Family Law in Michigan Post *Windsor* and *Obergefell*

Recent Caselaw and Procedures Affecting Same-Sex Relationships

By Richard Roane

Two years have passed since the landmark United States Supreme Court decision in *Obergefell v Hodges*,[1] which brought marriage equality to all 50 states.[2] This decision required states, including Michigan, to recognize same-sex marriages performed in other states and other countries as well as authorizing couples to legally marry in Michigan. While the issue of marriage for same-sex couples has been settled for two years now, there are challenges and problems that some same-sex couples continue to face when their relationships break up and families come apart.

Parenting—equitable parent doctrine is still limited to married couples

Mabry v Mabry[3]

In an unpublished order, the Michigan Court of Appeals ruled against a lesbian nonbiological mother, limiting the equitable parent doctrine to married couples. This would affect same-sex couples who were unconstitutionally prohibited from marrying but separated before the Supreme Court's decision in *Obergefell* and have a custody dispute. The Michigan Supreme Court refused to take an appeal from the lower court's decision.

Stankevich v Milliron[4]

A spouse filed a verified complaint seeking an order dissolving her same-sex marriage solemnized in Canada and an order affirming that she was the parent of the child born to the spouse's partner. The circuit court entered a summary disposition judgment in favor of her wife, and the spouse appealed. The Court of Appeals upheld the grant of summary disposition. The spouse then filed an application for leave to appeal. The Supreme Court vacated and remanded the summary disposition order. On remand, the Court of Appeals held that the spouse had legal standing under the equitable parent doctrine to bring a custody action. Thus, if an established marriage was proven, this would be sufficient to establish legal standing to file an action seeking equitable parenthood. "Standing" is a word used to describe a party's legal ability or right to file a court action or to otherwise seek relief from a court.

Lake v Putnam[5]

The Court of Appeals held that a third person—"a person other than the parent"—will not have standing to initiate a child custody proceeding unless he or she falls within the specific circumstances as set forth in the Child Custody Act.[6] The Court held that a third party may not gain standing by asserting the equitable parent doctrine if the third party and the natural parent were not married at the time the child was born or conceived.

Kolailat v McKennett[7]

The Michigan Court of Appeals relied on the Supreme Court decision in *Van v Zahorik*[8] that "[b]y its terms, [the equitable parent] doctrine applies, upon divorce, with respect to a child born or conceived during the marriage."[9] Thus, when a child is not conceived or born within a marital relationship, the equitable parent doctrine is not applicable. In *Stankevich*, the Court acknowledged the *Van* Court's refusal to extend the equitable parent doctrine outside the context of marriage. Therefore, in attempting to establish standing pursuant to the equitable parent doctrine, a same-sex couple must prove the existence of valid marriage. Since the parties were never married, the plaintiff lacked standing pursuant to *Van*. The Michigan Supreme Court refused to take an appeal of the lower court's decision.

Based on these cases, the equitable parent doctrine is still limited to married couples.

Birth certificate—birth records for children of same-sex couples pre-marriage

A legal issue that many same-sex couples with children may face is how to have both parents' names listed on birth certificates of children born to or adopted by the couple. Before the *Obergefell* decision, there was no "marital presumption" that children born during a same-sex nonmarital

FAST FACTS

When unmarried couples with children break up, parental rights cannot be established between the children and a nonbiological, non-legally-recognized parent figure. (*Mabry v Mabry*)

A birth certificate merely records the fact of a birth and does not convey custodial rights in adults regardless of whether their names are included on the certificate.

Currently, 11 states excluding Michigan recognize some type of "psychological" parent association specific to family relationships.

relationship were children of that relationship. If one parent was the birth parent, that parent would most certainly be listed on the birth certificate. If the other parent or parental figure in a relationship was not the biological father or the birth mother, he or she would not be listed on the birth certificate.

After the *Obergefell* decision where same-sex married couples enjoy the same rights and privileges as heterosexual married couples, the legal marriage presumption applies. This means that all children born during a marriage—whether a same-sex or heterosexual marriage—are presumed to be children of that marriage and, as such, both married parents should be listed on the birth certificate. County clerk offices manage the state vital statistics records, which is where a person would obtain a birth certificate or a copy. Some parents in same-sex relationships or marriages before *Obergefell* who were not married or whose marriages were not recognized when their children were born may now seek to modify or correct birth certificates to reflect both parents on these important administrative documents.

It should be noted that birth certificates are administrative documents that record the fact of the birth of a child and identify the parents. A birth certificate is not a custody order; it does not have the same important effect as a custody order on the life of a family or the rights and responsibilities of parents with respect to each other and their children. It is essential to correct and update birth certificates to reflect legally recognized parents as a result of these changing laws. It is also important to recognize that a parent's name on a birth certificate does not convey or establish custodial rights.

Because Michigan has no specific published cases or rules or statutes addressing the issue of names of same-sex unmarried couples on birth certificates, the following cases demonstrate how this issue is being treated in other jurisdictions.

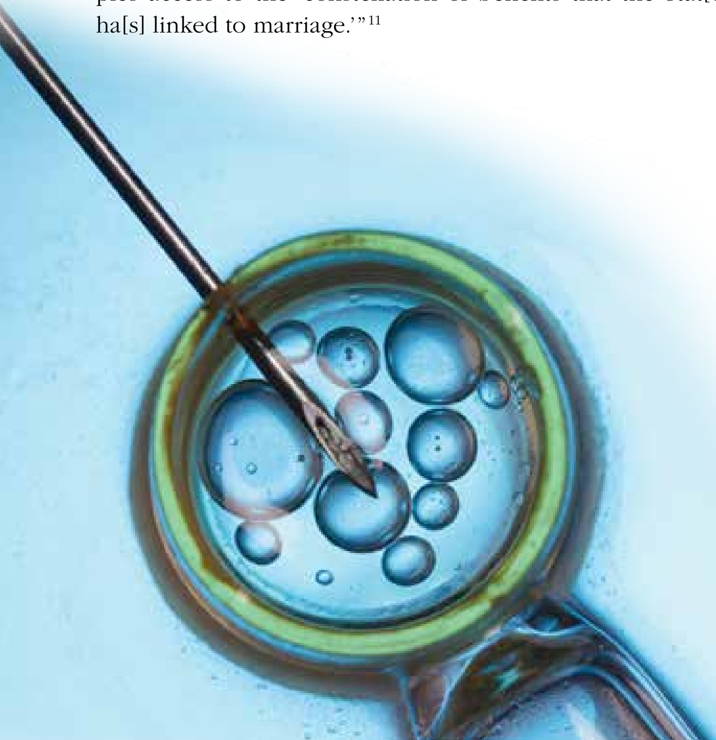
Smith v Pavan[10]

Married female couples brought an action against the Arkansas Department of Health seeking an injunction and a declaration that the department's refusal to issue birth certificates with the names of both spouses violated their constitutional rights and that certain statutes were unconstitutional. The state appealed to the Arkansas Supreme Court, which overturned the lower court ruling, holding that:

- issue preclusion did not apply;
- statutes governing birth certificates do not violate the due process rights of same-sex couples;
- statutes do not violate the equal protection rights of same-sex couples; and
- the Supreme Court would admonish the circuit court judge for inappropriate remarks.

This case does not address legal parentage rights and deals strictly with the issue of birth certificates. It may be appealed to the United States Supreme Court.

Note: On June 26, the United States Supreme Court reversed the Arkansas Supreme Court's decision in *Pavan v Smith* and ruled that both names of married parents must be included on birth certificates regardless of the parents' gender. In a decisive victory for same-sex married couples, the Court reversed the Arkansas Supreme Court decision without requiring oral argument, stating: "The Arkansas Supreme Court's decision, we conclude, denied married same-sex couples access to the 'constellation of benefits that the Stat[e] ha[s] linked to marriage.'"[11]



In re TJS[12]

A husband and wife in New Jersey applied for declaration of parentage and a pre-birth order directing that their names be listed on the birth certificate of the biological child of the husband and an anonymous ovum donor carried to term by a gestational carrier. After initially granting application, the Superior Court granted the motion by the Bureau of Vital Statistics and Registration to vacate the portion of the pre-birth order directing the wife to be listed as the child's mother on the birth certificate. The husband and wife appealed. The Superior Court held that:

- the New Jersey Parentage Act provides for declaration of maternity only to a biologically or gestationally related female;
- the wife did not have a fundamental right under the state constitution to create a legal parental relationship to the child at birth;
- the Parentage Act's recognition of parental status for an infertile husband but not an infertile wife does not violate equal protection principles of the state constitution; and
- the Bureau of Vital Statistics and Registration was entitled to notice of application for the pre-birth order.

The plaintiffs argued that the provisions of the Parentage Act conferring paternity upon a husband either presumptively (where the child is born to the wife during marriage[13]) or by operation of law (where the wife is artificially inseminated with donor sperm[14]) should be read gender neutrally to apply to the infertile wife as well and, if not construed in this manner, are facially unconstitutional because they treat differently similarly situated groups, i.e., infertile married men and women. The Court rejected the plaintiffs' argument, holding that nothing in the constitution or law provides that a male or female with no biological or gestational connection to a child has a fundamental right to create parentage by the most expeditious or convenient method possible.

The Court held that the legislature, in recognizing genetic link, birth, and adoption as acceptable means of establishing parenthood, has not preferred one spouse over the other because of gender. And when both spouses are infertile, the law treats them identically by requiring adoption as the singular means of attaining parenthood. Thus, the Court was satisfied that the complaint of disparate treatment was not grounded in gendered constructions of parenthood but in actual reproductive and biological differences, necessitating in the case of an infertile wife the introduction of a birth mother whom the law cloaks with superior protection. The state has a valid interest in making identification of the father easier when the child is born during the marriage for child support purposes.[15]

The Court also noted that "a birth certificate simply records the fact of parentage as reported by others; it neither

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constitutes a legal finding of parentage nor independently creates or terminates parental rights."[16]

DG v KS[17]

The biological father and his same-sex spouse filed a complaint seeking legal and physical custody of the child, parenting time, and declaration that the father's spouse was the child's psychological and legal parent. The biological mother filed a counterclaim seeking to establish a legal custodial relationship between the parties with physical custody vested in the mother. The Superior Court held that:

- the same-sex spouse of the biological father was the child's psychological parent;
- the biological father and his same-sex spouse and the biological mother were entitled to joint legal and joint physical custody;
- it was not in the child's best interests to permit the biological mother to relocate with the child to California;
- the father's same-sex spouse could not be found to be the child's legal parent; and
- each party would be required to provide for the care, needs, and general well-being of the child during his or her respective parenting time.

This case involves issues of custody, removal, and support surrounding an agreement entered into between three friends to conceive and jointly raise a child in a tri-parenting arrangement. Plaintiff DG is the biological father and KS is the child's biological mother. Plaintiff SH is DG's same-sex spouse, who has bonded with and become a psychological parent of OSH. The Court awarded joint legal and joint residential custody of OSH to all three parties and denied the application of KS to remove and relocate the child to a different state.

The biological father's same-sex spouse could not be found to be the child's legal parent, even though the spouse's surname was on the child's birth certificate as the child's own. The Court did not have the jurisdiction to create a new recognition of legal parentage other than that which already existed—genetic contribution, adoption, or gestational primacy—and the spouse did not contribute genetically to or act as a gestational carrier of the child, nor had he moved for adoption. The fact that the child bore the spouse's last name held no weight in the determination of legal parentage.

Based on the above factors, birth certificates cannot be amended to add a parent to a birth certificate absent genetic contribution, adoption, or gestational primacy. However, a birth certificate neither constitutes a legal finding of parentage nor independently creates or terminates parental rights.

Psychological parent doctrine

Some same-sex couples may raise children together without the benefit or legal rights of marriage and then break up. If one parent is not legally recognized either because of lack of marriage or biological connection with the child, other legal principles or theories may apply to address and protect the parent-child relationships.

Eleven U.S. states recognize the psychological parent doctrine or de facto parent doctrine in some variation: Alaska, Colorado, Idaho,[18] New Jersey, New York, Oregon,[19] Pennsylvania, Rhode Island, South Carolina, Washington, and Wisconsin.

A psychological parent is

> one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of the child's emotional and psychological needs. . . . The wanted child is the one who is loved, valued, appreciated, and viewed as an essential person by the adult who cares for him.
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> . . . This relationship may exist between a child and an adult; it depends not upon the category into which the adult falls—biological, adoptive, foster, or common law—but upon the quality and mutuality of the interaction.[20]

The psychological doctrine focuses on the child and his or her psychological bond with an adult and the effects on the child if that bond is suddenly severed. This doctrine puts the focus on the best interests of the child, not on the legal relationships between the respective parent figure or figures and the child.

In the New Jersey case *VC v MJB*,[21] the court held:

> At the heart of the psychological parent cases is recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.[22]

In the case *KAF v DLM*,[23] KAF and FD were domestic partners and together decided to have a child, Arthur. KAF gave birth. KAF and FD eventually ended their relationship, but the parties still consented to FD adopting Arthur. KAF then began a relationship with DLM, the parties moved in together, became domestic partners, and lived as a family. KAF and DLM ended their relationship, but DLM continued to see Arthur weekly for overnights. Over time, KAF terminated the overnights and withheld Arthur from DLM. DLM filed for visitation under the psychological parent doctrine. KAF and FD argued in trial court that since FD did not consent to DLM creating a parent-like relationship with Arthur, she could not prevail on all four factors. The trial court agreed and dismissed the case.

On appeal, the appellate court overruled the trial court and said both legal parents did not have to give consent; it was enough for *one* legal parent to give consent/foster the parent-child relationship between Arthur and DLM. "Plainly understood, this statement by the Court emphasizes that the transcendent importance of preventing harm to a child weighs more heavily in the balance then the fundamental custody rights of a non-forsaking parent."[24]

In summary, the 11 states cited here have moved away from a strictly legal interpretation for identifying and defining a parent, shifting toward the factual realities of these family relationships when determining and recognizing the psychological parent doctrine. As such, an adult may be identified and conferred rights and access to a child or children not based on the traditional legally recognized identification of who a parent is, but the emotional relationship which provides entry to analyze the best interests of the child.

Are same-sex married couples treated differently regarding custody?

For the most part, courts should and do treat same-sex couples and their children the same as heterosexual couples. For years, the courts have been faced with custody disputes between married and separated heterosexual couples as well as unmarried heterosexual couples and same-sex unmarried couples (when same-sex marriage was not allowed). The Michigan Child Custody Act is the standard the courts must apply when considering the best interests of children and determining custodial placement, parenting time schedules, and other orders providing for the protection, nurturing, and good parenting of children.

Michigan judges should look at the 12 best interest factors when determining custody disputes, regardless of the sexual or gender orientation of the parents of children appearing before them. Standard analysis of the best interest factors should result in fair treatment of same-sex couples in their custody and family dissolution disputes.

Conclusion

As the definition of family evolves with same-sex marriage and recent changes in the law and recognition of these families, courts and society grapple with these changes. Foremost in the concern of the judges handling these cases are the best interests of the children whose parents appear before them. Dignity, respect, open-mindedness, and a willingness to recognize all types of families will assist courts in navigating this new territory. If so, a sense of equal justice for all will prevail. ■

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ENDNOTES

1. *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
2. "Post *Windsor*" is a term of art in the marriage-equality world, marking a flashpoint in this movement on June 26, 2013, when the United States Supreme Court held as unconstitutional section 3 of the Defense of Marriage Act, thereby opening up more than 1,138 federal benefits to same-sex married couples that were already available to heterosexual married couples.
3. *Mabry v Mabry*, 499 Mich 997; 882 NW2d 539 (2016).
4. *Stankevich v Milliron*, 313 Mich App 233; 882 NW2d 194 (2015).
5. *Lake v Putnam*, 316 Mich App 247; 894 NW2d 62 (2016).
6. MCL 722.26b; MCL 722.26c(1)(b).
7. *Kolailat v McKennett*, unpublished opinion of the Court of Appeals, issued December 17, 2015 (Docket No. 328333).
8. *Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999).
9. *Id.* at 330.
10. *Smith v Pavan*, 2016 Ark 437; 505 SW3d 169 (2016).
11. *Pavan v Smith*, 582 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2017).
12. *In re TJS*, 419 NJ Super 46; 16 A3d 386 (2011).
13. 390 NJSA 9:17–43(a).
14. 390 NJSA 9:17–44.
15. *Fazilat v Feldstein*, 180 NJ 74; 848 A2d 761 (2008).
16. *In re TJS*, 419 NJ Super at 53.
17. *DG v KS*, 444 NJ Super 423; 133 A3d 703 (2015).
18. *Stockwell v Stockwell*, 116 Idaho 297, 301; 775 P2d 611 (1989).
19. Or Rev Stat 109.119(10)(a).
20. *Evans v McTaggert*, 88 P3d 1078, 1082 (Alas, 2004), quoting *Carter v Brodrick*, 644 P2d 850, 852 n 2 (Alas, 1982).
21. *VC v MJB*, 163 NJ 200; 748 A2d 539 (2000).
22. *Id.* at 221.
23. *KAF v DLM*, 437 NJ Super 123; 96 A3d 975 (2014).
24. *Id.* at 135; see also *In the matter of Brooke SB v Elizabeth ACC*, 28 NY3d 1; 61 NE3d 488 (2016) (Unmarried same-sex couple agreed together to have a child and entered into a "pre-conception agreement" to conceive and raise a child together. The court ruled that where the nonbiological parent can show by clear and convincing evidence that such pre-conception agreement was entered into, the nonbiological parent has standing to seek custody and parenting time.).