

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHELSEA TORRES and JESSAMY
TORRES, individually and as next friends and
parents of A.T., a minor child,

Plaintiffs,

versus

KITTY RHOADES, in her official
capacity as Secretary of the State of
Wisconsin Department of Health Services,

Defendant.

CASE NO. 15-cv-288

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiffs CHELSEA TORRES (“Chelsea”) and JESSAMY TORRES (“Jessamy”), individually and as next friends and parents of A.T., a minor child (collectively, “Plaintiffs” or the “Torres family”), by and through their attorneys, file this Complaint against Defendant KITTY RHOADES, in her official capacity as Secretary of the Wisconsin Department of Health Services (“DHS”) and allege as follows:

INTRODUCTION

1. Chelsea and Jessamy are a legally married lesbian couple residing in Madison, Wisconsin, in Dane County. Their infant son, A.T., was conceived through anonymous donor insemination and born in Meriter Hospital in Madison, Wisconsin after Chelsea’s marriage to Jessamy. Chelsea and Jessamy filled out the birth certificate worksheet at the hospital, indicating on the form that they are married and that both are A.T.’s parents. However, DHS has refused to provide A.T. with an accurate birth certificate that identifies both Chelsea and Jessamy as his parents. Indeed, upon information and belief, DHS has refused to provide any child born to same-sex spouses an accurate birth certificate listing both spouses as parents absent a court order of

adoption or parentage—even though DHS routinely provides two-parent birth certificates to all children born to different-sex spouses without requiring a court order, and without any regard to how these children are conceived, or whether these children share a genetic connection to both spouses.

2. The refusal by DHS to provide an accurate two-parent birth certificate to A.T. and other children born to same-sex spouses deprives these children of the dignity, legitimacy, security, support, and protections available upon birth to children of married different-sex parents, and denies Chelsea, Jessamy, and other same-sex spouses who are parents the privacy, dignity, security, support, and protections available to married different-sex parents.

3. The refusal by DHS to provide a two-parent birth certificate to A.T. and other children of same-sex spouses violates the equal protection guarantee of the United States Constitution by discriminating against Chelsea, Jessamy, and other married same-sex parents on the basis of their sexual orientation and sex, and against A.T. and other children on the basis of their parents' sex, sexual orientation, and status, all without adequate justification.

4. The refusal also violates the due process guarantee of the United States Constitution by unconstitutionally infringing on the liberty interests of each member of the Torres family and other same-sex spouses and their children to family privacy, integrity, and association, which includes the fundamental right to security in their legal parent-child bonds. The refusal also violates the fundamental right to parental autonomy shared by Chelsea, Jessamy, and other same-sex spouses who have children, including their fundamental right to make decisions concerning whether and how to increase their family, and decisions concerning the care, custody, and control of their children that are

presumptively in their children's best interests. The refusal by DHS to treat both same-sex spouses as parents of children born to them after their marriage also violates these spouses' liberty interests shielded by the fundamental right to marry.

5. The Torres family now brings this action asking this Court to: (1) declare that Defendant's refusal to issue accurate two-parent birth certificates for children born to same-sex spouses, including A.T., is unconstitutional; (2) enjoin Defendant from continuing her policy, or custom and practice, of denying children born to same-sex spouses birth certificates that list both spouses as the child's parents; and (3) further order Defendant immediately to issue a correct birth certificate to A.T. that lists both Chelsea and Jessamy as his parents in reliance on Chelsea's and Jessamy's marriage.

JURISDICTION AND VENUE

6. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation of rights secured by the laws and the Constitution of the United States.

7. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because the matters in controversy arise under the laws and Constitution of the United States.

8. This Court has personal jurisdiction over Defendant because she is domiciled in the State and/or has otherwise made and established contacts with the State sufficient to permit the exercise of personal jurisdiction over her.

9. Venue is proper in the Western District of Wisconsin under 28 U.S.C. § 1391(b)(1) and (2) because Defendant resides in this district, and a substantial part of the events that gave rise to Plaintiffs' claims occurred in Madison, Wisconsin, in Dane County.

PARTIES

10. Plaintiffs Chelsea Andiar Torres, age 36, and Jessamy Flaherty Torres, age 35, both women, are spouses who reside in Madison, Dane County, Wisconsin. They each appear individually and as parent and next friend of their son, Plaintiff A.T., a minor child. Chelsea and Jessamy are harmed by the denial of a birth certificate to A.T. that names both Chelsea and Jessamy as his parents.

11. Plaintiff A.T. sues through his parents and next friends, Plaintiffs Chelsea and Jessamy Torres, who bring this action on behalf of A.T. because he is harmed by the denial of a birth certificate naming both Chelsea and Jessamy as his parents.

12. Defendant Kitty Rhoades is sued in her official capacity as Secretary of DHS. Defendant is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this Complaint. The Wisconsin Vital Records Office, which is responsible for the filing, preserving, protecting, changing, and issuing copies of birth certificates, is a unit of DHS and is controlled by Defendant.

STATEMENT OF FACTS

13. Chelsea and Jessamy Torres are a lesbian couple who have been friends since 2001. They have been in a loving, committed relationship since 2010. They were married on September 7, 2012, in New York, New York, in front of friends and family. Jessamy is a deputy with the Dane County Sheriff's Department, and Chelsea works for a local cleaning company.

14. From the beginning of their relationship, Chelsea and Jessamy knew that they wanted to be parents and have children together. In or around September 2013, Chelsea and Jessamy began working with a fertility clinic in order for Chelsea to conceive via assisted reproductive technology, which was ultimately successful. They

both considered themselves and each other to be partners in the process, including with respect to selection of the anonymous donor.

15. On or about March 13, 2015, Chelsea was admitted to Meriter Hospital in Madison, Wisconsin to give birth. During the birth, there were complications, and Jessamy watched as her wife hemorrhaged and her son turned blue due to lack of oxygen. Jessamy was terrified that her wife and child would not survive. Fortunately, both Chelsea and A.T. survived, though both were required to spend several days in the hospital following the birth, and A.T. was placed in intensive care. Jessamy stayed at the hospital throughout this period, moving between floors to help care for both her wife and son.

16. On or about March 14, 2015, while at the hospital, Chelsea and Jessamy filled out a DHS form for the purpose of obtaining a birth certificate for A.T. On the form, Chelsea and Jessamy indicated that they are married and that both are parents to A.T., and they supplied DHS with the requested information for both parents.

17. On March 30, 2015, Chelsea and Jessamy received a “Notification of Birth Certificate Registration” from DHS that, without explanation, incorrectly omitted all of Jessamy’s information and listed only Chelsea as A.T.’s parent. A copy of the Notification is included as an exhibit to the attached Exhibit A.

18. On April 24, 2015, counsel for the Torres family sent a letter to Defendant requesting confirmation within seven days of its receipt that DHS intends to issue a correct birth certificate that accurately lists both Chelsea and Jessamy as A.T.’s parents. A copy of the letter is attached hereto as Exhibit A.

19. On May 1, 2015, the Chief Legal Counsel for DHS wrote to counsel for the Torres family stating that the “Vital Records Office . . . is evaluating the request and

will respond when that evaluation is complete.” At the time of filing this Complaint, the Torres family has not received a correct copy of A.T.’s birth certificate that lists both of his parents.

20. Under Wisconsin law, a birth mother’s spouse is the presumed parent of a child born during the marriage (hereafter termed the “spousal presumption of parentage” or “spousal presumption”). Specifically, Wis. Stat. § 891.41(1)(a) states that a “man is presumed to be the natural father of a child” if “he and the child’s natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.” The spousal presumption also applies to married couples who use assisted reproductive technology. *See* Wis. Stat. § 891.40 (“If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of the child shall be the natural father of a child conceived.”).

21. In accordance with the spousal presumption, Wis. Stat. § 69.14(1)(e)1 provides: “If the mother of a registrant under the this section was married at any time from the conception to the birth of the registrant, the name of the husband of the mother shall be entered on the birth certificate as the legal father of the registrant. The name of the father entered under this subdivision may not be changed except by a proceeding under ch. 767.”

22. Upon information and belief, and as required by Wis. Stat. § 69.14(1)(3)1, DHS issues birth certificates to children born to married different-sex couples listing both spouses as parents regardless of whether these children have a genetic connection to both spouses. Thus, DHS issues two-parent birth certificates to children born to different-sex

spouses even when the husband is not the child's genetic parent because the couple achieved pregnancy through use of donor insemination, or because the mother had intercourse with a man other than her spouse.

23. Defendant's refusal to provide the Torres family with an accurate birth certificate for A.T. poses significant and ongoing harm to A.T. and his parents, Chelsea and Jessamy, and renders the family vulnerable to future harm.

24. Without an accurate birth certificate, it is difficult if not impossible for the Torres family to comply with legal identification requirements for A.T. Birth certificates are vital to A.T.'s ability to obtain a Social Security card and a passport.¹

25. When A.T. or his parents must produce a birth certificate to establish Jessamy's parental rights and Jessamy's ability to take actions on A.T.'s behalf, such as to enroll him in daycare or school or extracurricular activities (Wis. Stat. § 118.01 *et seq.*) or authorize medical treatment (Wis. Stat. § 146.81(5)), they are unable to do so.

26. State agencies and employers often request birth certificates to enroll a child for needed benefits. *See, e.g.*, Wis. Stat. 632.885 (regarding health insurance for a child through a parent's employer-sponsored group plan). Recognition of a parent on a birth certificate also provides for Social Security survivor benefits to the child in the event of the parent's death and provides inheritance to the child if a parent dies intestate. *See* Social Security Administration, *Benefits for Children*, available at <http://www.ssa.gov/pubs/EN-05-10085.pdf>; Wis. Stat. § 852.05.

27. Birth certificates often are most essential when a family goes through unforeseen family tragedies or crises. Indeed, during A.T.'s birth, Jessamy feared that

¹ *See* Social Security Administration, *Learn What Documents You Need To Get A Social Security Card*, available at <http://www.ssa.gov/ssnumber/ss5doc.htm>; United States Department of State, *Passports for Minors Under 16*, available at <http://travel.state.gov/content/passports/english/passports/under-16.html>.

Chelsea might not survive, and that she would lose both her wife and her ability to establish her parental rights with respect to her newborn son. Fortunately, the staff at Meriter Hospital treated Jessamy as A.T.'s parent, but absent an accurate birth certificate, she may not be as fortunate in future medical emergencies.

28. If a family falls on hard economic times, birth certificates may be required to apply for benefits on behalf of the child. Moreover, if A.T. were to go missing or be kidnapped, law enforcement agencies often require parents to produce a birth certificate to report a missing child or secure his return.

29. If a couple's marriage breaks down, birth certificates commonly are necessary for a state agency to obtain delinquent child support.

30. Even if Chelsea and Jessamy can explain the discrepancies in the birth certificate and establish Jessamy's equal claim to exercise control over A.T.'s care and custody, having to do so is likely to invade the privacy of the Torres family by revealing which parent has a genetic connection to A.T., which is a fact that Plaintiffs may not wish to share in all circumstances.

31. Defendant's policy and practice of denying birth certificates to children born to same-sex parents serves as an unjustified barrier to the ability of the Torres family to exercise their rights stemming from their legal parent-child relationships by making it more difficult for them to obtain the benefits and protections that families whose children have married different-sex parents can more easily obtain.

32. Defendant's discriminatory denial of an accurate birth certificate to A.T. denies him the dignity, legitimacy, security, support, and protections available upon birth to children of married different-sex parents, and denies Chelsea and Jessamy the privacy, dignity, security, support, and protections available to married different-sex parents.

There is no justification, let alone a constitutionally adequate one, for imposing these harms on the Torres family.

CLAIMS FOR RELIEF

COUNT I
Deprivation of Equal Protection
U.S. CONST. Amend. XIV
(42 U.S.C. § 1983)

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

34. Plaintiffs state this cause of action against Defendant in her official capacity for purposes of seeking declaratory and injunctive relief.

35. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

36. Defendant’s refusal to apply the spousal presumption of parentage to same-sex spouses and accordingly to issue two-parent birth certificates to children born to same-sex spouses discriminates against Chelsea and Jessamy on the basis of both their sex and sexual orientation without even a rational justification let alone the required compelling showing that the overall societal benefits of the discrimination clearly outweigh the harms inflicted upon its victims.

37. Defendant’s refusal to provide an accurate two-parent birth certificate to A.T. harms him by incorrectly labeling him the child of an unwed parent, depriving him of access to immediate, clear proof of his relationship to both of his parents and the security that comes with having two parents on his birth certificate. The denial of an accurate birth certificate to children born to same-sex spouses discriminates against such children on the basis of their parents’ status as a same-sex couple, and their parents’ sex

and sexual orientation. There is not even a rational, let alone important, justification for such discrimination.

COUNT II
Deprivation of Due Process
U.S. CONST. Amend. XIV
(42 U.S.C. § 1983)

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

39. Plaintiffs state this cause of action against Defendant in her official capacity for purposes of seeking declaratory and injunctive relief.

40. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

41. The Torres family has a liberty interest in their family privacy, integrity, and association, which includes the fundamental right to security in their legal parent-child bonds. Moreover, Chelsea and Jessamy have a protected liberty interest in their parental autonomy, including the fundamental right to make decisions concerning whether and how to increase their family, and concerning the care, custody, and control of their child, A.T., that are presumptively in his best interests.

42. By refusing to issue A.T. a birth certificate that correctly identifies both Chelsea and Jessamy as his parents, Defendant is unconstitutionally infringing on those liberty interests and depriving the Torres family of the single most important identity document necessary to demonstrate their familial relationship to A.T.

43. The interest of parents in the care, custody, and control of their children is deeply intertwined with the fundamental right to marry. Wisconsin’s spousal presumption of parentage is a benefit of marriage that protects a marital child and his or her bonds to

and right of support from both parents. By declining to apply the spousal presumption of parentage to children born to same-sex spouses, and depriving these families of accurate two-parent birth certificates, Defendant not only has infringed impermissibly on same-sex spouses' fundamental parental interests, but also upon their fundamental liberty interests in their existing marriage.

44. There is no constitutionally adequate basis for Wisconsin's decision to infringe on the fundamental rights of same-sex parents, let alone an interest that can survive the elevated scrutiny required to justify infringement of these fundamental rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that Defendant's refusal to issue a birth certificate to A.T. on the same terms as to children of married different-sex parents violates all Plaintiffs' guarantees of equal protection under the Constitution of the United States;

B. Declaring that Wis. Stat. §§ 69.14(1)(e)1, 891.40(1), and 891.41(1)(a) are invalid and unconstitutional as written and are henceforth to be construed in a gender-neutral manner to require application of the spousal presumption of parentage to same-sex couples and issuance of two-parent birth certificates to same-sex spouses accordingly;

C. Declaring that Defendant's refusal to issue a birth certificate to A.T. that names both Chelsea and Jessamy as his parents violates all Plaintiffs' rights under the Due Process Clause of the Constitution of the United States;

D. Enjoining Defendant from continuing to enforce her policy, or custom and practice, of denying to children born to same-sex spouses birth certificates that list both spouses as the child's parents;

E. Ordering Defendant to immediately issue a correct birth certificate to A.T. that lists both Chelsea and Jessamy as his parents in reliance on Chelsea's and Jessamy's marriage;

F. Awarding Plaintiffs costs, expenses, and reasonable attorneys' fees pursuant to, inter alia, 42 U.S.C. § 1988 and other applicable laws; and,

G. Granting such other and further relief as the Court deems just and proper.

DATED: May 13, 2015

Respectfully submitted,

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* Motions for admission
pro hac vice pending

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