

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

MARISA N. PAVAN and TERRAH D. PAVAN,
Individually, and Marisa N. Pavan and Terrah D.
Pavan, as parents, next friends and guardians
of T.R.P., a minor child

LEIGH D. W. JACOBS and JANA S. JACOBS,
Individually, and Leigh D. W. Jacobs and Jana
S. Jacobs, as parents, next friends and guardians
of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT,
Individually, and Courtney M. Kassel and Kelly L.
Scott, as parents, next friends and guardians of
A.G.S., a minor child

PLAINTIFFS

VS.

CASE NO. 63DR-15-_____

NATHANIEL SMITH, MD, MPH, Director of the
Arkansas Department of Health, in his official capacity,
and his successors in office

DEFENDANT

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Comes the Plaintiffs, Marisa N. Pavan and Terrah D. Pavan, Individually, and as
parents, next friends and guardians of T.R.P., a minor child, Leigh D.W. Jacobs and
Jana S. Jacobs, Individually and as parents, next friends and guardians of F.D.J., a
minor child, and Courtney M. Kassel and Kelly L. Scott, Individually and as parents, next
friends and guardians of A.G.S., a minor child, by and through their attorney, Cheryl K.
Maples, and for their Complaint for Declaratory and Injunctive Relief, state:

STATEMENT OF FACTS

MARISA N. PAVAN, TERRAH D. PAVIN AND T.R.P., A MINOR CHILD

1. Marisa and Terrah Pavan are a lesbian couple, legally married on June 25, 2011 in the State of New Hampshire. They reside in Little Rock, Pulaski County Arkansas and did so reside on May 15, 2015 when their daughter, T.R.P. was born at UAMS in Little Rock, Arkansas. T.R.P. was conceived through an anonymous donor planned, arranged and financed during, by and through their marriage.

2. Marisa and Terrah completed the birth certificate form at the hospital following T.R.P.'s birth, indicating on the form that they are married and that both are the parents of the newborn child.

3. The Arkansas Department of Health, Bureau of Vital Statistics, omitted the inclusion of Marisa N. Pavan on the birth certificate due to the then non-recognition of same-sex marriages by the State of Arkansas.

4. On June 26, 2015 the United States Supreme Court ruled that every state must recognize legally performed out-of-state same-sex marriages and that the failure to do so had been unconstitutional. Following this ruling Marisa and Terrah Pavan made five visits to the Bureau of Vital Statistics, each time being denied the right to have their child's birth certificate corrected.

5. On July 10, 2015 the parents of T.R.P. were summarily told they would have to go to the expense and time of hiring an attorney to get a court order requiring the Department of Health, Bureau of Vital Statistics, to add Marisa to the birth certificate.

6. Health insurance is available for the minor child through Marisa's Employment upon the provision of proof that Marisa is the minor child's parent.

LEIGH D. W. JACOBS, JANA S. JACOBS AND F.D.J., A MINOR CHILD

7. Leigh D. W. Jacobs and Jana S. Jacobs are a lesbian couple, legally married

on June 1, 2010 in the State of Iowa. They reside in Little Rock, Pulaski County Arkansas and did so reside on June 26, 2015 when their son, F.D.J. was born at Baptist Medical Center in Little Rock, Arkansas.

8. F.D.J. was conceived through an anonymous donor planned, arranged and financed during, by and through their marriage. Leigh and Jana completed the birth certificate form at the hospital following T.R.P.'s birth, indicating on the form that they are married and that both are the parents of the newborn child.

9. The Arkansas Department of Health, Bureau of Vital Statistics, omitted the inclusion of Jana S. Jacobs on the birth certificate even though the child was born the very day the United States Supreme Court ruled that every state must recognize legally performed out-of-state same-sex marriages and that the failure to do so had been unconstitutional.

10. The actual birth certificate was completed by the Bureau of Vital Statistics after the ruling and after that agency was instructed by Gov. Asa Hutchinson to comply with the ruling.

11. On July 10, 2015, fully expecting the Department of Health to obey the Governor's directive, the parents of F.D.J appeared at the Bureau of Vital Statistics, were informed that Jana's name was not placed on the birth certificate and were summarily told they would have to go to the expense and time of hiring an attorney to get a court order requiring the Department of Health, Bureau of Vital Statistics, to add Jana to the birth certificate.

12. Jana has provisionally added her son to the health insurance provided by her employer. The employer requires the production of a birth certificate within 60 days of the birth of the child showing the employee to be, in fact, the parent of the child.

Without the corrected birth certificate, F.D.J. will be unable to continue his health insurance coverage.

COURTNEY M. KASSEL, KELLY L. SCOTT AND A.G.S., A MINOR CHILD

13. Courtney M. Kassel and Kelly L. Scott are a lesbian couple who have maintain a committed relationship for over ten years and finally were able to become legally married on July 1, 2015 in the State of Arkansas.

14. They reside in Alexander, Pulaski County Arkansas and did so reside on January 26, 2015 when their daughter, A.G.S. was born at Saline Memorial Hospital in Benton, Arkansas.

15. A.G.S. was conceived through an anonymous donor planned, arranged and financed during, by and through Courtney and Kelly.

16. This couple were denied the opportunity to both be listed on the birth certificate form although the hospital personnel were fully aware that Kelly was also A.G.S.'s mother.

17. Immediately upon the issuance of the June 26, 2015 decision by the United States Supreme Court, Courtney M. Kassel and Kelly L. Scott contacted the Arkansas Department of Health, Bureau of Vital Statistics, on several occasions requesting the addition of Kelly to A.G.S.'s birth certificate. These contacts were made both before and after their marriage and each time they were informed that Kelly's name would not be placed on the birth certificate and were summarily told they would have to go to the expense and time of hiring an attorney to get a court order requiring the Department of Health, Bureau of Vital Statistics, to add Kelly to the birth certificate.

18. They have retained an attorney for this purpose, undergoing delay and

financial hardship.

ARKANSAS DEPARTMENT OF HEALTH, DIVISION OF VITAL STATISTICS

19. Upon information and belief, the Arkansas Department of Health, Bureau of Vital Statistics is refusing to amend birth certificates to reflect both parents in same-sex marriages and is/will refuse to issue birth certificate reflecting both parents for children to be born to legally married same-sex couples absent a court order of adoption or parentage.

20. Additionally, upon information and belief, the Department of Health, Bureau of Vital Statistics has/is/will continue to refuse to add the second parent to birth certificate of children who are born out of wedlock to same-sex couples.

21. The Bureau of Vital Statistics routinely provides two-parent birth certificates to all children born to heterosexual couples, even those that are not married, without regard to how the children are conceived or whether a child shares a genetic connection to both parents.

22. In the case of a child born during a marriage, Ark. Code Anno. § 20-18-401 provides for mandatory inclusion of the spouse on the birth certificate unless there has been a finding that he spouse is NOT the parent or unless there is a sworn statement from the birth mother that her spouse is not the parent of her child. There is a strong presumption that a spouse of a birth mother is also the child's parent. Defendant's policy is to unconstitutionally apply this to heterosexual married couples only.

23. Ark. Code Anno. § 20-18-401 also provides for the birth mother, if unmarried, to provide the name of the child's other parent by way of a sworn affidavit. With such a sworn affidavit, the other parent is listed on the birth certificate without any other

showing of proof. Defendant's policy is to unconstitutionally apply this to heterosexual unmarried couples only.

24. The failure by the Arkansas Department of Health, Bureau of Vital Statistics, to include both parents on the birth certificates of T.R.P., F.D.J. and A.G.S. and other children born to same-sex couples deprive these children of the dignity, legitimacy, security, support and protections provided to children of heterosexual couples, regardless of marital status.

25. The failure by the Arkansas Department of Health, Bureau of Vital Statistics, to include both parents on the birth certificates of T.R.P., F.D.J. and A.G.S. and other single same-sex parents, married and unmarried, deprives these parents of the privacy, dignity, security, support and protections available to heterosexual parents regardless of marital status.

26. The refusal by the Arkansas Department of Health, Bureau of Vital Statistics, to provide a two-parent birth certificate to the three Plaintiff couples and other children of same-sex parents violates the equal protection guarantee of the United States Constitution and the Constitution of the State of Arkansas on the basis of their sexual orientation and sex without justification and in direct contrast to how this defendant treats married and unmarried heterosexual parents of new born children.

27. The refusal by the Arkansas Department of Health, Bureau of Vital Statistics, to provide a two-parent birth certificate to the three minor children plaintiffs and two other children of same-sex parents violates the equal protection guarantee of the United States Constitution and the Constitution of the State of Arkansas on the basis of their parents' sex, sexual orientation and status, all without justification and in direct contrast to how this defendant treats children of married and unmarried heterosexual couples.

28. The actions of the Arkansas Department of Health, Bureau of Vital Statistics is also in violation of the due process rights guaranteed by the Constitution of the United States and the Constitution of this State of Arkansas. These violations include infringement upon the fundamental right to privacy, liberty interests of each plaintiff, freedom of association, and parent's fundamental right to make decisions concerning the care, custody, control and best interests of their children.

29. Plaintiffs Pavan and Jacobs respectfully request this court declare Defendant's refusal, to issue and/or amend the birth certificate of children born to a marriage of same-sex couples to reflect both parents, to be unconstitutional and to permanently enjoin defendant from continuing his unconstitutional discriminatory procedures.

30. These plaintiffs additionally respectfully request an emergency injunction ordering defendant to immediately place both parents' names on the birth certificates in order to qualify the minor children for health insurance coverage.

31. The failure by the Defendant to include both parents on the Plaintiff children's birth certificates will or could result in, but not limited to, the following:

- a. Difficulty in identification procedures for the issuance of Social Security numbers and passports;
- b. The non-birth mother being denied the right to authorize medical care for her child;
- c. The non-birth mother being denied the right to authorize or enroll her child in daycare, school or extracurricular activities;
- d. The non-birth mother being denied the right to apply for needed benefits through her employer or through an agency;
- e. The denial to the child of survivor benefits in the case of the death of the non-birth mother;

- f. The denial to the child of inheritance rights in the event of the intestate death of the non-birth mother;
- g. The protection of the mother - child relationship in the event of the breakup of the parents' relationship; and
- h. The ability to collect child support from the non-birth mother in the event of the breakup of the parents' relationship with custody of the minor child going to the birth mother.

32. Plaintiffs Kessal and Scott respectfully request this court declare Defendant's refusal to include the name of the other parent as provided by the biological mother only in cases of same-sex parents to be in violation of equal protection and due process protections of the United States Constitution and the Constitution of the State of Arkansas. These plaintiffs additionally respectfully request that this defendant be permanently enjoined from continuing these unconstitutional discriminatory procedures.

Jurisdiction and Venue

33. That all plaintiffs are residents of Pulaski County, Arkansas. That this court has personal and subject matter jurisdiction over this cause of action. Venue is proper in this court.

Defendant

34. That Defendant, Nathaniel Smith, MD, MPH, is the director of the Arkansas Department of Health and in that capacity is over the Bureau of Vital Statistics, which issues all birth certificates for children born in the state of Arkansas. That Defendant, Nathaniel Smith, MD, MPH is sued in his official capacity only.

Claims for Relief

Count 1

35. That plaintiffs re-allege all of the preceding paragraphs of this Complaint and incorporate same by reference as though fully set forth herein.

36. That Article 2 of the Arkansas Constitution and the 14th Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, both require that all people are entitled to equal protection under the law.

37. Defendant's refusal to apply the presumption of parenthood to the spouse of the birth mother as set forth in Ark. Code Anno. 20-18-401 in the case of Plaintiffs Pavan and Jacobs, solely on the basis of their status as a same-sex married couple, their sex and sexual orientation is in clear violation of their right to Equal Protection under the federal and state constitutions. Defendant cannot assert any rational basis, much less a compelling interest, for this denial of their fundamental as enumerated heretofore.

38. Defendant's refusal to allow the birth mother to name the other parent of her child and have same recognized on the birth certificate as set forth in Ark. Code Anno. 20-18-401 in the case of Plaintiffs Kassel and Scott, solely on the basis of their status as a same-sex couple, their sex and sexual orientation is in clear violation of their right to Equal Protection under the federal and state constitutions. Defendant cannot assert any rational basis, much less a compelling interest, for this denial of their fundamental rights as enumerated heretofore.

39. There is no societal benefit achieved by treating Plaintiffs differently and requiring the non-birth mothers to go through time-consuming and expensive legal procedures to achieve what is automatically granted to heterosexual parents.

40. The effect of a delay in the issuance of a birth certificate reflecting both parents can be not only inconvenient, but devastating to Plaintiffs' families in case of death or other change in family circumstances.

41. Each of the minor children Plaintiffs in this case and those of other same-sex couples in the State of Arkansas are deprived of access to immediate, clear proof of

their relationship to both of their parents and the security afforded by such proof. This denial discriminates against such children on the basis of their parents' status as a same-sex couple, their parents sex and sexual orientation.

Count 2

42. Plaintiffs incorporate by reference and re-allege all of the preceding paragraphs of this complaint as though fully set forth herein.

43. That Article 2 of the Arkansas Constitution and the 14th Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, both require that Defendant cannot deprive Plaintiffs of their fundamental rights without due process of law.

44. Defendant's infringement upon Plaintiffs' fundamental rights to liberty, privacy, association and family, as set forth hereinabove, was done without any basis in reason, rational or otherwise, and is a clear violation of the due process rights of all plaintiffs.

Conclusion

45. The Plaintiffs, and each of them, are irreparably damaged each and every day that passes during which they are deprived of their constitutional rights.

46. Time is of the essence in this matter as tragedies or changes in circumstances may occur resulting in further irreparable and devastating harm.

WHEREFORE, Plaintiffs, Marisa N. Pavan and Terrah D. Pavan, Individually, and as parents, next friends and guardians of F.D.J., a minor child, Leigh D.W. Jacobs and Jana S. Jacobs, Individually and as parents, next friends and guardians of F.D.J., a minor child, and Courtney M. Kassel and Kelly L. Scott, Individually and as parents, next friends and guardians of A.G.S., a minor child, pray this Court enter judgment:

a. Declaring that Defendant, Nathaniel Smith, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, be declared to have violated all Plaintiffs' rights to Equal Protection under the Arkansas Constitution and the Constitution of the United States of America for his refusal to include both parents on the birth certificates of the three minor children Plaintiffs solely because of their parents' sex and sexual orientation while at the same time issuing birth certificates for children of heterosexual couples reflecting both parents without proof of genetic relationship to the child;

b. Declaring that Ark. Code Anno. § 20-18-401, et seq and other Arkansas statutory provisions relating to the rights of parents in relation to their children are invalid and unconstitutional as written and should be henceforth construed in a gender neutral manner to require the application of those laws to parents regardless of their sex or sexual orientation;

c. Declaring that said Defendant's refusal to issue birth certificates reflecting both parents of the minor children Plaintiffs violates all Plaintiffs' rights under the due process clauses of the Arkansas Constitution and the Constitution of the United States of America;

d. Immediately and permanently enjoin Defendant from continuing to enforce this policy of denying birth certificates reflecting both parents to only children of same-sex couples without the additional requirement of unnecessary delay and expense of further legal process;

e. Ordering Defendant to immediately issue corrected birth certificates for the three minor children Plaintiffs in this case, reflecting both of their parents;

f. Awarding Plaintiffs their costs and attorney fees pursuant to the Arkansas

Civil Rights Act and 42 U.S.C. § 1988; and

- g. Granting Plaintiffs all other relief to which they may be entitled.

Respectfully submitted,

/s/ Cheryl K. Maples

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