE CERTIFICATION OF A SINGLE CLASS WITH THREE SUBCLASSES

INTRODUCTION

Chelsea and Jessamy Torres are a same-sex married couple. They ask this Court to order defendant Kitty Rhoades, Secretary of the State of Wisconsin Department of Health Services, to include both of their names on the birth certificate of their child, A.T.

Plaintiffs also seek class certification. The putative class includes "[a]ll same-sex couples who legally married in Wisconsin or in another jurisdiction, at least one member of whom gave birth to a child or children in Wisconsin on or after June 6, 2014 . . . ." (Dkt. 12:2; Dkt. 26:1-2.)[1] The case is not about whether class members may have the names of both spouses

[1]By its terms, the proposed class includes only female same-sex couples, since neither member of a male same-sex couple can give birth to a child.

entered on the birth certificate of a child born to one member of the couple. Every same-sex spouse can adopt her wife's biological child. *See* Wis. Stat. § 48.81(4). Upon adoption, the child's birth certificate can be amended to include her name as parent. *See* Wis. Stat. §§ 48.94, 69.15(2). This case is about the narrower question of whether the name of the non-gestational spouse can be placed on the child's birth certificate automatically, without going through step-parent adoption.

Rhoades opposes the certification of the class as proposed by the Torreses. The class as proposed does not satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). Rhoades concedes that there are "questions of law or fact common to the class." However, there are factual differences among members of the proposed class that make a unitary resolution of those common questions unworkable. These factual differences arise from the different ways in which the putative class members conceived their children. As will be explained in more detail below, these factual differences trigger the application of different statutes and different legal analyses to answer the birth certificate question for these families. These factual and legal differences will overwhelm the commonalities that make a class action a desirable and efficient vehicle.

As an alternative to the proposed class, Rhoades proposes that this Court certify one class with three subclasses. The three proposed subclasses would be: (1) couples who conceived their children through artificial insemination and complied with Wis. Stat. § 891.40(1); (2) couples who conceived their children through artificial insemination but did not comply with Wis. Stat. § 891.40(1); and (3) couples who conceived their children through natural insemination. Rhoades would not oppose class certification along these lines.

Certification of three subclasses as Rhoades proposes would be advantageous to the resolution of this litigation. As will be explained below and in more detail in Rhoades' response to plaintiffs' summary judgment motion, Rhoades opposes summary judgment for class members in subclasses (2) and (3). Rhoades does not oppose summary judgment for class members in subclass (1). Rhoades believes that summary judgment should be granted to members of that subclass.

ARGUMENT

This Court should deny plaintiffs' motion for class certification and instead certify three separate classes or one class with three subclasses.

A. Legal standards for class certification.

A plaintiff seeking class action certification must satisfy four prerequisites: numerosity, commonality, typicality, and adequate

representation. Fed. R. Civ. P. 23(a); *Gustafson v. Polk Cty.*, 226 F.R.D. 601, 603 (W.D. Wis. 2005).

Rhoades concedes that plaintiffs can satisfy Rule 23(a)'s numerosity requirement.

The class as proposed does not meet the commonality and typicality requirements.

> "The commonality and typicality requirements of Rule 23(a) tend to merge." The purpose of both requirements is to "ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class," but, in considering the typicality requirement, a court asks specifically whether the class representatives have suffered the same kind of injury as other members of the class. A named plaintiff's claim is typical if it rests on the same legal theory and arises from the same course of conduct alleged by the other members of the proposed class. This is so even though there are factual differences between her claim and the claims of other class members. "Typicality under Rule 23(a)(3) should be determined with reference to the [defendant's] actions, not with respect to particularized defenses [the defendant] might have against certain class members."

Gustafson, 226 F.R.D. at 605 (citations omitted).

Whether analyzed under the commonality or typicality prong, the Torreses cannot fully represent all class members. The Torreses conceived A.T. through artificial insemination during their marriage. PFOF ¶¶ 7, 11. According to the declaration of Chelsea Torres, she became pregnant at a fertility clinic by artificial insemination. Chelsea Torres Decl., ¶ 8. This puts the Torreses in the first subclass proposed by Rhoades, couples who complied

with Wis. Stat. § 891.40(1) and are therefore entitled to an automatic two-parent birth certificate under Wis. Stat. § 69.14(1)(g).

The Torreses' factual circumstances and legal claim are distinct from couples in Rhoades' second and third proposed subclasses, whose children were conceived either through artificial insemination that did not comply with Wis. Stat. § 891.40(1) or through natural insemination. The factual circumstances and legal claims of those two groups are also distinct from each other. For the artificial insemination group, the question of whether they should be entitled to a birth certificate despite their failure to comply with Wis. Stat. § 891.40(1) must be decided by this Court. That issue is irrelevant to the natural insemination group. For the natural insemination group, the legal rights of the biological father are of paramount concern.

Non-common questions of fact may complicate class action litigation because those differences may be relevant to the relief different class members are entitled to. But "Rule 23 is a flexible instrument. It gives the court the power 'to treat common things in common and to distinguish the distinguishable.' Specifically, Rule 23(c)([5]) allows the court to divide a class into subclasses 'when appropriate.' Each subclass is then treated as a class, and the provisions of Rule 23 are construed and applied accordingly." *Williams v. State Bd. of Elections*, 696 F. Supp. 1559, 1560 (N.D. Ill. 1988); *see also Forbes v. Guiliani* 126 F.3d 372, 378-79 (2d Cir. 1997);

Ruppert v. Alliant Energy Cash Balance Pension Plan, 255 F.R.D. 628, 631 (W.D. Wis. 2009).

As noted above, Rhoades concludes that the Torreses belong in the first subclass. Rhoades assumes that plaintiffs' counsel will be able to locate appropriate representatives for subclasses 2 and 3.

B. The different ways a child may be conceived as a matter of fact and the different legal implications of those methods.

1. The Wisconsin Statutes.

The determination of parentage for birth certificate purposes is set out in the "Vital Statistics" Subchapter of Chapter 69. *See* Wis. Stat. §§ 69.14-.15. The specific birth certificate statutory subsections relevant to this case are Wis. Stat. § 69.14(1)(e)1. and (1)(g). These statutes predate this Court's decision in *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014), as well as the Seventh Circuit's decision affirming *Wolf* in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), and the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Therefore, it is indisputable that the statutes were written with different-sex married couples in mind.

If a woman is married to a man "at any time from the conception to the birth of the registrant,[2] the name of the husband of the mother shall be

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

entered on the birth certificate as the legal father of the registrant." Wis. Stat. § 69.14(1)(e)1. The husband's status as "legal father" is a rebuttable presumption only. If the state registrar receives an order establishing the paternity of a different man, a new birth certificate shall be prepared "changing the name of the father if the name of the adjudicated father is different that the name of the man on the birth certificate." Wis. Stat. § 69.15(3)(a)2.

Wisconsin Stat. § 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 Wis. Stat. § 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 the artificial insemination occurred during the marriage, was performed under the supervision of a licensed physician, and the husband provided 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 presumption. It is irrebuttable and definitive, and cannot be later challenged by the father/husband, the mother/wife, the donor, or any third party.

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."

2. Insemination scenarios for same-sex spouses.

Rhoades' proposal of three subclasses is based on her understanding of three different scenarios under which same-sex couples can conceive a child.[3] First, the couple may conceive a child by means of artificial insemination according to the statutory requirements of Wis. Stat. § 891.40(1). Second, they may conceive a child by means of artificial insemination without meeting all the requirements of § 891.40(1). Third, one spouse may conceive by means of natural insemination (*i.e.*, through heterosexual intercourse). Each set of facts is subject to different treatment under the Wisconsin Statutes.

[3]Plaintiffs' class certification motion refers to same-sex couples "at least one of whom gave birth to a child or children." (Dkt. 12:2). Therefore, Rhoades does not consider conception and birth through third-party surrogacy.

3. Applying the Wisconsin Statutes to the three scenarios.

After careful consideration, Rhoades concludes that each of the three scenarios just described is subject to different treatment under the Wisconsin Statutes.

Artificial insemination that complies with Wis. Stat. § 891.40(1): Rhoades concludes that same-sex couples who comply with the married "at the time of conception," "supervision of a licensed physician," and written consent requirements of § 891.40(1) should be treated the same way as different-sex couples who comply with those requirements.

Regardless of whether the non-gestational parent is male or female, it is known that he or she is deemed the "natural" parent of the child as a matter of law, not biology. Regardless of gender, if the non-gestational spouse 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 Wis. Stat. § 69.14(1)(g). The statute is 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."

Artificial insemination that does not comply with Wis. Stat. § 891.40(1):

Rhoades concludes that same-sex couples who do not comply with the requirements of § 891.40(1) are not entitled to have the non-gestational parent's name on the child's birth certificate pursuant to § 69.14(1)(g).

The statute is explicit that "[i]f 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." This restriction applies to any couple. If a different-sex couple were to seek to include the husband's name on the birth certificate of a child conceived by artificial insemination using donor semen, his name would be "omitted" if the § 891.40(1) requirements were not complied with.

Rhoades further concludes that no other statutory provision grants same-sex couples the right to have the non-gestational parent's name on the child's birth certificate under these circumstances. Plaintiffs cite Wis. Stat. § 69.14(1)(e)1., under which the name of the husband of a woman who has just given birth is placed on a newborn child's birth certificate as the father. They contend that this statute should be equally applied to both same-sex and different-sex couples. This argument fails.

Under the specific/general canon of construction the general statute, § 69.14(1)(e)1., is controlled by the specific statute, § 69.14(1)(g). *See RadLAX*

Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012). Furthermore, § 69.14(1)(e)1., like the closely related evidentiary presumption of paternity, Wis. Stat. § 891.41, is based on presumption that a woman's husband is the biological father of her child. These statutes are inapplicable to same-sex couples, where there is no question that the non-gestational spouse is not the biological father of the child.

Natural insemination: Rhoades concludes that same-sex couples who conceive a child by natural insemination are not entitled to have the non-gestational parent's name on the child's birth certificate pursuant to any provision of the birth certificate statutes.

Neither of the birth certificate provisions applies to this situation. Section 69.14(1)(g), the artificial insemination provision, is obviously inapplicable. Section 69.14(1)(e)1. is inapplicable in these circumstances for many of the same reasons it is inapplicable in the situation discussed in the previous section.

Cases of natural insemination are the most problematic from a public policy perspective. Artificial insemination may involve an anonymous or a known semen donor. Where the insemination occurs naturally, however, the semen donor is never anonymous. The donor may be a friend, relative, or fleeting acquaintance. But, whatever his role in the lives of the same-sex couple, he is a known person who may expect to have parental rights.

Indeed, he may have agreed to inseminate the birth mother with the express expectation that he would have parental rights and would participate legally and emotionally in the child's upbringing. Even if he does not know prior to the birth that a child will be born, he may want to assert parental rights when he discovers that he is a biological father of a child. The spouse of the child's mother may not adopt the child unless the biological father (if living) terminates his parental rights. Wis. Stat. § 48.81(4).

The interests of men in this position must be considered. The birth certificate statutes cannot be casually applied to same-sex couples as if the rights of biological fathers did not exist.

C. This Court should certify three subclasses as described in Part B.

Rhoades does not intend her legal analysis of the three proposed subclasses in Part B. of this brief to be definitive on the merits of this case. She will elaborate further on the merits in her response to plaintiffs' motion for summary judgment, and show there why summary judgment should be granted to the first subclass of plaintiffs and denied to the second and third subclasses of plaintiffs (and instead granted to defendant Rhoades).

The purpose of Rhoades' legal analysis in this brief is to illustrate the different legal issues that must be addressed in the three categories of same-sex parents. By highlighting the legal differences—which are all based

on the factual differences between the three categories—Rhoades has shown that the certification of a single class in this case is not appropriate. There is no unitary legal analysis that applies to couples within the three different classes. Section 69.14(1)(g) cannot be used to grant relief to all same-sex parents, because not all of them have complied with the requirements of § 891.40(1). To extend it to couples that have not complied with that statute is to give same-sex couples greater benefits than different-sex couples. Section 69.14(1)(e)1. cannot be applied to same-sex couples because it is based on the biological fact that a child is conceived by the union of male sperm and female ovum. But the inapplicability of that statute should not preclude same-sex couples who have complied with § 891.40(1) from obtaining relief under § 69.14(1)(g).

Accordingly, Rhoades asks this Court to deny plaintiffs' motion to certify a single class, and grant Rhoades' alternative proposal to certify a single class with three subclasses.

CONCLUSION

For the reasons stated, defendant Kitty Rhoades asks this Court to deny the certification of the class action proposed by plaintiffs. Instead, Rhoades asks this court to certify one class with three subclasses.

Dated this 2nd day of October, 2015.

BRAD D. SCHIMEL
Attorney General

s/Maura FJ Whelan
MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant Kitty Rhoades

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859 (*AAG Whelan*)
(608) 266-0020 (*AAG Keenan*)
(608) 267-2223 (fax)
whelanmf@doj.state.wi.us
keenanbp@doj.state.wi.us

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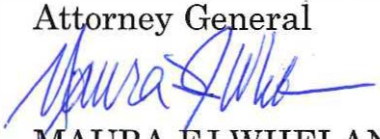
BRAD D. SCHIMEL
Attorney General



MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Defendant Kitty Rhoades

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859 (*AAG Whelan*)
(608) 266-0020 (*AAG Keenan*)
(608) 267-2223 (fax)
whelanmf@doj.state.wi.us
keenanbp@doj.state.wi.us