IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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IN RE THE MARRIAGE OF

KIMBERLY DANYEL MCLAUGHLIN,
*Petitioner/Appellant*,

*and*

SUZAN ELIZABETH SWANSON, FKA SUZAN ELIZABETH MCLAUGHLIN,
*Respondent/Appellee*.

No. 2 CA-CV 2019-0210
Filed October 5, 2020

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Appeal from the Superior Court in Pima County
No. DC20130015
The Honorable Lisa Abrams, Judge Pro Tempore

**VACATED AND REMANDED IN PART; AFFIRMED IN PART**

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COUNSEL

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**OPINION**

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

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E C K E R S T R O M, Judge:

**¶1** Kimberly McLaughlin appeals from the trial court's ruling ordering that both she and her former wife, Suzan Swanson, be designated as "Parent" on their minor child's birth certificate and denying her motions to strike portions of the brief Suzan filed on this issue. For the reasons that follow, we vacate a portion of the order, remanding this matter for further order, and affirm in part.

**Factual and Procedural Background**

**¶2** The facts, which are set forth in *McLaughlin v. Jones*, 243 Ariz. 29 (2017), are not in dispute. In 2011, while Kimberly and Suzan were married, Kimberly gave birth to a child. *Id.* ¶¶ 2-4. In subsequent marital dissolution proceedings, the parties disputed whether Suzan was legally the child's parent. *See id.* ¶¶ 4-7. Our supreme court confirmed that the presumption of legal parentage established at A.R.S. § 25-814(A)(1)[1] applies to spouses in same-sex marriages, confirming that Suzan is the child's legal parent. *McLaughlin*, 243 Ariz. 29, ¶¶ 1, 32-33, 44.

**¶3** On remand, the parties settled their remaining issues except for the manner in which they would each be designated on their child's birth certificate. Kimberly argued that she should continue to be listed as "Mother," consistent with A.R.S. § 36-334(A),[2] or have her designation amended to "Biological Mother," while Suzan should be listed as "Legal Parent" or "Legal Mother." Suzan argued that both parties should be listed as "Mother," but—in light of the "practice and procedure" of the Arizona Department of Health Services (ADHS), whose forms currently only allow for the options "Mother/Father" or "Parent/Parent"—requested, in the alternative, that both she and Kimberly be designated as "Parent."

**¶4** The trial court agreed with Suzan that, "[i]n an ideal world, the field identifiers available for birth certificates should reflect all possible circumstances of the birth of a child," in particular, here, that the child "has

[1]The statute establishes, in relevant part: "A man is presumed to be the father of [a] child if . . . [h]e and the mother of the child were married at any time in the ten months immediately preceding the birth . . . ."

[2]This statute states: "A person completing a birth certificate shall state the name of the woman who gave birth to the child on the birth certificate as the child's mother unless otherwise provided by law or court order."

two mothers, each of whom is a parent." However, because ADHS is not a party to this action, the court concluded it lacked legal authority to order ADHS to modify the field identifiers already used on its forms. The court therefore concluded that only two options existed for the birth certificate in question: "Mother/Father" or "Parent/Parent." Explaining that it would be "patently absurd" and would "perpetuate[] a falsehood" to designate a female parent as "Father,"[3] the court ordered that both mothers be designated "Parent."

**¶5** Kimberly filed a motion to alter or amend the judgment, which the trial court denied. She then appealed, contending that the court's order had "stripped" her of the "Mother" designation on her biological child's birth certificate solely because she was formerly married to a woman, in violation of her Fourteenth Amendment right to equal protection.[4] We have jurisdiction pursuant to A.R.S. § 12-2101(A).

**Discussion**

**¶6** The trial court's order was premised on the conclusion that it lacked legal authority to order ADHS to amend the birth certificate to designate both parties as "Mother" because ADHS is not a party to this case. On appeal as below, Kimberly contends the court was not legally limited to the two choices to which it felt itself constrained and "could have fashioned a remedy more in keeping with the legislative preference evident from § 36-334" that the woman who gives birth to a child should presumptively be listed as the child's "Mother." We agree.[5] The trial court had the authority under the statutory scheme to order that the birth certificate be

[3]We agree. "Mother" is the semantically correct term for a female parent. *See McLaughlin*, 243 Ariz. 29, ¶ 12 (quoting Webster's Third New Int'l Dictionary 1474 (2002)).

[4]Because we vacate and remand on other grounds, we need not address Kimberly's constitutional arguments.

[5]Kimberly urged the trial court to order ADHS to utilize different designations for her and Suzan on their child's birth certificate. Our agreement with her argument extends only to the trial court's authority to order ADHS to amend the field identifiers used on birth certificates, not to her argument that it would be appropriate in this case for the child's two female parents to be labeled differently.

amended to reflect that not only Kimberly, but also Suzan, is the child's female parent, or "Mother."

**¶7** We review legal questions such as issues of statutory interpretation *de novo*. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, ¶ 28 (2019). Section 36-337(A)(4), A.R.S., provides that "the state registrar shall amend the birth certificate for a person born in this state when the state registrar receives . . . [a] court order ordering an amendment to a birth certificate." The trial court interpreted this statute to be limited to "changing the names of the parents or the child, not changing the field identifiers." But, as Kimberly correctly notes, no such limitation exists in the statute.

**¶8** "Amend" is defined broadly to mean "to make a change, other than a correction, to a registered certificate by adding, deleting or substituting information on that certificate." A.R.S. § 36-301(2). "Court order" is also broadly defined, and it includes any "written decision" issued by a superior court. § 36-301(7)(a).

**¶9** With regard to § 36-337 in particular, although subsection (B) refers to paternal name changes, subsection (A) refers to amendments more generally. Had our legislature intended to limit the amendments referenced in subsection (A) to name changes, it could have done so. *See, e.g.*, A.R.S. § 36-323(B) (specifying that "state registrar shall amend a registered birth certificate to show the new name of a person born in this state" in certain circumstances). Thus, the plain language of the statutory scheme establishes that a trial court may order ADHS to add, delete, or substitute information on birth certificates beyond changing the names of the parties identified. As Kimberly argued below, § 36-337(A)(4) gives the trial court "the authority to order the amendment of the birth certificate," and "[i]mplicit in that power is the ability to designate how each parent shall be labeled on the birth certificate" and to order ADHS to use whatever terms the court deems appropriate in the circumstances.

**¶10** Our legislature has also directed ADHS to adopt and enforce rules to administer Arizona's system of vital records. A.R.S. § 36-302(B). Pursuant to this delegation of authority, ADHS promulgated regulations appearing in title 9, chapter 19, of the Arizona Administrative Code. A.A.C. R9-19-208 governs amendments to birth records.[6] As Suzan argued before

[6]This regulation was amended in non-relevant part, effective July 7, 2020. 26 Ariz. Admin. Reg. 1534 (2020).

the trial court, paragraph (B) of the regulation, like the overarching statutory scheme, makes clear that "courts have the authority and discretion to amend a birth certificate when petitioned to do so and when appropriate in a particular case." It establishes generally that a person seeking such amendment must present to ADHS a copy of a court order, "certified by the issuing court and including the information to be amended," R-19-208(B)(2), identifying "the specific information to be deleted and the specific information to be added," R-19-08(A)(5). No language in the regulation limits the court's discretion in ordering such changes to the field identifiers already used on ADHS forms.

**¶11** The only provision of the regulation that addresses same-sex parents is R9-19-208(N). It directs that when ADHS receives a court order or certificate of adoption naming two persons of the same sex as an adopted individual's "parents" or "mother and father," the Registrar "shall enter the name of each person as the individual's parent in the individual's birth record." Insofar as this regulation can be read as mandating anything with regard to the field identifiers used on birth certificates,[7] it is limited to indicating a preference for the factually accurate "parent" over the terms "mother and father," which will never be factually accurate in the context of same-sex parents. The provision does not address situations in which a court order or adoption certificate accurately names two persons of the same sex as the adopted individual's "mother and mother" or "father and father." Moreover, the statutory scheme expressly treats such amendments based on adoption separately from other amendments ordered by a court. *See* § 36-337(A)(1), (4).

**¶12** Notably, the April 2018 letter from the Office of the Arizona Attorney General, which the trial court cited, explained that ADHS "makes amendments to birth certificates according to statute, rule, *and court orders*" (emphasis added). The letter also noted that the *McLaughlin* opinion did not "decide or determine that the Department must change its birth certificate forms to reflect the preference of the parents"—an issue that was not before our supreme court at that time. This argument reflects an

[7]This is by no means clear. Nothing in R9-19-209(N) establishes that same-sex parents must be labeled "Parent" on an amended birth certificate. As Kimberly argued to the trial court, "Clearly more terminology is available to [ADHS] when identifying parents on a birth certificate and there is no strict requirement for the use of the word 'parent.' The language of R9-19-209(N) allows for multiple labeling options when identifying parents on a child's birth certificate."

understanding that the courts do have the authority to order such changes and that such an order would obligate ADHS to comply.[8]

**¶13** In sum, our legislature has given trial courts general authority to order ADHS to amend birth certificates. Nothing in the statutory scheme precluded the trial court in this case from ordering ADHS to include Suzan on the birth certificate and to label her as "Mother," as it had already done for Kimberly, pursuant to § 36-334(A). Such an order, which would have resulted in a birth certificate accurately reflecting that the child has two female parents, would have involved no violation of the regulations promulgated by ADHS to implement our system of vital records.

**¶14** To the extent such an order would have required ADHS to alter its existing internal practices, the order the trial court entered also required ADHS to depart from its normal practice—pursuant to the statutory directive established at § 36-334(A)—of listing the child's birth mother as "Mother." The order also required ADHS to depart from its purportedly "normal" practice of listing the name of her spouse at the time of the child's birth as "Father," irrespective of that person's gender. We therefore vacate the order and remand this matter to the trial court so that it may exercise its statutory authority and order the amendment of the birth certificate it deems most appropriate in the circumstances of this case, in which the child has two female parents.

**Motion to Strike**

**¶15** As ordered by the trial court, the parties submitted simultaneous briefs on the birth certificate issue. Kimberly contends that Suzan's brief primarily contained unsupported assertions that Kimberly would seek to use differences in parental designations on the birth certificate to claim greater rights to the child. Kimberly filed a motion to strike portions of Suzan's brief, arguing that it contained unproven allegations that Kimberly had not had the opportunity to dispute. The court denied the motion, noting that it had given "no weight to arguments made by [Suzan] that exceeded the scope of the issue at hand," but not identifying which arguments those were.

[8]The trial court likewise noted that, in *McLaughlin*, our supreme court did not "determine or order that [ADHS] change its birth certificate forms to reflect the preference of the parents." The implication is that the court could have so ordered, but so may the trial court.

**¶16** In her motion to alter or amend, Kimberly argued that the trial court had not specified which portions of Suzan's argument the court believed exceeded the scope of the issue before it. She requested that the original motion to strike be granted "or, at a minimum, the Court designate which portions of [Suzan's] brief were given no weight." In denying the motion to alter or amend, the court did not respond to this request.

**¶17** On appeal, Kimberly contends the trial court erred in denying both the original motion to strike and the motion to alter or amend as it relates to the motion to strike. We review a trial court's ruling on a motion to strike a pleading, as well as a ruling on a motion to alter or amend a judgment, for an abuse of discretion. *Dowling v. Stapley*, 221 Ariz. 251, ¶ 45 (App. 2009) (motion to strike); *McGovern v. McGovern*, 201 Ariz. 172, ¶ 6 (App. 2001) (motion for reconsideration).

**¶18** Kimberly has demonstrated no such abuse. As Suzan correctly points out, the trial court's rulings contain legal analyses unaffected by the factual portions of Suzan's brief to which Kimberly objected. The court was not obligated to designate specific portions of Suzan's brief that were not the basis for those rulings.

## Disposition

**¶19** For the foregoing reasons, we vacate the trial court's order that both mothers be designated as "Parent" on the birth certificate. We do so because the court based that order on its erroneous conclusion that it lacked legal authority to order otherwise. We remand for further proceedings consistent with this opinion. We affirm the trial court's denial of Kimberly's motion to strike and of her motion to alter or amend as it relates to the motion to strike.