

D.B.A. Family Law Section Case Law Update

July 12, 2017

GEORGINNA L. SIMPSON, P.C.

ATTORNEY AT LAW
1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TX 75247-4042
PHONE 214-905-3739 • FAX 214-905-3799
EMAIL: georganna@glsimpsonpc.com

BETH M. HEARN

ATTORNEY AT LAW
555 Republic Drive, Ste. 200
Plano, TX 75074
Phone: 469-509-6253 • Fax: 469-519-4253
EMAIL: beth@bhearnlegal.com

**SAPCR
PROCEDURE AND JURISDICTION**

TO DETERMINE WHETHER UNCLE HAD STANDING TO SEEK CONSERVATORSHIP, TRIAL COURT SHOULD HAVE CONSIDERED FATHER'S PAST AND CURRENT BEHAVIOR AND MAKE REASONABLE INFERENCES ABOUT THE CHILDREN'S NEEDS GOING FORWARD.

¶17-5-___. *Rolle v. Hardy*, ___ S.W.3d ___, No. 01-16-00402-CV, 2017 WL 2376826 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (06-01-17).

Facts: The Children's Mother past away due to cancer. Prior to her death, she and Father had been appointed joint managing conservators of the Children. Upon Mother's death, Father took possession of the Children, who had been staying with Mother's extended family. Mother's brother ("Uncle") filed a SAPCR, seeking sole managing conservatorship. Uncle asserted that he and his wife had been very involved in the Children's lives and that Mother wanted him to care for the Children after her death. Uncle further alleged that Father had never been involved in the Children's lives prior to Mother's death and was not an appropriate caregiver for the Children. After a long hearing on Uncle's standing to maintain the SAPCR, the trial court found that Uncle failed to present satisfactory proof that an order appointing him as the sole managing conservator was necessary because the Children's present circumstances in Father's care would significantly impair their physical or emotional development. Further, the trial court found that the satisfactory proof must have existed on the date the suit was filed and that the court was prohibited from considering what may happen in the future.

Holding: Reversed and Remanded

Opinion: Uncle was required to present "satisfactory proof" that "the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. "Satisfactory proof" is proof established by a preponderance of the evidence as the facts existed at the time the suit or intervention was filed.

Thus, for Uncle to have standing to pursue his petition seeking a modification of the children's conservatorship, the trial court had to find it necessary to reassess the children's conservatorship order because their present circumstances in the sole managing conservatorship—not merely "care"—of Father would significantly impair their physical health or emotional development. Uncle was not required to establish that he should be appointed as sole managing conservator of the children in order to have standing to seek a modification of the conservatorship order. Whether Uncle should be appointed a sole or joint managing conservator, a possessory conservator, or whether he should be granted any visitation or possession rights at all, was relevant to the merits underlying his petition. That question was not properly before the trial court in making its standing determination.

The trial court erred in looking only at the Children's circumstances on the day Uncle filed his petition. The court's determination necessarily entailed drawing reasonable inferences from the evidence of both past and current behavior that Father exhibited towards the Children and their needs going forward.

MISCELLANEOUS

FATHER AND EX-GIRLFRIEND COULD NOT RECEIVE MENTAL-ANGUISH DAMAGES FOR "WRONGFUL PREGNANCY," BUT FATHER MAY HAVE BEEN ENTITLED TO MENTAL ANGUISH DAMAGES FOR MOTHER'S BAD ACTS NOT DIRECTLY RELATED TO BIRTH OF CHILD.

¶17-5-___. *Hardin v. Obstetrical and Gynecological Assoc. P.A.*, ___ S.W.3d ___, No. 01-15-01004-CV, 2017 WL 2438641 (Tex. App.—Houston [1st Dist.] 2017, no pet. h.) (06-06-17).

Facts: Father and Ex-Girlfriend were in an intimate relationship. Father had children from a prior relationship, and the couple had a child from their current relationship. Father decided to have a vasectomy, but they did not want to preclude the possibility of giving their child a younger sibling. Father stored 8 vials of sperm and signed an agreement with the fertility clinic to keep the sperm frozen. The agreement provided that if the couple split up, Ex-Girlfriend would have dispositional authority over the use and storage of the sperm.

Father had an affair with Mother (a 19-year-old woman), which led to Father and Ex-Girlfriend breaking up. After an on-again-off-again relationship with Mother, she and Father also broke up. During their brief relationship, Mother

learned of the frozen sperm. She convinced the fertility clinic to give her two vials, with which she impregnated herself and gave birth to the Child.

Throughout her pregnancy, Mother treated Father poorly. At some points, she told Father the Child was not his. Other times, she said the Child was his, that he could be at the birth, but he would otherwise not be allowed to see the Child. When she gave birth, she did not permit Father to be present, which Father later testified was devastating.

Mother, Father, and Ex-Girlfriend lived in a small town. Mother told everyone in town that Father agreed to allow her to impregnate herself, and showed people a photo of a forged HIPAA release giving her authority to use the sperm. Ex-Girlfriend, a police officer, was embarrassed to have her personal life exposed to the town. People in the town made negative statements about Father and accused him of dishonesty. They said evil things about him and confronted him about the pregnancy. Father described the situation as a painful nightmare.

Father isolated himself to avoid Mother and the Child he was not allowed to see. Later, Mother began a new relationship with a man who wanted to adopt the Child. Because Father had isolated himself and not made an effort to be involved in the Child's life, a court agreed to terminate his parental rights against his wishes.

Father and Ex-Girlfriend sued the fertility clinic for breach of contract and conversion, and they sued Mother for conversion and IIED. After a jury trial, the jury found the fertility clinic breached the contract, both Mother and the fertility clinic converted the sperm, and Mother engaged in outrageous conduct and inflicted severe emotional distress on Father and Ex-Girlfriend and awarded Father and Ex-Girlfriend damages for mental anguish from both defendants. Subsequently, the trial court granted Mother's and the fertility clinics motions for JNOV, holding that mental anguish damages were simply not available for a "wrongful pregnancy" claim.

Father and Ex-Girlfriend appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: After thoroughly reviewing and balancing the conflicting public policies interests supporting (1) permitting recovery for mental-anguish damages and (2) prohibiting recovery for mental anguish based solely upon the birth of healthy children, the court determined the latter outweighs the former. The court recognized strong reasons for permitting recovery of mental-anguish damages in certain contexts. Yet, the court also recognized that Father undisputedly suffered severe mental anguish. However, the reasons for precluding recovery for mental anguish based solely upon the birth of healthy children was more fundamental.

To the extent Father presented evidence of IIED that was not directly tied to the Child's existence, he may have been able to recover. The court expressed no opinion on whether Father, on remand, would be able to establish his claim, only that the possibility existed that mental-anguish damages were not entirely foreclosed as a matter of law.

None of Ex-Girlfriend's claims for mental anguish were not directly related to the birth of a healthy Child. Further, Ex-Girlfriend's distress was speculative and difficult to predict, and this state does not permit recovery for negligent infliction of emotional distress.

Finally, the only claims for mental anguish damages by Father or Ex-Girlfriend against the fertility clinic were tied to the existence of a healthy child. Further, Ex-Girlfriend still had access to 6 vials of Father's sperm if she chose to impregnate herself in the future.

★★★ SUPREME COURT OF THE UNITED STATES ★★★

ARKANSAS MAY NOT, CONSISTENT WITH *OBERGEFELL*, DENY MARRIED SAME-SEX COUPLES THE RIGHT TO BE LISTED ON THE CHILD-OF-THE-MARRIAGE'S BIRTH CERTIFICATE, WHEN THAT RIGHT IS GRANTED TO OPPOSITE-SEX MARRIED COUPLES.

¶17-5-___. *Pavan v. Smith*, 582 U.S. ____, No. 16-992, 2017 WL 2722472 (2017) (06-26-17).

Facts: Two married same-sex couples had children during their marriages. In both cases, the couples filled out paperwork to have both partners names listed on their respective child's birth certificate. In both cases, Arkansas denied the request and listed only the biological mother's name on the certificate. The state asserted that, pursuant to its statutes, only a "husband" could be listed as a "father" on the birth certificate. The couples sued, seeking a declaratory judgment that the state's statute violated the Constitution. The trial court agreed with the couples, but the Arkansas Supreme Court reversed, concluding that the statute "pass[es] constitutional muster" and that "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and so it "does not run afoul of *Obergefell*." The couples petitioned the U.S. Supreme Court for review.

Holding: Reversed and Remanded

Majority Opinion: (Per Curiam)

Pursuant to the state's statutes, when a married woman in Arkansas is impregnated by means of artificial insemination, Arkansas must list the woman's husband on the child's birth certificate. Thus, despite Arkansas's assertions, its statutes regarding parents' names on birth certificates do not center on the biology. Arkansas has chosen to make its birth certificates more than a mere marker of biological relationships: The state uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Thus, the Arkansas Supreme Court's decision denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage."

Dissenting Opinion: (J. Gorsuch, J. Thomas, J. Alito)

Summary reversal is usually reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Nothing in *Obergefell* spoke to the question of the constitutionality of the challenged Arkansas statute. Further, to the extent the majority relies on Arkansas's treatment of parental names on a birth certificate after artificial insemination, that particular statute was not challenged by the plaintiffs.



FIFTH CIRCUIT'S DECISION IN *DE LEON* IS NON-BINDING AUTHORITY; PARTIES ENTITLED TO PRESENT IN FULL THEIR CASES REGARDING EMPLOYMENT BENEFITS FOR SAME-SEX SPOUSES.

¶17-5-___. *Pidgeon v. Turner*, ___ S.W.3d ___, No. 15-0688, 2017 WL 2829350 (Tex. 2017) (06-30-17).

Facts: After *Windsor*, the city of Houston began offering employee benefits to same-sex spouses. Two taxpayers sued the city and its Mayor, alleging the practice violated Texas's and the city's DOMA statutes. The city and Mayor filed pleas to the jurisdiction. The trial court denied the please and granted the taxpayers' requested injunction. The city and Mayor filed an interlocutory appeal.

While the appeal was pending, *Obergefell* was decided. In a separate suit, *De Leon*, the Fifth Circuit dismissed an appeal, in light of *Obergefell* and found that Texas's DOMA statutes were unconstitutional. Subsequently, in this suit, the court of appeals reversed the trial court's injunction and remanded the case for further proceedings consistent with *Obergefell* and *De Leon*.

The taxpayers sought review from the Texas Supreme Court, arguing that the appellate court erred in remanding the case for further proceedings "consistent with" *De Leon*, by reversing rather than vacating the injunction, and by refusing to affirm the injunction with respect to dates prior to *Obergefell* thereby allowing the City to "claw-back" benefits paid. Additionally, the taxpayers urged the Texas Supreme Court to direct the trial court to "narrowly construe" *Obergefell* because that case did not recognize a fundamental right to spousal employee benefits. The City argued that to narrowly construe the case would ignore its natural meaning and applications.

Holding: Appellate Judgment Reversed; Trial Court Order Vacated; Remanded

Opinion: While the Fifth Circuit's opinion in *De Leon* is persuasive authority, it is not binding on Texas Courts. Thus, the appellate court erred in remanding the case to the trial court for further proceedings "consistent with" rather than "in light of" *De Leon*.

Dissolution of a temporary injunction bars a second application for such injunctive relief, unless the second request is based on changed circumstances not known by the applicant at the time of the first application. *Obergefell* constitutes a change in the law, which means that Plaintiffs are not precluded from seeking the same or similar relief on remand, regardless of whether their prior injunction was vacated or reversed. Thus, the appellate court's reversal would not bar the taxpayers from seeking the same or similar relief on remand.

Because the taxpayers never sought a claw-back injunction, the Texas Supreme Court declined to express an opinion on whether they had standing to seek one or were entitled to one.

While the Fifth Circuit found that Texas's DOMA statutes were unconstitutional, the U.S. Supreme Court made no such finding in *Obergefell*. Further, the parties had not yet presented their cases as to whether the City was entitled to immunity or the Mayor had acted *ultra vires*. The case before the Texas Supreme Court was only an interlocutory appeal of a temporary injunction. The parties in this case should be entitled to fully present their cases as to whether Texas's DOMA statutes are constitutional and whether the City may constitutionally deny benefits to its employees' same-sex spouses. The Texas Supreme Court declined to render a final ruling on the merits before the parties have had a full opportunity to make their cases.