

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

CHELSEA TORRES and JESSAMY  
TORRES, individually and as next friends and  
parents of A.T., a minor child, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

*versus*

KITTY RHOADES, in her official capacity as  
Secretary of the State of Wisconsin  
Department of Health Services,

Defendant.

CASE NO. 3:15-cv-00288

HON. BARBARA B. CRABB

**PLAINTIFFS' RESPONSE TO DEFENDANT'S PROPOSED FINDINGS OF FACT IN  
SUPPORT OF BRIEF CONCURRING IN PART AND OPPOSING IN  
PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1. The Vital Records Office is a unit of the Department of Health Services. Its head officer is the State Registrar. The Registrar is the custodian of vital records, including but not limited to birth, death, marriage, divorce and annulment records, and declarations and terminations of domestic partnerships. Affidavit of Rebecca L. Biely ("Biely Aff.") ¶ 2.

**RESPONSE: Not disputed.**

2. A woman who has just given birth to a child in a Wisconsin hospital completes a "Mother's Birth Certificate Worksheet-Hospital" (DHS Form F-05108). The worksheet includes a space for information about a woman's "husband." This worksheet is not intended to be sent to DHS, but is to be handed to hospital personnel. Biely Aff. ¶¶ 5, Ex. AA.

**RESPONSE: Not disputed.**

3. DHS provides a “Birth Certificate Worksheet—Hospital” (DHS Form F-05109) to assist hospital personnel in organizing the relevant information. DHS Form F-05109 asks whether the pregnancy resulted from artificial insemination. The form does not ask whether the artificial insemination complied with the requirements of Wis. Stat. § 891.40(1). Biely Aff. ¶¶ 6, Ex. BB.

**RESPONSE: Not disputed.**

4. These forms are currently under review by DHS/VRO. Biely Aff. ¶¶ 7.

**RESPONSE: Not disputed.**

5. Hospital personnel enter the information regarding the birth into the Statewide Vital Records Information System (“SVRIS”) database. Biely Aff. ¶¶ 8.

**RESPONSE: Not disputed.**

6. The birth record is considered to be “registered” after a state file number is assigned to the record. Biely Aff. ¶¶ 9.

**RESPONSE: Not disputed.**

7. DHS sends a “Notification of Birth Certificate Registration” (DHS Form F-05217) to the birth mother. The notification shows the information on the birth certificate, and instructs the parent to “[e]nter corrections if any, sign, and return immediately.” Biely Aff. ¶¶ 10, Ex. CC.

**RESPONSE: Not disputed.**

8. The contents in the Notification are taken from the information that the hospital entered into SVRIS. DHS/VRO does not investigate that information. Biely Aff. ¶¶ 11.

**RESPONSE: Not disputed.**

9. A.T. was born at Meriter Hospital on or around March 14, 2015. Declaration of Chelsea Torres ¶¶ 11, 14; Declaration of Jessamy Torres ¶¶ 9, 14.

**RESPONSE: Not disputed.**

10. According to SVRIS, Meriter Hospital identified Chelsea Torres as A.T.'s mother. The hospital entered no information about a second parent. Biely Aff. ¶¶ 13.

**RESPONSE: Not disputed.**

11. DHS has never refused to give A.T. a two-parent birth certificate including the names of both Chelsea Torres and Jessamy Torres. Biely Aff. ¶¶ 14.

**RESPONSE: Disputed. As stated in their affidavits, Chelsea and Jessamy Torres followed the same procedures that thousands of different sex-couples follow to obtain an accurate two-parent birth certificate. Nevertheless, DHS sent Chelsea a notification that A.T.'s birth certificate would list only Chelsea's name. A.T. still has not received a two-parent birth certificate. Chelsea Dec. ¶¶ 14-17; Jessamy Dec. ¶¶ 14-17. Because A.T.'s birth certificate lists only one parent, government officials have contacted Chelsea Torres in an effort to establish legal paternity. October 12, 2015 Declaration of Chelsea Torres at ¶ 4. Whether these actions constitute a "refusal" to issue a birth certificate is a question of law, not fact.**

12. In a letter to defendant Kitty Rhoades and DRS Chief Legal Counsel Sandra Rowe dated April 24, 2015, counsel for the Torreses requested that DRS "correct [A.T.'s] birth certificate to reflect that both Chelsea and Jessamy Torres are his parents." Declaration of Kyle Palazzo, Ex. A.

**RESPONSE: Not disputed.**

13. In response, Chief Legal Counsel Rowe wrote an email to the Torreses' counsel dated May 1, 2015, that said: "The Vital Records Office, in consultation with Heather Curnutt (the assigned OLC attorney), is evaluating the request and will respond when that evaluation is complete. Please contact me if you have questions." Neither the Torreses nor their counsel contacted Chief Legal Counsel Rowe with questions. Biely Aff. ¶ 16, Ex. DD.

**RESPONSE: Not disputed.**

14. On May 13, 2015, the Torreses filed their complaint in this case. Dkt. 2. With the institution of this litigation, DHS suspended its administrative evaluation of the Torreses' request for a two-parent birth certificate. Biely Aff. ¶¶ 17.

**RESPONSE: Not disputed.**

15. The deadline for Secretary Rhoades to file her Answer to the plaintiffs' complaint was June 5, 2015. Affidavit of Maura FJ Whelan ("Whelan Aff.") ¶¶ 2.

**RESPONSE: Not disputed.**

16. Counsel for Rhoades contacted the Torres counsel to ask if they would object to a brief extension of the Answer deadline because Rhoades was hoping to settle the case with the Torreses in a negotiated settlement. Counsel did not suggest what the settlement offer would be, but DHS would eventually agree to offer A.T. a two-parent birth certificate. Whelan Aff. ¶¶ 3.

**RESPONSE: Not disputed except to clarify that DHS's offer to issue A.T. a birth certificate was conditioned upon dismissal of this class action. Declaration of Clearesia Lovell-Lepak ("Lovell-Lepak Dec.") at ¶ 3. DHS's settlement offer with respect to the Plaintiff Class was limited to those same-sex spouses who had used "artificial insemination" in compliance with Wis. Stat. § 891.40, and would have required such spouses to meet burdensome evidentiary requirements not applied to other families. Lovell-**

**Lepak Dec. at ¶¶ 3-4. Many families are unable to meet such requirements despite having achieved pregnancy through the use of reproductive technology in a medical setting consistent with current medical standards of care. *Id.***

17. The Torres counsel did not object to the extension request. On June 4, 2015, counsel filed a motion for a one-week extension to file the Answer. In both the motion and the accompanying affidavit, counsel explained that Secretary Rhoades was considering pursuing a negotiated settlement with the Torreses. Whelan Aff. ¶¶ 4.

**RESPONSE: Not disputed.**

18. The same day counsel filed the extension motion, plaintiffs filed a First Amended Class Action Complaint for Declaratory and Injunctive First Amended Class Action Complaint for Declaratory and Injunctive

**RESPONSE: Not disputed.**

19. The class action motion made our plan to settle the case by supplying A.T. with a two-parent birth certificate effectively moot. Nevertheless, on June 9, 2015, counsel told the Torres counsel that DHS was prepared to give A.T. a two-parent birth certificate. The case did not settle. Whelan Aff. ¶ 6.

**RESPONSE: Not disputed except to clarify that DHS's offer to issue A.T. a birth certificate was conditioned upon dismissal of this class action. Lovell-Lepak Dec. at ¶ 3. DHS's settlement offer with respect to the Plaintiff Class was limited to those same-sex spouses who had used "artificial insemination" in compliance with Wis. Stat. § 891.40, and would have required such spouses to meet burdensome evidentiary requirements not applied to other families. Lovell-Lepak Dec. at ¶¶ 3-4. Many families are unable to meet**

**such requirements despite having achieved pregnancy through the use of reproductive technology in a medical setting consistent with current medical standards of care. *Id.***

20. On July 28, 2015, counsel for Rhoades had a teleconference with the Torres counsel. Counsel for Rhoades offered to settle the birth certificate question with respect to all same-sex couples who had complied with the requirements of Wis. Stat. § 891.40(1) by giving two-parent birth certificates to their children. The case did not settle. Whelan Aff. ¶ 7.

**RESPONSE: Not disputed except to clarify that DHS’s settlement offer with respect to the Plaintiff Class was limited to those same-sex spouses who had used “artificial insemination” in compliance with Wis. Stat. § 891.40, and would have required such spouses to meet burdensome evidentiary requirements not applied to other families. Lovell-Lepak Dec. at ¶¶ 3-4. Many families are unable to meet such requirements despite having achieved pregnancy through the use of reproductive technology in a medical setting consistent with current medical standards of care. *Id.***

\* \* \*

DATED: October 13, 2015

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Respectfully submitted,

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