

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE and RUBY HENDERSON, a married)	
couple and L.W.C.H., by his parent and next)	
friend Ruby Henderson, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
vs.)	No. 1:15-cv-220-TWP-MJD
)	
DR. JEROME M. ADAMS, in his official capacity)	
as Indiana State Health Commissioner, <i>et al.</i> ,)	
)	
Defendants.)	

CASE MANAGEMENT PLAN

The parties have agreed upon the following Case Management Plan:

I. Parties and Representatives

A. Plaintiffs:

ASHLEE and RUBY HENDERSON,
L.W.C.H., by his parent and next friend Ruby Henderson;
NICOLE and JENNIFER SINGLEY;
UNBORN BABY DOE, by his expectant mother and next friend, Jennifer
Singley; and,
ELIZABETH "NICKI" and TONYA BUSH-SAWYER, a married couple and
I.J.B. a/k/a I.J.B.-S. by his parent and next friend Nicki Bush-Sawyer

B. Plaintiffs' Counsel:

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C. State Defendants:

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D. State Defendant's Counsel:

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E. Tippecanoe County Defendants:

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CRAIG RICH, in his official capacity as Administrator of the Tippecanoe County Health Department;
GLENDA ROBINETTE, Vital Records Registrar, Tippecanoe County Health Department; and,

In their official capacities as members of the Tippecanoe County Board of Health:
PAM AALTONEN, RN;
DR. THOMAS C. PADGETT;
THOMETRA FOSTER, KAREN COMBS;
KATE NAIL, RN;
DR. JOHN THOMAS; and,
DR. HSIN-YI WENG

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G. Marion County Defendants:

DR. VIRGINIA A. CAINE, in her official capacity as Director and Health Officer of the Marion County Health Department;
DARREN KLINGLER, Administrator, Vital Records, Marion County Health Department; and,
In their official capacities as Trustees, Health & Hospital Corporation of Marion County

DR. JAMES MINER
GREGORY S. FEHRIBACH
LACY M. JOHNSON
CHARLES S. EBERHARDT II
DEBORAH J. DANIELS
DR. DAVID F. CANAL, and
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Counsel shall promptly file a notice with the Clerk if there is any change in this information.

II. Jurisdiction and Statement of Claims

- A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343 as this suit raises federal questions pursuant to 42 U.S.C. § 1983. Plaintiffs seek both injunctive relief and a declaratory judgment pursuant to 28 U.S.C. § 2201.
- B. Plaintiffs maintain that the State of Indiana denies them equal protection and substantive due process as promised by the U.S. Constitution because Indiana refuses to presume parenthood for the same sex spouse of the birthmother who was artificially inseminated by a third-party sperm donor but will presume parenthood for the opposite sex spouse of the birthmother who was artificially inseminated by a third-party sperm donor.
- C. Defendants maintain that the Court lacks jurisdiction over one or more claims asserted by Plaintiffs for lack of suitable defendants under Article III, the Eleventh Amendment, and principles of sovereign immunity. On the merits, Defendants assert Plaintiffs are not entitled to relief because the challenged statutes permissibly balance multiple competing compelling state interests, including but not limited to (1) identifying biological parents, (2) documenting terminations and bestowals of parental rights, (3) protecting family privacy in circumstances where it is plausible that married parents are also biological parents, (4) making it more likely that children will have access to adequate parental support and rights of inheritance; (5) making it more likely that children will have access to accurate family history, and (6) making it more likely that children will have access to genetic and family medical histories. The Marion County Defendants assert that they are ministerial officers with respect to the statutes in question and defer to the State Defendant's presentation of defenses.
- D. On or before **November 13, 2015**, and consistent with the certification provisions of Fed. R. Civ. P. 11(b), the party with the burden of

proof shall file a statement of the claims or defenses it intends to prove at trial, stating specifically the legal theories upon which the claims or defenses are based.

III. Pretrial Pleadings and Disclosures

All parties agree that the Supreme Court's forthcoming decision in the same-sex marriage case *Obergefell v. Hodges*, may have a substantial impact on the issues raised in this case. One of the cases that has been consolidated with *Obergefell* is a Sixth Circuit case, *Henry v. Hodges*, in which plaintiffs argue that the refusal to recognize same sex marriage is unconstitutional because it results in the failure to recognize both parents in cases where artificial insemination is involved or where the child is adopted by two same sex parents (in contrast, Indiana does allow second same sex parent adoptions). The Sixth Circuit summarized *Henry* as follows:

The *Henry* case involves four same-sex couples, all married in other States, who want Ohio to recognize their marriages on their children's birth certificates. Three of the couples (Brittani Henry and Brittini Rogers; Nicole and Pam Yorksmith; Kelly Noe and Kelly McCracken) gave birth to children in Ohio and wish to have both of their names listed on each child's birth certificate rather than just the child's biological mother. The fourth couple (Joseph Vitale and Robert Talmas) lives in New York and adopted a child born in Ohio. They seek to amend their son's Ohio birth certificate so that it lists both of them as parents.

Deboer v. Snyder, 772 F.3d 388, 398–99 (6th Cir. 2014). Because the Sixth Circuit affirmed Ohio's policy of non-recognition, it did not address the specific issue regarding birth certificates.

As to both *Henry* and *Tanco v. Haslam*, another same-sex marriage case, the Sixth Circuit observed: “[T]he claimants maintain that a State’s refusal to recognize out-of-state same-sex marriages illegitimately burdens the right to travel—in the one case by penalizing couples who move into the State by refusing to recognize their marriages, in the other by preventing their child from obtaining a passport because the State refused to provide a birth certificate that included the names of both parents.” *Deboer*, 772 F.3d at 420. The Sixth Circuit found that the right of travel claimed by the parties was not a right recognized by the U.S. Constitution. *Id.*

Thus, it is unclear whether the issue regarding birth certificates will be resolved by the U.S. Supreme Court this term in *Obergefell*. Nonetheless, all parties agree this case should not proceed further before that decision is handed down. It is expected no

later than the end of June 2015.¹

- A. The parties shall serve their Fed. R. Civ. P. 26 initial disclosures on or before **June 12, 2015**.
- B. Plaintiff(s) shall file preliminary witness and exhibit lists on or before **June 19, 2015**.
- C. Defendant(s) shall file preliminary witness and exhibit lists on or before **June 26, 2015**.
- D. All motions for leave to amend the pleadings and/or to join additional parties shall be filed on or before **July 15, 2015**.
- E. Plaintiff(s) shall serve Defendant(s) (but not file with the Court) a statement of special damages, if any, and make a settlement demand, on or before **June 19, 2015**. Defendant(s) shall serve on the Plaintiff(s) (but not file with the Court) a response thereto within **21 days after receipt of the demand**. The parties are instructed to email Magistrate Judge Dinsmore a copy of the settlement demand and response thereto to MJDinsmore@insd.uscourts.gov.
- F. Plaintiff(s) shall disclose the name, address, and vita of any expert witness, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before **August 28, 2015**. Defendant(s) shall disclose the name, address, and vita of any expert witness, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before **September 28, 2015**. Plaintiff(s) shall disclose the name, address, and vita of any rebuttal expert witness, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before **October 19, 2015**.
- G. Omitted.

¹ As is discussed *infra*, plaintiffs intend to file a motion for summary judgment no later than September 1, 2015 as they believe the case presents a question of law and undisputed facts. The State intends to engage in discovery, and its inquiries may be affected by one or more opinions in *Obergefell*, necessitating the later anchor date. The plaintiffs do not see the necessity of a later anchor date but will leave this decision to the Court.

- H. Any party who wishes to limit or preclude expert testimony at trial shall file any such objections no later than **May 2, 2016**. Any party who wishes to preclude expert witness testimony at the summary judgment stage shall file any such objections with their responsive brief within the briefing schedule established in this Case Management Plan.
- J. All parties shall file and serve their final witness and exhibit lists on or before **October 19, 2015**. This list should reflect the specific potential witnesses the party may call at trial. It is not sufficient for a party to simply incorporate by reference “any witness listed in discovery” or such general statements. The list of final witnesses shall include a brief synopsis of the expected testimony.
- K. Any party who believes that bifurcation of discovery and/or trial is appropriate with respect to any issue or claim shall notify the Court as soon as practicable.
- L. In the event that a document protected by the attorney-client privilege, the attorney work product doctrine or other applicable privilege or protection is unintentionally produced by any party to this proceeding, the producing party may request that the document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any copies of the document or any documents derived from such document. The producing party shall promptly identify the returned document on a privilege log. The unintentional disclosure of a privileged or otherwise protected document shall not constitute a waiver of the privilege or protection with respect to that document or any other documents involving the same or similar subject matter.

IV. Discovery² and Dispositive Motions

Due to the time and expense involved in conducting expert witness depositions and other discovery, as well as preparing and resolving dispositive motions, the Court requires counsel to use the CMP as an opportunity to seriously explore whether this case is appropriate for such motions (including specifically motions for summary judgment), whether expert witnesses will be needed, and how long discovery should continue. To this end, counsel must select the track set forth below that they believe best suits this case. If the parties are unable to agree on a track, the parties must: (1) state this fact in the CMP where indicated below; (2) indicate which track each counsel believes is most appropriate; and (3) provide a brief statement supporting the reasons for the track each counsel believes is most appropriate. If the parties are unable to agree on a track, the Court will pick the track it finds most appropriate, based upon the contents of the CMP or, if necessary, after receiving additional input at an initial pretrial conference.

- A. Plaintiffs believe this case can and should be decided upon summary judgment as a matter of law. It is undisputed that Indiana has refused to recognize the same sex spouse of the three birthmothers as a parent to the children. In light of *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), recognizing gays and lesbians as a quasi-suspect class and other Seventh Circuit decisions recognizing unequal treatment on the basis of sex and the constitutional rights of families, plaintiffs believe Indiana's practice is subject to heightened scrutiny and that the Defendants cannot justify it by showing an important governmental interest. Plaintiffs thus believe they are entitled to summary judgment.

Defendants agree this case can and should be decided upon summary judgment as a matter of law. Defendants believe the Court should review the statutes and practices at issue in this case under a rational basis standard and conclude they are constitutional. But even if the Court applies some form of heightened scrutiny, Defendants contend the challenged statutes and practices should survive because they permissibly balance multiple competing compelling state interests.

² The term “completed,” as used in Section IV.B, means that counsel must serve their discovery requests in sufficient time to receive responses before this deadline. Counsel may not serve discovery requests within the 30-day period before this deadline unless they seek leave of Court to serve a belated request and show good cause for the same. In such event, the proposed belated discovery request shall be filed with the motion, and the opposing party will receive it with service of the motion but need not respond to the same until such time as the Court grants the motion.

- B. All discovery shall be completed by **November 6, 2015**. Plaintiffs shall file any dispositive motion on or before **December 4, 2015**. Defendants shall respond to Plaintiffs' dispositive motion and assert any cross-dispositive motion on or before **January 8, 2016**. Plaintiffs shall respond to Defendants' cross-dispositive motion, to include a reply in support of Plaintiff's dispositive motion on or before **February 8, 2016**. Defendants shall file any reply in support of their cross-dispositive motion on or before **February 22, 2016**.

Absent leave of court, and for good cause shown, all issues raised on summary judgment under Fed. R. Civ. P. 56 must be raised by a party in a single motion.

If the required conference under Local Rule 37-1 does not resolve discovery issues that may arise, the parties will request a telephonic status conference prior to filing any disputed motion to compel or for a protective order.

V. **Pre-Trial/Settlement Conferences**

At any time, any party may call the Judge's Staff to request a conference, or the Court may sua sponte schedule a conference at any time. The presumptive time for a settlement conference is no later than 30 days before the close of non-expert discovery. **The parties are encouraged to request an earlier date if they believe the assistance of the Magistrate Judge would be helpful in achieving settlement. The parties recommend a settlement conference in April 2016.**

VI. **Trial Date**

This matter will be ready for trial in or after **September, 2016**. The trial is by the **Court** and is anticipated to take **four days**.

VII. Referral to Magistrate Judge

- A. **Case.** At this time, all parties do not consent to refer this matter to the currently assigned Magistrate Judge pursuant to 28 U.S.C. 636(b) and Federal Rules of Civil Procedure 73 for all further proceedings including trial.
- B. **Motions.** The parties may also consent to having the assigned Magistrate Judge rule on motions ordinarily handled by the District Judge, such as motions to dismiss, for summary judgment, or for remand. If all parties consent, they should file a joint stipulation to that effect. Partial consents are subject to the approval of the presiding district judge.

VIII. Required Pre-Trial Preparation

- A. **TWO WEEKS BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:**
1. File a list of trial witnesses, by name, who are actually expected to be called to testify at trial. This list may not include any witnesses not on a party's final witness list filed pursuant to section III.I.
 2. Number in sequential order all exhibits, including graphs, charts and the like, that will be used during the trial. Provide the Court with a list of these exhibits, including a description of each exhibit and the identifying designation. Make the original exhibits available for inspection by opposing counsel. Stipulations as to the authenticity and admissibility of exhibits are encouraged to the greatest extent possible.
 3. Submit all stipulations of facts in writing to the Court. Stipulations are always encouraged so that at trial, counsel can concentrate on relevant contested facts.
 4. A party who intends to offer any depositions into evidence during the party's case in chief shall prepare and file with the Court and copy to all opposing parties either:
 - a. brief written summaries of the relevant facts in the depositions that will be offered. (Because such a summary will be used in lieu of the actual deposition testimony to eliminate time reading depositions in a question and answer format, this is strongly encouraged.); or
 - b. if a summary is inappropriate, a document which lists the portions of the deposition(s), including the specific page and line numbers, that will be read, or, in the event of a video-taped deposition, the

portions of the deposition that will be played, designated specifically by counter-numbers.

5. Provide all other parties and the Court with any trial briefs and motions in limine, along with all proposed jury instructions, voir dire questions, and areas of inquiry for voir dire (or, if the trial is to the Court, with proposed findings of fact and conclusions of law).
6. Notify the Court and opposing counsel of the anticipated use of any evidence presentation equipment.

B. ONE WEEK BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:

1. Notify opposing counsel in writing of any objections to the proposed exhibits. If the parties desire a ruling on the objection prior to trial, a motion should be filed noting the objection and a description and designation of the exhibit, the basis of the objection, and the legal authorities supporting the objection.
2. If a party has an objection to the deposition summary or to a designated portion of a deposition that will be offered at trial, or if a party intends to offer additional portions at trial in response to the opponent's designation, and the parties desire a ruling on the objection prior to trial, the party shall submit the objections and counter summaries or designations to the Court in writing. Any objections shall be made in the same manner as for proposed exhibits. However, in the case of objections to video-taped depositions, the objections shall be brought to the Court's immediate attention to allow adequate time for editing of the deposition prior to trial.
3. File objections to any motions in limine, proposed instructions, and voir dire questions submitted by the opposing parties.
4. Notify the Court and opposing counsel of requests for separation of witnesses at trial.

Respectfully Submitted,

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Upon approval, this Plan constitutes an Order of the Court. Failure to comply with an Order of the Court may result in sanctions for contempt, or as provided under Rule 16(f), to and including dismissal or default.

Approved and So Ordered.

Dated: 05/13/2015

A handwritten signature in black ink, appearing to read "Mark J. Dinsmore", written over a horizontal line.

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

Distribution:

Service will be made electronically
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