In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00019-CV

IN THE INTEREST OF A.E.

On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 15-07-06902-CV

MEMORANDUM OPINION

Appellant C.W. appeals the trial court's dismissal of her suit affecting the parent-child relationship (SAPCR) of the minor child A.E.[1] We affirm.

Underlying Facts

C.W. initiated the underlying divorce and custody action on July 8, 2015, when she filed her Original Petition for Divorce and Request for Temporary Orders Hearing, seeking a divorce from M.N., the Respondent in the underlying suit and the

[1] For purposes of confidentiality, we refer to the child by the initials "A.E." and the parties by their respective initials. *See* Tex. Fam. Code Ann. § 109.002(d) (West 2014).

Appellee in this appeal. C.W. also included a SAPCR as to A.E., a child born on January 30, 2014. C.W. and M.N., a same-sex couple, were married in Connecticut in 2011, and separated before the birth of the child. M.N. is the biological and birth mother of A.E. who was conceived through assisted reproduction from an unidentified sperm donor.

M.N. filed an answer to C.W.'s petition for divorce and also a Motion to Dismiss for Lack of Jurisdiction as to the SAPCR. C.W. filed a response and request for evidentiary hearing and oral argument as to the motion to dismiss. M.N. filed a reply, and C.W. filed a sur-reply. The trial court conducted a hearing on the Motion to Dismiss, during which the court received testimony and evidence and heard the arguments of counsel. At the conclusion of the hearing, the court took the Motion to Dismiss under advisement. The parties presented additional briefing to the court after the hearing.

On October 12, 2015, the trial court entered an Order Granting the Motion to Dismiss. Following the ruling, C.W. filed a Request for Findings of Fact and Conclusions of Law. The trial court filed its Findings of Fact and Conclusions of Law on November 20, 2015. The trial court granted the Motion to Dismiss for Lack of Jurisdiction and ruled that C.W. lacks standing as a parent. The SAPCR was

severed from the divorce action and dismissed for want of jurisdiction. C.W. timely filed a notice of appeal.

Stipulations

Prior to the hearing on the Motion to Dismiss, C.W. and M.N. stipulated to the following facts:

- A.E. was born on January 30, 2014.
- A.E. was born during the marriage, but after the parties had separated.
- There is no gestational agreement or IVF agreement bearing C.W.'s signature.
- There is no signed acknowledgement of paternity of A.E. on file with the Bureau of Vital Statistics.
- A.E. was conceived with M.N.'s egg and sperm from an unidentified donor, and M.N. carried and gave birth to A.E.

Uncontroverted Facts

C.W. and M.N. are both female and were married in Connecticut in 2011. C.W. did not adopt A.E., nor did she initiate proceedings to adopt. C.W. is not a biological or adoptive parent of A.E., nor is C.W. genetically related to A.E. M.N. left the marital home prior to giving birth to A.E. M.N. moved in with M.N.'s mother prior to giving birth to A.E. A.E. has resided with M.N. since birth. M.N. has provided for A.E.'s care and needs since birth, and there are no allegations being made by C.W. that M.N. is unable to care for A.E., nor does C.W. complain about the care that M.N. has provided to A.E. There is nothing in the record before us that

indicates M.N. has ever relinquished her parental rights concerning A.E. Additionally, M.N. has not sought any child support, reimbursement, or insurance from C.W. for A.E. in this proceeding.

Trial Court's Findings of Fact and Conclusions of Law

The trial court issued Findings of Fact and Conclusions of Law, in which the court made the following findings and conclusions:

- C.W. and M.N. are both female.
- M.N. left the marital home prior to giving birth to A.E.
- M.N. moved in with her mother prior to giving birth to A.E.
- C.W. exclusively lives in the marital home and has lived in the marital home ever since M.N. left prior to the child's birth.
- C.W. has a girlfriend that stays with her periodically in the marital home.
- A.E. has resided with M.N. since birth.
- M.N. has provided for A.E.'s care and needs since birth.
- C.W. had some sporadic contact with M.N. and A.E. following the birth of the child.
- C.W.'s contact with M.N. and A.E. following the child's birth was not significant, regular, or continuous.
- C.W. has not been with the child for any overnight period of possession since the child's birth.
- C.W. has had possession of A.E. only three times since A.E.'s birth and never overnight.
- The last time C.W. saw A.E. was in October of 2014.
- C.W. did not financially support M.N. or A.E. after the birth of the child.
- C.W. has not made efforts or demands to see A.E.
- M.N. provided health insurance for A.E. at her sole cost.
- C.W. and M.N. did not treat A.E. as their child or a child of their marriage.
- C.W. and M.N. did not hold out to others that A.E. was their child.

- A.E. is M.N.'s child.
- M.N. carried, gave birth to, and raised A.E. as a single parent.
- The presumption of paternity under section 160.201(b)(1) of the Texas Family Code applies to a father-child relationship between a man and a child.
- The presumption of paternity under section 160.201(b)(1) of the Texas Family Code can be rebutted only by an adjudication under Subchapter G of Chapter 160 of the Texas Family Code, or via a valid, filed denial or acknowledgement of paternity.
- The presumption of paternity under section 160.201(b)(1) of the Texas Family Code does not apply in this case because C.W. is not a man.
- The presumption of paternity under section 160.201(b)(1) of the Texas Family Code, if applicable, is rebutted because (a) C.W. is not genetically related to the child, and (b) there is no valid, filed denial and/or acknowledgement of paternity.
- Because the child, A.E., was conceived through assisted reproduction and C.W. is not genetically related to A.E., the presumption of paternity under section 160.201(b)(1) of the Texas Family Code would not apply to the facts of this case regardless of the gender of the adult seeking any alleged parental presumption under this statute.
- C.W. has not established a parent-child relationship with the child pursuant to section 160.704(a) of the Texas Family Code because she did not sign a consent to assisted reproduction.
- C.W. has not established a parent-child relationship with the child pursuant to section 160.704(b) of the Texas Family Code because C.W. and M.N. did not openly treat the child as their own.
- *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) ("*Obergefell*") recognizes the right of marriage as a fundamental right of all citizens.
- *Obergefell* acknowledges other state-derived benefits of marriage that a state may confer upon married couples, including adoption rights and rights of child custody, support, and visitation rules.
- None of these state-derived benefits of marriage are fundamental rights.
- *Obergefell* does not confer standing upon C.W. to maintain a parentage claim as to the child.
- *Obergefell* does not confer authority upon this court to re-write Texas statutes and laws regarding standing to bring parentage claims.

- Recent policy changes made by the Texas Department of State Health Services ("DSHS") were made to acknowledge and recognize same-sex marriage in response to a federal court order.
- Recent policy changes made by the DSHS do not confer standing upon C.W. to assert a parentage claim over the child in this case.
- Sections 311.012 and 311.021 of the Texas Government Code do not provide this Court with authority to re-write the Texas Family Code or other statutes to convey standing upon C.W. to bring or maintain a parentage claim over the child in this case.
- Any revisions to the Texas Family Code and the laws governing standing to bring or maintain parentage claims under Texas law must be made by the Texas Legislature.
- C.W. lacks standing to bring and maintain a parentage claim over the child in this case.
- This court lacks jurisdiction over C.W.'s parentage claim over the child in this case.

Issue Presented on Appeal and Arguments of Parties

C.W. alleged in her Original Petition that she is a "legal parent of [A.E.] under chapter 160 of the Texas Family Code." In two issues, C.W. contends on appeal that the trial court erred in finding that C.W. lacked standing to file a SAPCR as to A.E.

In issue one, C.W.'s primary argument is that the ruling of the trial court violates the United States Supreme Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). According to C.W., she has a "fundamental right to marry" a person of the same sex, and she argues that such was acknowledged by the *Obergefell* Court, and that her "right" encompasses "the unified whole of rights" that inherently emanate from the marital relationship, including her standing to pursue a suit for

conservatorship of a child born during her marriage to M.N. C.W. further argues that the trial court erred in refusing to "interpret and apply" existing Texas SAPCR statutes in a "gender-neutral manner" that would "guarantee appellant standing to file a SAPCR under Section 160.201(b)(1), the section that guarantees standing in opposite-sex marriages." *See* Tex. Fam. Code Ann. § 160.201(b)(1) (West 2014).[2] In her second issue, Appellant argues that she has standing under section 160.201(b)(5) and section 160.704(b) ("Consent to Assisted Reproduction") because the parties openly treated A.E. as their own until they separated. *See id.* §§ 160.201(b)(5); 160.704(b) (West 2014). C.W. contends that she consented to M.N.'s assisted reproduction that resulted in A.E.'s birth, and therefore she has standing as a parent of A.E., despite the absence of a written consent or written IVF agreement.

M.N. contends that C.W. lacks standing to file the SAPCR because C.W. is not a parent of A.E., she is not entitled to the parental presumption, and she cannot rely upon the IVF statutory provision because she failed to comply with the requirements of the statute. According to M.N., the trial court correctly concluded that *Obergefell* does not confer standing upon C.W. to file a SAPCR, and the court should not engage in efforts to revise the plain meaning of the words used in the

[2] Because any subsequent amendments do not affect our analysis in this appeal, we cite to the current version of the statutes.

respective statutes. M.N. argues that C.W. lacks standing under the Texas Family Code section 102.003 because C.W. is not a parent of the child. Furthermore, M.N. contends that the parent-child relationship does not exist between C.W. and the child as section 160.201(b)(1) would not apply because C.W. cannot meet any of the required conditions outlined in that statute. M.N. also argues that C.W. lacks standing under section 160.704(b) of the Texas Family Code because C.W. and M.N. did not "openly treat the child as their own[.]"

Standard of Review

The purpose of a plea to the jurisdiction is to defeat a cause of action without regard to whether the claim has merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). When a party files a plea to the jurisdiction or motion to dismiss for lack of jurisdiction, the trial court has to decide whether the petitioner has affirmatively demonstrated the trial court has jurisdiction based on the facts alleged by the petitioner and, when necessary to resolve jurisdictional facts, on evidence submitted by the parties. *See State v. Holland*, 221 S.W.3d 639, 642-43 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004); *Bland*, 34 S.W.3d at 555. If the petitioner lacks standing to bring a suit, the trial court does not have jurisdiction over the suit and must dismiss the claim.

M.D. Anderson Cancer Ctr. v. Novak, 52 S.W.3d 704, 711 (Tex. 2001); *see Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015).

A parent's right to the "'companionship, care, custody, and management'" of his or her child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (quoting *Lassiter v. Dep't of Soc. Servs*., 452 U.S. 18, 27 (1981)); *see In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003). Although we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent, this case does not involve the termination of C.W.'s parental rights. *See Holick v. Smith*, 685 S.W.2d 18, 20-21 (Tex. 1985). Rather, this case concerns standing in a SAPCR proceeding.

"The standing inquiry 'focuses on the question of who may bring an action.'" *Vernco*, 460 S.W.3d at 149 (quoting *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998)). Standing is a component of subject matter jurisdiction. *Id.*; *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 443-44 (Tex. 1993). A party generally cannot confer or obtain standing by consent or agreement. *In re Smith*, 262 S.W.3d 463, 466 (Tex. App.—Beaumont 2008, orig. proceeding).[3]

[3] Exceptions are found in section 102.0035 (statement to confer standing to a prospective adoptive parent) and section 102.004(a) (consent to suit by relative of the child related within the third degree of consanguinity) of the Texas Family

Because standing is a component of subject matter jurisdiction, standing to file suit is not conferred or obtained by waiver, and may be challenged at any time. *Tex. Ass'n of Bus*., 852 S.W.2d. at 445; *Sarah v. Primarily Primates, Inc*., 255 S.W.3d 132, 139 (Tex. App.—San Antonio 2008, pet. denied).

In an original suit affecting the parent-child relationship in which the petitioner seeks conservatorship over a child, the question of standing is a threshold issue. *In re K.K.C.*, 292 S.W.3d 788, 790 (Tex. App.—Beaumont 2009, orig. proceeding) (citing *In re M.P.B.*, 257 S.W.3d 804, 808 (Tex. App.—Dallas 2008, no pet.)). A petitioner seeking conservatorship has the burden to prove standing. *See id.*; *Smith*, 262 S.W.3d at 465; *Alternatives in Motion*, 210 S.W.3d at 799. The Texas Legislature has provided a comprehensive statutory framework for standing in the context of suits involving the parent-child relationship. *See* Tex. Fam. Code Ann. §§ 102.003-102.006 (West 2014 & Supp. 2016); *In re Wells*, 373 S.W.3d 174, 176 (Tex. App.—Beaumont 2012, orig. proceeding); *K.K.C.*, 292 S.W.3d at 790-91; *Smith*, 262 S.W.3d at 465. A "parent of the child[]" is one of the categories of people authorized by statute to file an original SAPCR. Tex. Fam. Code Ann. § 102.003(a)(1) (West Supp. 2016).

Code. *See* Tex. Fam. Code Ann. §§ 102.0035, 102.004(a) (West 2014). Neither provision applies to the facts in this case.

"When standing has been conferred by statute, the statute itself should serve as the proper framework for a standing analysis." *In re Russell*, 321 S.W.3d 846, 856 (Tex. App.—Fort Worth 2010, orig. proceeding). Statutory interpretations are reviewed de novo. *Id.* "When the trial court makes and files findings of fact and conclusions of law, . . . , we review the trial court's findings under the sufficiency of the evidence standard, and the trial court's conclusions of law are reviewed de novo." *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.—San Antonio, 2009, pet. denied). When the trial court must examine evidence in making a determination regarding standing, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable. *See Bland*, 34 S.W.3d at 554 (confining the evidentiary review to evidence that is relevant to the jurisdictional issue). Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling de novo. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the nonmovant. *See Miranda*, 133

S.W.3d at 228. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

In construing sections 102.003 through 102.006, our objective is to determine and give effect to the Texas Legislature's intent. *See Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). We must ascertain that intent, if possible, from the language the Texas Legislature used in the statute and not look to extraneous matters for an intent the statute does not state. *Id.* When statutory language is unambiguous and yields only one reasonable interpretation, we must interpret the statute according to its plain meaning. *See Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). We must not engage in forced or strained construction. *See St. Luke's Episcopal Hosp.*, 952 S.W.2d at 505. Finally, suits affecting the parent-child relationship are governed by the same procedural law that applies in civil cases generally, except as otherwise provided by the Family Code. *See* Tex. Fam. Code Ann. § 105.003(a) (West 2014); *In re E.A.C.*, 162 S.W.3d 438, 442 (Tex. App.—Dallas 2005, no pet.).

Relevant Texas Family Code Provisions

A "[s]uit affecting the parent-child relationship" or SAPCR is defined in section 101 of the Texas Family Code as a suit wherein "the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested." Tex. Fam. Code Ann. § 101.032(a) (West 2014). Under section 102.003, entitled "General Standing to File Suit[,]" the Legislature has defined the categories of individuals who have standing to file a SAPCR.[4] *Id.* § 102.003. A "parent of the child[]" has standing [at any time] to file an original suit affecting the parent-child relationship. *Id*. § 102.003(a)(1).

"Parent" is defined in section 101.024(a) as follows:

> 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. . . .

Id. § 101.024(a) (West Supp. 2016). The Texas Family Code provides the following regarding the establishment of a parent-child relationship:

[4] There are fourteen categories of individuals who have standing to file a SAPCR under section 102.003(a) (West Supp. 2016). The only provision at issue in this case is section 102.003(a)(1).

(a) The mother-child relationship is 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.

(b) The father-child relationship is established between a man and a child by:
(1) an unrebutted presumption of the man's paternity of the child under Section 160.204;
(2) an effective acknowledgement of paternity by the man under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
(3) an adjudication of the man's paternity;
(4) the adoption of the child by the man; or
(5) the man's consenting to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child.

Tex. Fam. Code Ann. § 160.201 (West 2014). Under section 160.204(a)(1), a man is presumed to be the father of a child if he is married to the mother of the child and the child is born during the marriage. *Id.* § 160.204(a)(1) (West Supp. 2016). The presumption is rebuttable. *Id.* § 160.204(b) (West Supp. 2016).

Texas has also adopted the Uniform Parentage Act as outlined in chapter 160 of the Texas Family Code. *See id.* §§ 160.101-.763 (West 2014 & Supp. 2016) Therein, the statute provides that a civil proceeding may be maintained to adjudicate parentage of a child. *See id.* § 160.601(a) (West 2014). Standing to maintain a proceeding to adjudicate parentage is specifically defined in section 160.602 and includes the following: the child; the mother of the child; a man whose paternity of

the child is to be adjudicated; the support enforcement agency or another governmental agency authorized by law; an authorized adoption agency or licensed child-placement agency; a representative authorized by law to act for an individual otherwise entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; a person related by the second degree of consanguinity to the mother of the child, if the mother is deceased; and a person who is an intended parent. *Id.* § 160.602(a)(1)-(a)(8) (West 2014).

C.W. also cites to and relies upon subchapter H of the Uniform Parentage Act. This subchapter applies only to a child conceived by means of assisted reproduction. *See id.* § 160.701 (West 2014). C.W. argues that she "consented" to the assisted reproduction and that she should be entitled to rely upon section 160.704 because even though C.W. and M.N. did not have a "record" signed by them wherein they consented to the assisted reproduction as described in section 160.704(a), C.W. and M.N. "openly treated the child as their own[]" as described in section 160.704(b), and therefore C.W. has standing to bring the SAPCR. *See id.* § 160.704.

Section 160.704 is styled "Consent to Assisted Reproduction[,]" and provides as follows:

> (a) Consent by a married woman to assisted reproduction must be in a record signed by the woman and her husband and kept by a licensed physician. This requirement does not apply to the donation of eggs by a married woman for assisted reproduction by another woman.

> (b) Failure by the husband to sign a consent required by Subsection (a) before or after the birth of the child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.

Id.

Obergefell v. Hodges

In 2015, the United States Supreme Court issued a 5-4 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[5] In *Obergefell*, the Supreme Court's review was limited to two issues:

> . . . The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

Id. at 2593. The majority held that under the Fourteenth Amendment, same-sex couples have a fundamental right to marry. *Id.* at 2604-05. Furthermore, according

[5] In 2013, the United States Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, a 5-4 decision authored by Justice Kennedy, the Court held that the Defense of Marriage Act (DOMA) was unconstitutional in defining marriage as between a man and woman because it excluded same-sex partners from benefits accorded to married individuals under federal laws. *Id*. at 2695-96. Specifically, the Court held that the estate of Thea Spyer was entitled to a marital deduction for property passing to her same-sex spouse and executor, Edith Windsor, and the estate was owed a refund of $363,053.00 of estate taxes. *Id.* at 2682.

to the majority, States must recognize a lawful same-sex marriage licensed and performed in another State. *Id*. at 2607-08.

> This analysis compels the conclusion that same-sex couples may exercise the right to marry. . . .
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> The right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment. . . .
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> These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.
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> . . . . The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.

Id. at 2599, 2602, 2604-05, 2607-08.

The dissenters strongly criticized the majority for creating a "fundamental right" that does not find any basis in the United States Constitution, and for

overstepping the boundaries of the judiciary. *See id*. at 2612 (Roberts, C.J., dissenting), 2627 (Scalia, J., dissenting), 2631 (Thomas, J., dissenting), 2640-41 (Alito, J., dissenting).

Pre-*Obergefell* Cases from this Court Regarding SAPCR Standing

In 2008, this Court decided *Smith*, which involved the birth of twins conceived by artificial insemination from an anonymous donor. 262 S.W.3d at 465. In 2002, when the twins were four months old, Smith (the birth mother) and her same-sex partner, Haley, filed a joint SAPCR petition for joint managing conservatorship. *Id.* The trial court signed an agreed order. *Id.* Haley did not adopt the twins. *Id.* at 467. In 2008, Smith and Haley separated, Smith filed a motion to vacate the agreed order, and Haley filed a petition to modify the order. *Id.* at 465. The trial court entered temporary orders, denied Smith's motion to vacate, and Smith filed a writ of mandamus. *Id.* In conditionally granting Smith's petition for writ of mandamus, this Court held in part that because Haley cited no provision in the Family Code under which she had standing to file the 2002 SAPCR petition, the original SAPCR order was void, and the temporary orders arising out of the motion to modify the order must be vacated. *Id.* at 467.

In 2012, this Court decided *In re Wells*, 373 S.W.3d 174 (Tex. App.—Beaumont 2012, orig. proceeding). Wells and her same-sex partner, Ruppert, lived

together and Wells gave birth to a son. *Id.* at 175. In May 2010, after Wells and Ruppert had separated, the two agreed in writing that each would have the child during certain periods each week. *Id.* Despite the agreement, for over a year, Wells only intermittently allowed the child to live with or visit Ruppert. *Id.* at 175-76. Ruppert filed suit, requesting that she be appointed the child's sole managing conservator and alleging that Wells had a "history or pattern of mental and/or emotional abuse directed against" the child and that Wells should be denied access to the child. *Id.* at 176. Wells filed a plea to the jurisdiction, contending that the trial court lacked jurisdiction over Ruppert's lawsuit because Ruppert lacked standing. *Id.* The trial court denied Wells's plea to the jurisdiction, signed temporary orders appointing Wells as temporary sole managing conservator, and named Ruppert as the child's temporary possessory conservator. *Id.* Wells filed a petition for writ of mandamus challenging the trial court's decision giving Ruppert rights as the child's possessory conservator and the trial court's decision allowing Ruppert to have standing to sue Wells in the SAPCR. *Id.* at 175. In conditionally granting the writ, the majority of our Court concluded that Ruppert failed to demonstrate that she had standing to file a SAPCR against Wells under any of the provisions that defined who has standing to file a SAPCR. *Id.* at 178.

Analysis

This is not a case involving the failure of a Texas court to give recognition to the marriage of C.W. to M.N., nor is it a case involving a constitutional challenge to any statute. C.W. did not make a constitutional challenge to the Texas statutes at trial. *See In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) (the constitutionality of a statute should be considered only when the question is properly raised by a party in the trial court).

We agree with the legal conclusion reached by the trial court that *Obergefell* does not confer standing upon C.W. to maintain a parentage claim. Furthermore, we conclude that *Obergefell* does not require this Court to act as the Legislature and re-write the Texas statutes that define who has standing to bring a SAPCR. *Obergefell* invalidated the prohibitions of particular States preventing same-sex couples from obtaining marriage licenses, and it prohibits the State from enforcing laws prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere. *Obergefell*, 135 S. Ct. at 2605 ("[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.") *Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be "gender neutral."

Similar to this Court's prior decisions in *Wells* and *Smith*, we conclude that C.W. lacks standing to file this SAPCR. *See Wells*, 373 S.W.3d at 178; *Smith*, 262 S.W.3d at 467. C.W. is not a "parent" of A.E., as plainly defined in the relevant statutes. *See* Tex. Fam. Code Ann. §§ 101.024(a); 160.201. Under the facts of this case, C.W. would not be entitled to the rebuttable presumption of paternity even if C.W. were a man because the parties have stipulated to the uncontested fact that the child is genetically unrelated in any respect to C.W. The child was conceived by assisted reproductive technology (ART), and C.W. did not donate her egg. Additionally, C.W. is not "the mother" of the child because she did not give birth to the child, her maternity has not been adjudicated, and she did not adopt the child. *See* Tex. Fam. Code Ann. § 160.201 (West 2014). Furthermore, C.W. did not adopt the child. *See* Tex. Fam. Code Ann. §§ 160.204, 160.703.

Additionally, we conclude that C.W. cannot rely upon the ART statute to establish standing. Section (a) of the ART statute expressly provides that "Consent by a married woman to assisted reproduction must be in a record signed by the woman and her husband and kept by a licensed physician." *Id.* Section (a) of the statute would not apply to C.W. because C.W. failed to produce a record signed by M.N. and C.W. and kept by a licensed physician. Furthermore, section (b) of the

ART statute would not apply because C.W. does not meet the statutory requirements of that section.

Subsection (b) reads as follows:

> (b) Failure by the husband to sign a consent required by Subsection (a) before or after the birth of the child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.

Id. § 160.704(b). The parties stipulated that neither spouse signed a consent form. As it is plainly worded, subsection (b) governs a situation when the husband has failed to sign a consent, but it does not govern the situation that exists in the facts before this Court where neither spouse signed a consent form. Nevertheless, Appellant contends that when section 160.704(b) is "[a]pplied in a gender neutral manner," it means "[C.W.]'s failure to sign a consent does not matter because the parties openly treated A.E.[] as their own." C.W. asserts that:

> Specifically, when a case involves a same-sex marriage, statutes referring to "Mother" and "Father" or "Wife" and "Husband" do not apply and should be read as referring to "Parent" or "Spouse." This is a simple, non-substantive accommodation required by Obergefell's ruling that same-sex and opposite-sex marriages should be treated equally.

Accordingly, under C.W.'s argument, section 160.704(b) should be read as follows:

> (b) Failure by the [spouse] to sign a consent required by Subsection (a) before or after the birth of the child does not preclude a finding that the

> [spouse] is the [parent] of a child born to [spouse] if the [spouse] openly treated the child as their own.

"It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotation marks omitted). The word "contemporary" as used here means contemporaneous with the statute's enactment, not "contemporary" as in "now." *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) (citing *Sandifer* and *Perrin* and explaining that statutory interpretation "look[s] to the meaning of the word[s] at the time the statute was enacted"). When construing a statute, our primary objective is to ascertain and give effect to the Legislature's intent. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011); *see* Tex. Gov't Code Ann. § 312.005 (West 2013). If the statute is unambiguous, we adopt the interpretation supported by its plain language unless such interpretation would lead to absurd results. *TGS-NOPEC Geophysical*, 340 S.W.3d at 439. We consider statutes as a whole rather than their isolated provisions. *Id.* We presume the Legislature chose a statute's language with care, including each word for a purpose while purposefully omitting words not included. *See id*. We must not interpret a statute in a manner that renders

any part meaningless or superfluous. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). We reject C.W.'s reading of the statutes.

The word "husband" and the word "wife" are not expressly defined in the Texas Family Code. However, in its common usage "husband" is defined as "[a] man joined to a woman in marriage[.]" New College Edition of the American Heritage Dictionary of the English Language 643 (1978 ed.). The word "wife" is defined as "[a] woman married to a man." *Id*. at 1464. Reading the statute as requested by Appellant would affect a substantive change to the respective statutes, and it would materially alter the requirements outlined in subsection (a) and (b) of the ART statute as to husband and wife. The substitution of the word "spouse" for the words "husband" and "wife" would amount to legislating from the bench, which is something that we decline to do. *See Turner v. Cross*, 18 S.W. 578, 579 (Tex. 1892); *see also In re J.X.P.*, No. 07-07-00356-CV, 2008 Tex. App. LEXIS 230, at *5 (Tex. App.—Amarillo, Jan. 11, 2008, no pet.) ("It is the duty of this Court to administer the law as it is written, and not make the law. To do so would amount to blatant legislating from the bench.").

On this record, even after indulging every reasonable inference in favor of C.W., we cannot say that the trial court abused its discretion in concluding that C.W.

lacked SAPCR standing as to A.E. *See Miranda*, 133 S.W.3d at 228. We overrule both issues and affirm the ruling of the trial court.[6]

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on September 15, 2016
Opinion Delivered April 27, 2017
Before Kreger, Horton, and Johnson, JJ.

[6] In *Parker v. Pidgeon*, 477 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2015), appellees Jack Pidgeon and Larry Hicks sued to enjoin the Mayor of Houston and the City of Houston from providing employee benefits to the same-sex spouses of employees legally married in another state. The trial court signed a temporary injunction and concluded that, because such expenditure is barred by the Texas Constitution, the Family Code, and the City's charter, the City of Houston is prohibited from furnishing benefits to persons who are married in other jurisdictions to City employees of the same sex. *Id*. at 354. On appeal, the Fourteenth Court of Appeals concluded that "[b]ecause of the substantial change in the law regarding same-sex marriage since the temporary injunction was signed, we reverse the trial court's temporary injunction and remand for proceedings consistent with *Obergefell* [*v. Hodges*, 135 S. Ct. 2584 (2015)] and *De Leon* [*v. Abbott*, 791 F.3d 619 (5th Cir. 2015)]." *Pidgeon*, 477 S.W.3d at 354-55. We note that on January 20, 2017, the Texas Supreme Court granted the petition for rehearing in the matter. *See Pidgeon v. Turner*, No. 15-0688, 2016 WL 4938006 (Tex. Jan. 20, 2017).