



NO. 2014-CI-02421

A.L.F.L.	§	IN THE DISTRICT COURT
	§	
v.	§	438 <sup>th</sup> JUDICIAL DISTRICT
	§	
K.L.L.	§	BEXAR COUNTY, TEXAS

ORDER DENYING PLEA TO THE JURISDICTION

On March 27, 2014, the Court heard the Respondent’s First Amended Plea to the Jurisdiction and the Respondent’s Motion to Deny Divorce Filing. Both parties appeared with counsel and the pleadings of the parties reveal the following facts which are taken as true by the Court:

A.L.F.L and K.L.L. are women who were married in Washington, D.C. on August 13, 2010. The Certificate of Marriage was registered as a Foreign Judgment in Cause No. 2013-CI-17882, in the 438<sup>th</sup> Judicial District Court of Bexar County, Texas, and K.L.L. did not file a timely objection to its registration.

Petitioner pleads that she and Respondent are the parents of a child born of the marriage. K.L.L. is the biological mother; she became pregnant through artificial insemination. The parents chose the sperm donor together and the child was born on February 19, 2013.<sup>1</sup> The parties separated on July 9, 2013 and A.L.F.L. filed a petition for divorce on February 18, 2014, seeking orders regarding conservatorship, possession and access, child support, and a division of the marital estate. In the alternative, the petition seeks relief in a suit affecting the parent-child relationship.

Respondent answered that A.L.F.L, although married to her when the child was born, is neither the biological mother nor the adoptive mother. Respondent filed a plea to the jurisdiction, requesting that the court decline jurisdiction and dismiss the petition. The matter was set for hearing on amended pleadings on March 27, 2014.

<sup>1</sup> Other than K.L.L., no other parent is designated on the birth certificate.

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When considering a plea to the jurisdiction, the trial court should look solely at the pleadings and must take all allegations in the pleadings as true. *Washington v. Fort Bend Independent School District*, 892 S.W.2d 156, 159 (Tex. App.-Houston [14<sup>th</sup> Dist.] 1994, writ denied); *Doncer v. Dickerson*, 81 S.W.3d 349, 353 (Tex.App.-El Paso 2002, no pet.).

## STANDING

Article I, Section 32 of the Texas Constitution and Section 6.204 of the Texas Family Code ban same-sex marriage and prohibit recognition in Texas of lawful same-sex marriages celebrated in other jurisdictions rendering them void. *See* Tex. Const. art. I, § 32(b); Tex. Fam. Code Ann. § 6.204(b) (West 2013). These provisions were recently found to violate the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In a well-reasoned opinion by Judge Orlando Garcia, the federal district court found that a state cannot do what the federal government cannot – that is, it cannot discriminate against same-sex couples post-*Windsor*<sup>2</sup> and accordingly enjoined the State of Texas from enforcing Article I, Section 32 and any related provisions of the Texas Family Code, and any other law or regulation prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage. *See De Leon, et al. v. Rick Perry, et al.*, \_\_\_ F.Supp. \_\_\_, No. SA-13-CA-00982-OLG, 2014 WL 715741 at \*1 (W.D. Tex. Feb. 26, 2014) (stayed pending interlocutory appeal). The Court in *De Leon* further found that Texas’ denial of recognition of the parties’ out-of-state same-sex marriage violates equal protection and due process rights when Texas does afford full faith and credit to opposite-sex marriages celebrated in other states. *Id.* at \*22-24. On this reasoning alone, Petitioner would have standing to pursue her divorce in a Texas state court.

There is an even more compelling reason, however, to find standing in the case at hand. There is a child of the marriage. “The best interest of the child is always the primary consideration of the court in determining issues of conservatorship and possession of or access to a child.” Tex. Fam. Code Ann. § 153.002; *Doncer*. When marital bonds are dissolving, *the child’s* parents’ rights and responsibilities need to be adjudicated.

Under Texas Family Code, Section 101.024, a parent is defined as “the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.” As Respondent

<sup>2</sup> *See United States v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013) (holding that the federal government cannot refuse to recognize a valid state-sanctioned same-sex marriage).

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points out, the definitions favor biological and adoptive parents. In this case, the parties agreed to have a child and parent the child and did so. Texas Family Code, Section 160.204(a)(1) provides that there is a rebuttable presumption that a man married to the mother of the child is the father of a child if the child is born during the marriage. In this case, there is no legal father. Rather, there is a legally acknowledged mother (the birth mother) and her wife (who under the facts alleged here would be the presumed mother). It is undisputed that K.A.F.L. is a child born during this marriage. Were the parties to exercise their fundamental rights to travel back to the District of Columbia, the place of marital celebration, the following presumption applies:

There shall be a presumption that a woman is the mother of a child if she and the child's mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court, or within 300 days after the termination of the domestic partnership pursuant to § 32-702(d).

DC Code § 16-909 Proof of child's relationship to parents, at (a-1)(2) (eff. Mar. 19, 2013).

A failure in Texas to afford the same presumption of parenthood to the wife of a child's birth mother as it does to a husband of the birth mother violates the Equal Protection Clause.

Petitioner joins a chorus of concern that a "new class of children without mothers or fathers increasing the costs of corporate and governmental spending" arises from the rash of state constitutional and statutory discriminatory restrictions against the children of same-sex couples. By denying their parents the right to marry, Texas has created a suspect classification of children who are denied Equal Protection of the law under the Fourteenth Amendment. Immutable protections for the children born of same-sex marriages require the same protections as those born from other marital and intimate relationships, e.g., education, child support, hereditary rights, tax benefits. *See Plyler v. Doe*, 457 U.S. 202 (1982) (holding Texas statute which withholds from local school districts any state funds for the education of children not "legally admitted" into United States, and which authorizes local school districts to deny enrollment to such children, violates Equal Protection Clause); *Lalli v. Lalli*, 439 U.S. 259 (1978) (holding that illegitimate

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children are a suspect classification, requiring intermediate scrutiny under constitutional review).

Both proponents and opponents of the same-sex marriage ban argue that marriage creates a stable social environment for the protection of children. And marriage confers unique legal protections for the spouses and their children. As Petitioner notes, "The reality is assisted reproductive technology enables same-sex couples to create children of their marriage. As such these children, like 'illegitimate' children and children of undocumented workers, are entitled to all the legal protections afforded to other similarly-situated children."

### FINDINGS

Accordingly, the Court makes the following findings:

1. The parties are legally married in the District of Columbia.
2. The marriage certificate was registered without objection in Texas and is an order to which Texas must give full faith and credit.
3. The issue of the legality of same-sex marriage and the constitutional rights of parties entering into such marriages is of significant importance and impact on the citizens of Texas.
4. The issue of standing for and the accompanying constitutional rights of a party to a same-sex marriage where the parties to the marriage have planned to have a child and agreed to be the parents of that child is of significant importance and impact on the citizens of Texas.
5. Article I, Section 32 of the Texas Constitution is unconstitutional as it denies a specific group of citizens due process and equal protection under the law without a rational justification. *De Leon* at \*27.
6. Texas Family Code, Section 6.204 is unconstitutional as it denies a specific group of citizens due process and equal protection under the law without a rational justification. *Id.*
7. Texas Family Code, Section 102.003 is unconstitutional as it applies to parents of a child born during a legal same-sex marriage where the facts support that the parties agreed to have the child and be that child's parents and no other legal parent exists, because in that application it denies a specific group of citizens the right to parent his or her own child and denies that specific group due process and equal protection under the law without a rational justification.

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8. Texas Family Code, Section 160.204 is unconstitutional as it applies to the parents of a child born during a legal same-sex marriage where the facts support that the parties agreed to have the child, to be that child's parents and no other legal parent exists, because in that application there is no presumption that the same-sex partner is a parent and, therefore, the statute denies a specific group of citizens the right to parent his or her own child and denies that specific group due process and equal protection under the law without a rational justification.

9. Petitioner and Respondent are the parents of the child the subject of this suit.

10. No other legal parent of the child exists.

It is Ordered that:

1. The Respondent's First Amended Plea to the Jurisdiction and Request for Court to Decline Jurisdiction is denied.

2. The Respondent's Motion to Deny Divorce Filing is denied.

3. Article 1, Section 32 of the Texas Constitution is declared unconstitutional on its face.

4. Texas Family Code, Section 6.204 is declared unconstitutional on its face.

5. Texas Family Code, Section 102.003 is declared unconstitutional by application as delineated in the Findings above.

6. Texas Family Code, Section 160.204(a)(1) is unconstitutional by application as delineated in the Findings above.

7. Petitioner's Request for Temporary Orders shall be set for hearing in the 45<sup>th</sup> District Court after consulting opposing counsel and the Court's deputy district clerk.

8. A copy of this Order shall be sent to the Office of the Attorney General, 209 West 14<sup>th</sup> Street, Austin, Texas 78701.

SIGNED April 22, 2014

  
Barbara Hanson Nellermoe  
JUDGE PRESIDING

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