

The Precarious Path to Parenthood for Same Sex Couples

Elisa Reiter and Daniel Pollack | October 28, 2022



Whether by self-help or in vitro fertilization (IVF), the path to parenthood, particularly for same sex couples, can be complicated. Historically, if and when a same sex couple terminated its relationship, unless a person could present a biological connection to their child(ren), the party without a biological connection to the child(ren) could find themselves kicked to the curb not only by their partner, but by a domestic relations court. The times appear to be changing, albeit slowly, as to standing and parental rights.

In Texas, in the recent case of *In re D.A.A.-B.*, 2022 WL 3758574 (Tex. App. El Paso 2022, no pet. history), the El Paso Court of Appeals takes a bold step forward in a case involving a same sex couple. The parties, Andrea and Cristina, were legally married in New Mexico in 2013 (prior to *Obergefell*). A family friend, Luis, provided sperm. In lieu of using formal IVF through a medical professional, the women instead purchased an insemination kit, using self-help to impregnate Andrea, with Cristina actively involved in the process. When the child was born, Cristina was there. Although Andrea informed the hospital staff that she and Cristina were both parents, it was not yet legal for Cristina to be listed on the child's birth certificate, as same-sex marriage was not yet recognized in Texas. Prior to their separation in 2015, Andrea and Cristina both parented the child, sharing child rearing duties and responsibilities. When they separated, Cristina remained in the family home and Andrea moved out. Cristina suffered from depression, and further, was diagnosed with cancer, necessitating chemotherapy treatment.

While Andrea was aware of Cristina's physical and mental condition, Andrea nonetheless assured Cristina via text messages that both would always remain the child's parents and have the right to spend time with the child. The parties worked out a schedule allowing for frequent contact. Cristina provided nominal child support, and further, maintained dependent health coverage for the child. In April 2016, Andrea filed, pro se, for divorce. Subsequently claiming "confusion", the Decree stated that there were no children of the marriage. There were no orders for custody, support or access. The parties agreed to maintain the possession schedule orally agreed to prior to the decree. Cristina never adopted the child, but there were times that she had possession of the

child more than 50% of the time. The informal access schedule was successful until September, 2017, when the parties began to have disagreements. Andrea unilaterally decided to stop allowing Cristina to have access to the child, citing concern for Cristina's mental and physical health. Although Cristina was denied access, she continued to provide support payments to Andrea, and further, continued to maintain dependent health coverage for the child.

In November 2017, Cristina filed an original Suit Affecting the Parent-Child Relationship (SAPCR), seeking orders as to custody, support and access, alleging that she had standing in that she was a mother of the child. In addition, Cristina sought temporary orders. Andrea filed a general denial, and further, denied that Cristina was the child's mother. The trial court refused to rule on temporary orders until Luis, the sperm donor, was served. Luis filed a general denial, did not expressly deny that Cristina was a parent, nor did he seek to have his parentage adjudicated. Almost one year later, the trial court held a second hearing. Cristina was the sole witness, testifying as to her history with Andrea and their child. At the close of this temporary hearing, Andrea moved for a directed verdict, arguing that Cristina lacked standing as Andrea did not meet the legal definition of a mother under the Texas Family Code. Cristina responded that, based on recent decisions by the U.S. Supreme Court, she did have standing. The trial court granted Andrea's motion for directed verdict. Cristina was given time to amend her pleadings, and did so. In her second amended SAPCR petition, Cristina alleged that she had standing per Tx.Fam. Code §102.003(a)(9), stating that she was a person—not a foster parent—who had actual care, control and possession of the child for at least six months prior to filing her SAPCR action, and further, ending no more than 90 days prior to her filing her

case. She did not characterize herself as a parent in the second amended pleading. Andrea again moved to dismiss Cristina's case, arguing that there had not been access to the child ending within 90 days prior to filing. The trial court heard Andrea's motion in October 2019, stating it would rule following review of each party's brief. More than one year later, on the judge's last day in office, the judge granted Andrea's motion to dismiss Cristina's SAPCR. The new judge refused to enter findings of fact or conclusions of law.

The El Paso Court of Appeals considered whether the trial court failed to consider the Texas Family Code in a gender-neutral fashion, to assure that members of a same sex union had the same due process protections afforded an opposite sex couple. Andrea argued that Cristina could not be considered the child's "mother" under the gender specific provision of the Texas Family Code. The Court of Appeals also addressed Cristina's argument that she had standing pursuant to Tx.Fam. Code §102.003(a)(9), based on her argument that she had possession of the child for more than six months, ceasing within 90 days of the date Cristina filed her original SAPCR. The El Paso Court finds this issue in Cristina's favor, stating that she has standing as the child's parent.

Section 102.003 of the Texas Family Code provides that a SAPCR "may be filed at any time by ... a parent of the child." How does the family code define a "parent"? A parent is "the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father." Further, Tx. Fam. Code §101.025 defines the parent child relationship as "the legal relationship between a child and

the child's parents as provided by Chapter 160 [and] includes the mother and child relationship and the father and child relationship." The Uniform Parentage Act (UPA) set out in Chapter 160 of the Tx. Fam. Code sets out certain presumptions and definitions as to a "father-child" relationship. The El Paso Court notes that the "mother-child relationship" can be established between a "woman and a child" by "(1) the woman giving birth to the child; (2) an adjudication of the woman's maternity; or (3) the adoption of the child by the woman." The El Paso Court of Appeals takes a view of the issues at hand from the perspective of *Obergefell* and *Pavan*. Said simply: Same sex spouses are entitled to equal rights as to children born to their marriage. In *Pavan*, a same sex couple challenged an Arkansas statute that allowed inclusion of the name of the birth mother and of her "husband" on the child's birth certificate. The Arkansas Supreme Court held in *Pavan* that their 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." The U.S. Supreme Court disagreed with the Arkansas Supreme Court in *Pavan*, finding that their statute gave a woman in Arkansas the right and duty to list her husband on a birth certificate even if the child was conceived via IVF: "... it could not deny the same right of a married woman in a same-sex marriage to put her female spouse's name on the certificate." To do otherwise would be prohibited by the U.S. Supreme Court's holding in *Obergefell* (which prohibits "disparate treatment" of same-sex couples as opposed to opposite-sex couples). In the same vein, the El Paso Court of Appeals holds in *D.A.A.-B.*, based on the UPA, that it can rule on issues of maternity, noting "the unambiguous and plain language of this statute makes it clear that the legislature intended to

allow female spouses to establish their parentages just as male spouses are allowed to do.”

The El Paso Court adds that in applying parental presumptions to a same-sex couple, it must also apply the principle that the child’s best interest should be the court’s primary consideration when ruling on issues pertaining to “conservatorship and possession of or access to a child.”

We have previously opined about the importance of recognizing the impact of “psychological parents” on a child’s life. Is it possible that, notwithstanding Texas’ reputation as a conservative state, it is taking the lead in moving the rights of same-sex couples forward? Even when faced with a Decree alleging that no children were born to nor adopted of the marriage, with Luis’ refusal to step forward and assert his rights as a father to the child, and the trial court taking an incredible length of time to enter a final ruling, the El Paso Court of Appeals assures that a non-biological mother’s rights are protected.

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