OBERGEFELL'S IMPACT ON WRONGFUL DEATH IN MISSOURI AND KANSAS

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Obergefell *is good news for same-sex couples and their families because it has ensured that same-sex spouses can bring claims for loss of consortium and the wrongful death of a spouse. But children of same-sex spouses should also now be able to bring wrongful death claims for the death of either parent, as should both same-sex parents for the death of a child. However, defendants will argue that a child of same-sex parents would only be able to proceed with a wrongful death claim on behalf of a parent to whom such child is related either genetically or by virtue of adoption. In other words, defendants will claim that a child who is not adopted by the parent to whom the child is not genetically related would be barred in Missouri and Kansas from bringing a claim for the wrongful death of such non-genetic parent, and that such parents would likewise be barred from bringing a claim for the wrongful death of such parent's child. Thus, when advising same-sex parents, adoption should always be highly recommended, even when the parents are married and both parents are named on the birth certificate. Further, when facing these arguments from defendants, attorneys should look to the presumptive parent statutes, the Equal Protection Clause, and equitable adoption as bases upon which such claims for wrongful death or loss of consortium should be allowed to proceed. Finally, same-sex families dealing with personal injury or the loss of their loved ones must have access to and be able to choose lawyers who are understanding and sensitive to the specific needs and prejudices still faced by the LGBT community.*

I. INTRODUCTION

In June 2015, the Supreme Court of the United States rightly declared that the United States Constitution guarantees same-sex couples the right to marry.[1] Marriage equality advocates have long noted that more than 1,100

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[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015).

benefits and obligations are bestowed upon married couples under federal law.[2] Of course, the rights and obligations of married same-sex couples under state law are also important, and much has been written about same-sex family relations involving civil unions, cohabitation, premarital and post-marital agreements, marriage, divorce, parentage, child custody, child support, property division, spousal support, and more. Estate planning for same-sex couples has also received wide-spread attention because of the creative planning required to protect same-sex couples and their assets. Indeed, until the Supreme Court struck down Section Three of the Defense of Marriage Act (DOMA) under the Due Process Clause of the Fifth Amendment, same-sex couples married under state law could not take advantage of the federal marital deduction, and the other standard planning techniques enjoyed by married couples.[3] Laws regarding spouses and tenancy by the entirety, binational couples and immigration, taxes, insurance, health benefits, medical-decision making, workers' compensation, and spousal privilege have also been discussed in advising couples on the pros and cons of marriage. For example, married same-sex couples can now jointly file for bankruptcy protection.[4]

Still, we are just beginning to understand the implications of *Obergefell v. Hodges*, and despite Justice Kennedy's climactic opinion, the battle for equality for same-sex couples continues. During the first few weeks of September 2015, the media focused heavily on Kim Davis, a Rowan County, Kentucky Clerk who refused to issue marriage licenses to same-sex couples because she claimed issuing such licenses violated her religious freedom.[5] She likewise refused to allow any of the deputies over which she had authority to issue such marriage licenses to same-sex couples.[6]

Moreover, many benefits flowing from *Obergefell* remain relatively unexplored and certainly untried. In personal injury lawsuits, for example, married same-sex couples would now be entitled to damages for loss of consortium and the wrongful death of a spouse. Children of same-sex spouses should also now be able to bring wrongful death claims for the death of either parent, as should both same-sex parents for the death of a child. But, defendants in these lawsuits will surely argue that the child of same-sex parents would only be able to proceed with a wrongful death claim on behalf of a parent to whom

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[2] *See* DAYNA K. SHAH, U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO-04-353R (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[3] United States v. Windsor, 133 S. Ct. 2675, 2679-80 (2013).

[4] Interestingly, one case decided by the United States Bankruptcy Court for the Central District of California held in 2011, before *Windsor*, that prohibiting a same-sex couple from filing a joint petition for bankruptcy violated the debtors' equal protection rights. In re Balas, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011).

[5] Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released From Kentucky Jail, Won't Say if She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html.

[6] *Id.*

such child is related either genetically or by virtue of adoption (often, children of same-sex parents are genetically related to one of the parents and sometimes adopted by the other). In other words, defendants will argue that a child (a "Non-G/A Child" or "Non-G/A Children") who is not adopted by the parent to whom the child is not genetically related would be barred from bringing a claim for the wrongful death of such non-genetic parent (a "Non-G/A Parent") in Missouri and Kansas. Likewise, defendants would argue that a Non-G/A Parent would be barred from bringing a claim for the wrongful death of such parent's Non-G/A Child. When faced with such arguments, Non-G/A Parents and Non-G/A Children should examine whether (i) the presumptive parentage statutes deem them to be natural parents and children, (ii) the Equal Protection Clause mandates that such claims be allowed to proceed, and (iii) the child has been equitably adopted, thereby permitting such claims to proceed.

In a more perfect Union, Non-G/A Children and Non-G/A Parents would be protected based on the parent's marriage to the child's genetic parent. But, just as it is important for Non-G/A Parents to adopt so that they and their children are protected under family law and with respect to estate planning, adoption is likewise important to make sure parents and children are protected in case something tragic happens resulting from another's negligence, intentional act, or other wrongdoing. Further, lesbian, gay, bisexual, or transgender (LGBT) families faced with bringing such claims should make sure that their attorneys are sensitive to and understanding of the prejudices and challenges faced by same-sex families.

II. *OBERGEFELL'S* IMPACT ON WRONGFUL DEATH IN MISSOURI AND KANSAS

A. Overview of Wrongful Death Statutory Schemes in Missouri and Kansas

Many states, including Kansas and Missouri, permit spouses, parents, and children of a person who has been injured or killed because of a negligent, intentional, or otherwise wrongful act to recover damages from a defendant for loss of consortium and wrongful death.

In Missouri, an action for wrongful death must be brought within three years after the cause of action accrues.[7] Persons entitled to bring a claim for wrongful death are divided into three classes.[8] The first class (and the only class relevant to the discussion here) includes "the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive."[9] A

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[7] MO. REV. STAT. § 537.100 (2015).
[8] MO. REV. STAT. § 537.080.1(1) (2015).
[9] *Id.*

jury may award damages for wrongful death: "deem[ed] fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support . . . ."[10]

Missouri also provides damages for the decedent's suffering between the time of injury and the time of death (commonly known as "survival damages"), and a claim for such damages can be brought in the same action.[11] Survival damages typically include medical expenses and lost income, as well as conscious suffering.[12] Missouri does not place a dollar limit on recovery in most wrongful death cases, although it does when death results from medical malpractice.[13]

In Kansas, an action for wrongful death must be brought within two years from the date the cause of action accrues.[14] Rather than naming specific classes of persons entitled to bring the claim, Kansas allows any heir at law who has sustained a loss by reason of the death to bring the claim on behalf of all of the heirs at law who have sustained a loss.[15]

Kansas defines an heir at law as "one who takes by intestate succession [i.e., without a will] under the Kansas statutes."[16] Heirs at law include a decedent's spouse,[17] children,[18] and parents (whether natural or adopted).[19] Damages for wrongful death:

> [M]ay be recovered for, but are not limited to: (1) [m]ental anguish, suffering or bereavement; (2) loss of society, companionship, comfort or protection; (3) loss of marital care, attention, advice or counsel; (4) loss of filial care or attention; (5) loss of parental care, training, guidance or education; and (6) reasonable funeral expenses for the deceased.[20]

Since 1998, Kansas has imposed a $250,000 cap on non-pecuniary damages for wrongful death.[21] Fortunately, pecuniary damages in Kansas are not limited to loss of earnings but also include loss of the decedent's services,

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[10] MO. REV. STAT. § 537.090 (2015).
[11] *Id.*
[12] Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 23 (Mo. Ct. App. 2013).
[13] Sanders v. Ahmed, 364 S.W.3d 195, 200 (Mo. 2012).
[14] KAN. STAT. ANN. § 60-513(a)(5) (2015).
[15] KAN. STAT. ANN. § 60-1902 (2015).
[16] Baugh v. Baugh ex rel. Smith, 973 P.2d 202, 205 (Kan. Ct. App. 1999).
[17] KAN. STAT. ANN. § 59-504 (2015).
[18] KAN. STAT. ANN. § 59-506 (2015).
[19] KAN. STAT. ANN. § 59-507 (2015); KAN. STAT. ANN. § 59-2118 (2015).
[20] KAN. STAT. ANN. § 60-1904 (2015).
[21] KAN. STAT. ANN. § 60-1903 (2015).

companionship, care, guidance, attention, advice, and funeral expenses, so long as these damages can be estimated in terms of money.[22]

Although Missouri allows survival damages to be determined as part of the wrongful death claim,[23] in Kansas survival actions must be brought as a separate claim.[24] A survival action must be brought on behalf of the decedent's estate by the personal representative in order to compensate the estate for the damages sustained by the decedent prior to death as a result of the defendant's improper conduct.[25]

B. *Obergefell* and Wrongful Death Claims for Same-Sex Spouses in Missouri and Kansas

In 2004, Missouri enacted a constitutional amendment declaring that "marriage shall exist only between a man and a woman."[26] Kansas enacted a similar constitutional amendment in 2005, which declared that "[m]arriage shall be constituted by one man and one woman only" and that "[a]ll other marriages are declared to be contrary to the public policy of this state and are void."[27] Thus, because both states' statutory schemes awarded damages for wrongful death to "spouses," but neither state recognized same-sex marriage (even marriages or civil unions performed in another country or state), partners and same-sex spouses have been prohibited from bringing claims for the wrongful death of a spouse. Fortunately, that changed in June 2015, when the United States Supreme Court declared that state laws prohibiting marriage between same-sex spouses were unconstitutional under the Fourteenth Amendment.[28]

While it does not appear that courts in Missouri or Kansas have been confronted with this issue, under *Obergefell* same-sex spouses should be entitled to bring claims for the wrongful death of a spouse.[29] Prior to *Obergefell*, some courts had held that a same-sex partner or spouse was not entitled to bring a

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[22] Wentling v. Med. Anesthesia Serv, P.A., 701 P.2d 939, 942-43 (Kan. 1985).
[23] MO. REV. STAT. § 537.090.
[24] KAN. STAT. ANN. § 60-1801 (2015).
[25] Martin v. Naik, 300 P.3d 625, 630 (Kan. 2013); *see also* Mason v. Gerin Corp., 647 P.2d 1340, 1343 (Kan. 1982).

> A survival action allows the personal representative to recover damages accrued by the injured party between the date of injury and death for the benefit of the decedent's estate. On the other hand, the wrongful death action authorized by 60-1901 *et seq.*, is for the exclusive benefit of the heirs, and allows them to recover damages accruing after death for such things as loss of support, companionship and mental anguish.

Id.
[26] MO. CONST. art. I, § 33.
[27] KAN. CONST. art. 15, § 16.
[28] *Obergefell*, 135 S. Ct. at 2597.
[29] *Id.* at 2601.

claim for the wrongful death or their partner or spouse.[30] Overall, lawyers have done a good job advising their gay and lesbian clients about the family law and estate planning consequences of marrying or deciding not to marry. But, they should also be mindful to advise their LGBT clients regarding the other benefits *Obergefell* provides, such as the right to bring a claim for wrongful death or loss of consortium in the event of another's negligence or intentional wrongdoing.

Personal injury attorneys confronted with the death of a partner of a same-sex couple that never had a marriage ceremony should determine whether the couple had a common law marriage. Courts in some jurisdictions are now finding that same-sex couples were actually married under such states' common law marriage schemes.[31] While Missouri does not recognize common law marriage, in Kansas:

> The essential elements of a common-law marriage are: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public. Although the marriage agreement need not be in any particular form, it is essential there be a present mutual consent to the marriage between the parties.[32]

Thus, if a gay or lesbian person has lost a partner because of another's negligence or intentional wrongdoing, lawyers should determine whether a common law marriage existed under Kansas law, especially if the couple had any form of commitment ceremony or civil union. Although *Obergefell* seems to have clarified the rights of married same-sex couples with respect to wrongful death and loss of consortium, unfortunately the rights of their children remain less clear.

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[30] *See*, *e.g.*, Langan v. St. Vincent's Hosp. of N. Y., 25 A.D.3d 90, 91 (N.Y. App. Div. 2005) (holding that the same-sex partner of a decedent was precluded from bringing a wrongful death claim, even though the couple had entered into a civil union in Vermont). *But see* Armijo v. Miles, 127 Cal. App. 4th 1405, 1406 (Cal. Dist. Ct. App. 2005) (holding that amendments to California's wrongful death statute applied to allow domestic partners who had registered their partnerships to bring a wrongful death claim).

[31] A judge in Pennsylvania, for example, retroactively applied the state's common law marriage to a same-sex couple and held that the surviving spouse was entitled to benefits based on the marriage. *See* Gina Passarella, *Common Law Marriage Retroactively Applied to Same-Sex Couple*, LEGAL INTELLIGENCER, (July 30, 2015), http://www.thelegalintelligencer.com/id=1202733414697/Common-Law-Marriage-Retroactively-Applied-to-SameSex-Couple?slreturn=20150813160249.

[32] In re Estate of Antonopoulos, 993 P.2d 637, 647 (Kan. 1999).

III. ARGUMENTS IN SUPPORT OF CLAIMS FOR WRONGFUL DEATH ON BEHALF OF NON-G/A PARENTS AND NON-G/A CHILDREN

Under the Missouri and Kansas statutory schemes, both natural (i.e., genetic) and adopted children can bring wrongful death claims for the death of a natural parent or a parent who adopted such child.[33] Similarly, a parent who is the genetic or adoptive parent of a child can bring claims for the wrongful death of the child.[34] What remains unclear, however, is whether a Non-G/A Parent could bring a wrongful death claim for the death of a Non-G/A Child, and vice versa. While neither state's statutory schemes explicitly provides such a right, equitable adoption, equal protection, and each state's parental presumption and artificial insemination statutes could be used to establish that a Non-G/A Parent is a "presumed parent," and thus that such Non-G/A Parent would be entitled to bring a wrongful death claim for the death of a Non-G/A Child, and vice versa.

A. Assisted Reproduction Technology ("ART") and Wrongful Death

1. Introduction to ART and Adoption in Missouri and Kansas

It would be an understatement to say that same-sex couples contemplating surrogacy and artificial insemination need to meet with a family law attorney who understands the unique legal issues faced by the LGBT community. Numerous advances in ART have resulted in new challenges for family law practitioners because the laws do not reflect the realities of today's technology and families. Lesbians often utilize sperm donor insemination, and lesbians and gay men often adopt children. Gay men are also using in vitro fertilization (IVF) to have genetic offspring through traditional surrogacy and gestational surrogacy. In traditional surrogacy, the surrogate provides the eggs and is also genetically related to the child, whereas in gestational surrogacy, the surrogate carries the pregnancy, but the eggs and sperm have both been donated. Some lesbian couples using traditional surrogacy are opting for reciprocal IVF where one partner provides the eggs, which are then inseminated and transferred to the uterus of the other partner who then carries the pregnancy.

The common thread through all of this in working with any same-sex couple is that it is currently impossible for both of the same-sex parents to be genetic parents.[35] As a result, it is prudent that parents execute a co-parenting

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[33] MO. REV. STAT. § 537.080; KAN. STAT. ANN. § 59-506.

[34] MO. REV. STAT. § 537.080; KAN. STAT. ANN. § 59-506.

[35] Scientists now believe that creating a child that is genetically related to two same-sex parents could be realized in the next few years. *See* Guy Ringler, *Get Ready for Embryos From Two Men or Two Women*, TIME, (Mar. 18, 2015), http://time.com/3748019/same-sex-couples-biological-children/.

agreement, and that the Non-G/A Parent adopt such parent's Non-G/A Child, even when the parents are married and both parents are named on the birth certificate.[36] This sound advice has been given by family law practitioners for many years now. In jurisdictions like Missouri that allow second-parent adoptions,[37] attorneys have generally suggested that the non-genetic parent adopt the child. While Kansas does not recognize second-parent adoption,[38] it does allow step-parent adoptions.[39] Thus, Kansas would require that same-sex couples marry before the other parent could adopt. Adoption by the Non-G/A Parent is necessary, even when both of the same-sex parents are listed on the birth certificate, and even when the parents are married, especially in jurisdictions hostile to same-sex families. What can otherwise occur is that in the event of separation or divorce, the Non-G/A Parent may be deemed to have little or no rights (and certainly not the rights they would have as a natural or adoptive parent),[40] and may be prohibited from ever having access to the child or given any type of custody or visitation, even when such custody or visitation is in the child's best interest.

The advice for Non-G/A Parents to adopt likewise applies to protect the rights of the child and the parents in the event of wrongful death (and even personal injury claims in Missouri where damages for loss of consortium are claimed). Missouri's wrongful death statute provides that a "natural or adopted" child can bring a claim for wrongful death, and a parent of a "natural or adopted" child can bring a claim for wrongful death.[41] Thus, technically, Non-G/A Children and Non-G/A Parents are not provided for under Missouri's statute. The same holds true for Kansas, in which only heirs at law can bring a wrongful death claim.[42]

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[36] Kansas has been somewhat progressive in enforcing co-parenting agreements between a genetic parent and a non-genetic parent, provided the agreement is made to further the child's best interest. *See* Frazier v. Goudschaal, 295 P.3d 542, 555-56 (Kan. 2013) ("the coparenting agreement before us is not rendered unenforceable as violating public policy merely because the biological mother agreed to share the custody of her children with another, so long as the intent, and effect, of the arrangement was to promote the welfare and best interests of the children").

[37] Missouri's second-parent adoption statute, MO. REV. STAT. § 453.010 (2015), is gender-neutral.

[38] In re I. M., 288 P.3d 864, 869 (Kan. Ct. App. 2012).

[39] KAN. STAT. ANN. § 59-2112 (2015). It should be noted that while this specific statute is gender neutral ("'stepparent adoption'" means the adoption of a minor child by the spouse of a parent with the consent of that parent), KAN. STAT. ANN. § 59-2113 (2015) is not ("Any adult, or husband and wife jointly, may adopt any minor or adult as their child in the manner provided in [Kan. Stat. Ann.] 59-2111 through 59-2143, except that one spouse cannot do so without the consent of the other."). Thus, a Non-G/A Parent could be barred from adopting a Non-G/A Child.

[40] *See, e.g.*, McGaw v. McGaw, No. WD 77799, 2015 Mo. App. LEXIS 824, at *13 (Mo. Ct. App. Aug. 18, 2015) (holding that the Non-G/A Parent did not have standing to ask the court to find that a child/parent relationship existed).

[41] MO. REV. STAT. § 537.080.

[42] KAN. STAT. ANN. § 59-506.

2. The Presumed Parent

In situations involving wrongful death and a Non-G/A Parent or Non-G/A Child, personal injury attorneys should closely examine the arguments made by family law attorneys regarding the presumptive parentage statutes. In these cases, typically a Non-G/A Parent claims to have custody rights with respect to a Non-G/A Child by asserting that such parent is a presumptive parent (i.e., a *natural* parent) under a state statute.[43] These arguments tend to be more successful in states with gender-neutral presumption statutes, although the Kansas Supreme Court has been fairly progressive with respect to same-sex parents.[44] Missouri, unfortunately, has not been progressive interpreting Section 210.826, which determines who may bring an action to determine paternity.[45]

Both Missouri and Kansas statutes provide the scenarios under which a man is presumed to be the *natural* father of a child, although neither statute is written using gender-neutral language.[46] One such scenario is when a child's natural mother is married to a man when the child is born.[47] Both states also provide that a child resulting from artificial insemination and born to a married couple is considered as naturally conceived by the father (these statutes are also not written in gender-neutral language).[48]

Based on each state's statutory schemes, claims for wrongful death could likely proceed with opposite-sex families when made by a presumptive father or the children of a presumed father. The Supreme Court of Missouri has indicated that the presumption of paternity afforded under Missouri Revised Statute § 210.822 could serve as a basis for proving paternity in a wrongful death action (its decision involved opposite-sex parents).[49] It appears, however, that the

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[43] *See, e.g.*, *Frazier*, 295 P.3d at 553 ("A harmonious reading of all of the KPA provisions indicates that a female can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother, and, therefore, can be an 'interested party' who is authorized to bring an action to establish the existence of a mother and child relationship.").

[44] *See id.*

[45] *See* White v. White, 293 S.W.3d 1, 9 (Mo. Ct. App. 2009) (refusing to apply a gender-neutral reading to MO. REV. STAT. § 210.826).

[46] MO. REV. STAT. § 210.822 (2015) ("A man shall be presumed to be the natural father of a child if: (1) [h]e and the child's natural mother are or have been married to each other and the child is born during the marriage . . . ."); KAN. STAT. ANN. § 23-2208 (2015) ("A man is presumed to be the father of a child if: (1) [t]he man and the child's mother are, or have been, married to each other and the child is born during the marriage . . . .").

[47] MO. REV. STAT. § 210.822; KAN. STAT. ANN. § 23-2208.

[48] MO. REV. STAT. § 210.824 (2015) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."); KAN. STAT. ANN. § 23-2302 (2015) ("Any child or children heretofore or hereafter born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived child of the husband and wife so requesting and consenting to the use of such technique.").

[49] Lesage v. Dirt Cheap Cigarettes & Beer, Inc., 102 S.W.3d 1, 4 (Mo. 2003).

question whether the parental presumption statute can be used as a basis to claim wrongful death has not yet been raised in Kansas. Nonetheless, given that: (i) the wrongful death statutes provide the basis to natural parents and children to bring a wrongful death claim and (ii) that the presumption statutes define when a father is deemed to be the natural or genetic father of a child, Kansas likely would permit children and their presumed fathers to pursue claims for wrongful death.

Unfortunately, the law in both Missouri and Kansas for same-sex families is not clear on whether a Non-G/A Parent can bring a wrongful death claim for the death of such parent's Non-G/A Child, and vice versa. While tortfeasors would argue that neither state provides a statutory basis for such claims, these claims should be allowed to move forward based on the parental presumption statutes. That is, when a child is born to a married, same-sex couple, and the child is born during their marriage, counsel should argue that the non-genetic same-sex parent is the presumed (i.e., *natural*) parent under state law. Defendants may, of course, attempt to rebut the presumption, and until the law reflects the reality of today's families and is written with an understanding that there are situations when intent trumps genetics, adoption remains the best course to protect the rights of parents and children.

Arguably, a Non-G/A Parent who is married to a same-sex spouse should be the presumed parent of a Non-G/A Child born during the marriage, especially when the intent of both parents is known. The numerous public policies underlying such statutes also support the right of a Non-G/A Parent to bring a wrongful death claim for the death of a Non-G/A Child, and vice versa. It is better for a child to have two loving parents than one. Two parents (whether same-sex or opposite-sex) provide the child with increased stability, emotional and financial support, and love. Further, when parents are married and choose to have a child using ART, the parents' intent that the non-genetic parent be deemed a natural parent of the resulting child should control, regardless of whether they are a same-sex or opposite-sex couple. Reading these statutes without gender neutrality, and thereby prohibiting Non-G/A Children and their Non-G/A Parents from bringing claims for wrongful death, would be contrary to the public policy advanced in both states. The Kansas Supreme Court has at least ruled, in the context of a child custody determination, that the Kansas Parentage Act[50] is "gender-neutral, so as to permit both parents to be of the same sex."[51]

These policies certainly seem to be founded upon the overriding principle in Missouri and Kansas alike that courts are to act in the best interests of children.[52] And if a minor child loses a Non-G/A Parent, it would undoubtedly

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[50] KAN. STAT. ANN. ch. 23, art. 22 (2015).

[51] *Frazier*, 295 P.3d at 558.

[52] *See, e.g.*, In re Marriage of Rayman, 47 P.3d 413, 415 (Kan. 2002) ("when the custody issue lies only between the parents, the paramount consideration of the court is the welfare and best interests of the child"); *Thorp v. Thorp*, 390 S.W.3d 871, 878 (Mo. Ct. App. 2013) ("our courts have

be in a child's best interest to be compensated for the lost years of companionship, love, and financial support.[53]

Both Missouri and Kansas policy justifications for their wrongful death statutes support allowing these wrongful death claims to proceed. The Supreme Court of Missouri has identified three objectives of the wrongful death statutes: "(1) to provide compensation to bereaved plaintiffs for their loss; (2) to ensure that tortfeasors pay for the consequences of their actions; and (3) to deter harmful conduct which might lead to death."[54] Kansas simply acknowledges that the "general purpose" of its wrongful death statute is to allow an action to "be maintained for the damages resulting therefrom if the [decedent] might have maintained the action had he or she lived."[55] Refusing to permit a Non-G/A Parent or Non-G/A Child to maintain a wrongful death claim would undermine each state's public policy objectives because, at minimum, these parents and children constitute bereaved plaintiffs, the tortfeasors should be required to compensate such bereaved plaintiffs, and the tortfeasors' conduct should be deterred.

In addition, applying the presumptive statutes to an opposite-sex couple but not a same-sex couple surely violates a Non-G/A Child's and Non-G/A Parent's equal protection rights.

3. Constitutional Protections

The Kansas Supreme Court has stated that denying a Non-G/A Child the right to two parents would be a violation of such child's constitutional rights.[56] And while the Kansas Supreme Court was referring to a child's right to have the support of two lesbian parents, such constitutional argument should equally apply to a Non-G/A Child's claim for the wrongful death of the child's second parent.

Certainly, denying the Non-G/A Child the right to bring the claim seems to be a violation of the Equal Protection Clause. On one hand, the child of an opposite-sex couple would be allowed to proceed with a claim for the wrongful death of a parent to whom the child is not genetically related and by whom the child has not been adopted, based on the gender-specific parentage statutes applicable to the child's presumed father; the Non-G/A Child, on the other hand, would be prohibited from bringing the wrongful death claim on behalf of the

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routinely held that the best interests of the child are of paramount concern when determining child custody arrangements").

[53] *See* MO. REV. STAT. § 452.375.4 (2015) (noting that "it is the public policy of this state that frequent, continuing and meaningful contact with *both* parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child" (emphasis added)).

[54] State ex rel. Beisly v. Perigo, No. SC94030, 2015 Mo. LEXIS 149, *4 (Mo. Aug. 18, 2015) (internal citations omitted).

[55] Parker v. Mid-Century Ins. Co., 962 P.2d 1114, 1116 (Kan. Ct. App. 1998).

[56] *Frazier*, 295 P.3d at 557 ("[d]enying the children an opportunity to have two parents, the same as children of a traditional marriage, impinges upon the children's constitutional rights").

Non-G/A Parent *solely* because the presumptive parentage statute is not gender-neutral. In both examples, each child is genetically related to one parent, each child's other parent has not adopted such child, and each child's parents are married. The only distinction involves the gender of each child's parents, and this type of classification should be deemed unconstitutional under the Equal Protection Clause.[57] The Non-G/A Parent bringing a claim on behalf of such child should likewise be able to claim that the prohibition of bringing such claim for wrongful death is only based on gender, and the state does not have a sufficient reason for making such a distinction. And because a gender-classification is built into each state's statutory scheme, the state would then have the burden of establishing that it has a compelling interest in distinguishing between the genders of the parents of a child born to such parents while they are married.[58] As noted by the Supreme Court of the United States, "any statutory scheme which draws a sharp line between the sexes . . . necessarily commands dissimilar treatment for men and women who are . . . similarly situated. . . ."[59] Such a statute, "therefore involves the very kind of arbitrary legislative choice forbidden by the [Constitution]."[60]

Moreover, the statutory classifications also seem to violate the Equal Protection Clause in that they provide rights to married heterosexual couples that are not also provided to married same-sex couples. That is, the father who is not genetically related to a child born to the father's wife during the marriage would be presumed to be the father, and thus entitled to bring a wrongful death claim, whereas the mother who is not genetically related to a child born to the mother's wife during the marriage would not be presumed to be the child's mother.

In *Obergefell*, the Court noted "that the challenged laws burden[ed] the liberty of same-sex couples" and that "same-sex couples are denied benefits afforded to opposite-sex couples . . . ."[61] The Court thus invalidated laws "bar[ring] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex" under both the Due Process Clause and the Equal Protection Clause.[62] Applying a state's wrongful death and parental presumption statutes to allow wrongful death claims to advance in families where the parents

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[57] *See* United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. 2004) (noting that gender constitutes a suspect class and that the first step in examining an equal protection challenge "is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class . . . If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest.").

[58] Kahn v. Shevin, 416 U.S. 351, 360 (1974) (holding that a state statute failed "to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means").

[59] *Id.* at 358 (internal citations omitted).

[60] *Id.* (internal citations omitted).

[61] 135 S. Ct. at 2590.

[62] *Id.* at 2607.

are married and straight, but not in families where the parents are married but gay or lesbian, clearly denies benefits afforded to opposite sex couples. And just as such an application was deemed unconstitutional in *Obergefell*,[63] so too should such an application be deemed a violation of equal protection in this scenario.

In any event, in the context of a child who has lost a parent or a parent who has lost a child because of another person's negligence, intentional act, or otherwise wrongful conduct, the states simply do not have a compelling interest in granting statutory rights to a child or parent, and not to another, when those rights are determined solely based on the gender of a child's parents, or because a child has lesbian or gay parents.

In short, when a Non-G/A Parent or Non-G/A Child has a potential claim for wrongful death, the parentage presumption statutes, the public policy underlying such statutes, and the Equal Protection Clause of the United States Constitution require that they have standing to bring such wrongful death claims. In addition to parental presumption and equal protection, Missouri provides one more basis to support a wrongful death claim: equitable adoption.

B. Equitable Adoption

Equitable adoption is another avenue by which Non-G/A Children and their Non-G/A Parents could pursue a claim for wrongful death. Although Kansas has expressly rejected that equitable adoption would entitle a child or parent to a wrongful death claim,[64] Missouri permits such claims to proceed.[65] In Missouri, the equitable adoption must be alleged and proved in the wrongful death action; a finding of equitable adoption in a different action would not be binding on the parties in the wrongful death claim.[66]

> To prove an equitable adoption, the plaintiff must show that a promise to adopt was made, but the adoption had not occurred prior to the promisor's death. The existence of the equitable adoption must be shown with evidence so clear, cogent, and convincing as to leave no room for reasonable doubt. Further, if the plaintiff relies solely on circumstantial evidence, that evidence must be consistent only with the existence of the equitable adoption and inconsistent with any other reasonable hypothesis leaving nothing to conjecture.[67]

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[63] *See id.*
[64] In re Estate of Robbins, 738 P.2d 458, 462 (Kan. 1987).
[65] Coon v. Am. Compressed Steel, Inc., 207 S.W.3d 629, 634 (Mo. Ct. App. 2006).
[66] *Id.* at 634-35.
[67] *Id.* at 634 (internal citations omitted).

Coon v. American Compressed Steel, Inc. involved a plaintiff child who alleged that the decedent had promised to adopt the child in the future.[68] The defendants argued that the decedent's promises to adopt the child constituted hearsay because they were out-of-court statements offered prove the truth of the matter.[69] The child had offered the statement to (i) prove the decedent's intent to adopt the child at the time the statements were made, and (ii) prove that the decedent would have adopted the child in the future.[70] The court held that the statement was admissible to prove the decedent's state of mind but not to prove that the adoption would have occurred, and it noted that although evidence may be inadmissible for one purpose, it may still be relied on for another.[71] Thus, the decedent's statements, which were corroborated by both her husband and natural son, "provided clear, cogent, and convincing evidence of [the child's] equitable adoption."[72]

The take away from *Coon* when dealing with wrongful death claims involving same-sex families is that attorneys must determine whether a Non-G/A Parent has ever made any statements regarding intent to adopt a Non-G/A Child. This is indeed a common conversation with same-sex families utilizing ART and situations in which one same-sex parent has adopted the child. It is important to remember that adoption rights for same-sex families have historically been unclear and that *Obergefell* has not provided any clarity to same-sex families and adoption rights; these rights, therefore, remain unclear in many jurisdictions. Further, injury attorneys in Missouri and Kansas must remember that one does not have to prove that an adoption would have been possible in the jurisdiction; instead, one must simply prove the that the Non-G/A Parent intended to adopt the child (and that such Non-G/A Parent intended to adopt in the future when such adoption would be recognized or legal). Thus, attorneys should make sure to ask Non-G/A Parents about any conversations they have had regarding adoption of a Non-G/A Child at any point in time. If equitable adoption can be established in Missouri, a Non-G/A Child can then pursue a claim for the wrongful death of a Non-G/A Parent, and the Non-G/A Parent could pursue a claim for the wrongful death of a Non-G/A Child.

When advancing a wrongful death claim on behalf of a Non-G/A Parent or Non-G/A Child, counsel should be mindful to argue equitable adoption, equal protection violations, and parental presumptions, all of which may also be used as a basis to in wrongful death and for loss of consortium.

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[68] *Id.* at 633.
[69] *Id.* at 635.
[70] *Id.*
[71] *Id.* at 636.
[72] *Id.*

IV. DAMAGES FOR LOSS OF CONSORTIUM AND THE NEED FOR COMPASSIONATE COUNSEL

In Missouri and Kansas, damages for loss of consortium may be claimed in personal injury actions and in wrongful death actions. While Missouri recognizes damages for loss of consortium for spouses, as well as for parents and their children,[73] Kansas only recognizes damages for loss of consortium for spouses.[74] Thus, in Missouri, adoption also would protect a child or parent's claim for loss of consortium. As with wrongful death, equitable adoption, the presumptive parentage statutes, and the Equal Protection Clause should be used as a basis to argue for damages for loss of consortium in connection with the injuries sustained by a Non-G/A Parent or Non-G/A Child.

Further, because the core of claims for damages for loss of consortium among spouses is the loss of sexual intercourse, such claims often involve detailed aspects of the sexual life of the married couple.[75] During discovery, intimate and personal details of a couple's sexual relationship are often obtained through interrogatories and depositions, which are then examined ad nauseam by judges, juries, the media, and even the public as a trial progresses. Providing such details to hostile lawyers is never a good experience for any client, but this can be especially true for lesbian and gay clients because of the historical prejudices LGBT people have faced. Same-sex couples still face animus, prejudice, and even hatred, and it is important in serving their interests that these couples are represented by counsel who are not homophobic and who will work to protect them from others who have prejudices against gay and lesbian people and who may indeed simply desire to harass or embarrass such people, or even to use the discovery process and the courts and to discourage them and their families from moving forward with such claims (notwithstanding the prohibition on using discovery for the purpose of harassment or intimidation).[76]

The loss and/or death of a parent or child alone are traumatic enough, and unfortunately plaintiffs are often victimized again as they move through the litigation process. Clients with a personal injury claim or a claim for wrongful death should always find a lawyer they trust, who is accessible, who is

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[73] Hawley v. Tseona, 453 S.W.3d 837, 845 (Mo. Ct. App. 2014) ("In computing the loss of consortium for the loss of a parent for a child, or the loss of a child for a parent, factors such as the physical, emotional, and psychological relationship between the parent and child must be considered.").

[74] Klaus v. Fox Valley Sys., 912 P.2d 703, 706 (Kan. 1996).

[75] *See* Wright v. Barr, 62 S.W.3d 509, 537 (Mo. Ct. App. 2001) ("Missouri recognizes a loss of consortium claim as a separate and distinct personal injury claim." and "The claim encompasses the other spouse's loss of affection, care, companionship, and services, as well as an impairment or destruction of the sexual life of the married couple, due to the conduct of a tortfeasor.").

[76] Ferrellgas, L.P. v. Williamson, 24 S.W.3d 171, 184 (Mo. Ct. App. 2000) (holding that a party may "seek a protective order to prevent duplicative or harassing discovery [and that such order would be available] to prevent abusive discovery under Rule 56.01").

responsive to their needs, and who is compassionate and competent, and this is especially true for gay and lesbian people because of the animus that still exists.

V. CONCLUSION

Obergefell is good news for same-sex couples and their families because, by ensuring same-sex couples can marry, it has ensured that these married couples can bring claims for loss of consortium and wrongful death. Children of same-sex couples should be adopted by the parent who is not genetically related to such child (or both parents if neither are genetically related) to ensure that both the parents and the children have would have the right to bring claims for wrongful death and loss of consortium. If, however, adoption has not occurred, equitable adoption, the presumptive parentage statutes, the public policies underlying such statutes, and the Equal Protection Clause should be used to argue that claims for loss of consortium and wrongful death can still be maintained. Finally, same-sex families dealing with personal injury or the loss of their loved ones must have access to and be able to choose lawyers who are understanding and sensitive to the specific needs and prejudices still faced by same-sex couples.