New Legislation Acknowledges Same-Sex Marriage

In Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015), the Supreme Court of the United States held "the Constitution … does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." Citing this specific language from *Obergefell*, the Supreme Court again held in a more recent opinion that a state must "provide same-sex couples the constellation of benefits that the States have linked to marriage." Paven v. Smith, 137 S.Ct. 2075, 2077-78 (2017).

Acknowledging this clear mandate that the state treat same-sex marriages the same as opposite sex marriages and afford the same rights and responsibilities to all married couples, the North Carolina General Assembly enacted an important but easy to miss amendment to a seldom referenced statute as part of the voluminous 2017 Technical Corrections Bill.

"Rules for the Construction of Statutes"

To be honest, I do not remember ever reading GS 12-3 before a colleague told me it had been amended as part of the technical corrections bill, 2017 S.L. 102, section 35, in response to the change in our marriage laws. The statute contains a list of rules that apply to the interpretation of all General Statutes unless the specific statute provides otherwise. The amendment in the technical corrections bill adds the following two new sections:

"(16) "Husband and Wife" and similar terms. – The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.

(17) "Widow" and "Widower." – The words "widow" and "widower" mean the surviving spouse of a deceased individual."

The amendment was effective July 12, 2017.

Implications of the Amendment

The new statute confirms what most people probably already assumed to be true since the Supreme Court held states cannot limit marriage to opposite sex couples; that is that our laws must be interpreted to apply in the same way to all married couples, regardless of the gender of the spouses. North Carolina statutes relating to the relationship between spouses during the marriage, such as, for example, GS 52-10 regarding contracts between spouses and GS 39-7 relating to conveyances of real property by husbands and wives, as well as our numerous statutes relating to separation and divorce, must be read to apply to same-sex married couples in the same way they

apply to opposite sex spouses.

But what exactly that means in the context of interpreting state law regarding the parentage of a child born during a marriage is much less obvious and more complex, too complex to explore thoroughly in a blog post. However, there are several statutes relating to parentage that clearly now must be interpreted to apply to both opposite sex couples and same sex couples.

One example is our step-parent adoption statute, GS 48-4-401 *et. seq.*, which allows for the adoption of a child by the "spouse" of a parent. Even without the recent amendment to G.S. 12-3, it seems clear there is no basis even in the specific language of the statute to limit its application to opposite sex spouses.

Two other statutes relating to parentage are more directly impacted by the amendment to GS 12-3, one dealing with birth certificates and the other with children conceived through one form of artificial insemination.

Birth Certificates

While it does not legally establish the parentage of a child, GS. 130A-101(e) requires that the name of a mother's spouse be placed on a child's birth certificate. Specifically, that statute provides "[i]f the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband shall be entered on the certificate as the father of the child, except as provided in this subsection."

New GS 12-3(16) appears to require that GS 130A-101(e) be read to provide that when a mother gives birth, the name of her spouse must be placed on the birth certificate as the other parent of the child, regardless of whether the spouse is a male or a female, unless one of the exceptions in the statute applies.

This interpretation also is required by the recent US Supreme Court decision in Paven v. Smith, 137 S.Ct. 2075 (2017), wherein the court reversed a decision by the supreme court of Arkansas holding that a similar statute did not require that the name of a female spouse of a child's mother be placed upon a birth certificate even though it clearly required that a male spouse of the mother be placed on the birth certificate under the same circumstances. The Arkansas Supreme Court had concluded that because the birth certificate statute "centers on the relationship of the biological mother and the biological father of the child, not on the relationship of the husband and wife," it "does not run afoul of *Obergefell*."

The US Supreme Court in Paven disagreed, stating:

"As a result [of the interpretation of this statute by the Arkansas court], same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a

document often used for important transactions like making medical decisions for a child or enrolling a child in school. (citations omitted).

Obergefell proscribes such disparate treatment. As we explained there, a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificate." That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples." (citations omitted)

Children Born Through Heterologous Insemination

North Carolina has only one statute addressing the parentage of a child born through the use of assisted reproductive technology. Enacted in 1971 and not amended since, GS 49A-1 states:

"Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."

Medical dictionaries define "heterologous insemination" to be a medical procedure where sperm from a donor who is not the husband or regular partner of the mother is inseminated into the mother. Definitions distinguish the term from "homologous insemination" which means a medical procedure by which the sperm of the mother's husband or regular partner is used.

The amendment to GS 12-3 appears to require that this statute now be interpreted to provide that the spouse of a mother giving birth through the process of heterologous insemination be considered the parent of that child for all respects, as long as both spouses agreed in writing to the process.

I am certain there will be much more to write about with regard to parentage in the months and years to come.