On the Civil Side

A UNC School of Government Blog

https://civil.sog.unc.edu

Child Support: Would the result in Green v. Carter be different if the parties were married?

This entry was contributed by Cheryl Howell on July 10, 2024 at 9:00 am and is filed under Family Law.

I wrote about the opinion in *Green v. Carter*, 900 S.E.2d 108 (N.C. App., March 19, 2024), in this post: https://civil.sog.unc.edu/an-unmarried-partner-with-joint-legal-and-physical-custody-is-not-a-parent-and-cannot-be-ordered-to-pay-child-support/ The court of appeals held that the partner of the biological mother of a child (Green) could not be ordered to pay child support, even though she and the mother of the child (Carter) decided to have the child together while they were living together, agreed to the use of artificial insemination with a sperm donor to create the child, and held themselves out as the "parents" of the child for years until their romantic relationship ended. The partner (Green) was granted joint legal and physical custody of the child after a trial court concluded that the biological mother (Carter) had waived her constitutional right to exclusive custody by holding the partner out as the child's co-parent and by intentionally allowing the partner to develop this parent-like relationship with the child without indicating the relationship was not a permanent one. But when the trial court determined that the partner should pay child support, the court of appeals reversed, citing G.S. 50-13.4 and stating: "[b]ased on long-established North Carolina law, … [a person] cannot be required to pay child support unless she is the child's mother or father or has agreed formally, in writing, to pay child support."

This opinion makes it clear that custodial rights are not the same as parental rights. The court in *Green,* quoting *Heatzig v. MacLean*, 191 N.C. App. 451, 458 (2008), stated:

"A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions), …."

But is this statement true when a child is born during a marriage? Would the result in *Green* have been different if Green and Carter had been married when Carter gave birth to the child?

There is a statute and a common law presumption that applies in the context of marriage that may confer parental status upon a spouse who is not the biological parent of a child.

Children born by artificial insemination

The only North Carolina statute addressing the parentage of children born through assisted reproductive technology ("ART") is an old one, G.S. 49A-1, enacted in 1971. That statute is one sentence and provides:

"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."

Following the decision by the U.S. Supreme Court in *Obergefell v, Hodges, 576 U.S. 644, 135 S.Ct. 2584 (2015)* establishing the constitutional right of same-sex couples to marry, the General Assembly added subsection 16 in G.S. 12-3, effective July 12, 2017, titled "Rules for Construction of Statutes." It states:

"In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say: …

(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."

In the only North Carolina appellate opinion interpreting G.S. 49A-1, the court of appeals stated that two married women whose child was born through artificial insemination using the sperm of a male friend were the legal parents of the child, and that both women were entitled to the same constitutional protections regarding the custody of their child as are married biological parents. *McLane v. Goodwin-McLane*, unpublished opinion, 872 S.E.2d 180 (2022)(citing G.S. 49A-1, the court stated that the constitutional protections afforded married biological parents apply equally to "parents whose children are born through artificial insemination.").

Given G.S. 12-3(16) and the statement of the court in *McLane*, it seems safe to assume that both Ms. Green and Ms. Carter would be considered the legal parents of the child born during their marriage, and both would be responsible for child support, as long as both spouses agreed to the artificial insemination in writing.

What if the child was not conceived through "heterologous artificial insemination" or if there was no written agreement signed by both spouses as required by G.S. 49A-1? Other forms of ART are common. Procedures such as In Vitro Fertilization ("IVF"), Gamete Intrafallopian Transfer ("GIFT"), or Zygote Intrafallopian Transfer ("ZIFT") are not addressed in North Carolina statutes. See

discussion of common ART methodologies in The Honorable Beth S. Dixon, For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology, A Framework for North Carolina, 43 Campbell L. Rev. 21 (2021).

If that statute does not apply, can a spouse nevertheless be a legal parent and therefore liable for child support?

The common law presumption of legitimacy

A child born to a woman during her marriage to a man is presumed to be the child of the husband. *Wright v. Wright*, 281 NC 159 (1972), citing *Eubanks v. Eubanks*, 273 NC 189 (1968). This is true even if blood tests show that the man is not the biological father of the child. *See e.g. In re Mills*, 152 NC App 1 (2002)(mother's husband was a child's legal father even though blood testing excluded him as the biological father). A man is responsible for the support of a child born during his marriage to the mother unless the presumption of legitimacy is rebutted in a judicial proceeding. *See e.g. Davis v. Adams*, 153 NC App 512 (2002)(respondent's Rule 60 motion to set aside a child support order denied as untimely, leaving support order in place even though blood testing established respondent was not the father of the child.).

While the court in *Wright* referred to this presumption as 'one of the strongest known to the law', the presumption can be rebutted by the husband with evidence showing that husband is not actually the biological parent of the child. *Wright*; *In re Legitimation of Locklear*, 314 NC 412 (1985). But a wife cannot attempt to rebut the presumption that her husband is the child's father unless there is a determination that another man is the actual biological father of the child. *Jones v. Patience*, 121 NC App 434 (1996)(husband was a 'parent' in a custody proceeding even though blood testing confirmed he was not the biological father of the child).

Does the common law presumption apply to children born to same-sex married couples?

It appears the Constitution requires that the answer be yes. A presumption that applies in the context of heterosexual marriage must apply equally in the context of a same-sex marriage.

In *Paven v. Smith, 137 S,Ct. 2075, 2077 (2017),* the U.S. Supreme Court cited its earlier statements in *Obergefell v. Hodges, 576 U.S. 644, 670 (2015)*, that a state cannot "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" and that states are required to provide same-sex couples "the constellation of benefits that the States have linked to marriage" to support its ruling that an Arkansas statute requiring that a husband's name be listed on the birth certificate of a child born to a mother during their marriage must be interpreted to require that the name of the wife of the mother be listed as a parent on the birth certificate of a child born during the marriage.

The Arizona Supreme Court held that *Paven* also requires that a statutory marital presumption of parentage apply equally to same-sex couples, and further held that the biological parent was estopped from attempting to rebut the presumption. *McLaughlin v. Jones*, 410 P.3rd 492 (2017). A New York appellate court held the same, deciding also that the presumption cannot be rebutted solely with proof of the biological fact that the child cannot be the product of the same-gender parents. Rather, the presumption can be rebutted only with clear and convincing evidence that the child is not entitled to legal status as "the product of the marriage." *Christopher YY v. Jessica ZZ*, 159 A.D.3rd 18 (N.Y. 3rd Division 2018). And a Texas appellate court held that a statutory presumption of parentage of children born during a marriage applies to establish the "maternity for the non-gestational spouse of a child born during the marriage" and to make that spouse responsible for the payment of child support. *Treto v. Treto*, 622 SW3rd 397, 402 (Ct. App. Texas, 2020).

What does this mean in NC?

Assuming G.S. 49A-1 did not apply to Ms. Green and Ms. Carter, and assuming the presumption of parentage does apply, can Ms. Green rebut that presumption and avoid the payment of child support simply by showing she is not a biological parent of the child, as a husband could do under our current law?

This question, as well as questions relating to the interpretation and application of G.S. 49A-1 do not have an answer in current North Carolina law.

In *Green*, the court of appeals expressed a reluctance to create the answers to questions such as these, stating:

"We fully appreciate the difficult issues created by IVF and other forms of assisted reproductive technology, but only the General Assembly has the authority to amend our statutes to address these issues. Protection of the children born into these situations, whether to a same-sex couple or to a heterosexual couple, is a complex policy issue, but this Court does not have the role of creating new law or adopting new policies for our state."

This entry was tagged with the following terms: artificial insemination, assisted reproductive technology, child support, parentage, presumption of legitimacy, same-sex marriage.

Cheryl Howell	Cheryl Howell is a Professor of Public Law and Government at the School of Government specializing in family law.