



STATE OF MICHIGAN

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

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IV-D MEMORANDUM 2017-012

TO: All Friend of the Court (FOC) Staff
All Prosecuting Attorney (PA) Staff
All Office of Child Support (OCS) Staff

FROM: Erin P. Frisch, Director
Office of Child Support

DATE: June 6, 2017

SUBJECT: IV-D Services for Same-Sex Couples

ACTION DUE: None

POLICY EFFECTIVE DATE: Upon receipt

PURPOSE:

On June 26, 2015, the decision of the Supreme Court of the United States (SCOTUS) in *Obergefell v. Hodges*¹ legalized same-sex marriage. Although the Supreme Court's decision permits same-sex marriage in all states, the types of services that IV-D staff can provide to same-sex spouses and couples when they request IV-D services is not addressed in the decision.

OCS, the Michigan Department of Health and Human Services (MDHHS), and program partners have reviewed business, system, legal, and logistical issues related to processing requests for IV-D services for same-sex spouses and couples. The Establishment Work Improvement Team (WIT) discussed the issues over several meetings and were instrumental in identifying and understanding implications to the IV-D program.

Though the Program Leadership Group and the WIT reviewed the policy, both groups failed to reach consensus on it.

This IV-D Memorandum provides direction to IV-D staff regarding the level of IV-D services afforded to same-sex spouses and couples and their children.

¹ *Obergefell v. Hodges*, 135 S Ct 2584 (US, 2015)

UPDATE(S):

Manual

Form(s)

DISCUSSION:

A. Analysis and Direction

After reviewing the WIT findings and consulting with MDHHS leadership, OCS provides the following direction.

If IV-D staff confirm that the child(ren) was conceived or born to one spouse **during the marriage of two women**, then IV-D staff will presume the other spouse is the parent.² OCS and MDHHS believe it is in the child's best interest that the spouse of the child's birth mother be recognized as the child's other parent. Consequently, a female married couple who is referred to the IV-D agency or who applies for IV-D services will receive the same level of IV-D location, establishment, and enforcement services as an opposite-sex married couple. Additionally, other same-sex couples will also receive full services if they produce documents supporting their child's parentage.³

Several factors were considered in the development of this policy, including the SCOTUS decision, Michigan statutes, court decisions, fairness, and the need for legislation.

1. The SCOTUS Decision

The *Obergefell* decision states that "(f)our principles and traditions ... demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." SCOTUS highlights that one of these four principles is that marriage "... safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. ... Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples."

The opinion explains that state governments grant certain rights, benefits, and responsibilities to couples only if they are married. The states establish the marital institution as unique in several key areas, including those areas involving birth certificates, child custody, support, and visitation.

The decision concludes that "... the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil

² This IV-D Memorandum will refer to this presumption as the "presumption of parentage."

³ For example, two males with adoption papers. Ref: Section C(1) of this memorandum for further information.

marriage on the **same terms and conditions** as opposite-sex couples.”
(Emphasis added.)

Under the preemption doctrine, SCOTUS decisions are binding on all lower courts when it decides a constitutional issue, and its decisions supersede state laws that conflict with the decision – in this case, those laws that grant certain benefits, rights, and responsibilities only to opposite-sex married couples. These laws include those surrounding the rights and responsibilities for raising children. While *Obergefell* did not directly address the parentage issue, it did note in several places within the decision that children are profoundly affected by the marital status of their parents.

2. Michigan Statutes

OCS understands that in Michigan, many statutes and case law that the IV-D program uses to define parentage are gender-specific. For example, the Paternity Act⁴ supports the presumption of parentage of a child born **within** a marriage by defining a child born **out** of wedlock. It states: “(a) ‘child born out of wedlock’ means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage.”⁵ The term “begotten” is gender-specific because it commonly means to procreate between a man and a woman, or “to father.” Nevertheless, these laws pre-date the *Obergefell* decision and are in conflict with that decision. IV-D staff will presume the presumption of parentage can be claimed for the female spouse of the birth mother.

OCS and MDHHS leadership intend to seek legislative changes to make the Michigan statutes more gender-neutral, in line with *Obergefell*.⁶

3. Court Decisions

Nationally, an increasing number of court decisions support presuming the other spouse is the parent when the child is conceived or born during a same-sex marriage. The decisions from these courts are persuasive and generally state that such a presumption was the intended outcome of the *Obergefell* decision. These decisions are made despite applicable state laws on presumptions of parentage that consist of language similar to Michigan’s laws.

In *Brooke S.B. v. Elizabeth A.C.C.*, 29 NY 3d 1 (2016), the Court of Appeals for New York overturned an earlier decision, *Alison D v. Virginia M*, 77 NY 2d 651, 572 NE2d 27 (1991) which found that in an unmarried couple, a partner without a

⁴ Ref: Michigan Compiled Law (MCL) 722.711.

⁵ Ref: The Divorce Act, Revised Statutes of 1846 (Excerpt) MCL 552.29 also uses the term “begotten” and helps establish the presumption of parentage.

⁶ Ref: Section A(5) below for additional discussion.

biological or adoptive relation to a child is not that child's parent for purposes of standing to seek custody. In *Brooke S.B.*, the court held: "Moreover, *Alison D's* foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court holding in *Obergefell v. Hodges* (citation omitted), which noted that the right to marry provides benefits not only for same-sex couples, but also the children raised by those couples."⁷

In a decision from the U.S. District Court for the Southern District of Indiana in the case of *Henderson v. Adams*,⁸ the court found that:

Indiana's statutory scheme leads to unequal treatment of same-sex married women who bring children into their families ... This unequal treatment is based on the individual's gender and sexual orientation ... For these reasons, the Court determines that (Indiana law) violate(s) the Equal Protection Clause of the Fourteenth Amendment.

Indiana's laws are structured in a similar fashion as Michigan's – the statutes are gender-specific and imply that children are considered born in wedlock only if the marriage is between a man and a woman.

Additionally, this decision said that:

(t)he public interest in serving the best interests of the child will not be harmed ... but actually will be furthered by legally recognizing two parents for children and providing stability for children and families.

...

As other district courts have noted,⁹ the holding of *Obergefell* will inevitably require 'sweeping change' by extending to same-sex married couples *all* benefits afforded to opposite-sex married couples ... Those benefits must logically and reasonably include (recognition of a same-sex married couple as a child's parents).

In this case, the court held that "... (t)he State Defendant and its officers, agents, servants, employees, and attorneys, and those acting in concert with them, including political subdivisions of the State of Indiana, are enjoined from enforcing

⁷ The *Brooke S. B.* court decision was limited to the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determinant of whether those rights should be granted rests in the sound discretion of the court, which will determine the best interest of the child.

⁸ *Henderson v. Adams*, unpublished opinion of the Southern District of Indiana, issued June 30, 2016 (Docket No. 1:15-cv-00220-TWP-MJD)

⁹ *Campaign for Southern Equality v. Miss. Dep't of Human Servs.*, 175 F Supp 3d 691 (S.D. Miss., 2016).

(Indiana statutes) in a manner that prevents the presumption of parenthood to be granted to female, same-sex spouses of birth mothers.” They are also “... enjoined to recognize children born to a birth mother who is legally married to a same-sex spouse as a child born in wedlock.”

Other courts¹⁰ around the nation have made similar conclusions. MDHHS believes that when presented with similar circumstances, Michigan courts are likely to come to the same conclusion. Though Michigan is not subject to these decisions, and these decisions do not directly affect the Michigan IV-D program’s extension of services to these families, MDHHS aligns itself with the findings and conclusions in them.

Following this line of case law, MDHHS has determined it is in the best interest of the child to presume a person is a child’s other parent if that person was the birth mother’s spouse at the time the child was conceived or born. This presumption applies equally to same-sex and opposite-sex married couples.

4. Fairness

Presuming parentage for married females would reduce the time and legal costs to the spouse who may otherwise be required to obtain a court declaration. Opposite-sex couples do not have to take this step. MDHHS is adopting this policy because it has the least risk of litigation on the grounds of equal protection. Additionally, MDHHS recognizes that serving families now – fairly and equally – is of utmost importance.

5. Legislation

MDHHS leadership and OCS agree that pursuing legislation is the optimal approach to resolving the conflict between the SCOTUS decision and state law. OCS will work with program partners and other subject matter experts to identify statutes that should be changed to clarify the parentage of children conceived and born during same-sex marriages. In addition, OCS will locate statutes that can be revised to endorse the services the IV-D program will provide to these families.

Passing legislation will take a significant amount of time, and IV-D referrals and applications are being received now, although at a low volume. Consequently, OCS is issuing IV-D policy now for processing such applications in advance of any legislation.

OCS’s review of the Supreme Court’s decision and monitoring of additional court direction will be ongoing. Further policy and form revisions will include discussions with IV-D partners, legal partners, MDHHS, and others.

¹⁰ *McLaughlin v. Jones*, 240 Ariz 560 (2016) is another example.

B. Vital Records' Actions Related to Same-Sex Marriage

The MDHHS Division for Vital Records and Health Statistics (Vital Records) has updated several of its forms and processes, including the procedure for adding parents' names to birth certificates.

MCL 333.2824 states that "the name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child." Vital Records is liberally interpreting this language in light of the Supreme Court's decision. If a child was conceived or born during a marriage between two women, Vital Records now directs hospitals, county clerks, and others to place two women on the child's birth certificate: the birth mother as a parent and the other woman as the second parent. The labels of "father" and "mother" on the certificate are changed to "parent" and "parent." Vital Records is taking this action retroactively upon request if the child's conception or birth occurred during a legal marriage of two women prior to the Supreme Court's decision. Vital Records does not take the same steps if a child is born within the marriage of two men, because neither man gave birth to the child.

Other states have either made similar changes to birth certificates voluntarily or been required to do so. Pennsylvania's Department of Health has modified its birth and death certificates to acknowledge same-sex couples. Additionally, in August 2015, the Texas attorney general faced contempt of court for that state's refusal to recognize same-sex marriage in issuing death certificates. Consequently, on August 12, 2015, Texas revised its policies and began issuing birth and death certificates that complied with the *Obergefell* decision.

Although Vital Records' new process would not in and of itself provide a basis on which to establish a child support order, it is a position that complements and reinforces the IV-D policy position.¹¹

C. IV-D Referrals and Applications From Same-Sex Spouses or Couples

Pursuant to Subsection 2.3, "Federal Timeframes," of [Section 2.05, "Referrals and Applications," of the Michigan IV-D Child Support Manual](#), when IV-D staff receive requests for applications and/or completed applications and referrals for IV-D services, they will follow established policies in processing these requests.

When an applicant names a same-sex spouse or partner on a IV-D application or referral, IV-D staff will review the application and any existing IV-D cases for the family. Staff will determine if the application can move forward. Below, this IV-D Memorandum discusses the procedures that IV-D staff will follow in two case circumstances:

¹¹ For the parent who is not the biological mother, a birth certificate itself is not the document that legally establishes him/her as the parent. A marriage, a court judgment, both parents signing an *Affidavit of Parentage* (AOP), or an adoption affirms the parentage; these are the events that allow parents' names to be placed on the birth certificate.

- Same-sex spouse or couple *with* parentage established; and
- Same-sex spouse or couple *without* parentage established.

1. Same-Sex Spouse or Couple With Parentage Established

- a. Same-sex spouses or couples will have their child(ren)'s parentage established for purposes of receiving IV-D services if:
 - 1) IV-D staff confirm that the child(ren) was conceived or born to a mother during her same-sex marriage to another woman; or
 - 2) The applicant provides one of the following types of documentation:
 - a) A domestic relations order that names the non-biological spouse as a parent (e.g., Judgment of Divorce);
 - b) An adoption order that identifies the named same-sex spouse or partner as a parent; or
 - c) An affidavit establishing the person or couple as the legal parents of a child from a state other than Michigan.

Some states have passed laws that allow a same-sex couple to sign an affidavit establishing the couple as the legal parents of a child. If the applicant provides such a legal affidavit to IV-D staff and it is "regular on its face,"¹² it is not necessary for IV-D staff to contact the other state to confirm its validity. However, if there is doubt, IV-D staff may verify the affidavit's validity by contacting the other state or researching the other state's laws. (Ref: Section E of this memorandum.)

- b. If one of the criteria in Section C(1)(a) above is met, then the person/couple has been identified as the legal parent(s), and IV-D staff will:
 - 1) Create a new IV-D case identifying one member as the custodial party (CP) and one member as the non-custodial parent (NCP);
 - 2) Record detailed notes in the Michigan Child Support Enforcement System (MiCSES) indicating the legal parentage; and
 - 3) Follow the current process and workflow to establish and/or enforce a child support order.

MiCSES allows the entry of two people with the same relationship (e.g., two mothers) as parents. Therefore, for same-sex couples, MiCSES processes (such as those for court action referrals and order entry) will work correctly.¹³

¹² "Regular on its face" means that any reasonable person would think that the form is legally valid.

¹³ If IV-D staff experience issues when entering information into MiCSES for a same-sex couple, they will enter a MiCSES Help Desk ticket.

To provide services to these families, IV-D staff may modify or adjust any IV-D forms that are gender-based to ensure the form is appropriate given the family's situation. OCS will modify forms, as appropriate, at their next revision.

2. Same-Sex Spouse or Couple Without Parentage Established

If an applicant is unable to present information or documentation that confirms the named same-sex spouse or partner as the parent of the child(ren) (i.e., the criteria in Section C[1][a] above do not apply), IV-D staff will not establish or enforce a support order naming that person as the parent.

The IV-D agency is required to provide *available services* to any individual who files an application.¹⁴ However, OCS has determined that IV-D services would not be available to a same-sex spouse or couple who doesn't meet the criteria in Section C(1)(a) above. Federal law does not require IV-D agencies to establish *parentage* for individuals not biologically related to the child.¹⁵ Individuals who seek such assistance may consult with an attorney for possible adoption or other legal remedies.

After opening the IV-D case, IV-D staff will follow the procedures in Subsection 2.1 of [Section 3.50, "Case Closure," of the Michigan IV-D Child Support Manual](#) and close the case because there are no available services to provide. Under the procedures in that subsection, MiCSES will send a 60-day closure notice to the parties and IV-D staff will explain the closure on the *Notes Processor* (NOTE) screen.¹⁶

3. Contested or Disputed Parentage

Michigan's IV-D program will pursue child support from a same-sex spouse under Section C(1)(a)(1) above, even if the applicant and/or the non-custodial spouse disavows the spouse's parentage. The IV-D program will not pursue the biological father, regardless of the use or absence of Assisted Reproductive Technology (ART).¹⁷ It is MDHHS's position that, as with opposite-sex couples, if a child was conceived or born during a marriage, then the married couple are the child's parents and the non-custodial spouse can be pursued for support. If the IV-D **applicant** does not want to pursue support from the spouse and the child is not on public assistance, the applicant can close the IV-D case.

¹⁴ 45 Code of Federal Regulations (CFR) 302.33

¹⁵ Federal law requires IV-D agencies to establish the biological father as the legal father of a child when appropriate and/or to pursue a support order against the legal parents.

¹⁶ OCS will update Section 3.50 of the manual at its next revision. Until then, the permission granted in this memorandum is one of only five permissible reasons for the use of the "NS – No Viable IV-D Services" closure code.

¹⁷ Ref: Section (C)(4) of this IV-D Memorandum for more information on ART.

4. Use of Assisted Reproductive Technology (ART)

As defined in [Section 2.10, “Assisted Reproduction,” of the Michigan IV-D Child Support Manual](#), ART is a general term referring to methods used to achieve pregnancy by artificial or partially artificial means (e.g., intrauterine insemination). A woman who is married to another woman may conceive as a result of ART or through sexual intercourse. Regardless of the method used by the mother to become pregnant, if she was married at the time of conception or birth, the IV-D program will assume the female spouse is the child’s other parent.¹⁸

D. Support Order Establishment Assistance

MDHHS recognizes that cases involving same-sex couples are complex and present unique challenges. Processing the cases may require more research and additional resources. Many PAs will be able to follow this IV-D policy and resolve any issues. However, PAs who seek assistance on a specific IV-D case may contact OCS by email at MorseK@michigan.gov.

OCS may provide guidance or, if necessary, work with MDHHS leadership and the IV-D office; OCS will provide assistance to the extent possible.

OCS intends to monitor court decisions. If the IV-D program’s pursuit of child support from a same-sex spouse prevails – or fails to prevail – in court, IV-D staff will send copies of the court orders. IV-D staff will send them by email to MorseK@michigan.gov following encryption protocols in [Section 1.10, “Confidentiality/Security,” of the Michigan IV-D Child Support Manual](#), or send them via the U.S. Postal Service.

E. Using Michigan’s *Affidavit of Parentage (AOP)* to Establish Parentage

Michigan’s AOP is statutorily created to establish the legal father for an unmarried couple; it cannot be used to establish parentage for a same-sex couple (married or not). Consequently, IV-D staff will not offer the Michigan AOP to a same-sex couple and cannot accept a Michigan AOP as legitimate when signed by a same-sex couple.

F. Married Male Same-Sex Couples

OCS continues to receive inquiries about the parental rights of married male same-sex couples since the SCOTUS ruling. When such applications are received and parentage is **not** established as outlined above, IV-D partners will contact OCS by email at MorseK@michigan.gov for further direction and support in these situations.

¹⁸ Section 2.10 establishes policy by which IV-D staff will not pursue a biological father if the use of ART is confirmed. As stated in Section C(3) of this memorandum, IV-D staff will not pursue the biological father of a child born within a marriage of two women, regardless of the use of ART or the absence of ART.

NECESSARY ACTION:

Retain this IV-D Memorandum until further notice. OCS will revise the *Michigan IV-D Child Support Manual* with this policy regarding same-sex spouses and couples at its next opportunity.

REVIEW PARTICIPANTS:¹⁹

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SUPPORTING REFERENCES:

Federal
45 CFR 302.31
45 CFR 302.33

State
MCL 333.2824
MCL 552.29
MCL 722.711

ATTACHMENT(S):

None

EPF/MCA

¹⁹ Though the Program Leadership Group and the WIT reviewed the policy, both groups failed to reach consensus on it.