

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

VIRGINIA WOLF and CAROL SCHUMACHER,
KAMI YOUNG and KARINA WILLES,
ROY BADGER and GARTH WANGEMANN,
CHARVONNE KEMP and MARIE CARLSON,
JUDITH TRAMPF and KATHARINA HEYNING,
SALUD GARCIA and PAMELA KLEISS,
WILLIAM HURTUBISE and LESLIE PALMER,
JOHANNES WALLMANN and KEITH BORDEN,

Plaintiffs,

v.

SCOTT WALKER, in his official capacity as
Governor of Wisconsin,
BRAD SCHIMEL, in his official capacity as
Attorney General of Wisconsin,
OSKAR ANDERSON, in his official capacity as
State Registrar of Wisconsin,
JOSEPH CZARNEZKI, in his official capacity as
Milwaukee County Clerk,
WENDY CHRISTENSEN, in her official capacity as
Racine County Clerk and
SCOTT MCDONELL, in his official capacity as
Dane County Clerk,

Defendants.¹

In an order dated June 6, 2014, I declared that Wisconsin laws “that limit marriages to a ‘husband’ and a ‘wife’ are unconstitutional as applied to same-sex couples.” Dkt. #118

¹ Brad Schimel has been substituted for J.B. Van Hollen in accordance with Fed. R. Civ. P. 25.

ORDER

14-cv-64-bbc

at 87. The following week I issued an injunction that ordered defendant Scott Walker and his agents “to treat same-sex couples the same as different-sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage.” Dkt. #134 at 13.

Now before the court is a motion filed by plaintiffs Kami Young and Karina Willes to enforce the injunction. Dkt. #201. (Although plaintiffs call their motion one for “clarification,” they do not ask the court to modify the injunction in any respect.) Plaintiffs contend that the Department of Health Services is treating them differently from heterosexual married couples by refusing to place both Young’s and Willes’s names on their child’s birth certificate. In particular, plaintiff says that both of their names should be listed on the certificate because Young gave birth after she and Willes married. Plaintiffs ask for an order “direct[ing] the equal application of Wisconsin’s presumption of parenthood for married couples [under Wis. Stat. § 891.41] to both different-sex and same-sex couples and the issuance of an original birth certificate [under Wis. Stat. § 69.14(1)(e)1] for [plaintiffs’ daughter] that includes both Kami and Karina as parents.” Dkt. #202 at 23.

Plaintiffs are raising an important issue that affects many families across the state of Wisconsin. In their motion, plaintiffs identify many benefits and rights that flow from being listed as a parent on a child’s birth certificate, so it is understandable that plaintiffs would want the same legal protections as any other similarly situated family. To plaintiffs, each day that passes without legal recognition of both parents leaves them more vulnerable than other families.

Although I understand plaintiffs' frustration, I cannot grant plaintiffs' motion at this time. To begin with, as defendants point out, I declined expressly in the June 13, 2014 order to include specific language proposed by plaintiffs regarding the handling of birth certificates:

I am not including the additions to [the injunction] related to birth certificates that plaintiffs included with their reply brief. The new language is not responsive to any objections that defendants raised and plaintiffs do not explain why they did not include the language in any of their previous proposals. Even if I overlooked the untimeliness of the request, an injunction related to birth certificates seems to go beyond the scope of the issues in this case. Plaintiffs have not developed an argument that an amendment to procedures related to obtaining a birth certificate is implicit in the conclusion that a ban of same-sex marriage is unconstitutional. Any disputes that arise about birth certificates will have to be resolved in another forum.

Dkt. #134 at 7.

Plaintiffs say that their request falls within the general language of the injunction regarding equal treatment of same-sex and different-sex couples. However, plaintiffs devote little of their briefs to developing this argument. They choose to focus instead on explaining why they believe state employees are violating their constitutional rights, which seems to support a view that they are raising a new issue that falls outside the scope of the injunction. Further, they cite cases in which courts have held that the same-sex spouse of the birth mother has the right to be listed on a birth certificate under certain circumstances, but those cases involved *new* actions, decided years after the original challenge to the marriage ban. E.g., Gartner v. Iowa Dept. of Public Health, 830 N.W.2d 335, 344 (Iowa 2013); Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012). (In fact, a similar case is pending in this court now. Torres v. Rhodes, No. 15-cv-288-bbc (W.D. Wis.) (requesting

injunction ordering state officials to “appl[y] . . . the spousal presumption of parentage to same-sex couples and issu[e] . . . two-parent birth certificates to same-sex spouses”).) Plaintiffs do not cite any cases in which a court resolved any issues regarding birth certificates in the context of the same lawsuit in which the court invalidated a ban on marriage between same-sex couples.

Plaintiffs also argue that the decision of the Court of Appeals for the Seventh Circuit in this case, Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), requires this court to grant their motion, but that argument is a nonstarter. Plaintiffs did not challenge the scope of this court’s injunction on appeal and the court of appeals rejected defendants’ challenge to the injunction, so the only question before the court now is whether plaintiffs can show that defendants are violating the terms of this court’s injunction as written. In any event, the court of appeals did not discuss the issues of “parental presumption” or birth certificates.

In a supplemental memorandum, dkt. #209, plaintiffs make a similar argument about Obergefell v. Hodges, Nos. 14-556, 14-562, 14-571, 14-574, — U.S. — 2015 WL 2473451 (June 26, 2015), in which the Supreme Court held that individuals have a constitutional right to marry someone of the same sex. Although “birth and death certificates” were included in a list of “governmental rights, benefits, and responsibilities” that the Court said may accompany marriage, id. at *15, the Court did not resolve the issue plaintiffs raise. More important, Obergefell cannot answer the question whether defendants are violating an injunction issued more than a year ago.

Even if I assume that some issues regarding birth certificates could be encompassed

by the more general language in the injunction regarding equal treatment, plaintiffs' motion raises questions that plaintiffs do not answer. The first question relates to Wis. Stat. § 891.41(1)(a), one of the statutes that plaintiffs say should be applied to them:

A man is presumed to be the natural father of a child if any of the following applies:

(a) He and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.

It is not immediately apparent how this statute could be reinterpreted to apply to plaintiffs. It applies a presumption that a husband is the "natural father" of the child. However, in plaintiffs' situation, it is already known that Willes is not a biological parent of the child, so applying a "presumption" that she is seems counterintuitive. Plaintiffs do not address this issue in their motion.

The other statute that plaintiffs cite, Wis. Stat. § 69.14(1)(e)1, is a more comfortable fit:

If the mother of a registrant under this section 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 as the legal father of the registrant. The name of the father entered under this subdivision may not be changed except by a proceeding under ch. 767.

This provision refers to a "legal" parent rather than a "natural" parent, so it could apply more easily to plaintiffs' situation. However, in their motion, plaintiffs seem to assume that § 69.14(1)(e)1 does not apply unless § 891.41 applies as well. Without any explanation from the parties regarding how and whether the two provisions interact, I would be reluctant to issue an injunction with potential implications beyond the parties in this case.

A second question is whether other statutes may provide a more appropriate comparison to plaintiffs' situation. In particular, Wis. Stat. §§ 891.40 and 69.14(1)(g) address the circumstances under which a "husband" may be listed as a parent on a birth certificate when his wife became pregnant through artificial insemination. Although plaintiffs acknowledge that their child was conceived through artificial insemination, they do not discuss § 891.40 and 69.14(1)(g) in their briefs, let alone say whether they followed the procedure outlined in those provisions. This omission is particularly notable because two of the cases plaintiffs cite involved statutes that applied in the context of artificial insemination. Gartner, 830 N.W.2d at 344; Della Corte, 961 N.E.2d at 603.

The provisions regarding artificial insemination raise the question of what it means to provide equal treatment to plaintiffs and other similarly situated couples. 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)?

Another potential question is raised by the timing of the marriage and birth. Plaintiffs were married in Minnesota in 2013 and Young gave birth in March 2014, three months before this court issued its injunction. Although plaintiffs' marriage was lawful under Minnesota law, it was not lawful under Wisconsin law at the time they were married or when their child was born. The statutes plaintiffs cite do not discuss how the state would

treat a similarly situated heterosexual couple. Although plaintiffs ask the court to order the state registrar “to issue a new original birth certificate nunc pro tunc,” they do not explain why a heterosexual couple would be entitled to a new birth certificate under Wisconsin law if the couple’s marriage was not recognized by the state until after the child was born.

Finally, plaintiffs’ request raises questions about the implications a ruling in their favor would have for gay male married couples with children. Plaintiffs argue persuasively in their briefs that they should not be required to go through the cumbersome process of adoption in order to become legal parents when heterosexual couples do not have to go through that process. However, the statutes plaintiff cites tie the parental presumption to the birth mother, which would seem to exclude any protections for the male spouse of a child’s biological father. Is that a violation of the injunction as well?

Because plaintiffs have not addressed these questions, I cannot grant their motion at this time. Of course, this conclusion should not be construed as an opinion on whether any of the statutes discussed in this order are constitutional as applied to same-sex couples. Plaintiffs may renew their motion if they wish, but they will have to address the questions raised in this order. Further, if plaintiffs are unable to obtain relief in this case, this does not mean that they have no remedy for the alleged violation of their rights. Although the proposed scope of the class action lawsuit does not include couples who gave birth before June 2014, plaintiffs are free to file their own standalone suit.

ORDER

IT IS ORDERED that the motion filed by plaintiffs Kami Young and Karina Willes to enforce the June 13, 2014 injunction (which plaintiffs call “motion for clarification of the injunction order”), dkt. #201, is DENIED WITHOUT PREJUDICE.

Entered this 6th day of July, 2015.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge