IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

HEATHER MARTIN GARTNER and MELISSA GARTNER, individually, and as next friends of MACKENZIE JEAN GARTNER, a minor child, **Petitioners,** **v** **IOWA DEPARTMENT OF PUBLIC HEALTH,** **Respondent**	**Case No.: CE 67807** **RULING ON PETITION FOR JUDICIAL REVIEW**

The issue in this case is whether Melissa Gartner must adopt the baby born to her spouse, Heather Martin Gartner, in order to be listed as a parent on the child's birth certificate. The Department of Public Health is willing to list Melissa as a parent on the birth certificate, but insists she must first adopt two-year-old Mackenzie. Melissa argues that she is not required to adopt the child because she was married to the child's birth mother when the baby was born. She asserts that she should be automatically listed on the birth certificate under current Iowa statutes read in light of the Iowa Supreme Court's decision in *Varnum v. Brien.* For the reasons stated below, the court concludes the Department erred in not placing Melissa's name on the birth certificate.[1]

[1] This case was submitted on stipulated facts. Following the hearing, counsel submitted the following stipulation concerning the record: In addition to the pleadings, the record consists of: 1) Certificate of Agency Record, including the three cited documents, filed on August 29, 2011; 2) Respondent's Brief in Support of Resistance to Petition for Judicial Review, filed on October 28, 2011; 3) Respondent's Exhibits A - G; 4) All Petitioners' Memorandum of Authorities Submitted in Support of Petition for Judicial Review, filed November 2, 2011; 5) Petitioners' Exhibits 1- 9; 6) Exhibit A, Statement of Material Facts in Support of Petition for Judicial Review filed November 2, 2011(SMF) subject to the following: (a) Respondent disputes Petitioners' statements that the certificate of birth issued to Mackenzie Gartner is not accurate (SMF, ¶¶ 15, 16, 17, 19, 23); and (b) Respondent disputes Petitioners' statement that Mackenzie Gartner's birth certificate labels her as an "illegitimate" child. (SMF, ¶ 24).

Facts

Heather and Melissa are a lesbian couple who have been in a committed relationship since 2003. They held a commitment ceremony in front of family and friends in 2006. Heather gave birth to a son, Zachary, in 2007. She conceived via an anonymous sperm donor. Melissa adopted Zachary. Following the adoption, the Department of Public Health issued an amended birth certificate for Zachary, listing Heather as the mother, and Melissa as the other parent. Ex. 3.

Heather and Melissa decided together to have another child. Heather conceived again using anonymous sperm donor. She used the same donor as for Zachary.

In April 2009, the Iowa Supreme Court issued its decision in *Varnum v. Brien*, which legalized same-sex marriage in Iowa. On June 13, 2009, Heather and Melissa were legally married.

On September 19, 2009, Heather gave birth to a daughter, Mackenzie, in Des Moines. Heather and Melissa filled out the form to obtain a birth certificate from the Iowa Department of Public Health. They listed themselves as parents, indicating that they are a same-sex couple legally married in Iowa. The Department of Public Health completed the birth certificate listing only Heather as the mother, and leaving blank the space for a second parent. The Department informed Melissa that it would not place her name on the birth certificate unless she first adopts the child.

The Bureau of Health Statistics of the Iowa Department of Public Health is responsible for administering the statewide system of vital statistics, including records of births, deaths, and marriages. The Bureau, with a staff of 18 people, annually registers approximately 100,000 events, including 38,500 births. One important function of the Department is the maintenance of accurate and complete records and statistics of all vital events in Iowa, including births.

The parties agree that a birth certificate is the primary way to demonstrate legal parentage. They also agree that it is relied upon and legally required to establish identity, age,

and parentage in many contexts, including school, employment, travel, social security, marriage licenses, driver's licenses, professional licenses, insurance, banking, and medical care. Without her name on the birth certificate, Melissa will be unable to prove that she is Mackenzie's legal parent. This will adversely affect her ability to authorize medical care for the child, or even to enroll her or pick her up from a childcare facility. Melissa will not be able to obtain access to the child's birth certificate, and would likely be denied health care coverage for the child on her policy. The Department does not dispute Melissa's claim that the process of adoption is intrusive, expensive, and time-consuming. It would involve a home study and background check, plus the expenses of court fees, attorney fees, and the costs of the home study.

Mackenzie was hospitalized in early 2010, when she was less than a year old. Melissa is the stay-at-home parent to Zachary and Mackenzie, and Heather works outside the home. Because Melissa could not prove she was a legal parent to Mackenzie, Heather and Melissa both maintained a bedside vigil for the child when she was in the hospital. They feared that Melissa would not be able to authorize emergency medical care if it became necessary. Heather had to miss a great deal of work she would not otherwise have had to miss. This situation caused additional stress and anxiety to Heather and Melissa, which would not have been necessary had Melissa been on the child's birth certificate.

Additional facts will be set forth in the discussion below.

Standard of Review

This is a judicial review action under the Iowa Administrative Procedures Act, Iowa Code Chapter 17A. The court shall reverse, modify or grant other appropriate relief from final agency action if it determines the substantial rights of petitioner have been prejudiced by any of the means set forth in Iowa Code Sections 17A.19(10)(a)-(n). The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code § 17A.19(8)(a). The court shall make a separate and distinct ruling on each material issue

on which the court's decision is based. Iowa Code § 17A.19(9). Petitioners allege the Department of Public Health's action is in violation of Sections 17A.19(10)(a), (b), (c), (e), and (h).

Section 17A.19(10)(b) states an agency's action may be reversed if it is in violation of any provision of law. Section 17A.19(10)(c) states that an agency's action may be reversed if it is based on an erroneous interpretation of a provision of law whose interpretation has not clearly been vested in the agency. The agency action here rests on the Department's interpretation of the statute concerning issuance of birth certificates for children born of married parents - Iowa Code § 144.13(2) - and whether the Department has violated that statute.

An initial question for the court is the level of deference to be accorded to the agency's interpretation of this statute. This depends upon whether interpretation of the statute has "been vested by a provision of law in the discretion of the agency." Iowa Code §§ 17A.19(11)(b), (c). If discretion to interpret a law has clearly been vested by a provision of law in the agency, the court will reverse the agency's decision only when the interpretation is illogical, irrational, or wholly unjustifiable. Iowa Code § 17A.19(10)(l). If discretion to interpret a law has not clearly been vested in the agency, the court will reverse the agency if it is based on an erroneous interpretation of the law. Iowa Code § 17A.19(10)(c). *See also American Eyecare v Department of Human Services,* 770 N.W.2d 832, 835-36 (Iowa 2009); *Mosher v Iowa Department of Inspections and Appeals,* 671 N.W.2d 501, 508-511 (Iowa 2003). The court must not give any deference to the agency's view of whether it is vested with discretion to interpret the law. Iowa Code § 17A.19(11)(a).

As the Iowa Supreme Court recently stated:

> Our review of authorities on this subject has confirmed our belief that each case requires a careful look at the specific language the agency has interpreted as

> well as the specific duties and authority given to the agency with respect to enforcing particular statutes. It is generally inappropriate, in the absence of any explicit guidance from the legislature, to determine whether an agency has the authority to interpret an entire statutory scheme. As we have seen, it is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions. Accordingly, broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority.

Renda v. Iowa Civil Rights Com'n, 784 N.W.2d 8, 13 -14 (Iowa 2010). The Court in *Renda* set forth some guidelines for courts to follow, such as: 1) whether the statutory provision being interpreted contains a substantive term within the special expertise of the agency; 2) whether the provisions to be interpreted are found in a statute other than the statute the agency has been tasked with enforcing; and 3) whether the term has an independent legal definition that is not uniquely within the subject matter expertise of the agency. *Renda,* 784 N.W.2d at 14.

Section 144.13(2) states that the Department of Public Health shall place the "husband's" name on a child's birth certificate, unless "paternity" has been established otherwise. The Department concedes that the legislature has not expressly granted it the authority to interpret Section 144.13(2). However, it argues that it has been granted broad interpretive and rule-making authority, which entitle its interpretation to deference, citing Iowa Code §§ 144.2, 144.5, 144.12, and 144.13 (dealing with registering and administering vital statistics records). However, the concept of "paternity" as set forth in Section 144.13 is not exclusively within the expertise of the Iowa Department of Public Health. The term is found within statutes that the Department is not taxed with enforcing. *See,* Iowa Code Chapter 252A.3 (support of dependents); Iowa Code 600B (paternity and obligation for support). In addition, the concept of legitimacy of children is not uniquely within the expertise of the Department of Public Health. *See* Iowa Code § 598.31 (divorce statute stating children born of a marriage are legitimate to

both parties), § 252A.3(4) (children born to married parents are the legitimate children of both parents). These statutes have been read together with Section 144.13(2) in court decisions analyzing establishment of paternity. *See, e.g., Callender v Skiles,* 591 N.W.2d 182, 185 (Iowa 1999). The court concludes that the agency's interpretation is not entitled to deference, and that its decision should be examined under Section 17A.19(10)(b) and (c).

Discussion

Petitioners assert the Department's refusal to put Melissa's name on the child's birth certificate is in violation of a provision of law, and based on an erroneous interpretation of law, in violation of Iowa Code § 17A.19(10)(b) and (c). The Department relies on Section 144.13(2):

> If the mother was married at the time of conception, birth, or at any time during the period between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.

Iowa Code § 144.13(2) (2011).

Petitioners argue Section 144.13(2) must be read in a gender-neutral fashion following the Iowa Supreme Court's landmark decision in *Varnum v. Brien,* 763 N.W.2d 862 (Iowa 2009). *Varnum* struck down the Iowa statute limiting civil marriage to a man and a woman, and allowed same-sex couples to be civilly married in this state. Petitioners assert that following *Varnum,* the Department should read the statute to refer to "spouse" instead of "husband," and "parent" instead of "father." The Department argues that because Section 144.13(2) says a "husband's" name must be placed on a birth certificate as the "father" of the child, it cannot enter Melissa's name on the birth certificate under that statute, and she must adopt the child in order to have her name placed on the birth certificate.

Varnum states that language in the Code of Iowa will have to be interpreted and applied to carry out the legality of same-sex marriage: "Consequently, the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, *and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage*." *Varnum v Brien*, 763 N.W.2d at 907 (emphasis added).

Section 144.13(2) is often read with other laws governing the status of children born during a marriage. *See, Callender v Skiles,* 591 N.W.2d 182, 185 (Iowa 1999) (reading Section 144.13(2) with Section 252A.3 concerning legitimacy of children born to a marriage); 1945 OAG 77; 1945 OAG 65 (stating that a husband's name must be placed on a birth certificate even though he could not possibly have fathered his wife's child). *See also In re Marriage of Steinke,* 801 N.W.2d 34 (Table), 2011 W.L. 1584834, at *8 (Iowa Ct. App. 2011); *In re K.E.D.*, 2001 W.L. 194856, at *1 (Iowa Ct. App. 2001).

One such law is Iowa Code Section 252A.3, which deals with the obligation of parents to support their children. Under that law, a spouse is liable for the support of the other spouse and any child or children under eighteen years of age. Iowa Code § 252A.3(1). This law also states:

> A child or children born of parents who, at any time prior or subsequent to the birth of such child, have entered into a civil or religious marriage ceremony, shall be deemed the legitimate child or children of both parents, regardless of the validity of such marriage.

Iowa Code § 252A.3(4). In addition, Iowa's divorce statute states, "Children born to the parties, or to the wife, in a marriage relationship which may be terminated or annulled pursuant to the provisions of this chapter shall be legitimate as to both parties, unless the court shall decree otherwise according to the proof." Iowa Code § 598.31. The language of these Code sections

dealing with legitimacy is gender-neutral – i.e. it refers to "parents" and "parties," and not "wife" or "husband." *See* Iowa Code § 252A.3(4) and 598.31. Because Mackenzie was born during the marriage of Heather and Melissa, she would be deemed their legitimate child under these statutes. However, absent a birth certificate naming Melissa as a parent, she and the child are denied the primary means of proving legitimacy.

The Supreme Court in *Varnum* cited legitimacy of children born to married parents under Section 252A.3(4) as one of the benefits that was withheld from same-sex couples who could not legally be married. *Varnum v. Brien*, 763 N.W.2d at 903, n. 28. This is a strong indication that the Supreme Court intended married same-sex couples to have legal recognition that their children are legitimate and entitled to the support of both parents. The Department's refusal to place Melissa's name on the birth certificate frustrates the purpose of the law to recognize the legitimacy of a child born to a marriage, and to establish the parents' obligation to support the child, as recognized in the *Varnum* decision.

In an earlier case, the Iowa Supreme Court, citing both Sections 144.13(2) and 252A.3(4), held that when a child is born during a marriage, the husband is the legally established father of a child, even though genetic testing shows that another man is the child's biological father. *Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999). This is because when a wife gives birth to a child, the husband is legally presumed to be the father. *Id.* The Supreme Court relied on the statute stating children born to married parents are legitimate (Section 252A.3(4)), and on the statute requiring the husband's name be placed on a birth certificate (Section 144.13(2)). That case held the biological father would have to petition the court to overcome paternity of the established father. *Callender v. Skiles* 591 N.W.2d at 192.[2]

[2] Four justices dissented from the final ruling in *Callender*, stating that the biological father had no right to intrude into the married couple's family structure. *Id.*, 591 N.W.2d at 192-93. Interestingly, the dissent also cited both

In a similar vein, the Iowa Attorney General has opined that the predecessor to Section 144.13(2) requires a husband's name be placed on the birth certificate of a child born to his wife, even though he was away at war and could not possibly have fathered the wife's child. 1945 OAG 77; 1945 OAG 65 (Ex. B, C attached to Petition). Because the husband "is presumed to be the father of the child, he must be recorded on the birth certificate as the father." 1945 OAG at 78. In reaching this conclusion, the Attorney General relied on the legitimacy statutes. *Id.* This is the same legal reasoning presented by the birth mother's spouse here.

Of course the present action does not raise the issue of same-sex parenting. The Department makes no claim that children raised by same-sex married parents will be less well-adjusted than children raised by different-sex married parents. *See* Ex. 5, RFA 14. Indeed, Iowa law recognizes that the sexual orientation of a parent does not affect the ability to parent a child. *See*, *Varnum v. Brien*, 763 N.W.2d at 899; *Hodson v. Moore*, 464 N.W.2d 699, 700-701 (Iowa Ct. App. 1990); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990); *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995). The present action is merely about what steps must be taken to place Melissa's name on the child's birth certificate – i.e. whether she will have to first adopt the child.

As stated above, *Varnum v. Brien* recognizes that some statutory language will have to be interpreted and applied in a manner allowing gay and lesbian people "full access to the institution of civil marriage." 763 N.W.2d at 907. One important incident of the institution of civil marriage is a presumption that a child born during the marriage is the legal child of both parties to the marriage – regardless whether there is a biological connection to the other parent. *Varnum*, 763 N.W.2d at 903, n. 28. When a married woman gives birth, *Varnum* dictates that

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Section 252A.3(4) and Section 144.13(2) in support of its conclusion. Thus both the majority and dissenting opinions in *Callender v. Skiles* support petitioners' interpretation of the statutes.

Section 144.13(2) be interpreted and applied to give "full access to the institution of marriage" by placing her spouse's name on the birth certificate.

This holding is supported by the purposes of Section 144.13(2) and 252A.3(4), and the presumption of parentage. "The state's interests involve preserving the integrity of the family, the best interests of the child, and administrative convenience." *Callender v. Skiles,* 591 N.W.2d at 191. The integrity of Heather and Melissa's family is promoted by allowing Melissa's name to be placed on the birth certificate. In addition, it is in Mackenzie's best interest to have two legal parents, rather than one. She will be legally entitled to financial support from both parents, rather than one, to inherit from both parents, and to have two adults who will be able to act for her in important matters such as medical care and schooling. As to administrative convenience, the court is aware of the large number of filings for which the Bureau of Vital Statistics is responsible. *See* France affidavit. However, the administrative burden of placing Melissa's name on a birth certificate is not onerous. If a married woman gives birth to a child and presents an application for a birth certificate naming her same-sex spouse, the administrative burden would seem no heavier than for a woman married to a man.

The Department argues that statutes like Section 144.13(2) are founded on a belief that the birth mother's husband is the genetic father of a child. They cite Byrn and Ives, *Which Came First the Parent or the Child,* 62 Rutgers L. Rev. 305, 333 (Winter 2010). However, other legal scholars argue the opposite: that statutes declaring a husband is the father even when it is clear he could not have fathered a child are designed to preserve the integrity of the family and the marriage. *See* Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship,* 5 Pierce L. Rev. 1, 8 (2006). "Though now codified in most states, the presumption of legitimacy has a long

history in common law. (footnote omitted) Originating in the common law of England to prevent children from losing their inheritance and succession rights, the presumption was also meant to protect the integrity of families, regardless of the biological connections." *Id.* The Iowa Supreme Court endorses the latter view. *See, Callender v. Skiles,* 591 N.W.2d at 191; *Craven v. Selway,* 216 Iowa 505, 246 N.W. 821, 823 (Iowa 1933); *Heath v Heath,* 269 N.W. 761 (Iowa 1936); *Wallace v. Wallace,* 137 Iowa 37, 114 N.W. 527 (1908). The presumption of paternity "is founded on decency, morality, and public policy. By that rule, the child is protected in his inheritance and safeguarded against future humiliation and shame . . . the family relationship is kept sacred and the peace and harmony thereof preserved." *Craven v. Selway,* 246 N.W. at 823.

An important fact of this case is that the child was conceived by use of *in vitro* fertilization with an anonymous sperm donor. The Department's stated goal of naming the biological father of the child cannot be met, as there is no identified man who could be named as the father. Paternity cannot be established here. In addition, the Department argues that biological fathers could challenge its decision to omit them from birth certificates, thus leading to administrative inefficiencies. Again, this cannot happen in this case, where the sperm is from an anonymous donor. The court's holding is limited to the facts of this case.

Conclusion

Pursuant to *Varnum v. Brien,* where a married woman gives birth to a baby conceived through use of an anonymous sperm donor, the Department of Public Health should place her same-sex spouse's name on the child's birth certificate without requiring the spouse to go through an adoption proceeding. Petitioners have proven the Department's actions are in

violation of law, and based on an erroneous interpretation of the law, in violation of Iowa Code Sections 17A.19(10)(b) and (c).

The Petitioners also argue that the Department's interpretation of Iowa Code Section 144.13(2) is unconstitutional, as a violation of their Equal Protection and Due Process rights under the Iowa Constitution. The court need not reach this issue in light of its ruling that petitioners have proven a violation of Sections 17A.19(10)(b) and (c).

IT IS THEREFORE ORDERED that the Iowa Department of Public Health shall issue a birth certificate naming Melissa Gartner as a parent for the child Mackenzie Jean Gartner.

Costs are taxed to respondent.

Dated this 4th day of January, 2012

ELIZA J. OVROM, JUDGE
Fifth Judicial District of Iowa

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