


# Who is a Parent? What We Know So Far.....

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## Custody and Parentage - Summary

- If both parties are legal parents, custody is determined using best interest test
  - *Owenby v. Young*, 357 NC 142 (2003)
  
- If neither party is a legal parent, custody is determined using best interest test
  - *Owenby v. Young*, 357 NC 142 (2003)
  
- If one party is a legal parent but the other is not, parent has constitutional right to exclusive custody unless that parent has acted inconsistent with her/his protected status
  - *See Seyboth v. Seyboth*, 147 NC App 63 (2001)



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## Consider:

- Same-sex female couple who live together – Ann and Susan – decide Ann will have a child
  
- Ann becomes pregnant using an anonymous sperm donor
  
- Ann and Susan continue to live together following birth of the child, sharing living expenses and childcare responsibilities
  
- When child is 6 years old, Ann and Susan separate
  
- Susan files for custody when Ann restricts Susan's time with the child



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## We have case law.....

- *Mason v. Dwinell*, 190 NC App 209 (2008)
- *Estroff v. Chatterjee*, 190 NC App 61 (2008)
- *Heatzig v. MacLean*, 191 NC App 451 (2008)
- *Boseman v. Jarrell*, 364 NC 537 (2010)

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## Mason, Estroff and Boseman

- The “nature of the relationship” between the parties is not relevant nor determinative
  - Court stated it is “immaterial” that parties could not marry or adopt a child together
- When custody dispute is between a parent and a non-parent *Price v. Howard*, 346 NC 68 (1997), controls
- Biological parent has constitutional right to exclusive custody

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## Mason, Estroff and Boseman

- Parent can waive constitutional protection by engaging in conduct inconsistent with her protected status
- Conduct inconsistent with protected status:
  - Creating a “parent-like” relationship between child and non-parent, and
  - Intending that relationship to be permanent, and
  - Ceding a portion of parent’s exclusive rights to the non-parent without intending that sharing of rights will be temporary
- *Cf. Mason* (waiver found) & *Estroff* (no waiver)

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## Custody rights are **not** parental rights

- When parent waives constitutional protection, court can apply best interest to determine *custody*
- Alternative theories – such as *de facto* parent and parent by estoppel – “have not been recognized in North Carolina”
  - *Seyboth v. Seyboth*, 147 NC App 63 (2001)
  - *Estroff v. Chaterjee*, 190 NC App 61 (2008)
- “District court in NC 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 [adoption].”
  - *Heatzig v. MacLean*, 191 NC App 451 (2008)

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## *Green v. Carter*, COA (March 19, 2024)

- Woman who shared custody of a child since the birth of the child with the biological mother of the child but never married the biological mother of the child was not a parent.
- Because the woman was not a parent, she is not responsible for child support unless she assumes the obligation of support in writing.

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## What about bio dad?

- There is no statute or case law addressing anonymous sperm donors in NC
  - *In re Guardianship of I.H.*, 834 A.2d 922, 927 (Me. 2003)(anonymous donor does not need to be served)
- There is no statute or case law indicating a parent is a ‘necessary party’ to a custody case
  - A parent must be provided notice before custody determination is made unless TPR.
    - GS 50A-205
  - *Mason, Estroff* and *Boseman* do not mention the bio father at all.
    - Dispute to be resolved is between the parties only

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## Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
- Ann becomes pregnant using an anonymous sperm donor
- Ann and Susan are married when the child is born and continue to live together following birth of the child, sharing living expenses and childcare responsibilities
- When child is 6 years old, Ann and Susan separate
- Susan files for custody when Ann restricts Susan's time with the child

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## *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

- The right to marry is a fundamental liberty interest protected by the Due Process and Equal Protection Clauses of the 14<sup>th</sup> Amendment and couples of the same-sex cannot be deprived of the right to marry
- State marriage laws are invalid to the extent they exclude same-sex couples from civil marriage **on the same terms and conditions as opposite-sex couples**
- States must recognize a lawful same-sex marriage performed in another state

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## *Paven v. Smith*, 137 S.Ct. 2075 (2017)

- *Obergefell* provides that a State may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples”
- *Obergefell* requires States to provide same-sex couples **“the constellation of benefits that the States have linked to marriage.”**
- State statute that requires that the name of a mother's male spouse be added to birth certificate of child born during their marriage must be interpreted to require that the name of the mother's female spouse be added to birth certificate of a child born during their marriage.

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## Consider:

- Same-sex female **married couple** – Ann and Susan – decide Ann will have a child
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## Is Susan a legal parent?

- **§ 49A-1. Status of child born as a result of artificial insemination.**
  - 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. (1971, c. 260.)

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## Similar statutes in other states

- Artificial insemination statutes similar to GS 49A-1 have been interpreted to make mother's same-sex spouse the child's parent
  - *Della Corte v. Ramirez*, 961 NE2d 601(Mass. Appellate Court 2012)
  - *Shineovich and Kemp v. Shineovich*, 214 P.3<sup>rd</sup> 29 (Oregon Appellate Court 2009) ("There appears to be no reason to allow heterosexual couples to bypass adoption by mutually consenting to artificial insemination but not permitting same-sex couples to do so.")

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## G.S. 12-3, amended effective July 12, 2017

- Added two definitions:
  - (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.

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## Susan and Ann??

- If they used heterologous artificial insemination with written agreement of both:
  - Pursuant to GS 49A-1, Susan is a parent
  - Custody determined using best interest test
- What if GS 49A-1 not applicable?
  - There was no written agreement? No medical procedure?

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## When GS 49A-1 is not available....

- **Common law presumption**
  - When a child is born to a married woman, the law presumes the child to be legitimate
    - *Wright v. Wright*, 281 NC 159 (1972)
    - *Eubanks v. Eubanks*, 273 NC 189 (1968)
  - Legitimate means child is the biological child of the husband (spouse)
  - This presumption (normally) is rebutted by facts and circumstances – including blood tests – that show presumed parent is not the natural parent

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## Common law presumption

- Does *Obergefell* and *Pavan* require that we apply the presumption to all married couples?
- See
  - *McLaughlin v. Jones*, 401 P.3<sup>rd</sup> 492 (Arizona Supreme Court 2017)
    - Statutory presumption must be applied to same-sex couples
    - Biological parent estopped from rebutting presumption
  - *Christopher YY v. Jessica ZZ*, 159 A.D.3<sup>rd</sup> 18 (N.Y. 3d Division 2018)
    - Statutory presumption must be applied to same-sex couples
    - Presumption cannot be rebutted solely with proof of the biological fact that a child cannot be the product of the same-gender parents
    - Need clear and convincing evidence that child is not entitled to legal status as “the product of the marriage”.

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## Common Law Presumption

- When a child is born to a married woman, the law presumes the child to be legitimate
  - *Wright v. Wright*, 281 NC 159 (1972)
  - *Eubanks v. Eubanks*, 273 NC 189 (1968)
- Will the presumption apply to male couples?
  - See *Mize v. Pompeo*, 482 F.Supp.3<sup>rd</sup> 1317 (N.D. Georgia 2020)(when interpreting “born to a married couple” in the context of statutory citizenship requirements, the phrase must be read to include male married couples to avoid constitutional invalidation).

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## Assume the presumption applies...

- Susan and Ann are presumed to be the parents of the child
- Best interest applies to determine custody
- Can Ann rebut the presumption by showing Susan is not biologically related to the child?
  - See *Jones v. Patience*, 121 NC App 434 (1996)

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## If Susan is not a parent.....

- No best interest test to decide custody unless Ann has waived her constitutional right to custody
- Did Ann act inconsistent with her protected status?
  - See *Boseman*
  - See *Mason*
  - Cf. *Estroff*

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## Adoption

- GS 48-4-100 *et. seq.* authorizes step-parent adoptions
- “Step-parent”:
  - “an individual who is the spouse of a parent of a child but is *not the legal parent* of the child.”
  - GS 48-1-101
- Adoptive parent is a legal parent for all purposes
  - In custody dispute between biological parent and an adoptive parent, best interest test applies

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## Uniform Parentage Act

- Promulgated by the Uniform Laws Commissioners
  - 1973, 2002 and 2017
- Creates a series of presumptions to establish the parentage of a child
  - Biology is not always controlling
- Recognizes *de facto* parents
- Establishes parentage of children born through the use of assisted reproductive technologies
  - Donors are not parents
  - Intent of parties' controls
- Authorizes and regulates surrogacy agreements

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## 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.

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