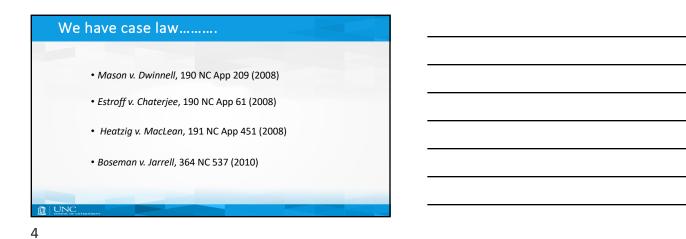


Custody and Parentage - Summary If both parties are legal parents, custody is determined using best interest test Owenby v. Young, 357 NC 142 (2003) If neither party is a legal parent, custody is determined using best interest test Owenby v. Young, 357 NC 142 (2003) If one party is a legal parent but 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)

Cor	sider:
	 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
UNC	



Maso	on, 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 <i>Price v. Howard</i> , 346 NC 68 (1997), controls
	Biological parent has constitutional right to exclusive custody

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)

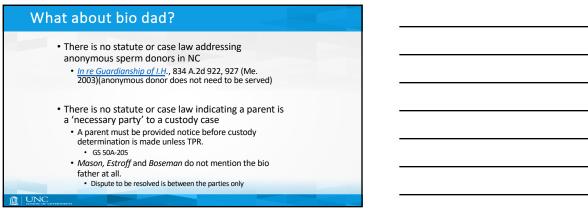
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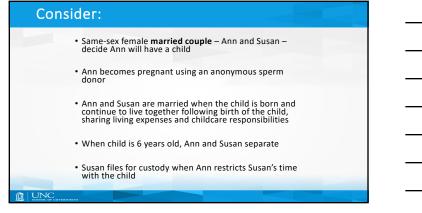
Green v. Carter, COA (March 19, 2024)

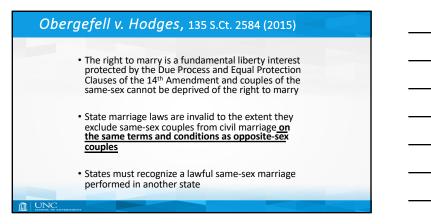
- Woman who shared custody of a child since the birth of the child with the biological mother of the child but never married the biological mother of the child was not a parent.
- Because the woman was not a parent, she is not responsible for child support unless she assumes the obligation of support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

8

UNC





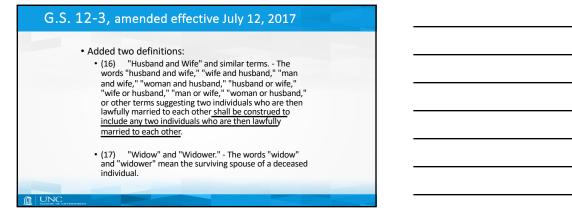


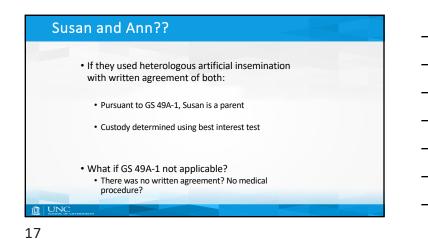
Obergefell provides that a State may not "exclude	
same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples"	
 Obergefell requires States to provide same-sex couples <u>"the constellation of benefits that the States have</u> <u>linked to marriage.</u>" 	
State statute 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.	

Cor	nsider:
	 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

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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	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.3rd 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.")
LINC	





 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

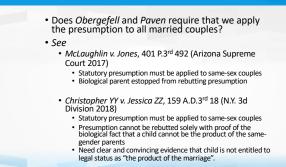
 • Wright v. Wright, 281 NC 159 (1972)

 • 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

Common law presumption



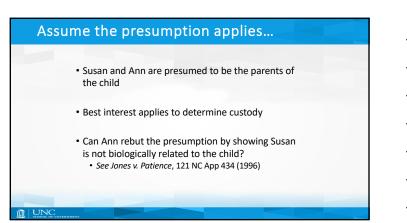
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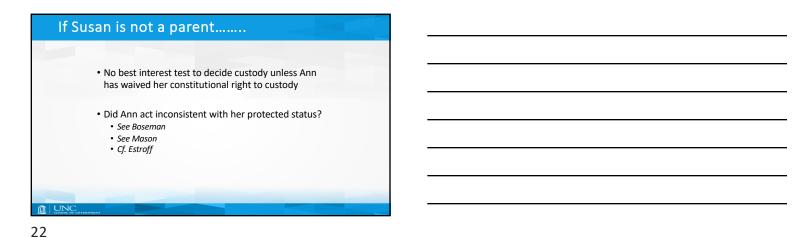
Common Law Presumption

- 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.3rd 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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UNC





niform 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 	
assisted reproductive technologies • Donors are not parents • Intent of parties' controls	
 Authorizes and regulates surrogacy agreements 	

New Legislation Acknowledges Same-Sex Marriage

In <u>Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015)</u>, 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." <u>Paven v. Smith, 137</u> <u>S.Ct. 2075, 2077-78 (2017).</u>

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 <u>2017 Technical Corrections Bill.</u>

"Rules for the Construction of Statutes"

To be honest, I do not remember ever reading <u>GS 12-3</u> before a colleague told me it had been amended as part of the technical corrections bill, <u>2017 S.L. 102</u>, 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, <u>GS 52-10</u> regarding contracts between spouses and <u>GS 39-7</u> 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, <u>GS 48-4-401 *et. seq.*</u>, which allows for the adoption of a child by the "spouse" of a parent. Even without the recent amendment to <u>G.S. 12-3</u>, 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 <u>GS 12-3</u>, 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, <u>GS. 130A-101(e)</u> 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 <u>GS 130A-101(e)</u> 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 <u>Paven v. Smith</u>, <u>137 S.Ct. 2075 (2017)</u>, 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, <u>GS 49A-1</u> 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 <u>GS 12-3</u> 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.