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October 1, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2054 Julie R. Tesch v. Dolores A. Hager (L.C. # 2015FA371)

Before Sherman, Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Julie Tesch appeals a decision that denied her motion for joint legal custody of a child she and her former same-sex partner have co-parented since the child's birth. After reviewing the

record, we conclude at conference that this case is appropriate for summary disposition.[1] *See* WIS. STAT. RULE 809.21 (2015-16).[2] We affirm.

Tesch and Dolores Hager engaged in a commitment ceremony in October 2008, after which Hager was listed as Tesch's domestic partner on an insurance policy Tesch maintained through her employment with Dane County. About two years later, Hager gave birth to a child and the three lived together as a family unit until the summer of 2012, and again from the summer of 2013 to the summer of 2014. Tesch and Hager then shared placement of the child for another year, until the parties separated and Tesch filed this lawsuit seeking joint legal custody and physical placement. The circuit court determined that Tesch was entitled to visitation, and awarded her equal placement time with the child. However, it concluded Tesch did not have standing under either the Wisconsin statutes or the United States Constitution to seek joint legal custody of the child.

On this appeal, Tesch raises a series of different claims under the rubric of a single issue—which she characterizes as whether a nonbiological lesbian mother should be granted joint legal custody of her child. For clarity's sake, we will separate and reorganize Tesch's arguments into statutory claims, constitutional claims, and equitable arguments.

[1] Neither the respondent nor the Wisconsin Attorney General has filed a brief. Therefore, we do not deem this an appropriate case for publication. The dissenting judge would certify the issues here to our supreme court. We think, however, that it is sufficient that Tesch may now petition for review in that court. Separately, we observe that the dissent fails to provide support for its suggestion that this summary order misconstrues pertinent statutes.

[2] All reference to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Statutory Claims

Tesch first seeks joint legal custody pursuant to WIS. STAT. § 767.80(1)(f), which allows a "physical custodian of the child" to seek a paternity determination, in conjunction with WIS. STAT. §§ 767.41(1)(b) and 767.89(3)(b), which require a judgment or order determining paternity to address the legal custody of the child. Tesch concedes that subchapter IX of WIS. STAT. Ch. 767 and WIS. STAT. §§ 891.39 to 891.41 (collectively, the paternity statutes) repeatedly refer to "fathers" and "males," but she cites WIS. STAT. § 990.001(2) for the proposition that "[w]ords importing one gender extend and may be applied to any gender." Tesch further contends that a person's gender should not be determinative for purposes of the paternity statutes in light of WIS. STAT. § 69.15(4)(b), which recognizes that a person's gender may be legally altered by a surgical reassignment procedure.

We agree that WIS. STAT. § 767.80(1)(f) provides Tesch with standing to seek a paternity determination as a physical custodian of the child. Further, we assume without deciding that there may be some situations in which the male-gender-specific language of the paternity statutes must be expanded to include females. *See, e.g.*, ***Torres v. Seemeyer***, 207 F. Supp. 3d 905, 910, 914 (W.D. Wis. 2016) (a biological mother's same-sex spouse is entitled under the equal protection and due process clauses to be listed as a parent on a child's birth certificate when the mother was artificially inseminated, even though the statute's language refers only to "husband"). However, it does not follow that Tesch has satisfied any of the ways for establishing her own parenthood under the paternity statutes.

As a threshold matter, we note that the paternity statutes do not explicitly define the term "paternity." However, WIS. STAT. § 767.813(5g)1., requires that all parties to a paternity action receive a notice that includes the following language:

> [A] judgment of paternity legally designates the child in the case to be a child of the *man* found to be the father. It creates a legally recognized parent-child relationship between the *man* and the child. It creates the right of inheritance for the child, and obligates the *man* to support the child until the child reaches the age of 18, or the age of 19 if the child is enrolled full-time in high school or its equivalent.

(Emphasis added.) The paternity statutes then set forth multiple ways in which paternity—which we construe in conjunction with the language in the statutory notice to mean a legally recognized parent-child relationship—can be established.[3]

First, a presumption of paternity is created when it is shown that: (1) the alleged father (or, as Tesch would have it, same-sex parent) was married to the mother during the presumptive conception period of 240 to 300 days before the child's birth; or (2) the alleged father (or, as Tesch would have it, same-sex parent) and the mother each signed an acknowledgement of paternity in conjunction with the filing of a birth certificate, and no other man (or, as Tesch would have it, woman) was married to the mother during the presumptive conception period. *See* WIS. STAT. §§ 767.82(2), 891.39(1), 891.395, 891.41, 891.405. A presumption of paternity can be rebutted by a genetic test that excludes the alleged parent as the biological parent of the child or that shows another person to be the biological parent. *See* WIS. STAT. §§ 767.84(4), 891.41(2). However, equitable estoppel may be employed to preclude rebutting a statutory

[3] A legal parent-child relationship can also be established by adoption, which is not at issue in this case. *See* WIS. STAT. § 48.81 et seq.

presumption of paternity. ***Randy A.J. v. Norma I.J.***, 2004 WI 41, ¶¶27-31, 270 Wis. 2d 384, 677 N.W.2d 630.

Next, paternity may be established by presenting evidence of a biological relationship between the alleged parent and the child, such as a genetic test showing that "the statistical probability of the alleged father's parentage is 99.0 percent or higher" or that there was "sexual intercourse between the mother and alleged father at any possible time of conception." *See* WIS. STAT. §§ 767.84(1m); 767.87(1)(a) and (c).

Finally, a person is deemed to be the "natural" parent of the child when the biological mother was artificially inseminated under the supervision of a licensed physician while married to the person and with the person's consent. WIS. STAT. §§ 767.87(9), 891.40(1). In that case, the semen donor bears no legal relationship to the child, notwithstanding the biological relationship. Sec. 891.40(2).

Here, Tesch argues that she has established statutory paternity or parenthood under each of the three methods we have just described by: (1) a presumption that the child was a marital child based upon her commitment ceremony with the child's biological mother; (2) evidence that she had sexual intercourse with the biological mother during the presumptive conception period; and (3) her participation in the biological mother's artificial insemination. Each argument falls short.

As to her first argument, Tesch contends that her commitment ceremony with the child's mother created a "putative marriage" triggering the presumption of a marital child. Tesch further argues that, in the best interest of the child, Hager should be estopped from using the lack of an

actual biological relationship between Tesch and the child to challenge the presumption of Tesch's paternity.

A "putative marriage" that has been "solemnized in proper form," but that is void or voidable by reason of some legal infirmity, may be recognized in equity as legally binding if "the court finds that either or both parties believed in good faith that the marriage was valid." ***Edmondson v. Xiong***, 2002 WI App 110, ¶22, 255 Wis. 2d 693, 648 N.W.2d 900. Here, however, Tesch did not assert that either she or Hager actually believed that their commitment ceremony created a valid marriage under Wisconsin law in effect at the time. Neither party, for instance, filed for a divorce upon their separation. Rather, Tesch seems to contend that her relationship to Hager ought to be recognized in equity as a valid marriage because Wisconsin laws in effect at the time of her commitment ceremony that prohibited her marriage to Hager were subsequently found to be unconstitutional. *See* ***Obergefell v. Hodges***, 135 S. Ct. 2584 (2015) (legalizing same-sex marriage nationally); ***Wolf v. Walker***, 986 F. Supp. 2d 982 (W.D. Wis. 2014) (legalizing same-sex marriage in Wisconsin). That contention does not fit the criteria for a putative marriage. Moreover, Tesch has neither provided any authority, nor developed any argument, establishing that a marriage recognized in equity—whether same-sex or opposite sex—is sufficient to trigger a marital child presumption under the paternity statutes.

Because Tesch has failed to establish that she is entitled to a presumption of paternity based upon the child being a marital child, we need not address the additional argument that Hager should be estopped from rebutting that presumption.

In support of her second argument, which is that she has proved paternity by providing evidence of sexual intercourse with the child's biological mother, Tesch attempts to import into

the paternity statutes a definition of "sexual intercourse" from WIS. STAT. § 939.22(36), which does not require penile penetration of the vagina or the emission of semen. However, that definition is explicitly limited to chapters 939 to 948 and 951, dealing with criminal offenses, and has no bearing here. WIS. STAT. § 939.22 (preface). Rather, because evidence of sexual intercourse under WIS. STAT. § 767.87(1)(a) is explicitly linked to the time of conception, we conclude that the only rational construction of the phrase must relate to some manner of sexual intercourse that could result in insemination. In other words, this provision of the statutes contemplates evidence of a biological relationship between the alleged parent and child, not an intimate relationship between the alleged parent and biological mother.

Tesch's third argument, which is that she has established paternity through artificial insemination, fails because the procedure to inseminate Hager was not supervised by a physician, as required by WIS. STAT. § 891.40—regardless whether Tesch's relationship to Hager could be recognized as a marriage.

In sum, we conclude that Tesch has failed to establish paternity or legal parenthood under the statutes by presumption of a marital child, by evidence of a biological relationship, or by artificial insemination under the supervision of a licensed physician.

Constitutional Claims

Tesch argues that, even in the event that this court rejects her claims that she is entitled to a determination of parenthood under the paternity statutes, the paternity statutes are unconstitutional. Specifically, Tesch contends that the paternity statutes violate the equal protection and due process clauses as applied to her to the extent that they fail to import gender-neutral terms. We do not need to address these arguments, however, because we have already

concluded that Tesch has failed to establish parenthood by presumption of a marital child, by evidence of a biological relationship, or by artificial insemination under the supervision of a licensed physician, even if gender-neutral terms are imported into the paternity statutes. *See generally* ***State v. Wood***, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (a party raising an as-applied challenge to a statute must show that his or her constitutional rights were actually violated). In other words, Tesch has not shown that she is being treated differently than an opposite-sex, unmarried partner of a biological mother who has raised or co-parented a child since birth.

Equitable Argument

Finally, Tesch asserts that the trend across the United States is to recognize the equitable rights of "functional parents," and she urges this court to recognize that same-sex parents have an equitable right to legal custody in light of cases such as ***Obergefell*** and ***Wolf***. However, the Wisconsin Supreme Court has expressly held that "custody is governed exclusively by the custody statutes" and "'courts have no [equitable] power in awarding custody of minor children other than that provided by statute.'" ***Holtzman v. Knotts***, 193 Wis. 2d 649, 684, 533 N.W.2d 419 (1995) (quoted source omitted). We are bound by ***Holtzman*** not to recognize any equitable rights to legal custody. As long as ***Holtzman*** controls, any argument that the legal custody statutes are outdated must be addressed to the legislature.

IT IS ORDERED that the order denying the appellant joint legal custody is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

SHERMAN, J. (*dissenting*) Throughout the consideration of this appeal, I have maintained that we should refrain from deciding the issue ourselves and that this case ought to be certified to our supreme court. It is clear to me that the law involved in this case is murky and that it should be up to the supreme court to develop and clarify the law, as that court has repeatedly reminded us that we are an error-correcting court and that law development is their exclusive province.

In response to my position, the majority decided that there was a case directly on point that we were compelled to follow under ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). There is no need to discuss that case because initial research conducted by the court showed that the case believed to be on point was not actually applicable to the present case.

At that point, instead of certifying the case to the supreme court, as I had suggested all along, the majority undertook to analyze the case in detail and render a decision. Much of that decision is, as predicted, development of the law.

For example, in deciding that Tesch has no right to establish paternity through sexual intercourse, the majority rejects Tesch's argument that the statutory definition of "sexual intercourse" from another part of the statutes should be adopted. In spite of the fact that there is no statutory definition of "sexual intercourse" applicable to paternity, the majority creates its own definition of sexual intercourse: "[Since] evidence of sexual intercourse under WIS. STAT § 767.87(1)(a) is explicitly linked to the time of conception, we conclude that the only rational construction of the phrase must relate to some manner of sexual intercourse that could result in insemination."

Similarly, in rejecting Tesch's contention that the parties' commitment ceremony, undertaken at a time when formal marriage between same sex couples was not legally recognized in Wisconsin, ought to be recognized as "putative marriage," the majority simply declares, without explanation, that the contention "does not fit the criteria for a putative marriage."

There are serious issues raised by the facts of this case which deserve greater development than that given to them here. What we are dealing with here is the most intimate relationship in society–that between parent and child. To sever that relationship on the basis of no more than sophistry is unacceptable.

I will never decide to deprive people of basic rights where the law is not clear. That is the case here. Where the law is as unclear as it is here, it is the job of the Wisconsin Supreme Court, not this court, to declare the law.

Therefore, I dissent.

Sheila T. Reiff
Clerk of Court of Appeals