

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**SUSAN WATERS and SALLY
WATERS, et al.,**

Plaintiffs,

v.

**PETE RICKETTS in his official
capacity as Governor of Nebraska, et al.,**

Defendants.

Case No. 8:14-CV-356

**BRIEF IN SUPPORT OF OBJECTIONS
TO PLAINTIFFS' "SUPPLEMENT TO
MOTION FOR SUMMARY
JUDGMENT AND BRIEF IN
SUPPORT" AND MOTION TO STRIKE**

INTRODUCTION

Procedurally, the Plaintiffs' "Supplement" at Filing 83, along with its accompanying affidavits and declarations, attempt to shoehorn a brand new, un-pled issue into this case, in violation of this Court's rules, and without the Court's leave after summary judgment proceedings have been submitted. Not only does the birth certificate issue referenced in the Supplement not exist in the Plaintiffs' Amended Complaint, it is presented by the affidavits of individuals who are not parties to this case.

Substantively, the Plaintiff's "Supplement" reflects a misstatement of Nebraska law. Birth certificates, under Nebraska law, are for the purpose of recording "vital events". The determination of the legal relationship of parent and child is not determined by Nebraska law solely by a birth certificate. Other Nebraska statutes, overlooked by Plaintiffs' counsel in their Supplement argument, provide for the presumptive legal relationship of parent and child of a person married to the mother at birth.

If persons who are not parties to this non-class action case believe they are presently suffering a constitutional injury, they should file their own separate lawsuit, plead their claims, and seek appropriate relief. But the Court should not countenance last-minute efforts to expand *this* lawsuit into a catch-all vehicle for issues beyond the ambit of the identified Plaintiffs' underlying pleadings.

ARGUMENT

1. Procedure: Motion to Strike for violation of Court rules.

As the State Defendants described in their underlying motion, the Supplement and its attachments are barred because they have been submitted without the Court's leave after the close of briefing on the cross-motions for summary judgment.

This Court's motion practice rule unambiguously provides that after a moving party has filed a reply brief and index of evidence, "**No party may file further briefs or evidence without the court's leave.**" NECivR 7.1(c) (emphasis added). This Court has specifically enforced this prohibition. *See Herrera v. Mowry*, 2014 WL 4101611 at *9 n. 5 (D. Neb. 2014) (Bataillon, J.) ("The court does not consider Herrera's 'Response to Defendants Reply' part of the summary judgment record because this court's local rules prohibit parties from filing further briefs or evidence without the court's leave once the summary judgment motion, reply brief, and opposing brief have been submitted. NECivR 7.1(c)."). Filings 83, 83-1, 83-2, 83-3, 83-4, 83-5, 83-6, and 83-7 should be stricken because they violate NECivR 7.1(c).

Moreover, the Plaintiffs declined to explain to the Court the procedural context in which their cited order from the Western District of Texas arose in *De Leon v. Abbott*,

No. 5:13-cv-982-OLG (W.D. Tex.), which case is distinguishable. In *De Leon*, an individual with an issue relating to *death certificates* moved to intervene in Texas's existing marriage litigation and *was formally granted permission to intervene by the court*. See *De Leon*, ECF Filing nos. 104-105. No such intervention permission has been sought or granted by this Court to expand *this* case to include issues concerning birth certificates, much less to address claims of individuals who are not even parties.

2. Evidence objections.

Additionally, State Defendants object to Filings 83, 83-1, 83-2, 83-3, 83-4, 83-5, 83-6, and 83-7 on grounds of relevance, hearsay, lack of foundation, and because they variously offer unsupported and misleading legal conclusions.

All of the referenced filings are generally irrelevant because they neither have a tendency to make any fact pertinent to the Court's consideration more or less probable than it would be without the filings, nor are the filings of any consequence in determining the present action. See Fed. R. Evid. 401. The Plaintiffs' operative Amended Complaint (Filing 9) did not allege any issue regarding the birth certificates. Even in their "by way of example" paragraph, in which they listed a multitude of legal protections associated with marriage, Plaintiffs did not mention birth certificates. Filing 9, ¶ 68(a-s).

Filings 83-1, 83-2, 83-3, 83-4, and 83-5 are also irrelevant because none of those affidavits/declarations mention any of the actual Plaintiffs or any of the Plaintiffs' alleged injuries. If they and their attorney believe they have a cause of action, they may file their own lawsuit instead of seeking to ride the coattails of the existing parties.

All of the presented affidavits and declarations constitute hearsay under Fed. R. Evid. 801 as they are unquestionably out-of-court statements offered to prove the truth of the matters they assert.

Moreover, not only do the affidavits and declarations lack foundation due to the failure of the affiants/declarants to establish their personal knowledge of the matters asserted, the Supplement improperly presents legal conclusions which misleadingly characterize provisions of Nebraska law.

Finally, the affidavits and declarations make erroneous legal conclusions and assumptions about Nebraska law. Under Nebraska law, a presumptive parental relationship between the subject child and the non-birthing mother can be evidenced through a combination of the child's birth certificate listing the birthing mother *and* the spouses' marriage license showing that the birthing mother and non-birthing mother or spouse were married at the time of the child's Nebraska birth. Neb. Rev. Stat. § 42-377 concerning the "Legitimacy of Children" provides as follows:

Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-381 shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown.

(emphasis added).

Thus, to the extent the affidavit of Plaintiff Jessica Kallstrom-Schreckengost (Filing 83-7) implies that a birth certificate listing only a child's mother would not establish the presumptive legal parental status of one's spouse, the affidavit is an erroneous conclusion under Nebraska law.

3. The Supplement has no substantive merit.

The Plaintiffs' Supplement seeks to obtain injunctive relief on their motion for summary judgment by assuming that Nebraska establishes the legal relationship of parent and child exclusively by a birth certificate's recording of a live birth. The Plaintiffs' argument is premised on an erroneous understanding of Nebraska law. As explained by the preceding section of this brief, Neb. Rev. Stat. § 42-377 establishes the presumptive legitimacy or legal parent-child relationship under Nebraska law by a combination of a birth certificate showing the identity of the child's mother at birth along with a marriage license showing the birth mother's spouse at the time of birth.

Notably absent from the Supplement and supporting affidavits/declaration is any reference to Neb. Rev. Stat. § 71-626.01, which expressly provides for the reissuance of a birth certificate listing adoptive parents. Since adoption and obtaining an adoptive birth certificate is the process spouses in a male-male marriage would use to be listed on their adopted child's reissued birth certificate, the Plaintiffs' Supplement does not explain why similarly situated spouses in a female-female marriage should be subject to differentiated treatment.

Legal process and proceedings such as paternity suits, adoption proceedings (*see* Neb. Rev. Stat. § 71-626.01, *supra*), marriage licenses combined with birth certificates, and statutory presumptions are appropriate and acceptable methods for determining and establishing the legal relationship of parent and child. In the case of male-male marriages, adoption proceedings combined with a birth certificate listing the biological mother and father or putative father may be needed to establish the legal relationship.

Neb. Rev. Stat. § 71-603 provides for the Nebraska Department of Health and Human Services to register vital statistics as “events” as follows:

The department shall provide for the registration of *vital events* and shall adopt, promulgate, and enforce such rules and regulations as are necessary to carry out the purposes of the Vital Statistics Act.

(emphasis added).

The statutory requirements for the vital events that must be recorded on a birth certificate, who must provide such information, and when the information must be provided are set out at Neb. Rev. Stat. § 71-604. Neb. Rev. Stat. §§ 71-603 and 71-611 provide that the Department must provide the forms for registering the vital event of a birth *and* that such forms be established by regulation. 174 Nebraska Administrative Code, Chapter 2, contains the Department’s adopted regulations, including forms, for recording the vital event of a birth or an adoption. Department regulations, under Nebraska law, can be promulgated only by following the statutory procedure set out by the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901.01 to 84-911, which include provisions at § 84-911 for challenges to the validity of regulations by a declaratory judgment action. The adopted regulations are to be filed with the Nebraska Secretary of State. In short, Nebraska law does not allow a vital statistics recording official to change the birth certificate forms or what may be listed on them by bureaucratic whim.

In any event, this Court should reject the Plaintiffs’ late attempt, in violation of this Court’s rules, to inject the issue of how a State must constitutionally establish the legal relationship of parent and child post-*Obergefell*.

CONCLUSION

For the reasons set forth herein, State Defendants respectfully request the Court sustain their motion to strike Filings 83, 83-1, 83-2, 83-3, 83-4, 83-5, 83-6, and 83-7 and the objections to the same.

Submitted September 29, 2015.

**PETE RICKETTS, DOUG PETERSON,
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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2015, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: s/ David A. Lopez